







Universal Periodic Review Joint Reports

Coalition reports coordinated by the U.S. Human Rights Network in preparation for the UN Universal Periodic Review of the United States. For the Ninth Session of the UPR Working Group of the Human Rights Council, 2010.

Universal Periodic Review

Joint Reports

United States of America

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In anticipation of the Ninth Session of the Universal
Periodic Review (UPR) Working Group of the UN Human
Rights Council, November 2010

Report coordination and publishing by the
US Human Rights Network

Cover Photos (clockwise from top left): (1) Alternative media and immigration rights groups march at the US Social Forum in Detroit, MI, June 2010. (2) The UN Advisory Group on Forced Evictions questions the developer of recently-demolished New Orleans Public Housing, July 2009 (3) Ejim Dike of the Urban Justice Center speaks at the February 2010 US Government - Civil Society UPR Consultation in New York City, and (4) Demonstration for Books Not Bars in California.

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US HUMAN RIGHTS NETWORK

Why a Human Rights Network?

The US Human Rights Network (USHRN) was formed in 2003 on a new model for US-based human rights advocacy. This new model would be "people-centered" - informed by and responding to the needs, aspirations and perspective of the communities and groups directly impacted by domestic human rights violations. It would seek to raise awareness of the human rights framework within the broader social justice movement, to create linkages between traditional human rights and social justice organizations, and to facilitate sharing of information and resources among a broader network of activists.

In the years since the USHRN's inception, constitutional protections for U.S. citizens and non-citizens have diminished, economic conditions for working and poor people in the U.S. have deteriorated, and repression has increased. These developments present both an opportunity to advance the human rights framework in the U.S., and a historical necessity to do so.

Underlying all human rights work in the United States is a commitment to challenge both the belief that the United States is inherently superior to other countries, and the belief that neither the US government nor the US rights movements have anything to gain from the domestic application of human rights. US Human Rights Network members believe that the US government should no longer be allowed to shield itself from accountability to human rights norms and that rights movements stand to benefit, perhaps now more than ever, from an end to US impunity in this regard.

To learn more or to join the Network, visit http://ushrnetwork.org/.

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* These reports were not part of the original USHRN joint submission to the United Nations in April 2010

Acknowledgments

The *raison d'etre* of the US Human Rights Network is to defend a single standard of human rights for all nations and peoples. In the United States, pursuing this objective inevitably means confronting the vestiges of "US exceptionalism" – that pernicious and historically distorted idea that authorities in the U.S. are somehow not bound by the same principles as other nations. This dual standard has been especially apparent during the last decade, as the U.S. has grappled with national security issues, wars and social upheaval that resulted in policies, both domestically and internationally, that raised fundamental questions about the nation's core values and severely damaged U.S. claims to global moral leadership.

Over the last 18 months, however, some evidence has emerged that the administration is attempting to reverse course and participate as an equal partner in global processes meant to provide protection for vulnerable citizens everywhere and further international human rights goals. By joining the Human Rights Council and subjecting U.S. human rights policies and behavior to international scrutiny as part of the United Nations Universal Period Review, the current administration has demonstrated a willingness to respect the opinions of its international peers and thus strengthen the mechanisms of international accountability. But while we welcome this new attitude, we also recognize that real accountability requires that all voices, perspectives and experiences – including those of the most marginalized and powerless – must be heard and incorporated into the debate. To that end, the member organizations of the USHRN have worked diligently over the last year to ensure that there is a place and voice for U.S. civil society in the UPR process. The 24 reports included in this document represent the culmination of those efforts.

It is no small feat to pull together and coordinate dozens of organizations and maintain a common focus over an extended period. But the establishment of the USHRN has resulted in a gradual but substantive shift in how human rights and social justice work is being done in the U.S. A new spirit of collaboration and cooperation, embodied in this report as well as in previous domestic and international advocacy initiatives, has been bearing significant fruit over the past several years.

The UPR project would not have been possible without the hard work and commitment of our steering committee, made of up representatives from the International Indian Treaty Council, Amnesty International USA, Four Freedoms Forum of the University of Hawaii, the Urban Justice Center, University of San Francisco, Human Rights USA, U.S. Network of Users and Survivors of Psychiatry, Columbia Law School's Human Rights Institute, Transnational Legal Clinic of the University of Pennsylvania School of Law, National Economic and Social Rights Initiative, Center for Reproductive Rights, and the National Law Center on Homelessness and Poverty. The individual reports could not have been produced without the leadership and sacrifice of our working group coordinators (See Appendix P. 383)

And I must also recognize the outstanding work of Sarah Paoletti, our senior consultant, and Laura Baum, our administrator and overall coordinator. These two dedicated professionals went above and beyond their contractual obligations and vastly exceeded our expectations. During the consultation process, which involved meetings in various cities across the country, they continually held the State Department to its commitments even though corralling federal officials was not part of their job description, but they did it anyway and helped ensure the integrity of the process. Laura in particular is owed a special acknowledgement for her work on the meetings.

Lastly, I want to acknowledge our supporters, in particular the Human Rights Fund, a group of visionary and courageous funders who understand the need for objective, impartial defense of human rights in this country and recognize the link between human rights, democracy and social justice. And to our anonymous supporter, you have demonstrated a consistent commitment to the groundbreaking work of this Network, and we thank you.

Ajamu Baraka
Executive Director, US Human Rights Network
August 2010

Introduction

On November 5, 2010, the United States is scheduled to appear before the United Nations Human Rights Council's Universal Periodic Review (UPR) Working Group to openly discuss and account for its human rights record. This historic review will be the first time the United States is called upon to address how its policies and practices compare not only to those human rights standards set forth UN human rights treaties it has ratified, but also to the full panoply of rights set forth in the UN Charter and the Universal Declaration on Human Rights (UDHR).

The Universal Periodic Review was established in 2006 with the creation of the UN Human Rights Council whereby every four years, each of the 192 Member States of the United Nations is reviewed on the level of fulfillment of its human rights obligations. The parameters for the UPR were initially set forth in General Assembly Resolution 60/251 and were further delineated in a statement of Principles and Objectives set forth in 2007 through Human Rights Council Resolution 5/1.

Core principles guide the UPR, including: the promotion of the "universality, indivisibility, and interrelatedness of all human rights"; the establishment of a cooperative mechanism based on objective and reliable information and on interactive dialogue"; ensuring universal coverage and equal treatment among all states in an intergovernmental process that fully involves the country under review; and the full integration of a gender perspective. Perhaps most importantly, the Human Rights Council established that the UPR should "ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions." As the United States does not have an independent national human rights institution, the work of the relevant stakeholders in civil society is all the more critical to the success of the UPR process.

Consistent with the principles and objectives set forth by the UN Human Rights Council, the USHRN UPR Steering Committee established the following goals for its role in facilitating and coordinating civil society participation in the upcoming US UPR:

1. Promote US compliance with human rights standards, including encouragement for treaty ratification.
2. Broaden public education and grassroots engagement to build human rights consciousness in the United States, with emphasis on all of the rights contained in the Universal Declaration of Human Rights.
3. Strengthen accountability mechanisms in the United States to enhance treaty implementation at all levels of government, including: the adoption of implementing statutes; the creation of comprehensive monitoring and reporting processes; and, the development of effective enforcement capabilities at the local, state, and federal level.
4. Advance the human rights dialogue at all levels of government and improve engagement of civil society in human rights reporting mechanisms and implementation.
5. Advance discourse on economic, social and cultural rights, and the interdependence of rights.

With the above goals in mind, the USHRN undertook extensive outreach and conducted trainings on the UPR. It has actively participated in, facilitated coordination of, and sought public participation in onsite consultations with the US government across the country. That outreach led to the USHRN's coordination, preparation, and submission to the UN of the coalition stakeholder (or "joint") reports, printed here. Coordinating with national and international non-governmental organizations submitting their own institutional reports, the USHRN has worked to ensure that the full range of rights in the UDHR, and the violations of those rights as experienced across the United States, are addressed during the UPR.

The USHRN Overarching Report seeks to bring together the key concerns and recommendations set forth in each of the individual reports, putting those concerns and recommendations in the context of the core human rights norms set forth in the UDHR. While the organization of the cluster reports in this publication seeks to mirror the structure and presentation employed in the overarching report, and therefore categorizes the reports under certain subsets of rights, we acknowledge that rights are not experienced in isolation, but are interrelated and interdependent, and any attempt to segregate them into distinct subject areas is inherently problematic. Report formatting is that used by the UN Office of the High Commissioner for Human Rights in its summary report, which will be circulated to the UN Human Rights Council UPR Working Group.

Tremendous credit is due to the advocates across the country who confronted the seemingly impossible task of drafting reports that do justice to the issues within the strict UN page limit (10 pages per cluster report). The depth and breadth of the reports are the result of an amazing amount of work and collaboration that reflect the growing human rights at home movement.

As has been noted by all participants in this UPR process - civil society and US government representatives alike - the preparation and submission of the reports are just beginning. The UPR itself is just a moment – an opportunity – to engage in a dialogue aimed towards the realization of the promise of the UDHR and its application to all people. The real work remains ahead of us. We must continue to dialogue with each other, the U.S. government, and the international community in an open, inclusive and transparent fashion to develop and implement policies and practices that achieve the recognition of fundamental human rights and dignity for all. We hope this publication, with its concrete recommendations, can contribute in a positive and meaningful way to the dialogue.

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The United States of America

Summary Submission to the UN Universal Periodic Review

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1 – 12 November 2010

Submitted by:

THE U.S. HUMAN RIGHTS NETWORK

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EXECUTIVE SUMMARY

This joint submission filed by the U.S. Human Rights Network (USHRN), a coalition of civil and human rights organizations and advocates from across the country, provides information under Sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review (UPR). The USHRN recognizes the positive steps the U.S. government has made towards the advancement of human rights, but remains concerned about the large number of individuals whose fundamental rights as provided for under the Universal Declaration on Human Rights (UDHR) remain unprotected, and the racial, ethnic, and gender disparities that persist in the enjoyment of those rights.

Section B examines existing frameworks in the United States for protecting and promoting human rights, raises concerns about the lack of adequate mechanisms available to ensure the full implementation of the human rights provided for under the UN Charter, the UDHR, and the human rights treaties the United States has ratified, and addresses the need for the United States to ratify several additional core human rights treaties.

Section C highlights shortcomings in the United States' implementation of its human rights obligations, including its obligation to take affirmative measures to combat and redress discrimination and the historical vestiges of racism, and the need to do more towards the achievement of economic, social and cultural rights.

Section D highlights a number of recommendations for actions the United States can and should take to protect and promote the rights contained in the UDHR and in fulfillment of its human rights treaty obligations. More detailed and comprehensive recommendations for action are provided in each coalition stakeholder report submitted in conjunction with this overarching report.

The USHRN recognizes the U.S. Government's efforts to engage civil society in the UPR process through a series of onsite consultations, or listening sessions, held across the country from February through April of this year. While these consultations, the first of their kind, represent a positive step toward engaging with civil society in the United States., they brought into sharp focus the need for ongoing open and transparent dialogue among members of affected communities and representatives from the federal, state, and local government agencies, to collectively develop and implement durable solutions to the human rights concerns raised in this UPR process and beyond. Moving forward, we call upon the Administration to demonstrate its ongoing commitment to human rights and to civil society participation, by recognizing and acting upon the need for: greater transparency in the selection of locations and agenda setting for the consultations, and by providing more advanced notice to allow for more a more fully-participatory and inclusive process.

B. NORMATIVE AND INSTITUTIONAL FRAMEWORK OF THE STATE

1. Despite having played an active role in the creation of the United Nations, and the drafting of the UN Charter, the Universal Declaration on Human Rights, and the core UN human rights treaties, the United States has failed to ratify a significant number of those human rights treaties.[1] The United States remains alone in the international community in its failure to signal intent to ratify the

Convention on the Rights of the Child (CRC), and stands with just Iran, Somalia, Sudan, Nauru, Palau, and Tonga as the only countries to have not ratified the Convention on the Elimination of Discrimination Against Women (CEDAW). While we commend President Obama for signing the Convention on the Rights of Persons with Disabilities (CRPD), it too lingers without ratification.

2. The United States has also failed to ratify the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This failure, coupled with the non-ratification of CEDAW and the CRC, both of which include substantive economic, social and cultural rights protections, reflects a deeper failure to recognize and protect core economic and social rights. Ratification of the ICESCR would serve as an important demonstration during a time of economic crisis of its commitment to those core rights, including the right to housing, education, health, work, and social security.

3. For those treaties it has ratified, the United States has adopted broad Reservations, Understandings, and Declarations (RUDs) significantly undermining their effectiveness. While Article VI of the U.S. Constitution incorporates ratified international treaties as part of "the supreme Law of the Land," the United States has taken the position that treaties are non-self-executing, and without the passage of implementing legislation, treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) remain unenforceable in U.S. courts. The United States has further hampered the realization of the rights contained therein by issuing as part of its regular package of RUDs a declaration that the federal government will only implement the treaties to the extent that it "exercises jurisdiction" over the treaty provision, raising federalism as a barrier to effective implementation at the state and local level. While U.S. domestic law is consistent in many ways with the standards set forth in the treaties, as the U.S. government repeatedly asserts, particularly with regard to civil and political rights, significant gaps persist in both law and practice between domestic law and our obligations under international treaty law, as discussed below.

4. The United States has historically relied on its RUDs and on claims that domestic law is largely in compliance with treaty obligations, to the detriment of the advancement of human rights. This is particularly true with regard to the U.S. failure to effectively combat discrimination, racism, and xenophobia. As the Committee on the Elimination of Racial Discrimination (CERD) reiterated in its most recent review of the United States, federal and state antidiscrimination laws do not fully recognize the scope of racial discrimination as defined in Art. 1(1) of the ICERD, and specifically reminded the U.S. of ICERD's requirement that States parties "prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."[2] Recognizing the interdependence of rights, as is highlighted in the shadow reports submitted during the 2008 CERD Compliance Review, and as is reiterated in the CERD Task Force's Report and those of many of the other Joint Reports submitted for this UPR, the failure to combat and redress *de facto* as well as *de jure* discrimination, has resulted in great disparities in the fulfillment of the promise of the range of rights articulated under the UDHR and our other treaty obligations.

5. Further hampering the advancement of human rights in the United States is the lack of a national independent human rights commission to monitor compliance with human rights standards or an effective mechanism designed to ensure a coordinated approach towards the implementation of human rights at the federal, state, and local level.

C. PROMOTION AND PROTECTION OF RIGHTS ON THE GROUND

Equality and Non-Discrimination

6. Discrimination permeates all aspects of life in the United States, and extends to all communities of color; when coupled with discrimination on the basis of gender, sexual orientation, disability, or other bases, it can have a devastating impact on the full panoply of fundamental rights provided for under the UDHR. The U.S. response to Hurricanes Katrina and Rita bring into sharp focus the ways structural racism impacts all aspects of human security, from housing, food, employment, education, health, and environmental justice.[3] Unfortunately, courts narrowly interpret anti-discrimination laws, laws that themselves define discrimination more narrowly than international law. While some state and local laws provide protections on the basis of sexual orientation and sexual identity, those protections do not exist at the federal level. The limited bases upon which an individual is protected and may seek redress for discrimination falls short of the U.S.' obligations under the UDHR, ICCPR, and ICERD. Each of these provide protections from practices that have a discriminatory impact, not just those undertaken with discriminatory intent and recognize the need to protect against discrimination on the basis of a broader range of categories, including language, property, birth, or "or other social status."

7. The result is a highly stratified society in which, for example, persons of color continue to live in isolated, segregated communities, and have been disproportionately affected by the current mortgage and foreclosure crisis.[4] Gross disparities in the U.S. educational system and the persistent achievement gap are the direct result: of inequalities and discrimination in housing, compounded by judicial restrictions on affirmative action policies aimed at redressing structural racism and historical discrimination; lack of programming for English Language Learners; excessive and discriminatory school discipline; and, use of restraints and seclusion in the school system as a means for "intervention" for children with disabilities.[5] The effects of excessive and discriminatory school discipline policies follow persons of color and sometimes directly result in discriminatory treatment in the criminal justice system which incarcerates African Americans and Latinos at rates far greater than Whites, due partly to ongoing racial profiling and discriminatory sentencing policies.[6]

8. Discrimination and segregation in housing and education, combined with discrimination in our criminal justice system, all contribute to inequalities in employment and discrimination in the enjoyment of the right to decent work. Discrimination in the employment opportunities and in the right to decent work persists because of relatively narrow and narrowly-interpreted anti-discrimination laws, denials of employment on the basis of criminal histories, and whole categories of workers who are disproportionately persons of color who are statutorily excluded from workplace protections.[7]

9. Race-based physical health disparities persist in the United States. As is noted in the Joint Submission on the *United States and its Treaty Obligations to Eliminate Racial Health Disparities*, despite the U.S. obligation to "undertake to prohibit and to eliminate racial discrimination in all its forms" including in the right to "public health" and to "medical care," under Article of ICERD, "Racial and ethnic disparities in health outcomes in the U.S. are caused not only by structural inequities in our health care system, but also by a wide range of social and environmental determinants of health."[8] This is particularly true in the case of persistent racial disparities in reproductive and sexual health.[9]

Right to life, liberty, and security of the person

10. The United States persists in its imposition of the death penalty, and in doing so, has failed to meet its international legal obligations in four major ways: (1) the discriminatory and arbitrary imposition of the death penalty; (2) lack of compliance with the International Court of Justice's judgment in *Avena and Other Mexican Nationals*; (3) the execution of persons with mental disabilities; and (4) inhuman and degrading conditions of death row facilities.[10]

11. With regard to the treatment of persons with disabilities, Americans with disabilities experience daily human rights violations, including involuntary euthanasia, forced psychiatric treatment, and forced institutionalization, which destroy their quality of life when not causing death outright. These acts violate virtually every article of the UDHR (and corresponding provisions of the ICCPR, CAT and CERD), specifically: Article 2 (non-discrimination); Article 3 (life, liberty and security of person), Article 5 (prohibition of torture and cruel, inhuman and degrading treatment), Article 6 (recognition as a person before the law), Article 7 (non-discrimination), Article 9 (prohibition of arbitrary detention), Article 12 (prohibition of interference with privacy and home), Article 13 (freedom of movement an residence), Article 18 (freedom of thought), Article 22 (realization of rights indispensable for dignity and free development of the personality) and Article 25 (adequate standard of living for health and well-being).[11]

Administration of justice, including impunity and the rule of law

12. The United States continues to fall short of its human rights obligations in the administration of justice, particularly in relation to: racially disparate sentencing, sentencing of juveniles to life without parole, and collateral consequences of felony convictions; conditions of confinement that violate an incarcerated women's reproductive rights, and rights of prisoners with psychosocial disabilities; treatment of individuals in supermax facilities; and, treatment of political prisoners. Furthermore, the Prison Litigation Reform Act presents significant barriers to prison oversight.

13. Racial profiling persists in the United States where policies and programs that allow for, or incentivize the use of racial profiling in criminal, immigration, and national security law enforcement proliferate, despite U.S. obligations under the ICERD, the ICCPR, and the UDHR to ensure the non-derogable right of all people under its jurisdiction to be free from discrimination.[12]

14. Dozens of political prisoners who were victimized by the U.S. government's political repression against African-Americans, Puerto Ricans, and Native American communities continue to languish in prison and endure solitary confinement, poor medical health care, various other forms of abuse, and perfunctory parole hearings resulting in routine denial of release. These violations have repeated themselves in the post-9/11 era under the guise of national security.[13]

Freedom of expression, association, and peaceful assembly, and the right to participate in public and political life

15. **Freedom of Expression and Association**: As is addressed in greater detail in the joint submission by charitable, development, grant-making, faith-based and peace-building organizations, U.S. security laws and policies create unnecessary and unreasonable barriers to the legitimate activities of civil society organizations.

16. **Freedom of Association**: As is detailed in the joint submission on labor rights and section immediately below, the rights of workers to engage in freedom of association and collective bargaining is severely hampered by statutory exclusions from protections to said rights, as well as procedural and other barriers to the protection and promotion of those fundamental rights.

17. **Right to participate in public and political life**: As is detailed in the report on criminal justice and right to work, collateral consequences of criminal convictions interfere with individuals rights to vote, and to obtain decent work. Residents of the District of Columbia remain disenfranchised, without a vote in Congress.

Right to work and to just and favourable conditions of work[14]

18. While the United States has recently undertaken renewed efforts to secure workplace rights and reduce unemployment at the aggregate level, the prevalence of exploitative, subsistence-only jobs combined with persistent unemployment rates are clear indicators of the need for the United States to do more to ensure that all, regardless of race, gender, sexual orientation and sexual identity, disability, immigration status, or other social status, are able to achieve dignity through work.

19. **Employment promotion measures have not yielded a sufficient number of jobs for jobseekers:** Recently, the American Recovery and Reinvestment Act (ARRA) has created and saved jobs, and extended benefits to vulnerable populations, but did not employ direct employment programs to create new jobs.

20. **Anti-discrimination laws do not fully comply with ICERD:** The United States has a number of laws that protect against discrimination in employment, however, the definition of discrimination in current law does not meet the standard in Article 1 (1) of ICERD, and is inadequate in addressing policies and practices that appear neutral but put people of particular racial, ethnic or national origin at a disadvantage compared with other persons in the enjoyment of the right to work. For example, most state laws allow employers to refuse to hire people with a criminal record including people who were arrested but never convicted.[15] Given the persistent practice of racial profiling, and disproportionate arrest based on race, this practice has a disproportionate negative effect on African Americans. Furthermore, Title VII of the Civil Rights Law of 1964, which prohibits employment discrimination, does not apply to employers with less than 15 employees, and thus sectors that tend to have fewer employees are *de facto* excluded from federal anti-discrimination protections. [16]

21. **Insufficient workplace accommodation for pregnancy and parenting:** The Pregnancy Discrimination Act offers incomplete protection for pregnant women in the workplace, because federal courts have interpreted the Act narrowly, leaving many allowable grounds to fire a pregnant worker.[17] Furthermore, the United States is the only industrialized country with no mandated maternity leave policy. The Family and Medical Leave Act guarantees up to 12 weeks unpaid leave for some workers, but because it is unpaid, many workers cannot afford to take advantage of it.[18]

22. **Federal labor laws exclude many low-wage workers:** Domestic workers, agricultural workers, and independent contractors—workers who are often low-wage, and predominantly women and racial/ethnic minorities in the case of domestic workers—are exempt from the full protection of labor laws creating uneven standards across labor sectors.[19] The Fair Labor Standards Act (FLSA), which establishes minimum wage and overtime pay guidelines, excludes live-in domestic workers.[20]

As a matter of policy, the Occupational Safety and Health Act (OSHA) excludes domestic workers, depriving them of the right to a safe and healthy work environment, among other rights.[21] Furthermore, because labor laws assign rights to "employees" —a status narrowly defined— employers often misclassify employees as independent contractors or subcontractors denying them workplace protections.[22]

23. **Inadequate protection of the of basic workplace rights:** The absence of public oversight in high-violation industries has precipitated the lowering of standards in the labor market as a whole. The few existing legal protections against workplace violations are not adequately enforced. [23]

24. **Inadequate protection of right of association:** The National Labor Relations Act (NLRA) is intended to encourage collective bargaining, however its provisions only apply to the private sector, offer inadequate protection for workers, and are poorly enforced. In violation of obligations in Article 22 of the ICCPR, there are five states[24] that completely prohibit collective bargaining in the public sector. In North Carolina, where the ILO has issued a decision asking the federal government to take steps to repeal the ban on collective bargaining,[25] workers and their representatives contend that ban[26] has made it difficult to combat race and sex discrimination in the workplace.

Right to social security and adequate standards of living, including rights to health, health care, and housing

25. The United States has not yet fully recognized economic and social human rights, including the rights to social security and adequate standards of living, nor does it protect and fulfill these rights. This human rights denial negatively impacts the entire U.S. population resulting in high income inequality and poverty rates, and lack of adequate social safety nets.[27]

26. **Right to Social Security**: In the United States, the human right to social security, which ensures the basic resources necessary for a life with dignity, is not sufficiently protected. Social policies assume that a basic income can be generated from work, and fail to provide adequate supports to meet fundamental needs and prevent poverty. The United States has far greater income inequality than all Western democracies,[28] and the second-lowest rate among OECD countries for reducing inequality through public cash transfers.[29] Consequently, the official poverty rate in 2008 was 13.2%,[30] but around 30% of the population lacks an adequate income to meet basic needs.[31] As a result, around 58 million people face either food or energy insecurity, or both.[32] Poverty has been thoroughly racialized and feminized, with 24.7% of African Americans and 14.5% of women living below the federal poverty level, compared to 10.5% of Whites.[33] The United States makes limited benefits available in a very selective way, for special eligible groups only. The sole universal benefit is mandatory public retirement insurance through the tax-funded Social Security program of 1935, which only provides income near the federal poverty level. Employment related benefits are difficult to claim and inadequate to meet needs, yet few benefits exist independent of work, apart from a growing Supplemental Nutrition Assistance Program (known as food stamps). Since the legal right to welfare was ended in 1996 and replaced by Temporary Assistance for Needy Families (TANF) for women with children, the number of recipients has decreased by a third to around 2 million, leaving many poor families entirely disconnected from support.[34]

27. **Right to health.** The United States is the only high-income country without a universal health care system, even after recent reform efforts. Instead the United States has a highly commercialized,

market-based system that relies predominantly on for-profit, private health insurance companies that are then publicly subsidized. 101,000 people are estimated to die each year because of the way the health system is organized,[35] and 45,000 deaths per year are attributed to the lack of health insurance.[36] Yet having insurance coverage does not guarantee access to care: at least 25 million people are underinsured and likely to forgo care due to high deductibles and co-pays.[37] The United States also has fewer doctors and nurses than other high-income countries, and a less developed primary care infrastructure.[38] In addition to these burdens, women who seek reproductive healthcare services including abortion are further limited by state and federal laws obstructing access, discriminatory restrictions on funding and government failure to curb extreme private conduct designed to intimidate women and health care providers. In international comparison, the United States has some of the worst health outcomes among high-income countries, including high infant mortality and low life expectancy rates, despite spending more than twice as much on health care as any other country. [39] Unfortunately, the health reform law of 2010 continues to rely on the market-based system that has resulted in these failures, and access to health care will continue to depend more on a person's ability to pay than their health needs.

28. **Right to housing**. Despite receiving findings and recommendations on its failure to fully uphold the right to housing from numerous UN human rights monitors over the past four years, including a comprehensive report from the Special Rapporteur on the Right to Adequate Housing in 2010,[40] the United States has taken no specific steps toward addressing the concerns raised by these bodies. While the United States dedicates significant resources to supporting homeownership and private development, these investments have hampered rather than furthered the human rights obligation of meeting the housing needs of all. Government policies have created the current housing crisis – which precipitated the 2008 global financial crisis – through deregulating mortgage lending, disinvesting in public housing and other affordable housing programs.

Right to education and to participate in the cultural life of the community[41]

29. Among the spectrum of social and economic rights, only the right to education has received some formal recognition in the U.S., primarily in state constitutions.[42] Consequently, primary and secondary schools are largely public and free, although post-secondary education is treated as a privilege with increasingly high fees attached. The U.S. scores poorly on access and quality indicators, with the lowest ranking of 28 high-income countries measured for secondary school enrollment math and science test performance.[43] Around 1.3 million children drop out of school each year,[44] more than 3.3 million are suspended and 102,000 expelled.[45] High stakes testing, lack of adequate funding, and zero-tolerance discipline policies, including jail-like environments with armed police officers, deprive many children of their right to education and dignity and push young people out of school.

30. The U.S. education system is highly segregated, stratified, grounded in a competition-based achievement model that is increasingly pursued through privatization – such as the creation of publicly funded but privately run charter schools – while public schools in low-income communities and communities of color suffer from underfunding, overcrowding, and forced closures, resulting in gross disparities in educational opportunities for students of color. More than half of African American male students and more than one third of Latino male students do not complete high school on time,[46] exemplifying severe educational disparities.[47]

Indigenous Peoples

31. The United States has not endorsed the UN Declaration on the Rights of Indigenous Peoples, and has not taken satisfactory measures to address the CERD 2008 concluding observations and recommendations vis-à-vis Indigenous Peoples, or those made by the Human Rights Committee in its 2006 review. The CERD specifically raised concerns about: the incidence of rape and sexual violence experienced by American Indian and Alaska Native women; reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining and logging, carried out or planned in areas of spiritual and cultural significance to indigenous peoples, and noted the negative impact those activities have on rights of indigenous peoples under Articles 5(d)(v), 5(e)(iv), and 5(e)(vi) of ICERD. The Human Rights Committee raised concerns about the lack of action on the part of the United States to ensure judicial protections against the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs, and urged the United States to secure the rights of all indigenous peoples under Article 1 and 27 of the ICCPR to provide for greater participation and influence in the decision-making affecting their natural environment, means of subsistence, and culture.

Migrants, refugees and asylum-seekers[48]

32. The U.S. immigration system, while generous in many ways, is riddled with systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice. The massive expansion of the immigration enforcement system has tremendous implications on the protection of the rights of non-citizens. According to a 2010 report, in fiscal year 2008 Department of Homeland Security officers apprehended at least 791,568 noncitizens; initiated 291,217 removal proceedings, detained 378,582 noncitizens, deported 358,886 noncitizens including 113,462 people through expedited removal.[49] Similarly, problems with the asylum and refugee protection systems have resulted in denial of protection to thousands of *bona fide refugees*. Finally, the United States regularly fails in its obligation to consider the unity of the family in its immigration laws, policies, and practices.

33. As noted above, migrants are routinely discriminated against in the administration of justice, as a result of racial profiling and programs such as NSEERS and implementation of 287(g) agreements entered into between the Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency and state and local law enforcement agencies.[50] Furthermore, migrants brought here as guestworkers routinely face exploitation, discrimination, and a host of abuses in their recruitment and employment, endemic to the guestworker program, and violations against guestworkers and undocumented workers routinely go unredressed because of legal and practical barriers to accessing justice.[51]

D. RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

The US Human Rights Network calls upon the government to take the following actions:

34. ***With regard to the normative and institutional framework for addressing human rights*:** to take immediate steps to ratify key international human rights treaties as laid out in the joint submission on *Treaty Ratification*; to endorse the Declaration on the Rights of Indigenous Peoples; to interpret the rights contained within ratified treaties in line with international human rights standards, including

protections of economic, social and cultural rights; to remove any RUDs that undermine compliance with, or violate the object or purpose of, treaties; to adopt implementing legislation and optional protocols to ensure treaties are enforceable and that domestic law is in full compliance with treaty obligations; and, establish federal mechanisms to ensure comprehensive coordination and monitoring of treaty implementation and federal, state and local compliance with international human rights obligations.

35. ***With regard to its obligations to take affirmative measures to combat discrimination in all of its forms, and the right to equality and non-discrimination***: adopt a National Action Plan on Racial Discrimination in line with the Vienna Declaration and Programme of Action, aimed at reducing disparities, that incorporates accountability measures; to encourage federal and state jurisdictions to adopt such plans and create inter-agency working groups to oversee their implementation; to ensure compliance with the obligations under ICERD, and adopt where necessary a definition of discrimination that complies with the definition found in Article 1 of ICERD and General Recommendation XI, as well as General Recommendation XXX, and implement a process by which policies and practices are reviewed for discriminatory impact; ensure implementation of CERD recommendations from 2008; and, strengthen civil rights agencies' capacity to investigate racial or ethnic disparities in the enjoyment of the full range of rights provided for under the UDHR, including health, reproductive and sexual health, housing, education and employment.

36. ***With regard to the right to life, liberty, and security of person***: immediately adopt a moratorium on executions as well as on the imposition of new death sentences until it revises its laws and practices that currently allow for the discriminatory and arbitrary application of the death penalty and the execution of prisoners with mental disabilities; implement the ICJ judgment in *Avena* by any means necessary, including Congressional legislation; revise its laws to prohibit the imposition of the death penalty against those with mental disabilities; and, review conditions of detention on death row and ensure that death row inmates are provided with access to educational opportunities, sufficient means of exercise, and occupational training; end the institutional bias in services for people with disabilities, and abolish civil commitment, allowing people to live freely in communities of their choosing; provide support, voluntary treatment and reasonable accommodation to prisoners with psychosocial disabilities; seek an end to racial discrimination within psychiatric systems; ensure educational opportunities for children and youth, but generally for all people in institutions; ban the practice of electroshock, forced drugging, restraints, seclusion, and aversives on people who are children, adults and seniors; and take steps to end all forms of physical, sexual, emotional, and psychological abuse and rape of all people using services for people with disabilities.

37. ***With regard to the administration of justice, including impunity and the rule of law***: within the criminal justice system, take immediate action to ensure the criminal justice system complies fully with international treaty obligations under the CAT, the ICCPR, and the ICERD; ratify the Optional Protocol to the CAT, and ratify CEDAW, CRC, and CRPD; and seek enactment of legislation aimed at curtailing and redressing prison abuses. Furthermore, the U.S. should take immediate action to prohibit the practice of racial profiling by federal officers and banning practices that disproportionately target people for investigation and enforcement based on race, ethnicity, religion or national origin; rescind the 2002 DOJ Office of Legal Counsel (OLC) "inherent authority" memo that reversed historical trends to keep state and local law enforcement out of federal civil immigration work and issue a new memo clarifying that state and local law enforcement agents may

not enforce federal immigration laws absent formal authority granted to them by the federal government; terminate the 287(g) program and all other federal immigration enforcement programs that rely on state and local criminal justice systems; and terminate the NSEERS program and repeal related regulations, and provide redress for those deported for lack of compliance with NSEERS but otherwise had an avenue for relief.

38. ***With regard to the right to work and to just and favourable conditions of work, including the right to freedom of association and collective bargaining***: monitor job creation associated with the recovery to ensure that jobs are of decent quality and employment opportunities are provided in a non-discriminatory and gender-sensitive way, ensuring that current and future budget allocations, including fiscal stimulus funds, should go towards the creation of new employment that specifically includes women, people of color, and other economically marginalized groups; increase and index the minimum wage and move toward guaranteeing a living wage for all; place human rights conditions on subsidies for private job creation and private development; increase direct jobs creation based on human rights principles; strengthen administrative, legal, and legislative infrastructure to eliminate institutional barriers that have traditionally limited racial and ethnic minorities from accessing good jobs, and to ensure equal realization of the human right to work; provide effective remedies against employer coercion and interference with freedom of association and collective bargaining, whether that be through passage of the pending Employee Free Choice Act or other legislation; adopt and enforce legal protections for basic rights at work, increasing public oversight in high-violation industries; cooperate with workers' groups to hold corporations accountable, and to develop and enforce employment regulations; and, take action to ensure all workers are deemed employees under federal and state labor laws, and have equal access to all available remedies, regardless of immigration status.

39. ***With regard to the right to social security and adequate standards of living***: ensure a proper social support system is available for workers so that an adequate standard of living may be maintained by low-wage workers and in the event of unexpected unemployment or incapacity; ensure that public resources are used wisely to meet urgent needs by implementing the already-authorized single-family home disposition program to make foreclosed homes owned by the government available to house homeless people, expand the types of properties available under the base closure and other federal vacant property programs, and create financial and tax-based incentives for state and local vacant property programs; stop the decrease in the number of available public and subsidized units even as the demand increases by mandating one-for-one and like-for-like replacement of lost subsidized units, and by providing incentives and subsidy structures to enable private owners to more easily continue participation in subsidized housing programs; and, protect homeless and low-income people from discrimination by creating federal protections against source-of-income housing discrimination; remove lifetime bans from subsidized housing for minor arrests; and ensure that localities that receive federal funds do not criminalize sleeping or conducting other life activities outside when there are no available shelter spaces.

40. ***With regard to education***: Preserve education as a public good, invest in public schools based on need, and stop privatization where it exacerbates stratification and segregation; end school push-outs and instead provide learning environments that protect dignity, foster children's full development, and ensure a quality education for all children; eliminate funding disparities by ending schools'

dependence on local property taxes; and, implement the recommendations of CERD regarding school segregation and discrimination in educational opportunities.

41. ***With regard to indigenous peoples:*** endorse, support and implement the UN Declaration on the Rights of Indigenous Peoples, and use it as a guide for interpretation of legally binding obligations regarding the implementation of the ICERD vis-à-vis Indigenous Peoples; establish new, effective, just and fully participatory mechanisms for addressing violations of the Treaties and other cases of land and resources rights as well as protection of sacred sites (based on both the 2006 Human Rights Committee and the 2008 CERD recommendations first sentence above); ensure the basic needs for health and well being, including housing, food, education; respect the right to self-determination and subsistence of indigenous peoples as provided for under ICERD, as well as the cultural rights of indigenous peoples, as guaranteed under Article 27 of ICERD.

42. ***With regard to Migrants, refugees and asylum-seekers***: reform U.S. refugee and asylum system to ensure that the United States meets obligations under the 1951 Convention, and, in particular, elimination of the one-year filing deadline for asylum claims and the elimination of the Tier 3 "terrorism" category; reform the immigrant detention system to end arbitrary detention and ensure that all those who are detained are afforded humane treatment that recognizes their inherent human dignity; and reform the U.S. immigration system to ensure that the ICCPR's obligation to due process and to protect family unity is met, including immediate passage of legislation ensuring protection of family unity in deportation cases.

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[1] See Joint Submission on *Treaty Ratification and Implementation* for a more in depth discussion.

[2] CERD/C/USA/6, para. 10.

[3] See Joint Submission, *The Human Rights Crisis in the Aftermath of Hurricane Katrina*.

[4] See the following Joint Submissions for greater details regarding inequality and discrimination in housing: *From Civil Rights to Human Rights: Implementing U.S. Obligations under ICERD*; *Right to Adequate Housing in the United States*; and, Joint Submission on *Racial Discrimination*, submitted by the Lawyers Committee for Civil Rights, et al.

[5] See the following Joint Submissions for greater details regarding inequality and discrimination in education: *From Civil Rights to Human Rights: Implementing U.S. Obligations under ICERD*; *Right to Education*; and, *Racial Discrimination*, submitted by the Lawyers Committee for Civil Rights, et al.

[6] See the following Joint Submissions for greater details regarding inequality and discrimination in criminal justice: *From Civil Rights to Human Rights: Implementing U.S. Obligations under ICERD*; *Criminal Justice*; *The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion, and National Origin;* and, *Racial Discrimination*, submitted by the Lawyers Committee for Civil Rights, et al.

[7] *From Civil Rights to Human Rights: Implementing U.S. Obligations under ICERD*; *Right to Work*; *Migrant Labor*; *Labor Rights*, and, Joint Submission on *Racial Discrimination*, submitted by the Lawyers Committee for Civil Rights, et al.

[8] Joint Submission on *United States and its Treaty Obligation to Eliminate Racial Health Disparities*, at para. 7. See full submission for more information on discrimination in health and access to health care, as well as Joint Submission *From Civil Rights to Human Rights: Implementing U.S. Obligations under ICERD*; *Reproductive Rights*; and, Joint Submission on *Racial Discrimination*, at para. 42 submitted by the Lawyers Committee for Civil Rights, et al.

[9] See joint submission on *The United States' Compliance with its Human Rights Obligations in the Area of Women's Reproductive and Sexual Health*.

[10] See Joint Submission on *The Application of the Death Penalty in the United States*.

[11] See Joint Submission on *The Human Rights of Persons with Disabilities*.

[12] See Joint Submission on *The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin*.

[13] See Joint Submission on *Political Repression and Political Prisoners*, and Joint Submission on *Domestic Repression*.

[14] For more information on the Right to Work and Just and Favourable Condition on Work, see the Joint Submissions on the *Right to Work*; *Towards Economic and Social Rights in the United States: From Market Competition to Collective Goods*; *Migrant Labor in the United States*; and *Labor Rights*.

[15] "What's the Law" in *After Prison: Roadblocks to Reentry,* http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4

[16] "Domestic Workers Under Labor Law" in *Domestic Workers United*, http://www.domesticworkersunited.org/media/files/63/DW-under-Labor-Law.pdf

[17] U.S. House. 2009. Education and Labor Committee, Subcommittee on Workforce Protections. Testimony of Ann M. O'Leary, Executive Director of the Berkeley Center on Health, Economic & Family Security at UC Berkeley School of Law: Hearing on The Impact of Women's Growing Participation in the Workforce: "The Shriver Report: A Woman's Nation Changes Everything." 111th Congress, 1st sess., 13 November.

[18] Only 6 percent of all employees in firms with fewer than 100 employees receive any paid family leave. See, Employee Benefit Research Institute, "EBRA Data Book on Employee Benefits," updated August 2009, Table 4.1c.

[19] "Rural Labor and Education: Farm Labor" in United States Department of Agriculture: Economic Research Service, http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm#demographic

[20] "Domestic Workers Under Labor Law" in Domestic *Workers United*, http://www.domesticworkersunited.org/media/files/63/DW-under-Labor-Law.pdf

[21] Id.

[22] "Independent Contractor Misclassification and Subcontracting" in National Employment Law Project, available at: http://www.nelp.org/site/issues/category/independent_contractor_misclassification_and_subcontracting.

[23] See Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Center for Urban Economic Development/National Employment Law Project/UCLA Institute for Research on Labor and Employment, 2010.

[24] The five states that exclude public sector workers are: North Carolina, South Carolina, Georgia, Texas and Virginia. See, Emily Cohen, Kate Walsh and RiShawn Biddle, Invisible Ink in Collective Bargaining: Why Key Issues Are Not Addressed (National Council in Teacher Quality 2008).

[25] International Labour Office (ILO), Reports of the Committee on Freedom of Association, 344th Reports of the Committee on Freedom of Association, ¶999. GB.298/7/1, 298th Session. Geneva, March 2007.

[26] North Carolina General Statute (NCGS) §95-98.

[27] For more information on economic and social rights in the United States, see the following joint submissions: *Toward Economic and Social Rights in the United States: From Market Competition to Collective Goods*; *Right to Adequate Housing the United States*; *Towards a Human-Rights Centered Macro-Economic and Financial Policy in the U.S.*; *Racial Health Disparities and Discrimination*; and, *United States' Compliance with its Human Rights Obligations in the Area of Women's Reproductive and Sexual Health.*

[28]The U.S. ranks 73rd in the world according to the UN's Gini index; United Nations Human Development Report 2009, accessed at http://hdrstats.undp.org/en/indicators/161.html

[29] CESR fact sheet, available at

[30] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2008.

[31] http://www.law.northwestern.edu/journals/njlsp/v4/n1/2/2Edelman.pdf.

[32] United States Department of Agriculture: Food Security in the United States: Key Statistics and Graphics, accessed at http://www.ers.usda.gov/Briefing/FoodSecurity/stats_graphs.htm.

[33] 2006-2008 American Community Survey, "Percent of People Below Poverty Level in the Past 12 Months." http://factfinder.census.gov/servlet/STTable?_bm=y&-

qr_name=ACS_2008_3YR_G00_S1701&-geo_id=01000US&-ds_name=ACS_2008_3YR_G00_&-_lang=en&-redoLog=true&-format=&-CONTEXT=st.

[34] One in five former recipients ultimately became disconnected from any means of support, see http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html.

[35] Nolte/ McKee, "Measuring The Health Of Nations: Updating An Earlier Analysis," Health Affairs, 27, No. 1 (2008), 58-71.

[36] A. Wilper et. al., Health Insurance and Mortality in US Adults, American Journal of Public Health | December 2009, Vol 99, No. 12.

[37] Cathy Schoen, Sara R. Collins, Jennifer L. Kriss, and Michelle M. Doty, How Many Are Underinsured? Trends Among U.S. Adults, 2003 and 2007, in: *Health Affairs,* June 2008.

[38] WHO 2007.

[39] K. Davis, C. Schoen, S. C. Schoenbaum, M. M. Doty, A. L. Holmgren, J. L. Kriss, and K. K. Shea, Mirror, Mirror on the Wall: An International Update on the Comparative Performance of American Health Care, The Commonwealth Fund, May 2007

[40] See Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context, Raquel Rolnik, on her Mission to the United States of America (22 October – 8 November 2009), A/HRC/13/20/Add.4, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.20.Add.4_en.pdf.

[41] For more information, see Joint Submissions on *Education*, and *Toward Economic and Social Rights in the United States: From Market Competition to Collective Goods*.

[42] *The Justiciability of Economic, Social, and Cultural Rights in the U.S.: Domestic Implementation of the Right to Equal Education*, Global Rights (October 2004), available at: http://www.globalrights.org/site/DocServer/Final_Right_to_Education__11.12.pdf?docID=1363.

[43] Susan Randolph/Sakiko Fukuda-Parr/ Terra Lawson-Remer, *Economic and Social Rights Fulfillment Index: Country Scores and Rankings*, Journal of Human Rights, forthcoming 2010.

[44] Alliance for Excellent Education (2009), *The High Cost of High School Dropout*, available at: http://www.all4ed.org/files/HighCost.pdf.

[45] Dignity in Schools - FACT SHEET: School Discipline and The Pushout Problem, available at: http://www.dignityinschools.org/files/DSC_Pushout_Fact_Sheet.pdf.

[46] Given Half a Chance: The Schott 50 State Report on Public Education and Black Males, The Schott Foundation, 2008. http://www.blackboysreport.org/files/schott50statereport-execsummary.pdf.

[47] See Joint Submission on *Education* for evidence of how the U.S. violates provisions under CERD.

[48] For more information, see Joint Submissions on *Rights of Migrants, Refugees and Asylum Seekers*, and *Migrant Worker Rights*.

[49] ABA, Reforming the Immigration System, at 5.

[50] For more information, see Joint Submission on *The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin*. See also See also, Concluding Observations of the CERD, ¶ 14, CERD/C/USA/CO/6 (Feb. 2008) (addressing NSEER and other forms of racial profiling against Arabs, Muslims and South Asians), available at: http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf

[51] For more information, see Joint Submission on *Migrant Labor Rights*. See also, Concluding Observations of the CERD, ¶ 28, CERD/C/USA/CO/6 (Feb. 2008) (addressing the need for the US "to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer"), available at: http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf.

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Treaty Ratification

Submitted by:

Columbia Law School's Human Rights Institute

American Civil Liberties Union of Georgia

Professor Jonathan Todres of Georgia State University College of Law

Just Detention International

Lawrence Moss

National Lawyers Guild

Beth Lyon of the Villanova Law School Farmworker Legal Aid Clinic

World Organization for Human Rights USA

Endorsed by:

Organizations: The Advocates for Human Rights; Allard K. Lowenstein International Human Rights Clinic, Yale Law School; Asian American Justice Center; Asociación Americana de Juristas (American Association of Jurists); Black Alliance for Just Immigration; Boalt Hall Committee for Human Rights; Campaign for US Ratification of the CRC; Castleton Park Tenants Association, Staten Island; Center for Constitutional Rights; Center for Justice & Accountability; Center for the Human Rights of Users and Survivors of Psychiatry; Center for Women's Global Leadership; Champaign-Urbana (Illinois) Citizens for Peace and Justice; Connect U.S. Fund; Disability Rights Education and Defense Fund; December 12th Movement International Secretariat; Emory University Institute of Human Rights; Four Freedoms Forum; Fuerza Mundial/FM Global; Human Rights Advocates; The

Human Rights Caucus, Northeastern University School of Law; Human Rights Education Associates; Human Rights Litigation and Advocacy Clinic, University of Minnesota Law School; Human Rights Project at the Urban Justice Center; International Association of Democratic Lawyers; International Center for Transitional Justice; International Indian Treaty Council; Lawyers' Committee For Civil Rights Under Law; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self Determination; Maria Iñamagua Campaign for Justice; Mayday New Orleans; Meiklejohn Civil Liberties Institute; Mental Disability Rights International; Metro Atlanta Task Force for the Homeless; Midwest Coalition for Human Rights; Minnesota Chapter of the National Lawyers Guild; Minnesota Tenants Union; National Economic and Social Rights Initiative; National Law Center on Homelessness and Poverty; National Network for Immigrant and Refugee Rights; People's Health Movement – USA; Poverty & Race Research Action Council; Public Interest Projects; South Bay Communities Alliance; Three Treaties Task Force of the Social Justice Center of Marin; United States International Council on Disabilities; U.S. Positive Women's Network; WILD for Human Rights, Berkeley Law School; Women Organized to Respond To Life Threatening Disease (WORLD).

Individuals[i]: Sandra Babcock, Center for International Human Rights, Northwestern University School of Law; **Joyce Carruth**; **Arturo Carrillo**, Professor of Clinical Law, Director, International Human Rights Clinic, The George Washington University Law School; **Margaret B. Drew**, Director of Clinics and Experiential Learning; Director, Domestic Violence and Civil Protection Order Clinic, University of Cincinnati College of Law; **Andrea Hornbein**, MassDecarcerate; **Deena Hurwitz**, Associate Professor of Law, Director, International Human Rights Law Clinic and Human Rights Program , University of Virginia School of Law; **Suzanne Jasper**, Director, First Peoples Human Rights Coalition; **Hope Lewis**, Professor of Law, Northeastern University School of Law; **Anjana Malhotra**, Practitioner in Residence, Seton Hall School of Law Center for Social Justice; **Sarah Paoletti**, Clinical Supervisor and Lecturer, Transnational Legal Clinic, University of Pennsylvania School of Law; **Amelia Parker,** Executive Director, Statewide Organizing for Community eMpowerment; **Ute Ritz-Deutch**, Ph.D., CUNY Professor and Tompkins County Immigrant Rights Coalition; **Penny M. Venetis**, Clinical Professor of Law, Clinical Scholar, Co-Director, Rutgers Constitutional Litigation Clinic, Rutgers School of Law; **Deborah M. Weissman**, Reef C. Ivey Distinguished Professor of Law, Director of Clinical Legal Programs, University of North Carolina-Chapel Hill School of Law.

1. This report provides information under sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.

2. The submitting stakeholders are Columbia Law School's Human Rights Institute, the American Civil Liberties Union of Georgia, Professor Jonathan Todres of Georgia State University College of Law, Just Detention International, Lawrence Moss, the National Lawyers Guild, Beth Lyon of the Villanova Law School Farmworker Legal Aid Clinic, and the World Organization for Human Rights USA.[1] We are dedicated to promoting U.S. ratification of, and full compliance with, international human rights treaties.

3. **EXECUTIVE SUMMARY:** In order to provide full respect for and protection of the rights within the Universal Declaration of Human Rights (UDHR) and comply with its human rights obligations, the United States must extend and enhance existing domestic law protections by:

(1) taking immediate steps to ratify key international human rights treaties and interpret rights contained within ratified treaties in line with international human rights standards, including protections of economic, social and cultural rights;
(2) removing any reservations, understandings and declarations (RUDs) that undermine compliance with, or violate the object and purpose of, treaties;
(3) adopting implementing legislation and optional protocols to ensure treaties are enforceable and that domestic law is in full compliance with treaty obligations; and
(4) establishing federal mechanisms to ensure comprehensive coordination and monitoring of treaty implementation and federal, state and local compliance with international human rights obligations.

A. The U.S. Should Take Immediate Steps to Ratify Major Human Rights Treaties.

4. The United States played a critical role in developing and drafting the UDHR, demonstrating an early commitment to promoting and protecting human rights. Yet since that time, the United States has had an inconsistent history of incorporating and applying international human rights standards domestically. Indeed, the U.S. has continuously refused to join with other states in taking on international human rights legal obligations through its failure to sign and/or ratify core international human rights treaties.[ii] Despite playing an influential role in the drafting and negotiation of many of these treaties, the United States has yet to take the steps necessary to demonstrate a commitment to the universality and interdependence of human rights.

5. Human rights treaties in the United States are generally given domestic effect through three steps: (1) the President signs the treaty; (2) the President offers the treaty for advice and consent; and (3) the Senate votes to ratify the treaty by a two-thirds majority. However, several human rights treaties that have been signed have remained in limbo between the first and second steps for years or even decades. Further, some critical human rights treaties have never even reached the first step.

[1] A full list of additional organizations endorsing this report is included as Appendix A.

6. When presenting its candidacy to the Human Rights Council, the current Administration noted its commitment "to live up to our ideals at home and to meet our international human rights obligations" and "to work[ ] with its legislative branch to consider the possible ratification of human rights treaties, including but not limited to the Convention on the Elimination of Discrimination Against Women." The U.S. should translate this rhetoric into action by taking immediate concrete steps to sign and/or ratify international human rights treaties.

1. <u>The U.S. Should Offer for Advice and Consent the Treaties it has Signed</u>.

7. The U.S. has failed to move several treaties beyond the presidential signing phase of the ratification process, leaving one treaty in limbo for over 30 years. The U.S. has symbolically approved, (agreeing, at a minimum, not to violate the spirit and purpose of), but failed to ratify:

a. Convention on the Elimination of Discrimination Against Women (CEDAW).

8. Among the treaties the U.S. has failed to ratify, CEDAW has made it the farthest along the track toward ratification. The United States stands with six other countries that have failed to ratify CEDAW: Iran, Somalia, Sudan, Nauru, Palau and Tonga.[iii] CEDAW contains important provisions for women's equal access to, equal opportunities and equal participation in all spheres of life on the basis of substantive equality.

9. Signed 30 years ago and submitted for ratification in 1994, CEDAW has never gone to a full Senate vote. In the absence of ratification, independent action at the subnational level demonstrates support for the rights enshrined in this Convention. By the end of 2009 numerous subnational bodies, including cities and counties, had passed resolutions supporting CEDAW.[iv]

b. The Convention on the Rights of the Child (CRC).

10. The CRC is the most widely ratified human rights treaty, leaving the United States virtually alone in its refusal to ratify. Currently, the United States and Somalia are the only states that have not ratified the CRC. In November 2009, Somalia announced its intention to ratify the Convention. The United States' failure to ratify this convention is in stark contrast to its position during the drafting and negotiation process, where the U.S. submitted more new articles than any other government and proposed language or amendments for 38 of CRC's 40 substantive provisions. Although President Clinton signed the CRC in 1995, no President has submitted it for a full Senate vote.

c. The Convention on the Rights of Persons with Disabilities (CRPD).

11. President Obama, in his first year as President, has already demonstrated his support for the United States' ratification of the CRPD by signing the convention in July 2009.[v] Further, the United States was instrumental in the development of the CRPD and has praised it as an "extraordinary treaty," recognizing the importance of equality and "the inherent dignity and worth and independence of all persons with disabilities."[vi] Despite this praise, the U.S. has not ratified the Convention.

d. The International Covenant on Economic, Social, and Cultural Rights (ICESCR).

12. Of the three foundational human rights documents that constitute the International Bill of Human Rights, the ICESCR is the only one that the United States has not either ratified or adopted. Despite its leading role in developing the UDHR, the U.S. demanded that binding obligations with respect to the rights enumerated in the Declaration must be divided into two separate core treaties, effectively splitting economic, social and cultural rights from civil and political rights. The ICESCR has been ratified by over 160 countries from every region of the world. The U.S. signed the ICESCR over 30 years ago but has taken no further steps towards its ratification. Ratification would demonstrate a commitment to protecting fundamental rights, including the rights to education, housing, work, social security and the highest attainable standard of health as recognized under international law.

2. The U.S. Should Take Action on the Regional and International Agreements it Has Not Signed or Ratified.

13. The United States' failure to engage fully with the international community is further demonstrated by the number of important regional and international agreements that it has not yet committed to uphold in the international arena. The U.S. should take immediate steps to sign and/or ratify the following international and regional agreements:

American Convention on Human Rights
Convention on Cluster Munitions
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
International Convention for the Protection of all Persons from Enforced Disappearance
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
International Labor Organization Fundamental Conventions[vii]
Protocol I and II to the Geneva Conventions
Rome Statute of the International Criminal Court

Additionally, the U.S. should endorse the United Nations Declaration on the Rights of Indigenous Peoples.

B. The U.S. Should Ratify and Embrace Economic and Social Rights Treaties.

14. One of the most unique characteristics of U.S. law is its failure to commit to upholding internationally recognized economic and social rights. The United States has ratified treaties that protect civil and political rights, as well as treaties that prohibit discrimination in the realization of economic and social rights. However, except in the context of discrimination, the United States is the only industrialized country that has failed to ratify the major treaties that recognize and protect basic economic and social rights, including not only the ICESCR, but others that contain economic and social right provisions such as CEDAW and the CRC.

1. The U.S. Should Recognize Economic, Social and Cultural Rights.

15. The failure to ratify economic and social rights treaties (or to live up to its signing obligations[viii]) is a reflection of a deeper failure to recognize and protect economic and social rights more generally. Indeed, the United States is famously reticent to recognize these rights both on the international stage as well as within the domestic sphere. For example, Ms. Goli Ameri, as a member of the United States Delegation at the United Nations Commission on Human Rights Annual Gathering in March and April of 2005 stated: *"The U.S. does not support the 'right to adequate housing' or 'housing rights,' because such a right does not exist."*[ix] Although U.S. representatives in the current Administration have emphasized that all rights must be protected and governments cannot "pick and choose," and that rights as a general matter are interdependent, they have not made a direct and specific statement supporting economic and social rights. Given the fairly consistent history of the United States denying the legitimacy of these rights (for several decades now),[x] it is imperative that the current Administration make such a direct statement of support and repudiate the U.S. anti-human rights position on these matters.

a. U.S. Domestic Law Should Protect Economic and Social Rights.

16. In the domestic sphere, there is a pervasive failure to recognize economic and social rights throughout U.S. law and policy. For example, the U.S. Supreme Court held in *Dandridge v. Williams* that the U.S. Constitution contains no affirmative state obligations to care for the poor.[xi] The Court essentially stated that economic and social rights were not justiciable: "[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[xii] Numerous other court decisions have echoed the notion that economic and social rights, unless they can be framed in terms of racial discrimination or a clear legislative mandate, have no place in U.S. state or federal courts.[xiii]

b. The U.S. Should Adopt a Rights-Based Approach to Policy and Resource Allocation.

17. Change is needed to the existing legislative framework, which does not compensate for the lack of constitutional protection. While the United States provides a range of government programs for the poor, none of them are designed under a rights-based framework. Housing assistance programs are not calculated to house every needy family (despite existing resources to do so), and as a consequence families must suffer waiting lists of up to a decade to receive assistance. Both public health insurance programs and cash assistance programs explicitly exclude certain categories of potential recipients, despite their below-poverty level incomes. The resource constraints imposed on such programs for the most vulnerable cannot be explained by lack of resources overall. On the contrary, it is how resources are allocated within each sector that raises serious rights concerns.

18. Overall, resource allocation for economic and social needs within the United States is often regressive in nature and in contradiction to human rights principles. For example, the greatest investment in housing within U.S. law is the mortgage tax exemption. These tax give-backs to homeowners are provided in a way that is inversely correlated to need: the bigger the mortgage (and therefore the more expensive the home) the larger the subsidy. Even more troubling, this tax subsidy is twice as large as all subsidies afforded the poorest residents, those too poor to buy a home or pay rent on the private market. Similar misallocations can be found in

other major rights areas. Education is funded primarily through local property taxes, so the most privileged communities have the most funding overall (despite federal funding streams targeted towards the needy). The health care sector is organized to allow for great waste resulting from privatization. The administrative overhead and profit taken by the private health insurance industry could insure the around 50 million people in the United States without health insurance. A recent Harvard study concluded that each year over 45,000 people die unnecessarily due to the lack of health insurance.[xiv] Even some of the better government programs, such as the food assistance program, fail to meet the actual need and food insecurity remains at around 10%.[xv] Countless families rely on private charities that are overwhelmed in light of the current economic crisis.

c. The U.S. Should Implement a National Strategy to Ensure Implementation of Economic, Social and Cultural Rights.

19. Because there is no national legal framework that protects these rights, there are vast disparities in the level of rights protection from state to state within the United States. With regard to cultural rights, these remain equally undefined and unprotected within U.S. law and policy, which includes bans on the use of other languages in government venues in some localities. The above factors, paired with socio-economic indicators that are shocking given available resources,[xvi] speak to the serious need for the current Administration to not only take steps towards ratification of the ICESCR, but to develop a national strategy to comply with the basic human rights standards contained within the UDHR, the ICESCR and other treaties that protect economic and social rights.

C. The U.S. Should Fully Implement the Human Rights Treaties it has Ratified.

20. Article VI of the U.S. Constitution incorporates ratified treaties as part of "the supreme Law of the Land," but the U.S. often fails to comply with its obligations to (1) publicize these treaties; (2) submit reports in a timely fashion with comprehensive state and local data; (3) enact the implementing legislation needed to make the treaties enforceable; and (4) ratify the Optional Protocols that provide complaint and monitoring mechanisms.

1. The U.S. Should Withdraw Reservations, Understandings and Declarations That Undermine Compliance With Treaties, Enact Implementing Legislation for Signed and /or Ratified Treaties and Adopt Optional Protocols that Allow for Effective Implementation and Oversight.

21. For each human rights treaty the U.S. has ratified, it has entered a package of RUDs. Some of these clarify interpretations, as allowed under international law.[xvii] However, several of the RUDs entered by the United States prevent legal enforcement of the treaties' provisions.

22. The most sweeping of these RUDs is the United States' understanding that human rights conventions are not "self-executing." As a result, victims of treaty violations cannot directly invoke the treaties' provisions in U.S. courts to seek legal remedies.[xviii] "Non-self-executing" treaties can have direct legal effect only through independent implementing legislation understood to cover the terms of each treaty.[xix] Congress has expressly adopted legislation in some cases, such as allowing limited prosecution for torture, war crimes, and genocide to

implement treaty provisions.[xx] By contrast, in over fifteen years since ratifying the CERD, the U.S. has not adopted any implementing legislation for that treaty.[xxi]

23. Human rights treaties rely on states parties to implement domestic laws that (1) prohibit violations of the treaty; (2) provide domestic legal remedies to victims of violations; and (3) punish violators, as a deterrent to future violations. Recognition of treaty provisions in domestic laws creates enforcement mechanisms within each nation's own judicial system and mitigates concerns regarding sovereignty. Although a range of domestic legislation codifies selective treaty provisions, none of the human rights treaties has been given full domestic legal effect. While many of the treaty rights (particularly civil and political rights) are in fact protected in domestic legislation, with rare exception, such legislation has not been enacted pursuant to treaty obligations. Rather relevant legislation has been enacted for a host of domestic reasons, which are important but fail to fully comply with human rights treaties and leave large gaps in the law. Indeed, there has been no systematic attempt to meet treaty obligations. Instead, the U.S. addresses these gaps with the vexing, and inaccurate, blanket statements that treaty provisions are coextensive with domestic law.[xxii]

24. When international treaty monitoring bodies have criticized the U.S. for failing to adopt implementing legislation, the U.S. response typically points to laws implementing the U.S. constitutional provisions that prohibit certain types of rights violations.[xxiii] This misunderstanding undermines the concept of domestic treaty enforcement. While U.S. constitutional guarantees provide important safeguards against rights violations, they do not protect against all forms of discrimination prohibited by the human rights treaties the U.S. has ratified. As a result, there are legal gaps between the U.S. Constitution – which is intended to provide minimum protections for individual rights – and the more expansive international treaty guarantees. So long as these gaps remain unaddressed, the U.S. falls short in its treaty obligations, and more importantly, fails to adequately provide victims of human rights violations access to the remedies they deserve.

25. Places where U.S. laws fall short of treaty obligations include (but are not limited to) the following examples, cited in recent Concluding Observations by UN human rights treaty monitoring committees:

> The CERD requires states parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but which have a discriminatory impact nonetheless. However, U.S. Constitutional law typically requires plaintiffs to prove intent in order to seek protections from discrimination.[xxiv]
>
> Federal laws and policies lack provisions to prevent "extraordinary" rendition to torture, a violation of both the ICCPR and the Convention against Torture (CAT), and to provide compensation to victims.[xxv]
>
> Federal laws that should prevent prison rape fall short of the ICCPR's requirements.[xxvi]
>
> Juvenile life sentences without parole are per se violations of the ICCPR.[xxvii]
>
> The CAT requires criminal statutes and civil causes of action for all torture, and yet federal laws prohibiting torture limit jurisdiction to extraterritorial acts.[xxviii]

26. The "non-self-executing" declaration that fosters these and other discrepancies is but one of the RUDs the Senate has attached when ratifying human rights treaties. The U.S. has also attached a "federalism clause" to the conventions, declaring that as a federal government, it will only implement the treaties to the extent that it "exercises jurisdiction" over the treaties' provisions.[xxix] In each report to the treaty monitoring bodies, the U.S. Government has used this understanding to limit its implementation responsibilities, and has failed to adequately address documented treaty violations at the state and local level. The treaty monitoring bodies have rejected this position, not only for the United States[xxx] but for all federal governments, including Canada and Australia.[xxxi] While under the existing federalism clause, it is appropriate for state and local entities to implement treaty provisions, ultimately the federal government remains responsible for treaty obligations. That responsibility includes providing the resources necessary to ensure effective implementation at all levels of government.

27. Not all RUDs present challenges to effective implementation; to the contrary, some are necessary under the U.S. Constitution.[xxxii] RUDs often serve the important and legitimate purpose of clarifying how treaty articles will take effect in domestic law, however any RUDs that contradict a treaty's object and purpose are not permitted.[xxxiii] In order to determine whether RUDs entered by the United States fall into this category, or whether they continue to be needed, Congress and the Administration should periodically review RUDs to human rights treaties it has already ratified. In 1998, President Clinton's Executive Order 13107 created the Inter-agency Working Group on Human Rights Treaties (IAWG) to coordinate oversight functions with respect to international treaties, including overseeing an annual review of U.S. RUDs to determine their continuing relevance. The IAWG was never fully operationalized and its functions were transferred to a Policy Coordination Committee on Democracy, Human Rights, and International Operations (PCC). If the IAWG, the PCC or any other entity has conducted such review, it should be publicized domestically or reported to the U.N. treaty monitoring bodies. Given that the treaty monitoring bodies have explicitly highlighted certain RUDs as problematic, this apparent failure to review RUDs is particularly concerning.[xxxiv]

28. Finally, the U.S. should adopt the optional protocols that allow for better implementation and oversight of human rights treaties – especially the protocol of the Convention Against Torture (OPCAT) and the First Optional Protocol for the ICCPR. Sound government systems require transparency, accountability, and external monitoring, something which the U.S. sorely needs, especially with respect to detention.

29. The U.S. incarcerates more people than any other country in the world but is lagging dangerously behind in allowing for appropriate oversight of its prisons and jails. This gap has grown in recent years due to the increasing use of private detention facilities by corrections departments and the Department of Homeland Security. The historic lack of transparency of U.S. detention has been a major contributor to the human rights abuses that the optional protocols and their underlying treaties seek to eliminate. Ratification of the OPCAT will allow for effective preventative oversight of obligations under the CAT and create a mechanism by which treaty mandates generally can be addressed proactively. Ratification of the Optional Protocol to the ICCPR, which provides an individual complaint mechanism, will further improve domestic accountability. Adjudication of complaints is not only an avenue for individuals to

seek remedies for treaty violations, it is an opportunity to gain guidance on treaty provisions and the steps necessary to strengthen domestic compliance with human rights obligations.

30. In summary, the United States has stated that human rights treaties are not self-executing, and yet it has neither enacted implementing legislation granting courts jurisdiction to hear claims concerning treaty violations, nor adopted optional protocols that allow for effective implementation and oversight. As a result, no court or institution in the U.S. has jurisdiction to directly resolve individual or group complaints alleging violations of the treaty obligations. At the same time, the U.S. has absolved itself of responsibility for implementation not within its jurisdiction, even though the federal government has ultimate responsibility for ensuring U.S. compliance with treaty obligations. As a result of these two approaches to the human rights conventions, individuals who fall into the gaps between international human rights norms and existing U.S. laws have no recourse, even when the U.S. has ratified treaties that have the purpose and object of protecting those rights.

2. <u>The U.S. Should Establish or Empower Federal Entities to Monitor and Report on Federal, State and Local Compliance With Domestic Enforcement of International Human Rights Treaties</u>.

31. Independent and permanent institutions set up to implement human rights obligations in U.S. policy and monitor compliance with those obligations are essential mechanisms for protecting human rights and preventing violations. U.S. failure to create such institutions has caused a lack of oversight, particularly at the state and local levels, leading to a hodge-podge of enforcement efforts that operate at highly variable levels and under a diversity of standards. The treaty bodies have repeatedly observed that U.S. reports are inadequate and incomplete, due to their failure to include state and local data.[xxxv] As discussed below, robust federal institutions should coordinate with existing state and local agencies charged with monitoring and enforcement of civil and human rights laws.

32. The ad-hoc PCC, which took over the role of treaty implementation oversight, has functioned only to prepare periodic reports and otherwise coordinate the U.S. government's formal presentation to international bodies. No entity is explicitly charged with coordinating or promoting local reporting mechanisms, informing various levels of government and the public about treaty obligations, or coordinating a systematic review of domestic legislation to ensure conformity with international mandates. As a result, judges, police, mayors and city council members, as well as state and federal legislators, have little awareness of their international human rights obligations.[xxxvi]

33. The United States urgently needs a comprehensive national system that integrates human rights treaty obligations into federal legislation and policies, and fosters implementation at the state and local levels. In developing such a system, the U.S. should create and fund two distinct yet related permanent federal institutions that (1) monitor treaty compliance, review legislation and recommend appropriate policy modifications, as well as RUDs; (2) have the authority to coordinate and support state and local civil and human rights agencies to undertake implementation of treaty obligations at the subnational level, through funding, training and education and dedicated staff; and (3) have sufficient staff and resources to achieve their mandate. First, an executive branch implementation body should be put in place by

reinvigorating the IAWG to serve as a focal point to ensure coordination of all federal departments and agencies both to promote and respect human rights and to implement human rights obligations into U.S. domestic policy at the federal, state and local levels. Second, an independent, non-partisan monitoring body should be created by transforming the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights, expanding its mandate to include human rights and monitoring of human rights implementation and enforcement efforts, as well as making structural reforms to improve the Commission's ability to function as a national human rights institution.

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34. **CONCLUDING RECOMMENDATIONS:** As detailed above, the United States must:

(1) take immediate steps to ratify key international human rights treaties and interpret rights contained within ratified treaties in line with international human rights standards, including protections of economic, social and cultural rights;
(2) remove any RUDs that undermine compliance with, or violate the object and purpose of, treaties;
(3) adopt implementing legislation and optional protocols to ensure treaties are enforceable and that domestic law is in full compliance with treaty obligations; and
(4) establish federal mechanisms to ensure comprehensive coordination and monitoring of treaty implementation and federal, state and local compliance with international human rights obligations.

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[i] *Organizations and titles listed for identification purposes only.*

[ii] For a list of human rights treaties ratified by the United States, as well as those signed but not ratified, *see* University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties - USA, http://www1.umn.edu/humanrts/research/ratification-USA.html (last visited Feb. 3, 2010).

[iii] Convention on the Elimination of All Forms of Discrimination Against Women: Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 3, 2010).

[iv] *See* Columbia Law School's Human Rights Institute and the International Association of Human Rights Agencies, State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework, 25 (2009).

[v] Press Release, The White House, *Remarks by the President on Signing of UN Convention on the Rights of Persons with Disabilities Proclamation* (July 24, 2009)..

[vi] *Id.*

[vii] The U.S. has not yet ratified six of eight ILO conventions, which set out core labor standards: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Minimum Age Convention, 1973 (No. 138); Equal Remuneration

Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[viii] The provision of Article 18 of the Vienna Convention on the Law of Treaties, which the United States government has recognized as binding customary international law, oblige a signing party to refrain from actions that would defeat the object and purpose of the treaty (Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

[ix] Press Release, United Nations, *Commission Adopts Six Resolutions and Two Decisions on Economic, Social and Cultural Rights* (Apr. 15, 2005).

[x] *See, e.g.,* Explanation of Position by Craig Kuehl, United States Advisor, on Resolution L.30, Rev. 1 - The Right to Food, in the Third Committee of the Sixty-fourth Session of the United Nations General Assembly (Nov. 19, 2009), *available at* http://usun.state.gov/briefing/statements/2009/132187.htm.

[xi] *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

[xii] *Id.* at 487.

[xiii] *See Linday v Normet*, 405 U.S. 56, 74 (1972) (rejecting the right to adequate housing); and *Tilden v Hayward*, 1990 WL 131162 (Del. Ch.Ct. 1990) (concluding the Court did not have the authority to order the state to house a family rather than choose the more expensive option of removing a child into foster care based on the homelessness of the family).

[xiv] Andrew P. Wilper *et. al.*, Health Insurance and Mortality in U.S. Adults, Am. J. of Pub. Health 99: 12, 4 (2009).

[xv] U.S. Dep't of Agriculture, Food Security in the US (Nov. 16, 2009), http://www.ers.usda.gov/briefing/Foodsecurity/ (last visited Feb. 3, 2010) [hereinafter USDA].

[xvi] The U.S. Census Bureau has estimated that in 2008, 39.8 million Americans, or 13.2% of our population, lived in poverty, and a record 47 million Americans lacked health insurance. U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2008, 13, 20 (Sep. 2009), An estimated 3.5 million Americans, 1.35 million of whom are children, are affected by homelessness each year, and millions more live in substandard housing conditions. National Coalition for the Homeless, How Many People Experience Homelessness? (Jul. 2009), http://www.nationalhomeless.org/factsheets/How_Many.html (last visited Feb. 3, 2010). Despite an obesity epidemic, the U.S. Department of Agriculture reports that 5.7 percent of American households suffered from hunger in 2008, while 49.1 million, or 14.6 percent of the population, faced food insecurity. USDA, supra note 14.

[xvii] Vienna Convention on the Law of Treaties, *supra* note 8, art. 31-33.

[xviii] *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). *See generally*, Restatement (Third) Foreign Relations Law of the United States § 111 (1987).

[xix] U.S. courts may give a treaty indirect effect by interpreting independent statutory or common law causes of action for consistency with the treaty, applying the *Charming Betsy* doctrine. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). However, this possible

indirect application does not satisfy the specific requirements for causes of action called for in several human rights treaties.

[xx] Torture Convention Implementation Act, 18 U.S.C. § 2340A (2009); Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (2009), and War Crimes Act of 1998, 18 U.S.C. § 2441 (2009).

[xxi] Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, ¶ 11, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (Aug. 14, 2001) (noting "the absence of specific legislation implementing the provisions of the Convention in domestic laws," and recommending that the U.S. take the necessary steps "to ensure the consistent application of the provisions of the Convention at all levels of government"). The most recent Concluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) [hereinafter CERD Concluding Observations 2008], noted at least nine specific areas of existing U.S. law that fall short of the CERD's protections and called on the U.S. government to address the shortcomings with implementing legislation.

[xxii] *See* Memo from Harold Hongju Koh, Legal Adviser, U.S. Dept. of State to Executive Branch Agencies, 1 (Dec. 17, 2009),(stating that "United States obligations under the ICCPR, CERD and the CRC Optional Protocols are implemented under existing law . . . the U.S. State Department, coordinating with other relevant agencies, reviewed the treaties and relevant provisions of U.S. law and determined that existing laws . . . were sufficient to implement the treaty obligations, as understood or modified by [RUDS] made by the United States at the time of ratification in order to ensure congruence between treaty obligations and existing U.S. laws." The memo further notes that "[w]ith regard to the CAT, Congress passed specific implementing legislation.").

[xxiii] *See, e.g.*, United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination (Jan. 13, 2009),(responding to a recommendation for implementing legislation by describing enforcement efforts under existing laws and holding existing laws out as evidence that the U.S. already has a "robust framework" for addressing racial discrimination).

[xxiv] CERD Concluding Observations 2008, *supra* note 21, ¶ 10.

[xxv] Concluding Observations of the Human Rights Committee, United States of America, ¶16, UN Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) [hereinafter HRC Concluding Observations 2006]. The U.S. has enacted implementing legislation for the CAT, The Torture Statute of 1996, which includes a narrow definition of torture that does not comply with the treaty and prosecution is limited to torture committed *outside* the United States, so does not apply to prisoners inside the country. Moreover, effective communication and accountability are lacking because the U.S. refuses to recognize the competence of the CAT Committee to recognize and consider communications from or on behalf of victims, in accordance with Article 22.

[xxvi] *Id*., ¶ 33.

[xxvii] *Id*., ¶ 34.

[xxviii] Conclusions and Recommendations of the Committee against Torture, United States of America, ¶ 13, U.N. Doc.

CAT/C/USA/CO/2 (Jul. 25, 2006).

[xxix] The Senate entered this understanding despite wording expressly rejecting such positions. For instance, the ICCPR Article 50 states: "The provisions of the present Covenant shall extend to all parts of Federal States without any limitations or exceptions." International Covenant on Civil and Political Rights*, opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

[xxx] *See* Human Rights Committee, General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 4, U.N. Doc. CCPR/C/21/Rev/1/Add/13 (May 26, 2004) (noting that "article 2, paragraph 2 . . . operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty" and reminding federal states that "the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'").

[xxxi] *See, e.g.*, Concluding Observations of the Human Rights Committee, Australia, ¶ 8, UN Doc. CCPR/C/AUS/CO/5 (May 7, 2009).

[xxxii] *See* Louis Henkin, U.S. Ratification Of Human Rights Conventions: The Ghost Of Senator Bricker, 89 Am. J. Int'l L. 341, 342-344 (1995) (observing that "… a reservation to avoid an obligation that the United States could not carry out because of constitutional limitations is appropriate, indeed necessary"). However, as Henkin documents, most "constitutional" reservations the U.S. has attached to human rights conventions have a broader sweep than necessary, effectively rejecting all international standards that would require changes to existing U.S. laws.

[xxxiii] Vienna Convention on the Law of Treaties, *supra* note 8, art. 19(c). In addition, some conventions explicitly prohibit reservations incompatible with their object and purpose, *e.g.,* Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, art. 20(2).

[xxxiv] *See, e.g.*, CERD Concluding Observations 2008, *supra* note 21, ¶¶11, 18.

[xxxv] *See, e.g.,* HRC Concluding Observations 2006, *supra* note 25, ¶39 (requesting that the United States "include in its next periodic report information … on the implementation of the Covenant as a whole, as well as about the practical implementation of the Covenant, the difficulties encountered in this regard, and the implementation of the Covenant at state level" and encouraging it "to provide more detailed information on the adoption of effective mechanisms to ensure that new and existing legislation, at federal and at state level, is in compliance with the Covenant, and about mechanisms adopted to ensure proper follow-up of the Committee's concluding observations").

[xxxvi] For example, thanks to the strenuous efforts of the Meiklejohn Civil Liberties Institute and the local Peace and Justice Commission, the City of Berkeley, CA, has committed to reporting on compliance with the ICCPR, CERD and CAT. However, the City must depend on volunteers to conduct this reporting, due to the lack of federal, state or local resources appropriated for treaty monitoring. For more information about the Berkeley ordinance, *see* http://www.mcli.org/.

United States of America

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From Civil Rights to Human Rights: Implementing US Obligations Under the International Convention on the Elimination of All forms of Racial Discrimination (ICERD)

Submitted by:

CERD Task Force[1]

Cidadao Global

Women's HIV Collaborative*

Women of Color United*

Atlanta Public Sector Alliance*

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Malcolm X Grassroots

Endorsed by the following 57 Organizations and 37 Individuals:

Organizational Endorsements: Advocates for Environmental Human Rights; Afrolatina Forum; American Civil Liberties Union of Mississippi (ACLU-MS); Amigos Multicultural Services Center; Anti-Racism Committee of the National Lawyer's Guild; Arab-American Association of New York; Atlanta Public Sector Alliance; Black People Against Police Torture; Black Workers for Justice; CADRE*; Casa Esperanza; Center

1 This report was written by Ramona Ortega for the CERD Task Force. The CERD Task Force is made up of human rights and civil rights advocates, lawyers, and organizations dedicated to the full implementation of the Convention on the Elimination of All Forms of Racial Discrimination within the United States. The Task Force is a sub-group of the U.S. Human Rights Network.
* Denotes membership of the CERD Taskforce of the U.S. Human Rights Network.

for Community Alternatives; Center for Constitutional Rights; Center for Law & Social Justice of Medgar Evers College, CUNY; Center for the Human Rights of Users and Survivors of Psychiatry; Center for Women's Global Leadership at Rutgers University; Center of Housing Rights and Evictions (COHRE); Champaign-Urbana (Illinois) Citizens for Peace and Justice; Chicago Anti-Eviction Coalition To Protect Public Housing; Data Center; Dominican Development Center; Emory University Institute of Human Rights; Families United for Economic Justice; First Peoples Human Rights Coalition; Gideon's Army Grassroots Army for Children; Green Worker Cooperatives; Harlem Tenants Council; Human Rights Caucus at Northeastern University School of Law; Human Rights Project of the Urban Justice Center*; INDIGENOUS; Indigenous Peoples and Nations Coalition; International Indian Treaty Council; Jewish Council on Urban Affairs; Justice Now; Latina & Latino Critical Legal Theory, Inc. (LatCrit, Inc.); Latin American and Caribbean Community Center; Lawyers Committee for Civil Rights*; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self Determination; Mayday New Orleans; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; Midwest Coalition for Human Rights Ministries in Economic Justice; Picture the Homeless; Poverty and Race Research Action Council*; Public Interest Projects; Rainbow PUSH Coalition; Restaurant Opportunities Center of New York (ROC-NY); Society of American Law Teachers (SALT); South Asian Americans Leading Together (SAALT); South Asian Forum; South Bay Communities Alliance; The Kirwan Institute for the Study of Race and Ethnicity at Ohio State University; The Praxis Project; The Rita Fund; Three Treaties Task Force of the Social Justice Center of Marin; World Organization for Human Rights USA

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A) Executive Summary

1. Equality and Non-Discrimination are among the most fundamental entitlements in the human rights framework. Non-Discrimination is non-negotiable and an immediate right given to all by virtue of their humanity. The right to non-discrimination is found in the Universal Declaration of Human Rights and numerous treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD]. The United States adopted ICERD on November 20, 1994.
2. The CERD Task Force, a subgroup of the US Human Rights Network, was formed in 2007 to coordinate a national civil society shadow report that was submitted to the U.N. Committee on the Elimination of Racial Discrimination in 2008. The Task Force is made up of organizations that represent the leading voices in human rights and racial justice. Our core mission is to ensure the effective implementation of the ICERD and its key obligations at the national and local level.
3. The CERD Task Force is calling on the United States to introduce a federal plan of action on racial discrimination, similar to other nation states and in compliance with the Durban Plan of Action, to eliminate persistent racial disparities found in American society. Despite weak constitutional protections for disparate impact under US law, there are several policy measures, which must and should be taken under ICERD.
4. Reduction of racial disparities in poverty, education, health, and incarceration are essential to a healthy and vibrant democracy and will put the US on the path to eliminating racial discrimination. A Plan of Action, similar to the Millennium Development Goals, creates concrete and measurable progress in reducing disparities and promotes a more proactive and systemic approach to policy. Trillions of dollars have been spent to activate the national economy and those dollars must be used to create a more equitable society. In line with developed nations around the globe, a National Plan of Action on Racial Discrimination is not only an obligation under ICERD but also recognizes the continuing impact of past injustices.
5. The United States´ record on racial discrimination and racial disparities is discouraging. In his 2009 visit to the US, the Special Rapporteur on Racism noted that "Socio-economic indicators show that poverty and race and ethnicity continue to overlap in the United States. This reality is a direct legacy of the past, in particular slavery, segregation, the forcible resettlement of Native Americans, which was confronted by the United States during the civil rights movement. However, whereas the country managed to establish equal treatment and non-discrimination in its laws, it has yet to redress the socio-economic consequences of the historical legacy of racism."[2]
6. In every indicator of human development as measured by three core areas of well-being: living a long and healthy life, having access to knowledge, and enjoying a decent standard of living, racial minorities fall below the mark in comparison to their white counterparts.[3]
7. Full implementation and compliance with ICERD would go a long way in remedying stark racial disparities. The United States' failure to recognize article 1(1) and General Recommendation XIV "to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect" is a major impediment to full compliance with ICERD.

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2 A/HRC/11/36/Add.3. 28 April 2009. para. 88-89.

3 Measure of America. Available at: http://measureofamerica.org/wp-content/uploads/2008/07/ahdr-execsumm.pdf

Civil Society Participation in the Universal Periodic Report

8. Robust civil society participation in the Universal Periodic Review process has produced a number of thematic reports which highlight racial dimensions of key human rights issues. This report focuses on racial discrimination and disparate impact under ICERD, with a particular emphasis on Article 5 and provides recommendations for full compliance.

B) Background and Normative Framework

Human Rights Framework

9. The United States has undergone two reviews by the Committee on the Convention on the Elimination of All Forms of Racial Discrimination; in 2001 and 2008 respectively. [4] In both instances US civil society contributed shadow reports that provided substantial factual information about the reality of racial discrimination in the United States. In 2001 and 2008 the committee included several important recommendations in its final reports [A/56/18 and A/63/18] many of which remain unfulfilled.

10. The two reports of the Committee overlap in their attention to several topics. These include the need for additional affirmative action measures aimed at increasing opportunity for minority group members; pervasive obstacles to access for minority group members in the areas of education, housing, and health care; the impact of disparate treatment of minorities at all stages of criminal legal proceedings, including police brutality and violence towards members of minority groups, higher rates of incarceration and death penalty sentences for members of minority groups, and political disenfranchisement due to felon voting prohibitions; US treatment of indigenous peoples; and the need for stronger US efforts to publicize the work of the Committee and US obligations under the Convention.

11. The U.S.'s narrow interpretation of the definition of racial discrimination as proposed under the Convention continues to be a major impediment towards its full implementation. Under the Convention and other customary human rights law, racial discrimination is understood to mean both intentional and *de-facto* discrimination. With few exceptions cognizable racial discrimination in the US requires evidence of *intent* to discriminate. This requirement is contrary to the Convention's framework and does not reflect the real-world operation of discriminatory behavior in contemporary American society.[5]

12. As recognized by both the Convention and the Committee, discrimination includes policies and practices that produce outcomes that have a disparate impact, including those impacts in the areas of education, health, housing, and other economic, social, and cultural rights as elaborated in Article 5 of ICERD.

13. The Committee expressed concern in both 2001 and 2008 that the US law, policy, and court practice relies on a definition of racial discrimination at odds with their obligations under article 1, paragraph 1 of the Convention to ensure prohibition of conduct not only discriminatory not only in purpose but also in effect.[6] It recommended in both years that the US review its legislation and practices to ensure

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4 The use of the term "minority" throughout this document indicates reference to racial, ethnic, and national minority groups, which are the same groups addressed in the CERD Committee's concluding observations. The use of the term "Convention or ICERD" throughout this document refers to the International Convention on the Elimination of All Forms of Racial Discrimination. The use of the term "Committee" throughout this document refers to the Committee on the Elimination of Racial Discrimination.

5 A Summary of U.S. NGO responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination, February 2008, 6. Available at http://www.U.S.hrnetwork.org/files/U.S.hrn/images/linkfiles/CERD/0_Executive%20Summary.pdf

6 As defined in Article 1 and General Recommendation XIV, racial discrimination includes distinctions and exclusions that have an "unjustifiable

protection against all forms of racial and ethnic discrimination and any unjustifiably disparate impact upon persons from different racial and ethnic backgrounds.

14. Numerous U.N. human rights monitors, including the Special Rapporteur on Education, Racism, and Housing have highlighted the challenge of racial disparities in combating racial discrimination in the United States.[7]

15. Each of the Special Rapporteur's noted the presence of racial disparities and highlighted the importance of policies to reduce these disparities.

National Framework

16. The US has an extensive constitutional and legislative framework to address intentional discrimination by public and private actors but lacks adequate protections and remedies related to the racially disparate impact of "neutral" policies and practices.

17. The fourteenth amendment of the Constitution contains an Equal Protection Clause that formally recognizes the principle of equality before the law. The fifteenth amendment further extends the right to vote to all races.

18. The advent of the "intent" doctrine, established through a 1976 court ruling, essentially narrowed the fourteenth amendment by requiring that victims of discrimination to prove "intent" to discriminate as a condition to getting a remedy; this is in direct conflict with the Convention.

19. The United States has robust legal protections for racial discrimination as defined and understood under the Civil Rights Act of 1964.[8] The challenge in remedying contemporary manifestations of racial discrimination under the Civil Rights Act is the limited scope of protections and narrow definition of racial discrimination.

20. Various governmental agencies including the Justice Department Civil Rights Division, The Equal Employment Opportunity Commission, Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity among others are charged with authority to investigate and challenge patterns or practices of employment discrimination. The Voting Rights Act, as well as Titles VI and VII of the Civil Rights Act of 1964 are vehicles through which disparate impact claims may be litigated yet recent Supreme Court cases have limited the extent to which these statutes provide viable remedies for individuals injured by the racially disparate impact of racially neutral laws.[9]

21. The United States is under an obligation to prohibit and eliminate laws, policies, and programs "which [have] the purpose or effect" of impairing rights or freedoms based on race." The United States did not reserve this definition of discrimination. However, plaintiffs alleging racial discrimination in United States courts must prove that the defendant was motivated by racial animus, and that this discriminatory

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disparate impact" upon the rights of freedoms of particular racial or ethnic groups.

7 Special Rapporteur on the Right to Education Katarina Tomasevski visited the United States from 24 September to 10 October 2001. Her report (E/CN.4/2002/60/Add.1) was submitted on 17 January 2002. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, visited the U.S. from 19 May to 6 June 2008. His report (A/HRC/11/36/Add.3) was submitted on 28 April 2009. Special Rapporteur on Adequate HoU.S.ing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik, visited the U.S. from 22 October to 8 November 2009. Her report was submitted on 12 February 2010.

8 The Civil Rights Act of 1964 prohibits discrimination in the areas of employment, housing and housing finance, access to public accommodations, and education.

9 Title VII prohibits tests that have a disparate impact on the basis of race or national origin that cannot be shown to be related to the job in question.

intent caused the plaintiff's harm.[10]

22. One of the more substantive yet often overlooked obligations under ICERD is the requirement of states to collect and disaggregate data related to government policies and practices. CERD Committee's General Recommendations IV and XXIV elaborate on extent of this obligation. While the US collects substantial data at the federal level by race, it is often difficult to access at the state level or within particular agencies. For example there is no national disaggregated data on Native Americans on death row even though where data is kept on Native Americans they suffer the grossest disproportion of executions than those of all other races. In data kept in most states of the Union they are listed as "other."[11]

23. The electoral college, the process by which presidents become elected in the US, continues to be a highly contested policy. The historical roots of the electoral college, creating rules that used slave bodies to be counted as three-fifths of a person with no voting rights, gave slaveholders and southern states increased representation in the house of representatives and consequently in the electoral college. As a result, 32 of the Constitution's first 36 years, a white slaveholding Virginian occupied the Presidency.[12] The legacy of this slave era policy continues to have disparate impacts of privilege and discrimination. Under the Electoral College, each state gets a fixed number of electoral votes based on population and congressional representation, so a state has no incentive to expand voting rights-as in states where formerly incarcerated individuals have no right to vote.[13] As Harvard law professor Lani Guinier reports, in Wyoming, one Electoral College vote corresponds to 71,000 voters, while in large-population states (where the votes of people of color are more numerous) the ratio is one electoral vote to over 200,000 voters.[14]

24. In its report to the Committee the United States claimed to satisfy obligations to review policies and practices "through its ongoing legislative and administrative processes at all levels of government, as well as through court challenges brought by governmental and private litigants. Laws and regulations in the United States are under continuous legislative and administrative revision and judicial review."[15]

25. The piecemeal and fragmented approach taken by the US to comply with Article 2 (1) (c) of the convention impedes the protection of victims of racial discrimination and often excludes them from seeking justice under the law.

C) Key Impacts of Racial Discrimination in the United States

26. Despite a clear understanding of Article 5 of the Convention, the United States continues to negate obligations related to economic, social and cultural rights. "As noted in the Initial U.S. Report, some of these enumerated rights [in Article 5] which may be characterized as economic, social, and cultural rights, are not explicitly recognized as legally enforceable "rights" under U.S. law. However, article 5 does not affirmatively require States parties to provide or to ensure observance of each of the listed rights themselves, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided in domestic law. In this respect, U.S. law fully complies with the requirements of the

10 See "Structural Racism in the United States." A Shadow Report to the U.N. Committee on the Elimination of Racial Discrimination. February 2008. Prepared by: Stephen Menendian, Marguerite Spencer, Lidija Knuth, John Powell, Sara Jackson, Fran Fajana, Andrew Grant-Thomas, Jason Reece, Eva Paterson, and Kimberly Rapp.

11 See, e.g., Death Penalty Information Center, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976. visited April 15, 2010

12 Presidency: Why We Should Junk the Electoral College. By Akhil Reed Amar and Vikram David Amar. Full article: http://hnn.us/articles/436.html

13 Nationwide, approximately 7% of African Americans, and 13% of Black men, are unable to vote. More than 30% of African American men in Alabama are prevented from voting by felon disenfranchisement laws. Statistic found at: http://www.eji.org/eji/node/360

14 Making Every Vote Count By Lani Guinier. December 4, 2000 edition of The Nation.

15 CERD/C/U.S.A/6, para. 82

Convention."[16]

27. The data provided in this section clearly illustrates that the US has not lived up to its obligations to protect the right to non-discrimination in the enjoyment of rights enumerated under Article 5 and in fact discrimination in the enjoyment of these rights is increasing.

Poverty and Employment

27. In 2008, 24.7 % of blacks and 23.2 % of Hispanics were poor, compared to 8.6 % of non-Hispanic whites. The poverty rate for black and Hispanic children was 33.9 and 30.6 % respectively compared with 10 % of white children[17]. The wealth gap between whites and people of color, particularly women, creates and extreme burden on those most vulnerable in US society. A recent study found that for every dollar of wealth owned by the average white family the average family of color owns a mere 16 cents. Single black and Hispanic women are even more disproportionately affected by this wealth gap. Black and Latina women have just one penny of wealth for every dollar of wealth owned by their male counterparts and a tiny fraction of a penny for every dollar of wealth owned by white women.[18]
28. Nationally, the unemployment rate among blacks climbed in January 2010 to 16.5 %, while it declined for other groups. Unemployment is 12.6 % for Latinos and 8.7 % for whites.
29. Poverty is influenced by a number of factors, including housing segregation, transportation, and regional infrastructure. For many suburban dwellers, lack of adequate public services, like public transportation affects their ability to find and keep employment.
30. In Atlanta, Georgia, home to the civil rights movement, structural racism and a legacy of Jim Crow is responsible for the historic under-funding of city services and public institutions. For example, the Metropolitan Atlanta Rapid Transit Authority (MARTA) is the ninth largest transit system in the country and is the largest system in the U.S. that receives no operating help from the state.[19] According to MARTA's own research, 76% of its 500,000 daily transit riders are African American and low-income.
31. Lack of state support for transit has also led to the elimination of service in suburban Clayton County on March 31, 2010 to riders who were majority people of color yet the state is paying $28 million toward a $121-million expansion of the Xpress bus system for more affluent white suburban commuters.[20]
32. The economic vulnerability of people of color in the US is the cumulative effect of slavery, apartheid, and discriminatory policies and practices of the United States government. The persistent impacts of racial discrimination between institutions and among private and public actors aggravate structural racism.[21]

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16 CERD/C/U.S.A/6, para. 148.

17 National Poverty Center. Available at: http://www.npc.umich.edu/poverty/#4

18 Lifting as we Climb: Women of Color, Wealth, and America's Future. Spring 2010. Insight: Center for Economic and Community Development.

19 Robert D. Bullard, "Highway Robbery" (2004), South End Press

20 CTRAN Reaches End of the Line," Atlanta Journal-Constitution, March 29, 2010http://www.ajc.com/news/clayton/c-tran-reaches-end-416424.html

21 "As a signatory to the Convention on the Elimination of Racial Discrimination (CERD), 1 the United States is under an obligation to condemn and pursue a policy of eliminating racial discrimination, in all its forms (art. 2, ¶1). The U.S. has not taken seriously the duty under Article 2 of CERD to affirmatively address racial discrimination. Instead, the U.S. has rationalized racial discriminatory effects as not covered by U.S. law. Sometimes these effects are caused by explicit government polices. At other times they are caused by private actors. Frequently, it is a combination of both." See Structural Racism in the United States: A Report to the U.N. Committee on the Elimination of Racial Discrimination, 2008. Available at: http://www.U.S.hrnetwork.org/files/U.S.hrn/images/linkfiles/CERD/1Structural_Racism.pdf.

Housing

33. The average white American residing in a metropolitan area lives in a neighborhood that is 80 % white and just 7 % African American.[22] The majority of whites also enjoy housing conditions that diverge drastically from those found in many communities of color. Minority groups live disproportionately in areas of concentrated poverty characterized by substandard housing, high rates of crime and violence, and inadequate access to education, health care, and employment opportunities.

34. In 2008, three of four non-Hispanic Whites owned homes, while fewer than half of all Blacks and Latinos did.[23]

35. Residential racial segregation in the U.S. was systematically promoted by federal programs such as the Home Owners Loan Corporation and the Federal Housing Authority. "The development of the segregated housing market provides an example of the influence of public actions on private decision-making."[24] From 1938 through the end of the 1950s, the FHA insured mortgages on nearly one-third of all new housing produced annually in the United States. But the FHA's Underwriting Manuals considered blacks' adverse influences' on property values and instructed personnel not to insure mortgages on homes unless they were in 'racially homogenous' white neighborhoods.

36. The US Secretary for Housing and Urban Development stated in 2009 that concentrations of poverty across the American landscape have "resulted not in spite of government policy - but in many cases because of it."[25]

28. The recent sub-prime mortgage crisis, while further decreasing the availability of affordable housing, has harmed persons of color in disproportionate numbers. Subprime loans were made in African American communities at a rate five times greater than in white communities. In addition, approximately 47 % of Latinos received subprime loans, compared with just 17 % of whites.

29. The CERD Committee observed in General Recommendation 19 that racial segregation may be a product of government policies as well as the actions of private persons. In fact, in 2008 the Committee noted with great concern the disparate impact that Hurricane Katrina had on low-income African American residents in affected areas, particularly the fact that many of these persons continued to be displaced more than two years after the hurricane.

Education

30. In the 2006/2007 academic year 76.8 % of whites held a Bachelors degree compared with 8 % and 5.3 % of black and Hispanics respectively.[26] The rate is substantially lower for more advanced degrees. Students living in low-income families were approximately 10 times more likely to drop out of high school between 2006 and 2007 than were students living in high-income families.[27] The high correlation between poverty and race creates a disproportionate impact on the right to education for racial minorities.

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22 John Logan, Lewis Mumford Ctr. For Comparative Urban & Reg'l Research, Ethnic Diversity Grows, Neighborhood Integration Lags Behind 1 (2001), available at http://www.s4.brown.edu/cen2000/WholePop/WPreport/MumfordReport.pdf.

23 Census Bureau Reports on Residential Vacancies and Homeownership," February 3, 2009 at 8. http://www.census.gov/hhes/www/housing/hvs/qtr408/files/q408press.pdf).

24 Ibid " Structural Racism in the United States" pg. 8

25 Prepared Remarks for Secretary of Housing and Urban Development Shaun Donovan at the Brookings Institution Metropolitan Policy Program's Discussion – "From Despair to Hope: Two HUD Secretaries on Urban Revitalization and Opportunity." National Press Club, Washington, D.C., Tuesday, July 14th, 2009.

26 U.S. Department of Education, National Center for Education Statistics. (2009). Condition of Education 2009, Indicator 24 (NCES 2009-081)

27 High School Dropout and Completion Rates in the United States: 2007, National Center for Educational Statistics 2009064. Cataldi, E.F., Laird, J., and KewalRamani, A

31. One out of every six African American public school students and one out of every nine Latino public school students attends a school with nearly 100 % minority students.[28] Moreover, minority public school students are more likely to attend schools with high numbers of poor students. In 2002-2003, 71 % of all African American public school students and 73 % of all Latino public school students attended high-poverty schools. For the same period, only 28% of all white public school students attended a high-poverty school.[29] Schools with high numbers of poor students face a host of attendant challenges for creating a productive learning environment.

32. The disparities in racial makeup and quality of public schools are inextricably linked to the similar imbalances in the housing context. Local property taxes typically make up a substantial portion of public school funding. For example, schools in inner-city neighborhoods of New York receive an average of $4,000 annually, while suburban New York schools on average receive $40,000 per year.[30]

33. Schools with smaller budgets face heightened barriers to providing variety and quality of educational opportunities, in turn decreasing students' chances of attaining higher education and narrowing their range of eventual employment opportunities. This correlation between race, neighborhood, and prospects for upward mobility is directly at odds with the principles of equal opportunity and meritocracy purported to characterize US political and social systems. Despite this dissonance, however, the US Supreme Court in 2007 ruled unconstitutional school district efforts to implement race-conscious affirmative action policies aimed at reducing de-facto segregation along racial and socio-economic lines.[31]

Criminal Justice and Juvenile Detention

34. As explored in numerous studies and reports submitted to United Nations bodies, the disproportionate number of black and Latino men, and increasing numbers of women, in the criminal justice system puts the United States out of compliance and in clear violation of ICERD and ICCPR. The urgent nature of this problem is found in both state and national data.

35. The United States has the largest incarceration rate in the world.[32] As of December 21, 2008, there were 754 inmates per 100,000 U.S. residents.[33] According to the U.S. Bureau of Justice Statistics, "in 2008, over 7.3 million people or 1 in every 31 adults, were on probation, in jail or prison, or on parole.[34] While one in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine.[35] The devastating impact of incarceration on families and communities is profound; affecting future income, opportunities for employment, civic engagement and well-being into the future.

36. According to The Sentencing Project, the incarceration rates of women of color, in particular mothers, is staggering. "The number of incarcerated mothers has more than doubled (122%) from 29,500 in 1991 to 65,600 in 2007" with evident racial disparities impacting their children: "One in 15 black children and 1

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28 Gary Orfield & Chungmei Lee, Civil Rights Project, Why Segregation Matters: Poverty and Educational Inequality, (2005), note 93, at 12-13.

29 Id., at 19, tbl.7 (2005). Note that these figures exclude millions of private school students, who are disproportionately white. Data from the U.S. Department of Education shows that, of 5,122,772 private school students nationwide, 76.2% are non-Hispanic whites, even though non-Hispanic whites comprise only 59% of children in the United States. See U.S. Dep't Of Educ., Characteristics of Private Schools in the United States: Results from the 2003-2004 Private School Universe Study 13 Tbl.7, 19 Tbl.13 (2006); Child Trends Databank, Racial and Ethnic Composition of the Child Population 5 (2006).

30 Department of Education, Digest of Education Statistics, 2000 edition (www.doe.gov).

31 Parents Involved in Community Schools v. Seattle School District No. 1 Et Al., 551 U.S. 701 (2007).

32 Walmsley, Roy (2009). "World Prison Population List. 8th edition" International Centre for Prison Studies. School of Law, King's College London. Available at: http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf

33 Sabol, William. J et al, "Prisoners in 2008". http://bjs.ojp.us.doj.gov/content/pub/pdf/p08.pdf

34 Total correctional population". United States Bureau of Justice Statistics. Available at: http://bjs.ojp.U.S.doj.gov/index.cfm?ty=tp&tid=11.

35 "One in 100:Behind Bars 2008". Pew Center on States. Available at http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf

in 42 Latino children has a parent in prison, compared to 1 in 111 white children." Estimates indicate, "Black women represent 30 percent of all females incarcerated under state or federal jurisdiction and Hispanic women 16 percent" with black women being "three times as likely as white women to be incarcerated" and "Hispanic women 69 percent more likely." [36]

37. In its last report to the Committee, the United States noted that reasons for such [racial] disparities in the criminal justice system are complex and "do not necessarily indicate differential treatment of persons in the criminal justice system."

38. Although only 1 % of the U.S. youth population in 2003, Native youth made up a full 2 % of the cases referred to juvenile courts. This is the single greatest increase among any racial group in the U.S. Similarly, in 2003, Native American youth had a higher percentage of petitioned cases waived to adult criminal court, at 1.2 % of all Native American cases formally processed, than any other racial group in the US. Twenty-six out of every 100,000 African American youth are serving time in adult prison while for white youth the rate is only 2.2 per 100,000.

39. While the juvenile death penalty has been struck down in the U.S., the Juvenile Life Without Parole (JLWOP) condemns children to die in prison. Stark racial disparities in the imposition of the JLWOP sentence are evident nationwide: under age 17, African American youth are 19% of the population but 65% of youth serving JLWOP sentences.

40. The school-to-prison pipeline is a well documented phenomenon that criminalizes youth of color within the educational system by using punitive discipline policies that lead to exclusion and increased juvenile arrests. The school-to-prison pipeline not only denies students the right to a quality education, it directly increases the rate of juveniles in the criminal justice system. In 2003, African American youth made up 16% of the nation's overall juvenile population, but accounted for 45% of juvenile arrests.[37]

Health Disparities

42. Research has shown that African Americans' continuing experiences with racism and discrimination may lie at the root of the many well-documented race-based physical health disparities that affect this population.

43. Access to healthcare and disparate rates of chronic illness, including diabetes, hypertension, high blood pressure, and obesity are just a few ways health intersect with race and class.

44. In a recent report by the Office of Women's Health and the Office of Health Assessment & Epidemiology, it was found that African American women were far more likely to suffer from sexually transmitted diseases, including AIDS, and to die from chronic illnesses. Additionally, although white women had a higher incidence of breast cancer, African American women were more likely to die from the disease.

45. According to the National Indian Health Board, "Native Americans are nearly three times more likely to be diagnosed with diabetes;" health problems, which are exacerbated by disproportionately high rates of poverty, compared to the national average. On the Yakama Indian reservation in Washington state, estimates indicate at least "one in five Yakama tribal members older than age 50 are affected by diabetes."[38]

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36 The Sentencing Project. "Women in the Criminal Justice System" (May 2007). Available at: http://www.sentencingproject.org/template/page.cfm?id=136. See also Paige M. Harrison and Allen J. Beck, Prisoners in 2005, Bureau of Justice Statistics, November 2006.

37 School-to-Prison Pipeline Taking Points: ACLU. Available at: http://www.aclu.org/racial-jU.S.tice/school-prison-pipeline-talking-points

38 Phil Ferolito. "Dealing with Diabetes." Yakima Herald. Available at http://www.yakima-herald.com/stories/2008/05/27/dealing-with-diabetes

46. Latina's reported the poorest health status of women in all ethnic groups, with disproportionately higher death rates from diabetes. Their obesity rate increased from 27% in 2005 to 31% in 2007 and they reported less access to healthcare, with more than a third lacking health insurance and about 41% reporting difficulty accessing care.[39]
47. African Americans and other communities of color bear a severely disproportionate burden of the AIDS/HIV epidemic. Though blacks represent 12 % of the U.S. population between 2001 and 2004 they accounted for 51 % of newly diagnosed HIV infections in the 33 states that had used confidential, name-based reporting of HIV and AIDS since 2001.
48. Black Americans living with HIV have not seen equal benefits from AIDS treatment: from 2000 to 2004, deaths among whites living with HIV declined 19 % compared to 7 % for blacks. Survival time after an AIDS diagnosis is lower on average for blacks than for other racial/ethnic groups.[40]

Key Recommendations

1) Adopt National Action Plan on Racial Discrimination

The US government has made piecemeal efforts to reduce racial disparities in health and education but its disconnected approach to policy fails to address the systemic nature of the problem and the interconnectedness of rights. Additionally, no federal agency is accountable for reducing racial disparities despite public dollars being allocated to various programs. Victims of racial discrimination need and deserve an ambitious, innovative, and practical approach to contemporary forms of racial discrimination.

In line with the Vienna Declaration and Programme of Action, and modeled after other federal programs, the US should adopt a national action plan to reduce racial disparities which includes a national strategy with clear, reachable targets, a budget allocation, and measurable indicators. It should also encourage state jurisdictions to adopt such action plans and create a federal inter-agency working group, which includes civil society participation, to oversee implementation and report on its progress.

The federal racial disparities reduction strategy must include:

- Long-term strategic planning with appropriate funding;
- Consultation with stakeholders, including civil society;
- Federal coordination across national, state, and local agencies;
- Public benchmarks in key areas and steps for reaching long and short term objectives.
- Key areas of concern must include: poverty, employment, incarceration, health, housing, and education.

2) Ensure compliance with the obligations under ICERD:

- Adopt, where necessary, a definition of discrimination that complies with the definition found in article 1 of ICERD and General Recommendation XI.
- Implement a process by which policies and practices are reviewed for discriminatory impact. The Committee recommends that the State party consider the establishment of an independent national human rights institution in accordance with the Paris Principles (General Assembly resolution 48/134 of 20 December 1993, annex) and ICERD General Recommendation 17 which recommends that State parties establish national commissions or other appropriate bodies to promote respect for the enjoyment of rights set out in Article 5. This could be done by passing legislation to establish such a body, which could be

39 Los Angeles County Department of Public Health, Office of Women's Health. *Health Indicators for Women in Los Angeles County: Highlighting Disparities by Ethnicity and Poverty Level,* February 2010.

40 Chris Collins. "Improving Outcomes: Blueprint for a National AIDS Plan for the United States". Open Society Institute. 2007.

created by restructuring and strengthening the existing U.S. Commission on Civil Rights, and converting it into an effective U.S. Commission on Civil and Human Rights.[41]

- The Committee and civil society encourage the state to adopt and strengthen the use of special measures when circumstances warrant their use as a tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial, ethnic and national minorities. The 2001 Committee report noted with disappointment the US's contrary viewpoint that the Convention merely permits, rather than requires, affirmative action measures aimed at developing and protection minority groups.

3) Ensure the full implementation of Committee recommendations from 2008 and 2001- including but not limited to:

- Adoption of the End Racial Profiling Act
- Adopt the Civil Rights Act of 2009
- Eliminate the National Entry and Exit Registration System (NEERS)
- Adopt the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) as a guide to interpreting its Convention obligations with respect to indigenous people (para 500; arts. 5 (d) (v), 5 (e) (iv), and 5 (e) (vi)).

4) Ensure full implementation of ICERD throughout its jurisdiction, including at the state and local levels, including:

- Adopt implementing legislation at the federal level to ensure the justiciability of rights afforded under ICERD, including taking into consideration recommendations by the Committee in 2001 & 2008 to reconsider allowing for the optional declaration provided for in article 14 of the Convention.
- Implement meaningful efforts to coordinate compliance initiatives at the state and local level.
- Ensure public and private awareness of the Convention's rights and educate public officials at every level of obligations under ICERD.

41 Summary of Human Rights at Home: A Domestic Policy Blueprint for the New Administration, authored by Professor Catherine Powell of Fordham Law School and released by the American Constitution Society for Law and Policy. The full Blueprint is available at http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf.

UNITED STATES OF AMERICA

A Joint Submission to the United Nations
Ninth Session of Universal Periodic Review Working Group
Human Rights Council
1-12 November 2010

Racial Discrimination and Civil Rights

Submitted by[1]**:**

African-American Ministers in Action

Black Leadership Forum

Lawyers' Committee For Civil Rights Under Law

National Bar Association, Civil Rights Section

The National Coalition on Black Civic Participation

Public Counsel

Rainbow Push Coalition

Endorsed by[2]**:**

Organizations: Emory University Institute of Human Rights**;** Malcolm X Center for Self-Determination**;** National Fair Housing Alliance**;** Poverty & Race Research Action Council**;** Public Interest Projects; Three Treaties Task Force of the Social Justice Center of Marin; Youth Justice Coalition

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EXECUTIVE SUMMARY AND INTRODUCTION

1. This joint submission to the Ninth Session of the United Nations Universal Periodic Review Working Group (hereinafter "Joint Submission") is intended as a supplement to the report of the United States Government. It provides an enhanced picture of how racial discrimination continues to harm various communities across the U.S. Current conditions in the U.S. suggest that progress toward the goals of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD" or the "Convention")[3] and the International Covenant on Civil and Political Rights ("ICCPR" or the "Covenant"),[4] has stalled, and in some cases, has shifted backwards in several key areas of concern to racial minorities.

The Joint Submission provides information on key areas of concern under Sections B, C and D, as stipulated in the Guidelines for Preparation under the Universal Periodic Review.[5] The key areas of concern are racial discrimination, voting rights, housing and community development, education, employment and environmental justice.

Pursuant to Sections B and D, we address the past, existing and planned legislative, judicial, administrative and other measures through which the U.S. Government has given effect to its undertakings under the Convention and its obligations under the Covenant.

In regard to Section C, we address our belief that remedial and proactive action is needed to ensure that the U.S. is taking the necessary coordinated steps to ensure it is in full compliance at the federal, state and local levels with all ICERD and ICCPR treaty obligations.

2. The Joint Submission also offers recommendations for undertaking specific actions to strengthen the U.S. Government's current strategy for fulfilling its obligations under the ICERD and ICCPR in specific areas of concern. Pursuant to its international human rights treaty obligations, the U.S. Government must be held accountable and compelled to fulfill all of the terms of these two instruments and to ensure that all of its laws and policies are non-discriminatory as written *and in their effect*.

CONCERNS REGARDING THE NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS IN THE U.S.

3. The U.S. continues to interpret and limit application of international human rights conventions only to the extent of its own existing domestic laws. Its justification is that domestic laws at the federal and state levels provide adequate human rights protections. However, the well-documented persistence of human rights violations and racial inequality described in this report refutes this claim.

4. With respect to the ICERD and ICCPR in particular, the U.S. continues to maintain unnecessary reservations, understandings or declarations ("RUDs") to the ICCPR and ICERD. When the U.S. ratified the ICCPR, it attached more RUDs to it than any other State

Party. Another specific concern is that the U.S. has taken no steps toward withdrawing or narrowing the scope of its reservation to Article 2 of the ICERD and broadening the protection afforded by the law against discriminatory acts perpetrated by private individuals, groups or organizations.

5. With the exception of Reservation 1 to the ICCPR Article 20 and free speech, none of the reservations are required by the U.S. Constitution. Read in conjunction with the U.S.'s reservation to Article 2 of the ICERD, the excessive number of RUDs undermines the U.S.'s statements that it accepts the modern, multilateral human rights regime.

6. The U.S. has yet to establish an independent human rights commission. However, in 2009, the U.S. Senate conducted the first-ever Congressional hearing on U.S. implementation of international human rights treaties[6] and civil society is advocating for the establishment of a national human rights body. These important first steps should be expanded on to develop a reliable set of mechanisms for holding the U.S. accountable for all of its international human rights obligations.

7. At the federal, state and local levels, statutes that protect civil and human rights are not uniform and vary considerably between state and local governments. We note with approval the series of January 20, 2010 memoranda sent by the U.S. Department of State to all Executive Branch agencies, State Governors and the Mayor of the District of Columbia describing the U.S.'s international human rights treaty obligations.[7] However, such efforts fall short of the coordinated approach to implementation of the ICERD and ICCPR needed to ensure full compliance at all levels of government. U.S. human and civil rights organizations have called for the reissue and updating of Executive Order 13017, which provided for the establishment of an Interagency Working Group on Human Rights Treaties for the purpose of "providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters."[8]

CURRENT CHALLENGES TO THE U.S. GOVERNMENT'S FULL IMPLEMENTATION OF ITS OBLIGATIONS UNDER THE ICERD AND ICCPR AND THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

8. The U.S. has numerous federal statutes and regulations that prohibit and provide remedies for discrimination based on race, color, gender, ethnicity and national origin. Other statutes protect important political rights such as the right to vote. However, the priorities of the executive and legislative branches at any particular time, as well as the current trends in judicial philosophy, can have a major impact on the manner in which these statutes and regulations are enforced in practice. Because discrimination and civil rights violations are unfortunately pervasive in U.S. society, the existing network of laws is not always sufficient and, indeed, these laws are not consistently and fairly implemented and enforced with the goal of ending systemic racial discrimination in employment, education, voting rights, housing and environmental policies.

RACIAL DISCRIMINATION

9. As discussed below, discrimination continues to occur within the U.S. in key areas. When these current issues are viewed as a whole, it is clear that the U.S. federal government fails to appreciate the structural makeup of racial discrimination within the nation; instead, the federal government only recognizes specific instances of racial discrimination.

10. For example, the U.S., in ratifying the ICERD, made certain telling reservations and declarations, most significantly, that, "[t]o the extent, however, that the Convention calls for a broader regulation of private conduct, the U.S. does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the U.S." On its face, this reservation has the effect of substantially limiting the U.S.'s compliance with the treaty.

11. Additionally, in ratifying the ICCPR, the U.S. made additional reservations and declarations concerning key treaty obligations, including language acknowledging each treaty party's pledge to eliminate the "advocacy of national, racial or religious hatred," and to prevent subjecting anyone to "torture or to cruel, inhuman or degrading treatment or punishment," while, in each instance, limiting the scope of the U.S.'s compliance to the bounds of the country's Constitution.

12. In general, the U.S. limits its interpretation and adoption of these treaties to instances in which the U.S. is already in compliance, instead of extending its obligation to areas where improvement is needed. A recent report on racial discrimination notes egregious instances of continued racial discrimination intertwined in the nation's legal and social structure.[9]

13. Clearly, when taken as a whole, these individual examples do not speak to a policy of adherence to international human rights standards but rather to the preservation of an institutional structure that preserves pervasive and widespread discrimination. If the U.S. wishes to become fully compliant with the ICERD and ICCPR, the U.S. Government must recognize that, in the face of the embarrassing statistics of the disparate impact of the laws discussed below on racial and ethnic minorities, the limits imposed by the U.S. Constitution or federal laws are alone insufficient for ensuring the human rights of all of its citizens. The absence of this recognition evidences an approach by which the U.S. chooses to fulfill its international human rights obligations in law but not in fact.

VOTING RIGHTS

14. Section 5 of the Voting Rights Act of 1965 ("VRA")[10] requires certain designated state and local governments to "pre-clear" any proposed changes to their voting systems with the Department of Justice before the changes go into effect. The purpose of the pre-clearance process is to ensure that the changes in election practices do not have a detrimental effect on the voting rights of racial, ethnic or language minorities. The pre-

clearance requirement has deterred and prevented many voting changes that would have harmed minority electoral participation and representation.[11]

15. Last year, the Supreme Court decided *Northwest Austin Municipal Utility District Number One v. Holder*, a constitutional challenge to the VRA. The Court concluded that the Appellant could seek a statutory exemption from the pre-clearance requirements of the Act.[12] While the Court did not rule on the constitutionality of the reenacted Section 5, the majority opinion detailed concerns about the constitutionality of the provision including federalism costs; improvements in the electoral conditions for minority voters in the southern United States; Section 5's departure from the principle of "equal sovereignty" among the States; the putative race-conscious nature of the Section 5 requirements; and the potential outdated nature of the Section 5 coverage formula.

16. There has been a history of using the felon disenfranchisement law to deny minorities rights such as voting.[13] Currently, of the 5.3 million disenfranchised voters, approximately 2 million are African-Americans.[14] This is coupled with the fact that, in 2008, 60 percent of the 2.3 million prison inmates in the U.S. were either African-American or Hispanic.[15] The Democracy Restoration Act ("DRA") is legislation pending before Congress that seeks to restore the federal voting rights of Americans that have been released from prison after a felony conviction.[16] Passage of this legislation would restore the federal voting rights of millions of disfranchised voters.

17. Currently, the nation's capital, the District of Columbia, still has an African-American majority comprising 54.4 percent of the population.[17] To redress the negative racial impact caused by lack of representation, the U.S. Congress is considering legislation that would allow for Congressional representation for the District.[18] The legislation is currently stalled in committee, but even then, the U.S. Department of Justice has expressed doubts over the constitutionality of the legislation that is likely to face a long legal challenge before it can be fully implemented, if it ever becomes law.

18. There is a serious question about the quality of the American voter registration system. Restrictions on voter registration, problems with registration that prevent individuals from voting and failure of the voting infrastructure have been extensively detailed. While passage of the National Voter Registration Act (a.k.a. "NVRA" or the "Motor Voter Act")[19] has greatly increased the number of voter registrations, a large percentage of the minority population is not registered to vote, along with those that are poor or without a high school diploma. The U.S. voter registration system needs to be updated to ensure that regardless of race, wealth or social standing, everyone has access to vote.

HOUSING AND COMMUNITY DEVELOPMENT

19. The persistence of racial and economic segregation in the U.S. is the result of a long history of public and private discriminatory action. Federal government policies accelerated the suburbanization of America's urban centers, resulting in Whites leaving cities for newly constructed suburbs and concentrating minorities in older, substandard housing in the urban centers.[20] While segregation is rooted in historical practices, it is maintained and even exacerbated by continued discriminatory practices. These include ongoing discrimination

in public housing; discrimination in the private rental, sales, lending and insurance markets; exclusionary zoning policies at the state and local level; and inadequate and insufficient housing opportunities for those receiving federal housing assistance.

20. The harms of racial segregation and concentrated poverty are well-documented. Racially isolated and economically poor neighborhoods "restrict employment options for young people, contribute to poor health, expose children to extremely high rates of crime and violence, and house some of the least-performing schools."[21] Residential segregation confines minorities to geographically and economically isolated areas with substandard public schools and limited access to transportation, open spaces and employment opportunities.

21. The Obama Administration has taken significant steps to renew the nation's commitment to federal fair housing policy and enforcement. Additional funds for housing have been requested in the fiscal year 2010 budget, representing an increase of 10.8 percent over the fiscal year 2009 budget.[22] The U.S. Department of Justice's Civil Rights Division, tasked with enforcement of the anti-discrimination provisions of the Fair Housing Act, has announced that enforcement of fair lending laws is one of its top priorities. It successfully fought for additional funding to hire new attorneys to increase significantly its fair housing and fair lending enforcement responsibilities. This will hopefully lead to increased enforcement activity and prioritization of housing and lending discrimination complaints since we have been discouraged by recent enforcement efforts.[23]

22. The current mortgage and foreclosure crisis, and its impact on the nation's economic well-being, is one of the country's most pressing domestic issues. Largely overlooked, yet equally important, are its roots in decades of discriminatory housing and lending practices and in more recent racial discrimination in the housing and lending markets.[24] The disproportionate impact of foreclosures on minority homeowners and renters is causing one of the greatest losses of wealth in the American minority community in its history.[25] This makes the foreclosure crisis not only an economic issue, but also an important civil rights issue.

23. The past decade brought an increase in the availability of mortgages to minority communities, but it came primarily through a newly created subprime mortgage market that made mortgages available to higher risk and non-traditional borrowers at higher interest rates. The subprime market became inundated with widespread discrimination by predatory lenders who targeted marketing of expensive subprime mortgages to minority communities. Based on 2006 federal data, while only 17 percent of White homeowners had subprime loans, 54 percent of African-Americans and 47 percent of Hispanics had subprime loans.[26]

24. In addition to the current mortgage crisis faced by homeowners, low-income renters face an equally dire situation. Housing that is affordable is often inadequate, and housing that is adequate is often unaffordable. The proportion of households paying more than 30 percent of their income for housing – a level categorized as unaffordable – rose steadily from 1997 to 2007.[27] In 2007, approximately 22 percent of the 36.9 million rental households in the U.S. were spending more than half their income on rental costs.[28] The poorest and most vulnerable people face the heaviest burden in housing costs, with 8.8 million low-income households spending more than half of their income for housing.[29]

EDUCATION

25. The U.S. education system is racially segregated, not by legal mandates but by policies that promote racial segregation. This racial segregation deprives minorities of equal educational opportunities. Unfortunately, this segregation is accelerating.[30] Presently, White students make up 56 percent of the public school population, but attend schools that are 76 percent White.[31] African-American and Hispanic students attend schools that are 29 percent and 27 percent White respectively.[32]

26. A number of factors contribute to racial segregation and unequal educational opportunities in the U.S. They include: school attendance zones promoting segregation;[33] consistent placement of minority students in lower level classes;[34] failure to counteract differences in parental income and educational attainment;[35] lower expectations by teachers and administrators for minority students;[36] and underperforming, poorly financed schools that perpetuate underachievement due to lower teacher quality, larger class size, and inadequate facilities.[37]

27. English Language Learners ("ELLs") are another highly segregated student population. Nearly 70 percent of ELL students enroll in only 10 percent of all elementary schools, while 50 percent of elementary schools in the U.S. enroll no ELL students.[38] The challenges faced by students at schools with large numbers of ELL schools are greater than their peers. These students also suffer from significantly higher rates of poverty and health problems.[39] These schools also have more difficulty filling teacher vacancies, and are more likely to rely on unqualified substitute teachers or teachers with less experience.[40]

28. School segregation is also attenuated by small school districts in residentially segregated housing markets. Extreme residential segregation makes it difficult to integrate schools because some school districts are completely non-diverse. Racial segregation can lead to socio-economic segregation. In the U.S., 25 percent of African-Americans, 23 percent of Hispanics, and only 8 percent of Whites live below the poverty line.[41] The median income for White Americans in 2008 was $55,530, while the median income for African-Americans and Hispanics was $37,913, and $34,218 respectively.[42] These economic disparities illustrate the likelihood of racially segregated schools becoming socio-economically segregated schools.

29. Disparate school funding becomes an issue when students are separated by race and class. Most primary and secondary schools receive 25 to 50 percent of their funding through local property taxes.[43] Thus, local sources of funding are less available in property-poor school districts than property-rich school districts. Even with equitable improvements in school funding at the state and federal levels of government,[44] property-poor school districts with high concentrations of minority students remain disadvantaged by their limited local tax base.

30. The U.S. Government has not supported recent attempts to integrate schools. In 2007, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1,*[45] found a voluntary school integration program unconstitutional because it classified students by race, and relied upon this classification in a non-individualized mechanical way when making school assignments. At that time, the Executive branch of the U.S. Government

also opposed the Seattle School District's integration plan and filed a brief arguing that diversity is not a compelling government interest.[46]

31. These restrictions on race-based integration conflict with the ICERD treaty obligations. In 2001, the Committee on the Elimination of Racial Discrimination ("CERD") voiced its support for special measures and concern about "persistent disparities in the enjoyment of, in particular, the right to . . . equal opportunities for education."[47] The CERD stated that such measures are an obligation under Article 2(2) of ICERD to ensure adequate development of certain racial groups.[48] More recently, the CERD expressed additional concern after the *Parents Involved in Community Schools* decision because the U.S. Supreme Court "further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms" and restricted the U.S.'s ability to fulfill its Article 2(2) obligation to eliminate racial discrimination.[49]

32. Minority students in the U.S. achieve less academic success than White students at primary, secondary and post secondary levels of education. This nationwide phenomenon is commonly called the "achievement gap." The CERD finds the "persistent 'achievement gap' between students belonging to racial, ethnic or national minorities, including ELL students, and white students" troubling and urged the U.S. to reduce the achievement gap by "improving the quality of education provided to these students."[50]

33. Affirmative action programs consider characteristics like race and ethnicity to promote diversity and equal opportunities for historically disadvantaged minorities. The U.S. legacy of slavery, mistreatment of Native Americans and discrimination against non-English speaking immigrants forces minorities to struggle to achieve full social equality. African-Americans and Hispanics still have lower levels of education,[51] lower wages[52] and higher poverty levels[53] than the rest of the U.S. population. The U.S. Government utilizes affirmative action according to its own judgment and discretion. [54] This position is inconsistent with the ICERD. The ICERD creates an affirmative obligation to take special measures that ensure the full enjoyment of all social, economic and cultural rights by all racial and ethnic groups.[55]

34. The limited constitutional, statutory and judicial protection given to affirmative action programs makes them vulnerable to repeal. Many people feel that affirmative action results in reverse discrimination.[56] This has led to state passage of initiatives, such as California's Proposition 209, Washington's Initiative 200 and Michigan's Civil Rights Initiative, ending long-standing state affirmative action programs. In the absence of a constitutional amendment or additional federal legislation, states may continue to rollback this ICERD guaranteed right.

EMPLOYMENT

35. The Equal Employment Opportunity Commission ("EEOC") has enforced equal opportunity laws since its inception, shortly after the signing of Title VII of the Civil Rights Act of 1964. Although the EEOC has done much on the enforcement front, race and color discrimination continues to exist in the workplace. In an effort to identify and implement new strategies that will strengthen its enforcement of Title VII and advance the statutory right to a

workplace free of race and color discrimination, the EEOC is in the process of instituting the E-RACE Initiative.[57] Specifically, the EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims and enhance public awareness of race and color discrimination in employment.

36. Additionally, the Obama Administration announced on February 1, 2010, that it requested $385.3 million for the EEOC for fiscal year 2011 and $162 million for the Civil Rights Division of the Department of Justice (the "DOJ") in the 2011 Federal Budget.[58] Significantly, the requests represent an $18 million dollar budget increase for the EEOC and a $17 million dollar budget increase for the DOJ. The EEOC describes the $18 million budget increase as allowing it to "improve enforcement initiatives, reduce the backlog, target systemic litigation, and reinvigorate Federal Sector enforcement."[59]

37. Another major victory for civil rights and the fight against discrimination in the workplace is the passage of the Lilly Ledbetter Fair Pay Act. On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act to ensure that all Americans receive equal pay for equal work. President Obama also continues to support the Employment Non-Discrimination Act and has expressed his belief that anti-discrimination employment laws should be expanded to include sexual orientation and gender identity.

38. Though improvements have been made by the current Administration, statistics on employment trends indicate that there is still a tremendous need for meaningful affirmative action measures, targeted programs and enforcement of existing laws. According to data compiled by the U.S. Department of Labor Bureau of Labor Statistics ("BLS"), of the 52,219 management, professional and related occupational positions available in 2009, only 8.4 percent were held by African-Americans, 6.2 percent by Asians, and 7.3 percent by Hispanics. The other 78.1 percent were held by Whites.[60] Additionally, over the last four years the number of charges of discrimination received by the EEOC has increased from 75,768 in 2006 to 93,277 in 2009, a 23 percent increase.[61] The number of harassment-based charges has risen from 23,034 in 2006 to 30,641 in 2009[62] and the number of race-based charges increased from 27,238 in 2006 to 33,579 in 2009.[63]

39. Among the major worker groups, the unemployment rates for African-Americans was 15.8 percent almost twice that of the 8.8 percent unemployment rate for Whites.[64] Additionally, as noted above, African-Americans and Hispanics were employed at a significantly lower rate in management and professional positions.[65] Furthermore, although the unemployment rate rose for all groups, the rates for minorities increased at a more rapid pace. African-American employment rates fell 10.9 percent points and White employment rates only fell a little more than half of that at 6.2 percent.

ENVIRONMENTAL JUSTICE AND HEALTHCARE

40. Climate change has a disproportionate impact on low-income people of color and indigenous communities.[66] The U.S must take special care to ensure that any steps made to reduce emissions do not lead to increased burdens on its minority and low-income populations.

41. U.S. law provides only limited protection for Native Americans seeking to protect culturally or socially significant sites from environmentally harmful activities. Religious protections under the First Amendment do not extend to ostensibly neutral land use practices, even where those practices substantially burden the spiritual practices of Native Americans.[67] Further, recent federal court decisions have limited or called into doubt the ability of Native Americans to continue relying on two key federal statutes that protect sites of historical or cultural significance, the Religious Freedom Restoration Act and the National Historic Preservation Act.[68] The availability of legal remedies for Native Americans to address environmental harm is crucial given that they "have to contend with some of the worst pollution in the United States, and the places where they live are prime targets for landfills, incinerators, garbage dumps and risky mining operations."[69] Proximity to these environmental hazards increases the risk of disease, birth defects and death.[70]

42. In its 2008 review of U.S. compliance, the CERD noted the persistent disparities in access to health insurance and health care among racial, ethnic and national minorities, and recommended that the U.S. continue its efforts to address those disparities.[71] Although the recent passage of health care insurance reform in the U.S. may prove to be a positive step towards ameliorating health care disparities, further steps are necessary to close the gap. Statistics on the prevalence of HIV/AIDS, heart disease, cancer, asthma and other diseases among minority groups reveal the consequences of unequal access to timely and quality health care. African-Americans have the highest death rate and shortest survival of any racial group in the U.S. for most cancers.[72] Of all racial and ethnic groups, American Indians and Alaska Natives have the highest sudden infant death syndrome rates (SIDS), highest rates of respiratory distress syndrome and highest mortality rate from H1N1 influenza.[73]

CONCLUSION

43. The U.S. Government has taken several positive steps that indicate a greater willingness to engage in activities designed to achieve compliance with international human rights treaty obligations. However, it continues to have an *ad hoc* and, ultimately, unsatisfactory approach to ensuring the protection of the human rights covered by the ICERD and ICCPR.

JOINT RECOMMENDATIONS

The U.S. Government should consider transforming the U.S. Civil Rights Commission into an independent, national human rights commission. The President should also reissue and update Executive Order 13017. In addition,

to prevent the unlawful disenfranchisement of minority voters, the U.S. should:

fully enforce federal voting laws and ensure the restoration of the right to vote after the completion of a criminal sentence; and,

adopt the Democracy Restoration Act and support passage of laws granting the citizens of the District of Columbia the right to full congressional representation.

to eradicate discriminatory practices in housing, the U.S. should:

create an independent, fair housing enforcement agency;

revive the President's Fair Housing Council, and act to ensure compliance with the "affirmatively, furthering fair housing" obligation; and,

expand foreclosure relief programs to make loans more affordable and to mitigate the effects of discriminatory predatory lending.

to remedy the persistence of unequal education opportunities, the U.S. should:

allow use of Title VI to permit challenges that address past discrimination, segregation and re-segregation; and,

encourage and support non-discriminatory measures that encourage school integration.

to address racial disparities in employment, the U.S. should:

provide direct federal aid to urban areas as well as targeted unemployment benefits, job programs and educational incentives; and,

reinstate the Equal Opportunity Survey which requires federal contractors to submit data on their pay practice - information that could then be used by the federal government when deciding which companies to audit.

to mitigate discriminatory environmental impacts on minorities, the U.S. should:

exercise greater enforcement of Title VII of the Civil Rights Act of 1964 to ensure federal money does not support programs that have a discriminatory impact on communities based on race, color and national origin; and,

enforce its existing environmental laws to guarantee protection of minority and low-income communities disproportionately burdened by pollution and industries that flagrantly violate the law.

APPENDIX AND END NOTES TO JOINT SUBMISSION

EDUCATION

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[1] *African-American Ministers in Action* is a network of ministers across the country organized around five issues central to African Americans: civic participation, economic justice, equal justice, health care, and public education. *The Black Leadership Forum* is an alliance of over thirty national African-American civil rights and service organizations linked to advocate for the legislative and policy interests of African-Americans. *The Lawyers' Committee for Civil Rights Under Law*, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. *Public Counsel* is the largest public interest pro bono law firm in the world. *The National Bar Association* is the oldest, largest national association of African-American lawyers and judges. *The National Coalition on Black Civic Participation* is a, non-profit, non-partisan organization dedicated to increasing African-American civic engagement and voter participation. *The Rainbow PUSH Coalition* is a multi-racial and multi-issue, progressive, international membership organization fighting for social change.

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[66] Morello-Frosch, *et al.*, *The Climate Gap: Inequalities in How Climate Change Hurts Americans and How to Close the Gap*, at 5 (2009).

[67] *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 448-53 (1988) (holding no constitutional protection under the Free Exercise Clause for Native Americans where Forest Service admitted that proposed timber harvesting and road construction would substantially burden their spiritual practice, because the state action was one of "general applicability" and not directed at religious practice).

[68] The Religious Freedom Restoration Act of 1993 limits the federal government's ability to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). However, courts have severely narrowed the scope of the statute by restricting the definition of a "substantial burden" to instances involving direct government coercion, either in the denial of benefits or the threat of civil or criminal sanctions. *See, Navajo Nation v. US Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). The National Historic Preservation Act requires federal agencies to consult with affected tribes before proceeding if a proposed undertaking will have an effect on historic properties to which those tribes attach religious and cultural significance. *See,* 16 U.S.C. §§ 470a(d)(6), 470f. However, some courts have concluded there is no private right of action to enforce the statute, forcing aggrieved parties to instead submit to an administrative

review process that is extremely deferential to the agency's decision. *See, San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1098 (9th Cir. 2005).

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United States of America

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RACIAL HEALTH DISPARITIES AND DISCRIMINATION[1]

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Endorsed by the Following 31 Organizations and 57 Individuals:

Organizations: The Advocates for Human Rights, Minneapolis; The African, African American, and People of Color Health Foundation; African American Institute for Policy Studies & Planning; Black Men's Health Initiative; Centre for Health Policy and Innovation; Cidadao Global; Center for the Study of White American Culture, Inc.; December 12th Movement International Secretariat; Emory University Institute of Human Rights; Emory University, Institute of Social Medicine & Community Health; The Greater Milwaukee Human Rights Network; Immigrant Service Providers Group/Health; International Association Against Torture; Medical Mission Sisters' Alliance for Justice; Metro Atlanta Task Force for the Homeless; Minority Health Institute; NESRI (National Economic and Social Rights Initiative); Native American Indian Center of Central Ohio; New Mexico Center on Law and Poverty; New York Lawyers for the Public Interest; Out of Many One; Poverty & Race Research Action Council; The Praxis Project; Public Interest Projects; REACH U.S. South Eastern African American Center of Excellence for Eliminating Disparities; S.O.P.E. SisterSong Women of Color Reproductive Justice Collective; Three Treaties Task Force of the Social Justice Center of Marin; U.S. Positive Women's Network; Universal African Peoples Organization; Women's HIV Collaborative of NY; Women's International League for Peace and Freedom, Milwaukee Branch.

[1] This document is based on "Unequal Health Outcomes in the United States: Racial and Ethnic Disparities in Health Care Treatment and Access, The Role of Social and Environmental Determinants of Health and the Responsibility of the State , Submitted by the CERD Working Group on Health and Environmental Health, A Report to the U.N. Committee on the Elimination of Racial Discrimination (January 2008)". See also, Vernellia Randall, Dying While Black (2006).

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The United States signed the Universal Declaration of Human Rights (UDHR or the Declaration), adopted by the United Nation on December 10, 1948. Under the Declaration of Human Rights, the U.S. is obligated to strive to secure effective recognition and observance of the substantive rights enumerated in the Declaration. Article 25 pertains to the right of an individual to a "standard of living adequate for the health and well-being of himself and of his family. . .." That well-being specifically includes "special care and assistance" for mothers and children.

1. The U.S. ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on October 21, 1994. Under CERD, Article 5, the U.S. is obligated to "undertake to . . . eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law. . . , [including] the right to public health, medical care, social security and social services."

2. This report will focus on the United States' compliance with its obligations to eliminate discrimination on the basis of race and ethnicity in securing health-related rights. Other reports submitted to the Universal Periodic Review examine non-compliance by the U.S. with obligations to secure other health-related rights pursuant to the human rights instruments to which the United States is a party.

CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS RELATED TO RACIAL HEALTH DISPARITIES

3. The United States federal and state governments must undertake far-reaching structural reforms to comply with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and eliminate racial disparities in health and health care.

4. The United States lacks a national coordinated infrastructure for the promotion and protection of human rights. Moreover, mechanisms for remedial action vary from state to state, and the United States has over the last decade retreated on its obligation to guarantee effective remedies to discrimination on the basis of race and ethnicity in the health area.

5. The United States has an obligation not to sponsor, defend or support discrimination – at any level of government -- and to review governmental policies and change laws "which have the effect" of perpetuating discrimination. (CERD Art. 2 (1)(a)-(c).) By contrast, in the United States, though the government not only regulates but pays for the majority of the health care dollar, it privatizes choices including where services are located and which patient populations providers choose to serve with no comprehensive system to monitor whether these choices are discriminatory. Government insurance programs such as Medicare and Medicaid account for just under half of health care expenditures in the US, with more government money flowing through tax subsidies and targeted programs. Despite an even greater government role in some sectors, such as the nursing home industry, these sectors engage in exclusionary and racially segregatory practices. Despite these apparent human rights violations, there is no comprehensive data collection, only skeletal enforcement, and no ability for individuals who have been discriminated against to go to court to challenge unjustified governmental actions with a disparate impact on the basis of race or ethnicity outside of a few local jurisdictions.

INFORMATION ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS RELATED TO ELIMINATING RACIAL DISPARITIES IN HEALTH

6. Article 5 of CERD provides that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms" in the right to "public health" and "medical care." Public health has been interpreted by the Special Rapporteur on the Right to Health to include not only health care systems but also the underlying social factors affecting health.

7. Structural deficiencies in the U.S. health care system adversely affect all people, especially lower income people, regardless of race or ethnicity. However, people of color face additional health burdens and inequities. Racial and ethnic disparities in health outcomes in the U.S. are caused not only by structural inequities in our health care system, but also by a wide range of social and environmental determinants of health. Both the Declaration of Human Rights and CERD recognize and encompass this dual analysis.

8. To understand whether the United States is meeting its treaty obligations, it is essential to understand the extent to which racial and ethnic groups experience health disparities. Numerous health disparities among racial and ethnic groups continue to exist in the U.S. These health and health care disparities need to be carefully exposed so that action can be taken to eliminate them.

9. African Americans live 6-10 fewer years than White Americans, and face higher rates of illness and mortality. Had mortality rates of African Americans been equivalent to that of whites between 1991 and 2000, over 880,000 deaths would have been prevented. Racial and ethnic gaps persist across a range of health conditions. For instance, the prevalence of diabetes amongst American Indians and Alaska Natives is more than twice that for all adults in the U.S. The age-adjusted death rate for cancer among African Americans was approximately 25% higher than for White Americans in 2001. African Americans, American Indians, and Pacific Islanders experience a disproportionate burden of poor health in problems ranging from infant mortality and diabetes to cardiac disease, HIV/AIDS, and other illnesses. And while some racial /ethnic groups – such as Hispanics and Asian Americans – have better overall health status than some other racial/ethnic minority groups, they still suffer disproportionately from chronic diseases such as diabetes, and tend to experience poorer health outcomes the longer they and their descendants live in the U.S.

10. The health status of subpopulations within racial groups varies considerably on the basis of nationality, immigration status, and other factors.

11. As mentioned, the Declaration of Human Rights specifically includes (Article 25) rights including "special care and assistance" for mothers and children. Nevertheless, there are disparities in the U.S. in relation to women's health. In every aspect of reproductive health, women of color in the U.S. fare significantly worse than White women. There are substantial disparities in rates of unintended pregnancy, which reflects problems in access to contraception as well as the lack of comprehensive, medically accurate sex education. .

12. Studies by the CDC show that disproportionate rates of HIV & STIs among minority women are high not because of risky individual behavior but because of long standing, unaddressed structural inequalities affecting communities: unstable housing, limited social mobility, high rates of incarceration, all factors making economic independence difficult to obtain thereby leaving minority women vulnerable to abusive, unstable, or asymmetrical relationships in which safer-sex negotiation is difficult to impossible.

13. Although infant mortality decreased among all races between 1980 and 2000, the Black-White gap in infant mortality widened. Racial and ethnic group differences persist even when socioeconomic factors are considered. In fact, despite their high socioeconomic status, African

American women with college or graduate degrees have infant mortality rates that are higher than those among White women with less than a high school education.

14. The United States has failed to meet its treaty obligation under CERD Article 5 to "undertake to . . . eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law. . . , [including] the right to public health, medical care, social security and social services." It has failed to address (1) historical and current racial bias, racial prejudice and discrimination; (2) racial disparities in social and environmental determinants of health; and (3) racial disparities in health care system access and treatment.

The Health Effects of Racial Bias, Prejudice and Discrimination

15. There is increasing evidence that race-based discrimination is not only emotionally harmful, but physiologically damaging to minority Americans. A growing body of research, using innovative methods, is beginning to uncover the toll that such discrimination is taking. Researchers found that everyday discrimination was associated with a variety of health conditions, such as chronic cardiovascular, respiratory, and pain-related health issues.

16. Race-related discrimination undermines health in several ways. From a developmental perspective, the influence of negative environments associated with structural racism and residential segregation has a profound and debilitating effect on health and development of young children. Intergenerational and life-span effects of race discrimination suggest that the health effects of racism carry forward over time in individuals and across generations.

Recommendations: Reducing Bias, Prejudice and Discrimination

17. The federal government should strengthen civil rights agencies' capacity to investigate racial or ethnic disparities in health and health care through the creation of an Office on Health Disparities in the Civil Rights Division of the Department of Justice (which already has offices dedicated to housing, employment and education) and/or in OCR. These special units should be charged with focusing on racial and ethnic disparities in access to care and quality of treatment including assess data on disparities in quality of care.

18. The federal government must intensify its civil rights enforcement not only in health care but all areas. The Department of Justice should initiate litigation on behalf of an agency for a violation of Title VI. The Offices of Civil Rights (OCRs) in the various federal agencies, including but not limited to the Department of Health and Human Services should investigate a recipient of federal funds and require the recipient to create a plan to remedy racial discrimination.

19. Each state should provide to the federal government complete information on the racial and ethnic groups within its borders. Data must the include the multiple forms of discrimination faced by certain ethnic or racial groups, including non-citizens and indigenous peoples. Finally, in recognition of the fact that "certain forms of racial discrimination may be directed towards women specifically because of their gender" or may "have a unique and specific impact on women," states should address the intersection between race and gender.

Racial Disparities in Social Determinants of Health

20. The neighborhood and community contexts in which people live powerfully shape health risks, access to health care resources, and their health behaviors. Many people of color live in racially segregated neighborhoods, and the communities in which they reside differ significantly on a

number of important social, economic, and environmental conditions in ways that can negatively influence health.

21. Residential segregation harms the health of people of color in multiple ways. Segregation concentrates non-Whites in areas with limited financial and human resources, and such neighborhoods are home to poor public education, inadequate food sources, inadequate health care, toxic living conditions, inferior housing and public spaces, higher rates of disorder and crime, and a dysfunctional criminal justice system and higher incarceration rates. People of color are also exposed to additional health risks in the form of racism and discrimination, which present stressors that are exacerbated by residential segregation.

22. To the extent that segregated neighborhoods suffer from poor schools, poor access to jobs and employment, inadequate public services such as transportation, and a lack of economic investment – all problems that disproportionately burden communities of color – the opportunity for individuals to advance economically, and therefore improve health status, is constrained.

Recommendations: Eliminating Racial Disparities in Social Determinants of Health

23. The federal government should integrate a *Health Impact Assessment* (HIA) tool into the domestic policy agenda to determine the effect of all new legislation and policy changes on the health of people of color. The impact tool, which includes mechanisms for public participation, could be used by federal, state, and local agencies to ensure that all decisions and programs are evaluated to determine their potential impact on the health status of affected communities.

24. The White House should convene an *Interagency Task Force* to examine systemic practices that underlie the structure and operation of not only the modern health care system but also other social determinants of health, particularly residential segregation, economic well-being, education, and criminal justice. This task force should also address the underlying structures that foster racism, including prejudice, stereotyping, and cultural ignorance.

25. The federal and state governments should convene local and/or municipal fact-finding inquiries to which private-and public-sector employees can present testimony on current intentional and/or disparate impact discrimination in area workplaces. Such testimonies will document workplace violations of CERD and inform federal and state recommendations.

26. In order to ensure that federal funds are distributed fairly and equitably, federal agencies, like the Department of Health and Human Services (HHS), should require recipients of funding, like state health departments, to review how a potential policy, such as a hospital opening or closing, will impact racial and ethnic communities *before*, rather than after, programs are finalized and implemented. Federal agencies should require a disparate impact analysis as a substantive compliance condition, as opposed to a post-complaint enforcement response.

27. Minority communities often have the most pressing need for health care services, educational services, and housing, but they are served by a dwindling number of providers and institutions that lack resources to expand and improve services. This overall complex of disparities is largely attributable to the predatory practices of banks and other financing organizations, which has been shown to severely undermine the economic infrastructure of minority and other communities. Proper federal regulation of these federally insured businesses is a necessary first step in restoring balance to the communities.

Racial Disparities in Health System Access and Quality of Care

28. Communities of color continue to experience significant disparities relative to Whites in both access to care and in the quality of care received. A substantial body of evidence demonstrates that racial and ethnic minorities receive a lower quality and intensity of health care than White patients, even when they are insured at the same levels and present with the same types of health problems.

29. Causal factors include the policies and practices of health care systems, the legal and regulatory context in which they operate, and the behavior of people who work in them, lack of adequate insurance coverage, separate and unequal care for low-income and minority patients, inequitable distribution of health care resources, lack of a regular source of health care, language barriers, and the actual clinical encounter with the health care provider.

30. Discriminatory treatment of immigrants is pervasive. Immigrants and others for whom English is not their native language face linguistic barriers in accessing care at facilities, the offices of practitioners, pharmacies and mental health providers. American hospitals are now engaging in what has been called medical deportation – the private repatriation of seriously injured or ill immigrants when hospitals cannot find nursing homes or other care providers who are willing to take patients without insurance. American immigration authorities have played no role in these repatriations despite American law, which rests jurisdiction for issues of immigration and deportation exclusively to federal authority.

Recommendations: Racial Disparities in Health System Access and Quality of Care

31. The high percentage of uninsured and underinsured people of color makes it clear that the U.S. must establish a universal health system, Medicare-for-all, that provides high-quality care that is available, accessible and acceptable to all Americans, regardless of race, gender, ethnicity, immigration status, sexual orientation, disability or ability to pay. Such a system will greatly reduce financial barriers to effective and equitable distribution of health care resources, because it will equalize incentives for hospitals, health care systems, and private providers to serve a range of communities regardless of their wealth or poverty. It will also foster a better integration of public health with medical care, and encourage other intersectoral approaches that can address the social determinants of health. The current health care reform falls far short of this .

32. The US should take concrete stops to address persistent disparities in access to health care and the quality of health provided in areas of longstanding concern, including maternal and child health, reproductive and sexual health, health care access for immigrants, and the quality of health care available for young people in juvenile detention and for prisoners.

33. The federal government must assess how policies to expand access (i.e. affordability standards and individual mandates to purchase insurance) or improve quality may differentially affect communities of color, immigrants, and low-income populations.

34. The federal government should integrate a *Health Impact Assessment* tool, described above, to evaluate health care policy. Moreover, in order to ensure that federal funds are distributed fairly and equitably, the Department of Health and Human Services (HHS) should require recipients of funding, like state health departments, to review how a potential policy, such as a hospital opening or closing, will impact racial and ethnic communities *before*, rather than after, programs are finalized and implemented. Federal agencies should require a disparate impact analysis as a substantive compliance condition, as opposed to a post-complaint enforcement response.

35. The state governments have it in their power to develop systems of universal coverage. Some states are ensuring that the coverage system addresses equity concerns, by expanding data

collection and taking other steps to end health disparities. All states should adopt good practice measures to reduce racial disparities and consider expanding insurance coverage to all residents.

36. The federal government should ensure that public and private health systems monitor racial and ethnic disparities, language and cultural competencies , and income-based health care disparities. The federal government must assure that the Centers of Medicaid and Medicare and other federal agencies that finance health care services engage in systematic, periodic analysis of racial disparities in the clinical care programs they support, using standard quality assurance measures. Data collection must be as inclusive as possible**;** it must reflect the diversity of the U.S. population and include immigrant communities with a special recognition of their unique status, including cultural differences, special health needs, and financial concerns. The federal government should mandate states to follow a uniform process in their data collection that includes information on each patient's race, ethnicity and primary language.

37. Licensing standards for health care institutions like hospitals, clinics, community health centers, health insurance plans, and physician offices should require data collection on race and ethnicity which can then be linked to health care utilization and health care outcomes in order to monitor and eliminate health care disparities.

38. Accreditation standards should be established for hospitals, community health centers, and health insurance plans to hold them accountable for meeting performance measures like Cultural and Linguistically Appropriate Services (CLAS) standards to ensure that all patients regardless of race and ethnicity have an equal opportunity to benefit from covered services.

39. As the US federal government has introduced cultural and linguistic standards in its publication, *National Standards for Culturally and Linguistically Appropriate Services in Health Care*, more work has to be done to determine to what extent is it being followed and what impact has it had since its introduction in 2001.

40. The state departments of health should collect data and monitor disparities in access to and quality of health care on the basis of income, race, ethnicity, gender, primary language, and immigration status. State agencies are already required to implement a Title VI compliance program, including data collection and record maintenance, to ensure that both departments of health and the facilities to which departments of health convey federal assistance meet the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964. This information is the foundation for addressing disparities in access to health care.

41. Health professionals should be trained in cross-cultural health care to improve provider-patient communication and eliminate pervasive racial and ethnic disparities in medical care. The federal government should require private professionals and administrators who receive federal funding for their education or who are paid for services via federal programs to receive training on cultural factors that influence health care, and design care to accommodate those factors. HHS must initiate a campaign to ensure that information is made publicly available concerning rights to equal access to quality healthcare. The OCR must develop easy-to-understand guidelines, in multiple languages, for people (particularly immigrants) who use health care facilities on their rights, responsibilities and entitlement to care. OCR should also work with community organizations, advocacy groups and relocation sponsors to disseminate these guidelines and information.

42. The federal and state governments should increase the racial and ethnic diversity of health care providers by reducing or eliminating financial barriers to education and training in the health professions for low-income students, strengthen magnet science programs in urban high schools,

and, consistent with the U.S. Supreme Court's 2004 ruling in *Grutter v. Bollinger*, support the consideration of applicants' race or ethnicity as one of many relevant factors in higher education admissions decisions.

43. The state governments have attempted to address the workforce imbalance by providing incentives, such as funds for graduate medical education programs that focus on underserved populations, tuition reimbursement and loan forgiveness programs that require service in health professional shortage areas. They should continue providing such incentives. In addition, states should support "safety net" hospitals and reduce the financial vulnerability of health care institutions serving poor and minority communities. The federal government should financially support safety net public hospitals in underserved, inner-city areas and prevent further closures of public hospitals.

44. The state governments must ensure that their departments of health consider the public's health needs in decisions affecting hospitals and clinics. Obtaining a Certificate of Need (CON) – the regulatory prerequisite for service changes in many states – should be contingent on evidence that the changes sought would reduce racial and economic inequality of health care. The CON process, however, has great potential to encourage a better distribution of health care resources, and to reflect community and statewide need. States should re-evaluate, and in some cases reinvigorate, CON through new policies that ensure accountability for the use of public funds.

45. The state governments should consider reinstituting and funding community-based health planning and should include health disparities reduction efforts as part of the mission of these planning agencies.

46. The federal government should provide additional funding for community health centers, which serve a disproportionate number of racial minorities in underserved areas in a cost-effective way.

47. The federal government should review and revise its requirements for citizenship documentation, which have been shown to exclude primarily eligible Hispanics/Latinos from Medicaid benefits.

48. The federal government should reform Medicaid by expanding Medicaid and removing eligibility categories. Low reimbursement rates under state Medicaid programs are a major problem that leads to both inadequate and unequal health care services. When reimbursement rates are too low, health care providers have little incentive to serve individual Medicaid patients or whole communities that desperately need care. States should review and increase Medicaid reimbursement rates for crucial primary, prenatal, and maternal health care services.

49. Congress should clarify the legal right of Medicaid recipients to force state compliance with the Medicaid Act. The judicial system is an important recourse for Medicaid recipients who face barriers to care. Recent court cases, however, have "jeopardiz[ed] the ability of Medicaid beneficiaries to go to court."

Failure to Provide Effective Legal Remedies

50. The U.S. lacks a national coordinated infrastructure for the promotion and protection of human rights in the health care area. The mission, activities and enforcement powers of the U.S. Commission on Civil Rights are limited and the Commission does not serve this function. It has occasionally issued reports on health-related concerns and refers the complaints that it receives to the appropriate federal, state, or local agency or private organization for action.

51. Though health is the sector of the American economy with the greatest government involvement and accounts for 16% of GDP, there is no regulatory system outside of the loose and bare construct envisioned by Title VI of the Civil Rights Act of 1964 to ensure that the dollars do not perpetuate discriminatory and segregatory patterns. There is no comprehensive data collection, no periodic and systematic review of data, no agency established with the capacity and mission comparable to the function, and, since 2001, no private right of action to enforce human rights protections.

52. Since 2001, private individuals can no longer go to domestic courts or tribunals to challenge actions with unjustified disparate impacts on the basis of race or ethnicity, even when the actions are taken by local or state government or by private actors receiving governmental money.[3] Title VI of the Civil Rights Act of 1964 promised to aid in this country's efforts to eliminate racial discrimination; it prohibits, "on the ground of race, color, or national origin, [that any person] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." However, despite the enactment of Title VI, subsequent judicial interpretation of the Equal Protection Clause and Title VI has significantly limited the ability of citizens and the Executive Branch of government to eliminate racial discrimination in the U.S. Currently, proof of discriminatory animus (intent) is required to bring a discrimination claim in court under the Title VI statute. Citizens are no longer permitted to enforce its implementing regulations, which until 2001 permitted court challenges to government policies with a discriminatory impact. This limitation prevents the U.S. from meeting its treaty obligation to prohibit not only racially discriminatory intent but also racially discriminatory impact in governmental action, government-supported programs, and government policies. This significant limitation on the enforceability of Title VI and its implementing regulations has contributed to the perpetuation and increase of serious racial health disparities.

53. Neither the health care reform bill signed into law "The Patient Protection and Affordable Care Act" nor the proposed reconciliation bill adequately address the problem of racial discrimination in medical treatment. Racial discrimination in medical treatment is a significant problem. The problem with "The Patient Protection and Affordable Care Act of 2010 it is that it relied on Title VI of the Civil Rights Act of 1964, without correcting any of the known problems, particularly the courts interpretation that Title VI only addresses intentional discrimination and that individuals do not have a private right of action for disparate impact discrimination..

Recommendations: Providing Effective Legal Remedies

54. Congress should enact effective anti-discrimination law which defines the coverage to include all health care providers, insurers and third-party payors; defines prohibited discrimination to include both intentional and disparate impact; exempts special measures designed to eliminate health disparities or health care discrimination; define "an Aggrieved Person" broadly to include organization; provide a private right of action on statute and regulations; and, impose Adequate Fines and Regulatory Enforcement.

55. OCRs must increase its enforcement efforts to identify and penalize violations of laws that prohibit discrimination on the basis of race and ethnicity, such as Title VI of the Civil Rights Act of 1964 and the Hill-Burton Act community service obligation. The federal government must increase the capacity of OCR at HHS, provide it with the necessary staff and resources, and encourage it to correct disparities in the quality of health care in the United States.

[3] See Alexander v. Sandoval, 532 U.S. 275 (2001).

56. The federal government can also strengthen civil rights agencies' capacity to investigate racial or ethnic disparities in health through the creation of an Office on Health Disparities in the Civil Rights Division of the Department of Justice (which already has offices dedicated to housing, employment and education) and/or in OCR. These special units should be charged with focusing on racial and ethnic disparities in quality of clinical treatment and should assess data on disparities in quality of care.

57. While strict government enforcement of civil rights laws is necessary to ensure compliance, the treaty obligations also requires courts to be available to individuals who have suffered from either intentional or structural discrimination. In *Alexander v. Sandoval*, the U.S. Supreme Court ruled that individuals do not have the right to sue to enforce the Title VI disparate impact regulations, because the statute did not specify a private right of action. Congress should ensure that every statute protecting civil rights specifically authorizes individuals to bring civil suits in federal court to redress such violations of the law. Indeed, since the presence and impact of discrimination in the health sphere are so pervasive, Congress should provide in such statutes for "private attorneys general" to bring suits in situations where the actual, measurable impact on those individuals is minimal.

58. States should encourage their Attorney General's Offices to challenge systemic racial inequities. Attorneys General possess broad authority under *parens patrie* standing, which provides states with the ability to sue to protect the health of their residents. States should also encourage their human rights and civil rights commissions to initiate investigations, file complaints, and conduct studies to prevent and eliminate discrimination. All of these actions are consistent with the state's "police power" to maintain good order.

59. Congress should clarify the legal right of Medicaid recipients to force state compliance with provisions of the Medicaid Act that are intended to ensure the accessibility and availability of care to individuals with this form of public insurance. The judicial system has historically been an important recourse for Medicaid recipients who face barriers to care. The U.S. Supreme Court ruling in Gonzaga v. Doe, 536 U.S. 273 (2002), coupled with the lower court decisions applying the Supreme Court's holding to the enforceability of provisions of the Medicaid Act, however, have "jeopardiz[ed] the ability of medical beneficiaries to go to court.

United States of America

Submission to the United Nations
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Lesbian, Gay, Bisexual and Transgender (LGBT) Rights

Submitted by:

Council for Global Equality

Human Rights Campaign

National Center for Lesbian Rights

Immigration Equality

Endorsed by:

Organizations: American Jewish World Service, Amnesty International- USA, Anti-Defamation League, Center for American Progress, Gay and Lesbian Leadership Institute, Global Rights, Heartland Alliance, Human Rights Campaign, Human Rights First, Human Rights Watch, Immigration Equality, International Gay & Lesbian Human Rights Commission, Metropolitan Community Church, National Center for Lesbian Rights, National Center for Transgender Equality, National Gay & Lesbian Chamber of Commerce, National Gay & Lesbian Task Force, Open Society Institute, and Out & Equal Workplace Advocates

Executive Summary

1. The founding documents of the United States speak of equality and inalienable rights, and in that spirit, the United States proudly contributed to the founding of the United Nations and the birth of the modern human rights movement. However, lesbian, gay, bisexual, and transgender (LGBT) Americans remain decidedly second-class citizens in the United States in 2010. Deprived of basic Constitutional protections at the federal level and denied essential family recognition in most state and local jurisdictions, LGBT Americans are still waiting for the long arc of the moral universe to bend toward justice, as it has for other historically disadvantaged communities in the long struggle for fully equal civil rights in the United States. Although several crucial pieces of LGBT equality legislation are winding their way slowly through the U.S. Congress, discrimination, violence, and disrespect remain daily realities for far too many citizens.

2. The struggles depicted in this narrative reflect basic human aspirations to be free from violence and fear, to have an equal chance for employment based on merit that can contribute to the economic life of the country, and to protect and provide for one's family. These are basic to the promises of life, liberty, and the pursuit of happiness that undergird the United States' founding.

3. We are proud that our country has announced its commitment to the UN General Assembly Statement on Human Rights, Sexual Orientation and Gender Identity, but it must also ensure that those same protections are afforded to LGBT Americans in this country. It is time for the United States to adopt legislation that will give full human rights to all LGBT Americans, while simultaneously standing squarely for human rights protections on the world stage.

4. Based on U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), as well as other international human rights mechanisms that the U.S. has ratified, the United States should move with alacrity to provide remedies that address the following human rights concerns in the United States.

   Hate crimes based on sexual orientation and gender identity must be actively deterred. Those that occur must be prosecuted with the full force of the law and with a conviction that reflects the harm that such crimes impose not just on a victim but on an entire community. State and local jurisdictions must continue to pass laws to protect victims from hate crimes, as well as report hate crimes to federal authorities.

   Private and governmental employers in the United States must be prohibited in law from discriminating against individuals because of their sexual orientation or gender identity. This protection should apply to hiring and firing, training and promotion, and employee benefits.

   LGBT individuals must be allowed to form secure and stable families in the United States.

Information on NGO

5. The Council for Global Equality is a coalition of 19 U.S.-based organizations that together encourages a clearer and stronger U.S. voice on international lesbian, gay, bisexual, and transgender (LGBT) human rights concerns. Its member organizations are American Jewish World Service, Amnesty International- USA, Anti-Defamation League, Center for American Progress, Gay and Lesbian Leadership Institute, Global Rights, Heartland Alliance, Human

Rights Campaign, Human Rights First, Human Rights Watch, Immigration Equality, International Gay & Lesbian Human Rights Commission, Metropolitan Community Church, National Center for Lesbian Rights, National Center for Transgender Equality, National Gay & Lesbian Chamber of Commerce, National Gay & Lesbian Task Force, Open Society Institute, and Out & Equal Workplace Advocates. The Council for Global Equality is a fiscally sponsored project of Public Interest Projects, based in New York.

Hate Crimes

"The impact of human rights abuses goes beyond the loss of human life.... Human rights abuses are wounds on our collective sense of purpose and harmony. Only by addressing their root causes –through government and community action—can we hope to build a future in which, even if our own wounds are not completely healed, wounds such as ours are much more rare."

Testimony of Sylvia Guerrero at the UPR Listening Session in San Francisco, March 26, 2010. Sylvia's daughter, Gwen Araujo, was brutally murdered in 2002 at the age of 17 in Newark, CA for being transgender.

6. Bias-motivated hate crimes against LGBT Americans represent concerns under Articles 6 and 9 of the ICCPR. In particular, the ICCPR requires the United States to take appropriate measures to prohibit acts of violence or bodily harm, whether inflicted by government officials or by any individual or group, and to guarantee the security of the person for everyone, regardless of sexual orientation or gender identity.

7. In 2006, during a review of our nation's compliance with the ICCPR by the UN Human Rights Committee, the Committee noted that the United States "should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence." Fortunately, the United States has made substantial progress in achieving federal-level protection, although a number of states still refuse to adopt state-level protections.

8. Hate crimes occur when a perpetrator of a crime intentionally selects a victim based on a bias-based motivation against a protected group. These crimes may be motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. Such crimes are generally motivated by extreme prejudice and often visceral animus toward the protected group to which the perpetrator assumes the victim belongs. As such, a hate crime affects not only the victim and his or her family but an entire community or category of people and their families. The LGBT community, both in the United States and abroad, historically has been victimized by these types of bias-motivated crimes.

9. The Federal Bureau of Investigation (FBI) produces an annual report on hate crimes statistics within the United States. At the end of 2009, it released its report on hate crimes committed in 2008. This report – a compilation of the hate crimes that states, cities, towns, colleges, and universities have reported to the federal government – revealed that hate crimes are at their highest reported level in America since 2001, with a total of 7,783 crimes reported.

10. According to the report, hate crimes based on an individual's sexual orientation have increased every year since 2005. (The FBI was not required to collect statistics on hate crimes based on gender identity until 2009). FBI statistics report that there was an 11% increase in victims of hate crimes based on sexual orientation from 2007 to 2008. In all, 1,617 offenses against lesbian and gay victims were reported to the FBI in 2008.

11. Clearly, FBI statistics only represent a sample of the actual number of hate crimes that occurred in 2008. By way of example, the National Coalition of Anti-Violence Programs, a non-profit organization that tracks bias incidents against lesbian, gay, bisexual and transgender people, reported 1,677 incidents for 2008 in only four states and 10 cities, which starkly contrasts with the 1,617 reported to the Federal Bureau of Investigation in 2008 by 13,690 local and state agencies. This discrepancy reflects the fact that many victims do not report their victimization to authorities. In addition, state and local authorities are not required to report hate crimes to the FBI as participation in the federal statistics program is voluntary. Thus, countless incidents are not represented in the FBI's annual hate crimes statistics report.

12. Of the 1,617 offenses against lesbian and gay victims reported to the FBI in 2008, there were five murders, six rapes, 733 assaults, and 50 robberies. Seven bias-motivated murders were reported to the FBI in 2008, and five of those murdered victims were murdered because of their sexual orientation. This is just one of many pieces of evidence demonstrating that the LGBT community is often subjected to the most gruesome and violent of bias-motivated crimes.

The Matthew Shepard and James Byrd, Jr. Act

13. After 12 years winding through the legislative process, the U.S. Congress passed the first federal law protecting LGBT individuals from bias-motivated crimes in 2009 – the Matthew Shepard and James Byrd, Jr. Hate Crimes Protection Act (HCPA). This legislation was quickly signed into law by President Obama, making it the first federal law in the U.S. to protect LGBT individuals.

14. The HCPA gives the federal government power to investigate and prosecute bias-motivated violence where a perpetrator selects a victim because of the victim's actual or perceived sexual orientation or gender identity, as well as other characteristics. It also provides federal funding opportunities for local law enforcement agencies to help them investigate and prosecute these crimes, since the nature of the crime may require additional forensic attention that can stretch state and local budgets. Furthermore, the HCPA requires the Federal Bureau of Investigation to track statistics on hate crimes based on gender identity (statistics for sexual orientation were already tracked). The HCPA also requires that the Attorney General's annual summary of the data acquired under the Hate Crimes Statistics Act include a report on hate crimes committed by, and hate crimes directed against, juveniles.

Opportunities Better to Address Hate Crime Problems

15. **Implement the HCPA**. In order for the HCPA to have its intended effect, the law must be effectively implemented by the federal government. This requires the federal government to train federal and state investigators and prosecutors on the new authority provided under the law, and about the concomitant availability of new resources to address hate violence. In addition, it requires the federal government to begin collecting statistics on hate crimes based on gender identity.

16. **Expand State Hate Crimes Laws**. Despite the HCPA, states governments need to continue to pass laws that protect LGBT individuals from hate crimes. The HCPA only protects LGBT victims from violent crimes where the federal government has jurisdiction over the underlying criminal act, regardless of the bias motivation. Since most crimes in the U.S. are still prosecuted at the state level, LGBT victims remain particularly vulnerable to hate crimes in the 38 states that do not provide protections for individuals based on gender identity, and in the 29 states that do not provide protections for individuals based on sexual orientation. Passage of state level HCPAs allows states to prosecute hate crimes without a federal nexus and in many instances crimes against property.

17. **Improve Statistics Collection.** In addition, the United States must improve hate crimes reporting. Since the enactment of the 1990 Hate Crime Statistics Act (HCSA), the FBI hate crimes statistics report has sparked improvements in hate crime response – since in order to effectively report hate crimes, police officials must be trained to identify and respond to them. The FBI report is now the most authoritative snapshot of hate violence in America – though clearly incomplete, with thousands of police agencies reporting no hate crime data at all.

18. As in past years, the vast majority of participating agencies (84.4%) reported that zero hate crimes occurred in their jurisdictions. This does not mean that they did not report hate crimes; it means that they affirmatively reported to the FBI that there were no hate crimes in their jurisdiction. This is difficult to believe.

19. In addition, thousands of police agencies across the nation did not provide statistics at all – including at least five agencies in cities with populations over 250,000 and at least 11 agencies in cities with populations between 100,000 and 250,000. Because participation is not mandatory and some agencies fail to report, the report fails to cover almost 40 million people.

20. While FBI statistics provide a snapshot of hate crimes in the United States, local and state law enforcement authorities should be required to provide accurate data to the FBI in order to assess with greater accuracy where the federal government can best target its resources to address hate crimes in America.

21. **Institute Federal Education and Prevention Initiatives**. The government must complement tough laws and more vigorous enforcement – which can deter and address violence motivated by bigotry – with education and training initiatives designed to reduce prejudice. The federal government has an essential role to play in helping law enforcement, communities, and schools implement effective hate crimes prevention programs and activities. Education and exposure are the cornerstones of a long-term solution to prejudice, discrimination, and bigotry against all communities. A federal anti-bias education effort would exemplify a proactive commitment to challenging prejudice, stereotyping, and all forms of discrimination that affect the whole community.

Employment Discrimination

22. The principle of non-discrimination, as enshrined in Articles 2(1) and 26 of the ICCPR, provides a substantial level of protection for lesbian, gay, bisexual and transgender persons under the jurisprudence of the ICCPR. The Human Rights Committee has upheld this basic premise since its 1992 decision in the case of *Toonen v. Australia,* when it found that the criminalization of private sexual activity between consenting, same-sex adults violated articles 2(1), 17 and 26 of the ICCPR. The U.S. Supreme Court, in the 2003 case of *Lawrence v.*

Texas, also found that such laws violate the right to liberty under the Due Process Clause of the U.S. Constitution, but the U.S. Supreme Court's jurisprudence has not developed significantly beyond the right to live free from criminal sanction. So while human rights law has by now firmly extended the ICCPR's non-discrimination provisions to other areas of daily life, including education and employment, the U.S. Supreme Court's jurisprudence has not developed as robustly, and LGBT Americans can still be discriminated against in the workplace – including in hiring, firing, and workplace-related benefits – simply because of their sexual orientation or gender identity in a majority of states in the United States.

23. In 2006, during a review of our nation's compliance with the ICCPR by the UN Human Rights Committee, the Committee's concluding observation "notes with concern the failure of the U.S. to outlaw employment discrimination on the basis of sexual orientation in many states." The Committee called on the United States to "acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation." It also specifically asked the United States to ensure that "federal and state employment legislation outlaw discrimination on the basis of sexual orientation."

24. Unfortunately, qualified, hardworking Americans are still denied job opportunities, fired or otherwise discriminated against just because they are LGBT. There is no federal law that consistently protects LGBT individuals from employment discrimination. It remains legal in 29 states to discriminate in employment based on sexual orientation, and in 38 states to do so based on gender identity or expression. As a result, LGBT people face serious discrimination both in the job market and within the workplace.

25. Such discrimination is not only legal in the private sector, but it is also legal for many state and local governments. For example, according to her testimony before the U.S. Senate Health, Education, Labor and Pensions Committee on September 23, 2009, Ms. Vandy Beth Glenn was fired in 2007 from her job working for the General Assembly in Georgia because of her gender identity. Glenn, who served in the U.S. Navy as a lieutenant, had been hired by the Georgia General Assembly in 2005 as an editor in the Office of Legislative Counsel, where she edited bills and resolutions during the annual legislative session. At that time, Glenn was still living as a man – despite having understood since childhood that her gender identity was female. In the fall of 2007, after she had told her friends and family that she was transgender, she was ready to come to work as female. When she told her supervisor that she would be transitioning, her immediate boss called her into his office and told her that her decision was immoral and inappropriate and that she was fired. In her testimony before the Committee, Glenn emphasized:

> ***"My editorial skill had not changed. My work ethic had not changed – I was still ready and willing to burn the midnight oil with my colleagues, making sure that every bill was letter-perfect. My commitment to the General Assembly, to its leaders, and to Mr. Brumby [her boss] had not faltered. The only thing that changed was my gender–and because of that, the legislature I'd worked so hard for no longer had any use for my skills. I was devastated."***

26. The State of Georgia fired Glenn because of her gender identity, and there is no law that explicitly protects Glenn from being fired for that reason.

Employment Discrimination in the Armed Forces

27. Moreover, the U.S. Armed Forces, which is the largest employer in the United States, statutorily discriminates against lesbian and gay individuals. The U.S. Code currently prohibits lesbians and gays from serving openly in the U.S. Armed Forces. This law, commonly referred to as "Don't Ask, Don't Tell" (DADT), is the only law in the country that requires people to be dishonest about their personal lives or face the possibility of being fired. Since DADT was enacted in 1993, over 13,500 lesbian and gay service members have been discharged from the armed forces because their sexual orientation was exposed against their will or because they were open and honest about their sexual orientation.

28. Mike Almy serves as an example of the many individuals discharged from the armed forces under DADT. Almy joined the U.S. Air Force in 1993. He served a total of thirteen years on active duty as a communications officer before he was discharged under DADT in 2006. During his career in the Air Force, Almy was stationed in both the United States and Germany. He was deployed to the Middle East four times during his career, supporting Operation Desert Fox, Operation Southern Watch and Operation Iraqi Freedom. As a service member, Almy was awarded the Joint Commendation Medal, the Air Force Commendation Medal and the Humanitarian Service Medal. He was also named Officer of the Quarter and Officer of the Year several times throughout his career. In 2005 he was named the top communications officer for the Air Force in Europe, and in 2006 he was recommended for promotion to Lieutenant Colonel. Despite these accomplishments, Almy was discharged from the Air Force because of his sexual orientation.

29. During his time in Iraq, the Air Force restricted service members from accessing private email accounts. As such, service members were authorized to use work email accounts for personal or morale purposes. Shortly after Almy left Iraq, someone in the unit that replaced Almy's unit did a routine search of computer files and found Almy's personal emails, which were written from a combat zone to family and friends, including a person he had dated. Because Almy is gay, and his emails documented this, Almy was discharged from the Air Force – losing his career and his access to certain benefits.

> ***"Don't Ask Don't Tell failed me despite the fact that I lived up to the premises of this law and never disclosed my private life."*** Lieutenant Colonel Mike Almy
>
> From Mike Almy's testimony before the Senate Armed Services Committee on March 18, 2010.

Solutions

30. Employment discrimination by the private sector, by state and local governments, and by the U.S. Armed Forces could become a relic of the past if the U.S. Congress were to pass legislation that is pending in the U.S. House of Representatives and Senate.

31. **ENDA.** The Employment Non-Discrimination Act (ENDA) would provide basic protections against workplace discrimination on the basis of sexual orientation and gender identity. ENDA, which would apply to both the public and private sectors, simply provides all Americans with basic employment protection from discrimination based on irrational prejudice.

32. **MREA.** The Military Readiness Enhancement Act (MREA) would end DADT, replacing it with a law preventing discrimination on the basis of sexual orientation. The legislation permits the U.S. Armed Forces to prescribe and enforce conduct regulations as long as they are designed and applied without regard to sexual orientation. MREA also permits those discharged because of their sexual orientation under previous laws and policies to seek to re-enter the military without consideration of their previous separation.

Family Recognition

33. Article 23 of the ICCPR recognizes that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the state." The UN Human Rights Committee has not established a fundamental right to same-sex marriage under the ICCPR, but evolving standards of human rights law now recognize that everyone has a right to form a family, and that no family may be subjected to discrimination on the basis of sexual orientation or gender identity. This means that same-sex partners must be provided with equal rights and responsibilities, including rights to family-related social welfare and other public benefits, employment and immigration.

Immigration

> ***"I have a partner who is a U.S. citizen, and two beautiful children who are also U.S. citizens. But none of them can petition for me to remain in the United States with them. Because my partner is not a man, she cannot do anything to help me. I am very lucky Senator Dianne Feinstein sponsored a private bill for me. Because of Senator Feinstein's efforts my deportation has been temporarily delayed until 2011."***
>
> From Shirley Tan's testimony at the UPR Listening Session in San Francisco, March 26, 2010.

34. Although the concept of family unification is central to the American immigration system, accounting for roughly 65% of all legal immigration,[i] lesbian and gay families are completely excluded from this system. Under the U.S. Immigration and Nationality Act, U.S. citizens and legal permanent residents may sponsor their spouses (and other immediate family members) for immigration purposes. But same-sex partners of U.S. citizens and permanent residents are not considered "spouses," and their partners cannot sponsor them for family-based immigration.

35. In many cases this leaves many Americans with the untenable choice of giving up a life partner or giving up one's country. Many of these couples are forced to leave family and friends, sell businesses, and abandon the community and country they love in order to keep their families together. An analysis of data from the 2000 Decennial Census estimated that approximately 36,000 same-sex binational couples live in the United States, approximately 46% of whom are raising children.[ii] Behind each of these statistics lies a family who struggles every day for the basic right to be together.

36. For example, in January 2009, Shirley Tan, the life partner of U.S. citizen Jaylyn Mercado, and stay-at-home mother to their twin sons, then aged twelve, was arrested at her home and taken into detention by agents of Immigration and Customs Enforcement because she had a removal order against her which her attorney had never informed her was final. Shirley has

been in the United States for over twenty years; is the primary caretaker for Jaylyn's elderly mother as well as the twins; and is a pillar of her community, acting as a Eucharistic minister in her church and singing in the church choir. However, under U.S. immigration law, Jaylyn is not considered Shirley's family and so she has no ability to sponsor her for immigration benefits. The family was unusually fortunate that a U.S. Senator intervened to stay deportation for two years, but without a lasting solution, the stay will only delay Shirley's inevitable deportation.

Solution

37. The Uniting American Families Act (UAFA), a bill currently pending in the U.S. Congress, would remedy this injustice and allow U.S. citizens and permanent residents to sponsor their same-sex partners for family-based immigration. As with any opposite-sex married couple, under UAFA permanent partners would need to prove that they are in a long-term committed relationship and that they are financially interdependent. Passage of this bill would keep thousands of families from living with daily uncertainty about their future.

Relationship Recognition

> ***"My partner Tom has worked for the federal government for 20 years, we have been together 11 years, and we have two adopted children. And even with that very typical American family, I am still denied medical benefits because the federal government does not recognize our relationship. To compound that, I am HIV positive, so I am denied coverage because of my pre-existing conditions if I do not have full time employment. The necessity for me to have full time employment has forced me to take jobs that I wouldn't have…I would have chosen to stay home to take care of our children."***
>
> From Henry Pacheco's testimony at the UPR Listening Session in San Francisco, March 26, 2010.

Family Recognition

38. Children with LGBT parents often do not have a legal relationship to at least one of their parents. As a result, they can be denied social security benefits or can be separated from their non-biological parent if their parents separate or their biological parent dies. LGBT parents who are not legal parents may not be able to consent to medical care for the child or even have the authority to approve things like school field trips, and may have no ability to claim the child as a dependent for health insurance. In the absence of a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative.

39. Many states allow second-parent adoption, which allows a co-parent to adopt his or her partner's biological child without terminating the rights of the biological parent. Sixteen states have a statute or appellate decision allowing second-parent adoption, a process that allows both parents in a same-sex couple to be legally recognized as parents. At least 15 additional states have allowed second-parent adoptions by same-sex couples in certain counties. However, 8 states have restrictions limiting or prohibiting lesbians and gay men from adopting jointly, and one state even prohibits adoption by lesbian or gay individuals. Some states allow same-sex parents to obtain a parentage judgment recognizing their parental rights.

40. Even where parents have been able to protect their parental rights through an adoption or parentage judgment, some states have refused to recognize such judgments from other states. Under the Full Faith and Credit Clause of the U.S. Constitutions, all states are required to recognize judgments from other states, but in practice, many states have refused to recognize adoptions granted to same-sex couples. For example, a Florida judge refused to recognize a second-parent adoption completed in Washington by a same-sex couple after the couple moved to Florida and broke up. A Florida Court of Appeal held that Florida must recognize this adoption, but the adoptive mother was separated from her child for years while this case was pending.

Solution

41. All states should provide legal recognition to LGBT families by providing joint adoptions to same-sex couples and second parent adoptions to a non-biological parent who has functioned as a child's parent. In addition, states should recognize all the adoptions and parentage judgments issued by other states. The federal government should also provide child-based benefits to children of de facto parents. The federal government should also revise rules for children born abroad to same-sex parents to allow children born abroad to have U.S. citizenship through their non-biological parents.

Relationship Recognition

42. Only 14 states and the District of Columbia provide any form of relationship recognition for same-sex couples (through marriage, civil unions, domestic partnerships, or a similar status), and in 6 of these states, benefits are substantially limited. The remaining 32 states treat same-sex couples as legal strangers. While couples can obtain some degree of protection through private agreements, such agreements cannot confer most of the rights and protections that are provided through marriage or other forms of official relationship recognition. Moreover, even when same-sex couples execute these agreements, they often are not respected. For example, in 2010, a Florida hospital refused to allow Janice Langbehn and her children to visit her partner of 18 years, Lisa Pond, even though the partner had executed an advanced directive and power of attorney naming Janice. Lisa passed away after collapsing with an aneurysm while her family was kept in a waiting room.

43. In addition, in California, voters used the initiative amendment process to enact a state constitutional amendment stripping same-sex couples of a previously established right to marry. A challenge to this measure is currently pending in federal court.

44. Even if a same-sex couple lives in one of the states that recognize their marriage, civil union, or domestic partnership, the couple is denied the numerous federal protections provided to married couples. In 2004, the U.S. General Accounting Office identified 1,138 federal rights and responsibilities that turn on marital status.[iii] These include federal tax benefits, the ability to sponsor same-sex partners in family-based immigration, spousal benefits for federal employees, and marital protections in federal benefit programs. For example, when one spouse receives Medicaid coverage for nursing home care, a same-sex spouse who is not institutionalized could end up losing the couple's home because federal Medicaid spousal protections do not apply to same-sex couples. Under current federal law, none of these rights, benefits, or protections are available to same-sex couples – even if a couple is legally married or in another type of legally recognized relationship under state law. In addition, the federal government does not provide spousal-equivalent benefits, including with regard to health insurance coverage and pension conferral, to the partners of homosexual federal employees.

Solution

45. States should remove discriminatory amendments and legislation that prohibit same-sex couples from marrying. The federal government should recognize marriage between same-sex couples and provide these couples with the attendant federal rights and benefits.

46. **DPBO.** The Domestic Partnership Benefits and Obligations Act should be passed so that the same-sex spouses of federal employees can be provided with the benefits available to different-sex spouses.

47. **DOMA.** In addition, the Defense of Marriage Act, which prohibits the federal government from recognizing same-sex marriages and permits states to refuse to recognize lawfully-performed marriages from other states, should be repealed.

State Ballot Measures

48. Twenty-eight states in the United States have ballot initiatives or popular referenda whereby citizens, collecting a minimum number of signatures on a petition within a specified time, place statutes or constitutional amendments on the ballot for citizens to adopt or reject. These mechanisms have increasingly allowed voters to limit the rights of LGBT people and other minority populations – sometimes taking away rights previously enjoyed and allowed by State legislatures or courts. Popular votes have been held in 30 states, enshrining discrimination into state constitutions regarding same-sex relationship recognition. Other states have held popular votes on other LGBT family recognition issues such as adoption. For example, in Arkansas in the 2008 election, the citizens stripped away the rights of same-sex couples to adopt or be foster parents.

49. When democracy goes too far, and rights are removed from a particular group in society, this violates the principle of non-discrimination that is upheld in the ICCPR Article 26. It also violates Article 3 of the Inter-American Democratic Charter, which claims, "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms…" When the United States allows a majority of citizens to take away existing rights away from minority group, it is not applying equal protection under the law for all of its citizens and is not respecting human rights and fundamental freedoms.

Solution

50. When states recognize the relationships of LGBT citizens, they should not be able to take away those rights through a majority vote of the people. People should not be able to vote to take away the civil rights of minority populations. The federal government, and its laws, should oppose ballot initiatives that strip same-sex couples of existing relationship and family protections.

Conclusion

51. We look forward to working with the Human Rights Council and with the Obama Administration to give full implementation to our human rights obligations, and to ensure that those obligations extend to all LGBT Americans. As we do so, we also will continue to speak out on behalf of LGBT individuals in other countries who are struggling simultaneously to defend their lives and their livelihoods and to protect their families from the abuse and violence to which LGBT Americans have been subjected for too long.

[i] Department of Homeland Security, Annual Flow Report, March 2009, Table 2, at 3 http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

[ii] *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law,* joint report by Human Rights Watch and Immigration Equality, 2006, at 17 and 176, available at http://www.hrw.org/en/reports/2006/05/01/family-unvalued.

[iii] U.S. General Accounting Office, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (available at www.gao.gov/new.items/d04353r.pdf).

United States of America

Submission to the United Nations
Universal Periodic Review

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Human Rights Council
1-12 November 2010

Death Penalty

Submitted by:[i]

National Association of Criminal Defense Lawyers (NACDL)

Death Penalty Focus

The World Coalition Against the Death Penalty

The Texas Defender Service

The Southern Center for Human Rights

Human Rights Advocates

The Equal Justice Initiative

Endorsed by:

Advocates for Human Rights; American Association of Jewish Lawyers and Jurists; Arizona Capital Representation Project; Arizona Death Penalty Forum; California Attorneys for Criminal Justice; Coloradans for Alternatives to the Death Penalty; Colorado Criminal Defense Bar; Connecticut Network to Abolish the Death Penalty; Equal Justice USA; Gulf Region Advocacy Center (GRACE); Metro Atlanta Task Force for the Homeless; Mexican Capital Legal Assistance Program; New Mexico Criminal Defense Lawyers Association; Oregon Capital Resource Center; Pennsylvanians for Alternatives to the Death Penalty; Public Interest Projects; Reprieve; Sentencing Advocacy Group of Evanston; StandDown Texas Project; Three Treaties Task Force of the Social Justice Center of Marin; UNC School of Law Clinical Program; Ute Ritz-Deutch, Ph.D.; Virginia Capital Case Clearinghouse; Washington Coalition to Abolish the Death Penalty; World Organization for Human Rights USA; Youth Justice Coalition.

Executive Summary

This submission provides information on the United States' failure to implement certain international human rights obligations pertaining to the application of the death penalty, and raises a number of concerns about the administration of the death penalty in the United States. Specifically, the report addresses four areas in which the United States has failed to meet its international legal obligations: (1) the discriminatory and arbitrary imposition of the death penalty; (2) lack of compliance with the International Court of Justice's judgment in *Avena and Other Mexican Nationals*; (3) the execution of persons with mental disabilities; and (4) inhuman and degrading conditions of death row facilities.

Discriminatory and Arbitrary Imposition of the Death Penalty

1. There is ample evidence that the imposition of the death penalty in the United States is influenced by race and poverty. In 2006, the Human Rights Committee recommended that the United States "assess the extent to which [the] death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem." The Committee recommended that "[i]n the meantime, the State party should place a moratorium on capital sentences. . . ."[1] This recommendation was reiterated by the Committee on the Elimination of Racial Discrimination (CERD) in 2008, which recommended that the United States "undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices." The Committee further recommended that the United States "adopt all necessary measures, including a moratorium, to ensure that [the] death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers."[2]

2. Although a small number of states in the United States have assessed the discriminatory nature of the death penalty's application, the great majority have failed to undertake the assessments recommended by the Human Rights and CERD Committees. The United States has also failed to enact a moratorium. Nevertheless, race and socioeconomic status continue to influence the administration of the death penalty in violation of the United States' obligations under Article 6(1) and Article 26 of the ICCPR as well as Article 5(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

[1] U.N. H.R.C., *Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee: United States of America*, ¶ 29, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

[2] U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States*, ¶ 23, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

3. Studies have repeatedly shown that race is a critical factor in the determination of who is sentenced to death.[3] In the state of Pennsylvania, for example, black defendants in Philadelphia County are sentenced to death at a significantly higher rate than similarly situated non-black defendants.[4] And over the last three decades, social scientists have repeatedly observed that capital defendants are much more likely to be sentenced to death for homicides involving white victims.[5]

4. Another aspect of capital prosecution where racial animus comes into play is jury selection. Throughout the United States, African-Americans and other racial minorities are systematically excluded from capital juries that typically make sentencing decisions, even in communities with substantial minority populations. According to a report published by Amnesty International, one in five of African-Americans executed in the modern era was convicted by an all-white jury. Ninety percent of these cases involved victims who were white.[6] Diverse and representative juries have been shown to be critical in ensuring fair trials in criminal proceedings,[7] and the absence of such has serious consequences for people of color who must frequently overcome presumptions of guilt based on negative stereotypes.[8]

5. Socioeconomic status, like race, plays an influential yet inappropriate role in determining who is sentenced to death. The ranks of death row are filled by the poor, who cannot afford to retain well-trained and properly funded defense attorneys. United States Supreme Court Justice Ruth Bader Ginsburg famously observed that "[p]eople who are well-represented at trial do not get the death penalty."[9] Without access to resources and competent counsel, impoverished defendants are inherently disadvantaged in the criminal justice system. Yet income, like race, should never be a factor in who is sentenced to death.

6. Another form of arbitrariness is present in Alabama, the only state that gives judges free rein to impose death sentences notwithstanding the jury's determination that the defendant should be sentenced to life without parole. As a result, several prisoners have been executed in Alabama after a judge overruled a jury's life verdict—

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[3] DEATH PENALTY INFORMATION CENTER, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (1998), http://www.deathpenaltyinfo.org/article.php?scid=45&did=539.

[4] AMERICAN BAR ASSOCIATION, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report* xxviii (2007), http://www.abanet.org/moratorium/assessmentproject/pennsylvania/finalreport.pdf.

[5] *See generally* AMNESTY INTERNATIONAL, *Death by Discrimination: The Continuing Role of Race in Capital Cases* (Apr. 24, 2003), http://web.amnesty.org/library/index/engamr510462003. *See also* Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 78, 96 (1984); SAMUEL GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 65-66 (1989).

[6] *Death by Discrimination, supra* n. 5, at 19.

[7] *See, e.g.*, William Bowers, et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. PS. J. CONST. L 1, 187 (2001).

[8] *Id*. at 179 (noting opinion polls showing that the public identifies blacks as more prone to criminality than other racial groups).

[9] Ruth Bader Ginsburg, Justice, United States Supreme Court, Address at the University of the District of Columbia: In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001).

including some unanimous life verdicts—and imposed a sentence of death. Standardless judicial override is particularly problematic in Alabama because Alabama judges are selected in hotly contested partisan elections in which judges campaign on their records of imposing death sentences. This practice raises serious concerns about the fairness and reliability of death sentencing in Alabama.

7. Arbitrariness in capital prosecutions also contributes to the wrongful conviction of the innocent. Since 1973, 139 individuals have been released from death rows in the United States after presenting evidence of their innocence. There were nine exonerations in 2009 alone.[10] Wrongful convictions result from a number of factors, including police misconduct and prosecutorial overreaching, racial bias, poverty, inadequate legal representation, and the denial of access to potentially exculpatory DNA evidence, even when the defendant is willing to pay for additional testing. Moreover, the United States does not always compensate individuals who have been wrongly convicted and sentenced to death. Punishment of the innocent as a result of government-sanctioned misconduct or discrimination violates Article 7 of the ICCPR.

Ongoing Violations of the *Avena* Judgment of the International Court of Justice

8. The United States ratified the Vienna Convention on Consular Relations (VCCR) without reservations in 1969. That same year, the United States ratified the treaty's Optional Protocol, giving its consent to the jurisdiction of the International Court of Justice (ICJ) over any claims arising under the VCCR.[11] Under Article 36 of the VCCR, detaining authorities must inform detained foreign nationals of their rights to consular notification and access without delay.

9. In January 2003, Mexico initiated proceedings before the ICJ on behalf of a group of Mexican nationals who had been sentenced to death in the United States without being advised of their Article 36 rights to consular notification and access. The United States participated fully in the case, entitled *Avena and Other Mexican Nationals.*[12]

10. The ICJ issued its final judgment on March 31, 2004, finding violations of Article 36 in 51 of the 52 cases that it reviewed. The Court held that United States courts must provide "review and reconsideration" of the conviction and sentence of each Mexican national to determine whether the violation of consular rights was harmful.[13] Although Article 94 of the U.N. Charter obligates each member state "to comply with the [ICJ's] decision…in any case to which it is a party,"[14] the United

[10] DEATH PENALTY INFORMATION CENTER, *The Innocence List,* http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Feb. 24, 2010).

[11] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 487.
[12] *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (2004).
[13] *Id.* at ¶138, 153 (9).
[14] U.N. Charter art. 94, ¶1.

States has thus far failed to implement the ICJ's judgment. Former President George W. Bush attempted to enforce *Avena* through an executive order, but the United States Supreme Court determined that legislation was necessary to implement the ICJ's decision. As of April 2010, the United States Congress had failed to enact the necessary legislation, and only two of the Mexican nationals affected by *Avena* had received some form of review in accordance with the ICJ's judgment.[15]

11. In August 2008, the state of Texas executed José Ernesto Medellín, one of the 51 Mexican nationals named in *Avena*, without providing him review and reconsideration. His execution defied the original ICJ decision as well as a subsequent order issued by the Court on July 16, 2008, which specifically directed the United States to refrain from executing Medellín until he had received review and reconsideration.[16] In January 2009, the court unanimously found that "the United States had breached the obligation incumbent upon it" by executing Medellín.[17] Other Mexican nationals are now facing execution, and the United States has failed to provide them review and reconsideration consistent with the ICJ's judgment. Until all of the nationals named in *Avena* receive the remedy mandated by the ICJ, the United States will remain in continued breach of its international legal obligations under the U.N. Charter.

Imposition of Capital Sentences on Persons with Mental Disabilities

12. In the last ten years, the United States has put to death dozens of prisoners suffering from schizophrenia, bipolar disorder, and other incapacitating mental disabilities. This practice constitutes cruel, inhuman or degrading treatment or punishment in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as well as Article 7 of the ICCPR.

13. The execution of persons with mental disabilities is squarely prohibited by international law.[18] Although the United States Supreme Court has held that it is

[15] Osbaldo Torres received review and reconsideration in the State of Oklahoma. His death sentences were commuted to life imprisonment without the possibility of parole. Another Mexican national, Rafael Camargo, received a life sentence in exchange for his agreement to forgo the review and reconsideration mandated by the ICJ.

[16] *Avena and other Mexican Nationals* (*Mex. v. U.S.*), 2008 I.C.J. (Provisional Measures Order of July 16) (No. 139).

[17] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2009 I.C.J., ¶55(2009) (No. 139).

[18] *See, e.g.,*U.N. Econ. & Social Council [ECOSOC], Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50;U.N. ESCOR, Supp. No. 1, at 33;U.N. Doc. E/1984/92 (1984) (death sentence shall not be carried out on persons who have become insane); ECOSOC, *Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty,* U.N. Doc. Res. 1984/50 (May 25, 1984); ECOSOC Res. 1989/64; U.N. Doc. E/1989/91, at 51 ¶ 1 (d) (death penalty shall not be imposed on "persons suffering from…*extremely limited mental competence*, whether at the stage of sentence or execution") (emphasis added); U.N. Commission on Human rights [C.H.R], *Question of the Death Penalty*, Res. 2003/67 (April 24, 2003); U.N. Doc. E/CN.4/2005/L.77 (2005) (calling on retentionist countries "not to impose the death penalty on a person suffering from *any form of mental …disabilities* or to execute any such person"); Report of the Special Rapporteur on

cruel and unusual punishment under the Eighth Amendment of the United States Constitution to execute persons who have mental retardation[19] or who are mentally incompetent,[20] it defines these terms narrowly, and continues to apply the death penalty to individuals who suffer from severe mental illnesses, brain damage, and other mental disabilities.

14. The cases of these inmates are too numerous to recount in this report, but they have been cogently summarized by Amnesty International in its 2006 report on the execution of mentally ill offenders in the United States.[21] Amnesty found that one in every ten individuals executed in the United States suffered from a serious mental disorder other than mental retardation. In all, Amnesty found that at least 100 severely mentally ill men and women have been executed in the United States since 1977.[22]

15. In December 2009, Bobby Wayne Woods was executed[23] despite compelling evidence of mental retardation. His entire life, Woods had had difficulty completing even the most basic tasks and had to be told by family even when to go to bed. He was never able to live by himself and was functionally illiterate as an adult. Despite professional analysis of his test scores throughout childhood that determined he had an IQ of about 70, which is in the zone of mental retardation, he was executed in December 2009.[24]

Death Row Conditions

16. Death row conditions are harsh and inhumane in many parts of the United States. The effects of such conditions must be assessed in conjunction with the length of time that prisoners spend on death rows awaiting their executions. Bearing in mind the need for brevity, this report focuses only on Texas and California, as they (along with Florida), have the largest death rows in the nation – with 342 and 701 death-sentenced prisoners respectively.

<u>Death Row Conditions in Texas</u>

Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1997/60 (1996) (calling on retentionist states that impose the death penalty on the mentally ill to "bring their domestic criminal laws into conformity with international legal standards").

[19] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[20] *Ford v. Wainwright,* 477 U.S. 399 (1986).

[21] AMNESTY INTERNATIONAL, *United States of America: The Execution of Mentally Ill Offenders* (2006), http://www.amnesty.org/library/asset/AMR51/003/2006/en/73c0b3fe-d46f-11dd-8743-d305bea2b2c7/amr510032006en.pdf. .

[22] *Id.* at 6.

[23] *Bobby Wayne Woods, Killer of 11-year-old girl executed in Texas*, Financial, Dec. 4, 2009, *available at* http://www.finchannel.com/news_flash/World/53360_Bobby_Wayne_Woods,_killer_of_11-year-old_girl_executed_in_Texas/.

[24] Petition for a Writ of *Certiorari* at 12-25, *Woods v. Texas,* No. 09-7879 (2009).

17. Since 1999, all male Texas death row prisoners have been incarcerated in the Polunsky Unit in Livingston, Texas. Death row prisoners are segregated from other prisoners in every aspect of their lives. They eat alone, exercise alone and worship alone. Communication between prisoners on death row – accomplished by yelling between cells – is extremely difficult.[25]

18. Prisoners are allowed no physical contact with family members, friends or even their attorneys. Generally, a death row prisoner will not have physical contact with anyone other than prison staff from the time of his entry onto death row until the time of his execution. Even in the days and hours before his execution, the prisoner is not permitted to touch any family member or loved one.

19. The best behaved death row prisoners spend twenty-two hours per day in their cells. They are ordinarily given access to small indoor or outdoor "cages" for two hours per day. Prisoners considered to be disciplinary problems, which usually includes the most mentally ill inmates, are allowed outside of their cells only three to four hours per week. Death row prisoners are not provided any opportunities to participate in "programming," *i.e.*, structured activities in or out of their cells. They receive no educational or occupational training.

20. The conditions on Texas' death row are harsher than those found in many of the nation's highest security prisons and segregation units. Mental health experts have repeatedly observed that prolonged confinement without sensory stimulation or human contact exacerbates pre-existing psychological disorders and can precipitate mental illness in otherwise healthy individuals.[26]

21. It is well-established that a large percentage of death row inmates suffer from mental disabilities.[27] Yet, dozens of severely mentally disabled death row prisoners are housed in the conditions described above. James Colburn, a Texas death row inmate who suffered from schizophrenia, "deteriorated on death row to the point that he was psychotic and eating his own feces."[28] He was executed on March 26, 2003.

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[25] The information presented here regarding the conditions on Texas' death row has been confirmed by numerous interviews with death row inmates and with the attorneys who represent those inmates. Compelling individual accounts of life on Texas' death row have been published on the internet. *See, e.g.,* Alvin Kelly, *Trial by Fire,* Feb. 19, 2002, *available at* http://www.ccadp.org/alvinkelly.htm; G. Wilford Hathorn, *Animus* (2001) (*available at* http://www.deathrow.at/hathorn/home1.html).

[26] *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995); *Davenport v. DeRobertis,* 844 F.2d 1310, 1313 (7th Cir. 1988), Stuart Grassian and N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49 (1986); Stuart Grassian, *Psychopathological Effects of Solitary Confinement,* 140 AM. J. PSYCHIATRY 1450 (1983). *See also* HUMAN RIGHTS WATCH, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* Part XII (2003), http://www.hrw.org/reports/2003/usa1003/.

[27] *See, e.g.,* Laura Mansnerus, *Damaged Brains and the Death Penalty,* N.Y. TIMES, Jul. 21, 2001; David Freedman and David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Soc. Sci. & Med. 1757 (2000).

[28] Renee Feltz, *Cruel and Unusual? Texas Death Row Conditions,* Address at KPFT Radio (Nov. 8, 2002) (transcript available at KPFT Radio, http://www.kpft.org/news/110802story3.html).

Death Row Conditions in California

22. California has the largest death row in the nation, with 701 inmates awaiting execution as of March 2, 2010. Of these, the men are housed at San Quentin State Prison, while the sixteen women are housed at the Central California Women's facility near Chowchilla, California.[29] San Quentin is one of the oldest prisons in California and has been described as "so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and over-crowded that . . . it is dangerous to house people there with certain medical conditions."[30]

23. The treatment of mentally ill prisoners in all California prisons, including death row, is governed by *Coleman v. Wilson*.[31] The *Coleman* monitors visited San Quentin's death row to assess the treatment of mentally ill prisoners and found that the conditions in which the most severely ill prisoners were kept "were substandard and included filthy and badly lit cells, with many inmates in poor, unsanitary conditions. Several inmates were symptomatically psychotic on sight; inmates complained of harassment by other inmates and staff and being compelled to make choices between going to health and mental health appointments, visits or yard."[32]

24. Prisoners who are not among the most severely ill, but who nevertheless have been diagnosed with a major mental illness, are not offered therapeutic mental health counseling, which is available to non-condemned prisoners. [33]

25. All San Quentin condemned prisoners are locked down for at least 19 hours each day in single cells. They are segregated from non-condemned, "mainline" prisoners. They live in cells that are four-and-a-half feet wide and eleven feet long.[34]

26. Approximately 100 of the highest security male prisoners are locked down 24 hours a day, and kept in secure "hard" cells, with only a food port through which to communicate with the outside word. Those prisoners are permitted a maximum of 10 hours of exercise a week, under ideal conditions. These high security prisoners are not allowed contact visits with anyone, including attorneys, and are not permitted to use the phones.

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[29] California Commission on the Fair Administration of Justice: Official Recommendations on the Fair Administration of the Death Penalty in California at 4 (2008), *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf.
[30] *Plata v. Schwarzenegger*, 2005 WL 2932243 at *3 (N.D. Cal. May 10, 2005) (Order to Show Cause Re Civil Contempt and Appointment of Interim Receiver).

[31] *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995).
[32] Special Master's 20th Monitoring Report, p. 107, reflecting October 2007 visits, *Coleman v. Schwarzenegger*, E.D. Cal, No. Civ. S-90-0520 LKK JFM.
[33] *Id*. at p. 108, reflecting October 2007 visits.
[34] The rules and regulations for San Quentin are contained in the San Quentin Institutional Procedures Manual. The rules for the condemned are contained in IP 608, which was last updated in November of 2007.

27. The cumulative effect of the conditions on San Quentin's death row is clearly aggravated by the length of time that California prisoners typically await their executions. The elapsed time between pronouncement of a judgment of death and execution in California exceeds that of every other death penalty state; the average is currently 17.2 years.[35] Even worse, delays increase every year. As the population of California's death row has grown, the length of the delay between sentence and disposition of appellate reviews has grown as well. Thirty persons have been on California's death row for more than 25 years; 119 have been on death row for more than 20 years; and 240 have been on death row for more than 15 years.[36] Since 1978, seventeen California death row prisoners have committed suicide.[37]

The Effects of Lengthy Incarceration and Inhuman Death Row Conditions: A Case Study

28. Prolonged incarceration on death row, particularly under the conditions described above, has devastating psychological effects on condemned prisoners – particularly those who are mentally ill. Indeed, the torturous effects of "death row phenomenon" -- that is, the psychological impact of a lengthy stay on death row -- have been widely noted by jurists and scholars over the last three decades.

29. It is both necessary and appropriate for nations to provide adequate procedural safeguards to ensure condemned inmates receive full and fair appellate review of their convictions and sentences. Nonetheless, prolonged incarceration on death row amid unendurable conditions of confinement violates the United States' obligations to treat individuals with dignity under Article 10(1) of the ICCPR and constitutes cruel, inhuman or degrading treatment in violation of the CAT as well as Article 7 of the ICCPR. The case of César Roberto Fierro Reyna, a Mexican national condemned to death in Texas, provides a particularly disturbing example of the destructive psychological effects of extended solitary confinement on death row.[38]

30. César Roberto Fierro has been under a sentence of death since February 27, 1980.[39] He has been scheduled for execution on 14 separate occasions. Six times, he has come within days of execution before receiving a court-ordered reprieve. According to the prison's classification records, Mr. Fierro contacted the prison's psychiatric department for the first time on May 15, 1986, stating that he was hearing voices and he might injure himself.

31. As the years passed, Mr. Fierro's mental condition continued to deteriorate. Until March 1999, he was able to communicate with his attorneys in a regular and fairly rational manner. From that point forward, however, Mr. Fierro's letters to his

[35] California Commission on the Fair Administration of Justice, *supra* at 4, 24.
[36] *Id*. at 28, 29.
[37] California Department of Corrections and Rehabilitation, Office of Public and Employee Communications, *Condemned Inmates Who Have Died Since 1978,* February 3, 2010.
[38] *See* Patricia Giovine, *Pide Ayuda César Fierro*, EL DIARIO DE EL PASO, July 27, 2005, at A1; John Carlin, *César Fierro, 25 Años a La Espera de la Ejecución*, EL HERALDO, Aug. 18, 2005, at 2.
[39] The facts regarding Mr. Fierro's case are derived from interviews and documents provided by Mr. Fierro's attorneys.

attorneys became increasingly bizarre and irrational. He lost a great deal of weight. He became convinced that his attorneys were conspiring against him.

32. One of the hundreds of irrational letters he sent to his attorneys included the following message:

> NO ACCESS TO GRIEVANCES. STOLEN PENS AND STAMPS. LIMITED ACCESS TO SAME INK AND STAMPS. NO TYLENOLS. NO FLOSS. SCARED OF DENTIST BECAUSE A DRILLED HOLE OR SOMETHING AND CAVITIES. NO MEDICAL. INCOMPETENT EMPLOYEES. FORGOT, GUM/TOOTH BLEEDS. NO FAIR HEARINGS, CONFISCATION OF DOCUMENTS AND ORCHASTRATED [*sic*] CASES. NO RULES. NO MAIL. PSYCHOLOGICAL SUICIDE BY HYPNOSIS OR OTHER INSINUATED. . . .

33. What is particularly tragic about Mr. Fierro's case is that he may actually be innocent of the crime for which he was convicted.[40] Although a Texas court has found that his confession was coerced by the El Paso police,[41] and his former prosecutor has urged the courts to grant him a new trial, he remains on death row. As of 2010, he has spent 30 years awaiting his execution for a crime he may not have committed.

Recommendations

In light of these violations, and considering the information submitted above, we ask the Human Rights Council to adopt the following recommendations:

1. The United States should immediately adopt a moratorium on executions as well as on the imposition of new death sentences until it revises its laws and practices that allow for the discriminatory and arbitrary application of the death penalty and the execution of individuals with mental disabilities.

2. The United States should implement the ICJ judgment in *Avena* by any means necessary, including Congressional legislation. Stays of execution should be granted to anyone named in the judgment until they are provided judicial "review and reconsideration" of their convictions and sentences.

3. The United States should revise its laws to prohibit the imposition of the death penalty against those with mental disabilities. The laws should be reformulated so that they are consistent with resolutions of the Commission on Human Rights calling on states to refrain from executing individuals with "any form of mental disorder."[42]

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[40] *See, e.g.,* Dianne Jennings, *U.S. Courts Haven't Considered Effect of Man's Coerced Confession,* DALLAS MORNING NEWS, Mar. 4, 2002, at A17; Ken Armstrong and Steve Mills, *Gatekeeper Court Keeps Gates Shut,* CHICAGO TRIBUNE, June 12, 2000, at A1; Mark Donald, *Stuck in Habeas Hell: Bush Breathes New Life Into Texas Death Row Inmate's Case,* TEXAS LAWYER, May 2, 2005.

[41] *Ex Parte Cesar Roberto Fierro*, No. 33,752-171-4 (171st Dist. Ct. – El Paso May 1, 1995).

[42] *See, e.g.,* UN Doc. E/2005/3, ¶ 89 (Mar. 9, 2005).

4. The United States should review conditions of detention on death row and should ensure that death row inmates are provided with access to educational opportunities, sufficient means of exercise, and occupational training. The United States should treat all persons on death row in accordance with Articles 7 and 10 of the ICCPR, the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners.

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[i] *The National Association of Criminal Defense Lawyers (NACDL)* is an organization in the United States whose mission is to ensure justice and due process for persons accused of crime. *Death Penalty Focus* is one of the largest nonprofit advocacy organizations in the nation dedicated to the abolition of capital punishment. *The World Coalition Against the Death Penalty* is an alliance of more than 100 NGOs, bar associations, local bodies and unions from 35 nations around the world that aims to strengthen the international dimension of the struggle for abolition of capital punishment. *The Texas Defender Service* was established in 1995 and aims to improve the quality of representation afforded to those facing a death sentence and to expose and eradicate the systemic flaws plaguing the Texas death penalty. *The Southern Center for Human Rights* provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, and advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States. *Human Rights Advocates* is a non-governmental organization with ECOSOC special consultative status and has worked on various aspects of the application of the death penalty before United Nations treaty and Charter organs. *The Equal Justice Initiative* is a law office that advocates on behalf of condemned prisoners, juvenile offenders, people wrongly convicted or charged with violent crimes, poor people denied effective representation, and others whose trials are marked by racial bias or prosecutorial misconduct.

United States of America

Submission to the United Nations
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Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Human Rights of Persons with Disabilities

Submitted by:

ADAPT

Center for the Human Rights of Users and Survivors of Psychiatry

Nationwide Organizing Call to Action: Stop Forced "Mental Health" Treatment

Not Dead Yet

Self Advocates Becoming Empowered

The Opal Project

The U.S. Network of Users and Survivors of Psychiatry

Endorsed by:

All About You Home Care; CAFETY; Joyce Carruth; Center for Disability Rights; Dreamweaver's Peer Support Inc.; Disability Rights Education and Defense Fund; Andrea Hornbein; Human Rights Caucus, Northeastern University School of Law; International Disability Alliance; Ithaca Mental Patients Advocacy Coalition (IMPAC); Justice Now; Law Project on Psychiatric Rights; Leonard Peltier Defense Offense Committee; Mental Health Empowerment Project Inc.; Metro Atlanta Task Force for the Homeless; Mind Freedom International; National Council on Independent Living (NCIL); New York Association on Independent Living; New York State ADAPT; New York State Independent Living Council; People's Health Movement; Public Interest Projects; Regional Center for Independent Living; South Bay Communities Alliance; The Icarus Project; Three Treaties Task Force of the Social Justice Center of Marin; Ute Ritz-Deutch, Ph.D.; Voices of the Heart, Inc.; We The People; World Network of Users and Survivors of Psychiatry

Executive Summary

This joint submission provides information on the rights of people with disabilities (PWDs) in the United States (U.S.) under sections B, C, E and F, as stipulated in the *General Guidelines for the Preparation of Information under the Universal Periodic Review:*

Section B raises concerns about limitations of the U.S. human rights framework that permits serious violations such as involuntary euthanasia, physician-assisted suicide, guardianship, civil commitment and compulsory mental health treatment.

Section C discusses morbidity and mortality of people with psychiatric disabilities, deprivation of rights based on youth and disability, institutionalization and abuse of children in the mental health system, institutionalization and abuse of people with physical and developmental disabilities and abuses, and lack of alternatives to institutionalization.

Section E presents best practices to support PWDs' right to live in the community and respect their legal capacity to make their own choices.

Section F provides recommendations for realizing the rights of PWDs and for fortifying the human rights framework in the United States.

SECTION B. Normative and Institutional Framework of the State

1) General normative framework on disability-based discrimination

1. The U.S. is party to the Universal Declaration of Human Rights (UHDR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), and the International Convention on the Elimination of Racial Discrimination (CERD), all of which must be applied without discrimination based on disability. The U.S. has signed but not yet ratified the Convention on the Rights of Persons with Disabilities (CRPD), as well as the Convention on the Rights of the Child (CRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2. The U.S. Constitution guarantees to all persons equal protection of the law. The standard for scrutiny of disability-related discrimination is lower than that applied to race and sex discrimination,[i] but on a par with discrimination based on sexual orientation.

3. Serious human rights violations persist despite the enactment of the Americans with Disabilities Act (ADA), which prohibits discrimination based on disability in employment, by state and local governments, and in public accommodations, and despite other enactments such as the Rehabilitation Act (of which Section 504 prohibits disability-based discrimination by federal agencies), the Fair Housing Act Amendments, and the Individuals with Disabilities Education Act (IDEA). Despite the policy of non-discrimination articulated by these laws, there are many aspects of federal and state law and policy that are contrary to the principles of the ADA but remain in force.

2) Non-voluntary and Involuntary Euthanasia

4. Third party decisions to withhold life-sustaining treatment, without the consent of the person concerned, are an increasing human rights concern. These decisions may be made by a surrogate appointed by a court or by operation of law, or a health care provider in opposition to an

individual or surrogate decision in favor of treatment. In either case, current U.S. law does not adequately protect the individual's right to not be deprived of life.

5. First, with respect to decisions made by surrogates, other than those appointed by the individual through a document such as a durable power of attorney, constitutional standards must be met before life-sustaining treatment can be withdrawn. As discussed by the U.S. Supreme Court in *Cruzan* (1990)[ii], it cannot be assumed that surrogates are able to represent patient wishes. Use of surrogate decision-makers instead of requiring a best attempt to discern the wishes of the person concerned is contrary to the recognition of the legal capacity of PWDs on an equal basis with others, as required by CRPD Article 12 (to which the U.S. is a signatory) and constitutes discrimination based on disability under UDHR Articles 2 and 6, and ICCPR Article 26.

6. Decisions by physicians and other health care providers to withhold life-sustaining treatment in opposition to the decision of the individual or their surrogate present an even clearer violation of constitutional and human rights. Nevertheless, approximately 40 states authorize such decisions in some form under health care laws adopted over the last decade. Often labeled "futility" provisions, they do not require an objective determination that a particular health care treatment is futile, but rather confer civil and criminal immunity from liability based on vague and undefined professional judgments that treatment is inappropriate,[iii] and increasing cognitive disability is a factor in such considerations.[iv] Such measures violate the right to life of people with serious medical conditions, who are a subset of PWDs, under UDHR Article 3 and ICCPR Article 6, as well as CRPD Article 10.

3) Physician-Assisted Suicide

7. Laws permitting physician-assisted suicide in the states of Oregon and Washington do not adequately protect people from deprivation of their life without consent because they empower the physician over the patient. A double standard exists, in which these laws facilitate suicide by PWDs whose quality of life is seen by physicians to be poor, particularly individuals with significant physical disabilities, while in other situations "suicidality" is attributed to mental illness and physicians are empowered to detain the person and administer compulsory mental health treatment. Both aspects of this double standard constitute disability-based discrimination.

8. Terminology such as 'death with dignity' used to justify assisted suicide masks discrimination. While there are two existing laws that apply only to people predicted to die within six months due to terminal conditions, laws have been proposed in other states (e.g. New Hampshire) that include people with non-terminal disabilities.[v] People with terminal conditions constitute a subset of PWDs and, moreover, physician predictions are not always accurate.[vi] Furthermore, 'indignities' are often described in terms that include people with non-terminal conditions as well, such as the need for assistance in daily activities like bathing and toileting. Like derogatory racist and sexist language, the equation of disability and "indignity" is an insult to the disability community.

9. The rhetoric of personal choice diverts attention from the fact that assisted suicide laws actually make physicians the gatekeepers of assisted suicide, granting them the power to determine who is eligible for assisted suicide and conferring blanket immunity for exercising that

power based on a mere claim of "good faith." In addition, the nominal safeguards in the law end at the point in which the lethal prescription is granted, with no requirements at the time the lethal dose is administered, raising concerns about involuntary administration by others in a society with a high prevalence of elder abuse by family members.[vii]

4) Guardianship and deprivation of legal capacity

10. Guardianship places PWDs under the control and supervision of others. An outdated mechanism, it does not take into account current values and knowledge about the importance of self-determination, and how to provide support to facilitate self-determination. Guardianship keeps people in institutions and negates the right of people with disabilities to exercise legal capacity, an aspect of the right to recognition as persons before the law, in violation of UDHR Articles 2 and 6, and ICCPR Article 26, and in violation of CRPD Article 12.

5) Civil commitment and compulsory mental health treatment

11. The U.S. Supreme Court recognizes that civil commitment on mental health grounds, and compulsory mental health treatment, are infringements of the liberty interest guaranteed under the U.S. Constitution, but considers these infringements to be justified by state interests,[viii] and has not taken account of the serious violation of mental and physical integrity by such practices or their close connection with disability-based discrimination, as analyzed by UN Special Rapporteur on Torture Manfred Nowak.[ix] This amounts to inadequate constitutional protection for PWDs from practices that may constitute torture or ill-treatment, and violates U.S. obligations under UDHR Articles 2, 3 and 5, ICCPR Articles 2, 7 and 9, and CAT Articles 2 and 16, as well as CRPD Articles 4, 5, 15 and 17.

12. State law regulates and authorizes civil commitment and compulsory mental health treatment. For example, in New York State, Article 9 of the Mental Hygiene Law governs all admissions for inpatient mental health treatment, as well as compulsory outpatient treatment. Article 9 states a preference for informal admission or voluntary commitment; however the bulk of Article 9 provides for involuntary commitment in a variety of forms and for the legal review of such commitment. Civil commitment laws create a separate regime of detention and involuntary treatment applicable only to persons with psychosocial disabilities that is discriminatory in purpose and effect, contrary to U.S. obligations under UDHR Articles 2, 3 and 5, ICCPR Articles 2, 7 and 9, and CAT Articles 2 and 16, as well as CRPD Articles 14, 17 and 25.

13. The Court of Appeals case Rivers v. Katz,[x] governs compulsory inpatient treatment in New York. *Rivers* established that involuntary "patients" have the right to refuse treatment if they are capable of making rational decisions about treatment, however, if found "incapable," the court may order compulsory treatment based on its assessment of factors such as risks and benefits. Courts nearly always find incapacity and order compulsory treatment, without giving reasons, suggesting that "incapacity" is difficult to separate from a diagnosis of mental illness. The use of a capacity standard to deprive people of the right to control their own body and health discriminates based on disability, and violates U.S. obligations under UDHR Articles 2, 3, 6 and 25, ICCPR Articles 7 and 26, CAT Articles 2 and 16, and CRPD Articles 12, 15, 17 and 25. CRPD Article 12 establishes that PWDs have legal capacity on an equal basis with others in all aspects of life, including the right to make decisions about mental health treatment.[xi]

SECTION C. Implementation of human rights on the national and state levels

1) Morbidity/Mortality Rate for persons with psychiatric disabilities

14. A 2006 study[xii] indicated that for adults with a psychiatric history there is a 25-30 year reduction in the life expectancy when compared with their counterparts without a psychiatric history. Since the use of psychiatric drugs was cited as a primary causative factor in early mortality, there is a grave concern about the implications of the mass drugging of children and youth, as well as of adults. The failure to address iatrogenic mortality as an urgent public health issue and to take measures to prevent it, including the banning of such drugs and development of non-medical support and safer alternatives, violates UDHR Articles 3 and 25 and ICCPR Article 6.

2) Youth as a status that strips individuals with disabilities of legal rights

15. Young people are seen as having limited to no ability to make their own medical choices. In some states, such as New York, young people appear to have the right to be involved with their treatment decisions at 16 years old. In practice, they may only give informed consent to participate in treatment – they do not have the right to refuse treatment. Not only is the right to informed consent withheld from children, but their guardians are often not given full information about treatment options.

16. Parents routinely lose custody of their children to foster care systems for either not complying with suggested courses of treatment (medical neglect) or not having enough money or insurance to pay for suggested treatments. Foster care has been described as "an institutionalized system of injustice" by the advocacy group Parents in Action.

17. Parents are often threatened with having their children taken away from them, and denied the right to choose what type of education their children shall experience. Even when their children are living in the community, parents are being denied supports and accommodations to aid their children in fully developing.

18. The failure to respect children's and parents' right to make mental health treatment decisions contrary to medical recommendations, and the failure to provide support to parents in raising children with disabilities, violates UDHR Articles 2, 3, 5 and 25, ICCPR Article 7 and CAT Articles 2 and 16, as well as CRC Articles 12 and 23 and CRPD Articles 7.3, 12 and 23.

3) Psychiatric institutionalization of children

19. Young people who have not committed any crime are nevertheless routinely incarcerated against their will in institutions. As well as being inherently unjust and discriminatory, very often these detentions are arbitrary, based on the type (if any) of health insurance (public or private). Young people are often unable to freely communicate with the outside world. They are often victims of sexual, physical, psychological, emotional abuse or neglect; in the U.S. "about 80% of 21 year old that were abused as children met criteria for at least one psychological disorder."[xiii] In the U.S., rape and abuse often occur in youth psychiatric facilities. Institutions are often overcrowded, poorly maintained, and do not allow for the privacy crucial for personhood. Institutionalization of children in mental health facilities, and the re-traumatizing abuse that

occurs in institutions, violates their rights to liberty and security of the person under UDHR Articles 2, 3 and 5, ICCPR Articles 2, 7 and 9, and CAT Articles 2 and 16, as well as CRPD Articles 7, 14 and 23.

20. Mental health diagnosis and institutionalization often violate the freedom of thought, expression and public participation under UDHR Article 18, 19 and 20, and ICCPR Articles 18, 19 and 21, as well as CRPD Articles 21 and 29. Very often the assigned diagnosis is based on the thoughts, religions, and beliefs that individuals hold, which may be out of step with conventional thought or religions. Once in a facility, religious practices and worship are often dictated by the rules of a facility, and religious observance is sometimes prohibited, as it is seen as symptomatic (i.e. magical thinking). Further, young people are often refused the right to gather among themselves in protest or form their own associations, and are routinely forced to comply with further mental health treatment if they want to be released.

21. Institutionalization results in violations of many other rights, including freedom from slavery and forced labor, and the right to an education. Young people all too often are treated as prisoners – some believe they are treated as slaves (Parents in Action)[xiv]. The needs of young people in institutions for rest and leisure are rarely accommodated on their own terms. Opportunities for fresh air are limited by the willingness and availability of the staff of the institutions and are often used as bargaining chips for compliance with treatment. Children in psychiatric institutions are denied a decent education as they are immediately filed into special education classes and awarded a high school "Individualized Education Plan Diploma" which symbolizes a certificate of attendance. Children in institutions are also denied the opportunity to learn another language, sex education, and preparation for higher education and future life.

4) Abuse of children by drugs, electroshock, seclusion and restraint, and aversives

22. The overmedication of children, including with drug cocktails (polypharmacy), is a systemic violation of the right to physical and mental integrity, and constitutes cruel and inhuman treatment or torture. Some children are drugged before it is developmentally appropriate for them to even speak. Central nervous system depressants known as "mood stabilizers" and "antipsychotics" are given to children as young as two years old.[xv] It is estimated that over 8 million children are being drugged in the U.S. each year, with approximately 1,300 deaths resulting from the practice. In New York State, in 2006, the Medicaid bill for psychiatric drugging of children was 82.8 million dollars (NY Post).[xvi] The routine practice of off-label prescribing is of grave concern, particularly in state-sponsored services. A lawsuit has been filed by the Law Project for Psychiatric Rights alleging that this practice constitutes Medicaid fraud.[xvii]

23. The invasive and brain damaging practice of electroshock (electroconvulsive treatment, ECT) on minors is widely accepted in the U.S., outside a few states, such as Texas, which have a ban for those under 16 years of age.

24. Restraint and seclusion is used as a form of control and punishment to instill fear in children so they are compliant, and can lead to death.[xviii] Further, restraint and seclusion are retraumatizing to someone who has experienced physical, sexual, psychological, emotional abuse or neglect in the past. Even if children themselves are not secluded or restrained, they are

in environments where they know it occurs, which can be just as detrimental to one's sense of security of person. There are institutions in the United States that have eliminated these practices, proving it can be done successfully.[xix]

25. The practices of applying skin shocks ("aversives") and withholding of food or toilet paper are also cruel and inhuman treatment and may be considered torture. Despite efforts to create a ban on aversives in New York State, such practices are permitted.

5) Institutionalization of persons with physical and developmental disabilities

26. Institutionalizing people is a violation of a person's right to liberty and security of person. Whether it is 6 people or more, in intermediate care facilities (ICFs) or group homes, people are not in charge of their lives. They can't leave.

27. The 1999 U.S. Supreme Court decision of *Olmstead* holds, under the Title II of the ADA, that services must be provided in the most integrated setting appropriate to an individual's needs. Although most states are moving people with developmental disabilities from large institutions to community living arrangements, institutionalization of people with disabilities remains a common practice. The system is still biased toward institutions and too often PWDs are neither afforded the choice of where to live, nor provided with adequate supports and services to maintain themselves in the community.

28. When States institutionalize PWDs who have committed crimes in secure facilities rather than allowing them to go to trial, the person has an endless sentence. Some people prefer to face the criminal justice system because they have more rights in that system than in the secure facilities.

29. There are currently 1.5 million Americans in nursing facilities[xx] and 129,000 in ICFs.[xxi] Although there isn't a system to track the number of persons with developmental disabilities in ICFs who would like to live in the community, there is data for nursing facility residents. According to the Centers for Medicare and Medicaid Services, 20% of individuals in nursing homes have expressed an interest in living in the community.[xxii] Another study conducted by Access Living and the Center for Urban Research and Learning at Loyola University in Chicago found that 64.5% of nursing home residents surveyed expressed that they would prefer to live elsewhere given the opportunity.[xxiii]

30. The institutionalization of PWDs in facilities that they are unable to leave, either because they are locked in or because the services they need are not provided in the community, violates the right to liberty and security of the person under UDHR Article 3 and ICCPR Article 9, as well as CRPD Articles 14 and 19, to which the U.S. is a signatory.

6) Abuses of people with developmental disabilities in institutions

31. People continue to be abused and murdered when living in institutions. In the past several years, many examples of abuses have been documented in Texas institutions for PWDs. In March 2009 it was discovered that employees of the Corpus Christi State School had been forcing mentally disabled residents to fight each other for the staff's amusement. In June 2009,

45-year old Michael Nicholson was suffocated to death by Lubbock State School worker Donnell Smith. Smith was charged with manslaughter, but 5 other staff witnesses to the incident have not been charged.[xxiv] These high profile events followed years of allegations that went mostly un-investigated and unprosecuted. In fiscal year 2008, the Corpus Christi school had almost 1,000 allegations of abuse, neglect or mistreatment, of which 60 were confirmed. On average, about 300 employees are fired or suspended every year for abusing or neglecting residents in Texas institutions. Of 75 employees fired for serious physical or sexual abuse in the past 10 years, only 13 were charged with crimes for their acts. Of those, only two have served jail time.[xxv]

32. These events also followed a December 2008 Department of Justice Civil Rights Division investigation documenting pervasive substandard conditions and multiple violations of residents' civil rights in the state institutions.[xxvi] The settlement agreement, like those the DOJ has established in other states, does not require that Texas move residents to a community-based system for PWDs as required by the ADA.

33. The abuse of PWDs in institutions violates the right to security of the person and freedom from torture and ill-treatment, under UDHR Articles 3 and 5, and ICCPR Articles 7 and 9, as well as CRPD Articles 14, 15, 16 and 17, to which the U.S. is a signatory.

7) The lack of community based alternatives to institutionalization

34. The reason people do not often have any real alternative to institutional placement is the institutional bias in Medicaid funding for long-term services. Financial assistance for community-based services has been provided since the 1980s through the Home and Community Based Services Waiver (HCBS) program under Medicaid. However, under Medicaid laws, states are required to provide institutional services (i.e. nursing facility care), while community-based services are optional. To provide alternatives to nursing facilities or intermediate care facilities, states go through an arduous application process to secure a Medicaid HCBS Waiver, permitting the state to use Medicaid funds to provide home and community-based services as alternatives to institutional placements.

35. Even when states are approved to provide home and community-based services, access to these alternatives is limited. Although there are often no waiting lists for nursing facilities, the federal government authorizes only a certain number of HCBS "slots", which often results in waiting lists for these services. Although states have an option to choose approaches that guarantee access to community-based services, they are unlikely to do so because they want to control their costs.

36. Spending patterns demonstrate the impact of these policies. The spending data trends for seniors and people with physical disabilities demonstrate that spending for long-term services and supports remains significantly biased toward nursing facilities. In fact, only 32.6% of the spending on long-term care for the seniors and persons with physical disabilities is spent for home and community-based services, while the remaining 67.4% funds nursing facilities.[xxvii] Large variations in state spending indicate different degrees of progress in achieving deinstitutionalization for people with developmental disabilities. In 2008, seven states (IL, LA, AR, TX, NJ, DC and MS) spent less than 50% of their Medicaid long-term care funds for people

with developmental disabilities in the community, while 14 states spent more that 80% of funds in the community.[xxviii]

37. These federal and state policies deprive persons with disabilities of liberty, the freedom of movement and the right to live in the community, and of social services necessary to the free development of the personality, contrary to UDHR Articles 3, 13, 22 and 25, and ICCPR Articles 2, 9 and 12, as well as CRPD Article 19, to which the U.S. is a signatory.

SECTION E. Achievements, best practices, and challenges for the rights of people with disabilities

1) Peer-run crisis respite

38. More opportunities must be developed for people to exercise their right to a life in the community. One positive model is peer-run crisis respite, a safe, home-like environment where people are supported to work through emotional crises; program staff are themselves individuals with psychosocial disabilities.[xxix] Program philosophy and practice support full community re-integration at the earliest opportunity.

2) Affordable housing without bundled services

39. A primary barrier to community integration is the lack of affordable housing. Many "supportive housing programs" offer "bundled services" which means that PWDs must participate in services which they may not want, including therapy and medication, in order to keep their housing. "Housing First" is a viable alternative; According to Pathways to Housing, the organization which created the model, it is "based on the belief that housing is a basic human right. Pathways moves homeless people with psychiatric disabilities directly from the streets into apartments of their own, instantly making them part of a community."[xxx] The units are scattered throughout communities, not clustered together, and all participants are given the choice as to whether to accept other services.

3) Consumer control and Money Follows the Person demonstration (MFP)

40. Organizations run by PWDs, such as the Centers for Independent Living, have led the way in developing models for giving seniors and PWDs a real choice where they live. Even without funding dedicated for this purpose, organizations such as Topeka Independent Living Resource Center (Topeka, KS), the Center for Disability Rights (Rochester, NY) and Liberty Resources (Philadelphia, PA), have gone into nursing facilities to support individuals who wish to make the transition to the community, and then have provided them with the supports to do so.

41. Giving people direct control over their services is critical to their success in living independently. Programs like the Consumer Directed Personal Assistance Program (New York) and Self Directed Personal Assistance Services (Montana) give PWDs direct control over their services. These programs often serve individuals with more significant disabilities who would otherwise be unable to secure traditional assistance to live independently.

42. The state of Texas created a Money Follows the Person program which allows people to move from nursing facilities to the community without having to spend time on a waiting list for

community-based services. This policy also permits public money, up to the amount that was spent on them in the nursing home, to "follow" them to the community.

Section F. Recommendations

43. In order to remedy the human rights violations discussed above and give effect to best practices, the U.S. must:

a) Ratify the CRPD, CRC and ICESCR without any reservations, understandings or declarations, without further delay.
b) Align the standard for review of disability-based discrimination under the U.S. constitution with the common standard under international law for discrimination based on race, sex and disability.
c) Ensure that guardianship is abolished and replaced by a system of support for people to make their own decisions.
d) Until guardianship is abolished, provide access to lawyers and protective services so that individuals can get out of institutions even if their guardian says "no".
e) Undertake comprehensive review at both the federal and state levels, with the participation of PWDs, to abolish all laws and mechanisms that restrict the legal capacity of PWDs, and to create supportive measures for the exercise of legal capacity that respect the will and preferences of the person.[xxxi]
f) Prohibit by federal law the withholding or withdrawal of life-sustaining medical treatment in violation of the individual's decision in favor of such treatment, or the decision of a surrogate upholding the person's wishes.
g) Collect data about the circumstances surrounding any surrogate decision to withhold life-sustaining treatment, to permit investigation of potential conflict of interest. Such data should include diagnoses, prognoses, financial circumstances, the type of medical treatment withheld or withdrawn (including food and water), and evidence of legal or financial disputes concerning the identity or decisions of the surrogate.
h) Investigate at the federal level abuses of laws legalizing assisted suicide and any funding policies that favor assisted suicide over treatment or support services.
i) Prohibit civil commitment and compulsory mental health treatment under federal law, as forms of disability-based discrimination and violence, which may amount to torture and ill-treatment and cannot be justified by any legitimate state interest.
j) Ensure that states repeal or nullify their mental health laws, such New York's MHL Article 9, in their entirety, and ensure that laws require free and informed consent of the person concerned as the only basis for inpatient and outpatient mental health treatment. In the case of children, or if the person's will and intention is unclear, intrusive and irrevocable measures such as electroshock and neuroleptic drugs[xxxii] must not be used.
k) Ensure that states and private entities offering mental health services do not institutionalize children based on disability or compel them to receive mental health treatment against their will or that of their parents; and should ensure that parents receive support to raise children with disabilities in the community. Shift federal and state funding from institutions to community-based supports.
l) Make available alternatives to the traditional system such as youth-to-youth peer support, family support, and strength-based innovative community-based models that have shown to be effective, such as the SAMHSA-recognized Wrap-around and System of Care

services. These options should be youth and family centered, culturally competent, and advance the human potential of children.

m) Ensure that electroshock is banned everywhere for children under 16 years of age.
n) Ensure that restraint, seclusion, and aversive interventions are eliminated nationwide from all schools, mental health facilities and other institutions.
o) Ensure that DOJ CRIPA settlement agreements are directed towards improving community integration. Minimum requirements for any agreement should include provision of services in the most integrated setting and the recognition and acceptance that all individuals can be served in the community; individual involvement; informed decision-making and choice; person-centered planning; developing and expanding community capacity; monitoring of community placements; and quality assurance.
p) End the institutional bias in federal law, which requires states to provide institutional services while making community-based services optional. The Community Choice Act (S683/HR1670) would establish a national program of community-based attendant services and supports for PWDs, regardless of age or diagnosis. This legislation would allow individuals who are entitled to institutional services to choose where they receive their services and supports.
q) Create peer-run crisis respite centers in every state and every county as a meaningful alternative to psychiatric emergency rooms.
r) Adopt the Housing First model as federal policy.

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United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Criminal and Juvenile Justice

Submitted by: [1]

Campaign for the Fair Sentencing of Youth
Drug Policy Alliance
Justice Now
The Sentencing Project

Endorsed by:

American Academy of Child and Adolescent Psychiatry (AACAP); American Civil Liberties Union (ACLU) of Mississippi; The Children and Family Justice Center; Center for Children's Law and Policy; Center for Community Alternatives; Champaign-Urbana (Illinois) Citizens for Peace and Justice; Civil Justice Clinic, Washington University School of Law; Colorado Criminal Defense Bar; Families Against Mandatory Minimums (FAMM); Human Rights Caucus, Northeastern University School of Law; Interfaith Drug Policy Initiative; Iowa Coalition 4 Juvenile Justice; Juvenile Justice Initiative of Illinois; Juvenile Justice Project of Louisiana; Justice Policy Institute; Juvenile Law Center; Law Offices of Deborah LaBelle; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self Determination; Meiklejohn Civil Liberties Institute; The Mental Health Association of the District of Columbia; Metro Atlanta Task Force for the Homeless; Midwest Coalition for Human Rights; National Center for Youth Law; National Juvenile Justice Network; National Prison Project of the ACLU; The National Social and Economic Rights Initiative (NESRI); Nebraska Coalition for the Fair Sentencing of Youth; The Pendulum Foundation; Public Interest Projects; Rainbow PUSH Coalition; Ute Ritz-Deutch, Ph.D.; Sex Abuse Treatment Alliance & CURE-SORT; South Bay Communities Alliance; Students for Sensible Drug Policy; Treaties Task Force of the Social Justice Center of Marin; United Church of Christ/Justice and Witness Ministries; Youth Justice Coalition; Youth RISE (Resources, Information, Support and Education)

I. EXECUTIVE SUMMARY

1. The United States, in the administration of its criminal justice system, continues to fall short of meeting its international human rights obligations, in accordance with the Universal Declaration of Human Rights and other international instruments, including U.N. treaties that it has ratified. At issue are violations of rights protected by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and, the International Convention to Eliminate All Forms of Racial Discrimination. The international human rights framework also provides special protections and assistance for children who are criminally involved. In order to bring its juvenile and criminal justice systems in line with its human rights obligations, the U.S. must, as a matter of urgency, address the following pervasive issues and practices, which violate or undermine applicable human rights norms and standards:

2. Sentencing:
   - Racially disparate sentencing
   - Juvenile life without parole sentencing
   - Collateral consequences of felony convictions

3. Conditions of Confinement
   - Violations of incarcerated women's reproductive rights
   - Treatment of mentally ill prisoners
   - Confinement in supermax facilities

4. Prison Oversight
   - Barriers imposed by the Prison Litigation Reform Act

II. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

A. Sentencing Practices

1. Racially Disparate Sentencing

5. In violation of Articles 2 and 5(a) of the U.N. Convention on the Elimination of All Forms of Racial Discrimination (CERD)[2] and Article 26 of the International Covenant on Civil and Political Rights (ICCPR)[3], the U.S. criminal justice system operates according to a double standard in its imposition of mandatory minimum sentences[4] for drug-related offenses. The inconsistent application of penalty statutes, racially biased sentencing schemes, and the failure to consider racial and ethnic impact of sentencing and corrections legislation has resulted in disparate sentencing based on race.

6. Mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. The United States Sentencing Commission, in a 15-year overview of the federal sentencing system since the full implementation of the Sentencing Reform Act of 1984, concluded that "mandatory penalty statutes are used inconsistently" and disproportionately affect African American

defendants.[5] As a result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.[6]

7. Due in large part to the racially disparate application of mandatory sentences, African Americans, on average, now serve almost as much time in federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).[7] Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62 percent, compared with a 17 percent increase among white drug defendants.[8]

8. The broad range of mandatory minimum sentences for drug offenses includes substantially different penalty structures for crack and powder cocaine. For example, a defendant convicted of possessing five grams of crack cocaine – between 10 and 50 doses – receives a five-year mandatory sentence. To receive the same sentence for a powder cocaine violation, a defendant would have to possess 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the "100-to-1 sentencing disparity."

9. A 2002 Sentencing Commission report found the average sentence for less than 25 grams of crack cocaine was 65 months, compared to 14 months for the same quantity range of powder cocaine.[9] Despite the fact that two-thirds of regular crack cocaine users in the U.S. are either white or Latino, 80 percent of those sentenced in federal court for a crack cocaine offense are African American.[10]

10. A bill pending in Congress will reduce the sentencing disparity between crack and powder cocaine, but it will still treat low-level offenses involving crack cocaine more harshly than powder offenses. While the legislative changes to the crack cocaine penalty statute would mark progress, they do not fully address the distinct racial disparity the law created in the federal criminal justice system.

2. Juvenile Life Without Parole Sentencing

11. In the U.S., there are more than 2500 people serving life without the possibility of parole sentences for crimes committed before they turned 18.[11] This is the harshest punishment imposed on young people in the United States, as the U.S. Supreme Court ruled it unconstitutional to execute youthful offenders in 2005. The U.S. is the only nation in the world known to impose life without the possibility of parole – an irrevocable and final judgment – on people under age 18.[12]

12. Sentencing youthful offenders to life in prison without the possibility of parole violates or drastically undermines at least three international treaties to which the U.S. is a party: the ICCPR; the CERD; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[13] The international committees responsible for monitoring compliance with these treaties have criticized the U.S. for its continued use of juvenile life without parole as a form of punishment.[14]

13. Juvenile life without parole sentencing violates the rights and special protections given to children under the international human rights framework. Specifically, life without parole sentences for those who commit their crimes before the age of 18 is a prohibition that is universally applied outside of the U.S.[15] Article 37 of the United Nations Convention on the Rights of the Child (CRC),[16] which only the United States and Somalia have not ratified, explicitly prohibits life without parole sentences for children. The ICCPR, at Articles 10.3 and 14.4, requires that youthful offenders be treated in accordance with their age and the desirability of promoting their rehabilitation.

14. The imposition of life without parole sentences on young people is especially cruel because children are different from adults. Juvenile justice is founded on the majority view that children, even those convicted of grave crimes, deserve the opportunity for second chances. Behavioral research confirms what is recognized by international, federal, and state laws: children do not have adult levels of judgment, impulse control, or ability to assess risks. There is widespread agreement among child development researchers that young people who commit crimes are more likely to reform their behavior and have a better chance at rehabilitation than adults.[17] The Supreme Court agrees - in *Roper v. Simmons* the Court explained, "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[18] Youth deserve meaningful and periodic reviews of their life sentences, to ensure that those who can prove that they have reformed are given an opportunity to re-enter society.

3. Collateral Consequences of Felony Convictions

15. In violation of the CERD Articles 3 and 5(e)(iii), which guarantee the right to social services, housing, and employment without racial discrimination in purpose *or effect,* the United States law excludes people convicted of felony drug offenses from economic aid programs, including the Supplemental Nutritional Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and housing assistance programs. Denying these critical assistance programs harms the 700,000 people who leave prison every year by creating obstacles to successful reintegration into communities after incarceration and complicates family reunification. A disparate rate of incarceration for racial and ethnic minorities translates in to significant racial and ethnic disparities among those impacted by the collateral consequences of felony convictions.

16. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 permitted the denial of food stamp and TANF eligibility of ex-drug offenders. By 2005, most states (35) had enacted laws that modified the ineligibility of drug offenders to receive TANF or SNAP.[19] However, many states continue to fully enact these bans. Of the individuals convicted of a drug-related crime and released from prison in states with SNAP and TANF bans, about one-fourth in 2001 were parents who could have been eligible for food stamps.[20] In 2003, according to the HIRE Network, it was estimated that 92,000 women were ineligible to receive welfare benefits due to this law, 48 percent of whom are African American or Latina. The United States Government Accountability Office noted in a 2005 report that female ex-offenders are more likely to experience the

negative impact of the food stamps bans as they are almost twice as likely to live with their minor children and have low incomes—elements which would make them eligible had they not been convicted of a drug conviction.[21]

17. The United States Housing Act of 1937 and the 1998 amendment to it, the Quality Housing and Work Responsibility Act, currently allow for a Public Housing Authority (PHA) to terminate the lease of a tenant based on a drug conviction. According to current PHA policy, tenants who live with a person convicted of a drug crime, who may or may not be a tenant, can be evicted, even if he or she had no foresight or ability to control the occupant's current or past behavior.[22] This of course has serious repercussions for the children or dependants, spouses, and even parents of individuals previously convicted for using or selling drugs. Instead of helping needy families, this policy leaves families without a home and separates them.

18. Due to the racial disparities in law enforcement and criminal justice practices, the number of those exposed to collateral consequences is racially disparate, with African Americans bearing the brunt of the policies. Federal policies should not discriminate against former drug users, families of current drug users, or individuals who are trying to reenter back into society. These policies impose unfair restrictions on individuals whose only crime may be possession and creates a severe barrier for people who are struggling with drug problems to regain and maintain control in their lives and keep families together. By rendering people with drug problems hungry and homeless, the United States exacerbates, not ameliorates, the problems associated with drug use and misuse and our criminal justice system.

B. Conditions of Confinement

1. Violations of Incarcerated Women's Reproductive Rights

19. As of December 31, 2008, 114,852 women were incarcerated in U.S. federal and state prisons.[23] Two-thirds of women in state prisons are incarcerated for non-violent crimes – crimes that frequently arise out of drug addiction and poverty such as drug sales, larceny, and fraud.[24] Women of color are imprisoned at alarmingly disproportionate rates: two-thirds of women held in local jails and state and federal prisons are women of color.[25] And the majority of incarcerated women are already mothers to, and the sole support and caregivers of, young children.[26]

20. The forced, coerced, and uninformed sterilization of women of color is regularly practiced in California state women's prisons. Longitudinal data gathered from California's women's prisons since 2007 has found aggressive, medically unnecessary sterilization primarily of women of color, including nonconsensual tubal ligation after birth and coerced partial and complete hysterectomies and oopherectomies.[27] These findings indicate that the California women's prison system is also destroying people's reproductive capacity through abysmal baseline gynecologic care leading to infertility and imprisonment throughout one's reproductive years due to mandatory minimum and life without parole sentencing trends.

21. A forthcoming report by Justice Now also details the degrading treatment of pregnant, birthing and post-partum people in California women's prisons, including verbal and physical abuse, substandard medical care, poor diet, high risk of maternal complications and death, obstruction of breastfeeding, and the shackling of pregnant women in transport to the hospital. Finally, this report documents an alarming rate of women in prison who, due to prison regulations and domestic law, are forced to terminate their parental rights over their children and give them up to family members, child protection services, or to the foster care system.

22. These practices are in violation of domestic and international law, specifically Articles 2, 7, 17, and 23 of the ICCPR, Articles 5(e)(iv) of the CERD, and Article 1 of the CAT. These articles span the right to freedom from discrimination based on status, equality before the law, the right to privacy, the right to family, the right to freedom from racial discrimination in health care, and the right to freedom from torture, other cruel, inhuman or degrading treatment. These abuses are also violations of Articles 12 and 17 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the rights to freedom from discrimination in health care and family relations[28], and Article 12 General Comment 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to the highest attainable standard of health.[29]

2. Treatment of Mentally Ill Prisoners

23. According to Human Rights Watch, "prisons have become the nation's primary mental health facilities."[30] According to the most recent report by the BJS, 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail prisoners in the U.S. suffer from mental illness.[31] Between 16 percent and 21 percent of prisoners have a severe mental illness, defined as schizophrenia, bipolar disorder, or severe depression.[32] And experts estimate that people with mental retardation may constitute as much as ten percent of the prison population.[33]

24. Treatment for mental illness in prison is extremely limited and, inmates often do not receive treatment at all, despite reporting suicidal thoughts, self-injury, and paranoia.[34] When provided, it often consists of brief psychologist visits to cell-fronts or the provision of psychotropic medication.[35] The state of Georgia, for example, recently reported that it had "reduced psychiatrist and psychologist staffing by 30 percent with significant budget savings" despite "moderate to significant medical and legal risk."[36] However, the U.N. Human Rights Committee has stated unequivocally that humane treatment of prisoners "cannot be dependent on the resources available."[37]

25. Article 10 of the ICCPR creates an affirmative duty to provide rehabilitation for inmates by requiring that the "essential aim" of imprisonment is "reformation and social rehabilitation." This includes access to mental health services. However, only one-third of U.S. prisoners categorized as having a mental health condition are given any treatment while in prison.[38] Instead, prison officials frequently segregate mentally ill inmates including in solitary confinement, [39] on the basis that their mental illness prevents them from conforming to prison rules or leads them to act out.[40] A federal court determined

that half of the mentally ill inmates in one state were living in the segregation units of their prisons.[41] Inmates with serious mental illnesses are often haphazardly released into the community without having received needed treatment, making them likely to recidivate.[42] Such practices effectively penalize the mentally ill for their illness, in violation of the Convention on the Rights of Persons with Disabilities (CRPD), to which the U.S. became a signatory in 2009.[43]

3. Confinement in Super-Maximum Security (Supermax) Prisons

26. The use of supermax prisons, sometimes referred to as prisons within prisons, is a growing trend in the U.S. Currently, there are approximately 20,000 inmates in 57 supermax prisons in 40 states.[44] In these facilities, prisoners serve lengthy terms in conditions that amount to solitary confinement. Prisoners are kept in cells that generally measure 60 to 80 square feet for 23 hours per day; exercise and recreation time is spent in another small cell or outdoor cage; books and other materials are severely restricted; and, prisoners' day-to-day interpersonal contact is limited to prison officials.[45]

27. Because supermax facilities are intended to house inmates who are viewed as the most dangerous in the prison system,[46] many prisoners in these facilities are held in solitary confinement indefinitely. For example, one-third of the inmates at the Tamms Correctional Center in Illinois have been incarcerated there since it opened in 1998.[47] Lifetime confinement to supermax facilities is an increasing concern as the U.S. engages in criminal prosecution of terrorist suspects who are housed almost exclusively in supermax facilities.[48]

28. Research has repeatedly shown that the use of solitary confinement causes profound psychological effects, including hallucinations, irrational rage, suicidal thoughts and behavior, and loss of self-control.[49] A U.S. court has concluded that supermax conditions "may well hover on the edge of what is humanly tolerable for those with normal resilience, *particularly when endured for extended periods of time*."[50] Moreover, the Special Rapporteur on Torture and the United Nations Human Rights Committee have criticized the excessively harsh conditions in some U.S. supermax facilities, observing that solitary confinement may amount to torture or other ill treatment.[51]

29. Although legal reform has improved the process by which prisoners are assigned to supermax facilities, prison officials maintain significant discretion in housing assignments of prisoners.[52] Assignments are frequently made based on subjective judgments regarding dangerousness[53] that frequently involve a determination of whether the inmate is a member of a gang, resulting in the disproportionate classification of African-American and Latino inmates to supermax units.[54] Such practices violate the CERD, including Articles 2.1(c) and 5(a). In addition, the creation of new supermax units leads to "net widening," in which additional inmates are deliberately deemed to meet the requirements for supermax classification when more supermax beds become available.[55] Moreover, assignment to supermax facilities is frequently used to protect vulnerable inmates, who may benefit from greater protection but who are needlessly penalized by the isolation and restricted movement.[56]

C. Prison Oversight

1. Barriers Imposed by the Prison Litigation Reform Act (PLRA)

30. The Prison Litigation Reform Act of 1995[57] (PLRA) created a separate and unequal civil justice system for prisoners in the United States. Although the stated purpose of the PLRA was to curtail allegedly frivolous litigation by prisoners,. in practice the law creates nearly insurmountable barriers for prisoners seeking to vindicate their civil and human rights in court and greatly undermines the crucial oversight role played by federal courts in addressing violations of constitutional and other federal rights in prisons, jails and youth detention facilities.

a. The Physical Injury Requirement

31. The PLRA's "physical injury" requirement prevents domestic prisoners, juveniles, and pre-trial detainees from obtaining money damages in federal court for rights violations that do not result in a physical injury, no matter how egregious. Even some forms of torture or cruel and demeaning treatment have been found to lack a "physical injury" for PLRA purposes.[58] The following are a few examples of cases in which prisoners have been denied relief because they had no "physical injury":

> Actions challenging the violation of prisoners' religious rights guaranteed by the U.S. Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act;[59]
>
> An action challenging sexual assault including forcible sodomy;[60]
>
> Cases challenging a prisoner's false arrest and illegal detention;[61] and
>
> An action challenging placement in filthy cells and exposure to the deranged behavior of psychiatric patients.[62]

b. The PLRA's Exhaustion Requirement

32. The PLRA also requires courts to dismiss a prisoner's case if he or she has not completed all internal complaint procedures at his or her facility prior to filing suit. This provision of the PLRA is often referred to as the "exhaustion requirement."[63] On its face, encouraging correctional facilities to manage problems and improve conditions without court intervention is a sound idea. Unfortunately, in practice, this provision of the PLRA has done great damage to the ability of prisoners to seek protection and remedies for serious violations of their civil and other human rights.[64]

33. Arbitrary and burdensome grievance requirements and procedures prevent prisoners from seeking redress for serious rights violations. Deadlines are very short in many grievance systems, almost always a month or less,and often five days or less.[65] Nonetheless, these deadlines operate as statutes of limitations for federal civil rights claims. Moreover, a typical system does not have just one deadline that could lead to forfeiture of a claim; it may have three or more such deadlines as prisoners must appeal to all levels of the grievance system.

34. As a general matter, prisoners have very low rates of literacy and education.[66] Moreover, the number of severely mentally ill and cognitively impaired persons in prison is staggering.[67] For these individuals, the convoluted requirements of most grievance systems and internal complaint processes are virtually impossible to navigate. Thus, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of technical misunderstandings rather than lack of legal merit.

35. Finally, prisoners who do file grievances often face threats and retaliation. Under some grievance regimes, prisoners are even required to obtain grievance forms from or file their grievances with the same officials who have abused them or violated their rights.. Many prisoners are simply too afraid to file grievances for fear of the consequences—and with good reason.[68] All these factors bar prisoners' access to the courts and undermine remedies for serious rights violations.

b. Application of the PLRA to Juveniles

36. Although juvenile detainees are far less likely than adult prisoners to file lawsuits, they must nevertheless comply with all PLRA requirements.[69] Application of the PLRA to incarcerated youth is especially problematic because youth are exceptionally vulnerable to abuse in institutions and often lack the understanding and developmental capacity to complain effectively. Evidence of widespread staff sexual and physical abuse and harassment of youth in custody has been an issue in states from New York to Hawaii.[70] In the Texas juvenile system, boys and girls were sexually and physically abused by staff, and faced retaliation, including being thrown into an isolation cell in shackles, if they complained.[71]

c. The PLRA Violates Human Rights Protections

37. The PLRA's restrictions on access to the courts for prisoners undermine the core international human rights principle of equality of all persons before the law embodied in the ICCPR.[72] Indeed, the ICCPR specifically requires that "[a]ll persons shall be equal before the courts and tribunals."[73] The PLRA further undermines the core human rights principle that persons whose rights are violated are entitled to an effective remedy.[74] These principles are embodied in the ICCPR and the Convention Against Torture.[75] The CAT Committee clearly recognized that the PLRA undermines effective remedies for prisoners in its most recent review of U.S. compliance with the CAT in 2006, when it called for repeal of the PLRA's physical injury requirement.[76] CERD similarly requires adequate redress for victims of racial discrimination.[77] In addition, the PLRA's application to children disregards international human rights principles embodied in the ICCPR[78] and the CRC[79] that recognize the special needs and status of children and the obligation to provide incarcerated youth with age-appropriate treatment.

38. The barriers posed by the PLRA to prisoners seeking relief through the courts underscore the urgent need for the U.S. to participate in two mechanisms already in place that would significantly enhance external oversight of detention facilities. In particular, the U.S. has not signed the Optional Protocol to the Convention Against Torture

(OPCAT)[80], and refuses to recognize Article 22 of the CAT. The additional oversight provided through the OPCAT is urgently needed in the U.S. in order to prevent a range of human rights abuses in detention, including those discussed in this report.[81] The U.S. should also recognize the competence of the CAT Committee to consider communications from or on behalf of detainees under Article 22 of the CAT, once they have exhausted available avenues of relief within the U.S. legal system. Permitting Article 22 communications - which would require the U.S. to report in writing to the CAT Committee the steps it has taken in response to individual communications - would help address abuse that often remains unresolved by the U.S. legal system.

III. Concluding Recommendations

A. General Recommendations

1. Comply fully with international treaty obligations under the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
2. Ratify the following international instruments: the Optional Protocol to the Convention Against Torture (OPCAT); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and, the International Convention on the Rights of the Child (CRC);
3. Permit Article 22 communications with the Committee Against Torture; and,
4. Enact the *Prison Abuse Remedies Act of 2009*, H.R. 4335 (PARA).[82]

B. Issue-Specific Recommendations

1. Sentencing Practices

Racially Disparate Sentencing

5. End all mandatory sentencing practices.
6. Amend penalties for crack cocaine to be equivalent with those for powder cocaine, and eliminate similar egregious sentencing disparities.
7. Mandate the preparation of racial/ethnic impact statements to be submitted in conjunction with proposed sentencing and corrections legislation.

Juvenile Life Without Parole Sentencing

8. Abolish the practice of sentencing people under age 18 to life in prison without the possibility of parole.
9. Provide meaningful review of the sentences of people currently serving life without parole for crimes committed under age 18 after they have served 10 years, and every three years thereafter, to determine whether they have been rehabilitated and may return to the community.

Collateral Consequences of Felony Convictions

10. End implementation of all practices of collateral consequences for drug convictions.
11. Reinstate benefits for individuals with prior drug convictions.

2. Conditions of Confinement

Violations of Incarcerated Women's Reproductive Rights

12. Cease performing sterilizations in the prison setting and comply with domestic and international law prohibiting the use of federal funds for sterilization in the incarceration settings.
13. End the practice of shackling of incarcerated pregnant women, including in transport to and from the hospital setting.

Treatment of Mentally Ill Prisoners

14. Develop and implement quality screening methodology to identify mental illness at prison intake in order to provide treatment as needed.
15. Define minimum standards for mental health treatment of those inmates.

Confinement in Super-Maximum Security (Supermax) Prisons

16. Cease the placement of vulnerable inmates, including the mentally ill, in solitary confinement conditions where less punitive alternatives are available.
17. House prisoners in the least restrictive unit possible, in order to cease the expansion of supermax confinement.

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[1] *The Campaign for the Fair Sentencing of Youth* is dedicated to ending the practice of sentencing youth to prison for the rest of their lives without hope of release. *The Drug Policy Alliance Network (DPA Network)* is the nation's leading organization promoting policy alternatives to the drug war that are grounded in science, compassion, health and human rights. *Justice Now* works with women prisoners and local communities to build a safe, compassionate world without prisons. *The Sentencing Project* is a national organization working for a fair and effective criminal justice system by promoting reforms in sentencing law and practice, and alternatives to incarceration.

2 CERD, adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 3, 1969, ratified by the United States on October 21, 1994.

3 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.

[4] Mandatory minimum sentences are statutorily prescribed terms of imprisonment that automatically attach upon conviction of certain criminal conduct, usually pertaining to drug or firearm offenses. Absent very narrow criteria for relief, a sentencing judge is powerless to impose a term of imprisonment below the mandatory minimum. Sentences are disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences for drug offenses rely solely upon the weight of the substance as a proxy for the defendant's role and culpability.

[5] United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 2003, at 89.

[6] *Id.* at 122.

[7] BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS*, 2003*, NCJ 210299, October 2005, at 112.

[8] *Id.*; BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, NCJ 163063, April 1998, at 85.
[9] United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 2002.
[10] Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health*: *Detailed Table J*, 2006, at Table 1.43a; and, United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy,* May 2007, at 15.
[11] HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008 2 (2008), http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf.
[12] Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law & Practice,* University of San Francisco Law Review 42.4 (2008): 938-1044. Available at: http://works.bepress.com/connie_de_la_vega/1.
[13] 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 (1983), entered into force June 26, 1987, ratified by the United States on October 21, 1994.
[14] Brief of Amnesty Int'l, et al. as Amici Curiae Supporting Petitioner at 1-2, Graham v. Florida, 130 S.Ct. 357 (2009) (No. 08-7412) and Sullivan v. Florida, 129 S.Ct. 2157 (2009) (No. 08-7621), at 24-30.
[15] *Id.*
[16] CRC, adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.
[17] Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741,742 (2000).
[18] *See Roper v. Simmons, 543 U.S. 551, 569–73 (2005).*
[19] United States Government Accountability Office. (Sep 2005). *Drug Offenders: Various factors may limit the impacts of federal laws that provide for denial of selected benefits*. Retrieved from http://www.gao.gov/highlights/d05238high.pdf , 17 September 2008.
[20] *Id.*
[21] *Id.*
[22] Department Of Housing And Urban Development Y. Rucker (00-1770) 535 U.S. 125 (2002)
[23] BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PRISONERS IN 2008 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.
[24] *Id.*
[25] Beth E. Richie, *Challenges Incarcerated Women Face as They Return to Their Communities: Findings from Life History Interviews*, 47 CRIME & DELINQ. 368, 368–89 (2001).
[26] *Id*.
[27] Justice Now Interviews with people imprisoned at CCWF (Jul. 2004, Jun. 2006, Sep. 2006, and Jun. 2007). Anecdotal evidence further supports the data. For example, a woman imprisoned at CCWF in a July 17, 2008 interview observed, "I finally got sent to [the hospital] to get a tonsillectomy, and I met five women from [the prison] getting hysterectomies within a 24 hour period. There's a joke going around that [the hospital] is selling women's uteruses."
[28] CEDAW, articles 12 and 17, Dec. 18, 1979, 1249 U.N.T.S. 513.
[29] Committee on Economic, Social, and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, General Comment 14].
[30] Human Rights Watch, ILL-EQUIPPED: US PRISONS AND OFFENDERS WITH MENTAL ILLNESS, October 13, 2003, http://www.hrw.org/reports/2003/usa1003.
[31] James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report* 1, Department of Justice, Bureau of Justice Statistics, December 14, 2006.
[32] National Commission on Correctional Health Care, PREVALENCE OF COMMUNICABLE DISEASE, CHRONIC DISEASE, AND MENTAL ILLNESS AMONG THE INMATE POPULATION, INMATES: A REPORT TO CONGRESS (2002), http://www.ncchc.org/stbr/volume1/chapter3.pdf.
[33] Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/faqs/crimqa.html.

[34] *Hadix v. Caruso*, 4:92-CV-110, 2006 WL 3275865 (W.D. Mich. Nov. 13, 2006).
[35] *See* Human Rights Watch, MENTAL HEALTH, HUMAN RIGHTS, AND U.S. PRISONS (September 22, 2009), http://www.hrw.org/en/news/2009/09/22/mental-illness-human-rights-and-us-prisons#_Prisons_and_Prisoners; Michael Rezendes, *UMass Finds Gap Between Studies, Real Life*, BOSTON GLOBE, Dec. 10, 2007.
[36] Georgia Department of Corrections, Office of Health Services, GEORGIA DEPARTMENT OF CORRECTIONS, HEALTH SERVICES OVERVIEW FOR 2002*,* http://www.dcor.state.ga.us/pdf/hsovrFY03.pdf.
[37] Human Rights Committee, General Comment 21, article 10 (Forty-fourth session, 1992), replaces general comment 9 concerning humane treatment of persons deprived of liberty, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994).
[38] Doris J. James & Lauren E. Glaze, U.S. DEPT. OF JUST. OFFICE OF JUST PROGRAMS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (Dec. 14, 2006).
[39] Thomas White, National Commission on Correctional Health Care, Letter to Gary Maynard, Director of the Iowa Department of Corrections, February 13, 2005, http://www.doc.state.ia.us/publications/DrWhitesFindings.doc.
[40] *See* The Commission On Safety and Abuse in American Prisons, CONFRONTING CONFINEMENT, June 2006.
[41] *Goff v. Harper*, Findings of Fact and Conclusions of Law, No. 4-90-CV-50365 (S.D. Iowa, June 5, 1997).
[42] *See* Fred Cohen, THE MENTALLY DISORDERED INMATE AND THE LAW: 2005 TRENDS AND DEVELOPMENTS UPDATE7.2 (2005) (*describing Brad H. v. City of New York*, 712 N.Y.S.2d 336, 345 (2000).
[43] General Assembly, CRPD, adopted January 24, 2007, A/RES/61/106, entered into force May 3, 2008, signed by the United States on July 30, 2009, http://www.unhcr.org/refworld/docid/45f973632.html.
[44] Daniel P Mears and Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 2006 JUSTICE QUARTERLY 232, 232-33.
[45] Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 2003 Crime & Delinquency 124, 127.
[46] Daniel P Mears and Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 2006 JUSTICE QUARTERLY 232.
[47] Amnesty International, *Conditions Must be Improved at Tamms Correctional Facility in Illinois*, Mar. 25, 2009.
[48] Carrie Johnson and Walter Pincus, *Supermax Prisons in U.S. Already Hold International Terrorists*, THE WASHINGTON POST, May 22, 2009.
[49] For a review of research studies, *see id.* at 148.
[50] *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995) (emphasis added).
[51] INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENt, July 28, 2008, 10-11; Estrella v. Uruguay, Comm. No. 74/1980, U.N. GAOR Hum. Rts, Mar. 29, 1993.
[52] *Wilkinson v. Austin*, 504 U.S. 209 (2005); Leena Kurki and Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 2001 CRIME AND JUSTICE: A REVIEW OF RESEARCH, 385-424.
[53] CONFRONTING CONFINEMENT, *supra* note 44 at 56.
[54] Terry Kupers, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 237 (1999).
[55] *See* Kurki and Morris, *supra* note 9; *Jerry R. DeMaio, If You Build It, They Will Come: The Threat of Overclassification In Wisconsin's Supermax Prison,* 2001 WIS. L. REV. 207, 219-20.
[56] CONFRONTING CONFINEMENT, *supra* note 44 at 56.
[57] Pub. L. 104-134 (Apr. 26, 1996).
[58] The provision reads as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).
[59] *Searles v. Van Bebber,* 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez,* 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights).

[60] *See Hancock v. Payne,* 2006 WL 21751 at *1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady,* 2006 WL 314514 at *2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed penis barred by provision).

[61] *Young v. Knight,* 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); *see also Colby v. Sarpy Co.,* 2006 WL 519396 (D. Neb. Mar. 1, 2006) (dismissal of a claim of wrongful confinement for four months). Other examples include: *Luong v. Hatt,* 979 F. Supp. 481 (N.D. Tex. 1997) (involving claim that prison officials failed to protect prisoner from repeated beatings that resulted in cuts and bruises), and *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005) (claim that prison officials deliberately caused prisoner to experience pain and depression by denying him psychiatric medications).

[62] *Harper v. Showers,* 174 F.3d 716 (5th Cir. 1999).

[63] 42 U.S.C. § 1997e(a).

[64] *See* Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA[IS THERE A WORD MISSING HERE?]),* 29 Cardozo Law Review 291, 321 (2007) (reporting that in cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo,* 548 U.S. 81, 126 S. Ct. 2378 (2006), all of the prisoner's claims survived in fewer than 15 percent of reported cases).

[65] *See Woodford v. Ngo*, *supra* note 68 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two and five days).

[66] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (2003), available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

[67] See discussion at pages 5-6 for further information.

[68] *See, e.g., Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002).

[69] *See* 18 U.S.C. § 3626; 42 U.S.C. § 1997e; 28 U.S.C. § 1915; and 28 U.S.C. § 1915A. [MORE SPECIFIC CITATIONS WOULD BE GOOD]

[70] *See, e.g.,* American Civil Liberties Union of Hawai'i, "Hawai'i Youth Correctional Facility to Pay Over Half a Million Dollars for 'Relentless Campaign of Harassment' of Gay and Transgender Youth" (June 15, 2006) (threats of violence and physical and sexual assault), available at http://www.acluhawaii.org/news.php?id=24; Letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 1996, available at http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls 44-56, 63-71 (2006).

[71] *See* Gregg Jones, et al., *TYC Facilities Ruled by Fear,* Dallas Morning News, March 18, 2007, available at http://www.dallasnews.com/sharedcontent/dws/dn/latestnes/stories/031807dnprotycretalii.

[72] The ICCPR, at Article 26, provides that :

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[73] *Id*. at art. 14, sec. 1.

[74] *Id*. at art. 2, sec. 3.

[75] CAT, art. 14, sec. 1.

[76] Committee Against Torture, *supra* note 24, ¶29.

[77] CERD, art. 6.

[78] ICCPR, art. 24, sec. 1; art. 10, sec. 3.

[79] CRC, art. 37(c).
[80] OPCAT, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002). *See also* Just Detention International, Fact Sheet, U.N. Optional Protocol to the Convention Against Torture (OPCAT) (2009).
[81] Similarly, Rule 55 of the Standard Minimum Rules for the Treatment of Prisoners calls for regular inspections of detention facilities by qualified inspectors appointed by a competent authority.
[82] PARA reinstates the ability of prisoners to challenge conditions of confinement that violate their constitutional rights by reforming the PLRA. In particular, PARA addresses the unintended consequences of the PLRA by repealing the "physical injury" requirement; exempting juveniles under age eighteen (18) from the burdens created by the PLRA; and amending the "exhaustion requirement" to allow prison officials to deal administratively with problems in the first instance, but without the ability to block legitimate claims from reaching the federal courts.

United States of America

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The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin

Submitted by:[i]

Rights Working Group (RWG)

American-Arab Anti-Discrimination Committee (ADC)

Asian American Justice Center (AAJC)

Center for Constitutional Rights (CCR)

National Immigration Law Center (NILC)

UNC School of Law Immigration and Human Rights Policy Clinic

Endorsed by: The Advocates for Human Rights; The Arab American Association of New York; The Arab American Family Support Center; The Arab American Institute; The Arab Community Center for Economic and Social Services; The Bill of Rights Defense Committee; The Coalition for Humane Immigrant Rights of Los Angeles; Community to Community; Desis Rising Up & Moving; The Friends Committee on National Legislation; The International Human Rights and Rule of Law Project, Seton Hall University School of Law; JoAnn Kamuf Ward, Human Rights in the U.S. Fellow, Human Rights Institute, Columbia Law School; Justice Now; LatinoJustice PRLDEF; The Leonard Peltier Defense Offense Committee; The Maine People's Alliance; Make the Road New York; The Meiklejohn Civil Liberties Institute (MCLI); Metro Atlanta Taskforce for the Homeless; Muslim Advocates; The National Economic and Social Rights Initiative; The National Immigration Forum; The National Lawyers Guild; The National Lawyers Guild, Anti-Racism Committee; The National Network for Arab American Communities; The National Network for Immigrant and Refugee Rights; The New Jersey Immigration Policy Network; The Northwest Federation of Community Organizations; Public Interest Projects; South Asian Americans Leading Together; Three Treaties Taskforce of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition; Ute Ritz-Deutch, PhD.; World Organization for Human Rights USA; Youth Justice Coalition.

EXECUTIVE SUMMARY

1. As a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), the United States (U.S.) is obligated to ensure the non-derogable right of all people under its jurisdiction to be free from discrimination. This report focuses on U.S. policies and programs that racially profile or that allow for or incentivize the use of racial profiling—resulting in U.S. failure to comply with its obligations to honor the principles of equality and non-discrimination. In this report, and unless specified otherwise, we use the phrase 'racial profiling' to refer to profiling based on race, ethnicity, religion and national origin.

2. The Rights Working Group (RWG) is a national coalition of over 260 organizations working at the national, state, and local/community level and, as such, has access to information pertaining to the implementation of international human rights obligations at all levels of the U.S. government. In preparing a report for the Universal Periodic Review (UPR) process, RWG conducted broad consultation with its member organizations and received significant contributions from these and other partners, including human rights institutes at U.S. law schools. The report was drafted based on submissions from these partners as well as on human rights reports released over the period of the last four years. Following the preparation of a draft report, RWG conducted a comment period during which organizations engaged in the UPR process could provide feedback on and endorse the draft.

3. Two United Nations (UN) human rights treaty bodies have called upon the U.S. government to take specific actions to end racial profiling and fulfill its treaty obligations. In paragraph 24 of its 2006 Concluding Observations of U.S. compliance with the ICCPR (CCPR/C/USA/CO/3/ Rev.1), the Human Rights Committee called upon the U.S. government to "continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials," particularly in state police stops and searches. In paragraph 27, the Committee recommended that "agents who have received adequate training on immigration issues enforce immigration laws." In paragraph 14 of its 2008 Concluding Observations of U.S. compliance with the ICERD (CERD/C/USA/CO/6), the Committee on the Elimination of Racial Discrimination (CERD) recommended that the U.S. "strengthen its efforts to combat racial profiling at the federal and state levels."

4. In both 2008 and 2009, the CERD urged the U.S. to review the National Security Entry-Exit Registration System (NSEERS) and to stop this and other programs that have encouraged racial profiling of Muslims, Arabs and South Asians since September 11th , 2001. It further encouraged the U.S. to ensure that counter-terrorism measures do not discriminate on the grounds of race, color, descent, or national or ethnic group. In fact, despite the Administration's acknowledgement that the NSEERS program has not been effective at identifying potential terrorists, the government has failed to terminate or reform the program.

5. In 2009, the CERD raised concerns about the use of racial profiling in migration policies and urged the U.S. government to reconsider its policy under the 287(g) provision of the 1996 Immigration and Nationality Act. Rather than assess the human rights violations caused by this provision, the Obama Administration in fact expanded the "287(g)" program in 2009, adding programs in new jurisdictions and bringing the total number to 66 programs in place

and 7 additional agreements in negotiation. Despite a series of congressional hearings about abuses caused by the 287(g) program and a Department of Homeland Security (DHS) Office of Inspector General's report identifying serious problems in the implementation of the program, DHS continues to tout it as an important component of immigration enforcement efforts.

6. Beyond 287(g), DHS has also expanded other programs intended to engage state and local criminal justice systems in the enforcement of federal civil immigration laws. Programs such as the Criminal Alien Program and the Secure Communities Initiative have been criticized by advocates as violating the human rights of both non-citizens and citizens, yet these programs have also expanded in the last year and are anticipated to grow in 2010 and 2011.

7. In 2009, the CERD additionally urged the U.S. to eliminate loopholes in the 2003 Department of Justice (DOJ) *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*. The Obama Administration has thus far failed to complete an adequate review of this guidance, which has the effect of perpetuating discrimination.

8. The UN Special Rapporteur on Racism in his 2009 report on his country visit to the U.S. also called attention to the serious problem of racial profiling by law enforcement. He criticized the persistent use of racial profiling by law enforcement officials, particularly in stops and searches of members of the African American and Hispanic communities. He also noted concerns with profiling practices that target people of Arab, Muslim, South Asian or Middle-Eastern descent, particularly in air travel and border control, and condemned the NSEERS program for its ethnic and religious discrimination. The Special Rapporteur urged the U.S. government to adopt federal legislation prohibiting racial profiling and he called for action by state governments to do the same. Despite this recommendation, also urged by the CERD in its follow up letter to the U.S. government in 2009 and its 2008 Concluding Observations of U.S. compliance with the ICERD, the U.S. Congress has not introduced such legislation during this current legislative session, and the Administration has not urged Congress to act.

9. In his January 2007 report, the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism noted that U.S. policies designed to counter terrorism singled out immigrants from Arab and/or Muslim populations and expressed grave concern with the use of terrorist profiles based on race, ethnicity, religion or national origin.

10. We recommend the swift implementation of the following reforms by the U.S. government to combat racial profiling at the federal and state levels and bring the U.S. into compliance with its human rights obligations (these recommendations are further described on page 10):
    a. The President should issue an executive order prohibiting racial profiling.
    b. The Department of Justice should revise its 2003 guidance on racial profiling.
    c. The Obama Administration should urge Congress to introduce and pass meaningful federal legislation prohibiting racial profiling.
    d. The Department of Homeland Security should terminate federal immigration enforcement programs that rely on state and local criminal justice systems.
    e. The 2002 DOJ Office of Legal Counsel (OLC) "inherent authority" memo that reversed historical trends to keep state and local law enforcement out of federal

civil immigration work should be rescinded and OLC should issue a new memo clarifying that state and local law enforcement agents may not enforce federal immigration laws absent formal, federal authority.

f. The Department of Homeland Security should terminate the NSEERS program, repeal related regulations, and provide relief to unfairly impacted individuals.

CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS RELATED TO RACIAL PROFILING

11. In June 2003, the U.S. Department of Justice (DOJ) issued administrative guidance on the use of race by federal law enforcement agencies. While the guidance bans the use of race or ethnicity in routine or spontaneous law enforcement decisions made by federal officers, the guidance suffers from several problematic loopholes. First, it makes an exception with respect to "activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders," an exception that is so broad and ill-defined that it eviscerates much of the purpose of the guidance. Further, the prohibition on racial profiling is weakened because there is no parallel prohibition of profiling on the basis of religion and national origin. The guidance also has limited reach because it does not consistently apply to state or local law enforcement agencies working in cooperation with federal agencies or receiving federal funds. Finally, the guidance has limited effect as it is unenforceable in a court of law.

12. Federal legislative efforts to prohibit racial profiling and overcome the flaws in the existing DOJ guidance have so far not come to fruition. As early as 2001 and again in 2004, 2007 and 2009, Congress has tried to pass the End Racial Profiling Act (ERPA). The latest efforts to introduce ERPA are ongoing, but currently, there is no federal legislation prohibiting the use of racial profiling by law enforcement authorities.

INFORMATION ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS PERTAINING TO RACIAL PROFILING

Racial Profiling by Law Enforcement in Stops, Frisks, Searches and Seizures

13. Racial minorities and indigenous peoples continue to be unfairly targeted by law enforcement based upon subjective identity-based characteristics rather than on identifiable behavior that makes them reasonably suspicious of criminal activity. Across the United States, traffic stops are often used as a pretext for determining whether these individuals are engaged in criminal activity. These racially motivated searches are not productive, resulting in extremely low seizure rates of contraband.

14. A national survey conducted in 2002 by the DOJ found that blacks and Hispanics were two to three times more likely to be stopped and searched than whites but were less likely to be found in possession of contraband.[ii]

15. In Arizona, analysis of data related to highway stops made between July 1, 2006 and June 30, 2007 found that Native Americans were more than 3 times as likely to be searched as whites by officers of the Arizona Department of Public Safety. African Americans and Hispanics

were 2.5 times more likely to be searched than whites. Whites, however, were found to be more likely to be carrying contraband than Native Americans or Hispanics; seizure rates of drugs, weapons or other illegal materials for whites and African Americans were similar.[iii]

16. In Maryland, data from 2008 shows that 70% of individuals searched by Maryland State Police (MSP) on Interstate 95 were people of color (defined in a related report as African American, Hispanic and other non-white individuals). This is a finding very similar to that revealed by data from 2002, the year prior to a consent decree where MSP agreed to improve procedures for motorists to file complaints of racial profiling and where MSP agreed to investigate all such complaints. When the American Civil Liberties Union and the National Association for the Advancement of Colored People filed a public information request for investigative records related to complaints of racial profiling after 2003, MSP refused to turn over these documents and then appealed the ruling of a judge who stated that the documents should be disclosed.

17. In Los Angeles, analysis of data by Yale University[iv] gathered between July 2003 and June 2004 found that the stop rate of blacks and Hispanics, respectively, is 3,400 times and 360 times higher than the stop rate for whites. Compared to stopped whites, stopped blacks and Hispanics are, respectively, 127% and 43% more likely to be frisked. Compared to stopped whites, stopped blacks and Hispanics are, respectively, 76% and 16% more likely to be searched. Simultaneously, the analysis found that these frisks and searches were systematically less productive when conducted on blacks and Hispanics than when conducted on whites. Frisked blacks and Hispanics, respectively, are 42.3% and 31.8% less likely to be found with a weapon than frisked non-Hispanic whites.

18. In New York, the Center for Constitutional Rights (CCR) alleged that the New York Police Department (NYPD) engaged in a policy and practice of illegal racial profiling. In CCR's lawsuit *Floyd v. City of New York*,[v] a court ruling during the discovery period of this case ordered the NYPD to release all of its 'stop-and-frisk' data from 1998 through the beginning of 2008 to CCR. This data revealed that in 2009, a record 575,304 people were stopped, 87 percent of whom were Black and Hispanic individuals—although they comprise approximately 25 percent and 28 percent of New York City's total population respectively. Of the cumulative number of stops made since 2005, only 2.6 percent resulted in the discovery of a weapon or contraband. Though rates of contraband yield were minute across racial groups, stops made of Whites prove to be slightly more likely to yield contraband.[vi]

19. Data from across the country demonstrate that racial profiling is an ineffective crime detection tactic. Racial profiling is also unconstitutional and in violation of human rights obligations. It contributes to mistrust and fear of police by members of minority communities who become less likely to report crimes or serve as witnesses.

Racial Profiling in the Enforcement of Federal Immigration Laws by State/Local Police

20. In the last decade, the U.S. government has increasingly encouraged the involvement of state and local police in the enforcement of federal immigration laws. Formal and informal partnerships between state/local law enforcement and the federal government incentivize

racial profiling by using the state criminal justice system to target perceived foreigners and to channel them into the immigration enforcement system.

21. The 287(g) program is a voluntary partnership initiative authorized by the U.S. Immigration and Nationality Act (INA) of 1996 that allows the Department of Homeland Security's (DHS's) Immigration and Customs Enforcement (ICE) agency to enter into agreements with state and local law enforcement agencies. These agreements delegate specified immigration enforcement duties to state and local law enforcement officers. Implementation of the 287(g) program has not prioritized areas of the country most affected by violent and serious crimes by deportable immigrants. Instead, the jurisdictions that have elected to participate have simply seen a recent influx of immigrants, not an increase in crime: 87% of the jurisdictions, as of February 2009, had shown increases in the Latino population demographic that is higher than the national average.[vii] The Department of Homeland Security's Office of Inspector General, the Government Accountability Office (GAO), and numerous advocacy groups have found that the 287(g) program has not been consistently implemented, that it lacks effective training, communications, and oversight, and that it is missing protections against racial profiling and other civil rights abuses.[viii] Reports by universities, think tanks and advocacy groups have documented allegations of racial profiling and have also found that several jurisdictions have mostly employed their 287(g) authority to process individuals for minor offenses like speeding. ICE-deputized officers in Gaston, North Carolina, for example, reported that 95% of state charges resulting from 287(g) arrests were for misdemeanors; 83% of individuals were charged for traffic violations.[ix]

22. Although ICE announced a new standardized memorandum of agreement (MOA) for the 287(g) program in July 2009, claiming to have created greater oversight and control, state and local law enforcement deputized into the program still only receive a very limited 4-week training session, only some portion of which is spent on the scope of complicated U.S. immigration and constitutional laws. The program also lacks a mechanism to determine whether racial profiling may have led to the arrest. Finally, the new MOA contains a provision preventing local jurisdictions from sharing information about the program with the public, making the program less transparent.

23. The Criminal Alien Program (CAP) is an immigration screening process within federal, state and local correctional facilities designed to allow ICE to identify and place immigration holds or "detainers" on incarcerated individuals perceived to be deportable immigrants and to process them for possible removal before they are released from custody. A recent study by the University of California, Berkeley School of Law examining the CAP program in Irving, Texas strongly suggests that the program incentivized local police officers to racially profile individuals and conduct pre-textual arrests on minor charges including driving offenses, as they knew that federal officers would check immigration status through CAP. The report found that felony charges accounted for only 2% of the ICE detainers issued, while 98% of ICE detainers were issued for misdemeanor offenses. Further, the report found an upward trend in arrests of Latino individuals and referrals to ICE and a downward trend in issued detainers, indicating that after implementation of CAP, the majority of Latino arrests were for misdemeanor offenses of lawful residents.[x]

24. During the booking process, Secure Communities, an immigration enforcement initiative launched by ICE in March 2008, allows the fingerprints of arrestees to be automatically checked against DHS' civil immigration databases in addition to the Federal Bureau of Investigation's (FBI's) criminal databases. Like CAP, Secure Communities has been criticized for creating an incentive for police to arrest people based on racial or ethnic profiling and for pre-textual reasons so that immigration status can be checked. Between inception of the program in October 2008 and the time of a joint announcement by the Secretary of the Department of Homeland Security and the Assistant Secretary for ICE in November 2009, Secure Communities had identified only 11,000 individuals charged with or convicted of Level 1 crimes while more than 100,000 individuals were charged with or convicted of lesser Level 2 and Level 3 crimes.[xi] The "criminal aliens" included in ICE's numbers even included U.S. citizens, since naturalized U.S. citizens have records in immigration databases.

25. These immigration enforcement programs have been implemented absent meaningful transparency and accountability measures and DHS has made it challenging for the public to gain access to information about them. As such, non governmental organizations including the American Civil Liberties Union, the National Immigration Law Center, and the Center for Constitutional Rights have had to resort to making requests for information on the nature, scope and impact of the 287(g) and Secure Communities programs under the Freedom of Information Act. The 287(g) program, the Criminal Alien Program and the Secure Communities program also lack effective complaint procedures. Unable to guarantee confidentiality and reliant on internet access and 1-800 numbers, which may not be accessible by an arrestee from his jail cell and which require proficiency in English, the complaint procedures attached to these programs do not provide an adequate avenue for redress to individuals who may have legitimate complaints regarding violations of their human rights.

26. In some localities, state and local police are enforcing federal immigration laws without any formal authority granted to them by the federal government. Many such agents are operating on what they believe is their "inherent authority" to enforce immigration law, an "authority" advanced through a 2002 Department of Justice (DOJ) Office of Legal Counsel (OLC) memo. Some state and local law enforcement agents have interpreted this memo as granting them the ability to arrest individuals they suspect of lacking legal immigration status and then to turn them over to ICE. State and local agents exercising "inherent authority" act without oversight or training in immigration law enforcement and potential human rights violations.

27. The participation of local police in these programs also undermines community trust in law enforcement. Many independent reports document that immigrant victims and witnesses of crime are reluctant to contact local police for fear of immigration consequences in areas where these programs are in operation.

Racial Profiling in "National Security" or "Counterterrorism" Measures

28. Following the tragic events of September 11, 2001, the U.S. government implemented counterterrorism programs and policies that profiled mostly Muslim, Arab and South Asian

men based on their perceived race, ethnicity, religion or national origin. The government also began aggressively using civil immigration laws, criminal laws and criminal procedures in a sweeping and discriminatory manner to target members of these communities.

29. Muslims, Arabs and South Asians have been profiled at border stops and airports where individuals are singled out for intrusive questions, invasive searches and lengthy detentions without reasonable suspicion of criminal activity. Customs and Border Patrol (CBP) agents question individuals about their faith, associations and political opinions. Travelers have had their personal documents, books and electronic devices seized and many of these travelers believe that the information contained therein has been copied by CBP agents. This unjust treatment is due partly to poor CBP guidance released in 2008 that allows officers to "review and analyze information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States" absent individualized suspicion.

30. In August 2007, the Transportation Security Administration (TSA) released new guidelines to serve as standard operating procedures for airport security screening. Sikh turbans and Muslim head coverings were singled out for screening with higher scrutiny, despite a lack of evidence that these religious head coverings were being employed to hide dangerous items. Widespread profiling of Sikhs occurred as a result, and the Sikh Coalition, an advocacy group, found that with turban-wearing men facing additional scrutiny absent reasonable suspicion at rates so disproportionate as to suggest that nearly all turban-wearing Sikh men were being subjected to additional screening.[xii] In late 2007, a set of options for screening Sikhs that allow, for example, greater privacy, was negotiated by the TSA and Sikh organizations in coordination with the release of TSA's October 2007 "bulky clothing" policy. The policy was implemented with questionable success, with great variance and inconsistency between airports. TSA's broad "bulky clothing" policy through which "passengers could be subjected to additional screening to further evaluate any item that could hide explosives or their components" has resulted in de facto racial profiling, capturing a majority of Sikhs who wear non-form fitting headwear, flowing clothing, or other secular and religious clothing.

31. The Bush Administration released the Attorney General's Guidelines for Domestic FBI Operations (hereinafter "FBI Guidelines") that went into effect on December 1, 2008. They allow for racial profiling by permitting the FBI to open "assessments" and thus investigate anyone without any requirement that there be a factual connection between the agent's authorizing purpose and the conduct of the individual under investigation. Additionally, while the 2003 DOJ Guidance Regarding the Use of Race by Federal Law Enforcement Agencies prohibits the use of race or ethnicity as ***a factor*** leading to investigations, the FBI Guidelines prohibit only investigative activities ***based solely*** on the use of race or ethnicity, essentially eviscerating the purpose of the DOJ Guidance. The FBI Guidelines have been used by the U.S. government to disproportionately target Arabs, Muslims and South Asians and the Obama Administration has not yet repealed these Guidelines.

32. The National Security Entry-Exit Registration System (NSEERS) employed immigration law as a counterterrorism tool. This program required non-immigrant males aged 16-45 from 25 countries (all but one were predominantly Muslim countries, the anomaly was North Korea) to register themselves at ports of entry and local immigration offices for fingerprinting,

photographs, and lengthy interrogations. Many individuals were deported through secret proceedings that took place without due process of law. More than 80,000 men underwent registration and thousands were subjected to lengthy interrogations and detention. Though certain registration requirements have been suspended, individuals who did not comply with NSEERS registration requirements, due to factors including inadequate government notice of the requirements and individuals' fear of potential interrogations, detention and deportation, are still subject to severe penalties which have included the prevention of naturalization or the deportation of individuals. An investigation by the National Commission on Terrorist Attacks upon the United States determined that programs like NSEERS did not demonstrate clear counterterrorism benefits.[xiii]

33. "Operation Frontline," a DHS program initiated after September 11th and designed to "detect, deter and disrupt terrorist operations" utilized the NSEERS database to identify targets. Data from DHS revealed that 79% of individuals investigated were from Muslim-majority countries.[xiv] Data also demonstrated that foreign nationals from Muslim-majority countries were 1,280 times more likely to be targeted than similarly situated individuals from other countries.[xv] Similarly to NSEERS, Operation Frontline was ineffective in producing a single terrorism-related conviction from the interviews conducted under the program.

34. A 2006 study commissioned by the DOJ found that Arab Americans were significantly fearful and suspicious of federal law enforcement due to government policies. It also found that both community members and law enforcement officers determined that diminished trust was the most important barrier to cooperation.[xvi] Community groups have also reported that members of these targeted communities became so afraid of having any contact with officials after post-9/11 "national security" or "counterterrorism" policies were introduced that they did not report domestic violence or other crimes, did not ask for assistance in emergency situations, and, in some cases, did not seek medical treatment[xvii].

ACHIEVEMENTS AND BEST PRACTICES

35. Following the attempted bomb attack on board a flight bound for Detroit, Michigan on Christmas Day 2009, the Transportation Security Administration (TSA) issued new screening standards. Encouraging profiling based on national origin, this guidance mandated that enhanced security measures be applied indiscriminately to individuals who hold passports "issued by or [are] traveling from or through nations that are state sponsors of terrorism or other countries of interest" and, in early 2010, TSA began subjecting airline passengers originating from or passing through these countries to heavy screening including pat-down searches and physical inspections of carry-on items absent any individualized suspicion. The list of countries consisted of predominantly Arab and Muslim nations with the exception of Nigeria—the country of origin of the Christmas Day bomb suspect—and Cuba—a country sending extremely limited numbers of flights to the United States. In early April 2010, the Obama Administration rescinded this policy and stated that it would instead select passengers for screening based on "real-time, threat-based" intelligence information. It is commendable that the Administration took this action in response to pressure from advocates and affected communities who highlighted the discriminatory nature of this policy. However, the risk of ongoing, de facto profiling by border agents given broad discretion to

search and question without individualized suspicion remains a concern for human rights advocates.

36. It is important to note that the U.S. government has taken some critical first steps in response to concerns about racial profiling by instigating a number of investigations into particular programs or law enforcement agencies. For example, in March 2009, the U.S. Department of Justice announced an investigation into the Maricopa County (Arizona) Sheriff's Office to determine whether law enforcement officials have engaged in "patterns or practices of discriminatory police practices and unconstitutional searches and seizures." Sheriff Joe Arpaio has been the subject of a number of complaints, including some from local city mayors and members of the U.S. Congress. Additionally, in September 2009, the Department of Justice initiated another investigation of the police department of East Haven, Connecticut, considering "discriminatory police practices, unlawful searches and seizures, and excessive use of force" after receiving a complaint from advocates and a faith-based group who documented allegations of racial profiling from January 2008. Although these investigations have not yet concluded, it is significant that the U.S. government has undertaken investigations in response to complaints from stakeholders about racial profiling.

37. Another positive step taken by the government was the announcement of an internal review of the 2003 Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. Attorney General Holder promised to review this Guidance after taking office in February 2009, with an eye to making it more effective. Unfortunately, the internal review has not been completed, and federal government agents continue to rely on the Guidance with its substantial loopholes.

38. The Department of Homeland Security (DHS) Office of Inspector General (OIG) initiated an investigation of the 287(g) program in 2009. This investigation followed an independent review in January 2009 by the Government Accountability Office (GAO) which strongly criticized DHS and the 287(g) program for lacking internal controls. The OIG review found that the 287(g) program lacks effective training and oversight mechanisms and that it is missing protections necessary to prevent racial profiling and other civil rights abuses. This review has the potential to spur further reforms and increase accountability for protecting human rights under the program.

39. Finally, various law enforcement executives and associations have collectively and publicly denounced the comingling of civil immigration enforcement and community policing activities, acknowledging that enforcement of federal immigration laws by state and local police negatively impacts public safety.

RECOMMENDATIONS

40. The President should issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, religion or national origin.

41. The Department of Justice should revise its June 2003 guidance on racial profiling to eliminate the loopholes created for national security and border searches, to include religion

and national origin as protected classes, to apply the guidance to state and local law enforcement agencies, and to make it enforceable in a court of law.

42. The 2002 DOJ Office of Legal Counsel (OLC) "inherent authority" memo that reversed historical trends to keep state and local law enforcement out of federal civil immigration work should be rescinded and OLC should issue a new memo clarifying that state and local law enforcement agents may not enforce federal immigration laws absent formal authority granted to them by the federal government.

43. The Department of Homeland Security should terminate the 287(g) program and all other federal immigration enforcement programs that rely on state and local criminal justice systems, including the Secure Communities Initiative and the Criminal Alien Program.

44. The federal government should terminate the NSEERS program and repeal related regulations. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for, or be denied, a specific relief or benefit. Similarly, the federal government should provide relief to individuals who were deported for lack of compliance with NSEERS but otherwise had an avenue for relief.

45. The Obama Administration should urge Congress to introduce and pass meaningful federal legislation prohibiting racial profiling.

ANNEX

For additional information on the programs, policies and cases referred to in this document, please consult the 2009 Follow-up Report to the U.N. CERD Committee, jointly sent by the Rights Working Group and the American Civil Liberties Union, and available at http://www.aclu.org/human-rights_racial-justice/persistence-racial-and-ethnic-profiling-united-states.

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[i] **The Rights Working Group (RWG)** is a national coalition of immigrant rights, human rights, civil liberties and national security organizations that formed after September 11th, 2001 and committed to guaranteeing human rights protections for all people in the United States. **The American-Arab Anti-Discrimination Committee (ADC)** is a civil rights organization committed to defending the rights of people of Arab descent. **The Asian American Justice Center (AAJC)** works to advance the human and civil rights of Asian Americans, and build and promote a fair and equitable society for all. **The Center for Constitutional Rights (CCR)** is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. **The National Immigration Law Center (NILC)** is dedicated to protecting and promoting the rights of low-income immigrants and their family members. **The UNC School of Law Immigration and Human Rights Policy Clinic** is a law school academic/clinical program devoted to representing individuals seeking a pathway to lawful status in the United States. Students and faculty also work on legal projects addressing human rights initiatives.

[ii] U.S. Department of Justice, Bureau of Justice Statistics, Contacts between Police and the Public: Findings from the 2002 National Survey, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf.

[iii] ACLU of Arizona, Driving While Black or Brown: An Analysis of Racial Profiling in Arizona (April 2008) *available at* http://www.acluaz.org/DrivingWhileBlackorBrown.pdf.

[iv] Ayres, Ian and Jonathan Borwsky, Yale Law School, A Study of Racially Disparate Outcomes in the Los Angeles Police Department (October 2008), *available at* http://www.aclu-sc.org/contents/view/3.

[v] CCR is currently involved in class-action litigation against the New York City Police Department (NYPD) challenging the stop-and-frisk practice, *Floyd, et al. v. City of New York, et al*. More information is *available at* http://ccrjustice.org/ourcases/current-cases/floyd-et-al.
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[viii] American Civil Liberties Union of Georgia, Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety (Oct. 2009), http://www.acluga.org/287gReport.pdf; Government Accountability Office, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws (Jan. 2009), *available at* www.gao.gov/new.items/d09109.pdf; University of North Carolina Immigration and Human Rights Policy Clinic and the American Civil Liberties Union of North Carolina Foundation, The Policies and Politics of Local Immigration Enforcement Laws (Feb. 2009); American Civil Liberties Union of Georgia, The Persistence of Racial Profiling in Gwinnett: Time for Transparency, Accountability, and an End to 287(g) (March 2010), *available at* www.acluga.org/GwinnettRacialReportFinal.pdf; Mai Thi Nguyen and Hannah Gill, The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities (The University of North Carolina at Chapel Hill, Feb. 2010) *available at* http://isa.unc.edu/migration/287g_report_final.pdf (last visited April 5, 2010).

[x] Trevor Gardner II and Aarti Kohli, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (The Warren Institute on Race, Ethnicity and Diversity, Sept. 2009), *available at* www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.
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[xii] The Sikh Coalition, The TSA Report Card: A Quarterly Review of Security Screenings of Sikh Travelers in U.S. Airports, (August 2009).
[xiii] Thomas R. Eldridge et al., 9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks upon the United States (2004).
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[xv] Yousef Munayyer, End Counterproductive Racial Profiling, S.F. Chron., Nov. 23, 2008, at G-4, *available at* http://sfgate.com/cgi-bin/article.cgi?f=c/a/2008/11/23/INS3149NFE.DTL.
[xvi] Vera Institute of Justice, Law Enforcement and Arab-American Community Relations after September 11, 2001: Engagement in a Time of Uncertainty 13, 21 (2006).
[xvii] Immigration Policy Center, Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States, May 2004, *available at* http://ispu.org/reports/articledetailpb-63.html.

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
22 November – 3 December 2010

Political Repression – Political Prisoners

Submitted by:

National Conference of Black Lawyers

Malcolm X Center for Self Determination

Endorsed by the following 42 organizations and 50 individuals:

Organizations: A Movement Re-Imagining Change (ARC); African-American Police League and Chicago Human Rights Council; Afrikan Frontline Network; Albuquerque Jericho Movement for Political Prisoners and Prisoners of War; All-African People's Revolutionary Party (GC); Association Americana de Jurists (American Association of Jurists); Black Agenda Report; Black People Against Police Torture; Campaign In Support of C# Prisoners; Chicago Committee To Defend The Bill of Rights; Christian Council on Urban Affairs; Cidadao Global; Coalition of Black Trade Unionists; DC Radio Co-op; Earth First! Prisoner Support Project, Portland, Oregon; Education Not Incarceration, Bay Area Chapter; Family And Friends of Dr. Mutulu Shakur: For Our Children Productions; Free Mumia Abu-Jamal Coalition; Freedom Archives; FTP Movement - Behind Enemy Lines Initiative; Georgia Green Party; Human Rights-Racial Justice Center; Idriss Stelley Foundation; International Concerned Family and Friends of Mumia Abu-Jamal; Leonard Peltier Defense Offense Committee Chapter Silicon Valley, CA; Malcolm X Grassroots Movement for Self Determination; Meiklejohn Civil Liberties Institute, Berkeley, CA; Metro Atlanta Task Force for the Homeless; National Alliance Against Racist and Political Repression; National Coalition of Blacks for Reparation in America (N'COBRA), Oakland, California; National Islamic Solidarity Front; National JERICHO Movement; NYC Jericho Movement; People's Law Office-Chicago, Illinois; Public Interest Projects; San Francisco Women In Black; Shut-Up Prison Ministry; Spears & Shield Publications; The Leonard Peltier Defense Offense Committee; Three Treaties Task Force of the Social Justice Center of Marin; Youth Justice Coalition

Individuals: Alderman Lionel J. Baptiste, Attorney; Alice Palmer, educator; Andrea Hornbein, Massachusetts Statewide Harm Reduction Coalition; Anne Lamb, NYC Jericho; Annette Dickerson, Center for Constitutional Rights; Atty. Efia Nwangaza; Barbara Clark, Leonard Peltier Defense Committee-Support Group Coordinator; Bill Ware; Bonnie Kerness, American Friends Service Committee (AFSC); Bruce A. Dixon, Journalist; Calvin Cook, Black United Fund Illinois; Cliff Kelley, WVON Talk Show Host; Cynthia McKinney, Former Georgia Congresswoman and 2008 Green Party Presidential Nominee; Donna Wallach, LPDOC Chapter Silicon Valley, CA; Dorothy Burge, Educator, Chicago; Dr. Kwame Kalamara, Educator; Dr. Suzanne Ross, Co-chair, Free Mumia Abu-Jamal Coalition; Dr. Yvonne King, Educator; Edward "Buzz" Palmer, educator; Emile Schepers, Ph.D., Great Falls Virginia; Henry English, Black United Fund of Illinois; Jane Frankin, Author; Jeffrey Segal, Attorney at Law, Louisville, Ky; John Trimbach, Wounded Knee Victims and Veterans Assoc.; Joyce Carruth; Justin Cornett McGee, Activist; Kevin Gray, author; Larry Holmes, Activist NYC; Lawrence Kennon, Civil Rights Attorney; Leah Pemberton; Nahal Zamani, Center for Constitutional Rights; Naji Mujahid, Chairman, Black August Planning Organization; Pam Africa, Chair, International Concerned Family and Friends of Mumia Abu-Jamal; Paulette F. Dauteuil, Educator; Prexy Nesbitt, Educator; Prof. Raoul Contreras, Chair, Indiana Univ. NW, Minority Studies Dept; Prof. Soffiyah Elijah, Harvard Law School, advisor to the Committee for the Defense of Human Rights; Professor Robert Starks, Jacob Caruthers Center for Inner-City Studies; Randolph Stone, University of Chicago School of Law, Clinical Professor, Mandell Clinic; Rasheda Weaver, Community Activitist; Renee Lovato; Rev. Dr. Jeremiah A. Wright; Rev. Luis Barrios, Prof CUNY & John Jay College of Criminal Justice; Standish E. Willis, Civil Rights Attorney, Chicago, Illinois; Steve Saltzman, Civil Rights Attorney; Susan Gzesh, Human Rights Educator; Thandisizwe Chimurenga, Journalist; Ute Ritz-Deutch, Ph.D., Tompkins County Immigrant Rights Coalition; William Crossman, San Francisco 8 Defense Committee; William Dunne, Political Prisoner.

I. Executive Summary

Background and Framework for Testimony

1. A Congressional Sub-Committee known as The "Church Committee", (1976) made factual findings which amounted to massive human rights violations against U.S. citizens based on race, political ideas, and political affiliations. In the final reports of the Committee, permanent means of congressional review were recommended. None of the recommendations addressed the human rights violations suffered by dozens of political prisoners who were victimized by the U.S. government's political repression against African-Americans, Puerto Ricans, and Native American communities. Such repression resulted in murders, injuries, false arrests, malicious prosecutions and lengthy imprisonments of scores of political activists. Many of these political prisoners and prisoners of war languish in prisons throughout the United States. U.S. political prisoners have languished in U.S. prisons for decades under cruel and inhumane conditions. Several have died in prison; others have endured years of solitary confinement, poor medical health care, various other forms of abuse, and perfunctory parole hearings resulting in routine denial of release.

2. The cluster group is comprised of NGOs, grassroots organizations, church groups, attorney organizations, elected officials, college professors, law professionals, students, concerned citizens, and others.

II. Scope of International Obligations

3. The United States is a member of the United Nations. The UN Charter commits all member States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to *race*, sex, language or religion,"

4. The United States played an active role in the preparation and adoption of the Universal Declaration of Human Rights. The UDHR lays down fundamental *economic, social, cultural, political and civil rights which includes the right to life, liberty and security of person, right to recognition as a person before the law, freedom from torture and cruel, inhuman or degrading treatment or punishment;*

5. The United States has treaties as follows:

A. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which includes Article 2, in part, that the U.S. "…undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations. Article 5 of the CERD provides that the States shall "…undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other bodies administering justice; (b) The right 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; and Article 5(d)(vii) guarantees the right to freedom of thought, conscience and religion; (viii) the right to freedom of opinion and expression; (ix) the right to freedom of peaceful assembly and association.

B. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

III. Constitutional and Legislative Framework

6. "The Church Committee." Following the "Watergate Scandal," the United States Senate conducted a thorough review of the function, operation, and administration of the U.S. intelligence community. A special committee, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities was established to conduct the sweeping audit of national intelligence services. Known as the "Church Committee" after its chairman Frank Church, the committee investigated not only the actions and operations of the intelligence and security services, but also abuses of those services by the Office of the President. The main targets of its investigations were the CIA, FBI, National Security Agency (NSA), and Internal Revenue Service (IRS). The Church Committee issued its final report in April 1976. The Committee concluded that the CIA, FBI, and other intelligence forces, had conducted "concerted campaigns of domestic espionage that threatened the Constitutional rights of ordinary citizens".

IV. Introduction [1]

7. Prior to September 11, 2001, there were nearly 100 political prisoners and prisoners of war incarcerated in the United States. Political prisoners are men and women who have been incarcerated for their political views and actions. They have consciously fought against social injustice, colonialism, and/or imperialism and have been incarcerated as a result of their political commitments. This definition of the term "political prisoner" is accepted throughout the international community. Political prisoners have always been an especially vulnerable and abused subset of the American prison population.

Political Prisoners in the United States: A Brief History of Political Repression

8. Many of today's political prisoners were victims of an FBI counterintelligence program called COINTELPRO. COINTELPRO consisted of a series of covert actions directed against domestic dissident groups, targeting five perceived threats to "domestic tranquility." These included the Communist Party USA (1956-71), the Socialist Workers Party (1961-69), White Hate Groups (1964-71), Black Nationalist Hate Groups (1967-71) and the New Left (1968-71). People viewed as dissidents, Communists, or anti-establishment were at risk of prosecution, persecution or both:

9. In these programs, the Bureau went beyond the collection of intelligence to secret action designed to "disrupt" and "neutralize" target groups and individuals. The techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial (mailing reprints of Reader's Digest articles to college administrators) to the degrading (sending anonymous poison-pen

[1] The "Introduction" and "History" taken, in substance and form, from "The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them", authored by J.Soffiyah Elijah in the Harvard BlackLetter Law Journal, Vol. 18, 2002.

letters intended to break up marriages) and the dangerous (encouraging gang warfare and falsely labeling members of a violent group as police informers).

10. In response to pressure from a broad spectrum of the American public, a Congressional subcommittee, popularly known as the Church Committee, was formed to investigate and study the FBI's covert action programs. In its report, The Church Committee concluded that the FBI had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence." It went on to report that "many of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent activity".

11. In fact, before COINTELPRO was laid to rest, it was responsible for maiming, murdering, false prosecutions and frame-ups, destruction, and mayhem throughout the country. It had infiltrated every organization and association that aspired to bring about social change in America whether through peaceful or violent means. Hundreds of members of the Puerto Rican Independence movement, the Black Panther Party (BPP), the Young Lords, the Weather Underground, Students for a Democratic Society (SDS), the Republic of New Africa (RNA), the Student Non-Violent Coordinating Committee (SNCC), members of the American Indian Movement (AIM), the Chicano Movement, the Black Liberation Army (BLA), Environmentalists, the Revolutionary Action Movement (RAM), Peace activists, and everyone in between were targeted by COINTELPRO for "neutralization."

12. In 1969, the FBI and local Chicago police agents were responsible for the pre-dawn assassination of Fred Hampton and Mark Clark as they lay asleep in their beds. Hampton and Clark were the leaders of the Chicago office of the Black Panther Party. Among Hoover's other targets were Leonard Peltier of AIM; the Rev. Dr. Martin Luther King of the Southern Christian Leadership Conference (SCLC); El-Hajj Malik Shabazz (Malcolm X); Kwame Ture (Stokely Carmichael) of SNCC; Huey Newton (leader of the BPP); and Rev. Phillip Berrigan and his brother Rev. Daniel Berrigan, peace activists who challenged the Vietnam War and the U.S. military industrial complex.

13. Prosecutor's offices and the courts were complicit in the destruction meted out by the FBI. Prosecutors routinely withheld exculpatory evidence as was evidenced in the cases of Geronimo ji-Jaga Pratt, Dhoruba Bin-Wahad, and Mumia Abu-Jamal. Although Pratt and Bin-Wahad were eventually exonerated after serving twenty-seven and nineteen years respectively for crimes they did not commit, requests by Peltier and Abu-Jamal for new trials have been frustrated at every turn by law enforcement and the prosecution.

14. Many of today's political prisoners were incarcerated as a direct result of COINTELPRO's activities They were targeted because of their political beliefs and/or actions. Unlike those convicted and sentenced for similar crimes, they were given much harsher sentences and routinely denied parole. Former BLA member, Sundiata Acoli (a.k.a. Clark Squire), the codefendant of Assata Shakur, was sentenced to life plus thirty years for the death of a New Jersey State trooper. He was eligible for parole after twenty years. After serving twenty-two years, however, the New Jersey parole board denied him parole and gave him an unprecedented twenty-year set off. Susan Rosenberg was sentenced to fifty-eight years for possession of explosives and denied parole despite her exemplary prison record. Geronimo ji-Jaga Pratt was denied parole at least seven times although he was innocent of the charges for which he was serving time.

V. The Promotion and Protection of Human Rights on the Ground through the Implementation of International Human Rights Obligations

United States Government Targets Civil Rights Movement

15. The Civil Rights Movement was a primary target of such misconduct. In an official memorandum dated March, 1968, the following long-range goals of the COINTELPRO against Blacks were outlined:

(1) to prevent the "coalition of militant black nationalist groups," which might be the first step toward a real "Mau Mau" in America;
(2) to prevent the rise of a "messiah" who could "unify and electrify" the movement, naming specially Martin Luther King, Stokely Carmichael, and Elijah Muhammad;
(3) to prevent violence on the part of black nationalist groups, by pinpointing "potential troublemakers" and neutralizing them 'before they exercise their potential for violence";
(4) to prevent groups and leaders from gaining "respectability: by discrediting them to the "responsible" Negro community, to the white community and the "liberals" (the distinction is the Bureau's), and to "Negro radicals"; and
(5) to prevent the long range growth of these organizations, especially among youth, by developing specific tactics to "prevent" these groups from recruiting young people."

16. The politically punitive nature of their lengthy sentences becomes even more apparent when compared to sentences given to right wing offenders, as a few recent examples demonstrate. In 1997, a white supremacist received a three year sentence for a plot to bomb fifteen cities. In 198l, an anti-abortion proponent responsible for torching seven family planning clinics throughout the western states over the course of five years, causing over $1 million in damages, received "almost seven years in prison". In 1997, a former member of the Klan was sentenced to 12 years in prison for bombing the car of a white woman who was dating a Black man. The bomb killed a 23 month old child and injured her father. And in 1997, a militia leader charged with a plot to blow up the FBI's Criminal Justice Information Services, who provided resources, sold blueprints of the building to an undercover FBI agent, and recruited others to supply explosives, was to receive a sentence of less than 25 years.

Denial of Parole

17. Germany, France and Spain Release Political Prisoners: U.S. Should Follow Example and Release Political Prisoners and Prisoners of War. In February 2007, news of the release of political prisoners splashed the front pages of Europe's newspapers. Political prisoners with sentences far lengthier than most US Political Prisoners and Prisoners of War were to leave prison after serving less time than most US PP/POWs. On February 12, a German court ordered the release of Brigitte Mohnhaupt, a leader of the Red Army Faction [RAF], after serving 24 years in prison. Mohnhaupt was serving a term of five life sentences plus 15 years, having been convicted of politically motivated kidnappings and murders in the 1970s. On February 14, Philippe Bidart, a leader of the Basque armed independence organization Iparretarrak, was released from a French prison after serving nine years of two life sentences plus 20 years for the deaths and injuries of various police. On February 12, the Spanish Supreme Court reduced the sentence of ETA hunger striker Iñaki de Juana Chaos, who, after serving 18 years of his 3,000 year sentence for causing 25 deaths, was

serving a sentence of 12 years and 7 months for making terrorist threats in two newspaper articles. As word of the release or sentence reductions of these European men and women reached Puerto Rico, Carlos Alberto Torres and Oscar Lopez Rivera were contemplating the 27th and 26th anniversaries of their imprisonment, while their supporters hoped President Bush would follow the example of his European counterparts.

18. In his report on his first year as president of Ecuador, Rafael Correa asked Congress to grant amnesty to political prisoners who participated in strikes, as well as to former government officials who are considered victims of political persecution. He also asked Congress to pardon hundreds of "mules," or people who transport small quantities of drugs.

19. The Chilean Supreme Court reduced the sentences of two officials, reversed the conviction of one, and ordered their release. The three had been convicted of kidnapping and then assassinating 22 political prisoners in 1973, whose bodies were found burned. The officials had originally been sentenced to 17, 10, and 7 years in prison

20. Venezuelan President Hugo Chávez granted amnesty to opposition leaders connected to the April 2002 military coup against his government. The amnesty also covers those charged with detaining the Interior Minister, invading the home of a National Assembly Deputy, taking over the Governorships of Merida and Tachira and the Court of Justice in Tachira, closing the state owned television station, taking over oil tankers during the oil industry shutdown, and inciting civil rebellion through 2007. Chávez said the amnesty was intended to "send a message to the country that we can live together despite our differences." In another amnesty which he said was a humanitarian gesture, Chávez pardoned 36 prisoners convicted of various crimes, including some diagnosed with AIDS.

21. In February 2008, The Revolutionary Armed Forces of Colombia [FARC] announced it would free three politicians in its custody for the past six years, as part of a process of seeking a solution to Colombia's lengthy conflict. The FARC's hope is to win the release of hundreds of its imprisoned compatriots in exchange for releasing some 40 people in its custody. Both releases have been stalled by the Colombian president's refusal to accede to FARC demands that its representatives be allowed to carry arms to talks to be held in a proposed demilitarized zone.

22. United States PP/POWs receive excessive sentences and are routinely denied parole. For example, in 1973 Sundiata Acoli was sentenced to life imprisonment; 37 years later, despite an exemplary prison record, he was again denied parole in March, 2010. Leonard Peltier was sentenced to life in 1975; another model prisoner, he was denied parole again in 2009. Acoli and Peltier are but recent examples of the U.S. rule regarding prison officials' use of the parole process to exact political punishment. Parole officials often acknowledge the advancing age, deteriorating health, significant release plans and good prison records of these aging PP/POWs.

Prolonged Isolation: Violates Convention Against Torture

23. U.S. PP/POWs are confined in prolonged isolation or "control units" due to their status as political prisoners or prisoners of war, not because of disciplinary infractions, which is in direct violation of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The UN Human Rights Commission has specified prolonged solitary confinement" as prohibited as a form of torture under the CAT. Despite their excellent prison record,

PP/POWs are placed in "control units." The men's federal prison in Marion, Illinois, which includes several political prisoners among its 400 inmates, has been condemned by Amnesty International for violating international standards on the minimum treatment of prisoners. The men in Marion are locked in their cells 23 hours per day and are sometimes chained spread-eagle to their beds for days at a time.

24. The "control unit" for women at Lexington, Kentucky, was an experimental underground political prison that practiced isolation and sensory deprivation. It was finally closed by a federal judge after years of protest by religious and human rights groups.

Human Rights Violations with Impunity

25. The United States has ignored claims of Human Rights violations against PP/POWs. On December 11, 1978 the National Conference of Black Lawyers, the National Alliance Against Racist and Political Repression and the United Church of Christ's Commission on Racial Justice filed a Petition to the United Nations Commission on Prevention of Discrimination and Protection of Minorities – raising the plight of political prisoners and victims of racist repression.

26. In 1981, Amnesty International issued a "Proposal for a Commission of Inquiry into the Effect of Domestic Intelligence Activities on Criminal Trials in the United States of America." Amnesty urged an investigation into the plight of political prisoners.

27. Independent examiners, such as Yale Law Professor Thomas I. Emerson, could not avoid the "inescapable message of [such material] that is: the FBI jeopardizes the whole system of free expression which is the cornerstone of our society…at worst it raises the specter of a police state…In essence, the FBI conceives of itself as an instrument to prevent radical social change in America…The Bureau's view of its function leads it beyond data collection and into political warfare." Yet not only were the FBI personnel involved in the activities which so concerned Dr. Emerson rewarded rather than punished, the bureau itself was left essentially unchanged in the wake of public revelations concerning COINTELPRO. The most that can be said is that, in 1979, it was subjected to a "rechartering", the terms of which it itself had taken a most prominent role in formulating.

Facing Continued Abuse: The Post-September 11 Treatment of Political Prisoners[2]

28. In concluding its review of COINTELPRO, the Church Committee wrote: "The American People need to be assured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order". Just over twenty-five years later, the American people are again in need of such assurance. In the wake of the attacks on the World Trade Center and the Pentagon on September 11, 2001 the use of the nation's jails and prisons for political repression was renewed. Within hours of the attacks, several of the political prisoners were rounded up and put in administrative segregation, generically known as 'the hole'. No charges or allegations were levied against them. Some of them were told that they were being

[2] "Facing Renewed Abuse: the Post-September 11 Treatment of Political Prisoners is taken, in substance and form," from "The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them", authored by J. Soffiyah Elijah in the Harvard BlackLetter Law Journal, Vol. 18, 2002.

placed in the hole for their own safety. They were held in solitary confinement and restricted to their cells twenty-three or twenty-four hours a day.

29. Some, like Marilyn Buck, Sundiata Acoli, and Richard Williams were held incommunicado for weeks without access to legal counsel. Other prisoners were told that they were to have no contact of any kind with Marilyn Buck once she was thrown in administrative segregation "for her own safety." Numerous requests to arrange for legal visits and phone calls with these prisoners were flatly refused by administrators of the Bureau of Prisons (BOP). All legal mail was suspended; no letters were allowed out of the prison and legal mail that was mailed in was neither given to the prisoners nor returned to the attorneys. From September 11 to October 24, 2001, Sundiata Acoli was not allowed any access to his lawyers. Social visiting, mail, and phone calls were suspended for many of these prisoners. The actions of the Bureau of Prisons were so unusual that initially the BOP General Counsel denied that any prisoners were being refused access to their lawyers. The Bureau continues to put forward this position as recently as February of this year (2010). Yet on September 26, 2001, the Warden of USP Allenwood, where Mr. Acoli was being held, wrote to his attorney to inform her that he was "denying her request to allow Inmate Squire (Acoli's former name) a legal telephone call.

30. Between September 11 and 17, 2001, the restrictions placed on the prisoners were in flux, and it seemed clear that the individual prison authorities were trying to determine exactly what the directions from Washington dictated. But on or about September 17, Attorney General John Ashcroft issued a memorandum to the Bureau of Prisons directing them to terminate all communications, both social and legal, for certain prisoners. Some have posited that the memo left the discretion to the prison wardens. Others believe that Ashcroft determined who should be held incommunicado. No matter who had the final discretion, the result was the same for the political prisoners; they were in the hole and some had no access to the outside world.

31. Other present day violations, in the 2006 report "Out of the Shadows: Getting Ahead of Prisoner Radicalization" by George Washington University's Homeland Security Policy Institute, it is stated that the "potential for radicalization of prison inmates poses a threat of unknown magnitude to the national security of the United States." On November 7, in that same year, USA Today reported that the FBI and Homeland Security were "urging prison administrators to set up more intelligence units in state prisons…" In the case of Ojore Lutalo, former United States political prisoner, there is Department of Corrections paperwork acknowledging that "he was kept in isolation for twenty-two years due to his radical views and ability to influence others." On January 26, 2010 he was "disappeared" off an Amtrak train in La Junta, Colorado and charged with "endangering public transportation." Although a judge dismissed all charges one week later, we now know that the past history of abuse can become current.

32. The United States government is increasingly violating the Constitution when it comes to Muslim, Arab and South Asian inmates. In 2006 and 2007, the Federal Bureau of Prisons (BOP or "Bureau") secretly created the Communications Management Unit (CMU), a prison unit designed to isolate and segregate certain prisoners in the federal prison system from the rest of the BOP population. The Bureau claims that CMUs are designed to hold dangerous terrorists and other high-risk inmates, requiring heightened monitoring of their external and internal communications. Many prisoners, however, are sent to these isolation units for their constitutionally protected religious beliefs, unpopular political views, or in retaliation for challenging poor treatment or other rights

violations in the federal prison system. Over two-thirds of the CMU population is Muslim, even though Muslims represent only six percent of the general federal prison population.

Recommendations

33. All U.S. Political Prisoners/Prisoners of War (PP/POWs) imprisoned as a result of COINTELPRO must be immediately and unconditionally released from U.S. imprisonment.

34. The United States must institute an Executive review of all cases involving those imprisoned as a result of COINTELPRO.

35. The United States must initiate a criminal investigation into the conspiracy to commit the murder of Fred Hampton, Mark Clark and other political activists targeted by COINTELPRO.

36. The United States must adopt the necessary measures to ensure the right of PP/POWs to seek just and adequate reparation and satisfaction to redress acts of racism, racial discrimination, xenophobia and related intolerance, and to design effective measures to prevent the repetition of such acts.

37. The United States must, at a minimum, afford Mumia Abu Jamal and Leonard Peltier, new trials.

United States of America
Submission to the United Nations
Universal Periodic Review (UPR)

Ninth Session of the Working Group on the UPR
Human Rights Council
22 November + 3 December, 2010

Political Repression - Political Prisoners

APPENDIX I

Imam Jamil Al-Amin: Personal Statement: COINTELPRO LIVES!, A brochure about Iman Jamil Al-Amin's case, The FBI Conspiracy Against H. Rap Brown, FBI Murders Iman Luqman Ameen Abdullah (Currently held: USP Florence ADMAX, Florence, CO)

Veronza Bowers: Case Summary: Wrongful Conviction, Parole Denial, Excerpt of Trial transcript (Currently: USP Atlanta, Georgia)

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Jaan Laaman: Personal Statement; Status Report, (USP Tucson, AZ)

Mondo Langa (David Rice): Personal Statement, case review articles, (Currently: Nebraska State Prison, Lincoln, NE)

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APPENDIX-2

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United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

POLITICAL REPRESSION: CONTINUUM OF DOMESTIC REPRESSION

Submitted by:

African American Institute for Policy Studies & Planning

October 22nd Coalition

Ida B.Wells Media Institute

Endorsements:

Organizational Endorsements: Afrikan Frontline Network; Albuquerque Jericho Movement for Political Prisoners and Prisoners of War; DC Radio Co-op; Education Not Incarceration, Bay Area Chapter; For Our Children Productions; Free Mumia Abu-Jamal Coalition; FTP Movement - Behind Enemy Lines Initiative; Idriss Stelley Foundation; International Concerned Family and Friends of Mumia Abu-Jamal; Malcolm X Center for Self Determination; Metro Atlanta Task Force for the Homeless; National JERICHO Movement; NYC Jericho; Public Interest Projects; SC Malcolm X Grassroots Movement for Self Determination; Youth Justice Coalition

Individual Endorsements[1]: Pam Africa, Chair, International Concerned Family and Friends of Mumia Abu-Jamal; **Ajamu Baraka**, Executive Director, USHRN; **Rev. Luis Barrios**, Prof CUNY & John Jay College of Criminal Justice; **Joyce Carruth**; **Thandisizwe Chimurenga**, Journalist; **William Crossman**, San Francisco 8 Defense Committee; **Paulette F. Dauteuil**, Educator; **Bruce A. Dixon**, Journalist, Black Agenda Report; **King Downing**, Director, Human Rights-Racial Justice Center; **Annette Dickerson**, Center for Constitutional Rights; **Carl Dix**, Revolutionary Communist Party (RCP); **William Dunne**; **Hugh Esco**, Georgia Green Party; **Kevin Gray**, Author; **Larry Holmes**, Activist NYC; **Andrea Hornbein**, Massachusetts Statewide Harm Reduction Coalition; **Bonnie Kerness**, American Friends Service Committee (AFSC); **Dr. Kwame Kalamara**, Educator; **Anne Lamb**, NYC Jericho; **Renee Lovato**; **Justin Cornett McGee**, Activist; **Cynthia McKinney**, Former Georgia Congresswoman and 2008 Green Party Presidential Nominee; **Naji Mujahid**, Chairman, Black August Planning Organization; **Efia Nwangaza**, Attorney; **Ute Ritz-Deutch**, Ph.D., Tompkins County Immigrant Rights Coalition; **Dr. Suzanne Ross**, Co-chair, Free Mumia Abu-Jamal Coalition; **William D. Ware**, SNCC; **Nahal Zamani**, Center for Constitutional Rights.

[1] Organizations listed for identification only

1. This report provides information under Sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review regarding growing domestic, political repression, erosion of the right to dissent, and the return of once discredited regressive practices, domestic legislation, and policies, which undermine dissent, most notably the rights to freedom of speech, religion, and association and protections against racially disparate prosecution and its collateral impact, inhumane conditions of confinement, and social and civic death.

2. The submitting organizations and individuals are NGOs, professional, lay, and grassroots organizations and individuals committed to advancing freedom of speech, religion, and association.

EXECUTIVE SUMMARY: Background and Framework

3. It is appropriate for the Council to review to freedom of speech, religion, and association in the United States as the UDHR, the ICCPR as well as the ICESCR define such rights as basic human rights. While recent years mark key anniversaries in U.S. political and social history, e.g. public accommodation, voting rights, school desegregation, civil rights and anti-war protest landmarks, the protection and advancement of civil and human rights have declined amidst the celebration of those landmark years and the current environment and law enforcement has grown increasingly more repressive and hostile to the U.S. Constitutions 1st, 4th, and 14th Amendments, in addition to international obligations.

4. The National Lawyer's Guild (NLG), 2004, issued the report, "Assault on Free Speech, Public Assembly, and Dissent." It catalogued tactics, many of which were put into place to curb abuses exposed during the civil rights and anti-war movements of the 1960-70s and the U.S. Senate's, post-Watergate "Church Committee" COINTELPRO revelations. NLG reported that law Enforcement tactics included unwarranted collective punishment of individuals who peacefully exercised their First Amendment rights.

5. Today, police still routinely make unfounded mass arrests and detentions to keep people off the streets and out of the eye of the media which tends to be accommodating. There is the return of police-initiated violence at demonstrations, notably the use of so-called less-lethal weapons against peaceful protesters. Despite their name, such weapons—among them chemical sprays, impact projectiles, and electroshock weapons, cattle-prods from the 1960s—are often associated with fatalities. This police practice has been acknowledged and condemned by several independent panels investigating police actions and by the United Nations Commission on Human Rights and yet it persists.[i]

6. September 24, 2009, the long forgotten so-called, federal "H. Rap Brown Anti-Riot Act" was revived at anti-G20 mobilization, in Pittsburgh, Pa. The federal anti-riot statute—18 USC §2101[ii] —makes it a felony to engage in interstate

travel to "organize, promote, encourage, participate in, or carry on a riot." It was name for Brown, now known as Imam Jamil Al-Amin, currently held at the federal super max prison, in Florence, Colorado, on a questionable state conviction, when rebellions spread across the U.S. in the 1960s.

7. Just as the Anti-G20 protests were to begin, Pennsylvania State Troopers, their guns drawn, broke down the door of room 238 of the CareFree Inn on the outskirts of Pittsburgh. The troopers were acting on a sealed search warrant related to protests planned for the G20 summit[iii] —a meeting of the heads of state of the world's major economies. Thousands of protesters had descended on the city, presenting demands ranging from curbs on carbon emissions to the outright abolition of capitalism.

8. Unlike the U. S. government praise heaped upon activist using social networking technology in Tehran, Elliott Madison and Michael Wallschlaeger, a couple of middle-aged housemates from Queens, New York, using a laptop, a cell phone, and police scanner for demonstrators' crowd control were arrested and charged with "criminal use of a communication facility," "possessing instruments of crime," and "hindering apprehension"—two felony counts and one misdemeanor. The charges were later dropped after they were forced to pay bail and their equipment taken and house ransacked.

9. Madison and Wallschlaeger, part of Tin Can Comms Collective[iv], a "collection of communication rebels" made up of several individuals in various locations across Pittsburgh. Madison's job was to verify information being sent in and then relay that to legal observers, street medics, and other organizers who could in turn tweet the information to the masses in the streets.

10. Academic freedom has also come under assault. T*he NLG, along with other civil liberties organizations, joined in defense against termination of tenured Ward Churchill. It filed an amicus brief Churchill v. The Board of Regents of the University of Colorado*[v] (February 18, 2010)

11. The brief argued that academic freedom, a central component of the First Amendment and essential to a thriving democracy, is imperiled when state university officials succumb to political pressure to fire a tenured professor over constitutionally protected statements. Further, that affording absolute immunity to university officials and vacating a jury finding of wrongful discharge in violation of the First Amendment threatens the fundamental rights of all faculty members. Fidelity to the rule of law, they point out, requires a remedy for those deprived of their constitutional rights by state officials. Barring legal recourse for politically-motivated investigations and terminations will have a chilling effect on professors, students, and citizens whose speech is unpopular but constitutionally-protected. The resultant suppression of free inquiry and critical thinking vitiates the First Amendment and undermines the foundation of higher learning in this country.

12. In the 2007 United States Human Rights Network report, submitted to the United Nations Committee on Elimination of Racial Discrimination, the Second and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, "In The Shadows of the War on Terror: Persistent Abuse of People of Color in the United States," examples of the domestic use of torture against African Americans and other persons of color, under the guise of fighting terrorism, were cited.

13. In the section titled, *The Reality: Torture and Other Cruel Inhuman and Degrading Treatment* Torture, it was noted that cruel, inhuman or degrading treatment by law enforcement agents during interrogations and in police custody continues to take place within the U.S. Law enforcement officers, throughout the country, who have engaged in torture for the purpose of extracting confessions, continue to escape prosecution while individuals who were tortured continue to be prosecuted or languish in prison based on the use of coerced confessions in their criminal cases.

14. In addition to the Abu Ghraib style Chicago Police Torture Cases (Burge Cases)[vi] of 1973, is the current case of the San Francisco 8 (SF8). Both are examples of the domestic use of torture against African Americans by law enforcement officers. The Burge Cases based on race; however, the SF8 based on race and political beliefs and activities. In 1973, John Bowman (deceased in December 2006), Harold Taylor and Ruben Scott were tortured by the New Orleans Police Department, with the assistance of two San Francisco detectives, Frank McCoy and Edward Erdelatz. The torture, which lasted for several days, included "strip[ing] the men, blindfold[in]g them, beat[ing] them and covering them in blankets soaked in boiling water. The detectives also used electric prods on their genitals."[vii]

15. As a result of the torture, the men confessed and signed pre-written statements. They were then charged with various crimes, including the death of the 1971 death of Sergeant John Young, a San Francisco Police officer. In 1974, a federal court ruled that the statements of the three men were inadmissible because they were obtained through torture. Subsequently, a California court dismissed the charges against Bowman, Taylor and Scott; without any vindication of their human rights. The perpetrators have never been brought to justice; two former detectives serve as agents with the Anti-Terrorist Task Force of the Federal Prosecutor's Office under the auspices of U.S. Department of Homeland Security

16. Now, after 30 years, eight elderly Black activists ranging in age from 55 to 70 years old, including one of the men who was tortured, many of whom were former members or supporters of the Black Panther Party (a political justice organization), were arrested and charged in January 2007 with the murder of Sergeant Young based on the confessions obtained through torture. On October 10, 2007, a judge ruled the confessions, previously found inadmissible under the Constitutional doctrines relied upon by the U.S. government as evidence of its compliance with the Convention, can now be offered as evidence at trial. The

prosecution of the SF8, spearheaded by the officers who tortured several among them, and based on statements elicited by torture, violates article 5(b) and (d) of the Convention guaranteeing the right to be free of excessive force and the rights to freedom of speech, expression, assembly and association.[viii]

17. The Government's increasing disregard for the Constitution is displayed in its treatment of Muslim, Arab and South Asian inmates. In 2006 and 2007, the Federal Bureau of Prisons (BOP or "Bureau") secretly created the Communications Management Unit (CMU), a prison unit designed to isolate and segregate certain prisoners in the federal prison system from the rest of the BOP population. The Bureau claims that CMUs are designed to hold dangerous terrorists and other high-risk inmates, requiring heightened monitoring of their external and internal communications. Many prisoners, however, are sent to these isolation units for their constitutionally protected religious beliefs, unpopular political views, or in retaliation for challenging poor treatment or other rights violations in the federal prison system. Over two-thirds of the CMU population is Muslim, even though Muslims represent only 6 percent of the general federal prison population. . In March 2010, the Center for Constitutional Rights (CCR) filed a federal suit challenging unconstitutional policies and conditions at the CMUs.[ix]

18. Furthermore, CCR has joined Muslim community groups and human rights organizations in expressing grave concern about the conditions of confinement for inmates who are subject to Special Administrative Measures, or SAMs. Established in 1996 to limit the communications of prisoners with a demonstrated reach and ability to commit violence, now SAMs can be placed on anyone with a "proclivity for violence."[x] The case of Syed Fahad Hashmi, who is scheduled to be tried in the Southern District of New York on charges of material support for terrorism in April 2010, is a stark example of the extreme features of SAMs. Mr. Hashmi, an American citizen, has been kept in severe solitary confinement under SAMs for three years awaiting trial. SAMs have severely limited Mr. Hashmi's ability to communicate with the outside world – including members of his family – even though he has not been convicted of any crime. SAMs are being imposed disproportionately on Muslims suspected of connections with terrorism and is typical of how terrorism suspects are being treated in U.S. prisons and courts.

RECOMMENDATION FOR ACTION BY THE U.S. GOVERNMENT

19. Take leadership role to insure protections afforded under U.S. Constitution are applied rigorously.

20. Adopt and ratify all major treaties and conventions, without RUDs.

21. Release all U.S. Political Prisoners/Prisoners of War (PP/POWs) imprisoned as a result of COiNTELPRO must be immediately and unconditionally released from U.S. imprisonment.

22. The United States must institute an Executive review of all cases involving those imprisoned as a result of COiNTELPRO.

23. The United States must adopt the necessary measures to ensure the right of COINTELPRO PP/POWs/Exiles to seek just and adequate reparation and satisfaction to redress acts of racism, racial discrimination, xenophobia and related intolerance, and to design effective measures to prevent the repetition of such acts.

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[i] UN Commission on Human Rights, Promotion and Protection of Human Rights: Human RightsDefenders, submitted by Hina Jilani, Special Representative of the Secretary General on the status of human rights defenders, E/CN.4/2004/94/Add.3, 23 March 2004, p. 151, par. 476, http://www.unhchr.ch/pdf/chr60/94add3AV.pdf

[ii] http://www.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002101----000-.html

[iii] http://en.wikipedia.org/wiki/2009_G-20_Pittsburgh_summit

[iv] http://tincancomms.wordpress.com/

[v] Churchill v. The Board of Regents of the University of Colorado

[vi] At least eleven decisions in both federal and state courts have found or noted the practice of torture by Burge and his men. U.S. ex. rel. Maxwell v. Gilmore, 37 F. Supp.2d 1078, 1094 (N.D. Ill. 1999) ("It is now common knowledge that in the early to mid-1980s Chicago Police Commander Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. Both internal police accounts and numerous lawsuits and appeals brought by suspects alleging such abuse substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis."); Hinton v. Uchtman, 395 F 3d 810, 822-23 (7th Cir. 2005) (Wood, J., concurring) ("a mountain of evidence indicates that torture was an ordinary occurrence at the Area Two station of the Chicago Police Department . . . And, in language reminiscent of the news reports of 2004 concerning the notorious Abu Ghraib facility in Iraq, the report [OPS Goldston report] said that '[t]he type of abuse described was not limited to the usual beating, but went into such esoteric areas as psychological techniques and planned torture.' . . . Indeed, the alleged conduct is so extreme that, if proven, it would fall within the prohibitions established by the United Nations Convention Against Torture ("CAT") . . . thereby violating the fundamental human rights principles that the United States is committed to uphold. . . ") See also "Report on the Failure of Special Prosecutors Edward J. Egan and Robert D. Boyle to Fairly Investigate Systematic Police Torture," pp. 16-20 and Appendix A. 24Investigators working with the OPS have sustained the torture allegations of seven individuals. In addition, attorneys on behalf of the City of Chicago have admitted "an astounding pattern or plan… to torture certain suspects, often with substantial criminal records, into confessing to crimes or to condone such activity." City of Chicago's memorandum in Opposition to the Motion to Bar Testimony Concerning Other Alleged Victims of Police Misconduct filed on January 22, 1992 before the Police Board In the Matter of Charges

Filed Against Respondents Jon Burge, John Yucaitis and Patrick O'Hara, Cases #1856-58).

Most recently, Special Prosecutors, appointed by a State judge pursuant to a request from several community organizations, recently confirmed that Burge and those under his command committed acts of torture. See supra note 21 at 3-5. Andrew Wilson was suffocated with a plastic bag, shocked on his genitals and ears, burned with cigarettes, and beaten and handcuffed across a hot radiator while interrogated by Burge and other detectives. Dr. John Raba, the medical director at Cook County Jail, examined Wilson after his interrogation, and noted Wilson's injuries in a letter sent to former Chicago Police Superintendent Richard Brzeczek, in which he requested an investigation. Brzeczek declined to act on this request, instead referring the investigation to Daley, the lead local prosecutor for the Chicago area at the time (now Mayor of Chicago), who took no action.

[vii] Jaxon Van Derbeken & Marisa Lagos**,** Ex-militants Charged in S.F. Police Officer's '71 Slaying at Station, San Francisco Chronicle, January 24, 2007, at A-1

[viii] It is well established that the U.S. Government deliberately sought to disrupt and destroy the members and activities of the Black Panther Party, a political organization that supported and promoted the rights, freedom and self-determination of African American people in the U.S. In the 70s, the Black Panther Party was comprised of human rights activists who built community programs such as free breakfast programs for Black children, as well as free legal and health clinics, and campaigned against police brutality. The prosecution of the SF8 is part of the continuing campaign to destroy and distort the work of the Black Panther Party. Beginning in the 1950's, the U.S. launched a series of covert actions against domestic 'dissident' groups. See United States Senate, Final Report of The Select Committee To Study Governmental Operations with Respect To Intelligence Activities, April 23, 1976 at http://www.cointel.org (last visited on Oct. 14, 2007) [hereinafter "Church Report"]; see also David Cole & James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security, 3ded. (2006). The policy, entitled "Counter Intelligence Program", or COINTELPRO, included infiltration of organizations, external psychological warfare, harassment through the legal system and extralegal force and violence, including assassinations. Among those targeted were prominent peace activists such as Dr. Martin Luther King Jr., as well as organizations such as Students for a Democratic Society (SDS), the Student Non-Violent Coordinating Committee (SNCC), the National Association for the Advancement of Colored People (NAACP), and
the Congress for Racial Equality (CORE). While COINTELPRO victimized a range of political movements, including women's rights, anti-war activities, the Puerto Rican Independence Movement and the American Indian Movement, its most profound impact was on members of the Black civil and human rights movement. With the expressed intent of "preventing the rise of a black messiah," the FBI set out to systematically disrupt, distort and destroy organizations and individuals which it deemed a "security risk." See Church Report. With the motto that "to
be a black revolutionary is to be a dead revolutionary" the FBI's field offices from California to Chicago to New York sought to discredit legitimate organizations and movements by eliminating leaders. One of the most egregious examples of these tactics

was the murder of Fred Hampton, Chairman of the Black Panther Party in Chicago in a predawn police raid in 1969. John Kifner, F.B.I. Gave Chicago Police Plan of Slain Panther's Apartment, New York Times, May 25, 1974. Indeed, it is well documented that the FBI killed more than thirty Black Panther Party members. Church Report. COINTELPRO was exposed following the leak of FBI files to the media. Subsequently, a congressional sub-committee known as the Church Committee was established to investigate the existence, consequences and legality of COINTELPRO. The Committee concluded, inter alia, that the FBI had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association …." David Cole & James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security, 3d ed. (2006). Moreover, the Committee found that

while COINTELPRO "sow[ed] distrust and fear among many seeking peaceful change in government policies, …[it] produced little evidence of criminal activity."Id. While exposing the existence of illegal activities conducted by the U.S. government, the Church Committee failed to provide any real remedies for those whose lives were uprooted and destroyed by COINTELPRO. The renewed interest in prosecuting the SF8 for crimes that are more than 35 years old represents nothing more than a continuation of these policies in a climate of suppression of dissent.

[ix] Learn more at: http://ccrjustice.org/ourcases/current-cases/aref-et-al-v-holder-et-al.

[x] See REQUESTS FOR SPECIAL CONFINEMENT CONDITIONS—28 C.F.R. § 501.3, available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/24mcrm.htm

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Human Rights Abuses Committed by the New York Police Department

Submitted by:

The Coalition for Community Safety[1]

Endorsed by:

Center for Constitutional Rights;

The Justice Committee;

Make the Road New York;

Malcolm X Grassroots Movement;

Metro Atlanta Task Force for the Homeless;

New York Civil Liberties Union (NYCLU);

Public Interest Projects;

The Urban Justice Center;

Ute Ritz-Deutch, Ph.D.;

Youth Justice Coalition

[1] We are writing as members of the New York City Coalition for Community Safety (CCS), a coalition of New York City grassroots, community-based, legal and advocacy organizations. CCS's mission is to increase transparency and accountability of the New York Police Department (NYPD) to New York City communities and individuals through legislative and policy reform.

I. Police Brutality, the use of TASERs and Sexual Assault as a Form of Torture

Police brutality, the use of TASERs and sexual assault have been recognized in the international community as forms of torture. In 2006, the United Nations Committee Against Torture (the treaty body for the Convention Against Torture to which the United States is a signatory), requested that the United States provide information about how the United States monitors behavior of law enforcement officials internally.[2] The United States Second Periodic Report stated that there was federal legislation that allowed Attorney General to institute civil lawsuits to evoke change in "patterns or practices of misconduct" in law enforcement agencies. The report also described statutory avenues of redress such as writs of habeas corpus, criminal charges and civil actions through the use of federal civil §1983 claims.[3] In response to the Periodic Report, the Committee Against Torture included in their "Conclusions and Recommendations" that the United States should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment by law enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention.[4]

In January 2010, the Committee Against Torture requested reports of brutality and use of excessive force by law enforcement officials and ill-treatment of vulnerable groups, in particular towards racial minorities, migrants and persons of different sexual orientation. It asked the United States to describe steps taken to address this concern including establishing adequate systems for monitoring police abuse, developing adequate training for law enforcement officials and producing reports of police brutality and excessive use of force, ensuring that incidents are investigated and that perpetrators are prosecuted and appropriately punished.[5] The United States has not responded to this report at this time. A response to this list of questions should be given to the Committee Against Torture anticipation of the Fifth Periodic Report that the United States must submit by January 2011.[6]

The Committee Against Torture and the United Nations Human Rights Committee (HRC) have expressed considerable concern regarding human rights abuses amounting to torture and cruel, inhuman and degrading treatment, as well as deaths, arising from the use of TASERs by local law enforcement agents and correctional authorities, and called on the US government

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[2] *See* List of Issues to Be Considered During the Examination of the Second Periodic Report Of the United States of America. CAT/C/USA/Q/2/8 February 2006.
[3] *See* Second Periodic Report of the United States to the Committee Against Torture, United States State Department Website (February 2000), available at http://www.state.gov/g/drl/rls/c14907.htm.
[4] *See* United Nations, Committee Against Torture Report-Thirty-sixth Session, "Consideration of Reports Submitted by State Parties Under Article 19 of the Convention. Conclusion and Recommendations of the Committee Against Torture. United States of America" CAT/C/USA/CO/2/ 25 July 2006, (hereinafter CAT Recommendations).
[5] List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America, 43rd Session," CAT/C/USA/Q/5/20 January 2010, available at http://tb.ohchr.org/default.aspx [click on convention, "CAT"; country "United States of America"; type "List of issues".
[6] The present list of issues was adopted by the Committee at its forty-third session, according to the new optional procedure established by the Committee at its thirty-eighth session, which consists in the preparation and adoption of lists of issues to be transmitted to States parties prior to the submission of their respective periodic report. The replies of the State party to this list of issues will constitute its report under article 19 of the Convention.

to strictly regulate their use.[7] Consistent with the position taken by the Committee, the HRC also expressed concern with respect to the use of TASERs "in situations where lethal or other serious force would not otherwise have been used. It is concerned about information according to which police have used tasers against unruly schoolchildren; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; elderly people; pregnant women; unarmed suspects fleeing minor crime scenes and people who argue with officers or simply fail to comply with police commands…"[8] The Committee Against Torture also recommended the United States **"**carefully review the use of electro-shock devices, strictly regulate their use, restricting it to substitution for lethal weapons and eliminate the use of these devices to restrain persons in custody…" The US government should report on its progress in this regard.

CASE STUDIES:

- In 2008, a New York City police officer tasered a 35 year old emotionally disturbed man, causing him to fall from a building ledge to his death.[1]
- In 2008, two lesbians of color were severely beaten and called "bitch ass dyke" and other homophobic slurs by New York City officers responding to a noise complaint at a club.[1]
- In 2008, a transgender woman was forced to strip and bend over by New York City police and court personnel on three different occasions to "determine her gender" following a single arrest for misdemeanor trespassing in a public housing project. Even though she has had gender reassignment surgery, she was subsequently held overnight in a cell with men.[1]
- In 2005, two New York City police officers followed a 35 year-old Latina woman home after stopping her for a traffic offense, and subsequently forced her to perform oral sex on them in her apartment while her three children slept nearby.[1]

Both the Committee Against Torture and the HRC also expressed particular concern regarding violations of the human rights of lesbian, gay, bisexual and transgender people by law enforcement agencies and correctional authorities, and widespread police violence against

[7] CAT Recommendations at 35; United Nations, Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Convenant. Conclusions and Recommendations of the Human Rights Committee. United States of America" CCPR/C/USA/CO/3/Rev.1 18 December 2006, (hereinafter "HRC Recommendations).
United Nations, Committee Against Torture Report-Thirty-sixth Session, "Consideration of Reports Submitted by State Parties Under Article 19 of the Convention. Conclusion and Recommendations of the Committee Against Torture. United States of America" CAT/C/USA/CO/2/ 25 July 2006.

[8] *See* HRC recommendations. A member of the UN Committee Against Torture raised very similar concerns when questioning the US during the May 7th hearing before the CAT. During the CAT's review of the U.S.' government's Initial Report to the Committee, the Country Rapporteur inquired how "the administration, however brief, of an electric shock of 50,000 volts did not constitute cruel, inhuman, and degrading treatment," *Summary Record of the First Part (Public) of the 427th Meeting*, May 10, 2000, CAT/C/SR.424, ¶ 21, and the Committee's 2000 Conclusions and Recommendations also reflect concerns regarding the use of electroshock devices. *Conclusions and Recommendations of the Committee Against Torture: United States of America*. 15/05/2000. A/55/44, para. 179(e).

transgender individuals was explicitly raised during the hearings before the HRC.[9] The US government failed to offer any substantive response to questioning regarding its efforts to implement the recommendations of Amnesty International's 2005 report, *Stonewalled: Police Brutality and Abuse Against Lesbian, Gay, Bisexual and Transgender People in the US*,[10] documenting widespread abuses of the rights of LGBT people by law enforcement officers extending from street encounters to custodial situations.[11]

Additionally, the Committee Against Torture and the HRC expressed particular concern regarding violations of the human rights of lesbian, gay, bisexual and transgender people by law enforcement agencies and correctional authorities, and widespread police violence against transgender individuals was explicitly raised during the hearings before the HRC.[12]

New York City has experienced a series of police brutality cases where officers have raped, assaulted and killed innocent citizens with impunity. This violence has spanned multiple city administrations, from Rudy Giuliani to Michael Bloomberg. Innocent New Yorkers and their families, most of them people of color, have found themselves brutalized and scarred while the majority of police officers involved are not held accountable for human rights violations.

These are just a few tragic cases that demonstrate a pattern of police violence and torture that continues to disproportionately impact racial minorities with practically no oversight nor accountability.

The NYCLU reports that between 2006-2008, nearly 90 percent of the people shot by the NYPD officers were African American or Latino. Between 1999 and 2006, in 77 percent of the incidents where officers fired their weapons at civilians the officers were the only ones shooting, with officers often shooting at unarmed civilians (like Sean Bell and Amadou Diallo).[13] Furthermore, police violence impacts sex workers and the Lesbian Gay Bisexual and Transgender (LGBT) community of color. According to two studies released by the Sex Workers' Project of the Urban Justice Center in NYC, up to 17 percent of sex workers interviewed reported rape, sexual harassment and abuse by law enforcement officers.[14] Another report noted an increase in the number of cases in which officers were found to have extorted sexual acts from women in exchange for leniency.[15] Additionally, LGBT people of color in New

[9] HRC Recommendations at 25, *see also* CAT Recommendations 32.
[10] Report available at: http://www.amnestyusa.org/lgbt-human-rights/stonewalled-a-report/page.do?id=1106610. A 2003 FIERCE survey of LGBT youth in the West Village and Chelsea, gay neighborhoods in NYC, found that 98 percent of respondents had experienced police harassment or violence.
[11] Comments of HRC member Michael O'Flaherty during the July 18, 2006 hearing.
[12] HRC Recommendations at 25, *see also* CAT Recommendations at 32.
[13] Center for Constitutional Rights Report, *Backgrounder on Racial Profiling and Police Brutality Against People of Color in New York City Prepared for the Special Rapporteur on Racism on the occasion of his 2008 mission to the U.S.*, available at: http://ccrjustice.org/racial-gender-and-economic-justice.
[14] Sex Workers Project, *Unfriendly Encounters: Street-Based Sex Workers and Police in Manhattan, 2005*;
Sex Workers Project, *Behind Closed Doors* (New York City: 2005); Sex Workers Project, *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, (New York City: 2003).
[15] M. Weiss, *Crooked-Cop Cases Surge*, New York Post, October 22, 2007.

York City have reported excessively harsh treatment in their interactions with police authorities; including verbal, physical, and sexual abuse.[16]

II. Racial Profiling and Racial Disparity in Policing Practices

In New York City and its surrounding boroughs, racial profiling and police brutality have been institutionalized through a series of "quality of life" programs enforced by the NYPD. These purported "anti-crime" programs are based on a theory of "zero tolerance" for even minor offenses. "Quality of life" policing creates a hostile environment where youth of color, homeless people, sex workers and street vendors, among others, are harassed, intimidated, stopped, and searched on a daily basis, where women of color are frequently subject to sexual harassment by the police, poor residents are displaced, and communities are transformed in terms of race and socio-economics.

The New York City government and the NYPD have done little to combat the racial profiling that impacts half a million New Yorkers every year. According to the NYPD's own data, the number of stops indicates a nearly seven percent rise since 2008 in police stops with a corresponding increase in racial disparity as well. A "stop" is when a police officer approaches an individual and temporarily detains them. Furthermore, a stop often does not have to result in arrest. Between 2005 and 2008, 80 percent of individuals stopped were African American and Latinos, and police reports from 2009 indicate that 84 percent of individuals stopped were African American and Hispanic – though they comprise approximately 25 percent and 28 percent of New York City's total population respectively. In 2009, there was a record high 576, 394 stops by the NYPD. The data reveals only 1.25 percent of the year's stops resulted in the discovery of a weapon, and only 6 percent of the stops resulted in arrests.[17] This is a stark disparity considering that African Americans and Latinos make up 25 and 27 percent respectively of New York City's population. [18]

The Civilian Complaint Review Board (CCRB) is the oversight agency charged with investigating complaints against police officers.[19] The latest CCRB Status Report for the six month period from January through June 2009 states that the number of complaints for the first part of 2009 (totaling 4,026) was *higher* than any six month period since 1993 (the year the CCRB was first established. During this period, the CCRB referred an *additional* 5,752

[16] Amnesty International, *Stonewalled, Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, 2005; *"It's War in Here": A Report on the Treatment of Transgendered and Intersex People in New York State Men's Prisons 33*, Sylvia Rivera Law Project (2007*).*

[17] The City often claims the racial disparity in stops is accounted for by the racial breakdown of crime suspects, but the data from the first three quarters of 2009 (fourth quarter detail unavailable at this time) reveal that "fits relevant description" is the reason for a stop only 15 percent of the time. Far and away the most often cited reason for a stop by the police is the vague and undefined, "furtive movements" (nearly 50 percent of all stops), and "casing a victim or location" (nearly 30 percent of all stops). Also listed are "inappropriate attire for season," "wearing clothes commonly used in a crime," and "suspicious bulge," among other boxes an officer can check off on the form.

[18] New York City Civilian Complaint Review Board, Status Report January-December 2008, pg 14 (June 2009)

[19] The CCRB is an independent and non-police mayoral agency charged with investigating civilian complaints of police misconduct and recommending disciplinary actions in cases they substantiate. The CCRB is headed by a thirteen-member board, representing 5 mayoral appointments, 5 City Council appointments and 3 police commissioner appointments. Considering the Mayor appoints the police commissioner, it is our (and many other organizations') belief that the CCRB is not truly independent of the police department.

complaints outside its jurisdiction to other agencies.[20] Furthermore, the CCRB reports that 57 percent of all complaints made against the NYPD are filed by African Americans. This is striking, considering that in 2008, African Americans made up only 23 percent of the New York City population. The CCRB reports that Hispanics make up the second highest group of complainants – approximately 26 percent of all complaints filed against the NYPD compared to only 13 percent of all complaints filed by Whites.[21]

The CCRB is generally considered ineffective by many New York residents. This may be in part because the NYPD fails to discipline many officers in cases that have been substantiated by the CCRB. In the past three years, the number of cases that the NYPD has refused to discipline has increased dramatically. In the years 2004, 2005, and 2006, the NYPD refused to discipline an average of 15 cases a year. In 2007 and 2008, the NYPD has refused to discipline 104 and 86 cases respectively.[22] The 2009 CCRB six-month status report notes that since 2007, the NYPD has failed to discipline an average 48 cases per six months. The report notes that the CCRB is working with the Police Department's Advocate Office to determine why there has been such a jump in cases that go undisciplined by the NYPD.[23] Without an adequate mechanism for independent civilian review, the residents of New York, especially African Americans and Latinos, lack trust in the city or state government's ability to hold accountable perpetrators of human rights violations. CCS is concerned that the CCRB has been ineffective in its investigation role and has failed to effectively advocate for the reform of police practices. The CCRB has no prosecutorial authority and carries no power to affect change within the police department. As a result, even officers reported by the CCRB are often not punished for their misconduct. Human Rights bodies such as the Committee Against Torture and Committee on Elimination of Racial Discrimination acknowledge a need for both monitoring and holding officers accountable for misconduct.[24] A monitoring system such as the CCRB is thus ineffective unless there are stronger measures to hold officers charged with misconduct accountable for their abuse.

[20] New York City Civilian Complaint Review Board Status Report January -June 2009 pg 6 (March 2010) available at http://www.nyc.gov/html/ccrb/pdf/ccrbsemi2009_Jan_June.pdf.
[21] *Id* at 8
[22] New York City Civilian Complaint Review Board, Status Report January-December 2008, pg 10 (June 2009)
[23] New York City Civilian Complaint Review Board Status Report January -June 2009 pg 13 (March 2010) available at http://www.nyc.gov/html/ccrb/pdf/ccrbsemi2009_Jan_June.pdf.
[24] *See supra* note 5, see also *infra* note 24

III. International Calls for Accountability, Investigation and Reform

In March 2008, the Committee on the Elimination of Racial Discrimination presented its concluding observations on the United States to the United Nations. The Committee expressed concern about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities. The Committee observed the impunity of police officers responsible for racial profiling and recommended the United States significantly increase its efforts to address the problem by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee recognized the need to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.[25] Additionally, the Committee Against Torture has recently requested the United States provide information on measures taken by the Government to put an end to racial profiling by federal and state law enforcement officials, specifically requesting information on measures the federal and state governments have adopted to prohibit racial profiling and updated data on the extent to which such practices persist, as well as on complaints, prosecutions and sentences in such matters.[26]

IV. Due Diligence in Preventing Government Misconduct

The international community has recognized a State's duty to protect citizens from excessive force,[27] torture and racial profiling.[28] Police officers are granted authority to use force, but human rights standards mandate that this force be used proportionally and in situations of necessity. The United States must ensure that harmed individuals will receive justice from ill-treatment, abuse or harassment from law enforcement agencies.

We thank you for your careful consideration of these issues.

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[25] Committee on the Elimination of Racial Discrimination. *Concluding Observations of the Committee on the Elimination of Racial Discrimination United States of America.* CERD/C/USA/CO/6 February 2008.

[26] "List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America, 43rd Session," CAT/C/USA/Q/5/20 January 2010, available at http://tb.ohchr.org/default.aspx [click on convention, "CAT"; country "United States of America"; type "List of issues".

[27] Excessive force" is used to refer to force that exceeds what is objectively reasonable and necessary in the circumstances confronting the officer to subdue a person, as in Article 3 of the U.N. Code of Conduct for Law Enforcement Officials (*see* http://www.hrw.org/legacy/reports98/police/uspo150.htm), which provides that: "Law enforcement officials should use force only when strictly necessary and to the extent required for the performance of their duty." GA resolution 34/169 passed on December 17, 1979, and in the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which stipulates that, "Whenever the use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved." UN Doc. A/CONF.144/28/Rev.1 (1990).

[28] *See* Human Rights Watch Report, *Shielded From Justice Police Brutality and Accountability in The United States*, (1998), available at http://www.hrw.org/legacy/reports98/police/toc.htm; Committee on the Elimination of Racial Discrimination. *Concluding Observations of the Committee on the Elimination of Racial Discrimination United States of America.*CERD/C/USA/CO/6 February 2008;.

United States of America

Submission to the United Nations
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Environmental Justice

Submitted by:

Bay Area Environmental Health Collaborative

Center for Community Action and Environmental Justice

Center on Race, Poverty and the Environment

Central California Environmental Justice Network

Environmental Justice League of Rhode Island

New York City Environmental Justice Alliance

New York Environmental Law and Justice Project

New York Lawyers for the Public Interest

Pratt Center for Community Development

People Organized in Defense of Earth and her Resources (PODER)

South Bay Communities Alliance (AL)

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Endorsed by the following 17 Organizations and 6 Individuals:

Endorsements:

Organizations: Advocates for Environmental Human Rights; Deep South Center for Environmental Justice; Environmental Justice Resource Center, Clark Atlanta University; Human Rights Caucus, Northeastern University School of Law; INDIGENOUS; International Indian Treaty Council; Lawyers' Committee for Civil Rights Under Law; Leonard Peltier Defense Offense Committee – Fargo, North Dakota; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; National Economic and Social Rights Initiative; National Lawyers Guild; Natural Resources Defense Council; People Organized to Demand Environmental and Economic Rights (PODER); Poverty and Race Research Action Council; Public Interest Projects; Three Treaties Task Force of the Social Justice Center of Marin

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EXECUTIVE SUMMARY

This report addresses the United States of America's (U.S.) implementation of its human rights obligations in the area of environmental justice. In the U.S., communities of color and low-income communities are disproportionately burdened by environmentally harmful human activities and their adverse health consequences. While this phenomenon is caused by multiple governmental actions and inactions, this report focuses on three main issue areas:

1) The failure of U.S. law to redress discriminatory actions that adversely impact communities of color in the absence of proof of discriminatory motives;

2) The failure of U.S. law and policy to adequately protect the inherent right to life of racial minorities through a precautionary approach to environmental decision-making; and

3) The failure of U.S. law and policy to protect communities of color and low-income communities from cumulative impacts created by the concentration of environmentally harmful uses in discrete communities.

In support of its analysis and recommendations, the report draws upon credible environmental research, government studies and analyses, and specific case studies.

The main submitting organizations for this report are the Center on Race, Poverty, and the Environment (CRPE) and New York Lawyers for the Public Interest (NYLPI). Founded in 1989, CRPE is an environmental justice litigation organization dedicated to helping grassroots groups across the United States attack head on the disproportionate burden of pollution borne by poor people and people of color. Founded in 1976, NYLPI is a nonprofit, civil rights law firm that strives for social justice through impact litigation, community organizing and advocacy.

I. CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

1. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, states that "everyone has the right to life, liberty, and the security of person."[1] It further acknowledges that all "are entitled without any discrimination to equal protection of the law" and "to an effective remedy by the competent national tribunals for acts violating [their] fundamental rights."[2]

2. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), ratified by the U.S. in 1994, requires state parties to "amend, rescind, or nullify any laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists."[3] CERD protects the right to public health including "the underlying determinants of health, such as …healthy occupational and environmental conditions."[4]

3. The International Convention on Civil and Political Rights (ICCPR), ratified by the U.S. Senate in 1992, states that "every human being has the inherent right to life,"[5] a right that includes freedom from exposure to environmental dangers.[6]

4. The U.S. Constitution's 14th Amendment mandates that no "state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[7] This mandate has been extended by the U.S. Supreme Court to apply to federal actions as well.[8] An important basis for addressing racial discrimination in the Unites States, this equal protection clause has been interpreted by the U.S. Supreme Court to only prohibit actions motivated by *intentional* racial discrimination.[9] In a departure from CERD's mandates, the Court provides no redress for actions that are discriminatory in effect where there is no evidence of a racially discriminatory motive.

5. Similarly, Title VI of the Civil Rights Act of 1964 prohibits, "on the ground of race, color, or national origin, [that any person] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[10] Section 601 of Title VI provides for a private right of action to enforce its anti-discrimination mandate and Section 602 of Title VI authorizes federal agencies to issue implementing regulations.[11] Most federal agencies' Title VI regulations, including those of the U.S. Environmental Protection Agency (EPA),[12] bar recipients of federal funds from taking actions that have disparate impacts on the basis of race, color or national origin. Prior to 2001, private citizens could enforce regulations promulgated under Section 602 in U.S. courts. In 2001, the U.S. Supreme Court ruled in *Alexander v. Sandoval* that private parties could not bring suit to enforce disparate impact regulations issued under Section 602 of Title VI.[13] As a result, private enforcement of Title VI can only occur pursuant to Section 601, which the Supreme Court had previously held to require proof of discriminatory intent.[14]

6. The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of their proposed actions.[15] For any proposed action that may significantly impact upon the environment, including those "significantly affecting the quality of the human environment,"[16] NEPA requires preparation of an environmental impact statement (EIS) that assesses potential significant impacts, including cumulative impacts and identifies measures or alternatives to avoid or mitigate such impacts.[17] Federal regulations define cumulative impacts as "the impact on the environment which results from the incremental impact of [a proposed] action when added to other past, present, and reasonably foreseeable future actions."[18]

II. PROMOTION AND PROTECTION OF HUMAN RIGHTS

7. It is well-established that U.S. communities of color and low-income communities are disproportionately burdened by environmentally harmful human activities and their individual and cumulative adverse health consequences such as:

> The siting of toxic waste disposal facilities;[19]
> The concentration of pollution emitting facilities;[20]
> The distribution of environmental harms caused by the extraction of natural resources, particularly coal and uranium (an issue of particular concern for Native American communities);[21]
> The contamination of wildlife used as a food source by Native American and low-income and minority populations that engage in subsistence hunting and fishing;[22]

The siting of low-income housing[23] and public schools[24] in close proximity to sources of pollution; and

The racial segregation of U.S. housing markets, which concentrates populations of color in neighborhoods with substandard housing conditions, limited access to healthy food, and high levels of environmental pollution, leading to disproportionately negative health outcomes such as asthma and diabetes.[25]

These disproportionate burdens on communities of color and low-income communities raise three broad and related human rights concerns: the lack of adequate legal remedies for racially disparate environmental injuries; the failure of U.S. law to protect of racial minorities through a precautionary approach to environmental decision-making; and the failure of U.S. law to address the cumulative effects of concentrating environmentally harmful uses in communities of color and low-income communities. These broad concerns remain, despite recent developments at EPA suggesting a deeper commitment to address disproportionate environmental burdens on communities of color and low-income communities.

A. Failure to Provide Adequate Legal Remedies for Racially Disparate Environmental Injuries.

8. In 2008, the Committee on the Elimination of Racial Discrimination reviewed U.S. compliance with CERD and recommended that it "review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure – in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."[26] To date, the U.S. has failed to amend its anti-discrimination legislation accordingly, thus continuing to deny effective remedies to victims of actions with a discriminatory effect.

9. The aforementioned *Sandoval* ruling has undermined the ability of communities of color to seek legal redress from discriminatory siting and environmental permitting practices. For example, prior to the ruling, residents of the predominately minority Waterfront South neighborhood in Camden, New Jersey, filed suit against New Jersey's environmental agency under EPA's Title VI regulations to invalidate a permit for the operation of a cement crushing facility in their neighborhood, which already contained "two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating facilities, including chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station."[27] On April 19, 2001, a federal district court judge suspended the cement plant's permit, finding that New Jersey's permitting had disparately impacted racial minorities in violation of the EPA's Title VI regulations.[28] The Supreme Court issued its *Sandoval* decision five days later. In response the district court judge allowed the plaintiffs to amend their complaint and found that the amended complaint still stated a valid claim.[29] Upon appeal, however, the U.S. Court of Appeals for the Third Circuit held that EPA's Title VI regulations could not be privately enforced.[30] The cement plant's permit was restored.

10. After *Sandoval,* the only redress at the federal level for victims of actions having a disparate impact on the basis of race, color or national origin is to file an administrative

complaint with the appropriate federal agency under the agency's Title VI regulations. This course of action has proven ineffective in environmental matters. A number of studies and a recent court ruling document EPA's consistent failure to process and investigate Title VI complaints in a timely and thorough fashion.

11. In 2003, the U.S. Commission on Civil Rights issued a study of the effectiveness of EPA's Title VI Complaint Program.[31] The study found that, of the 124 complaints filed with EPA by January 1, 2002, only 13 cases (10.5%) were processed by the agency in compliance with the its 20 day processing rule; and all 13 cases were rejected for investigation by the agency for failure to meet the agency's regulatory requirements ("rejected").[32] By June 30, 2003 EPA had received a total of 136 Title VI complaints, and of that total, 75 were rejected, 26 were dismissed for other reasons, and the remaining 35 complaints were accepted by the agency for further action.[33] Of the 35 complaints accepted for further action, only 2 were informally resolved by EPA and another 2 were referred to another agency. The other 31 complaints remained in some stage of EPA review at the time of the study.[34]

12. Six years later, an independent report examined more recent data on EPA's Title VI complaint process.[35] This report found that between 1993 and 2008 the EPA processed a total of 211 Title VI complaints and of those, 40 (19%) were still pending and 171 (81%) had been closed. Of the closed cases, 127 had been rejected for investigation and 44 had been dismissed. Not a single complaint resulted in the EPA ordering remedial measures. Also, in 2009, the Ninth Circuit Court of Appeals reinstated a lawsuit filed by a non-profit community organization against EPA for failing to timely process a series of Title VI complaints.[36] Through discovery in the matter, it was learned that in 2006 and 2007 EPA failed to process a single Title VI complaint within the timeframes set forth in EPA's Title VI regulations.[37] The court found that the EPA engaged in "a consistent pattern of delay" in response to Title VI administrative complaints.[38]

13. The U.S.'s deliberate failure to meet its international human rights obligations is further underscored by the failure of EPA and other federal agencies to implement a 1994 executive order on environmental justice, Executive Order 12898. The Order directs every federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the U.S. and its territories."[39] Over the past six years, EPA's Office of the Inspector General (OIG) issued two evaluation reports faulting EPA for failing to determine whether the agency's programs caused any disproportionate adverse environmental impacts on minority and low-income populations and for failing even to develop criteria for assessing such impacts,[40] an omission which continues to this day.

B. U.S. failure to adequately protect the inherent right to life of racial minorities through a precautionary approach to environmental decision-making.

14. CERD requires signatory states to "review… and amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[41] The precautionary principle provides a framework for such a review and is essential to

eliminating disparate environmental impacts on communities of color and low-income communities in the U.S.

15. Human activities that use and release toxic pollution, extract natural resources, and that change the natural environment have significant adverse consequences for the environment and public health, particularly for communities of color and low-income communities. The precautionary principle contains four important components for reducing the disparate pollution burden experienced by these communities: a) "where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically;" b) the entity proposing an activity bears the burden of showing safety - i.e. affected communities do not bear the burden of proving harm; c) less harmful alternatives are identified and possibly adopted; and (d) the decision-making process requires full participation of those affected by a proposed activity.[42]

16. The precautionary principle is well established in international environmental law. In 1982, the World Charter on Nature first recognized the precautionary principle in relation to the natural environment and human activities.[43] Since then it has been included in several treaties including the Rio Declaration on Environment and Development,[44] the Climate Change Convention,[45] and the Convention on Biodiversity.[46] The European Commission has also adopted a Communication on the Precautionary Principle which outlines how Europe will apply the precautionary principle throughout its regulations.[47] In addition, Europe uses the precautionary principle in its Registration, Evaluation, Authorization, and Restriction of Chemical substances regulation (REACH).[48]

17. In stark contrast is the U.S.'s ineffective chemical policy - the Toxic Substances Control Act (TSCA). Low-income communities and communities of color in the U.S. suffer adverse health impacts from heightened chemical exposure, as substantiated by a recent study that focused on synthetic chemicals, such as dioxin, pesticides, disinfectants, and PCBs.[49] Among other things, the study found that:

> non-Hispanic Blacks are much more likely to be exposed to dioxins and polychlorinated biphenyls (PCBs) and are more likely to be exposed at higher levels; Mexican-Americans are much more likely to be exposed to pesticides, herbicides, and pest repellants and are more likely to be exposed at higher levels than non-Hispanic Whites, and are much more likely to be exposed to polycyclic aromatic hydrocarbons (PAHs) and phytoestrogens and are more likely to be exposed to phthalates at higher levels; non-Hispanic Blacks and Mexican-Americans are much more likely to have higher levels of less common chemicals; and non-Hispanic Blacks are exposed to the greatest number of chemicals.[50]

18. This disproportionate exposure has led to increased "rates of illness linked to chemical exposure include those of obesity, diabetes, thyroid disease, childhood cancers, breast cancer, prostate cancer, heart disease, asthma, neurodevelopmental problems, and learning disabilities in children that persist throughout life."[51] In order to comply with its

international obligations, and consistent with our recommendations below, the USA must reform its chemical policy in light of the precautionary principle.

C. The failure of U.S. law and policy to protect communities of color and low-income communities from cumulative impacts created by the concentration of environmentally harmful uses in discrete communities

19. As described above, communities of color and low-income communities are disproportionately burdened by and exposed to a multitude of environmentally harmful land uses and practices and disproportionately suffer the adverse health outcomes they cause. This is true despite a federal law, NEPA, that ostensibly requires agencies to ensure that significant adverse environmental impacts, including impacts to the human environment, are avoided and/or mitigated before a proposed action or land use can proceed. One of the major reasons that the NEPA mandate remains unfulfilled is the U.S.'s failure to adopt regulations and guidelines that ensure that the cumulative impacts of a proposed action and of other past, present, and reasonably foreseeable actions are adequately assessed and dealt with.

20. The ineffectiveness of the U.S.'s approach to addressing cumulative impacts is due in large part to its failure to develop a clear methodology for doing so. As pointed out by the U.S. Commission on Civil Rights, "Federal agencies…have not adopted formal cumulative impact standards to assess the risk to human health from exposures to multiple chemicals from multiple sources, even though Executive Order 12898 requires consideration of multiple and cumulative exposures."[52] Moreover, as noted above, the requirement to address cumulative impacts has existed since the passage of NEPA. As a result of this omission, there is significant variation in the nature and quality of cumulative impact assessment from agency to agency and from project to project.

21. Another significant problem is that agencies generally ignore potential cumulative impacts where methodological and data limitations make their assessment difficult. For example, NEPA's implementing regulations require that an agency, when confronted with the challenge of incomplete information from which to assess cumulative impacts, consider the "overall cost" of obtaining complete information.[53] Guidelines developed by the Council on Environmental Quality (CEQ), which was created within the executive branch by NEPA to coordinate and provide guidance on environmental impact assessments, specify that the costs to be considered include "financial costs and other costs such as costs in terms of time (delay), program and personnel commitments."[54] Thus, it is within the discretion of a permitting agency to prioritize expediency over the health of a community.

22. Where information is incomplete, NEPA's regulations instruct that the limitations be expressly stated in an environmental impact assessment, and that an agency assess cumulative impacts to the extent possible given the "credible scientific evidence" that is available.[55] Such a standard, ostensibly based in sound research principles, effectively creates the presumption that there are no human health risks where such risks cannot be properly assessed due to limitations in data and/or limitations in our understanding of the cumulative and synergistic effects of given impacts. An approach designed to protect the rights to life and health would instead presume that caution is paramount in communities where multiple environmental harms exist: "there is no

presumption that multiple exposures, in any amount, constitute an adverse health impact. This 'piling-on' of exposures should be given great weight when assessing the health risk associated with placing yet another facility in a neighborhood."[56]

23. Perhaps most significantly, as pointed out by the Council on Environmental Quality, even where a cumulative impact analysis determines that a proposed action will lead to adverse human health consequences, the proposed action may still go forward:

> Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.[57]

Such a policy is in clear conflict with the U.S.'s international human rights obligations. The procedural requirement that a proposed action's impact on environmental health be *considered* is a far cry from the requirement that a community's environmental health be protected.

D. Recent developments at EPA suggest a renewed commitment to addressing disproportionate environmental burdens on communities of color and low-income communities.

24. While this report is largely critical of the U.S. government's actions and inactions with respect to environmental justice, recent developments at EPA suggest that the agency plans to address disproportionate environmental burdens on communities of color and low-income communities more aggressively than it has in the past. Those new developments include:

> Environmental justice was named as one of seven agency priorities by the new EPA administrator Lisa Jackson, who declared in a January 12, 2010 memorandum to all EPA employees that EPA "must include environmental justice principles in all of our [agency's] decisions." [58]
>
> On January 22, 2010, EPA strengthened the health-based National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO_2), by creating a new 1-hour NO_2 standard at the level of 100 parts per billion (ppb) and ordering additional monitoring stations for NO_2 in urban areas near major roads as well as in other locations where maximum concentrations are expected. The new standard was developed to protect public health of sensitive populations – people with asthma, children and the elderly.[59]
>
> On June 16, 2009, EPA signed an agreement with the U.S. Department of Housing and Urban Development (HUD) and the U. S. Department of Transportation (DOT) creating an interagency Partnership for Sustainable Communities to help improve access to affordable housing, more transportation options, and lower transportation costs while protecting the environment in communities nationwide.[60]

On April 10, 2010, EPA issued a detailed guidance governing the agency's review of Appalachian surface coal mining operations that directs EPA regional administrators in EPA Regions 4, 5 and 6 to identify and address the potential adverse human health and environmental effects of proposed mining related activities on low-income and minority populations in permitting decisions under the Clean Water Act.[61]

III. RECOMMENDATIONS

25. The following are recommendations based on the human rights concerns described herein:

a) The EPA should enforce its Title VI regulations by providing an effective administrative remedy for addressing actions within its jurisdiction that are racially discriminatory in effect. Doing so requires EPA to address the substantial existing backlog of administrative complaints, respond to new complaints within the time frame required by its regulations, thoroughly investigate credible claims of discrimination, and enforce remedial measures that address the impacts of such discrimination.

b) The U.S. government should amend Title VI of the Civil Rights Act of 1964 to clarify that its prohibition on racial discrimination in federally funded programs applies to actions that are discriminatory in effect regardless of their intent; and to provide a private right of action to enforce existing federal regulations forbidding recipients of federal funds from taking actions that are discriminatory in effect regardless of their intent.

c) The U.S. government should enact legislation proposed in 2008[62] to codify Executive Order 12898 and to provide for judicial review of agency actions with respect to implementation of said Executive Order and a private right of action to enforce compliance with the Order.

d) The U.S. government should reform the Toxic Substance Control Act (TSCA) of 1976 in light of the precautionary principle. TSCA,[63] which authorizes EPA to regulate the use of chemicals, needs to be reformed in a manner that will: a) reduce the disproportionate burden of toxic chemical exposure placed on people of color, low-income people and indigenous communities; (b) protect vulnerable groups using the best science – chemicals should meet a standard of safety for all people, including children, pregnant women, and workers; (c) take action to phase out uniquely hazardous and persistent, bio-accumulative toxicants and identify safer alternatives; and (d) hold industry responsible for demonstrating chemical safety.[64] Currently, chemicals are presumed safe until proven harmful; chemical manufacturers should be responsible for demonstrating the safety of their products.[65]

e) The U.S. should adopt and encourage localities to adopt precautionary land use regulations that require a distance between residential populations and hazardous industrial facilities sufficient to prevent chemical exposure. The European Commission

controls the siting of new facilities "to maintain appropriate distances between establishments …and residential areas, areas of public use and areas of particular natural sensitivity or interest"[66] and obliges the owner or operator of existing uses "to take all measures necessary to prevent major accidents and to limit their consequences for man and the environment." The United States should adopt similar regulations.[67]

f) The U.S. should amend the National Environmental Policy Act to state that:

   i) Any proposed action that will create disproportionately high and adverse environmental impacts for communities of color and low-income communities cannot go forward unless measures are adopted to eliminate such impacts.

   ii) Actions proposed in communities that already host a disproportionate share of environmentally burdensome facilities are presumed to create significant adverse environmental impacts that must be avoided or mitigated to the greatest extent possible.

g) The U.S. should prioritize and fund research efforts designed to determine the cumulative and synergistic effects of environmental toxins found in overburdened communities of color and low-income communities.

h) The U.S. should provide clear, uniform guidance to federal, state, and local agencies for effectively assessing cumulative impacts and disproportionate environmental impacts on communities of color and low-income communities in the context of an environmental review.

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[1] Universal Declaration on Human Rights Art. 3 (UDHR).
[2] UDHR Art. 7, 8.
[3] International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c) *entered into force* Jan. 4, 1969 [emphasis added].
[4] Paul Hunt, *Report of the Special Rapporteur*, UN Doc. E/CN.4/2003/58, ¶ 23 (2003).
[5] International Covenant on Civil and Political Rights, Art. 6(1)
[6] *See EHP v. Canada*, Human Rights Committee, Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982)
[7] U.S. Const. Amend. XIV, Sec. 1.
[8] *Bolling v. Sharpe*, 347 U.S. 497 (1954).
[9] *Washington v. Davis*, 426 U.S. 229 (1976).
[10] 42 U.S.C. §2000d.
[11] *Id.*, 40 USC 2000d-1
[12] *See,* 40 C.F.R. Part 7
[13] *Alexander v. Sandoval*, 532 U.S. 275 (2001).
[14] *Regents of the University of* California v. Bakke, 438 U.S. 265 (1978).
[15] 42 U.S.C. §4321 *et seq.*
[16] 42 U.S.C. §4332 (2007).
[17] 40 CFR 1508.25.
[18] 40 C.F.R. § 1508.7
[19] People of color make up 56% of the population in neighborhoods that host the nation's 413 commercial hazardous waste facilities and 69% of the population in neighborhoods where such facilities are clustered (as opposed to 30% of the population of non-host neighborhoods), and race continues to be an independent predictor of the location of

such facilities. Bullard, Mohai, Saha and Wright, *Toxic Wastes and Race at Twenty 1987-2007, A Report Prepared for the United Church of Christ Justice & Witness Ministries*, http://www.ucc.org/assets/pdfs/toxic20.pdf

[20] Residents of the predominantly African-American community in Mossville, Louisiana, filed a petition with the Inter-American Commission on Human Rights of the Organization of American States alleging that the United States government and its political subdivisions authorized fourteen industrial facilities to manufacture, process, store, and discharge toxic and hazardous substances in close geographic proximity to their community, in violation of international human rights law. The Commission recently accepted jurisdiction to hear the complaint. Both the complaint and the Commission's admissibility ruling are available at: www.ehumanrights.org .

[21] Both the UN Committee on the Elimination of Racial Discrimination and the UN independent expert on the question of human rights and extreme poverty expressed human rights concerns from the impact of natural resource extraction on low-income and minority communities, particularly Native American communities in the United States *See,* Committee On The Elimination of Racial Discrimination, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, UNITED STATES, OF AMERICA, at ¶29 (February, 2008) CERD/C/USA/CO/6; Economic and Social Council, REPORT SUBMITTED BY THE INDEPENDENT EXPERT ON THE QUESTION OF HUMAN RIGHTS AND EXTREME POVERTY, ARJUN SENGUPTA, MISSION TO THE UNITED STATES, at ¶73 (27 March 2006) E/CN.4/2006/43/Add.1.

[22] *See,* International Indian Treaty Council, MERCURY: THE TOXIC LEGACY OF THE CALIFORNIA GOLD RUSH, (Undated) available at http://www.treatycouncil.org/PDFs/UpdatedMercuryflyer614.pdf .

[23] The UN Special Rapporteur, on her mission to the United States, visited at least one subsidized housing development located next to polluted areas, Altgeld Gardens outside of Chicago, and expressed concern about its proximity to landfills, numerous industrial manufacturing plants and waste dumps. UN Human Rights Council, REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, AND ON THE RIGHT TO NON-DISCRIMINATION IN THIS CONTEXT, RAQUEL ROLNIK, ADDENDUM, MISSION TO THE UNITED STATES OF AMERICA, at ¶43 (12 Feb. 2010) A/HRC/13/20/Add.4.

[24] A growing number of urban school districts are choosing to site schools on former industrial sites contaminated with unsafe levels of toxic substances. Only five (5) states prohibit or severely restrict
siting schools on or near hazardous or toxic waste sites. Another nine (9) states have policies that prohibit outright the siting of schools on or near sources of pollution or other hazards that pose a risk to children's safety. *See,* Center for Health, Environment and Justice, BUILDING SAFE SCHOOLS: INVISIBLE THREATS, VISABLE ACTIONS, at 11-17 (Dec. 2005) available at http://www.childproofing.org/documents/building_safe_schools.pdf .

[25] *See,* UN Human Rights Council, REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, AND ON THE RIGHT TO NON-DISCRIMINATION IN THIS CONTEXT, RAQUEL ROLNIK, ADDENDUM, MISSION TO THE UNITED STATES OF AMERICA, at ¶¶37, 65 (12 Feb. 2010) A/HRC/13/20/Add.4.; Economic and Social Council, REPORT SUBMITTED BY THE INDEPENDENT EXPERT ON THE QUESTION OF HUMAN RIGHTS AND EXTREME POVERTY, ARJUN SENGUPTA, MISSION TO THE UNITED STATES, at ¶32 (27 March 2006) E/CN.4/2006/43/Add.1.

[26] Committee On The Elimination of Racial Discrimination, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, UNITED STATES, OF AMERICA, at ¶10 (February, 2008) CERD/C/USA/CO/6.

[27] *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.,* 274 F.3d 771, 775 (3d. Cir. 2001).

[28] *See*, *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.,* 145 F. Supp. 2d 446 (D.N.J. 2001).

[29] *Id*. at 505.

[30] *See, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.,* 274 F.3d 771 (3d. Cir. 2001).

[31] U.S. Commission on Civil Rights, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE, (Oct. 2003), available at www.usccr.gov/pubs/envjust/ej0104.pdf.

[32] *Id.,* at 57.

[33] *Id.,* at 58.

[34] *Id.*

[35] CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION, 499 (2nd ed. 2009).

[36] *Rosemere Neighborhood Ass'n v. US Envtl. Protect. Agency,* 581 F. 3d 1169 (9th Cir. 2009).

[37] *Id.,* at 1175.

[38] *Id.*

[39] Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 at ¶1-101 (Feb. 11, 1994) (hereafter, Executive Order 12898).
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[41] CERD, Article 2, ¶1(C).
[42] Wingspread Statement on the Precautionary Principle available at http://www.gdrc.org/u-gov/precaution-3.html .
[43] UN Resolution 37/7, 22 I.L.M. 455 (1983), II.11.
[44] Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992), Principle 15.
[45] 1992 Climate Change Convention, Art. 3(3), reprinted in 31 *ILM* 849.
[46] Convention on Biodiversity (June 5, 1992) reprinted in 31 I.L.M. 818, Preamble and Article 14.
[47] Communication from the Commission on the Precautionary Principle (Com 2/2/2000) 16, 22, available at ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf (visited on April 5, 2010).
[48] EC 1907/2006.available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:396:0001:0849:EN:PDF. "This Regulation is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle." Id. Article I, The regulation also encourages the development of alternatives. Id. Article 55.
[49] Environmental Justice and Health Union, *Environmental Exposure and Racial Disparities*.(2003) available at http://www.ejhu.org/disparities.html. This 2003 study provides a racial analysis of the Center for Disease Control and Prevention's Second Report on Human Exposure to Environmental Chemicals.available at http://www.cdc.gov/exposurereport/.
[50] *Id*.
[51] Letter of Principles for Toxic Regulatory Reform to the Obama Transition government available at http://namanet.org/files/documents/Letter%20of%20Principles%20for%20Toxic%20Chemical%20Regulatory%20Reform%20to%20the%20Obama%20Transition%20government.pdf.; See also testimony before the House of Representatives by Cecil Corbin-Mark, Deputy Director of We Act for Environmental Justice, Committee On Energy AND Commerce Subcommittee on Commerce and Trade and Consumer Protection at a Hearing to Revisit the Toxic Substances Control Act of 1979 February , available at http://energycommerce.house.gov/Press_111/20090226/testimony_corbinmark.pdf; Testimony of Maureen H. Swanson Healthy Children Project Coordinator Learning Disabilities Association of America Before The U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection At a Hearing On Revisiting the Toxic Substances Control Act of 1976 (February 26, 2009**).**
[52] U.S. Commission on Civil Right, *infra note* ___ p.21.
[53] 40 C.F.R. 1502.22a.
[54] Council on Environmental Quality*, Guidance on the consideration of past actions in cumulative impact analysis* (6/24/05).
[55] 40 C.F.R. 1502.22b(4).
[56] U.S. Commission on Civil Rights, *infra note* 31 at p.22.
[57] Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act,* p 10 (1997).
[58] Memorandum available at http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/
[59] *Primary National Ambient Air Quality Standards for Nitrogen Dioxide; FinalRule,* 75 Fed. Reg. 6473 (Feb. 9, 2010).
[60] Partnership agreement available at http://www.epa.gov/smartgrowth/pdf/dot-hud-epa-partnership-agreement.pdf
[61] Detailed Guidance document available at http://www.epa.gov/owow/wetlands/guidance/pdf/appalachian_mtntop_mining_detailed.pdf . The Guidance document states that EPA is "working with other federal agency partners to develop and implement an interagency environmental justice strategy to more fully evaluate environmental justice considerations in review of Appalachian surface coal mining operations. *Id.,* at note 2.
[62] *See, Environmental Justice Act of 2008,* S.642 (110th Cong. 2d Sess.) available at http://www.govtrack.us/congress/billtext.xpd?bill=s110-642

[63] 15 U.S.C. §§ 2601 *et seq*.
[64] Press Release, Safer Chemicals, Healthy Families Coalition, Diverse Health & Environmental Coalition Calls for Sweeping Changes in U.S. Chemical Safety Law (Aug. 4, 2009).
[65] Id.
[66] Serveso Directive II 96/82/EC, Article 12
[67] Recently, two California communities adopted buffer zones to successfully reduce or eliminate pollution. In June 2009, the California Energy Commission (CEC) denied a power plant permit that was incompatible with the City of Chula Vista's General Plan which required a 1000 foot buffer zone between power plant development and residences. Press Release, *Victory! Power Plant Expansion Denied CEC recommendation supports community demands* (1/23/2009). In addition, the Kern and Tulare County Agricultural Commissioners imposed quarter-mile buffer zones to prevent pesticide drift around schools. Press Release, *Tulare County Residents Win Greater Protection from Dangerous Pesticides* (February 21, 2008).

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Right to Decent Work

Submitted by:

Urban Justice Center

Women of Color Policy Network

New York Jobs with Justice

National Employment Law Project

Common Cause/NY

Applied Research Center

Domestic Workers United

9to5 National Association of Working Women

Center for Family Life in Sunset Park

Urban Agenda

International Worker Justice Campaign

Good Jobs New York

South Austin Coalition

Atlanta Labor Council

AFRODES

Restaurant Opportunities Center of New York

D.C. Professional Taxicab Drivers Association

Philip Harvey, Professor of Law & Economics at Rutgers University

Endorsed by the following 29 Organizations and 12 Individuals:

Endorsements:

Organizations: Arise Chicago; Atlanta Public Sector Alliance; Bail Out the People Movement; Center for Constitutional Rights; City and County of San Francisco, Department on the Status of Women; Direct Care Alliance, Inc.; Families United for Racial and Economic Equality (FUREE); Family Values @ Work; Human Rights Caucus at Northeastern University School of Law; Human Rights Litigation and International Advocacy Clinic at University of Minnesota Law School; Jobs for America Now; La Raza Centro Legal; Labor-Religion Coalition of New York State; Legal Momentum; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self Determination; Metro Atlanta Task Force for the Homeless; National Economic & Social Rights Initiative (NESRI); National Network for Immigrant and Refugee Rights; National Women and AIDS Collective; New York May 1 Coalition for Worker and Immigrant Rights; North Carolina Public Service Workers Union-UE Local 150; Public Interest Projects; The Center for Women's Global Leadership at Rutgers University; Three Treaties Task Force of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition; U.S. Positive Women's Network; Women Organized to Respond to Life-threatening Disease; Women's HIV Collaborative of New York.

Individuals: **Andrea Hornbein**, Massachusetts Statewide Harm Reduction Coalition; **Colia L. Clark**, Grandmamas For the Release of Mumia Abu Jamal, Green Party New York City and State; **Cynthia F. Racer**, MA, MPH, Past President, NY Metro Chapter, American Medical Writers Association; **Deborah M. Weissman**, Professor of Law and Director of Clinical Programs at the School of Law, University of North Carolina at Chapel Hill; **Dr. Debra J. Liebowitz**, Associate Professor, Political Science & Women's and Gender Studies, Drew University; **JoAnn Kamuf Ward**, Human Rights in the U.S. Fellow, Human Rights Institute at Columbia Law School; **Joyce Carruth**; **Sarah H. Paoletti**, Clinical Supervisor and Lecturer at University of Pennsylvania School of Law; **Sue Simon**, Director, Human Rights Public Interest Projects, U.S. Human Rights Fund; **Susan Lob**, Adjunct Faculty Columbia University School of Social Work, Founder and Former Director of Voices of Women Organizing Project; **Thandabantu Iverson**, Ph.D., Indiana University Labor Studies Program at the School of Social Work; **Ute Ritz-Deutch,** Ph.D., Tompkins County Immigrant Rights Coalition.

United States of America

Joint Report to the UN Universal Periodic Review
Ninth Session of the UPR Working Group of the Human Rights Council
22 November – 3 December 2010

Executive Summary

This joint submission provides information under sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review:

- Under Section B, this submission raises concerns over the failure to enforce domestic legislation to promote the right to decent work for racial and ethnic minorities and women.

- Under Section C, the report highlights issues of concern that result in disproportionately high unemployment and underemployment rates for people of color and women.

- Under Section D, the report makes a number of recommendations for action by the United States government.

Introduction

This submission focuses on the over-representation of women and racial and ethnic minorities in unemployment, underemployment, and poverty, and calls on the government to take specific steps to create employment opportunities for these groups.

B. Normative and institutional framework of the State

1. Review and amend the institutional framework for promoting the human right to work

Framework has failed a disproportionate number of racial and ethnic minorities and women
The United States government pursues a variety of policies designed to expand employment opportunities and reduce unemployment at the aggregate level. It also enforces a range of statutory and Constitutional protections designed to secure workplace rights, and operates a variety of programs designed to expand employment opportunities and combat poverty among vulnerable population groups. The problem with this institutional framework is that it has failed to achieve any lasting progress in securing either the right to work or the right to income security in the United States over the past several decades. While progress has been achieved in securing some aspects of the rights in question for some population groups, retrogression in other areas has more than counterbalanced these positive trends. Fairly judged, the United States can claim no overall progress since the early 1970s in securing either the right to work or the right to income security. This failure is particularly evident for African Americans and Latinos, as well as for women, and calls into question the adequacy of its institutional framework for achieving compliance with its human rights obligations in this area.

- **Employment promotion measures have not yielded a sufficient number of jobs for jobseekers:** The United States has acknowledged its obligation to strive for "maximum" or "full" employment in the Employment Act of 1946[1], and more explicitly in the Full Employment and Balanced Growth Act of 1978.[2] Both pieces of legislation highlight the importance of decent work in the promotion of a prosperous economy in which economic stability and well-being may be enjoyed by all. More recently, the American Recovery and Reinvestment Act (ARRA) has created and saved jobs, and extended benefits to vulnerable populations, but did not employ direct employment programs to create new jobs. The chronic job shortage in the United States not only indicates that these measures did not realize their goal of full employment—to create the number of jobs needed to employ all able and willing workers,—but also that the government has failed to meet obligations in the United Nations Charter, and understandings stemming from Article 22-25 of the Universal Declaration of Human Rights, and Articles 6-11 of the International Covenant on Economic, Social and Cultural Rights. Additionally, the failure of ARRA to target vulnerable populations in job creation does not reflect the government's obligations under articles 1(4) and 2(2) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) which *inter alia* mandates the use of affirmative programs to improve employment opportunities for disadvantaged racial minorities.

- **Anti-discrimination laws do not fully comply with ICERD:** The United States has a number of laws that protect against discrimination in employment. However, the definition of discrimination in current law does not meet the standard in Article 1 (1) of ICERD, and is inadequate in addressing indirect discrimination resulting from policies and practices that appear neutral but put people of particular racial, ethnic or national origin at a disadvantage compared with other persons in the enjoyment of the right to work. For example, most state laws allow employers to refuse to hire people with a criminal record including people who were arrested but never convicted.[3] Given the persistent practice of racial profiling, and disproportionate number of arrests based on race, this practice has a disproportionate negative effect on African Americans and the current laws are insufficient to protect them. Furthermore, Title VII of the Civil Rights Law of 1964, which prohibits employment discrimination, does not apply to employers with less than 15 employees, and thus sectors that tend to have fewer employees are de facto excluded. [4] This includes domestic workers, the majority of whom are women and racial minorities.

- **Insufficient workplace accommodation for pregnancy and parenting:** The Pregnancy Discrimination Act offers incomplete protection for pregnant women in the workplace. Because federal courts have interpreted the Act narrowly, there are many allowable grounds to fire a pregnant worker.[5] For example, the Act does not require an employer to accommodate a doctor's order instructing a pregnant worker not to lift heavy objects. The employer can fire the worker instead. Furthermore, the United States is the only industrialized country with no mandated maternity leave policy. The Family and Medical Leave Act guarantees up to 12 weeks unpaid leave for some workers, but because it is unpaid, many workers cannot afford to take advantage of it. Only 6 percent of all employees in firms with fewer than 100 employees receive any paid family leave.[6] In all, the poor protection and accommodation for pregnant workers and mothers has a disproportionate impact on low-wage workers, and African American and Latina women.[7]

- **Federal labor laws exclude many low-wage workers:** Domestic workers, agricultural workers, and independent contractors—workers who are often low-wage, and predominantly women and racial/ethnic minorities in the case of domestic workers—are unfairly exempt from the full protection of labor laws creating uneven standards across different labor sectors.[8] The Fair Labor Standards Act (FLSA), which establishes a national minimum wage and overtime pay guidelines, excludes live-in domestic workers, as well as home care workers such as workers who assist elderly and disabled persons with personal and household duties.[9] As a matter of policy, the Occupational Safety and Health Act (OSHA) also excludes domestic workers, depriving them of the right to a safe and healthy work environment, among other rights.[10] Furthermore, because labor laws assign rights to "employees" —a status that is very narrowly defined— employers often misclassify their employees as independent contractors or subcontractors denying them workplace protections.[11]

- **Inadequate protection of the right of association:** The National Labor Relations Act (NLRA) is intended to encourage collective bargaining, however its provisions only apply to the private sector, offer inadequate protection for workers, and are poorly enforced. In violation of obligations in article 22 of the International Covenant on Civil and Political Rights, there are five states—North Carolina, South Carolina, Georgia, Texas and Virginia[12]—that completely prohibit collective bargaining in the public sector. In North Carolina, where the ILO has issued a decision asking the federal government to take steps to repeal the ban on collective bargaining[13], groups contend that the ban on collective bargaining[14] has made it difficult to combat race and sex discrimination in the workplace. Women and African-Americans are overrepresented in North Carolina's low-wage state jobs.[15] In one example of workplace harassment at a North Carolina Department of Transportation maintenance shop with African American workers, a noose—which has long been a symbol of racially motivated violence—was hung at the worksite where workers were organizing a union chapter.[16] This is not an isolated incident; however there is no formal, institutionalized process to monitor other occurrences, with some level of anonymity, such as was provided by the U.S. Commission on Civil Rights in the late 1950s with respect to voting rights.

C. Promotion and protection of human rights at the national level

1. Positive Developments

- **Healthcare reform:** Passage of the Patient Protection and Affordability Act in March 2010 marked a historic and laudable moment in the United States. This Act will guarantee access to medical insurance for an estimated 30 million people who now lack such access, including "lawfully present" immigrants. However, even with passage of this Act, millions will still remain uninsured. In particular, undocumented immigrants are excluded from coverage, and many low-income documented immigrants will have delayed access to coverage under the new bill. The bill also fails to treat health care as a right which the government is accountable for fulfilling.

- **Lilly Ledbetter Fair Pay Act:** Signed into law in 2009, this Act was a commendable effort by the government to remedy loopholes in existing legislation regarding pay disparities

between men and women. The Act relaxed the statute of limitations, making it easier for workers to seek justice for pay discrimination they have experienced because of their sex.

- **American Recovery and Reinvestment Act (ARRA):** ARRA was estimated to have created 2 million jobs a year after its passage in 2009, and is projected to save or create 3-4 million jobs by the end of 2010. ARRA is a positive step towards filling the need for jobs, but will still generate less than 20 percent of the total jobs needed.[17] Moreover, it does not contain any provisions to target job creation to groups disproportionately represented in unemployment, nor are States and localities that are receiving federal money as a result of the Act required to collect race or gender disaggregated data on employees in order to assess how effectively funds are alleviating unemployment and underemployment for low-income women and racial and ethnic minorities.

2. Adopt employment policies that address the economy's endemic shortage of jobs

Employment-promotion policies have failed to create sufficient work opportunities

Although productivity and national wealth have steadily increased over the past several decades, unemployment rates and poverty rates have shown no long-term tendency to decline.[18] The current high unemployment rates underscore a severe jobs shortage. In February 2010, the U.S. Bureau of Labor Statistics indicated that there were approximately 13.3 million unemployed job seekers competing for 2.7 million job vacancies in the economy.[19] In other words, the economy lacked over 10 million jobs compared to the number of jobless individuals seeking work. This is a conservative figure and does not include involuntary part-time workers and persons who want a job but are not actively looking for one. ARRA has made some progress in creating employment largely by subsidizing demand for goods and services produced by some industries; but at the same cost of $787 billion for the ARRA, a direct jobs program could have created 5 times as many good jobs.[20]

- **Job shortages impact people of color and women disproportionately:** The job shortage has hit groups that are vulnerable to discrimination and social exclusion especially hard, specifically African Americans and Latinos, and women, (as well as immigrants and persons with disabilities). These groups tend to have additional barriers to accessing work such as low-education levels. The unemployment rate for African Americans is roughly double the rate for white Americans. This is the same ratio that Congress deemed unacceptable when the Civil Rights Act of 1964 was enacted. For Latinos and women who are heads of households, the unemployment rate is about two-thirds higher than for white Americans.[21] The problem is more pronounced among youth. African American youth job seekers between 16 and 19 years have an unemployment rate as high as 43.8 percent (compared to 26.4 percent for all job seekers in that age bracket). In addition, one in four African American and Latino workers is underemployed i.e. they cannot find the amount of work they want, and this number is on the increase even as job loss slows down.[22]

  Greta Philips of New York City is an African American woman who has been unemployed since September 2008 after losing her job in the healthcare industry. Greta has over ten years of experience in the industry, but has been unable to find employment and is now looking for work in any field. Despite having participated in a job training program and subsequently being hired by the City, she was told after two months that her employment would not be extended due to a lack of funds in the City's budget. Greta has explored many avenues in her

job hunt, including searching outside of her field of experience, participating in a job training program, and accepting an unpaid internship. She has depleted all of her personal savings, and is set to exhaust her unemployment benefits by April 2010. Her story represents the reality for so many women and people of color in the United States, groups that are also over-represented in the number of chronically unemployed.[23]

3. Ensure that all jobs meet decent work standards

The lack of decent work is a severe problem for racial and ethnic minorities and women
The problem is not simply the unavailability of jobs, but also that many of the jobs available do not meet decent work standards, i.e. they are not "*good* jobs" that provide a living wage, health and retirement benefits, and guarantee collective bargaining and freedom of association rights. The procurement of a good job is one of the most direct paths out of poverty for most workers.

- **Failure to provide a living wage:** Racial and ethnic minorities and women are overrepresented in low wage occupations, and consequently are disproportionately living in poverty despite being employed.[24] In Atlanta, Georgia, Marilynn Winn is a single woman supporting her mother and grandson on minimum wage jobs including temporary work as a driver for an auto auction and cleaning restrooms at a stadium. She does not have guaranteed hours, and works anywhere from 5 to 30 hours per week, with no benefits. As a result of the low wages, she cannot afford to live on her own and is forced to live with a friend. Her story is the same for countless others. Nationally, the percentage of Latino and African American workers earning poverty-level wages is 41.8 and 34 percent respectively, while the rate for White American workers is significantly lower at 21.9 percent.[25] Moreover, employees including home health care workers, predominately women are not even guaranteed minimum wage payment.[26]

- **Lack of healthcare for workers:** Despite the laudable passage of healthcare reform, many United States residents, primarily undocumented immigrants, are excluded from its coverage. Undocumented immigrants, who are mostly ethnic minorities, are not eligible for federal health programs, and are actually prevented from buying health insurance with their own money by the new reform.[27]

- **Paid sick leave:** Currently there are no state or federal laws requiring employers to provide paid sick days. Many fields that are traditionally staffed by women, such as nursing, retail, child care, office administration, and food service, do not offer workplace protections such as paid sick days. About 50 percent of full-time private sector workers have no sick days and among low wage workers, a disturbing 79 percent have no access to paid sick days.[28] Without guaranteed paid sick days, workers are forced to choose between caring for their health and the health of their families, or the economic instability resulting from losing a day's worth of wages. A minimum standard of paid sick days would ensure economic stability for families in the event of unexpected illness.

- **Retirement benefits:** The government sponsored social security program provides a guaranteed income to eligible retirees, but needs to be supplemented with other savings such as pension plans in order to meet retirement income adequacy. Yet most employers do not offer pension plans. In private firms with fewer than 100 employees, only 37 percent of all employees are offered pension plans.[29] Racial and ethnic minorities and single-female headed

households are less prepared for retirement than their white male counterparts.[30] Single African American and Latina women have a median wealth that is less than 1 percent of their male counterparts, and even less when compared to white women—the median wealth for African American and Latina single women is $100 and $120 respectively, and $41,000 for single white women.[31]

4. Strengthen and expand the social safety net for workers and people unable to work

The current safety net is inadequate and limited in its coverage

The UDHR's article 23(3) calls on governments to ensure the right to an adequate standard of living by all people, including by supplementing low-wages or providing a safety net in the event of unemployment or incapacity.

- **Welfare reform weakened previously existing safety net programs:** With strict work requirements and time limits tied to receipt of benefits, the 1996 welfare reform effectively eroded the previously existing social safety net for people unable to work or find work. This had a disproportionate effect on mothers and children because the vast majority of parents receiving public assistance—through the Temporary Assistance to Needy Families (TANF) program—are single mothers. While the reforms were intended to incentivize single mothers to find work, they ended up leaving many individuals and families with no safety net to catch them in the event of loss of employment; a pronounced problem in periods of extreme work shortage and extended recession such as the present.[32]

- **Limited Unemployment Insurance and Disability Protection:** The unemployment insurance system fails to provide benefits to most victims of unemployment. For example, domestic workers who suddenly fall ill or suffer an injury, often do not qualify for unemployment or disability benefits as they are left out of unemployment and workers compensation insurance in many states.[33] In addition, the level of assistance provided to those who do receive benefits averages only about half of their lost income.

5. Address all forms of discrimination in the labor market

The government has failed to protect against discrimination in employment and economic opportunity

Discrimination in hiring persists across the board in the United States. A 2003 study by the University of Chicago and Harvard University confirmed significant discrimination against African-American names in a range of fields including sales, administrative support, clerical services, and customer service. The study found that white-sounding names like Emily Walsh and Brendan Baker were 50 percent more likely to get called for an initial interview than applicants with African-American-sounding names like Lakisha Washington or Jamal Jones for jobs ranging from cashier at a store to managers at a large firm.[34] In addition to more direct forms of bias in employment, there are indirect forms of discrimination or patterns of exclusion that create barriers to the full and equal realization of the human right to decent work.

- **Labor segmentation negatively impacts vulnerable groups:** Historic patterns of discrimination in the labor market have had a significant effect on the kinds of jobs that women and racial and ethnic minorities can access. Unfortunately, programs like ARRA target industries where women, African Americans and Latinos are under-represented. For

example, while construction and manufacturing will experience the highest growth as a result of ARRA, African American and Latino men comprise 6.3 and 10.1 percent respectively of workers in this industry compared to 59.4 percent for White men. Latino men have better representation in construction at 23.7 percent, but barriers that have prevented their access to unions means that they are less likely to have a union job in construction compared to their White counterparts who represent 81.5 percent of men working in construction.[35] At 30 percent, women are disproportionately under-represented in ARRA targeted industries. White women comprise 8.7 percent of workers in construction, compared to African-American and Latina women who together make up less than 1 percent of those employed.[36] The numbers show that unless job creation policies clearly target the most vulnerable segments of workers, the impact and benefit of these policies will be minimal for workers who are experiencing the highest levels of unemployment and underemployment.

- **Barriers to employment for workers with a criminal history:** Barriers to employment are especially marked for people with a criminal history, and being a racial minority only exacerbates this difficulty. A recent study on the effect of criminal records and race on employment show that while criminal records have a significantly negative impact on the ability to gain employment, this effect is even more pronounced for African-American candidates. When deciding between two equally qualified candidates vying for the same position, employers are more likely to choose a white candidate with a criminal record than a black candidate with no record.[37] With racial stigmas already putting black candidates at a disadvantage, having a criminal record compounds the issue. This is especially alarming considering that black men are six times more likely to be incarcerated than white men and so are overrepresented among formerly incarcerated persons.[38]

- **Economic development policies that fail to respect work in communities of color:** Many economic development policies, though well intentioned, end up having a damaging effect on the communities in which they are implemented, often displacing residents, disrupting small businesses, and the livelihood of the employees of those businesses. The victims of poorly designed development policies are residents, workers, and entrepreneurs in communities of color.

  New York City has seen its share of poorly designed development policies resulting in job losses for workers of color without compensation or relocation. In 2007, a thriving shopping center known as the Albee Square Mall, in downtown Brooklyn, New York, a primarily working class community of color, was demolished in favor of developing new luxury residences, retail space, and office areas. The destruction of the shopping center resulted in the displacement of 100-200 workers and 50 businesses (along with their economic opportunity) with little eviction notice, no relocation assistance, and arbitrarily distributed compensation. Furthermore, the project will actually result in a net loss of jobs in the area, and the jobs created by the proposed construction will be primarily part-time, low wage retail work. The demolished site has remained a giant hole in the ground for three years as construction on the project stalled. Construction has recently been revived with federal assistance—a $20 million tax-exempt Recovery Zone Facility Bond authorized under ARRA.[39]

  Similarly, in the Willets Point area of Queens, New York, a redevelopment plan authorized in November 2008 is resulting in the displacement of low-income, immigrant, Latino

workers and small business owners from what used to be a thriving commercial area. The area had thrived for decades despite the lack of vital infrastructure and services from the city government including paved roads, gutters, storm and sanitary sewers, fire hydrants, and snow or municipal trash removal.[40] The Willets Point redevelopment plan has already resulted in the closing of 15 businesses (11 from direct problems with the city government), and will ultimately displace 250 businesses, 95 percent of which are Latino-owned, and an estimated 1700 workers who are overwhelmingly immigrants, with no compensation and grossly insufficient relocation assistance.[41]

D. Recommendations for Action by the United States Government

1. **Set up job creation programs aimed at eliminating the economy's job shortage and targeting groups with high rates of unemployment and underemployment, in particular communities of color and women. Any job creation program should at a minimum:**

   a. Provide direct employment particularly in the short-term.
   b. Create good jobs. Jobs created should pay a living wage, provide health benefits, paid sick leave, and provision for retirement benefit.
   c. Create employment in distressed communities to employ people in new work that will benefit their communities including restoring the environment, providing child care and tutoring, and cleaning up abandoned houses. Passage of the "Local Jobs for America" Act would be a step in the right direction.
   d. Ensure gender and racial equity by giving equal priority to sectors that typically hire women, and racial and ethnic minorities.
   e. Increase the number of transitional jobs for formerly incarcerated.
   f. Include effective education and job training programs targeting communities of color and women—that connect workers to good jobs.

2. **Ensure a proper social support system is available for workers so that an adequate standard of living may be maintained by low-wage workers and in the event of unexpected unemployment or incapacity by taking steps to:**

   a. Improve existing social supports by increasing benefit amounts, relaxing eligibility requirements, expanding coverage, and providing full funding for TANF, Supplemental Nutrition Assistance Program, Section VIII housing benefits, child-care benefits, and disability insurance. TANF eligibility requirements should be relaxed to allow for education and training opportunities to recipients.
   b. Provide a lifeline for jobless workers by extending supplemental unemployment benefits and COBRA health care benefits for as long as it takes to ensure the availability of decent jobs for everyone who wants to work.

3. **Strengthen administrative infrastructure to eliminate institutional barriers that have traditionally limited racial and ethnic minorities and women from accessing good jobs, and to ensure equal realization of the human right to work.**

   a. Adopt a Plan of Action for meaningful compliance with ICERD and adopt the same principle in remedying employment discrimination against women and other disadvantaged population groups.

- **b.** Strengthen domestic human rights accountability mechanisms by transforming and strengthening of the U.S. Commission on Civil Rights into a human rights institution and improving federal, state, and local government coordination in support of human rights.
- **c.** Institute limits on length of time certain criminal offenses stay on an offender's record.
- **d.** Issue clear Equal Employment Opportunity Commission (EEOC) guidelines should be issued on the rights of undocumented workers.
- **e.** Protect and invest in women and minority owned businesses by redirecting leftover funds from the Troubled Asset Relief Program (TARP) to community banks to lend money to women and minority owned businesses, particularly small- and medium-size businesses in distressed communities.
- **f.** Issue new ARRA guidelines that require fund recipients to report employee level data disaggregated by race and gender, and stipulate that federal funding cannot be used directly or indirectly for development projects that displace workers.
- **g.** Issue federal guidelines protecting small business and residents in communities slated for development from displacement, and in accordance with the United Nations Guiding Principles on Internal Displacement.
- **h.** Extend the coverage of labor protective legislation to all workers by eliminating eligibility-restricting provisions in the NLRA, OSHA, and FFSA, and ensuring specific inclusion of domestic workers, agricultural workers, and independent contractors.

4. **Expand the legal and legislative framework to protect and ensure employment for groups most vulnerable to employment discrimination including racial and ethnic minorities and women**

- **a.** Pass the Civil Rights Act of 2009 as a step towards full implementation of ICERD.
- **b.** Institute a national maternity leave policy and strengthen Pregnancy Discrimination Act.
- **c.** Pass paid sick leave law.
- **d.** Pass the Employee Free Choice Act to enable low-wage workers to bargain for better wages, benefits, and working conditions.
- **e.** Pass the Domestic Workers Bill of Rights as precedent setting legislation that would amend existing labor laws to ensure basic benefits and protections for low-wage workers.

Endnotes

[1] Employment Act of 1946, 15 U.S.C. § 1021
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United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Labor Rights

This joint submission provides information under Sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review regarding failures of domestic legislation, policy, and practice, to adequately protect labor rights, and specifically the rights to freedom of association, collective bargaining and the right to strike. The report submitters are dedicated to advancing freedom of association and compliance with fundamental labor rights.

Submitted by:

AFL-CIO

Cornell Law School Labor Law Clinic

International Brotherhood of Teamsters

International Commission for Labor Rights

International Labor Rights Fund

Labor and Employment Committee, National Lawyers Guild

Service Employees International Union (SEIU)

The Transport Workers of America, AFL-CIO

United Electrical, Radio and Machine Workers of America (UE)

The United Steelworkers (USW)

Endorsed by the following 17 Organizations and 6 Individuals:

Endorsements:

Organizational Endorsements: The Advocates for Human Rights; Human Rights Advocates; Human Rights Litigation and International Advocacy Clinic, University of Minnesota Law School; Human Rights Project, Urban Justice Center; International Worker Justice Campaign from North Carolina; La Raza Centro Legal, Inc; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self-Determination; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; National Employment Law Project; National Lawyers Guild; National Whistleblowers Center; Paso del Norte Civil Rights Project, El Paso, Texas; Public Interest Projects; Three Treaties Task Force of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition.

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A. EXECUTIVE SUMMARY

It is appropriate for the Council to review labor rights in the United States as the UDHR, the ICCPR as well as the ICESCR define such rights as basic human rights. While this year marks the seventy-fifth anniversary of the National Labor Relations Act,[i] the American working class is experiencing the worst economic crisis in eighty years. Union density in the private sector stands below eight per cent, about five points lower than the level of unionization in 1935, when the NLRA was first enacted. The NLRA specifically excludes significant groups of employees, and recent court decisions have further limited coverage. There is overwhelming evidence that the rights of U.S. workers to freely associate, form unions, strike and collectively bargain remain in decline. Core internationally established labor rights are not adequately protected by state and federal laws that govern the American workplace.[ii] Workers have resorted to international fora to seek redress. Many positive decisions from international agencies have not been followed.

In order to comply with obligations under pertinent international instruments it is necessary for the United States to:

(1) Take action to and promote legislation to ensure all workers are deemed employees under federal and state labor laws, and have equal access to all available remedies, regardless of migration status:

(2) Seek passage of legislation which provides effective remedies against employer coercion and interference with freedom of association and collective bargaining as included in the pending Employee Free Choice Act

(3) Initiate consultation and enforcement of labor violations with its trading partners pursuant to the provisions of the free trade agreements.

(4) Take action to ratify ILO conventions 87 and 98 and to guarantee recognition and enforcement of the rights and guarantees set forth in the ILO's 1998 Declaration of the Fundamental Principles and Rights At Work, and ILO convention 151 governing freedom of association and collective bargaining for public sector workers.

B. BACKGROUND AND FRAMEWORK

a. International Obligations

1. The international obligations which form the backdrop of this report are the Universal Declaration of Human Rights (Articles 2, 4, 7, 8, 20, 23 & 24); the International Covenant on Civil and Political Rights (Articles 2, 8 & 22); the International Covenant on Economic Social and Cultural Rights, (Articles 7 and 8). Also implicated are the Convention on the Elimination of Racial Discrimination (Article 5) and International Labor Organization Conventions referred to as core labor standards as stated in the Declaration of Fundamental Principles and Rights at Work.

b. Legislative and Policy Framework

2. In the United States, the National Labor Relations Act (NLRA) protects an employee's right to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection…"[iii]

C. U.S. WORKERS ARE DENIED PROTECTIONS UNDER INTERNATIONAL AND DOMESTIC LAW

a. The Workers Movement Has Been Under Sustained Attack

3. Union representation and the labor movement have always played a major role in achieving workplace justice, raising living standards, and ushering many groups of workers into the American middle class. U.S. employers have, however, waged what Business Week [in a 1994 article] called "one of the most successful anti-union wars ever" with spectacular results. Union membership is now at its lowest level since the 1920s. The union membership rate in 2009 declined to 12.3%, comprising 15.3 million workers.[iv] In 1983 there were 17.7 million union members, 20.1% of the workforce. In the public sector, where employer hostility to union organizing campaigns is greatly diminished, the union membership rate in 2009 was 37.4% compared to 7.2% in the private sector.[v]

4. This war has been facilitated in part because U.S. labor policies fall short of international standards. For example, the United States' failure to protect the freedom of association rights of striking workers, public sector employees, and its principles regarding so-called "employer free speech" have repeatedly come under criticism by the International Labor Organization.[vi] Workers' voices have continually been silenced by threats, harassment, required participation in anti-union meetings, discharges, and by the laborious, toothless process of the National Labor Relations Board itself.[vii]

5. All workers suffer from the denial of the right to join and form labor unions and to collectively bargain, but because women and people of color benefit disproportionately from union representation, they are also the most harmed by denial of this right. In 2006, median weekly earnings for African Americans were 36% greater for unionized than for non-union workers, 8% greater for Asian Americans, and 46% greater for Hispanic union members.[viii]

b. Excluded Workers Denied Full Protection of their Core Labor Rights

6. Entire categories of workers are excluded from statutory protections to engage in freedom of association, and to form and join trade unions, resulting in unfavorable conditions of work, unequal pay, and reduced remuneration.

Exclusions Based on Industry

7. Domestic workers and agricultural workers (historically jobs held by African-Americans and now largely held by persons of Latino ancestry and immigrants) are explicitly excluded from significant protections provided under federal law. Two recent New York City studies found that almost all domestic workers are women, 95% of them women of color, immigrants from Latin America and the Caribbean, Asia, and Africa.[ix] Seventy-eight percent of U.S. agricultural workers are from Mexico and Latin America.[x] They are excluded from the definition of "employee" under the NLRA

8. State and federal employees are also excluded from protection under the NLRA, and state employees often find their labor rights further limited by state legislation which fails to fill in the gaps left by the federal labor law protections. In North Carolina, for example, General Statute (NCGS) §95-98 explicitly prohibits collective bargaining in the public sector. The workers filed a complaint with the Committee on Freedom of Association of the ILO protesting this law, which declares any agreement or contract between the government of any city, town, county, other municipality or the state of North Carolina and any "labour union, trade union, or labour organization as bargaining agent for any public employees" to be illegal unlawful, void and of no effect.[xi] This legislation frustrates the ultimate purpose of the freedom to associate by prohibiting collective bargaining and functions as an obstacle to advancing racial equality.

9. The International Commission for Labor Rights (ICLR) conducted an independent study of North Carolina's public worker employment in 2005. The ICLR found race and gender-based discrimination present in hiring, promotions, pay, the exercise of discipline and termination; all areas in which collective bargaining would normally play a prominent role and protect workers from the prejudices and preferences of individual supervisors.[xii] The Commission also reported, "from the perspective of experts, workers, North Carolina legislators, and state agencies, certainly the prevalence of race-based discrimination is the overarching barrier to workplace justice in public sector workplaces in North Carolina."[xiii] Public hearings revealed that many workers are treated in ways that reflect anti-union and racist sentiments.[xiv] In one instance when workers tried to organize a union, they found a dummy hanging by its neck from a tree across the street from the parking lot where 90% of the black workers park; a white man stood next to the dummy saying, "you going to end up like this". [xv]

10. The United Electrical, Radio and Machine Workers of America Union (UE) and UE Local 150 of North Carolina filed a complaint on December 7, 2005 with the International Labour Organization alleging a violation of the workers' right to collective bargaining.[xvi] The ILO Committee, noting the central role the right to freedom of association and collective bargaining plays in improving the living and working conditions of union members,[xvii] recommended the establishment of a collective bargaining framework for the public sector in North Carolina, and the repeal of NCGS §95-98 in order to bring state legislation into conformity the rights of freedom of association and collective

bargaining.[xviii] To date, this has not happened, in violation not only of ILO principles but of Article 5(e)(ii) of CERD.

Exclusions based on Classification of Employee as Supervisor or Independent Contractor

11. Expansive, pro-employer interpretations of the NLRA's statutory exclusion of supervisors and independent contractors from the coverage of labor law have recently been issued by federal courts and the NLRB, placing the right to unionize beyond the reach of tens of millions of workers.

12. In 2006, the NLRB ruled that twelve registered nurses who worked as charge nurses were supervisors excluding them from the right to organize. The Board held that any worker that nominally coordinates and guides the work of other nurses or health care workers are supervisory personnel who have no right to unionize.[xix] Based on two prior Supreme Court rulings[xx] that broadly defined what constituted supervisory conduct, the Board's latest ruling held that a worker becomes a supervisor if they "assign" another employee to work in a particular location or direct a coworker to perform "certain significant overall tasks." The Board indicated that a retail worker morphs into a supervisor when directing another worker to stock shelves or when a charge nurse designates a licensed practical nurse to administer medication. Under the *Oakwood Healthcare* ruling a worker can also be labeled as a supervisor if she "responsibly directs" another by giving ad hoc instructions to perform certain tasks. The Board used these standards to find that the nurses were supervisory even though they spent the vast majority of their time doing direct patient care and played no role in resolving workplaces grievances. The current chair of the NLRB, Wilma Liebman, one of two dissenters in *Oakwood Healthcare*, ominously noted that it creates a class of workers existing in a legal limbo "hav[ing] neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."[xxi] Under this ruling, eight million professionals employees and skilled workers will join the thirty-two million members of the U.S. workforce – one out of four workers – who, according to the U.S. General Accounting Office, do not have the legal right to join unions.[xxii]

13. In April 2009, the D.C. Circuit of the U.S. Court of Appeals overturned the NLRB-sponsored election in which truck drivers in a Massachusetts facility who worked for Fedex Home Delivery – one of the nation's largest parcel delivery services – voted overwhelming to join the Teamsters Union.[xxiii] The appeals court held that the truck drivers were independent contractors because they own their own trucks and, therefore, have the potential to use them for other entrepreneurial 'business opportunities.' The court made no factual finding that the workers who unionized actually did use their trucks for other business purposes. The court rejected the NLRB regional director's ruling that these workers are employees because they perform a regular and essential part of FedEx's normal operation, must follow routes configured by the company, are trained by the company, must plaster the name of FedEx on their trucks doing business in the company's name and take considerable guidance from the FedEx management. Indeed, the truckers use a company vacation plan, group insurance and pensions and have a permanent working arrangement with FedEx.

Exclusions based on immigration status

14. While deemed to be employees protected under the National Labor Relations Act (NLRA), in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board,*[xxiv] the United States Supreme Court constructively denied undocumented workers protection under the NLRA through the denial

of back pay.[xxv] The elimination of the only meaningful remedy to the worker has had the practical effect of eliminating the enforceability of this right and limiting undocumented workers' right to freedom of association,[xxvi] and leaving workers more vulnerable to exploitative working conditions because, without an effective remedy available, undocumented workers are less likely to risk job loss by attempting to form or join a union, or speak out about poor working conditions.

15. Despite the United States' repeated contention that undocumented workers receive the same protections as citizen workers in their rights under the National Labor Relations Act, the reality is very different. Employers have used the *Hoffman* decision to deter employees from pursuing their employment rights and from voting in union elections,[xxvii] and unauthorized workers and others working with them are now more vulnerable to intimidation from their employers.[xxviii] A recent report by Human Rights Watch focusing on the meatpacking industry, found that many employers threaten to call immigration authorities if workers seek to organize or make claims for labor law protection.[xxix] One study found that 52% of employers in workplaces that include undocumented immigrant workers threaten to call immigration authorities during organizing campaigns.[xxx] As evidenced in these studies and other experiences, the *Hoffman* decision has severely undermined labor protections, resulting in increased labor exploitation, and the creation of a racialized two tiered workforce in the United States.[xxxi]

c. Interference With Freedom of Association: Right to Organize, Bargaining Collectively & Strike

The Failure to Sanction or Remedy Coercive Employer Behavior During Union Organizing Drives Excludes Workers from Union Protection

16. The system of legal protections intended to protect workers who choose to join unions in the U.S. is widely recognized as badly broken and ineffective. An exhaustive 2009 study of employer responses to union organizing efforts concluded that it is standard practice during NLRB sponsored elections for corporations to subject workers to threats, unlawful interrogations, harassment, surveillance and retaliatory firings for supporting a union.[xxxii] Of particular concern is that the key elements of employer anti-union campaigns now include an increase of the more coercive and retaliatory tactics: threats of plant closing, discharges, harassment and surveillance. Illegal tactics are in fact the norm with 57% of employers illegally threatening to shut operations if the union wins; a third of employers fire workers for union activity during NLRB election campaigns; 28% attempt to infiltrate the organizing committee; and, almost two-third of employers use one-on-one meetings to interrogate and harass workers about their supporting the union.

17. To date, efforts to reform the NLRA have failed. Indeed, one scholar has regrettably noted that despite marked changes in the structure of U.S. labor markets and technological change, "no other body of federal law that governs a whole domain of social life – has been so insulated from significant change for so long."[xxxiii] Most recently, the union-sponsored Employee Free Choice Act, intended to allow workers to form unions by 'card-check' – a method widely sanctioned by state public sector labor law, has not been brought to a vote in the U.S. Congress. EFCA would also provide modest improvements in remedies for violations of labor law and attempt to deal with a currently intractable problem – the fact that even one year after a successful elections, 52% of newly formed unions had no collective bargaining agreement, and two years out, 37% of newly formed

unions still had no labor agreement. EFCA would remedy this by mandating arbitration of first contracts.

Restricting The Right to Strike

18. The ILO has long recognized that the right of workers to peacefully strike is a fundamental exercise of their freedom of association. The ILO's Committee on Freedom of Association has held that "[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests."[xxxiv] International law recognizes a general right to strike for all workers, in both the private and public sector, except for the very limited exceptions of members of the armed services and police forces, public servants who exercise authority in the name of the State and workers employed in services so essential that their interruption could endanger the life, safety or health of a substantial portion of the population.[xxxv]

19. Nonetheless, in the U.S., vast swaths of workers are prohibited from exercising their right to strike. Recent labor disputes involving public sector workers in New York and Massachusetts, both states that ban public sector strikes,[xxxvi] are indicative of the harsh penalties public employees and their unions are subject to for engaging in a refusal to work to improve their contract terms. In the private sector, the right to strike is in practice sorely compromised by longstanding judicial doctrine granting employers the right to permanently hire replacement workers anytime workers strike for economic reasons. Strike data further confirm that there is no meaningful right to strike in the U.S. At its peak, strike activity in the early 20th century claimed a 22.5% workforce participation rate, and now is less than 1%. In 2009 the number of major work stoppages was at its lowest point since 1947 with only 5.[xxxvii] The number of workers involved in the strikes, and the amount of time off the job in 2009, were the lowest recorded.

20. In December 2005, New York City subway workers, members of Transit Workers Union 100, struck after the Metropolitan Transit Authority demanded the union accept a two-tier system for pension and health care benefits for its members. The work stoppage, launched after the MTA offered a series of bad faith bargaining proposals, was peaceful and orderly; at no time did it present any threat to the health or safety of New Yorkers. Nevertheless, even before the strike began, the court granted the request of the Attorney General of New York State for an injunction. The strike, which lasted for sixty hours, resulted in a 2.5 million dollar fine against the union, forfeiture of automatic dues reduction for nineteen months and ten days of incarceration for Local 100 President, Roger Toussaint, for violating the injunction.

21. The Boston Teachers Union, Local 66, American Federation of Teachers began a public discussion of whether to hold a one-day work stoppage in January and February of 2007 after more than one year of acrimonious, unsuccessful negotiations for a successor collective bargaining agreement and a year and a half after the prior union agreement had expired. The teachers' union was fined $30,000 by a Massachusetts trial court after publicly calling for a meeting of the members in accordance with the union's by-laws where there could be a discussion whether the union should support a one-day strike. The judge found that the union had engaged in conduct prohibited under Massachusetts collective bargaining law and enjoined the union.

22. The adverse impact of state sanctions that outlaw legitimate trade union activity aimed at improving terms and conditions of employment are long-lasting. For the TWU, the heavy fine, loss of union revenue, the injunction and jailing of a prominent trade union leader undermine the union's ability to represent its members and challenge bad faith bargaining by their employer. Similarly, the current law in Massachusetts places a heavy pall over the First Amendment right of union members to gather and discuss collective action to challenge an employer's bargaining position free of state interference. These affronts to international labor standards continue even as the rationale for limiting public sector workers' rights to strike continues to erode.

d. Weak Enforcement of the North American Agreement on Labor Cooperation (NAALC) and Dominican Republic-Central American Free Trade Agreement (DR-CAFTA)

23. This section will address the weak enforcement of the labor provisions in two trade agreements: NAALC and DR-CAFTA.[xxxviii] The North American Free Trade Agreement (NAFTA) includes a "side agreement," the North American Agreement on Labor Cooperation (NAALC), requiring each country, among other things, to enforce its own labor laws. The enforcement mechanisms in the National Administrative Office of each country have proven ineffective.

NAFTA

24. The structure of NAALC sets up three tiers and gives little importance to freedom of association violations, by playing them in the least important tier for enforcement with no possibility of penalties. Furthermore, claims can only be brought against governments, rather than against employers. But possibly most significant to the challenges of the NAALC is the lack of transparency in the process and ultimate decisions. Information regarding cases submitted to the National Administrative Offices (NAOs) of the United States, Mexico, and Canada is disorganized, difficult to find, out of date, and conflicting from website to website.[xxxix]

25. According to the U.S. Dept. of Labor, 34 cases have been filed under NAALC since its inception in 1994; 21 cases have been filed with the U.S. NAO—16 involving issues of freedom of association and 8 also involving issues of the right to bargain collectively. Of all 21 cases filed with the U.S. NAO, 4 have been withdrawn, hearings were held on ten, 8 have gone to ministerial-level consultations, and the U.S. NAO declined to accept 6 of them for review.[xl]

26. Within the past 4 years, there have been only 2 proceedings under the NAALC.[xli] U.S. Submission 2006-01 (Coahuila) was filed by the United Steelworkers following a mine explosion that killed 65 miners. The USW claimed that workers were denied freedom of association rights and proper access to appropriate labor tribunals. The U.S. NAO declined to review the case, citing related proceedings in Mexico and the ILO and stating that a review would not further the objectives of the NAALC.[xlii] A lawsuit was recently filed in a U.S. District Court against the Grupo Mexico and related companies on behalf of three widows of miners killed in the explosion.[xliii]

27. U.S. Submission 2005-03 (Hidalgo) alleged that the Mexican government failed to effectively enforce labor laws regarding the freedom of association, the right to bargain collectively, and the right to strike.[xliv] The focus of the complaint was Mexico's labor tribunal's questionable denials of FTVO-CROC's efforts to obtain collective bargaining rights on behalf of workers at Rubie's de

Mexico, a textile plant. The Final Report found that the Mexican labor authorities overuse of technical denial, unwarranted delays, and ineffective communications were problematic. The Final Report called for a more transparent and accessible process, but also faulted the union for using "legal strategies" that contributed to delays and confusion, and therefore found that consultations at the ministerial level were not warranted.

DR-CAFTA

28. April 23, 2008, saw the first effort by a private group to bring a claim against a party under DR-CAFTA. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan workers' unions filed a claim with the U.S. Department of Labor pursuant to DR-CAFTA provisions alleging the mistreatment of union leaders and workers – from illegal firing, to death threats, to several reports of murder. Petitioners argued that Guatemala's failure to enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work allowed these acts to be committed and go unpunished, and in so doing, Guatemala failed to comply with its commitments under the ILO Declaration on Fundamental Principles and Rights at Work.

29. On January 16, 2009, the DOL's findings overwhelmingly supported petitioners' claims, confirming most of the alleged facts, but declined to recommend that the U.S. request consultations with Guatemala pursuant to Article 16.6.1 of DR-CAFTA, the key enforcement provision in the treaty.

30. The labor protections in free trade agreements, which provide justice for those most vulnerable to exploitation, are meaningless unless the U.S. initiates consultation and enforcement over abuses with its trade partners.

e. The US has failed to take action on ILO Decisions

31. The United States is a member of the ILO. Even though the U.S. has not ratified Conventions 87 and 98, the Committee on Freedom of Association accepts complaints against the U.S. There have been 4 cases filed against the United States with the ILO in the past 4 years. Unfortunately, despite its participation before the ILO, the United States has not taken sufficient measures to implement the recommendations set forth by the ILO, and violations persist under the UDHR, ICCPR and ICERD regarding the right to freedom of association, to join and participate in unions, and the underlying fundamental right to work and to dignity through work.

32. **No. 2547 (graduate teaching assistants)** In this case, the decision of the NLRB in *Brown University*, 342 NLRB 483, denying graduate student teaching assistants the right to collectively bargain, was found to be contrary to freedom of association principles. The committee recommended that the United States take necessary steps, including legislation, to ensure that graduate student teaching assistants are not excluded from the protections of freedom of association and collective bargaining. The *Brown University* decision, however, has been cited favorably by the NLRB.

33. **No. 2524 (supervisor definition)** In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37; *Croft Metal, Inc.*, 348 NLRB No. 38; and *Golden Crest Healthcare Center*, 348 NLRB No. 33, the NLRB

expanded the definition of "supervisor," effectively excluding a larger class of employees from collective bargaining units. The ILO complaint also highlighted the problem of the new definition creating an increase in litigation by employers to challenge the status of employees. The committee urged the United States to ensure that only workers "genuinely representing the interests of employers" be defined as supervisors under the NLRA.

34. **No. 2460 (North Carolina public employees)** As noted above, under state law, North Carolina public employees are prohibited from bargaining collectively. The complaint alleged that this not only frustrated the workers' right to freedom of association, but also resulted in widespread discrimination in public employment. The committee recommended that the United States take steps to repeal the North Carolina statute prohibiting collective bargaining in public employment and to recognize the right of all workers to freedom of association.

35. **No. 2292 (national security employees – Executive authority to exclude)** Under federal law, the President has the authority to exclude certain national security employees from collective bargaining. This case was filed specifically because over 56,000 TSA airport screeners had been denied collective bargaining rights. The Committee recommended that the TSA employees be given the opportunity to freely choose representation to collectively bargain over all matters not directly related to national security issues.[xlv]

36. Despite 4 cases filed in the past 4 years regarding the interpretation of the NLRA and other laws restricting the freedom of association and demonstrating a trend towards increased exclusion of workers from collective bargaining, the United States has not taken any steps recommended by the ILO Committee to ensure that the rights to freedom of association and collective bargaining are upheld.

f. The U.S has failed to appoint an effective National Contact Point to enforce the OECD Guidelines on Multinational Enterprises

37. The U.S. National Contact Point (NCP) for the OECD Guidelines on Multinational Enterprises, which have protections for the rights freedom of association and collective bargaining, is housed in the Department of State. The U.S. National Contact Point is one of few government offices established explicitly to ensure that the U.S. lives up to its international obligations. However, the U.S. NCP has an extremely poor track record compared to many European governments. The unions and NGOs involved in this drafting do not know of any cases where the US NCP has helped bring a resolution to alleged violations. An overhaul of the NCP resulting in a clear, transparent, responsive process that fulfills the government's obligation to investigate and "offer its good offices" to resolve abuses by U.S. corporations or taking place on U.S. soil is a key step in ensuring that human rights, including workers' rights, are upheld.

D. RECOMMENDATION FOR ACTION BY THE U.S. GOVERNMENT

Take a leadership role within the international community and at home to ensure protections for freedom of association and collective bargaining for all workers

- Take Administrative action and promote legislation to ensure *all* workers are deemed "employees" under federal and state labor laws, and have access to equal rights and remedies regardless of immigration status or job classification.
- Seek passage of legislation that protects freedom of association and collective bargaining through card check, first contact arbitration, and more effective remedies against employer coercion and interference with rights of association and collective bargaining, as is included in the pending Employee Free Choice Act.
- Initiate consultation and enforcement of labor violations with its trading partners pursuant to the provisions of the free trade agreements.
- Take action to ratify ILO Conventions 87, 98, and 151, and to guarantee recognition and enforcement of the rights and guaranties set forth in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.

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[i] 29 U.S.C. § 141 et seq. (2010).

[ii] As rights to collective bargaining and freedom of association have diminished in the United States, there is an increased need for employment laws that allow for individual enforcement of fundamental rights at work, and while the United States has an extensive array of employment laws aimed at redressing discrimination, health and safety, social security, and medical leave, those laws fall short. A discussion of those shortcomings, while important, is beyond the scope of this report.

[iii] National Labor Relations Act, 29 U.S.C. § 157 (2006).

[iv], Bureau of Labor Statistics, U.S. Dept. of Labor, January 20010 (http://www.bls.gov/news.release/pdf/union2.pdf)

[v] *Id.*

[vi] Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-wage Worker Communities,* 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (Fall 2007)

[vii] Let All Voices Be Heard, at 5; Gordan Lafer, NLRB Elections: Neither Free nor Fair, (Washington, DC: American Rights at Work) 2007, *available at* http://www.americanrightsatwork.org/publications/general/neither-free-nor-fair.html.

[viii] Let All Voices be Heard, at 8.

[ix] Annette Bernhardts, Siobhán McGrath and James DeFilippis, Unregulated Work in the Global City, (New York: Brennan Center for Justice, 2007), 63; DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY (July 14, 2006), *available at* http://www.domesticworkersunited.org/homeiswheretheworkis.pdf. .

[x] Findings from the National Agricultural Workers Survey (NAWS) 2001 - 2002. A Demographic and Employment Profile of United States Farm Workers. U.S. DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR POLICY, OFFICE OF PROGRAMMATIC POLICY, Research Report No. 9. March 2005, *available at* http://www.doleta.gov/ agworker/report9/toc.cfm.

[xi] ILO Case No. 2460, p. 215, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf.

[xii] ICLR Report, page 2.

[xiii] ICLR Report, page 20.

[xiv] ICLR Report, page 28.

[xv] ICLR Report, page 28.

[xvi] ICLR Report, page 19.

[xvii] ILO Case at 230.

[xviii] *Id*.

[xix] *Oakwood Healthcare, Inc.,* 348 NLRB 37; 180 LRRM 1257 (2006).

[xx] *NLRB v. Kentucky River,* 532 U.S. 706 (2001); *NLRB v. Healthcare & Retirement Corp. of America,* 511 U.S. 579 (1994).

[xxi] *Oakwood Healthcare,*180 LRRM at 1272.

[xxii] Collective Bargaining Rights, GAO-02-835 (2002).

[xxiii] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009)

[xxiv] 535 U.S. 137 (2002).

[xxv] Back pay is pay for work that would have been performed but for the unlawful termination, and is the only remedy available to the individual whose rights under the NLRA have been violated by the employer. The other substantive remedy available to an individual was reinstatement to the worker's former position, but that remedy was earlier foreclosed for undocumented workers by the Immigration Reform and Control Act of 1986 (IRCA), the law that prohibits the knowing employment of undocumented workers, and is not at issue here. See, *Sure-Tan, Inc.*, 467 U.S. at 903-904.

[xxvi] *Report on Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers (CTM)*, Case No. 2227, ILO Committee on Freedom of Association, (November 2003). See also, Smith & Ruckelshaus, 8 (200?).

[xxvii] See Human Rights Advocates report for further discussion.

[xxviii] See Petition Alleging Human Rights Violations of the Human Rights of Undocumented Workers, available at: http://www.nelp.org/docUploads/FinalPetition%2Epdf.

[xxix] Lance Compa, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, Human Rights Watch, (Jan. 2005), *available at* http://www.hrw.org/reports/2005/usa0105/.

[xxx] *How to Join a Union: Employer Interference by the Numbers*, American Federation of Labor - Congress of Industrial Organizations (2006), *available at* http://www.aflcio.org/joinaunion/how/employerinterference.cfm.

[xxxi] As noted above, Gen. Rec. 30 calls upon States party to "take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements,"[xxxi] and notes that any differentiation in the treatment of citizens and non-citizens must be judged "in light of the objectives and purposes of the Convention," and "applied pursuant to a legitimate aim" and be "proportional to that aim."[xxxi] But the U.S. has offered no such justification, but instead maintains that the denial of the remedy is separate and distinct from the denial the right.

[xxxii] *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Kate Bronfenbrenner, Ph.D. (Economic Policy Institute 2009).

[xxxiii] Cynthia Estlund, *The Ossification of American Labor Law,* 102 Columbia L.Rev. 1527, 1530 (2002).

[xxxiv] ILO CFA Digest of Decisions 2006, paragraph 522.

[xxxv] ILO CFA Digest of Decisions, 2006, paragraphs 576 and 581.

[xxxvi] Thirty-nine of the fifty states and the federal government outlaw strikes or any form of concerted work slowdown by public sector employees.

[xxxvii] "Work Stoppages: Five Major Strikes, Lockouts Occurred in 2009," Bureau of Labor Statistics, https://www.bls.gov/news.release/pdf/wkstp.pdf.

[xxxviii] As of 2008, only 23 workers' rights cases against four U.S. trading partners had been filed in the U.S., despite there being eight agreements with workers' rights provisions in force with thirteen different countries, and reports that violations were occurring repeatedly in at least ten of those countries.

[xxxix] *See* NAALC website: http://new.naalc.org/public_communications/publiccom.htm; Canada's website: http://www.hrsdc.gc.ca/eng/lp/spila/ialc/pcnaalc/01List_of_Public_Communications.shtml; The United State's websites: http://www.dol.gov/ilab/programs/nao/status.htm; http://www.dol.gov/ilab/programs/nao/public_submissions.htm Regarding the U.S. websites in particular, if Google did not offer a web caching service, some of this information would not be found as the links often malfunction.

[xl] Status of Submissions under the North American Agreement on Labor Cooperation http://www.dol.gov/ilab/programs/nao/status.htm#iib7 (last updated September, 2007).

[xli] Hidalgo Report U.S. NAO 2005-03; and Coahuila Decision U.S. NAO 2006-01.

[xlii] Coahuila Decision U.S. NAO 2006-01 (August 31, 2007).

[xliii] Widows Lawsuit Seeks Damages over Disaster that Killed 65 Mexican Miners Four Years Ago Today, http://www.usw.org/resources/civil_rights/news?id=0021 (Feb. 19, 2010).

[xliv] Hidalgo Report U.S. NAO 2005-03 (August 31, 2007).

[xlv] *See* http://whitehouse.blogs.foxnews.com/2010/03/27/will-he-or-wont-he-anxietyanticipation-build-over-possible-obama-recess-appointments/ There are many news reports regarding the TSA appointment and much speculation that TSA workers will have representation soon.

United States of America

Joint Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Toward Economic and Social Rights in the United States:

From Market Competition to Public Goods

Submitted by:

The National Economic and Social Rights Initiative (NESRI) (Coordinator)

CADRE, Los Angeles

Coalition of Immokalee Workers

Montana Human Rights Network

Picture the Homeless, New York

Poverty Initiative

United Workers, Baltimore

The Vermont Workers' Center

Endorsed by the following 39 Organizations and 7 Individuals:

Endorsements:

Organizations: Center for Community Alternatives; Center for Constitutional Rights; Center for Economic and Social Rights; Center for Human Rights at The University of Iowa; Center for the Human Rights of Users and Survivors of Psychiatry; Center for Women's Global Leadership (CWGL); Centre on Housing Rights and Evictions (COHRE); Coalition to Protect Public Housing/Chicago Anti-Eviction Campaign; Emory University Institute of Human Rights; Families and Friends of Louisiana's Incarcerated Children (FFLIC); Healthcare-NOW; Human Rights Caucus, Northeastern University School of Law; IHRIP, Washington DC; Janie Poe Resident Council, Sarasota, Florida; Justice Now, California; Leonard Peltier Defense Offense Committee; Los Angeles Community Action Network (LA CAN); Malcolm X Center for Self Determination; May Day, New Orleans; Media Mobilizing Project, Philadelphia; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; Miami Coalition for the Homeless; National Law Center on Homelessness & Poverty; National Lawyers Guild; NEPA Organizing Center, Wilkes-Barre, Pennsylvania; People for Community Recovery, Chicago; People's Health Movement; Philadelphia Student Union; Public Interest Projects; Resident Action Council (RAC), Seattle; Three Treaties Task Force of the Social Justice Center of Marin, California; Tompkins County Workers' Center of Ithaca, New York; South Bay Communities Alliance, Alabama; St. John's Well Child and Family Centers, Los Angeles; Unified Taxi Workers Alliance of Pennsylvania; Urban Justice Center, New York; World Organization for Human Rights USA; 5 RIGHTS, INC

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I. Executive Summary: Economic and Social Rights in the United States

1. The United States has not yet fully recognized economic and social human rights, including the rights to education, health, housing, work, and social security, nor does it protect and fulfill these rights. This human rights denial negatively impacts the entire population, as documented in this report by evidence of poor educational outcomes and school pushouts; high morbidity and mortality rates and lack of access to health care; increasing evictions, displacement and lack of affordable housing; poor working conditions and low wage levels; high income inequality and poverty rates and lack of adequate social safety nets.

2. To explain this dramatic failure to meet people's fundamental needs - in a country as rich as the United States – this report examines key normative and structural barriers to protecting economic and social rights in the United States. Firstly, the U.S. largely relies on poorly regulated market mechanisms to satisfy fundamental needs, and treats the core goods, services, and infrastructure necessary for human well-being only as market commodities rather than public goods. Over recent years the U.S. has seen an ever increasing disdain for the public sector, combined with a shift from direct public service provision to market competition, epitomized in proposed or existing 'voucher' schemes for schools, health care, and housing. Yet this reports presents evidence that markets have failed to provide essential services for everyone on an equal basis. Secondly, where government policies have intervened in markets, it has largely been to the benefit of wealthier population groups and private corporations. Allocation of tax benefits and direct subsidies has been redistributive upwards instead of downwards, increasing rather than mitigating inequities. Thirdly, political culture and public policies in the U.S. cast human needs as private matters, and promote individual responsibility as a solution to problems arising from socio-economic determinants and persistent structural racism. This disproportionally hurts disadvantaged population groups, particularly low-income people and communities of color, yet the entire population suffers when the principle of collective action for the collective good is abandoned in favor of individual competition.

3. The U.S. government has obligations conferred by the Universal Declaration of Human Rights and by international human rights treaties[1] to implement national strategies for education, health, and housing that allocate resources in an equitable and cost-effective way to realize the rights to adequate, affordable and accessible education, housing, and health care for everyone, irrespective of income or any other factors unrelated to needs. Moreover, the government has an obligation to realize everyone's right to an adequate standard of living and social protection, including through policies that achieve full employment with fair wages and dignified working conditions and guarantee the basic resources necessary for a life with dignity. The U.S. has signed – and should ratify – the International Covenant on Economic, Social and Cultural Rights,[2] which commits it to refrain from acts which would defeat the object and purpose of that treaty. Yet this report presents evidence of the increasing impoverishment, exclusion, and even criminalization of people who are unable to compete in ever expanding markets that have commercialized the most fundamental human needs. This evidence challenges the prevailing normative and policy paradigms that assume that rights can be realized solely as by-products of a competitive marketplace.

II. The Failure to Protect Economic and Social Rights in the U.S.: Impact and Barriers

1. <u>The Right to Education</u>

4. Among the spectrum of social and economic rights, only the right to education has received some formal recognition in the United States, primarily in state constitutions.[3] Consequently, primary and secondary schools are largely public and free, although post-secondary education is primarily treated as a privilege with increasingly high fees attached. The United States scores poorly on access and quality

indicators, as the lowest ranking of 28 high-income countries measured for secondary school enrollment as well as math and science test performance.[4] Around 1.3 million children drop out of school each year,[5] more than 3.3 million are suspended and 102,000 expelled.[6] Lack of adequate funding, high stakes testing, and zero-tolerance discipline policies, including jail-like environments with armed police officers, push young people out of school and deprive them of their right to education and dignity.

5. The education system is highly stratified, grounded in a competition-based achievement model that is increasingly pursued through privatization – such as publicly funded but privately run charter schools – while public schools in low-income communities and communities of color suffer from underfunding, overcrowding, and forced closures. More than half of African American male students and more than one third of Latino males do not complete high school on time,[7] exemplifying severe educational disparities.[8]

A. *Ensure equity: eliminate funding disparities by ending schools' dependence on local property taxes*

6. Public schools are largely funded through local property taxes, with schools in poorer communities receiving less money. For example, in 2005, school districts serving the highest concentration of poor students received on average $938 less per student than wealthy districts, and districts serving the highest concentration of people of color received around $877 less than predominantly White districts.[9] These gaps have increased significantly over recent years;[10] in fact, geographic borders of school districts are often intentionally drawn to prevent the sharing of a high tax base with surrounding communities. Because of such systemic funding disparities and related student segregation, the same economic barriers that give rise to complex needs among students from poorer communities prevent schools from addressing those needs. In California, for example, only 35% of core classes in schools with high poverty rates are taught by qualified teachers.[11]

7. Limited federal funds for schools are disbursed through competitive grant-making, not according to socio-economic needs. Moreover, instead of leveraging these funds to meet human rights obligations, the government's rules have inadvertently incentivized an increase in school pushout to meet federal performance standards. To ensure that all children can achieve their best, resources must match the needs of the students served, not generic test scores or the wealth of the local population.

B. *Provide public goods: preserve education as a public good and stop privatization where it exacerbates stratification and segregation*

8. Public education funding has been increasingly channeled toward privately-run charter schools, including those operated by for-profit companies. This is exacerbating a two-tier system that leaves many disadvantaged children behind. It has further undermined the fragile funding base of public schools, led to the closure of public schools or their conversion into charters, and diverted public funds to prop up private businesses that lack accountability and are disconnected from the communities they are located in. Charters raise additional revenue, pay high salaries, and make a profit by using practices such as selecting top students. Evidence shows that they deter higher-needs applicants by neglecting to offer special education services, language assistance, and free school lunches, and even by bullying and threatening students, as revealed by investigations in New Orleans.[12] Charters operated by private corporations have also been found to intensify racial and economic segregation within an already stratified system.[13]

9. The public promotion of private, market-based approaches is not limited to charters or to private school vouchers. In Los Angeles, for example, public schools have been put out to bid for private management contracts, relinquishing public control and oversight.[14] Such privatization reduces accountability to elected school boards, local communities and their children's needs.

C. *Ensure universality: end school push-outs and provide positive learning environments*

10. The growing reliance on the private market to fix the ailing education system correlates with a focus on individual merit rather than social needs. To appear successful, schools are incentivized to attribute poor academic performance to individual students and push them out whenever possible. Thus, the pushout crisis arises directly from an emphasis on students' individual responsibility, rather than on the schools' failure to meet needs. A negative selection process lies at the heart of an education system based on competition instead of the full development of all children. The price is paid in terms of human lives, relinquishing the right to education of those students who 'fail' to make it.

11. No strategy is in place to ensure that all children receive an education when pushout or school closures leave students without access to an adequate school. On the contrary, many children end up in the juvenile or criminal justice system instead, propelled by a 'school-to-prison pipeline' that results in a three times higher incarceration rate of males who drop out of school compared to those who graduate.[15]

12. The United States has betrayed the public education promise of a quality education for all, and instead incentivized the creation of a separate and unequal education system divided along racial and class lines. Education is no longer treated as a common public good, yet competition and choice have failed to create benefits for the population as a whole. Poor educational outcomes, diminished community control, drastic funding cuts in states' budgets, and vanishing professional opportunities even for those deemed 'successful' demonstrate that an overly competitive approach hurts all children and highlights the need for a universal, human rights based national education strategy.

2. <u>The Right to Health Care</u>

13. The United States does not recognize the human right to a system of health protection. Health care is treated as a commodity, not as a right and a public good. The U.S. lacks a national health strategy to address inequities in access to and quality of care, and largely ignores the social determinants of health.[16] This has resulted in comparatively poor health outcomes and severe health disparities.[17]

14. The United States is the only high-income country without a universal health care system, even after recent reform efforts. 101,000 people are estimated to die each year because of the way the health system is organized,[18] and 45,000 deaths per year are attributed to the lack of health insurance.[19] Yet having insurance coverage does not guarantee access to care: at least 25 million people are underinsured and likely to forgo care due to deductibles and co-pays.[20] The U.S. also has fewer doctors and nurses than many other high-income countries,[21] and a less developed primary care infrastructure.[22] The U.S. has some of the worst health outcomes among high-income countries, including high infant mortality and low life expectancy rates,[23] despite spending more than twice as much on health care as any other country. [24]

15. In contrast to comparable high-income countries the U.S. has a highly commercialized, market-based system that relies predominantly on for-profit, private health insurance companies propped up by substantial public subsidies. The role of the insurance industry, coupled with for-profit hospitals and multinational drug companies, will be consolidated and expanded under the health reform law of March 2010.[25] Rather than transitioning to a social insurance model, access to care will continue to depend on a person's ability to pay rather than their health needs. As long as this system of market incentives prevails, severe shortcomings in the availability, acceptability, and quality of care cannot be adequately addressed.

A. *Provide public goods: replace the private health insurance industry with public financing and administration of a national health insurance plan*

16. The U.S. is alone among high-income countries in continuing a business model of health insurance where market imperatives take precedence over health protection. Insurance corporations profit only if

people use little or no care, and lose money with every treatment people receive. Thus incentivized, the five largest insurers made a combined profit of $12.2 billion in 2009.[26] Yet each year, 700,000 families go bankrupt by trying to pay for their health care, even though three quarters of them are insured.[27] Despite new regulations for insurance companies in the 2010 health law, market incentives to deny care will continue, as the government lacks the power to ensure that premiums are returned to the pool of policyholders in the form of health services. The new law also fails to increase the accountability of privatized, investor-owned hospitals, even though data shows that for-profit hospitals provide lesser quality care, and less care to the poor, than non-profit and public facilities.[28] Pressures to maximize revenue through an overuse of medical technology, as suggested by a high rate of cesarean sections, can add to health risks and violate a patient's right to participation. For example, 25% of women who had a c-section reported feeling pressurized by a health provider to have a c-section.[29]

17. Evidence shows that commercialized health systems, where access depends on ability to pay and service delivery responds to market incentives, have poorer health outcomes and use resources less efficiently than public systems.[30] This is clearly evident in the U.S., where outcomes for patients improve once they turn age 65 and become eligible for the public Medicare program.[31] To realize the right to health care for all, the government should provide a national, publicly financed insurance plan, such as Medicare, to the entire population, and thus treat health care as a public good shared equitably by all.

B. ***Ensure universality: provide a universal public health insurance plan that entitles everyone to comprehensive, appropriate and equal high quality health care***

18. The exclusion of many millions of people from access to coverage and care will continue under the 2010 health law, with 23 million uninsured people predicted by 2019.[32] The system will remain highly stratified with separate tiers for different categories of people receiving different levels of care. The level and quality of care a person gets depends on how they access the system, with wealthier, White, and employed people enjoying better access than others. Yet individuals are routinely blamed and even penalized for being in poor health,[33] while systemic barriers and determinants of health are discounted.

19. The basis of the U.S. health system still rests in individual payment for care, with little acceptance of risk and income solidarity. While other high-income countries have highly redistributive systems, funded collectively through cross-subsidization with a common pool that includes all, the U.S. largely limits redistribution to residual public programs for certain groups. To ensure that everyone has access to the health care they need, the government should guarantee the same comprehensive level of care, including reproductive health care, for everyone in a universal public insurance plan.

C. ***Ensure equity: finance health care equitably through broad-based taxation, and ensure the equitable distribution of adequate, accessible health infrastructure in all communities***

20. The government provides a range of subsidies to private insurance corporations, including through a tax exemption of employer-sponsored health insurance valued at $132.6 billion in 2006.[34] The 2010 health law is projected to channel around $447 billion over ten years to insurers through tax credits for the purchase of private coverage.[35] While these public subsidies are intended to make health care more affordable, they effectively perpetuate the inequities inherent in a for-profit system, where the market limits access according to payment, coverage amount and source, and location. The pressures are growing on the health safety net, which serves especially inner city and rural areas, where the population is too poor or spread-out to make market provision viable. Public hospitals in inner cities are closing or being privatized,[36] and many rural areas suffer from an attrition of doctors, dentists, and reproductive health services.[37] To enable an equitable sharing of costs and benefits, including an equitable distribution of the country's vast health care resources, the government should move from tax-funded subsidies for special interests to broad-based tax-funding of a universal system that serves all needs.

3. The Right to Housing

21. The United States treats housing as a commodity, not as a human right and fundamental need of all. U.S. policies fail to provide safe and decent housing for everyone, a goal set by the Housing Act of 1937. There is no national strategy to address the severe lack of affordable, adequate housing,[38] which has led to millions of foreclosures, displacement, and homelessness. All these disproportionately affect low-income communities, where people of color are overrepresented.[39] Even prior to the current crisis, the number of households facing serious affordability constraints rose by 33% between 2000 and 2007.[40] Homelessness has become a structural feature of society,[41] yet public housing is being demolished across the country.

A. ***Ensure equity: move from stop-gap funding and subsidies for private developers to reinvesting in public housing and equitable, public development***

22. Government policies have created the current housing crisis – which precipitated the 2008 global financial crisis – through deregulating mortgage lending, disinvesting in public housing and other affordable housing programs, and distributing plentiful public resources inequitably. Over the past three decades funding for the Department of Housing and Urban Development (HUD) – responsible for overseeing national housing policy, including affordable housing programs – decreased from $83 to $29 billion.[42] At the same time, the tax code was changed to privilege homeownership over rental housing, thus disadvantaging lower-income people. Almost 25% of renters with incomes under $20,000 spend a third or more of their income on housing costs, compared to just over 7% of homeowners with the same low income.[43] Between 1983 and 2005, public subsidies to homeowners through the mortgage interest tax deduction increased from around $35 billion a year to over $120 billion a year.[44] The U.S. now spends over three times as much each year on tax breaks for homeowners than on all affordable housing programs combined, including the Section 8 voucher[45] and public housing programs.[46] As the value of this tax deduction increases with the value of the mortgage, wealthier people benefit more; in fact over 55% of this subsidy goes to 12% of owners with incomes above $100,000.[47] This means public monies go to those who least need it, while the urgent housing needs of lower-income people remain unmet. Insufficient public monies for addressing homelessness focus on temporary shelters and assistance, and thus serve as no more than a charitable afterthought to a crisis created by inequitable housing policies.

23. Around 200,000 public housing units have been lost to demolition and privatization since 1995.[48] The UN Special Rapporteur has called for an immediate moratorium on the demolition and disposition of public housing and explicitly condemned the disastrous impact of the demolition policy in New Orleans,[49] where public housing residents are fighting forced evictions. Public housing budget cuts have prevented the construction of new housing for almost three decades, resulting in such shortages that many cities have closed their waiting lists.[50] Those remaining in public housing face stigmatization and punitive policies; for example, unemployed public housing residents are required to complete mandatory community service, yet homeowners who benefit from tax breaks have no such requirement.

24. Public subsidies are increasingly offered to private developers, for example through low-income housing tax credits (LIHTC). Yet only 11% of these privately developed units are targeted at those earning less than 30% of the Area Median Income.[51] Given the divestment from public housing programs, LIHTC subsidies are effectively the only remaining publicly supported housing production program. Yet, they fail to reach the poorest households and primarily benefit private enterprises whose bottom line requires charging the highest possible rents.

B. ***Provide public goods: moratorium on privatizing public housing and on foreclosures; adopt and promote sustainable and equitable development codes***

25. U.S. housing policy is increasingly pursuing a complete privatization of public housing, coupled with a commercialization of housing needs. The trend toward converting public into private housing, outsourcing management of public housing to private contractors, and selling public land to private developers at discount rates has channeled public resources to private corporations, leaving low-income renters at their mercy. The few resources targeted at affordable housing assistance, such as Section 8 vouchers and subsidies for private housing developments, are in fact contributing to displacing poor people by forcing them into the competitive, private housing market. While Section 8 was expected to foster social mobility, the vouchers are often insufficient to pay market rents, and leave recipients in mixed-income housing struggling with living expenses in higher cost areas. Severe income differentials prevent poorer people from living side-by-side with those who can afford to treat housing as real estate.

26. The market-based treatment of housing as property has also driven unsustainable private development in new locations that lack services, food, and transportation. Low-income home owners as well as Section 8 renters have been displaced to speculative, sprawling developments at the edges of towns, incentivized by lax development codes. This has also led to new patterns of racial segregation, with urban gentrification forcing people of color into suburbs that lack basic amenities. Unsurprisingly, areas without restrictions on such speculative developments have been hardest hit by the foreclosure crisis.[52] Local, state and federal governments have serviced market interests by relinquishing oversight, rather than securing sustainable housing where it is most needed.

C. *Ensure universality: provide adequate and affordable housing for all who need it*

27. While the U.S. government dedicates significant resources to supporting homeownership and private development, these investments have hampered rather than furthered the human rights obligation of meeting the housing needs of all. Preferential treatment is given to the acquisition of private property by individuals and businesses who can afford it, rather than supporting housing as a public good, based on a common need shared by everyone. Housing is traded in a highly stratified marketplace, with public subsidies for owners over renters, for the housed over the homeless, and for property taxpayers over recipients of housing assistance. Housing policy debates do not even consider universal housing akin to universal education or health care. Multiple strategies and alternatives to individual property ownership are disregarded, even though good practices exist with community-owned land trusts and mutual housing associations, which meet housing needs by removing themselves from market pressures.[53] These models exemplify what the government's human rights obligations require across society: to provide adequate and affordable housing for all who need it.

4. The Right to Work with Dignity

28. The United States treats work and employment as individual obligations rather than rights, situated almost entirely in the domain of the private marketplace. With only minimal regulation of wages and working conditions and no commitment to securing employment for all, the prevalence of exploitative, subsistence-only jobs combined with persistent unemployment rates deprive large population sections of their right to work with dignity. Market imperatives for lowering labor costs to increase profitability dominate employment policy. People's needs are commoditized into demands for consumption, and their role as workers and producers is subordinated to that of consumers. Despite promoting work as an obligation for all, workers' rights are accorded less legitimacy and protection than consumers' rights.

A. *Ensure universality: guarantee a living wage, with dignified working conditions for all*

29. Finding and keeping work is seen as an individual responsibility, and making a living is correlated with a willingness to work hard. The disregard for the economic and social context in which employment opportunities arise and market forces dictate wages and workplace conditions leaves the U.S. without a

national strategy for employment and dignified work. Instead, a growing trend of increasingly informal and temporary work without benefits, obtained through temp agencies or contracting agreements, reduces the availability of stable, well-paid work. Long labor supply chains free employers of any responsibility for the workers at the end of the chains. Corporations increasingly treat their workforce as an expendable commodity. Since the 1980s government policies have refused to pursue full employment as a social goal, and have almost entirely refrained from undertaking direct job creation programs.

30. Successive governments have failed to guarantee a living wage to all workers. For about 30 years, wages have stagnated for the lower half of wage earners, while the top 1% of earners enjoyed a net income gain of 176%.[54] Women on average still earn less than men,[55] and people of color earn less than Whites.[56] The minimum wage has now fallen to about 35% of average wages,[57] and a quarter of all jobs do not pay enough to lift a family of four out of poverty.[58] The minimum wage should be raised to a guaranteed living wage – if necessary supplemented by adequate benefits and cash transfer programs directly to workers – as well as indexed to the cost of living and extended to all workers in all occupations. Workers who are currently denied a minimum wage include tipped workers,[59] domestic workers, farmworkers, and, when calculated pro rata, many workers in seasonal occupations.

31. The U.S. fails to provide and enforce legal protections for many basic rights at work, which has encouraged extreme cases of abuse that are symptomatic of, yet hidden in, a sea of workplace violations. The Coalition of Immokalee Workers (CIW), a grassroots farmworker organization, has uncovered consistent use of coercion and violence by agricultural employers in Florida and has aided in the investigation of six successful federal prosecutions for forced labor and slavery.[60] To secure human rights in every workplace, it is essential not only to remove legal exemptions for high-violation occupations, but to raise the floor of protections for all workers, e.g. through adopting laws to ensure paid sick leave, equal pay for women, and the right to unionize. Workers must not be punished or criminalized for claiming their human rights and should be accorded an equal status in the workplace, regardless of occupation.

B. ***Provide public goods: cooperate with workers' groups to hold corporations accountable, and to develop and enforce employment regulations***

32. Employment policies in the U.S. are largely market-driven and respond to the market dominance of large corporations that wield significant power in driving down wages and working conditions in the entire supply chain. Another source of corporate power is the recognition of corporations as rightsholders under the legal doctrine of 'corporate personhood,' which has been used to defend companies against workers' rights cases.[61] Yet grassroots workers' groups seek to hold corporate 'rightsholders' accountable for violations of *human* rights. For example, through its agreement with retail corporations, the CIW has introduced a human rights based monitoring program to ensure that produce is harvested under fair labor conditions and that independent monitoring is conducted with the participation of the workers themselves. United Workers, a grassroots organization of low-wage workers in Baltimore, has similarly demanded that large private developers enter into a binding human rights agreement to require their business tenants to pay a living wage and provide dignified working conditions for all workers.

33. The absence of public oversight in high-violation industries has precipitated the lowering of standards in the labor market as a whole. The few existing legal protections against workplace violations are not adequately enforced.[62] Yet ensuring work with dignity is a public obligation, not a market obstacle, and corporate 'rights' must not be allowed to trump workers' human rights.

C. ***Ensure equity: place human rights conditions on subsidies for private job creation and private development; increase direct public jobs creation based on human rights principles***

34. Government policies actively distribute public resources to the corporations they largely fail to regulate and monitor. Numerous tax incentives and direct public subsidies are given to the corporate sector, including the high-violation agricultural, retail, and service industries. Federal, state, and local subsidies, as well as development rights on public lands are provided in addition to the tax benefits corporations already enjoy. Yet no human rights conditions are tied to the receipt of subsidies, nor is corporate compliance with existing laws adequately monitored. Consequently, public resources are used to secure the revenues of corporations rather than the needs and rights of workers, thereby serving private interests rather than the common good.

35. Public investment in job creation must be targeted and accountable. The direct creation of public jobs is more transparent and accountable than transfers of public monies to the private sector for diffuse economic development purposes. At a minimum, public subsidies and incentives, as well as direct public contracts with private businesses, must include transparent conditions and enforceable standards to ensure that jobs are created that provide living wages, adequate benefits, and safe, dignified working conditions.

5. The Right to Social Security

36. In the United States the human right to social security, which ensures the basic resources necessary for a life with dignity, is not sufficiently protected. Social policies assume that a basic income can be generated from work, and fail to provide adequate supports to meet fundamental needs and prevent poverty. The U.S. has far greater income inequality than all Western democracies,[63] and the second-lowest rate among OECD countries for reducing inequality through public cash transfers.[64] Consequently, the official poverty rate in 2008 was 13.2%.[65] In addition, around 30% of the population lacks an adequate income to meet their needs.[66] As a result, around 58 million people face either food or energy insecurity, or both.[67] Poverty has been thoroughly racialized and feminized, with 24.7% of African Americans and 14.5% of women living below the federal poverty level, compared to 9.2% of non-Hispanic Whites.[68]

37. The U.S. makes limited benefits available in a very selective way, for special eligible groups only. The sole universal benefit is mandatory public retirement insurance through the tax-funded Social Security program of 1935, which only provides income near the federal poverty level. Employment related benefits are difficult to claim and inadequate to meet needs, yet few benefits exist independent of work, apart from a growing Supplemental Nutrition Assistance Program (known as food stamps). Since the legal right to welfare was ended in 1996 and replaced by Temporary Assistance for Needy Families (TANF) for women with children, the number of recipients has decreased by a third to around 2 million.[69]

A. *Ensure universality: provide a basic income and job guarantee for everyone, through an automatic universal basic income and a public jobs creation program*

38. Securing the basic resources for a life with dignity is treated as an individual responsibility, and poverty is seen as a personal rather than social problem. The culture of self-reliance is promoted by selective benefits policies that segregate the poor into special groups defined by eligibility criteria and a demeaning application process. Such polices draw a line of demarcation between people whose taxes pay for benefits and those who receive them. This stigmatizes and marginalizes poor people, and violates their dignity and liberty, as do compulsory work requirements imposed as a condition of welfare and housing benefits. Enrollment in benefits programs is actively discouraged, to the point where "applying for welfare is a lot like being booked for a crime," and punishing people for disapproved behavior with a withdrawal of benefits is commonplace.[70] At the same time, cash assistance programs, which allowed people to determine their priority needs, have been almost entirely replaced by material assistance, such as food stamps, which patronize the poor by paternalistically dictating needs.

39. A growing emphasis on individual responsibility can be found even with regard to the least stigmatized benefit, employer pension plans that supplement Social Security. Over the last decade, many of those employers still offering pensions have moved from defined-benefit to defined-contribution plans. Pensions have become investment accounts that place the risk for managing retirement savings onto workers, leaving them without guaranteed payouts.

40. The selective and segmented nature of U.S. social policy contributes to the lack of solidarity for those with greater need for social protection. This makes benefits programs less effective and less sustainable. In short, programs only for poor people are poor programs[71] and should be replaced with universal measures that not only tackle poverty but foster the economic and social inclusion of all. The lack of adequate social protection keeps wages low for the majority population, which in turn increases the need for income support. To end this vicious cycle, selective benefits programs should be turned into a universal system of social protection that provides guaranteed protection against common risks, through a universal basic income, while also giving targeted support to disadvantaged population groups.

B. ***Ensure equity: change social benefits and taxation policies to ensure a strong redistributional effect***

41. Public expenditures for social protection, which include both tax expenditures and direct social programs, fail to redistribute resources to the poor. The sizable tax subsidies for employer pension plans, employer-sponsored health insurance, and homeowner mortgage interest are all weighted to benefit higher-income people.[72] With regard to pensions, for example, lower-paid workers and even those excluded from their employers' pension plans effectively help pay for a tax subsidy of more than $100 billion per year that primarily benefits higher-paid employees and business owners. By comparison, resources for those with more serious needs are small. Maximum TANF benefits in 30 states amount to less than 30% of the federal poverty line.[73] Unemployment insurance benefits only replace 35% of an average weekly wage, and prior to the recession just 37% of unemployed people received those benefits. Although low-wage workers are twice as likely as higher earners to become unemployed, they are only one third as likely to collect benefits.[74]

42. The U.S. tax code replicates this regressive approach. For example, while the average income of the richest 400 individuals grew from $263.3 million in 2006 to $344.8 million in 2007, their effective tax rate fell from 17.17% in 2006 to 16.62% in 2007. This is primarily due to the preferential treatment of capital gains and stock dividends, which are taxed at a top rate of 15% instead of the (already low) top tax rate of 35% that applies to other income of the very rich.[75]

C. ***Provide public goods: end and reverse the privatization of social services and public utilities***

43. The U.S. has increasingly privatized the administration and delivery of social services. Yet the $1.5 billion business of using private TANF contractors has led to a lack of public oversight,[76] and the role of private companies in determining people's eligibility for benefits raises serious accountability questions. Processing delays and caseworker shortages have already harmed poor people.[77]

44. The push towards privatization and commercialization has also increased the populations' energy and water insecurity. The negative impact of privatizing energy and water utilities includes price increases and higher disconnection and shut-off rates, which have culminated in a number of deaths.[78] Dependency on investor-owned water utilities has increased,[79] yet a low-income community in Highland Park, Michigan, has been fighting privatization and demanded that water be treated as a public good, shared by all, rather than handed over into private ownership.[80]

III. Recommendations for Actions by the United States Government

1. **Strengthen the public sector to ensure that the core goods, services and infrastructure necessary to meet people's fundamental needs are treated as public goods, rather than commodities**. Defund market approaches that have failed to meet needs, provide equal access to public goods, and hold private corporations accountable for protecting human rights.
   a. Education: preserve education as a public good, invest in public schools based on need, and stop privatization where it exacerbates stratification and segregation
   b. Health care: replace the private health insurance industry with public financing and administration of a national health insurance plan
   c. Housing: moratorium on privatizing public housing, reinvest in public housing; require banks to put a moratorium on foreclosures; adopt and promote sustainable and equitable development codes
   d. Work with dignity: cooperate with workers' groups to hold corporations accountable, and to develop and enforce employment regulations
   e. Social security: end and reverse the privatization of social benefits services and public utilities

2. **Implement universal policies that include everyone and share costs and benefits equitably.** The government must assume responsibility for ensuring that everyone's needs are met, instead of forcing individuals to compete against each other in a marketplace that imposes artificial scarcity on meeting fundamental needs. Revoke divisive market-based incentives when they stigmatize, displace, exclude or criminalize people.
   a. Education: end school push-outs and instead provide learning environments that protect dignity, foster children's full development, and ensure a quality education for all children
   b. Health care: provide a universal public health insurance plan that entitles everyone to comprehensive, appropriate and equal high quality health care
   c. Housing: guarantee and provide adequate and affordable housing for all who need it, and guarantee security of tenure for everyone (tenants and owner-occupiers)
   d. Work with dignity: guarantee a living wage, with dignified working conditions for all
   e. Social security: provide a basic income and job guarantee for everyone, through an automatic universal basic income and a public jobs creation program

3. **Ensure the equitable distribution of public resources**. The government must invest in communities based on need, and redistribute resources to disadvantaged and underserved populations. End tax breaks and subsidies when they primarily serve private, for-profit interests, and high earners and instead implement a progressive taxation system.
   a. Education: eliminate funding disparities by ending schools' dependence on local property taxes
   b. Health care: finance health care equitably through broad-based taxation, and ensure the equitable distribution of adequate, accessible health infrastructure and services in all communities
   c. Housing: move from stop-gap funding and subsidies for private developers to reinvesting in public housing and equitable, public development. As a first step, end all demolitions of public housing.
   d. Work with dignity: place human rights conditions on subsidies for private job creation and private development; increase direct public jobs creation based on human rights principles
   e. Social security: change social benefits and taxation policies to ensure a strong redistribution effect

4. **Ensure that everyone in the United States is able to participate in the decision-making, resource allocation, and oversight related to how their fundamental needs are met.** This must include workers, students, parents, communities, patients, tenants, homeless people, income support recipients, and everyone else. The U.S. must address the increasing obstacles to democratic participation. Everyone must be able to organize freely, without fear of exclusion and criminalization.

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United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
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1-12 November 2010

Towards a Human Rights-Centered Macro-Economic and Financial Policy in the U.S.

Submitted by:

Center for Women's Global Leadership, Rutgers University,
Economic Policy and Human Rights Initiative of the International Network for Economic, Social and Cultural Rights (ESCR-Net),
Political Economy Research Institute, University of Massachusetts

Endorsements:

Organizations: Cidadao Global; Human Rights Caucus, Northeastern University School of Law; Malcolm X Center for Self Determination; Malcolm X Grassroots Movement; Metro Atlanta Task Force for the Homeless; National Economic and Social Rights Initiative (NESRI); National Lawyers Guild; Public Interest Projects; Right Respect; South Bay Communities Alliance; The Leonard Peltier Defense Offense Committee; Urban Justice Center; Three Treaties Task Force of the Social Justice Center of Marin; Women of Color Policy Network, New York University

Individuals: Joyce Carruth; Andrea Hornbein, Massachusetts Statewide Harm Reduction Coalition; Ute Ritz-Deutch, Ph.D.; Nicole Skibola, Right Respect

EXECUTIVE SUMMARY

Governments are obliged to advance their people's human rights. The specific obligations under international law are to protect and fulfill the economic and social rights of people within their jurisdiction. When businesses or private institutions threaten to interfere with these basic rights, the government must step in to protect those rights and cease from making policy that facilitates the interest of private corporations over and above the interests of realizing these rights.

The ongoing global economic crisis has its origins in U.S. financial markets and was a consequence of deliberate legislative changes, the erosion of regulatory protections and the failure to extend oversight to new financial products that contributed to excess systemic risk. The financial crisis has had an immediate and direct impact on the realization of human rights within the U.S. and worldwide, leading to significant retrogression in many areas. This submission provides a human rights analysis of the U.S. domestic measures in conducting macro-economic and financial policy in the period under review, focusing in particular on the right to equality and non-discrimination, the right to work and to just and favorable conditions of work, and right to social security and adequate standard of living. It also provides a set of inter-related recommendations aimed at developing a human rights-centered macro-economic and financial policy in the U.S

In response to the crisis, the U.S. has enacted a significant fiscal stimulus policy in the form of tax cuts, federal aid to states and direct jobs programs. In human rights terms, the policy response is mixed. Efforts to protect education, maintain public health insurance for low-income families, and create jobs represent a movement in the right direction. However, sizeable tax cuts and the substantial resources devoted to bailing out financial institutions raise questions of whether the maximum available resources are being mobilized to protect basic rights. Among other things, the U.S. should monitor the job creation associated with the recovery to ensure that jobs are of decent quality and employment opportunities are provided in a non-discriminatory and gender-sensitive way. Current and future budget allocations, including fiscal stimulus funds, should go towards the creation of new employment that specifically includes women, people of color and other economically marginalized groups.

The U.S. has conducted its monetary policy in response to the recent economic crisis by pumping liquidity into the commercial banking sector. In some respects, this could be seen as an effort to prevent unemployment from rising further. Nevertheless, the speed with which resources were mobilized to address threats to private financial interests was significantly faster than the speed at which the Federal Reserve has reacted to rising unemployment in the past. This raises concerns that the Federal Reserve does not always use the maximum resources at its disposal to support the right to an adequate standard of living. Moreover, there are few mechanisms to hold the Federal Reserve transparent and accountable in terms of its legal domestic mandate to maintain the maximum level of employment possible. The U.S. then should at a minimum improve the transparency, public participation, independent oversight and accountability of the Federal Reserve System, especially with regard to its measures to bailout financial institutions, and hold public and private actors accountable for their policy decisions which endanger the enjoyment of human rights. Given the Federal Reserve's mandate to achieve the maximum level of employment while maintaining stable inflation, it should be required to demonstrate how its policy choices support equitable access to jobs for everyone seeking employment.

Finally, the U.S. approach to financial regulation—through concrete policy and legislative measures—has so far failed to ensure basic human rights protections. The realization and sustainability of social and economic rights requires appropriate policies that prevent the type of crises the U.S. and the world has experienced in recent years. The U.S. then should introduce—domestically and in concert with other States—a comprehensive set of legislative, judicial and policy measures to prevent banking and any other financial sector entities (such as hedge funds, private equity funds, derivative instruments and credit rating agencies) from actions which may undermine the realization of human rights due to financial volatility, speculative behavior and heighten risks of a systemic economic crisis. Human rights require remedies, both to provide those negatively affected with access to justice and judicial protection as well as to prevent future financial sector abuses and crises from occurring.

I. Introduction

1. This submission focuses on the human rights implications of the financial crisis and subsequent domestic policy responses. In particular, it focuses on the human rights obligation to protect and fulfill economic and social rights as well as the need for transparency, accountability and participation in the making of macroeconomic policy.

II. Current Normative and Institutional Framework

A. Background

2. During the period under review (2006-2010), the sub-prime mortgage crisis (which began to emerge in 2006 and 2007), the subsequent systemic financial crisis (the extent of which began to be apparent in the second half of 2008) and the policy responses which have been implemented domestically since then are the most significant macroeconomic developments. It is critical in this context to recognize that the financial crisis resulted from a number of developments which predate the review period, but which are essential for understanding the impact of the economic crisis on human rights in the U.S. These issues are discussed in greater detail below.

B. Legislative and regulatory framework

3. The evolution of U.S. financial regulations over the past several decades sets the stage for the financial and subsequent economic crises which emerged in 2008. Here we briefly review the regulations which were put in place during the Great Depression and more recent legislation which removed the earlier protections.

4. The Glass-Steagall Act (1933) established the Federal Deposit Insurance Commission (FDIC) and allowed the Federal Reserve to regulate interest rates. Importantly, this act also effectively prevented the use of the assets of commercial banks for speculative activities – that is, banks could not invest deposits on the stock market. Glass-Steagall originally prohibited banks from owning non-bank financial institutions

5. The Securities Exchange Act (1934) established the SEC (Securities and Exchange Commission) to govern the exchange of financial securities. The SEC mandate to regulate finance markets has not always kept pace with financial innovations (hedge funds, derivatives – including financial futures, swaps, etc.).

6. The Depository Institutions Deregulation and Monetary Control Act (1980) increased the scope for bank mergers, allowed savings and loans and credit unions to offer checkable accounts, and deregulated interest rates. These changes set the stage for a weakened regulatory framework which led to the Savings and Loan crisis in the 1980s. It also contributed to the subsequent consolidation of the banking industry in the U.S.

7. The Gramm-Leach-Bliley Act (1999) ('Financial Services Modernization Act') repealed portions of the Glass-Steagall Act that established a firewall between banks and other financial institutions. It allowed the consolidation of commercial banks and investment banks, thereby setting the stage for the largest financial institutions to become 'too big to fail'.

8. The Commodity Futures Modernization Act (2000) then insured that certain financial products (i.e. derivatives) offered by commercial or investment banks would not be regulated under existing laws governing futures contracts. It also made it easier for financial institutions to invest in commodities futures. There are reasons to believe this contributed to the bubble in global food and energy prices in 2007 and the first half of 2008.

9. Most recently, the Sarbanes-Oxley Act (2002) followed the Enron debacle. It established standards for business management and accounting. The Act does not apply to privately held companies. In addition, apart from some new accounting guidelines, the act did not attempt to regulate the financial system.

C. Policy measures

10. The federal government and the Federal Reserve have responded to the economic crisis in several ways. The responses included:
    The American Recovery and Reinvestment Act of 2009 – a fiscal stimulus measure which aimed to stop the hemorrhaging of jobs and to help resource-stressed states.
    The Troubled Asset Relief Program (TARP), launched in 2008 – a federally organized bailout of the financial crisis, aimed at preventing a systemic collapse of the system.
    Federal Reserve monetary response – the Federal Reserve injected a substantial amount of liquidity into the financial system, keeping interest rates low and buying assets for which there was no longer a viable market. By buying such assets, the Federal Reserve replaced illiquid assets with liquid assets.

III. Promotion and Protection of Human Rights on the Ground

11. The ongoing global economic crisis has its origins in U.S. financial markets and was a consequence of deliberate legislative changes, the erosion of regulatory protections, and the failure to extend oversight to new financial products that contributed to excess systemic risk. The collateral damage of these choices has been enormous. The economic downturn destroyed jobs, reduced standards of living, and heightened risks for ordinary people and has driven families deeper into poverty, especially women and people of color. While this submission does not focus on international dimensions of the crisis, globally, the costs

around the world are even higher. [1]The World Bank estimates that, between 2009 and 2015, an additional 200,000 to 400,000 children will die every year before their fifth birthday compared to the number that would have perished in the absence of the crisis. The International Labor Organization estimates that worldwide unemployment could increase by another 29 to 59 million individuals due to the crisis. Such unemployment figures are staggering, but it is important to recognize that these formal numbers do not capture the even more stark real impacts on livelihoods – for example, of the informally self-employed who have seen their incomes from employment drop significantly.

12. The human rights which we highlight in this submission include: equality and non-discrimination, right to work and to just and favorable conditions of work, and right to social security and adequate standard of living.

A. Equality and non-discrimination

13. The financial crisis and the ensuing policies have had a disproportionate impact on women. For example, when budgets are cut on social spending, such as health and education, the increase in the unpaid work done by women to make up for the care provided by the state increases as women take up the slack when the state cuts back social spending. Investment of the stimulus money in child care and elder care would help with the increase burden on women as well as create job in an industry often dominated by poor women. Investments in direct care, education and healthcare would also go a long way in alleviating poverty as many low-income women are employed in these sectors. Federal money to these industries, as long as they require a commitment to minimum just employment standards, would help spur more of these "good" jobs, lifting the bottom of the labor market.

14. There is also clear evidence that there has been a failure to protect women, the poor and people of color who were disproportionately affected by predatory lending practices and the subprime mortgage crisis. In 2006, the Consumer Federation of America reported that, "women were 32 percent more likely to receive subprime loans than men."[2] Strong data was also presented about racial and class inequities regarding income and ethnic groups.

B. Right to work and to just and favorable conditions of work

15. As of March 2010, the number of unemployed persons in the U.S. has risen by over 7 million since the financial crisis began. There has been a modest addition of new jobs in recent months, but temporary and part-time employment account for a significant fraction of the new jobs created – e.g. in March 2010, 25 percent of the 160,000 new jobs were with temporary help agencies. While the unemployment rate held steady at 9.7% in March, the long-term unemployment situation deteriorated. In the same month, an additional 414,000 unemployed workers crossed the six-months-unemployed threshold, so that now there 6.5 million workers who have been unemployed for longer than six months – constituting 44% of all unemployed workers.

16. The *underemployment rate* (which includes not just the officially unemployed, but also jobless workers who have given up looking for work and part-time workers who want full-time jobs) also rose, from 16.8% to 16.9%, as the number of involuntary part-timers increased by 263,000 workers. However, the number of "marginally attached" workers — jobless workers who have given up looking for work,

declined by 209,000, likely because many marginally attached workers entered or re-entered the labor force, which increased by 398,000 in March, 2010. In the same month, there were 2.3 million marginally attached workers, 9.1 million involuntary part-timers, and 15.0 million unemployed workers in the United States, for a total of 26.4 million workers who are either unemployed or underemployed.[3]

C. Right to social security and adequate standard of living

17. One of the important impacts of the crisis has been the huge decrease in the value of pensions. Many older persons have had to postpone retirement, go back to work or face homelessness due to the decreased value of their pensions. The move from defined benefits to defined contributions in retirement has also created a much more vulnerable climate for the elderly in terms social security,[4] especially as the value of these pensions which were invested in the markets decreased so much as a result of the financial crisis.[5]

IV. Achievements, Best Practices, Challenges and Constraints

A. Challenges Discharging the Duty to Protect: Financial regulation and the manufactured crisis

18. Governments are obliged to advance their people's human rights. One of the specific obligations under international law is to protect the economic and social rights of people within their jurisdiction. When businesses or private institutions threaten to interfere with these basic rights, the government must step in to protect those rights and cease from making policy that facilitates the interest of private corporations over and above the interests of realizing these rights. In this vein, financial and economic crises are not random or natural events – they are manufactured through the design and implementation of particular policies. The realization and sustainability of social and economic rights requires appropriate policies that prevent the type of crises the U.S. and the world has experienced in recent years.

19. In this context, it is important to recognize that there was not simply deregulation of the U.S. economy, but instead a re-regulatory process that has in effect been biased toward the interest of banks rather than the interests of the general population. The sub-prime mortgages associated with the current crisis provides an example. Without the proper type of regulatory oversight, financial institutions engaged in predatory lending practices – that is, an extension of loans on unfavorable terms primarily targeted at low income households. These loans were not subject to 'due diligence' – an accurate assessment of the real risks involved – and many of these lending practices could be considered fraudulent. Federal mortgage regulation is fragmented and has become increasingly lenient, with some mortgage lenders experiencing no effective regulation at all. Perverse incentives encouraged lenders to exploit vulnerable borrowers while the government looked the other way. As a result, families holding mortgages have been particularly hard-hit by the government's failure to protect.

20. Similarly, while regulation of banks, investment companies and other financial players was relaxed, reform of personal bankruptcy laws was pushed through. This made it more difficult for people suffering a catastrophic medical problem or a prolonged period of unemployment to manage onerous levels of personal debt. An unexpected setback could lead to a loss of basic social and economic rights for the rest of a person's life.

21. As another example described above, the U.S. in recent years removed regulations of financial markets which very well may have helped contain or prevent the financial crisis. During the Clinton Administration, Congress eliminated many of the safeguards put in place after the Great Depression through such legislation as the Financial Services Modernization Act (1999). The government also failed to monitor the financial system when new products, such as derivatives based on mortgage-backed securities. Innovative financial products fell into a regulatory void, as efforts to protect the economy from excessive risks lagged far behind. "Over the counter" derivatives – financial products which are custom-designed for specific clients and purposes – accounted for many of the high-risk assets. These and other such products flourished. The lack of regulatory framework it was impossible to assess the risk profile of these products. One of the reasons for the enormous amount of money sitting in the reserves of banks is the inability to understand how toxic these assets are. Yet, these transactions were subject to fewer safeguards than securities that are more openly exchanged.

22. At the time of this submission, new financial regulations are being debated in the U.S. Congress. It is unclear what the final result will be. In order to create a framework which takes the obligation to protect seriously, a number of changes must be made, which are described below in the recommendations.

B. Challenges to the right to work, the right to an adequate standard of living and the right to equality and non-discrimination in U.S. fiscal and monetary policy measures

23. Macroeconomic and financial sector policies have a direct impact on the right to work the right to an adequate standard of living and the right to equality and non-discrimination. Even before the full impact of the financial crisis was felt, the situation in the U.S. with regard to these fundamental rights was problematic. In 2008, the U.S. Department of Agriculture found that 15 percent of U.S. households had been food insecure at some point during the year – the highest rate in over a decade – suggesting that a sizeable proportion of the population lacked an adequate standard of living. Over 16 million children lived in food insecure households in 2008 and 22 percent of households with children under the age of 6 experienced food insecurity. Thirty-seven percent of single-mother households were food insecure at some point in 2008. The problem is not simply one of unemployment, but rather of low incomes. A 2007 USDA study found that about 85 percent of households with food-insecure children had a working adult, including 70 percent with a full-time worker.[6] The economic crisis, which raised unemployment rates dramatically, must have made this situation worse, although we do not yet know how drastically average standards of living have fallen and the full impact of the crisis on vulnerable populations.

24. Fiscal policy can either counteract or reinforce the tendency towards unemployment and lack of decent work. As described in more detail below, a portion of the fiscal stimulus (the ARRA) has been used to create and retain jobs in the face of the economic downturn. The application of the principles of the right to work and an adequate standard of living should not be restricted to severe economic crises and the impact of fiscal policy choices on employment, both the quality and quantity, should be continuously evaluated to ensure that fiscal policy supports the right to work and an adequate standard of living.

25. The ability of the average American family to maintain an adequate standard of living depends critically on the economy's ability to generate employment. This is not only to provide work for the unemployed, but also because more employment leads to, "a tighter labor market *which* delivers faster pay gains".[7] In addition, the realization of other economic and social rights has been linked to access to employment and

relatively high-quality jobs – e.g. pensions and health insurance. Although alternatives available to people other than through decent jobs exist, such as the Social Security and Medicaid programs, this safety net is relatively weak compared to the social protections available to those in decent employment. For example, social security payments are meant to supplement other retirement savings and the amount of income replacement is minimal. Medicaid is not available to all the uninsured. With the new healthcare reforms coverage rates should increase, but the size of individual payments for insurance will vary significantly based on employment status. Progressive realization of the rights to work and an adequate standard of living means that the state has an obligation to take proactive measures towards generating decent jobs. Fiscal policy has a direct role to play – in terms of investing in education and infrastructure to support employment in the long-run and, in the short-run, running counter cyclical policies to prevent job losses when the economy weakens.

26. Monetary policy also has a central role to play, but the Federal Reserve is seldom held accountable for supporting the right to work and to an adequate standard of living. In the United States, the Federal Reserve operates under a dual mandate: it is responsible for maintaining the maximum level of employment possible and managing inflation to ensure price stability. Full employment was codified as a responsibility of the Federal Reserve with the 1978 Full Employment and Balanced Growth Act. The law specifically mandates that the federal government "promote full employment … and reasonable price stability."

27. Monetary policy has responded to the recent economic crisis – both in terms of maintaining low interest rates and pumping liquidity into the commercial banking sector. In some respects, this could be seen as an effort to prevent unemployment from rising still further. Nevertheless, the speed with which resources were mobilized to address threats to financial interests was significantly faster than the speed at which the Federal Reserve has reacted to rising unemployment in the past. This raises concerns that, in non-crisis years, the Federal Reserve does not always use the maximum resources at its disposal to support the right to an adequate standard of living.

28. Moreover, there are few mechanisms to hold the Federal Reserve transparent and accountable in terms of its legal mandate to maintain the maximum level of employment possible. The Federal Reserve System – itself an independent government entity therefore having human rights obligations – has extended its emergency powers in response to the crisis, but has not disclosed the full details of its bailout operations. Indeed, the day-to-day operations of the Federal Reserve are characterized by minimal transparency and accountability. The Government Accountability Office—an independent government watchdog—is restricted in its ability to audit the Federal Reserve; the Federal Reserve enjoys critical exemptions from the Freedom of Information Act, and the Federal Advisory Council, the central bank's industry advisors, is allowed to meet behind closed doors and not report on what they are doing. Without transparency and accountability, the type of public scrutiny necessary for ensuring human rights outcomes is next to impossible.

29. Furthermore, studies of the impact of interest rate policies suggest that Federal Reserve policy may have a discriminatory impact.[8] Higher real interest rates tend to have a stronger negative impact on African-American employment than on the average rate of employment overall. There has never been a systematic discussion in the U.S. about the discriminatory impacts of monetary policy, although non-discrimination represents a core human rights obligation.

C. Challenges Discharging the Duty to Fulfill through Fiscal Policy Measures

30. During the period under review, the U.S. implemented a fiscal stimulus in an attempt to mitigate the negative effects of the financial crisis which emerged in the second half of 2008, but was ultimately derived from the serious problems in the sub-prime mortgage market that became evident in 2007. The American Recovery and Reinvestment Act (ARRA), passed in February 2009, represents an unprecedented $787 billion fiscal stimulus. Although the ARRA has been implemented too slowly, the spending which has been mobilized has had positive effects. The ARRA represents a constructive but inadequate response of the U.S. government to the financial crisis; itself directly linked to human rights outcomes.

31. It is important to stress that there are good parts and 'less good' parts of the stimulus package from a human rights perspective. A positive aspect is that a significant portion of the stimulus package goes towards aid to states, which in the U.S. context provide much of the social services (supporting Medicaid and education for example). Since individual states are required to run a balanced budget, the reductions in revenues coming from the economic downturn spawned by the financial crisis, triggered intense pressure for social spending cuts. In other words, state budgets have been conducted in a overwhelmingly 'procyclical' way, that is, U.S. states must cut the social spending so necessary for the realization of human rights or raise taxes during recessions, thereby exacerbating the already poor economic situation, especially for the most vulnerable relying on these services. The ARRA helps, to a limited extent, prevent state budget processes from making the crisis much worse.

32. Despite these budget gaps – particularly at the state and local level – for delivering on human rights obligations, a sizeable share of the stimulus package is going to tax cuts. This put into question whether the U.S. is using the maximum available resources to protect social and economic rights during the crisis. In the state of Georgia, for example, a recent study showed that if tax reductions had not taken place, annual revenues would be $1.5 billion higher and would have decreased the size of cuts that Georgia has to face by 60 percent.

33. The ARRA also authorizes a large amount of direct spending aimed at job creation. This is important – since it could prevent retrogression in terms of the right to work and the right to an adequate income. Nevertheless, the job creation programs may not be gender equitable, since the types of jobs that will be created have traditionally been filled by men. The issue is complicated by the fact that, at least initially, many more men have lost their jobs relative to women. This may change as the dynamics of the crisis unfold. Nevertheless, there is no provision to monitor the stimulus spending in terms of its actual discriminatory effects, nor to ensure substantive equality in the benefits, such as using these resources to change the gender dynamic in the work force. A serious injection of resources to the provision of affordable child care for instance would not only employ a large percentage of women who work in that industry but would also allow women who have children to participate in the workforce more fully.

34. In addition to the ARRA, the government also implemented bailouts for the financial sector (the Troubled Asset Relief Program, or TARP) which also has implications for fiscal policy at the current time and in the future. TARP provides money to the financial institutions. From a human rights perspective, it is essential to analyze who has benefited from the transfer of these resources and what justifications exist in

the use of such a large quantity of public funds. That is, has the TARP prevented non-retrogression in rights by preventing a collapse, or has the money simply protected a narrow set of powerful interests? So far, the U.S. has failed to take steps to ensure transparency as to what happened to the resources that have been allocated to the financial sector, making it exceedingly difficult to analyze the State party's measures from a human rights perspective.

35. Furthermore, the resources devoted to rescuing the financial sector far exceed the resources used for direct stimulus of the real economy. The U.S. government authorized $700 billion to be used to save the financial sector through the Troubled Asset Relief Program (TARP),[9] and although it has devoted approximately $787 billion dollars to fiscal stimulus through the American Recovery and Reinvestment Act, as much as $288 billion of that package is comprised of tax cuts.[10] Given the immediacy and magnitude of the crisis, this may not have been the most effective or efficient way of creating jobs of dignity and building a just and resilient economic base.[11]

36. From a related perspective, while the U.S. has committed resources to housing, addressing mortgage modification programmes, neighborhood enhancement and emergency recovery initiatives through the ARRA, the amount of relief granted to the financial sector supersedes by a large margin the amount provided to households facing foreclosure.

37. All of this raises important questions concerning the State party's priorities in responding to the crisis with the maximum available resources available to meet human rights obligations. A large sum of resources were made readily available to the financial sector without accountability and participation, but many state, local and federal programs that impact directly on the lives of working people will be cut, increasing the unpaid work done mostly by women, and likely to lead to a backwards slide in the enjoyment of economic and social rights.

V. Recommendations for a human rights centered macro economic and financial policy in the U.S.

38. Channel resources towards protecting rights, not shielding wealth. Revisit tax cuts and the money being used to bail out financial institutions. Increase transparency and accountability to ensure that the funds are being used to prevent the retrogression of rights, not simply the realization of profits. Fiscal policy should play a direct role - in terms of investing in education, health care and other social spending and infrastructure to support sustainable employment gains in the long-run and, in the short-run, running counter cyclical policies to prevent job losses when the economy weakens. Expand macroeconomic initiatives to address the on-going crisis of unemployment. Monitor the job creation associated with the recovery to ensure that jobs are of decent quality and employment opportunities are equitably distributed. Shift priorities and create new programs to include women and people of color. Provide more federal funds to state and local government to prevent cuts to education, health, and core social services. Revisit the need for greater stimulus as the impact on state and local budgets becomes clear.

39. Balanced regulation, not biased regulation. Introduce a comprehensive set of regulations for the financial sector as a whole. Make sure that prudential safeguards are introduced to prevent future crises. Regulations must be transparent and increase the accountability of financial and regulatory institutions. They must be comprehensive and include all financial actors, markets and products. The legislation which Congress adopts must reduce conflicts of interest and eliminate perverse incentives by strengthening

oversight and imposing sanctions on risky behavior. The new legislation must reduce conflicts of interest and eliminate perverse incentives by strengthening oversight and imposing sanctions on risky behavior. Capital requirements on high-risk assets must be strengthened. Individual institutions must be prevented from becoming too big to fail and thereby holding the government hostage. We need consumer protections which reduce the complexity of financial products and impose safety standards. Perhaps most importantly, financial institutions responsible for the crisis must be held accountable for their reckless behavior which has adversely impacted so many people's lives and well-being.

40. Monitor the job creation associated with the recovery to ensure that jobs are of decent quality and employment opportunities are provided in a non-discriminatory and gender-sensitive way. Given persistently high rates of unemployment, additional policy responses will likely be required to address the right to work and an adequate standard of living. Current and future budget allocations, including fiscal stimulus funds, should go towards the creation of new employment that specifically includes women, people of color, and other economically marginalized groups. For example, a serious injection of resources to the provision of affordable child care will not only employ a large percentage of women who work in that industry but also allow women who have children to participate in the workforce more fully.

41. Improve the transparency, public participation, independent oversight and accountability of the U.S. central bank – the Federal Reserve System, especially with regard to its measures to bailout financial institutions, hold public and private actors accountable for their policy decisions which endanger the enjoyment of economic and social rights.

42. Conduct a national audit of fiscal policy practices of state and local governments to determine which policy decisions (e.g. tax cuts) have reduced available resources and therefore made spending so sensitive to economic cycles. Where necessary, reform tax systems to minimize similar cuts during future downturns.

43. Extend unemployment insurance, disability benefits, and support to low-income households to help maintain a minimal standard of living.

44. Stop foreclosures and implement a real rescue package for residential housing.

[1] See *Bringing Human Rights to Bear in Times of Crisis*, available at www.escr-net.org/usr_doc/HRResponsestoEconCrisis_Final.pdf
[2] See *Women are Prime Targets for Subprime Lending: Women are Disproportionately Represented in High-Cost Mortgage Market*, available at http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf
[3] See *Positive job growth, but not enough to reduce unemployment rate*, available at http://www.epi.org/publications/entry/jobs_picture_20100402/
[4] See *Rethinking Macro Economic Strategies from a Human Rights Perspective: Why MES with Human Rights II*, available at http://www.cwgl.rutgers.edu/globalcenter/publications/whymes2.pdf
[5] See *Pension Market in Focus*, available at http://www.oecd.org/dataoecd/42/19/41770561.pdf
[6] See Household Food Security in the United States, 2008, available at http://www.ers.usda.gov/publications/err83/err83.pdf
[7] See Price, Lee (2005). "THE BOOM THAT WASN'T The economy has little to show for $860 billion in tax cuts", available at http://epi.3cdn.net/767992214da6a41eb9_3um6bn297.pdf
[8] See Heintz, James and Stephanie Seguino (2009). "Federal Reserve Policy and Inflation Dynamics in the U.S.: Race and Gender Inequalities in Unemployment Outcomes". Paper presented at the Eastern Economics Association Annual Meeting, New York, February 2010.
[9] See Congressional Budget Office *The Troubled Asset Relief Program: Report on Transactions Through December 21, 2008* (Jan. 2009), available at http://www.cbo.gov/ftpdocs/99xx/doc9961/01-16-TARP.pdf.
[10] See Recovery.gov Website *Overview of Funding*, available at http://www.recovery.gov/Pages/home.aspx?q=content/investments
[11] See for example United Nations, *World Economic Situation and Prospects* (2010), available at http://www.un.org/esa/policy/wess/wesp2010files/wesp2010.pdf

United States of America

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On the Right to Education

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1. In this submission on the right to education in the United States, our organizations provide information under sections B, C, and D, as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review. This report is submitted by The Poverty and Race Research Action Council, Charles Hamilton Houston Institute for Race and Justice, Kirwan Institute for the Study of Race and Ethnicity, Center for Civil Rights at the University of North Carolina School Of Law, and Meiklejohn Civil Liberties Institute, and has also been endorsed by numerous organizations and individuals as listed in Appendix A.

I. EXECUTIVE SUMMARY

2. This report focuses on the right to education in the United States and the current state of implementation of human rights commitments in this area. While the federal government has recently taken certain steps to improve its human rights compliance in this area, serious concerns remain. This report focuses primarily on (a) school segregation and diversity, (b) school discipline and (c) the achievement gap. The U.S. has a long history of segregation and unequal education. While historically steps have been taken to improve the diversity of and equal access to education, the U.S. continues to struggle with providing equal education to all, as guaranteed by the Universal Declaration of Human Rights, Article 26. Racial minorities, children from low income families, and students with disabilities continue to be placed in lower performing schools, faced with the increased likelihood of disciplinary measures taken against them, and high drop out rates.

II. CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

3. The U.S. has ratified the following Human Rights Treaties which include protections for the right to education:

The Universal Declaration of Human Rights (Article 26)

The Convention on the Elimination of all Forms of Racial Discrimination (Article 5)

The U.S. has signed, but not ratified, the following treaties which also contain provisions protecting the right to education:

The Convention on the Elimination of all Forms of Discrimination against Women (Article 10)

The Convention on the Rights of Persons with Disabilities (Article 24)

The International Covenant on Economic, Social and Cultural Rights (Article 13)

The Convention on the Rights of the Child (Article 28)

4. The United States is a member of the U.N. Human Rights Council and as such has made certain human rights commitments in order to obtain membership. The U.S. lacks a nationally coordinated infrastructure for the promotion and protection of human rights. The U.S. Commission on Civil Rights has a limited jurisdiction and does not consider U.S. human rights treaty obligations or commitments when conducting its work. However, the Commission should consider human rights treaty obligations under the U.N. human rights treaties that the U.S has agreed to.[1] On Jan. 20, 2010, Harold Koh, Legal Advisor of the State Department, released a memo for state governors, stating that the U.S. is bound to implement treaty

provisions on "federal, state, insular and local" levels, and that the U.N. treaty committees insist that the treaty texts be publicized around the country.[2]

5. In addition to lacking a coordinated infrastructure for the promotion and protection of human rights, the U.S. has, through judicial opinion, curtailed the ability of individuals to challenge disparate outcomes and enforce anti-discrimination standards in domestic courts and tribunals, a right which is protected under the Convention on the Elimination of all Forms of Racial Discrimination ("CERD") Article 6. Title VI of the Civil Rights Act of 1964 offered the promise of aiding the government's efforts to eliminate racial discrimination, as the Act prohibits, "on the ground of race, color, or national origin, [that any person] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[3] Despite the enactment of Title VI, subsequent judicial interpretation of the Equal Protection Clause and Title VI has significantly limited the ability of citizens and the executive branch of government to eliminate racial discrimination in education.[4] Currently, proof of discriminatory animus (intent) is required for a claim of discrimination to be brought in court under the Title VI statute. This limitation prevents the U.S. from meeting its obligations as a state party to CERD, including its commitment to prohibit not only racially discriminatory intent, but also racially discriminatory impact in governmental action, government supported programs, and government policies affecting education.

III. ACHIEVEMENTS, BEST PRACTICES, CHALLENGES AND CONSTRAINTS

A. Segregated, Unequal Education in the U.S.

6. The U.S. has a long history of segregated and unequal education. In *Brown v. Board of Education*, the U.S. Supreme Court declared "separate but equal has no place in education" and subsequently unanimously held that segregated public primary and secondary schools are "inherently unequal" and unconstitutional.[5] Nevertheless, since the early 1990s, courts and government agencies have abandoned aggressive desegregation efforts and have allowed many successful integration plans to be dissolved. This trend has been exacerbated by the failure of the federal courts to address metropolitan interdistrict segregation. As a result, public schools today are more segregated than they were in 1970.[6] While American schools will soon be half nonwhite, the school system is becoming increasingly segregated as many schools in metropolitan areas are resegregating.[7] In the 2006-2007 school year, approximately 40 percent of Black and Latino students attended schools that were 90-100 percent minority, while whites remained the most isolated students in the system.[8] Additionally, more than nine in ten segregated minority schools are also schools of high poverty.[9]

7. The students in these racially and socio-economically isolated schools suffer from disparate educational opportunities including fewer resources and a lack of qualified, effective teachers. Disparate educational resources lead to larger class sizes, substandard facilities, lower per-pupil spending, and fewer counseling services.[10] For the most part, segregated nonwhite schools suffer from lower test scores, lower graduation rates, and overall lower achievement records than their counterparts. They also suffer from more U.S. military recruiters using more invasive tactics among students under 18 years of age,[11] a practice specifically condemned by

the Committee on the Rights of the Child.[12] Conversely, evidence shows that students from racially isolated schools who are given the opportunity to attend more diverse schools tend to have more success in the school system, including higher graduation rates and a greater likelihood of attending college.[13]

8. Following the review by the United Nations Committee on the Elimination of Racial Discrimination, the Committee issued its concluding observations in February, 2008. The CERD Committee noted its concern about "the persistence of *de facto* racial segregation in public schools." The Committee recommended that the U.S. "undertake further studies to identify the underlying causes of *de facto* segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school de-segregation and providing equal educational opportunity in integrated settings for all students. . . . [The Committee further recommended that the U.S.] take all appropriate measures—including the enactment of legislation—to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2 of the [CERD]." Despite these recommendations, no action has been taken to rectify the persistence of racial segregation in the public school system.

9. The CERD Committee took particular issue with the U.S. Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* that overturned voluntary integration plans in two cities that used the race of individual students as a factor in student assignment.[14] Ultimately, the *Seattle/Louisville* decision undermines traditional U.S. jurisprudence and mechanisms to desegregate public schools. The new restrictions on race conscious measures in school assignment[15] limit the application of special measures under CERD Articles 1 and 2 to promote adequate racial inclusion. Under CERD, such remedial measures are not only sanctioned but required, so long as "they shall not be continued after the objectives for which they were taken have been achieved."[16] The local school governing bodies in these cases were attempting to implement such measures, namely programs to promote integration and diverse environments in their school districts. Yet rather than support the school governing bodies overseeing these voluntary community-generated efforts at the local level, the U.S. government at that time condemned such programs' efforts.[17] While the *Parents Involved* decision leaves in place a variety of race conscious methods to achieve integration, it has taken away a crucial tool traditionally used by districts seeking to promote school integration.

10. The United States' failure to strongly address racial and economic school segregation goes beyond the actions of its court system. It includes the lack of adequate funding for integrated magnet schools, the absence of integration incentives or requirements for federally and state funded charter schools, the lack of federal mandates or incentives to reduce school poverty concentration, and the inability of parents with children in failing schools to choose interdistrict transfers to lower poverty schools for their children under the Elementary and Secondary Education Act.

11. The Elementary and Secondary Education Act ("ESEA", Title I) was originally enacted to direct more money to students who attended the most disadvantaged schools. However, this federal statute does nothing to address racial and economic segregation. Although ESEA

includes a provision for students in underperforming schools to transfer to another school, those transfers are only available to other schools within the same school district. Often, schools with low-achievement levels are located in school districts with high concentrations of poverty and minority students; and almost all schools within the same district have rampant inequities and low-achievement. ESEA provides no incentives for states and districts to reduce high poverty levels in individual schools and districts, leaving limited or no options for parents to ensure quality educational opportunities for their children, and failing to promote adequate racial inclusion. Greater inter-district opportunities are necessary and could create greater diversity within schools and improve academic outcomes.[18] Additional support for interdistrict transfer programs is also necessary, including support for parent education and organizing, transportation costs, and staff development and training to ensure incoming students receive the best possible education.

12. The Department of Education should support revisions in the basic Title I funding formula to more strongly encourage racial and economic integration, expansion of funding for parent involvement, and inclusion of a "private right of action" to permit parents to enforce their children's rights under the Act. Reauthorizing ESEA with increased incentives for integration would bring the U.S. further in compliance with its human rights commitments by improving the equality of access to elementary education.

13. Encouragingly, the President's FY 2011 budget provides for an increase of $10 million—to a total of $110 million—for magnet school assistance[19] However, substantially more support is needed to expand magnet school options for children in high poverty, racially isolated districts.

14. In addition to unequal opportunities available to poor and minority students with regards to school choice, federal law exacerbates these inequalities by inequitable distribution of federal funds. For example, Title I does not require any level of inter-district funding equity. Because large funding and resource disparities exist within school districts, it is difficult for Title I schools to attract and retain high-quality teachers. Inequitable school finance structures have led to states spending, on average, nearly one thousand dollars less per student per year in high-poverty districts than in low-poverty districts. Thus Title I does not provide additional or equitable opportunities for poor children. In order to provide all students with equal opportunities, resources—including high quality teachers—must be fairly and equitably distributed between high- and low-poverty schools.

B. Excessive and Discriminatory School Discipline

15. Over the past two decades, schools have increasingly relied on punitive, exclusionary discipline policies and practices, such as excessive suspensions, expulsions and arrests, which create degrading school climates, undermine academic achievement and contribute to dropout. According to the Office of Civil Rights (OCR) in the U.S. Department of Education, more than 3.3 million students were suspended out-of-school at least once during the 2005-2006 school year, and 102,000 students were expelled.[20] This is more than double the rate of suspension and expulsion in 1974.[21]

16. The trend towards the use of harsh exclusionary discipline policies began in 1994 when the U.S. Congress passed the federal Gun Free Schools Act, requiring that in order to receive federal education funding, states and school districts must create "zero-tolerance" policies resulting in mandatory removal from school.[22] Initially, zero-tolerance expulsions were limited to offenses such as having a weapon in school. Over time, as states and school districts implemented their own policies, they expanded the scope of zero-tolerance to include suspensions, expulsions and arrests for far less serious misbehavior, including school fights, classroom disruptions, dress code violations and even being late to school.[23]

17. While all students are impacted by these policies, students of color and students with disabilities are disproportionately impacted. For example, nationally in 2006, African American students made up 17.1% of the overall student population, but 37.4% of students suspended out of school.[24] In 2006, African-American students were three times as likely to be suspended and 3.5 times as likely to be expelled than white students, and Latino students were 1.5 times as likely to be suspended and twice as likely to be expelled that white students.[25] Students with disabilities are also suspended and expelled at a rate twice that of their non-disabled peers.[26]

18. Research has also shown that higher rates of suspension and expulsion among students of color are not the result of these students engaging in higher levels of disruptive behavior.[27] Students of color are more likely to be suspended and removed for subjective offenses, such as disrespect or disruptive behavior, and to receive more severe punishments for the same offenses than white students. [28] Rather, the disproportionate punishment of students of color is in part due to their concentration in schools with fewer supportive resources. Schools with high suspension rates have fewer preventive disciplinary systems in place, fewer resources for providing counseling and conflict resolution, larger class sizes, and lower academic quality ratings.

19. Across the country, schools have also increased the number of school safety officers, police officers, metal detectors, and security cameras in schools. Between 1999 and 2007, the percent of students across the country reporting regular police or security presence in their schools increased from 54% to 69%.[29] Police personnel are patrolling school hallways, handcuffing, arresting, and referring students to the juvenile justice system for relatively minor infractions, such as petty school fights or disobeying staff. In New York City, more than 5,000 police officers work in public schools every day, representing a larger police presence than exists in many U.S. cities. This heavy police and security presence is most concentrated in schools with a higher percentage of students of color.[30]

20. While nationwide data is not available, information from individual cities shows an increasing number of arrests of children while in school, again largely for minor misbehavior. For example, in 2003 in Chicago, Illinois, 8,539 students were arrested in public schools.[31] Almost 10% of those arrested were children age 12 or younger. Black students made up 77% of the arrests, but only 50% of the school population. Many arrests made in schools are for non-criminal activity, and are carried out without regard for the age of the student or the context for the child's misbehavior.[32]

21. In its 2006 review of exclusionary and zero-tolerance disciplinary policies, the American Psychological Association (APA) found no evidence that the use of suspension, expulsion, or zero- tolerance policies has resulted in improvements in student behavior or increases in school safety.[33] Rather, excessive suspensions and expulsions increase the likelihood that students will fall behind academically, become detached from school, or have future behavior problems.[34] Schools with high suspension rates scored lower on state accountability tests, even when adjusting for demographic differences.[35]

22. The APA also found that suspensions, expulsions and arrests increase the likelihood that students will dropout of school and come into contact with the juvenile and criminal justice system. Each year approximately 1.3 million young people drop out of school.[36] The National Center for Educational Statistics found that students who had been suspended three or more times by the 10th grade, were 5 times more likely to drop out than students who had never been suspended. Students that have dropped out of school are in turn three times more likely to be incarcerated.[37] This phenomenon has come to be known as the "school to prison pipeline", reflecting recognition of the direct and dire consequences of harsher punishments for minor disciplinary infractions in the public school system.

23. In its concluding observations in February 2008, the CERD Committee stated, "[t]he Committee also notes with concern that alleged racial disparities in suspension, expulsion and arrest rates in schools continue to exacerbate the high drop out rate and the referral to the justice system of students belonging to racial, ethnic or national minorities." The Committee called on "the State Party to encourage school districts to review their "zero tolerance" school discipline policies, with a view to limiting the imposition of suspension or expulsion to the most serious cases of school misconduct, and to provide training opportunities for police officers deployed to patrol school hallways."

24. As an alternative to harsh, zero-tolerance discipline, some schools, districts and states around the country have begun to implement supportive and restorative approaches to discipline that aim to reduce suspension and expulsion. School-wide Positive Behavior Supports (PBS) train teachers to reinforce positive behavior among students and provide positive, early interventions for misconduct. [38] Research from around the country has shown that PBS can reduce disciplinary incidents, improve the school environment and increase academic outcomes for students.[39] Growing numbers of schools and districts are also integrating restorative practices into their disciplinary policies and practices. Restorative practices use de-escalation and community circle techniques to build a sense of school community and manage conflict by repairing harm and restoring positive relationships.[40]

C. Confronting the Achievement Gap

25. Government reports and other entities in the U.S. use the term "achievement gap" to describe a nation-wide phenomenon where lower-income, Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers. For example, nationally in 2007, 54% of Black and 51% of Latino fourth grade students scored below the basic reading level for their grade, compared to only 34% of students overall.[41] The current achievement gap correlates to the long-standing difference in educational opportunity

and attainment that looms between Black and Latino students and their White and Asian counterparts. [42]

26. Where there is adequate opportunity, students at the low end of the gap can excel. Opportunity not only includes adequate funding for high-poverty schools, but also superb instruction and support for all students. The gap exists in part because students of color are more likely to be negatively impacted by low financial resources in their school districts, less qualified, experienced and effective teachers in the their schools, and lower academic standards in the classroom.[43]

27. In 2008, the CERD Committee expressed its concern about the "persistent 'achievement gap' between students belonging to racial, ethnic or national minorities, including English Language Learner students, and white students." The Committee recommended that the U.S. adopt measures to reduce the achievement gap by "improving the quality of education provided to these students." The President's FY 2011 education budget has requested an increase of $50 million for English Learner education. While a positive step, the government still has not sufficiently addressed the issue of the achievement gap or equal access to quality education for all students.

28. Current federal law does little to address systemic inequities or "educational debt" to disadvantaged students that has accrued over centuries of racial isolation and unequal access to quality education.[44] The current law requires states to ensure that "poor and minority students are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers."[45] While this law appears to further the obligation under CERD Article 5 to provide education "without distinction as to race, colour, or national or ethnic origin . . ." research suggests that this provision has not been well implemented and is inadequately enforced.[46] Thus, while laws on their face may comply with CERD, their implementation is failing to fully satisfy CERD's requirements.

29. English Learner ("EL") students make up a large portion of the U.S. student body and also suffer from educational inequalities in U.S. schools.[47] More than 10.5 million—or 20 percent of all—U.S. students speak a language other than English at home, and more than 5 million lack sufficient proficiency to be taught in English without support. EL students are predominantly—79%—native Spanish Speakers.[48] Overall, Latinos constitute 20% of the K-12 population and are the most racially isolated minority group in U.S. schools.[49] Not only does this language barrier create disadvantages for EL students, at least two-thirds of these students are being raised in low-income families.[50] According to federal data EL students are struggling in the current school system—only 12 percent of EL students tested at a proficient level in fourth grade mathematics compared to 41 percent of non-EL students.[51] The achievement gap for ELs increases in higher grades and the graduation rate for ELs is well below 50%.[52]

D. Lack of Access to Higher Education

30. Students of color and low-income students face many barriers to postsecondary education opportunities in the U.S. Often times these students are college-qualified but do not enroll in

institutions of higher education.[53] In order to ensure access, adequate funding for all students, and in particular students of color and low-income students, is necessary. Low income students are more likely to be African-American, Hispanic or Asian.[54] In 2007-2008, 66% of all undergraduate students received some type of financial aid and 47% received federal aid; but some students are ineligible to take advantage of federal student loan opportunities.[55] For example, some community colleges, collectively enrolling over one million students, have opted out of the federal student loan program; and where community colleges do participate in the program, African-American and Native-American students are less likely to have access to federal loans than their peers.[56]

31. Immigrant children also face barriers to higher education. In 2006 there were 12.9 million immigrant school age children living in the U.S.[57] Children of immigrants constituted 22% of all children age 0 to 17 nationwide in 2006.[58] Children of undocumented immigrants living in the United States, approximately 1.8 million,[59] are unable to legally work or afford a college education based on the decisions their parents made years ago. Only five to ten percent of these students obtain access to higher education due to ineligibility for work authorization or financial aid.[60] The Universal Declaration of Human Rights ("UDHR") declares that "higher education shall be equally accessible to all on the basis of merit."[61] By restricting a student's right to enroll in college because of their immigration status, the U.S. government is not conforming to its human rights commitments. Other impediments to college enrollment exist, including the prohibitive cost of higher education. For example, the University of California's 32% undergraduate tuition increase and California's K-12 budget cuts are new serious denials of human rights.[62]

32. The government has historically failed to take affirmative steps to eliminate obstacles which prevent qualified immigrant students from reaching their full potential. Recently, however, Congress took steps to increase opportunities for undocumented immigrant children to enlist in the military or go to college and have a path to citizenship which they otherwise would not have through Development, Relief and Education for Alien Minors Act (The "DREAM Act") which was introduced both in the House of Representatives and the Senate in March 2009.[63]

33. If passed, the DREAM Act would be a positive step toward better compliance with CERD obligations, specifically CERD General Recommendation XXX, which urges parties to "[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the area[…] of education . . . ."[64] Additionally, the DREAM Act would improve the U.S.'s compliance with its commitments to the UDHR.

34. Earning potential is tied to one's level of education—"Someone with a bachelor's degree earns nearly one million dollars more over his or her lifetime than a high school graduate."[65] Likewise, immigrants who are able to adjust their status to become legal residents are able to obtain better jobs.[66] Restricted access to education and better jobs for undocumented students will have a detrimental effect on U.S. society as a whole. In California, there are more jobs requiring a college education than there is demand for these jobs. A California study predicts, "by 2025, forty-one percent of the state's jobs will require a college education, but only 32% of workers in the state will have the necessary education."[67] Thus, passage of legislation such as

the DREAM Act, which promotes college enrollment, would have a positive effect not only on those children directly affected by the Act, but also on society as a whole.

E. Children with Disabilities and the use of restraints and seclusion

35. The use of seclusion, restraint and other aversive interventions in schools are causing trauma, injury and the death of school age children. Currently, no federal legislation protects children in classroom settings, although such federal protections exist for children and adults in mental health and residential facilities. Because there is not a Federal statute that protects children from inappropriate use of or abuse from restraint or seclusion in school, governing the use of these practices has been left to the States. However, state laws are widely divergent and neither provide sufficient protection of children nor effectively prevent or reduce the use of restraint and seclusion.

36. Existing research, recent reports, and a recent GAO investigation[68] clearly establish that the risk of harm, coupled with the ineffectiveness of such strategies, justify prohibiting the use of restraint and seclusion except in the rarest of circumstances; and then only after intense training, under rigorous supervision, and after specified preconditions have been met. There is evidence that the use of restraints disproportionately affects children with disabilities in the school system.[69] Every child has the right to be free from restraint and seclusion unless he or she poses a clear and imminent physical danger to him or herself or others. While the U.S. has not yet ratified The Convention on the Rights of Persons with Disabilities, the federal government's failure to establish clear law on this subject goes against the spirit of the UDHR and human rights protections as a whole.

IV. RECOMMENDATIONS

37. In light of the foregoing, we make the following recommendations:

a) Amend Title VI to expressly adopt an effects test to permit court challenges to *de facto* barriers to equal educational opportunities and ensure that all persons are guaranteed effective protection against educational practices that have a discriminatory effect.
b) Reject the use of the 'colorblind' doctrine in legislation and government education policies. This doctrinal incorporation threatens U.S. obligations under CERD to use special measures to promote the adequate development of quality educational opportunities to those historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities.
c) The federal government should strongly encourage and fund states and school districts to voluntarily promote school integration through the use of non-discriminatory, race-conscious measures to promote educational, democratic, and cultural benefits of racial and ethnic diversity in the classroom. The government should strengthen ESEA's right-to-transfer provisions, including requiring states to ensure that every low-income child assigned to a school that consistently underperforms on ESEA's accountability standards has the guaranteed right to enroll in a high performing school while also supporting low-performing schools through "turnaround" funds and technical assistance to improve the quality of education for all children.

d) Increase federal funding through the reauthorization of ESEA and ensure that funds are equitably dispersed between high- and low-poverty schools.
e) Pass federal legislation that significantly restricts the use of restraint and seclusion except under the narrowest, most emergent circumstances. Ensure that all school personnel are trained annually in positive behavior supports; proactive approaches to learning, social, and behavioral needs, and school-wide emergency and crisis prevention procedures.
f) Direct federal, state and local funding towards ending school push-out, reducing exclusionary discipline practices and improving school climate, through implementing proven methods including School-Wide Positive Behavior Supports (SWPBS) and Restorative Practices.
g) In order to identify and address racial disparities in discipline, require the annual collection of school climate and disciplinary data, including suspensions, expulsions, corporal punishment, school-based arrests, referrals to law enforcement and alternative schools, attendance, dropout and graduation rates, for all schools (including charters), disaggregated by race, gender, special educational status, socioeconomic status, and English proficiency, made available to the public at the national, state, district and school levels.
h) Create federal, state and local accountability mechanisms which measure school climate and monitor discipline policies and provide technical assistance and support for schools in need of improvement.
i) Increase language access services for students and parents. Oblige and support local school implementation of best teaching practices for EL students to reach English proficiency and for English speakers to learn a second language.
j) Implement the DREAM Act and take affirmative steps to remove barriers to higher education for immigrant children.

Endnotes

[1] The International Covenant on Civil and Political Rights, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, and the two Optional Protocols to the Convention on the Rights of the Child.
[2] *See* Memorandum from Harold Koh, Legal Advisor, U.S. Dep't of State, to State Governors (Jan. 20, 2010), available at http://www.state.gov/documents/organization/137292.pdf
[3] Title VI of the Civil Rights Act of 1964, 45 C.F.R. §80.8(1) (2006).
[4] Alexander v. Sandoval, 532 U.S. 275 (2001)
[5] Brown v. Board of Education, 347 U.S. 483 (1954).
[6] G. Orfield and C. Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, Civil Rights Project/Proyecto Derechos Civiles at UCLA, (Aug. 2007) *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.
[7] G. Orfield & E. Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation*, Civil Rights Project/Proyecto Derechos Civiles (Jan. 2008).
[8] G. Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, Civil Rights Project/Proyecto Derechose Civiles (Jan. 2009).
[9] E. Frankenberg, G. Sigel-Hawley, & J. Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, Civil Rights Project/Proyecto Derechos Civiles (Jan. 2010).
[10] *See generally*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents (2006) at App. 33.
[11] Low income rural conservative families in Arcata and Eureka, California collected signatures to put on the ballot an initiative prohibiting invasive acts by U.S. military recruiters at their high school, successfully targeting economically disadvantaged, low achieving students. When the initiatives were passed by significant majorities and the city councils passed ordinances forbidding such tactics, the U.S. government sued to outlaw their enforcement. The cities' appeal from U.S. District Court decision without a trial on the merits is pending. See United States v. Arcata, No. C 085725SBA. *See also* http://articles.sfgate.com/2009-04-26/news/1719250 1 arcata-military-recruiting.
[12] *See* Concluding Observations concerning enforcement of the Optional Protocol on the Involvement of Children in Armed Conflict, to which the U.S. is a party, Jan. 25, 2008, ¶¶ 15-18.
[13] J. Guryan, "Desegregation and Black Dropout Rates," *American Economic Review* 94(4) (Sept. 2004), 919-43.
[14] *Parents Involved in Cmty. Sch.* 551 U.S. at 701.
[15] *See* opinion of Justice Kennedy in *Parents Involved in Cmty. Sch,* 551 U.S. at 701 (2007).
[16] *See* International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1945. 660 U.N.T.S. 195.
[17] *See Amicus Brief of the United States of America* in *Parents Involved in Cmty. Sch,* 551 U.S. at 701 (2007).
[18] Some states have embraced interdistrict choice programs, most notably Connecticut, which has seen both academic and social benefits from its program. *See* R. Bifulco et al, CAN INTERDISTRICT CHOICE IMPROVE STUDENT ACHIEVEMENT? THE CASE OF CONNECTICUT'S INTERDISTRICT MAGNET SCHOOL PROGRAM, *EPAA*, vol. 31, no. 4 (2009).
[19] FY 2011 Department of Education Budget Request, *available at* http://www2.ed.gov/about/overview/budget/budget11/summary/edlite-section3a.html#ela
[20] National Center for Education Statistics, Contexts of Elementary and Secondary Education, 2009, http://nces.ed.gov/programs/coe/2009/section4/indicator28.asp. U.S. Office for Civil Rights, U.S. Department of Education, 2006 Civil Rights Data Collection.
[21] Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions, Justice Policy Institute, 2001. http://www.justicepolicy.org/images/upload/01-09_REP_SchoolsSuspensions_JJ.pdf
[22] Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track, 2005.
[23] Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track, 2005.
[24] U.S. Office for Civil Rights, 2006.
[25] National Center for Education Statistics, 2009. U.S. Office for Civil Rights, 2006.
[26] U.S. Office for Civil Rights, 2006.

[27] Open Society Institute-Baltimore, Putting Kids Out of School: What's Causing Hig Suspension Rates and Why are they Detrimental to Students, Schools and Communities, September 2008.
[28] Pedro Noguera, "Preventing and Producing Violence: A Critical Analysis of Responses to School Violence," Harvard Educational Review, 65 (2), 1995.
[29] National Center for Education Statisitcs, Indicators of School Crime and Safety 2008, Table 21.1.
[30] For example, in New York City, 93% of children attending schools with metal detectors were Black and Latino, compared to 82% in the citywide school population. *See* Criminalizing the Classroom: The Over-policing of New York City schools, New York Civil Liberties Union, 2007.
[31] Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track, 2005.
[32] In Palm Beach County, Florida in 2003, 26% of school arrests were for fights or threats where there were no injuries or weapons, and 22% were for miscellaneous, and highly discretionary, offenses such as "disruptive behavior". *Id.*
[33] Russell Skiba et al, Are Zero Tolerance Policies Effective in the Schools? A Report by the American Psychological Association Task Force, 2006.
[34] Consider also that zero tolerance policies are merely one aspect of discretionary powers of school and law enforcement officials. There are alternatives to mass incarceration. There is currently a movement in Texas to decriminalize some juvenile offenses, and use of a broader range of discretion given to school and law enforcement officials. *See* Texas Public Policy Foundation, "Getting More for Less in Juvenile Justice," *available at* http://www.texaspolicy.com/pdf/2010-03-RR01-JuvenileJustice-ml.pdf
[35] Russell Skiba & M. Rausch, *Zero Tolerance, Suspension and Expulsion: Questions of Equity and Effectiveness*, in C.M. Everston & C.S. Weinstein (Eds.), Handbook of Classroom Management: Research, Practices, and Contemporary Issues, 2005. For example, a state's suspension ranking was negatively related to their National Assessment of Educational Progress (NAEP) achievement ranking in mathematics, writing, and reading. Russell Skiba et al, Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline (2003) Paper presented at the Harvard Civil Rights Project School-to-Prison Pipeline Conference, Cambridge, MA.
[36] Alliance for Excellent Education (2009). The High Cost of High School Dropout. http://www.all4ed.org/files/HighCost.pdf
[37] L. Lochner and E. Moretti. (2004). "The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self Reports." *The American Economic Review,* 94 (1), 155-189. Freeman, R. (1996). "Why Do So Many Young American Men Commit Crimes and What Might We Do About It?" *Journal of Economic Perspectives*, 10(1), 25 - 42.
[38] www.pbis.org
[39] In the state of Illinois, there are over 600 schools implementing PBS. At Carpentersville Middle School, for example, after implementing PBS, office disciplinary referrals fell by 64% from 2005 to 2007. During the same period, the number of students that met or exceeded standards for 8th grade tests increased by 12.3% in Reading and 44% in Math. In Florida, a study of 102 schools using PBS found that after one year of implementation office disciplinary referrals fell by an average of 25% and out of school suspensions fell by an average of 10%. School districts including Los Angeles and New Orleans have adopted district-wide PBS policies.
[40] In 2006, Chicago Public Schools adopted a new student code of conduct incorporating restorative practices and now over 50 high schools in Chicago now have restorative peer jury programs. As a result over 1,000 days of suspension were avoided in 2007-2008 by referring students to peer jury programs for violating school rules, thereby keeping them in the learning environment. At West Philadelphia High School in Pennsylvania, previously labeled as a "Persistently Dangerous Schools," after implementing restorative practices suspensions dropped by 50% and violent acts and serious incidents dropped by 52%.
[41] 2007 ASSESSMENT RESULTS, THE NATION'S REPORT CARD., NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION. The U.S. Department of Education annually releases the National Assessment of Educational Progress (NAEP) or "The Nation's Report Card," which shows the national standardized test scores of all students from different racial and ethnic backgrounds, *available at* http://nces.ed.gov/nationsreportcard/.
[42] *See* J. Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?* EDUCATIONAL RESEARCHER, Vol. 31, No. 1, 3-12 (2002), *available at* http://edr.sagepub.com/cgi/content/abstract/31/1/3.
[43] A. Wilkins, et al., *Yes We Can: Telling Truths and Dispelling Myths About Race and Education in America*, The Education Trust, Sept. 2006.

[44] L. Darling-Hammond, *Evaluating 'No Child Left Behind,* THE NATION (May 21, 2007).
[45] No Child Left Behind Act of 2001, 20 U.S.C. §6301, 1111(b)(8)(C) (2008)
[46] W. Taylor et al, *The Continuing Challenge*, Report of the Citizens' Commission on Civil Rights pp. 7-9 (Feb. 2008) available at http://www.cccr.org/doc/TheContinuingChallengeReport.pdf
[47] Contrary to the assumption that children speaking a language other than English recently arrived from their country of origin—native-born, U.S. citizens predominate in the EL, K-12 student population. Seventy-six percent of elementary school and 56% of secondary school EL students are citizens; and over 50% of the EL students in public secondary schools are second or third-generation citizens.[47] Therefore, the stereotype of EL students as foreign-born immigrants is inaccurate. The majority are, in fact, citizens and legal permanent residents of the U.S. whose academic and linguistic needs are not met by the public school system. Nonetheless, all children in the U.S. are entitled to a quality education, regardless of their citizenship. Plyler v. Doe, 457 U.S. 202 (1982).
[48] R. Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act.* (2005). The Urban Institute, *available at* http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED490924&ERICExtSearch_SearchType_0=eric_accno&accno=ED490924
[49] U.S. Department of Education. *See* http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp
[50] R. Capps, *supra* note 48.
[51] National Center for Education Statistics (2009). The Nation's Report Card: Mathematics 2009 (NCES 2010–451). Institute of Education Sciences, U.S. Department of Education, Washington, D.C.
[52] *See* U.S. Department of Education, SY 2007-2008 Consolidated State Performance Reports, http://www.ed.gov/admins/lead/account/consolidated/sy07-08part1/index.html
[53] R. Hahn and D. Price, *Promise Lost: College-Qualified Students Who Don't Enroll in College*, Institute for Higher Education Policy, Nov. 2008; D. Gerald and K. Haycock, *Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities*, The Education Trust, 2006.
[54] The Pell Institute, Indicators of Opportunity in Higher Education, 2005.
[55] U.S. Department of Education, National Center for Education Statistics. (2009). *2007-2008 National Postsecondary Student Aid Study.*
[56] The Project on Student Debt, Denied: Community College Students Lack Access to Affordable Loans, 2008.
[57] K. Fortuny et al., *Children of Immigrants: National and state Characteristics*, (Washington DC: Urban Institute, 2009).
[58] *Id*., at 11.
[59] Roberto G. Gonzales, *Wasted Talent and Broken Dreams*, IMMIGRATION POLICY IN FOCUS (Oct. 2007).
[60] *Id*.
[61] Universal Declaration of Human Rights Art. 26(1), GA res. 217A (III), UN Doc A/810 at 71 (1948).
[62] *See* http://www.cnn.com/2009/US/11/19/california.tuition.protests/index.html; http://www.npr.org/templates/story/story.php?storyId=124317949; and http://www.cnn.com/2010/LIVING/03/04/layoffs.education/index.html?iref=allsearch
[63] *See* DREAM Act of 2009 (Introduced in Senate) S. 729; *see also* http://dreamact.info/
[64] Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 398 (2001), *available at* http://www1.umn.edu/humanrts/country/usa2001.html.
[65] "Amount of Schooling Affects Earning Potential," (July 18, 2002), *available at* http://www.usatoday.com/news/nation/ census/2002-07-18-degree-dollars.htm; *See* also, San Francisco Chronicle, "Getting a Degree Pays Off with Higher Salary," (Aug 18, 2007) *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/18/BUQ5RKS4J.DTL ("The median annual salary for a high school graduate in 2006 was about $30,940, according to the bureau. For college graduates with a bachelor's degree, the median was $50,024.").
[66] "[T]he US Department of Labor found that the wages of immigrants legalized under [the 1986 Immigration Reform and Control Act] had increased by roughly 15% five years later." *See* GONZALES, *supra* at note 59.
[67] *Id*.
[68] Government Accountability Office, *Seclusion & Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Testimony before the Committee on Education and Labor, House of Representatives, May 19, 2009.
[69] *See id*. at pp. 7-8.

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Right to Adequate Housing

Submitted by: [1]

Beyond Shelter

Community Voices Heard

Huairou Commission

L'ORAGE LTD.

Metro Atlanta Task Force on Homelessness

National Alliance of HUD Tenants

National Center for Family Homelessness

National Coalition for the Homeless

National Fair Housing Alliance

National Health Care for the Homeless Council

National Law Center on Homelessness & Poverty

Partnership for the Homeless

U.S. Positive Women's Network

Women Organized to Respond to Life-threatening Disease

Endorsed by the 56 Organizations and 14 Individuals listed on the following page:

[1] Submitting and endorsing organizations jointly endorse this report as a statement of solidarity, but do not necessarily endorse every assertion made herein.

Endorsed by:

Organizations: Advocates for Environmental Human Rights; The Advocates for Human Rights; Afro-Americans C.A.R.E.; Boalt Hall Committee for Human Rights; Center for Community Alternatives; Centre on Housing Rights & Evictions; Chicago Coalition for the Homeless; Clare Housing; Cleveland Tenants Organization; Coalition for Economic Survival, Los Angeles; Corazon Del Pueblo Cultural Center; Community HIV/AIDS Mobilization Project (CHAMP), New York, NY; Davidson/Site 166 Resident Association Inc.; DC Statehood Green Party; Equity and Inclusion Campaign; Fuerza Mundial; Give US Your Poor: The Campaign to End Homelessness; Jewish Council on Urban Affairs; Housing Is A Human Right; Housing Rights Committee of San Francisco; Human Rights Caucus, Northeastern University School of Law; International Alliance of Inhabitants; International Human Rights Clinic, George Washington University Law School; International Indian Treaty Council; Labour, Health and Human Rights Development Centre; Land & Housing Action Group, US Human Rights Network; Lawyers' Committee for Civil Rights Under Law; Los Angeles Coalition to End Hunger and Homelessness; Los Angeles Community Action Network; Malcolm X Center for Self Determination; Malcolm X Grassroots Movement; Meiklejohn Civil Liberties Institute; Miami Coalition for the Homeless; Minnesota Chapter of the National Lawyers Guild; Minnesota Tenants Union; National AIDS Housing Coalition; National Economic & Social Rights Initiative; National Lawyers Guild; Network to End Domestic Violence; National Policy & Advocacy Council on Homelessness; National Network for Youth; Northside Neighbors for Justice; Peace Action of San Mateo County; Picture the Homeless; Poor People's Economic Human Rights Campaign; Public Interest Projects; Resident Action Council; Rhode Island Homeless Advocacy Project; Social Justice Center of Marin; Sociologists Without Borders; South Bay Communities Alliance; Survivors Village NOLA; Three Treaties Task Force of the Social Justice Center of Marin; UNANIMA International; Western Regional Advocacy Project; Zi Teng

Individuals:[2] **Perfecto Caparas**, Program in International Human Rights Law, Indiana University**; Joyce Carruth**; **Paula Dyan**, The Salvation Army**; Davida Finger**, Loyola University New Orleans College of Law, Community Justice Clinic**; Andrea Hornbein**, Massachusetts Statewide Harm Reduction Coalition; **Charon Hribar**, Union Theological Seminary**; Meetali Jain**, American University, Washington College of Law**; Deborah LaBelle**, Law Offices of Deborah LaBelle; **Noah S. Leavitt; Abdul Nurridin**, Blair House/D.C. Coalition for the Homeless**; LLeni Pach**, MD**; Amelia Parker**, Statewide Organizing for Community eMpowerment**; Kathy Purnell**, Ph.D., Esq., Law office of Kathy Purnell and Founding Director, Human Rights Project of Michigan; **Ute Ritz-Deutch**, Ph.D., CUNY Professor and Tompkins County Immigrant Rights Coalition.

[2] Individual Endorsers organizational affiliations included for identification purposes only.

I. Executive Summary

1. The U.S. has recognized the human right to housing in the Universal Declaration of Human Rights as well as a number of other international covenants and declarations.

2. The U.S. has received findings and recommendations on its failure to uphold the right to housing from numerous UN human rights monitors over the past four years, including a comprehensive report from the Special Rapporteur on the Right to Adequate Housing in 2010.

3. Although the U.S. has developed some laws and policies which assist with housing, housing is viewed primarily as a commodity, and there is no entitlement to any housing assistance or even to basic shelter. Many homeless children are removed from their families into foster care when providing housing could have saved the whole family. Thousands of federal, state, and local government-owned properties, remain vacant even as families are forced onto the streets. Cities pass laws criminalizing sitting, sleeping or eating outdoors, or disparately enforce other laws against homeless persons, despite lack of shelter space.

4. In no U.S. jurisdiction can a person working full time at the federal minimum wage afford a one-bedroom apartment, according to federal guidelines. Yet there are no binding requirements on jurisdictions to plan for and create incentives for the production of sufficient adequate, affordable housing for low- income persons and families, or to require employers to raise wages to a level sufficient to pay for housing.

5. Despite the growing number of homeless families and the lack of affordable housing, the federal budget for developing and maintaining public housing and providing for low-income housing subsidies has decreased. Laws requiring the participation of public housing tenants in decisions affecting them have been under-implemented.

6. Governments participate in the forced evictions of homeowners and renters, often using safety concerns as a guise for quickly and brutally evicting families from their homes..

7. To comply with its human rights obligations, the U.S. should:

   Create a comprehensive plan to address the concerns raised by the Special Rapporteur on the Right to Adequate Housing;

   Implement a moratorium on the demolition of public housing and re-create a policy of one-for-one and like-for-like replacement of subsidized units prior to demolition;

   Expand, and expedite the process for, the use of vacant properties so that buildings do not stand empty while people are on the streets;

   Condemn the criminalization of homelessness;

   Require lenders to refinance mortgages made under unfair circumstances and provide assistance to help homeowners remain in their homes;

   Make permanent the Protecting Tenants At Foreclosure Act;

   Increase enforcement of anti-discrimination laws, including cases of disparate impact of housing policies that create segregation; and

Ensure adequate pre-eviction notice and that no family is evicted without a place to go.

II. Background and Framework

a. National Framework:

i. Scope of International Obligations:

8. The United States adopted the Universal Declaration of Human Rights ("UDHR") in 1948, signed the International Convention on Economic, Social and Cultural Rights ("ICESCR") in 1977[i], and signed the Habitat II Declaration in 1996, though it has not yet ratified the ICESCR. All of these agreements specifically protect the right to adequate housing.[ii] Additionally, the U.S. is a party to the International Convention on Civil and Political Rights ("ICCPR")[iii] as well as the Convention on the Elimination of all forms of Racial Discrimination ("ICERD")[iv], which protect the right to non-discrimination with regards to housing.[v] In the past four years, the U.S. has received specific concerns and recommendations from the U.N. Human Rights Committee ("HRC") in 2006[vi], the Committee on the Elimination of Racial Discrimination ("CERD") in 2008[vii], Independent Experts on Extreme Poverty (2006)[viii] and Minority Issues (2008), Special Rapporteurs on Racism ("SR Racism") (2008)[ix] and Adequate Housing ("SR Housing") (2010),[x] and the UN HABITAT Advisory Group on Forced Evictions in 2010.[xi] To date, no comprehensive or specific action plan addressing the concerns and recommendations raised by any of these human rights monitoring bodies has been proposed by the Administration.

ii. Constitutional and Legislative Framework:

9. The U.S. has included as legislation and/or policy some of the elements of the right to housing at both the federal and local levels, but many significant elements are missing, and others are under-funded and under-implemented. Housing is not protected as a right in the Constitution or by legislation, though legislation including the 1949 Housing Act, the 1968 Fair Housing Act, and the 1987 McKinney-Vento Homeless Assistance Act has improved access to housing for some. Legislative programs include funding for subsidized housing, protections for the security of tenure of residents, housing codes, housing discrimination enforcement bodies, and homeless assistance programs. The SR Housing provided extensive discussion of existing housing programs in her recent report on the U.S.[xii]

iii. Institutional and Human Rights Infrastructure:

10. Housing program infrastructure is discussed in each of the below sections. In terms of human rights infrastructure it should be noted that no formal mechanism exists within the government to transmit the recommendations of human rights bodies from the State Department, which receives them, to the domestic agencies at the federal and state level which would implement them, or to legislative bodies, including with regards to the right to housing.

iv. Policy Measures:

11. There is currently no federal plan to provide sufficient affordable housing for all. HUD's overall budget has decreased significantly since its high in 1978, though there

have been recent improvements with the HEARTH Act[xiii] and the creation of an affordable housing trust fund. In a forthcoming plan by the Interagency Council on Homelessness ("ICH"), emphasis is being placed on first addressing the chronic homeless population, followed by families, and finally individuals. Advocates however firmly believe that rather than a piecemeal population approach, the Council should take create one plan that addresses the needs of all homeless people equally.

v. National Jurisprudence:

12. Both the CERD and SR Housing have raised concerns that unlike in criminal cases, there is no right to a lawyer in a civil case, including those cases where a person's housing is being threatened.[xiv] There is no federally enforceable right to housing or housing assistance, and, though some protections exist at the state and local level, they are often inconsistent arbitrary.

b. National UPR Consultative Process:

13. NGOs welcome the government's willingness to reach out to civil society to engage in a consultative process, including regional "listening sessions" and site visits in 7 cities across the country. However, serious concerns have been raised about the manner in which the consultative process was carried out. In particular, the lack of adequate notice provided for participating organizations and lack of transparency on the government's part as to how they are making decisions, prevented this process from being a model participatory consultation. We thereby reserve the right to comment on the final accepted product.

III. Promotion & Protection of Human Rights on the Ground

a. Public & Subsidized Housing

14. The mainstream historical narrative of public housing asserts that the driving purpose for its development was a genuine effort to house the poor. However, a closer examination of history reveals that the federal government has used the public housing program to meet many different objectives - only some of which were about meeting the needs and wants of low-income residents. [xv]

15. Public housing was born during the Great Depression. The government saw the construction of public housing as a way to give people construction jobs and stimulate the economy in addition to providing housing. The first public housing development in the nation was First Houses (1935) in the Lower East Side of Manhattan, New York. The Housing Act of 1937 established public housing as a national program. In the 1940s, public housing was used for returning World War II veterans, but these veterans had to struggle and protest before the Housing Act of 1949 was passed promising to construct 810,000 new public housing units. In the 1950s, national housing policy encouraged the white working and lower middle class to move out of public housing and purchase homes in suburban communities. Thus the racial make up of public housing residents shifted to a majority being low-income people of color. As the Civil Rights movement and urban rebellions took hold in American cities in the 1960s, public housing was used as an anti-poverty program to quiet the racial and class unrest of the decade. The Housing Act of 1965 created the Department of Housing and Urban

Development (HUD) and the Housing Act of 1968 made it a goal to produce 26 million units of housing in 10 years with 6 million units targeted for low-income people. In the end, only 375,000 units were created between 1968-1973. Finally, the Brooke Amendment of 1969 ensured that low-income residents could remain in public housing by capping public housing rent at 25% of a resident's income (later increased to 30%).

16. With the economic crisis of the 1970s, the federal government reacted against the social welfare projects of the 1960s. Public housing was perceived as inefficient and policymakers began to push a market-based privatized social policy. In 1973, President Nixon called a moratorium on new public housing construction. The Housing and Community Development Act of 1974 established the Section 8 voucher program as a way to disperse low-income residents and subsidize the private market to provide affordable housing. This Act took the focus off of improving public housing development. The disinvestment in public housing continued into the 1980s. The HUD budget was reduced from $80 billion in 1978 to $18 billion in 1983 (a 77.5% reduction in funding). In 1992, the National Commission on Severely Distressed Public Housing reported that 86,000 of the country's 1.4 million units of public housing were distressed and recommended revitalization in 3 areas: 1) physical improvements, 2) management improvements, and 3) social and community services to address resident needs. The HOPE VI Program was established to address these issues, but resulted in the demolition of about 155,000 public housing units, with only about 50,000 of those units being replaced with public housing units. Frequently, residents were, and still are, expected to find housing with Section 8 vouchers and end up being displaced by higher income residents who move into new mixed-income public housing developments.

17. The HOPE VI program was created in 1996 to "eradicate distressed public housing" and replace it with mixed-income developments. The end result is that many residents are displaced and very few are able to return to new apartments, which are predominantly affordable housing for middle-income residents or market-rate housing. Since 1996, 57,000 units of public housing have been demolished across the country.

18. In his proposed FY 2011 budget, President Obama included money for public housing developments around the country to be privatized by converting them to Project-Based Section 8 buildings, which are privately owned but receive rental subsidies. While only $250 million was included in the budget for this pilot program, HUD announced plans to eventually privatize ALL public housing by converting it to Project-Based Section 8. This plan is viewed by public housing residents and advocates as a huge threat to the U.S.'s long-term commitment to ensuring affordable housing.

19. The 964 HUD regulations lay out the rights, roles, and powers of residents and Resident Associations. These regulations are under-enforced, and residents are often left out of any decision-making processes.

20. On November 1st 2009, the UN Special Rapporteur on Adequate Housing visited Pine Ridge Indian Reservation (Lakota/Sioux Nation, South Dakota) . The Human Right to Adequate Housing is affirmed in the 1868 Ft Laramie Treaty between the US and the

Great Sioux Nation, and in addition the US has specific Trust responsibilities to ensure the adequate living conditions of Indian Nations in the US. Nevertheless the SR Housing reported that "The conditions in the houses on the Reservation were the worst seen by the Special Rapporteur during her mission, evidence of the urgent and severe need for additional subsidized housing units there."[xvi]

b. Homelessness:

21. Despite government officials making a political commitment to "a human right related to housing," [xvii] there is currently no national right to any sort of shelter in the United States. Rather than recognizing the lack of housing as a cause of homelessness and providing sufficient housing, many communities have actually criminalized homelessness by enacting ordinances against the act of sleeping, sitting, begging, or eating outdoors, even when homeless persons have no other place in which to perform these basic life activities. Similarly, other laws, such as prohibitions against jaywalking and littering, are disproportionately enforced against homeless persons.[xviii] Both the SR Housing and the SR Racism criticized the practice of criminalizing homelessness in recent reports, and the HRC condemned the disparate racial impact of homelessness on African Americans. [xix]

22. Currently there is a severe shortage of shelter space throughout the nation. 22 of 27 cities surveyed by the U.S. Conference of Mayors reported an increase in the demand for shelter over the past year. 14 cities reported having to turn away homeless persons due to a lack of available beds; several of these cities reported pervasive problems with the lack of shelter availability. Los Angeles, for instance, cited a survey of homeless persons in the city and found that 13% of respondents had tried to access shelter in the 30 days prior, and 68% were turned away because no beds were available.[xx]

23. In many cases, children are removed from homeless families and placed into foster care when shelter or housing is not available for the entire family.[xxi] Studies have documented irreparable psychological harm to children removed from their parents and, as is usual in foster care, transferals from one foster placement to another, resulting in higher rates of illness, mental illness, delinquency, poor school performance, and crime. At least 30 percent of all youth in foster care could be reunited with their biological families if safe affordable housing were available to them. The Family Unification Program (FUP) provides vouchers to these families, and both produced documented savings and resulted in an 88 percent retention rate among homeless families.[xxii]

24. In 1987, Congress enacted what is now known as the McKinney-Vento Homeless Assistance Act, recognizing the Federal Government's "clear responsibility and . . . existing capacity to meet the basic needs of all the homeless." Under the Act, surplus federal property must be made available to serve homeless people.[xxiii] In 1994, Congress enacted the Base Closure Community Redevelopment and Homeless Assistance Act, which requires consideration of the needs of the homeless population in the redevelopment process. Local governments and non-profit organizations have used surplus federal property to provide services to hundreds of thousands of homeless people throughout the country each year. However the laws remain under-implemented.

The Single-Family Property Disposition Initiative authorized by Congress has been administratively shut down since the mid-1990s, preventing thousands of homes from being made available for use as transitional or low-income housing. Awareness remains low of the other federal vacant property programs, and state and local entities have many more properties that could be made available for use as temporary or permanent housing. Homes and buildings should not be vacant when people are homeless on the streets.

25. There is also a lack of affordable housing in the U.S, which is a primary cause of homelessness. From 2003 to 2005 the number of affordable and available low income housing units dropped by 1,658,000, not including the damage done by Hurricane Katrina.[xxiv] Furthermore, many cities construct more high-income housing than is needed and renters at the bottom end of the market are further squeezed.[xxv] Inadequate incomes are also directly linked to this problem: a person working a regular work week at the legal minimum wage cannot afford the fair market rent for even a one-bedroom apartment anywhere in the United States.[xxvi] Homelessness also impacts the right to health, and the right to life. A person experiencing homelessness is 3 to 4 times more likely to die prematurely than their housed counterparts.[xxvii] More than 90% of homeless women report having experienced severe physical or sexual abuse, and many victims of abuse become homeless after escaping violence because adequate housing is not available.[xxviii] Compared to the general population in the U.S., homeless individuals have an HIV prevalence rate three to nine times higher and are seven to nine times more likely to die from HIV/AIDS.[xxix] This also disparately impacts women, who, as caretakers for their children, head most homeless families[xxx] and are more likely than men in similar situations to find themselves having to exchange sex for shelter, food, or money[xxxi] or remain in abusive relationships that could make them more vulnerable to HIV, or less able to care for themselves and their children if already HIV-positive.[xxxii] Homeless women with children are less likely to prioritize their own health needs as they focus on finding shelter for their families. Without providing access to affordable, adequate housing – a first concern of those most at risk for HIV and those with HIV – the U.S. cannot effectively fight the HIV/AIDS epidemic.

c. Foreclosure

26. As detailed by the SR Housing in her report, HUD reported that approximately 3.7 million borrowers began the foreclosure process in 2007 and 2008 and RealtyTrac reported a 32 percent increase in foreclosure filings from April 2008 to April 2009.[xxxiii] The foreclosure crisis has taken many people out of the homeownership market and put them into the rental market, thus increasing the burden on an already tight rental market.[xxxiv] The cost of rent increased as more and more people began renting, areas became gentrified, and the already disadvantaged poor and homeless became even less able to afford housing.

27. The Protecting Tenants at Foreclosure Act was a victory in terms of protecting peoples' housing rights. This act allows tenants to remain in their apartments even though their buildings are being foreclosed on. Unfortunately, this legislation expires in three years, and will need to be renewed.[xxxv]

28. In spring 2009, the Federal Government also announced the Making Home Affordable Program which provides incentives for private industry to offer affordable loan refinancing and loan modifications. Criticism exists however due to the low number of banks and investment funds which are adhering to the program and the modest number of homeowners who are actually benefiting.[xxxvi] In general, the government's response to the foreclosure crisis has been focused on ensuring that banks do not lose too much on their investments rather than on ensuring that people are able to remain stably housed.

29. In most cities there is no requirement to construct adequate affordable housing, much less regulations requiring regional and local planning for such housing. In 2008 the CERD commended California for its Housing Element Law, which requires planning for adequate housing for all income levels.[xxxvii] Such laws should be encouraged throughout the U.S., and those already in place should be strengthened to be legally enforceable at both the state and federal level.

d. Forced Eviction:

30. Government agencies collaborate to forcibly evict both homeowners and renters in areas that are primarily inhabited by working class, artists, and poor persons.[xxxviii] Agencies such as the Fire Department, the Office of Emergency Management, the Police Department and the Department of Buildings work together to carry out preemptive forced eviction. The common practice in New York City is that the Fire or Buildings Department will discover a danger in a building, often a condition that has existed for years; officials order all residents to vacate immediately; and experts are hired to swear the danger is imminent. Often the removal of residents is aggressively implemented through threats of fines and jail time, the use of battering rams and heavy police presence. Media coverage tends to side with the authorities, and reports on those being evicted in a manner that diminishes their dignity. There is no notice, no process, and no right to appeal. No other housing is arranged beyond two days, and if the residents cannot find alternate housing on their own, they become homeless.

31. After Arthur Wood of the Broken Angel building won a court case against the NYC Department of Buildings in the 1980's, the Woods were forced to tear down their building despite engineer testimony that it was structurally sound, repeatedly prevented by the Department from rebuilding their home, were subject to numerous spot inspections, had officials lie to judges about the state of their building, were repeatedly fined by the Department, and had legal claims against the Department dismissed. This building was deemed to be in immediate danger of collapse, yet judicial hearings were conducted with the Woods, a judge and government officials, on the top floor of the building. The Woods ended up homeless. Mrs. Wood died and Mr. Wood lives in the foreclosed dwelling as a guardian.

32. In the case of the 475 Kent building factory and grain silo in the basement had been inspected multiple times by the Fire Department but were suddenly deemed in imminent danger of explosion. All that was required was to remove the grain from the

factory and remove the old sprinkler system, but authorities instead quickly evacuated the over 200 residents of the building, took a full week to remove the danger, and then banned residents for three months without providing alternative accommodations while they installed a new, unnecessary sprinkler system. Though the factory was deemed an immediate danger of explosion, no emergency personnel blocked off the area or acted with any sense of urgency.

33. Victims and surrounding communities of forced evictions suffer irreparable psychological harm. As Dr. Mindy Fullilove suggests in the book Root Shock, they are uprooted like a plant from the nurturing and familiar surroundings and never recover. The suffering induced by forced evictions is cruel and degrading treatment.[xxxix]

e. Housing Discrimination

34. Under ICERD, the United States government has an obligation to ensure that all people enjoy the right to housing and to own property, without distinction as to race. Similar to the requirements of the Fair Housing Act (42 U.S.C. §§ 3601-3631) and the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f), ICERD requires, and the United States agreed to, eliminate racial discrimination in the housing market and take proactive steps to increase residential integration. Due to a long and continuing history of racial segregation enabled by both federal, state, and local public policy and private discriminatory actions in the real estate sales, rental, lending, and insurance markets, the United States has struggled to fulfill its obligations under international convention and federal law.[xl] Indeed, United Nations Special Rapporteur on Adequate Housing Raquel Rolnik recently reiterated the 2008 observation of the Committee on the Elimination of Racial Discrimination[xli], which lamented:

> [R]acial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence.[xlii]

35. Today, minority residents continue to live in isolated, segregated communities.[xliii] In order to confront this opportunity-restricting segregation, the United States government must adequately examine its own policies to determine the effects of the policies have on perpetuating racial segregation, and it must better enforce its anti-discrimination laws against private actors that discriminate intentionally or in effect against the public protected under its laws.

36. Current housing policies of the United States government that seek to increase the supply of affordable housing often perpetuate residential segregation that became entrenched because of those policies implemented in the middle of the twentieth century.[xliv] In 2008, the National Commission on Fair Housing and Equal Opportunity reported that the federal government's three largest federal housing programs oftentimes maintain segregated housing patterns by limiting affordable housing options to segregated census tracts.[xlv] Moreover, federal grant money for housing and urban

development projects has been used illegally by local municipalities due to their allocation of funds and zoning laws that perpetuate segregation.[xlvi]

37. Programs designed to mitigate the foreclosure crisis[xlvii] could continue this trend. Both Making Home Affordable and the Neighborhood Stabilization Program seek to stem the effects of the crisis by keeping individual families from foreclosure and reducing the economic impact of blight and foreclosure in neighborhoods. However, these programs risk perpetuating segregation through their ineffectiveness,[xlviii] and continued concentration of affordable housing opportunities in low-income census tracts.[xlix] These programs require a comprehensive fair housing analysis.

38. There are an estimated 4 million incidents of housing discrimination that occur each year. In 2008, over 30,000 incidents were reported to private fair housing organizations, state and local agencies, the Department of Housing and Urban Development, and the Department of Justice.[l]

39. The federal government has failed to adequately address private discrimination, and has instead relied upon private non-profits to enforce the Fair Housing Act.[li] Congress has historically underfunded these activities, leaving millions of incidents of housing discrimination unaddressed. Although both agencies have recently indicated a greater willingness to address private discrimination, they must address issues of systemic discrimination particularly in the lending markets, and HUD must take steps to address internal conflicts of interest and processing delays that hinder the enforcement of the Fair Housing Act.

40. If the federal government is not committed to enforcing civil rights statutes against private actors and eradicating discrimination in the housing and lending markets, or committed to examining its own programs to ensure that they reduce, and do not reinforce, segregation, the United States will remain a nation segregated by both race and opportunity.

IV. Recommendations

41. In order to meet its obligation to ensure the right to housing, the U.S. government should make the following changes to address the recommendations made by the Rapporteurs, Independent Experts, CERD, and the HRC:
    - i. The Administration should ensure that public resources are used wisely to meet urgent needs by implementing the already-authorized single-family home disposition program to make foreclosed homes owned by the government available to house homeless people, expand the types of properties available under the base closure and other federal vacant property programs, and create financial and tax-based incentives for state and local vacant property programs.
    - ii. The Administration should stop the decrease in the number of available public and subsidized units even as the demand increases by mandating one-for-one and like-for-like replacement of lost subsidized units, and by providing

incentives and subsidy structures to enable private owners to more easily continue participation in subsidized housing programs.

iii. The Administration and Congress should protect homeless and low-income people from discrimination by creating federal protections against source-of-income housing discrimination; remove lifetime bans from subsidized housing for minor arrests; and ensure that localities that receive federal funds do not criminalize sleeping or conducting other life activities outside when there are no available shelter spaces.

iv. The Administration should stop privatization of public housing and not convert it to Project-based Section 8, stop funding programs such as HOPE VI, and fully fund public housing to ensure it will be maintained and preserved for the future.

v. The Administration should enforce current 964 regulations that require housing authorities to inform residents of all proposed policy and budget decisions and allow time for their input, and strengthen the 964 regulations to give Resident Associations real power to decide the policies and budget for their Housing Authority.

vi. The Administration should better integrate Housing Opportunities for People with Aids (HOPWA) and other housing programs with supportive services for HIV-positive people.

vii. The Administration should stop all preemptive evictions immediately.

viii. Congress should pass legislation consistent with the requirements of the ICESCR such that residents are provided the greatest security of tenure possible, provide protections for the circumstances under which evictions may be carried out, provisions for legal remedies for violations of these procedures, and a right to civil counsel for those in need to seek redress from the courts.

ix. The Administration should ensure that no actions are carried out in a discriminatory manner either intentionally or in effect.

x. The Administration should provide adequate and alternative housing to those people who are evicted and cannot provide new housing for themselves.

xi. The Administration should put a ceiling on rents, change occupancy laws, change work/living space laws to allow those of moderate income to live and work in the same space.

xii. Congress should pass H.Res. 582 recognizing children's right to housing together with their families, and adequately fund the FUP voucher program to ensure children are not separated from their families due to homelessness.

xiii. The Administration should pass an executive order creating an inter-agency working group on human rights implementation to ensure recommendations from treaty bodies and other human rights monitors are transmitted to, and implemented by, relevant domestic agencies and state and local governments.

xiv. The Administration should honor its legal, Treaty and Trust obligations to American Indians and Alaska Natives by providing adequate resources to ensure housing rights, in full collaboration with impacted Peoples and Tribes.

xv. Past recommendations from the United Nations continue to remain relevant and include increasing federal efforts to enforce federal civil rights laws,

funding testing programs and "pattern and practice" investigations to assess housing discrimination, eliminating obstacles to affordable housing choice and mobility opportunities, and enacting policies to end historically generated discrimination.[lii]

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[iii] International Convention on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52.
[iv] International Convention on the Elimination of all forms of Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.
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[xvii] U.S. Response to SR Housing Report (2010).
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[xxxiii] SR Housing Report (2010), at para. 47.
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United States of America

Submission to the United Nations
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THE HUMAN RIGHTS CRISIS IN THE AFTERMATH OF HURRICANE KATRINA

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Endorsed by:

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1. This submission provides information pertaining to the US Government's violation of human rights in connection with Hurricane Katrina. This submission is prepared by Advocates for Environmental Human Rights, a non-governmental public interest law firm based in New Orleans, Louisiana that is dedicated to upholding the human right to live in a healthy environment, and the Gulf States Human Rights Working Group, a coalition of non-governmental organizations dedicated to advocating for adoption by the US Government of the UN Guiding Principles on Internal Displacement as a domestic legal standard. Non-governmental organizations that contributed to this submission are as follows: ACLU-Mississippi, Alabama Arise, Center for Fair Housing, Community Justice Clinic at Loyola University New Orleans College of Law, Gert Town Revival Initiative, Katrina Citizens Leadership Corps, Mississippi Immigrants Rights Alliance, Mississippi NAACP, Mossville Environmental Action Now, South Bay Communities Alliance, Steps Coalition, and Women's Health & Justice Initiative.

2. This submission documents certain decisions, policies, and actions by the US Government and its political subdivisions in connection with Hurricane Katrina in 2005 and subsequent storms that have violated and continue to violate the human rights of people who lived or live in states bordering the Gulf of Mexico, including Texas, Louisiana, Mississippi, and Alabama (hereinafter "the Gulf Region"). This submission discusses critical areas in which the United States Government has disregarded its international human rights obligations.

I. The U.S. Government's National Disaster Mitigation, Preparation, Response, and Recovery Policies Create Racial Disparities and Prolong Internal Displacement

3. The United Nations Human Rights Committee and the United Nations Committee on the Elimination of Racial Discrimination issued separate Concluding Observations detailing the actions that the U.S. Government should implement in the aftermath of Hurricane Katrina in relation to Articles 6 and 26 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and Article 5(e)(iii) of the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). The July 2006 Concluding Observations by the UN Human Rights Committee recommended, among other things, that the U.S. Government implement the United Nations Guiding Principles on Internal Displacement and "ensure that the rights of poor people, in particular African Americans are fully taken into consideration in the reconstruction plans with regard to access to housing, education, and healthcare." The March 2008 Concluding Observations by the UN Committee on the Elimination of Racial Discrimination recommended that the U.S. Government "increase its efforts in order to facilitate the return of people displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence." Additionally, the UN Committee on the Elimination of Racial Discrimination recommended that the U.S. Government ensure that displaced persons can meaningfully participate in the design and implementation of all decisions affecting them.

4. Notwithstanding the recommendations of these two UN treaty-monitoring committees, which conform with the demands of non-governmental organizations based in the Gulf Region, as evidenced by their letters to governmental officials, published reports, public demonstrations, and lawsuits, the U.S. Government has not implemented these recommendations. Instead, the U.S. Government has implemented policies in the aftermath of Hurricane Katrina and subsequent storms affecting the Gulf Region that exacerbate racial disparities and prolong internal displacement.

5. It is estimated that approximately 1,000,000 residents of the Gulf Region were physically displaced during the events of Hurricane Katrina. This is the largest population of internally displaced people in the modern history of the United States. However, the U.S. Government does not recognize displaced Gulf Region residents as internally displaced persons.

6. For several years prior to Hurricane Katrina, the U.S. Government supported the work of the United Nations to develop the UN Guiding Principles on Internal Displacement as the standard of care for people who are forced to flee their communities as a result of a natural or human-induced disaster. In October 2004, nearly one year prior to Hurricane Katrina, the U.S. Government issued the *United States Agency for International Development Assistance to Internally Displaced Persons Policy* (PD-ACA-558, October 2004) (hereinafter "USAID policy"). The USAID policy adopts the UN Guiding Principles on Internal Displacement, and is intended to assist people in foreign countries. According to this policy, the US Government acknowledges that the UN Guiding Principles on Internal Displacement are "an important tool for dealing with situations of internal displacement" and encourages governments to incorporate these principles in their domestic policies. However, the U.S. Government has failed to follow its own recommendation, and demonstrates an unconscionable disregard for the fact that there are hundreds of thousands of internally displaced U.S. residents in the aftermath of Hurricane Katrina and subsequent storms striking the Gulf Region.

7. Under the UN Guiding Principles on Internal Displacement, displacement is not merely defined by physical space but by need. Thus, displacement ends when one no longer has needs associated with his/her displacement (Brookings Institution-University of Bern Project on Internal Displacement, *When Displacement Ends: A Framework for Durable Solutions*, June 2007). Both the UN Guiding Principles and the USAID policy recognize housing, education, healthcare, and employment opportunities as vital to ending displacement and rebuilding communities. Without these measures to adequately address the needs of displaced people, recovery is unlikely. People of color and other marginalized groups typically encounter the injustice of post-disaster plans that remove them from their communities. Women and children are more likely to face abuse and exploitation during displacement when the social safety net has been torn away. Such adverse conditions are exacerbated by prolonged displacement, which as recognized in the USAID policy, creates significant setbacks in a person's education, healthcare, and livelihood that can have detrimental effects on future generations (USAID Policy, p. 3). The ramifications of prolonged displacement are especially dire for poor people in the Gulf Region who are predominantly African American, Asian American, Latino, and Native American children and families suffering from racial injustice in governmental disaster recovery plans as well as the abuse, neglect, and exploitation that arise from the social breakdown.

8. The need for the UN Guiding Principles is particularly critical for single women who have children and/or care for relatives. According to the Women's Health & Justice Initiative, the number of families headed by single mothers in New Orleans fell from 51,000 to 17,000; and poor families headed by single mothers fell from 18,000 to 3,000 in the first year following Hurricane Katrina. The group has documented the consequences of inadequate governmental assistance to the significant number of displaced women-headed households.

9. Pursuant to a domestic law known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act (hereinafter "the Stafford Act"), the U.S. Government has developed and implements policies and programs that deprive Gulf Region residents of their human rights and are contrary to the UN Guiding Principles on Internal Displacement. The Stafford Act places virtually all governmental decisions regarding a national disaster, such as Hurricane Katrina, at the discretion of the President of the United States (Title 42 United States Code Section 5148). Given the entirely discretionary nature of the Stafford Act, an individual harmed by a national disaster has ***no right*** to any assistance at all,

including "essential assistance," such as the reduction of life-threatening risks, emergency medical care, and shelter (Title 42 United States Code Section 5170b). Governmental officials and non-governmental organizations have criticized the Stafford Act as inadequate and ineffective for addressing a catastrophic disaster that results in population displacement, such as Hurricane Katrina.[1] In contrast to the UN Guiding Principles on Internal Displacement, the Stafford Act does not prohibit governmental decisions that alter the racial demographic or composition of a disaster-affected area. The Stafford Act also does not establish the provision of housing, health care (including trauma counseling), and education for the duration of displacement. Nor does this domestic law adequately address the needs for permanent recovery of displaced people and the reconstruction of communities devastated by a national disaster. In sum, under the Stafford Act, displaced Gulf Region residents have ***no right to recovery*** as recommended by the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination.

10. Further analysis of the contrasts between the Stafford Act and the UN Guiding Principles on Internal Displacement, prepared by Advocates for Environmental Human Rights, a non-governmental organization, is provided in the table below.

Recovery Issue	Robert T. Stafford Disaster Relief and Emergency Assistance Act	UN Guiding Principles on Internal Displacement
Should the federal government have primary responsibility for disaster recovery?	**No.** The federal government's responsibility is limited to matters under exclusive federal control as established by the U.S. Constitution or federal law. All other federal responses to a disaster are discretionary acts that are completely immune from lawsuit. (42 USC §5148 & §5191)	**Yes.** National governments have the primary duty to provide protection and humanitarian assistance to people who are displaced by a natural or man-made disaster. (Principles 3 & 25)

Recovery Issue	Robert T. Stafford Disaster Relief and Emergency Assistance Act	UN Guiding Principles on Internal Displacement
Should people who have been displaced by a disaster have a right to humanitarian assistance and assistance to either return to their residences or resettle?	**No.** Individuals do not have a legal right to assistance. The federal government is not required to provide essential assistance, which includes emergency medical care, reduction of immediate life-threatening risks, and housing. (42 USC §5170b)	**Yes.** All displaced persons have the right to request and receive protection and humanitarian assistance from governmental authorities as well as the right to voluntarily return or resettle in safety and with dignity. (Principles 3, 25 & 28)
Should displaced people be protected from governmental actions that result in discriminatory impacts?	**No.** Federal courts have limited the prohibition against discrimination to an intentional act of discrimination, not an act that results in a discriminatory impact. (*Sandoval v. Alexander*, US Supreme Court, 2001)	**Yes.** Displacement that is aimed at or results in "ethnic cleansing" or altering the racial, ethnic or religious composition of an affected people **is** prohibited. Displaced persons have a right to governmental assistance and protection that does not intentionally discriminate or result in a discriminatory impact. (Principles 4, 6, 18 & 24)

Should displaced people have the right to housing, education, and healthcare?	**No.** Housing assistance, temporary educational facilities, and healthcare services are provided at the discretion to the federal government. (42 USC §5174(b), §5174(c) & §5170b.a.3.D)	**Yes.** Displaced persons have the right to housing, education, and medical services that requires the government to provide temporary housing for the duration of the displacement, support for the rebuilding of permanent homes; educational and training facilities, and medical services, including mental health care and social services. (Principles 18, 19, 23, 28 & 29)

A. The Human Rights to Life, Freedom from Racial Discrimination, and Protection from Bodily Harm and Violence Without Distinction as to Race

11. Article 6 of the ICCPR protects the human right to life, Article 26 of the ICCPR protects the human right to freedom from racial discrimination, and Article 5(b) of the CERD protects the human right to protection from bodily harm and violence without distinction as to race. These human rights are also recognized in the Universal Declaration of Human Rights (Articles 2 and 3). The protection of these human rights is essential to disaster mitigation and disaster response efforts undertaken by the U.S. Government.

12. The U.S. Government and its political subdivisions are investigating the shooting deaths and beatings of predominantly African American victims by law enforcement personnel in the wake of Hurricane Katrina. These investigations have not produced any results nearly five years since the shootings and beatings occurred. (*See* Monique Harden *et al*, *Racial Discrimination and Ethnic Cleansing in the Aftermath of Hurricane Katrina: A Report to the UN Committee on the Elimination of Racial Discrimination*, Advocates for Environmental Human Rights, Nov. 30, 2007, pp. 4-5, *available at* http:// www2.ohchr.org/english/bodies/cerd/ cerds72-ngos-usa.htm (click "Hurricane Katrina")).

13. The non-governmental organization, Mississippi Immigrants Rights Alliance, has documented the racial profiling of Latinos and those perceived to be immigrants, who have been subjected to unwarranted arrests and abusive treatment by law enforcement personnel.

14. In advance of Hurricane Katrina, the U.S. Government had information that levees and floodwalls could be breached by the storm surge causing catastrophic loss of life and damage. However, the U.S. Government failed to warn the public of the likelihood that levees and floodwalls would be breached by the storm surge.[2] Additionally, the U.S. Government failed to inform the public that floodwalls and levees were of substandard construction that made them vulnerable to breaches and overtopping by the storm surge.[3] By withholding this critical information, the U.S. Government failed to protect the lives of people in the Gulf Region.

15. It is estimated that 1,833 people died from drowning in floodwaters, injuries from falling objects caused by strong hurricane winds, and shootings. The approximate number of deaths by state: Louisiana – 1,577; Mississippi – 238; Florida – 16; Alabama -2; Georgia – 2.[4] The actual number of people who died remains unknown. The Katrina death toll is the third highest death toll among hurricanes in the history of the United States. It is important to note that the two highest death tolls resulting from hurricanes occurred during the 1920's,[5] decades before significant developments in meteorological forecasting, telecommunications, transportation infrastructure, and hurricane protection systems.

16. With regard to disaster mitigation, the U.S. Government designed and constructed substandard flood walls and levees that were breached by the Hurricane Katrina storm surge, which resulted in the drowning deaths of people in the Gulf Region, flooding 80% of the city of New Orleans, Louisiana for several days, devastating coastal and rural communities, and causing extensive property damage that remains largely unrepaired in many areas. Under domestic law, the U.S. Government, in particular the U.S. Army Corps of Engineers, is immune from liability for the deaths and extensive property damage caused by its substandard design and construction of levees and floodwalls.

17. The U.S. Government authorized the U.S. Army Corps of Engineers to conduct repairs and upgrades to flood walls and levees that failed in the immediate aftermath of Hurricane Katrina. However, the Corps' work has resulted in racial disparities that jeopardize the lives of predominantly African American residents. A June 2007 report by the U.S. Army Corps of Engineers documented that its efforts to upgrade and repair floodwalls and levees would significantly reduce the level of floodwater that inundated predominantly white neighborhoods during Hurricane Katrina, but exclude predominantly African American neighborhoods from any similar reductions in flood water. Specifically, the report shows that the predominantly white neighborhoods of Lakeview in New Orleans and Old Metairie which is adjacent to New Orleans would both have a 5.5 feet (1.68 meters) reduction in floodwater, while the predominantly African American neighborhood of New Orleans East, which also has the largest population of Vietnamese Americans in the city, would have no reduction in floodwater; the predominantly African American neighborhood of Gentilly would have a 6 inch (15.24 centimeters) reduction in floodwater, and the predominantly African American neighborhood of the Lower 9th Ward would have 1.5 feet (0.46 meters) reduction in floodwater.[6] Without adequate flood protection — a critical part of disaster mitigation in flood prone areas — predominantly African American neighborhoods are exposed to life-threatening conditions.

18. People living in coastal areas are made vulnerable by the combination of the U.S. Army Corps of Engineers' flood and navigation projects and offshore oil and gas operations in the Gulf of Mexico that continually erode the coastline and destroy wetlands. The U.S. Army Corps of Engineers is not required by law to mitigate the destruction of wetlands and coastal areas that results from its flood and navigation projects, and oil and gas companies are likewise not required to mitigate coastal erosion. Without mitigation, significant areas of wetlands and the coast in the Gulf Region which serve as natural defenses to hurricanes by reducing storm surge and absorbing wind and wave energy, have been destroyed and the lives of residents remain threatened.

B. The Human Rights to Housing and Housing Without Distinction as to Race

19. Article 26 of the ICCPR protects the human right to freedom from racial discrimination and Article 5(e)(iii) of the CERD protects the human right to housing without distinction as to race. These human rights are also recognized in the Universal Declaration of Human Rights (Articles 2 and 25). The protection of these human rights is essential to disaster response and disaster recovery efforts undertaken by the U.S. Government.

20. In the aftermath of Hurricane Katrina, the U.S. Government has developed policies and practices that deny recovery for the internally displaced residents of the Gulf Region, who are predominantly African American, Asian American, Latino, and Native American. Such governmental programs deny or reduce access to adequate housing for renters, including renters of government-subsidized housing, and homeowners. As a result, there has been a substantial increase in the number of homeless people.

21. In its one-year follow-up reports to the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination regarding Hurricane Katrina, the U.S. Government presents some of its federal expenditures for so-called recovery programs without providing context as to the effectiveness of such funding to ensure recovery for internally displaced residents of the Gulf Region and their devastated communities (United States Responses to Select Recommendations of the Human Rights Committee, Oct. 10, 2007, paragraph 26, pp. 14-16; United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, Jan. 13, 2009, paragraph 31, pp. 11-14). The vast majority of federal disaster response and recovery programs are managed by the U.S. Government's Federal Emergency Management Agency (hereinafter "FEMA") which also implements the Stafford Act, and the U.S. Department of Housing and Urban Development (hereinafter "HUD"). The U.S. Government failed to disclose to the UN committees that both FEMA and HUD have been widely criticized by governmental officials and civil society because of their actions that:

    failed to direct federal funds to meet the needs of the Gulf Region and failed to ensure accountability and meaningful participation by internally displaced persons in the design and implementation of recovery programs;

    unreasonably restricted and underfunded housing assistance to internally displaced Gulf Region residents (as evidenced by FEMA's evictions of internally displaced people living in temporary rental housing based on arbitrarily set expirations for assistance; deeply flawed recovery assistance programs managed by HUD that were designed to provide little support to homeowners and renters; HUD's waiver of a federal rule that requires HUD Community Development Block Grants to benefit people with low to moderate income, which has allowed significant amounts of federal funds to be diverted to commercial and industrial development projects; and the failure to provide language translation of governmental assistance programs, which shuts out internally displaced people who are not proficient in English from accessing assistance); and

    placed 143,000 homeless Gulf Region residents in unsafe and unhealthy temporary housing known as "FEMA campers" or "FEMA trailers" that exposed people to dangerous levels of formaldehyde (a toxic substance emitted from the interior wood cabinets and other furnishings that can cause eye, nose, and throat irritation; lung damage; wheezing and coughing; fatigue; skin rash; and severe allergic reactions).

i. Alabama

22. A portion of the State of Alabama borders the Gulf of Mexico, where Hurricane Katrina and subsequent hurricanes devastated the lives of residents and their communities. The hurricane-damaged communities in Alabama are the most overlooked areas by the U.S. Government, and are not mentioned in the U.S. Government's reports to the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination regarding Hurricane Katrina.

23. The responses by the U.S. Government and its political subdivisions are inadequate and ineffective for ensuring the recovery of coastal Alabama residents who suffer from unmet needs arising from their displacement. The denial of housing has created the majority of these unmet needs. In the aftermath of Hurricane Katrina, there were over 3,400 occupied housing units that were severely damaged and 45,000 occupied housing units that incurred minor damage. However, under the housing assistance fund program managed by HUD and local agencies, only 1,020 housing units were eligible for funds to repair or rebuild; and of these eligible housing units, the paltry amount of federal funds would afford assistance to less than 300 households (letter by U.S. Congressman Artur Davis (D-AL) to U.S. Speaker of the House of Representatives Nancy Pelosi (D-CA), Nov. 13, 2008). For the several thousand households that suffered major and minor damage, there is insufficient funding to assist with

the repair or rebuilding of homes. For example, the Mobile County Commission which manages housing assistance recovery funds, documented that since March 2007 it has been forced to not accept any new applications for funds because it did not have adequate funds to assist all of the 1,170 applications submitted by residents that had been previously accepted (letter by Mike Dean, President of the Mobile County Commission to Doni Ingram, Executive Director of the Alabama Department of Economic and Community Affairs, Feb. 22, 2010).

24. Consequently, there are thousands of individuals and families who are either homeless or living in damaged homes — some without roofs and some infested with mold that grew from the dampness remaining after flood waters receded. Among the 1,020 families who are eligible for federal home rebuilding assistance, 39% earn less than $15,000 a year; 31% care for elderly and disabled family members; and 58% have children who are cared for by single parents or grandparents (South Bay Communities Alliance, Open Letter to President Obama and other elected governmental officials, Feb. 26, 2009). Numerous requests by Alabama officials, coastal Alabama residents, and non-governmental organizations for increased federal funding to repair and rebuild affordable housing have been met with inaction.

25. The Center for Fair Housing, a non-governmental organization in Mobile, Alabama, reported that access to affordable and adequate housing without distinction as to race is denied as African Americans, in particular families headed by a single mother, are steered to rent homes in need of repair and find themselves living in squalor; are provided sub-prime loans with excessive interest rates for the purchase of homes; and are provided less information and fewer opportunities than whites when looking for homes to rent or buy.

26. In the small Alabama coastal community of Coden, the South Bay Communities Alliance, a non-governmental organization, conducted a survey of residents that revealed 150 Coden families reported significance unmet needs; and 70 Coden families responded that their homes had major damage, but they received little assistance or no assistance from the government. A member of South Bay Communities Alliance documented the deaths of residents whose homes were destroyed by hurricanes:

> *"Coden has never seen so many people pass away in such a short time. My neighbor Delaphine Barber, age 75 lost her home and died from a heart attack about a year after Katrina. Other neighbors who died, trying to survive in the [formaldehyde emitting] FEMA campers, and hoping to see their homes rebuilt were: Sally Dismukes, age 72, died of a heart attack; Tommy Barbour age 56, died of lung cancer; Michael Goleman, age 36 father of two teenage daughters, suicide; Shirley Clark, age 65, complications from a staph infection; Randy Hall, age 45, lung cancer; Nancy Maples, age 57. Most have spouses or children who are still hoping to see their family homes rebuilt. My mother Hilda Nelson died after living in a FEMA camper over a year and hoping for assistance to rebuild the family that never came . . . ."*— Paul Nelson

27. Pursuant to the post-Katrina waiver by the federal government of a federal rule that HUD Community Development Block Grants are to benefit people with low to moderate incomes, the State of Alabama diverted a reported $24 million USD to construct a new wastewater treatment facility that will not benefit poor and predominantly people of color residents who live nearby, and will pollute a local water body used for subsistence fishing with the facility's wastewater discharges (letter from Alabama Arise, a non-governmental organization, to Jessie Handforth Home, US Department of Housing and Urban Development, Oct. 8, 2008).

ii. Mississippi

28. The State of Mississippi borders the Gulf of Mexico, where Hurricane Katrina devastated the lives of residents and their communities. In its 2009 report to the UN Committee on the Elimination of Racial Discrimination, the U.S. Government predicts that the State of Mississippi "will not only have replaced lost housing stock, but will have created more affordable housing in South Mississippi than existed before Hurricane Katrina" (United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, Jan. 13, 2009, paragraph 31, p. 14). However, the possibly of this occurring is not likely given the fact that the State of Mississippi, with the approval of HUD, devised a flawed housing assistance grant program that prolongs the internal displacement of its residents.

29. According to the 2007 report, *The Unaccountability Gap: Unanswered Questions Two Years After Hurricane Katrina* by the Mississippi NAACP, the housing assistance recovery program managed by the State of Mississippi creates an inequitable recovery for displaced residents who rented homes and are predominantly African American. Specifically, the report documents that the Mississippi Homeowner Assistance Grant Program:

    provided federal funds to repair and rebuild for rental housing and government-subsidized housing at a level that was 10 times less than the funding provided to homeowners;

    provided grants to 86.9% of the homeowner applicants and only 8.5% of the renter applicants as of August 22, 2007;

    lengthened the waiting period for renters to receive housing assistance to up to five years, whereas nearly all homeowners received assistance within one year;

    failed to account for the 25-34% rise in rental rates in the hurricane-affected area that make access to rental properties unaffordable to residents who work in low-wage service jobs that form the basis of the Mississippi Gulf Coast economy; and

    failed to make publicly available the process and the outcomes of the work performed by the Reznik Group which was awarded an $88 million USD contract to manage the program.

30. The State of Mississippi rescinded its commitment to provide 8,000 affordable rental units, and is evicting residents from temporary housing; and denied some 7,000 residents emergency assistance funds based on an arbitrary rule that excluded people whose homes were damaged by hurricane winds.

31. Pursuant to HUD's waiver of the federal rule that requires HUD Community Development Block Grants to benefit people with low to moderate incomes, the State of Mississippi has allocated $570 million USD to expand its port which will displace existing neighborhoods where residents are struggling to rebuild.

iii. Louisiana

32. The State of Louisiana borders the Gulf of Mexico, where Hurricane Katrina devastated the lives of residents and their communities in coastal areas and substandard levees and floodwalls ruined 80% of the City of New Orleans. In its one year follow-up report to the UN Committee on the Elimination of Racial Discrimination, the U.S. Government provides a relatively lengthy discussion of its expenditures in Louisiana following Hurricane Katrina (United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, Jan. 13, 2009, paragraph 31, pp. 12-14), but the information presented is misleading because it omits any discussion of the severe flaws in how funds were applied.

33. HUD entered into contracts with private developers to demolish of 70% of the public housing developments in New Orleans, Louisiana,[7] many of which sustained little or no damage from the hurricane. The residents of public housing in New Orleans are all African American, the vast majority of whom are women and their children. The governmental contracts require private developers to replace the public housing developments with market rate housing[8] that will eliminate 82% of public housing apartments that were lived in prior to the storm. Specifically, the HUD-approved redevelopment plan reduces the number of low-income apartments in the Lafitte housing development from 896 to 276; the St. Bernard housing development from 1,436 to 160; the B.W. Cooper housing development from 1,550 to 154; the C.J. Peete housing development from 723 to 154. The demolition of public housing has created a crisis for approximately 5,000 African American families who lived in public housing prior to the storm.

34. HUD's poor oversight and funding of a home repair assistance program in Louisiana, known as the Louisiana Road Home Program, have contributed to the shortage of affordable housing. Louisiana entered into a contract that paid over $900 million USD to the private company ICF to manage the Louisiana Road Home Program, but that program provided only 19% of homeowner applicants with sufficient funds to cover the costs of repairing hurricane-damaged homes, and provided no direct assistance to renters, many of whom cannot afford the post-Katrina 40% increase in rents. By the time the Louisiana Road Home Program expired in 2009, there were not nearly enough affordable rental units on the market to meet the needs of internally displaced residents.

35. The design of the Louisiana Road Home grant formula exacerbates racial disparities for African American homeowners because it is based on the lower of the estimated pre-storm home value assessment and the estimated cost of damage. Because of racially discriminatory practices, home values in predominantly African American neighborhoods are lower than those in predominantly white neighborhoods. Thus, applying this discriminatory grant formula to calculate the grant awards assured that African American applicants would typically receive insufficient funds to rebuild their homes. In addition, the grant formula arbitrarily mandates that grants cannot be more than $150,000.

36. As documented in the 2008 report, *A Long Way Home: The State of Housing Recovery in Louisiana*, by the non-governmental organization Policy Link, the Louisiana Road Home Program created barriers to the recovery of internally displaced Louisiana residents:

> In New Orleans, four of every five people received grants from the Louisiana Road Home Program that were insufficient to pay for the necessary repairs to their flood-damaged homes. Statewide, more than two of every three people face the same predicament.
>
> The average Road Home Program applicant fell more than $35,000 short of the money they need to rebuild their home. The shortfall hit highly flooded, historically African-American communities particularly hard.
>
> Renters continue to face huge hurdles because only two in five damaged affordable rental units statewide will be repaired or replaced with recovery assistance. In the New Orleans metro region, the more dismal rate is one in three.
>
> The national credit crunch and personal financial vulnerability precludes the benefits of the program for many landlords who own small rental properties. Of the 10,000 rental homes that were budgeted to receive assistance, only 82 have received assistance.
>
> Nearly 28,000 internally displaced households that are located across the United States continue to rely on disaster rental assistance for homes, including 14,000 households in the greater New Orleans metro region alone.

III. Conclusion

37. Although flood protection and housing are the two most critical needs of internally displaced residents of the Gulf Region, significant unmet needs also persist regarding healthcare, education, employment opportunities, and environmental protection. (*See* Endnote #1 reference to the following reports: *What It Takes to Rebuild a Village after a Disaster: Stories from Internally Displaced Children and Families of Hurricane Katrina and Their Lessons for Our Nation* and *Hurricane Katrina and the UN Guiding Principles on Internal Displacement: A Global Perspective on a National Disaster*.)

38. The predicted effects of climate change on the Gulf Region in the form of increasingly intensive hurricanes, sea level rise, and land subsidence will only worsen the extant adverse conditions suffered by internally displaced residents, and the U.S. Government has thus far taken no action to address these predicted effects.

39. The U.S. Government must uphold its human rights obligations to ensure a just and equitable recovery for internally displaced Gulf Region residents by:

    recognizing that residents who are or become displaced by a national disaster are internally displaced persons; and adopting the UN Guiding Principles on Internal Displacement as the domestic legal standard;

    appropriating adequate funds for the Gulf Region to invest in the restoration of natural flood protection, disaster mitigation, rehabilitation of blighted properties, construction of affordable and environmentally sustainable housing, workforce development and employment of local residents, and supporting disadvantaged and small businesses; and

    prohibiting the use of federal funds to finance, create an incentive for, or otherwise assist any public or private program or project related to any type of disaster recovery efforts that would entail the exacerbation of displacement-related issues pertaining to US residents affected by a national disaster.

ENDNOTES

[1] *See, e.g.*, U.S. federal court decisions: "[FEMA] must free evacuees from the 'Kafkaesque' housing assistance application process they have had to endure . . . . It is unfortunate, if not incredible, that FEMA and its counsel could not devise a sufficient notice system to spare those beleaguered evacuees the added burden of federal litigation to vindicate their constitutional rights." *ACORN v. Federal Emergency Management Agency*, N06cv1521, Nov. 29, 2006. "[This Court] has seen scant evidence that desire for openness and clarity guided any of FEMA's communications, and this obfuscation has acted much to the detriment of the plaintiffs, and indeed the entire country." *McWaters v. Federal Emergency Management Agency*, No. 05-5488 (Eastern District of Louisiana) 2006.

See also the US Conference of Mayors, *Report of the Stafford Act Reform Task Force*, Jan. 2010, *available at* http://www.usmayors.org/pressreleases/uploads/StaffordActReformTaskForceReport.pdf; Monique Harden & Tracie Washington, *What It Takes to Rebuild a Village after a Disaster: Stories from Internally Displaced Children and Families of Hurricane Katrina and Their Lessons for Our Nation*, The Katrina Citizens Leadership Corps, 2009, *available at* http://www.childrensdefense.org/child-research-data-publications/data/rebuild-village-hurricane-katrina-rita-children.html; and Chris Kromm, *et al*, *Hurricane Katrina and the UN Guiding Principles on Internal Displacement: A Global Perspective on a National Disaster*, Institute of Southern Studies, Jan. 2008, *available at* http://www.southernstudies.org/iss/2008/11/hurricane-katrina-and-human-rights.html.

[2] Joby Warrick, *White House Got Early Warning on Katrina*, THE WASHINGTON POST, Jan. 24, 2006, p. A2.

[3] U.S. Army Corps of Engineers, *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System*, June 1, 2006.

[4] Alex Grauman *et al*, *Hurricane Katrina: A Climatological Perspective*, National Climatic Data Center of the U.S. National Oceanic and Atmospheric Agency, Technical Report 2005-01, Oct. 2005, p. 3, *available at* http://www.preventionweb.net/files/1539_techreport200501z.pdf.

[5] *Id.*

[6] US Army Corps of Engineers, Inter-Agency Performance & Evaluation Task Force, *Risk and Reliability Report*, June 2007, *available at* http://nolarisk.usace.army.mil/#map. *See also* The Times-Picayune Newspaper graphic illustrations of the flood risk maps prepared by the US Army Corps of Engineers *available at* http://blog.nola.com/ graphics (click "The Risk of Hurricane Flooding Today").

[7] US Department of Housing and Urban Development, *News Release: Housing Authority of New Orleans Approves Firms to Redevelop of St. Bernard, B.W. Cooper, and C.J. Peete*, Mar. 28, 2007, *available at* http://www.hud.gov/news/release.cfm?content=pr07-030.cfm.

[8] *Id.* (*see* HANO Developer Fact Sheet*, available at* http://www.hud.gov/news/releases/pr07-030b.cfm).

Universal Periodic Review
United States of America

Stakeholder Submission on United States Obligations to Respect, Protect and Remedy Human Rights in the Context of Business Activities

April 19, 2010

Submitted by:

Center for Constitutional Rights
EarthRights International
Western Shoshone Defense Project
Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net)









Executive Summary

1. This joint stakeholder submission analyzes the United States' record in discharging its obligations to respect, protect and remedy in the context of human rights abuses involving business enterprises acting abroad and on or near indigenous lands in the United States.[1] Businesses under U.S. domestic and extraterritorial jurisdiction (herein "businesses," "business enterprises," "corporations," or "companies") across the spectrum of industries have been implicated in, or found culpable for, *inter alia*, child labor, forced labor, extrajudicial killings and torture, abuses to the right to information, labor rights abuses, environmental abuses, gender discrimination, severe impacts to human health, and abuses to indigenous peoples' rights. During the period of review, the U.S. has taken some noteworthy legislative, adjudicative, administrative and policy measures to address these concerns. However, its approach has been at best piecemeal. The State party is not doing enough to ensure that government agencies monitor and respect human rights in their dealings with private business projects. Moreover, the State party is not taking adequate measures to prevent companies from abusing human rights, nor is it living up to its obligations to allow victims of such human rights abuses to exercise their right to effective remedy.

2. The submission concludes with a series of inter-related recommendations broadly consistent with the "Respect, Protect and Remedy" framework welcomed by the Human Rights Council in 2008.[2] If adopted, these steps would help the U.S. in upholding its commitments to human rights in the face of ongoing abuses by, or involving, businesses under its jurisdiction. In sum, the State party should refrain from directly or indirectly supporting business activities which fail to respect internationally-recognized human rights norms. This includes assuring effective and independently-verified policies and procedures to monitor and prevent human rights abuses. The State party should also take appropriate legislative, adjudicative and/or administrative measures to effectively prevent negative human rights impacts by business, including the rights of indigenous peoples and economic, social and cultural rights. This may entail additional legislative measures to make such human rights abuses punishable under U.S. law regardless of where the incident occurs and what type of private enterprise it is. Finally, the State party must take serious measures to ensure that victims of human rights violations involving business enterprises are able to exercise their right to effective remedy by *inter alia* supplementing or clarifying certain aspects of the current legislative framework, reversing executive branch positions protecting businesses from legal accountability for human rights abuses, and adopting policies that assist victims in accessing judicial remedies.

I. Current Normative and Institutional Framework

3. Despite some noteworthy exceptions, the United States' normative and institutional framework is at best piecemeal and incoherent as regards its duties to respect, protect and provide effective remedy for business-related human rights abuses. Following is a brief overview of the current framework.

Legislative and regulatory framework

4. With regard to its duty to respect, the U.S. has enacted a law requiring the Overseas Private Investment Corporation (OPIC), a State entity, to respect internationally-recognized human rights in the private projects it supports.[3] This is not yet in effect, and it is unlikely that rights such as indigenous peoples' rights and economic, social and cultural rights will be included.

5. The legislative framework in the U.S. also provides some limited examples of implementation of the duty to protect against, and ensure the right to effective remedy for victims of, human rights abuses involving businesses. The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides a statutory basis for foreign nationals to sue private actors, including businesses, for breaches of international law, including certain fundamental human rights. The Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§78dd-1, et seq., has also been used to hold companies accountable for failures to ensure transparency and avoid corruption. Notably, both the ATS and the FCPA bestow jurisdiction over business actors acting extraterritorially. Yet, there is neither a counterpart to the FCPA which allows for equivalent causes of action for activities within the U.S., nor a counterpart to the ATS for U.S. citizens. The Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note, does allow U.S. citizens to sue for extrajudicial killing and torture, but courts have disagreed about its applicability to business actors. The U.S. also has statutes that allow prosecution for war crimes, genocide, and a small number of other abuses committed abroad, and the U.S. Department of Justice (DOJ) recently established a new Human Rights and Special Prosecutions Section of the Criminal Division tasked with enforcing these statutes. Overall, however, the U.S. has no general statutes that require U.S. businesses to observe internationally-recognized human rights. A variety of national and state-level statutes generally prohibit businesses from practices such as racial discrimination and toxic pollution, for example, but these statutes often do not apply to such abuses abroad and/or do not incorporate the full spectrum of internationally-recognized human rights standards.

6. On the regulatory side, the U.S. has in place the Securities and Exchange Commission (SEC), which is responsible for ensuring reporting and oversight over U.S.-listed businesses, domestically and abroad. Although the SEC could be used to monitor situations where companies are alleged or have been found to engage in human rights violations, or to require reporting on operations in or near indigenous lands, there have been no serious efforts to date to incorporate such mechanisms into this regulatory framework.

National jurisprudence

7. U.S. courts generally observe the principle that victims of legal violations worldwide may access them to sue companies involved in such violations. This applies to ordinary claims as well as to violations of international law pursuant to the ATS. As discussed below, however, many obstacles to justice exist, such as judicial doctrines that allow courts to deny victims a remedy for business-related human rights abuses.

Policy measures

8. The stated policy of the United States is to promote human rights. The United States reports on human rights abuses in countries around the world annually. There are, however, some notable exceptions to this policy, such as the repeated failure of the U.S. to recognize and support human rights treaties and declarations specific to indigenous peoples' rights and economic, social and cultural human rights.

9. The U.S. has signed onto certain policy initiatives related to corporate accountability and human rights. It has promulgated the Voluntary Principles on Security and Human Rights (VPs), a non-binding, non-enforceable set of guidelines for oil, gas and mining companies in their security arrangements. The U.S. is also part of the Organization for Economic Cooperation and Development (OECD), and as such supports the OECD's Guidelines for Multinational Enterprises, similarly non-binding measures which include some human rights principles. The Director of the Office of Investment Affairs within the State Department is currently the U.S. National Contact Point (NCP) for the OECD Guidelines, tasked with promoting the Guidelines and discussing with the parties any alleged breaches of the Guidelines by U.S. businesses.

Human rights infrastructure

10. Outside of the regularly constituted courts, no national infrastructure or institution exists within the United States to hear claims of human rights abuses. Likewise, no U.S. government entity is expressly charged with monitoring or investigating human rights abuses by U.S. businesses. Furthermore, no mechanism exists to transmit the recommendations of human rights treaty bodies from the State Department, which receives them, to the administrative, legislative or adjudicative bodies at the federal and state level which would implement them.

II. Implementation and Efficiency of the Normative and Institutional Framework

11. The above-noted measures, while laudable, are isolated and lack overall coherency. As a result, the framework has led to serious gaps, and is thus inadequate in satisfying the State's obligations, as described below.

Legislative and administrative framework

12. Whereas the U.S. has enacted legislation to prevent one of its public export credit agencies, OPIC, from supporting projects which have adverse human rights impacts, it has yet to extend the same sorts of protections in a similar body, the Export-Import Bank (ExIm). Furthermore, the State party has not enacted legislation which would ensure that other business activities which it finances, supports or has considerable influence over —whether through direct government support, government contracting, development or reconstruction projects, or through decisions taken in the context of the World Bank Group or other inter-governmental institutions—respect internationally-recognized human rights standards.

13. Failures to implement the duty to protect and provide remedy are numerous. While the U.S. Congress has conducted hearings on corporate responsibility and the rule of law to consider whether the legislature should take steps to create explicitly legal responsibilities for corporations to respect human rights,[4] an overwhelming number of measures taken by other branches of the government, as well as Congress, undermine the efficacy of any such positive actions. Examples of this domestic incoherence include Executive positions vis-à-vis litigation against business actors, obstacles for victims to access justice through the courts, judicial hostility to lawsuits to remedy alleged business abuses, and other ineffective policy measures.

Executive positions

14. In lawsuits brought under the ATS and TVPA, the Executive Branch has failed to demonstrate a commitment to protecting human rights vis-à-vis business, frequently filing court submissions urging the dismissal of such suits involving allegations of serious violations of international law. The arguments raised by the Executive generally seek to protect business

interests and promote free trade at the expense of human rights protections and the right to a remedy, even when core rights violations are alleged.[5] The Executive has argued that to allow ATS claims against corporations to proceed could threaten foreign policy interests, in that it would discourage foreign governments or entities from contracting with U.S. businesses for fear of facing an ATS lawsuit.[6] It has also argued that to allow particular corporate cases to proceed could undermine its ability to secure the nation's safety and security.[7] Moreover, in a case brought against a company for its participation in CIA-operated "extraordinary renditions," both the Bush and Obama Administrations have invoked the "state secrets" doctrine to argue that the case should be dismissed, effectively denying remedy to victims of torture.[8]

15. The Executive has embraced other arguments that are inconsistent with protecting human rights, including that the ATS does not apply to acts outside the U.S., and that the ATS does not provide a remedy against those who aid and abet abuses.[9] Courts have generally rejected both arguments, finding that a primary purpose of the ATS was to provide a remedy for violations that occurred outside the territory of the U.S.,[10] and that those who are complicit in the violation of human rights may be held liable.[11] Nonetheless, if accepted, these arguments would undermine the ability of victims of egregious human rights violations committed with the knowledge and substantial assistance of U.S. businesses to seek redress for the harms done to them. The Executive has also invoked the "political question" doctrine in an effort to have other ATS corporate cases dismissed. One such case is *Corrie v. Caterpillar,*[12] in which the families of people killed in Palestinian home demolitions sued the U.S. company that provided militarized bulldozers to the Israeli army, alleging that Caterpillar aided and abetted war crimes. The U.S. government argued that to allow the case to proceed would intrude upon the political branches' foreign policy decisions because Israel's purchase of the bulldozers was reimbursed by U.S. foreign aid. The federal court of appeals accepted this argument and dismissed the case.[13]

Obstacles to access to justice

16. Apart from the Executive Branch's positions, judicial procedures and legal doctrines often pose nearly insurmountable barriers to victims of business-related abuses seeking justice in US courts. Financial and logistical challenges can make lawsuits difficult if not impossible in practice. Due to the numerous challenges raised by corporate defendants with almost unlimited resources to jurisdiction, or the viability of legal theories of limited liability for businesses active extraterritorially, litigation can be a slow vehicle for achieving justice. US courts have employed the doctrine of *forum non conveniens* to dismiss extraterritorial cases, even where there is no practical ability to litigate the case elsewhere, leading to an outright denial of effective remedy. In considering *forum non conveniens*, courts do not take into consideration whether a similar case has ever been brought or successfully litigated in a foreign forum. Moreover, some courts have concluded that business actors may not be sued under the TVPA, and one court has questioned whether businesses may be sued for violations of international law under the ATS.

17. Lastly, regarding the legislative framework, although the U.S. does have criminal statutes that could be used to prosecute businesses, aside from prosecutions under the FCPA, these statutes have never been used against U.S. companies, and the Department of Justice (DOJ) has yet to show an interest in prosecuting businesses.

Ineffective policy measures

18. U.S. policy measures, likewise, have not been effectively translated into concrete action in order to effectively deter and/or correct adverse business behavior. The U.S., for example, does

not routinely incorporate business-related human rights abuses into its annual human rights reporting. Although the United States has encouraged businesses to join the VPs, the U.S. has not taken steps to strengthen them, such as by including an enforceable complaints mechanism or by requiring public reporting by member companies. As they stand today, therefore, the U.S.' sole policy initiative on business and human rights—the VPs—are highly unlikely to provide effective deterrents to induce companies to conform their behavior to human rights standards.

19. The NCP for its part has not been effective in implementing the OECD guidelines. NCPs in other countries have successfully brought the parties to a mutually agreed solution, but no successful resolution of any U.S. NCP complaint is known. The U.S. NCP rarely responds to complaints in a timely manner, and has insufficient resources to do its job. The position of the NCP within the Office of Investment Affairs—whose primary task is protecting U.S. investment abroad rather than protecting human rights—may be partly to blame for its poor performance.

III. Cooperation of the U.S. with Human Rights Mechanisms

20. In the context of business-related human rights abuses, the U.S. has consistently failed to cooperate with international human rights mechanisms by failing to implement the recommendations of UN treaty bodies and other institutions. This has been particularly true with respect to the failure of the State party to meaningfully enforce human rights standards in the operation of private security contractors in detention facilities at Guantanamo Bay, Iraq, Afghanistan, and elsewhere. The Human Rights Committee and Committee against Torture, for example, identified major failures in the U.S.'s obligation to protect against and punish allegations of torture by contract employees in detention facilities, and recommended remedial measures.[14] The UN Working Group on mercenaries voiced concern over the limited scrutiny of private security contractors by the State party, urged greater transparency to prevent impunity for human rights violations and called for a global oversight and monitoring body.[15] During his 2008 visit to the U.S., the UN Special Rapporteur on extrajudicial, summary and arbitrary executions also expressed serious concern over the U.S. record of impunity for killings by private security contractors in Afghanistan and Iraq. While he pointed to some positive steps, for example, in the adoption of statutes to expand and clarify jurisdiction over offences committed by contractors, he urged the State party to enact comprehensive legislation on criminal jurisdiction over contractors, and declared that the DOJ—tasked with prosecuting private security contractors—has "failed miserably" due to a lack of political and prosecutorial will.[16]

21. Other UN human rights institutions have criticized the U.S. for its failures to protect workers, indigenous peoples, and immigrants from abuses by business actors. The Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about continuing failures to ensure legal protection and redress for workplace racial discrimination,[17] and about failures to take meaningful legislative or administrative measures to prevent acts of U.S. corporations which encroach upon the rights of indigenous peoples in territories within and outside the United States.[18] Confirming a Final Report issued by the Inter-American Commission on Human Rights in a strongly-worded Urgent Action Decision, CERD expressed serious concerns regarding the ongoing allowance of private corporations posing destructive and irreparable harms to the lands and resources of the Western Shoshone peoples. The U.S. was told to "stop", "desist" and "cease" the permitting of such activities.[19] Finally, the Special Rapporteur on the human rights of migrant workers strongly urged the U.S. in 2007 to create legally binding human rights standards

governing the treatment of immigration detainees in all facilities, including those operated by private companies.[20]

IV. Promotion and Protection of Human Rights on the Ground

22. These failures to respect, protect, and remedy negative impacts on human rights by or involving businesses have arguably opened the door for a full range of abuses. A wide variety of different business industries have been implicated, including manufacturing, agriculture, oil and natural gas, pharmaceutical, mining, food and beverage, retail trade, automotive, private security and contractor services, water services, construction, and information and communications. Companies under U.S. jurisdiction are alleged to have been involved in—or were found culpable for—child labor,[21] forced labor,[22] torture and violations of the rights to life and security of person,[23] abuses to the right to information,[24] labor rights abuses,[25] gender discrimination,[26] severe impacts to human health,[27] and abuses of indigenous peoples rights.[28] U.S. performance on the duty to provide a remedy for human rights violations is only slightly better. Once abuses have been committed by U.S. businesses, they are only rarely remedied by U.S. institutions, further compounding the original abuses through the denial of an effective remedy. Some specific examples of incidents brought to U.S. courts follow.

Fundamental human rights in the workplace

23. Serious allegations that businesses are committing violations of international labor standards have arisen. For example, claims have been brought alleging forced labor and child labor against Bridgestone for its operations in Liberia. Drawing on ILO standards, UN reports, and citing the United States' Fair Labor Standards Act, a U.S. court allowed the child labor claims to proceed, finding that they met the threshold of a violation of specific, definable and universally recognized norms required for ATS claims.[29] Other labor-related claims have been brought against corporations for human trafficking, including a case filed on behalf of Nepali laborers trafficked to Iraq against an American contractor, Kellogg Brown & Root for its own acts and that of its subsidiary.[30] Numerous cases have been filed on behalf of trade unionists who have suffered retaliatory torture or even murder for involvement in trade union activity, especially in Colombia.[31] Claims have also been brought under the ATS alleging labor violations in the supply chain.[32] Some of these cases are still proceeding, while others have been dismissed.

Extrajudicial killings and torture

24. Numerous cases of extrajudicial killings and torture by private military contractors have been reported.[33] Contractors have been hired at unprecedented rates to work with the military or civilian government officials in Iraq and Afghanistan. Contractors have been tasked with what are generally considered core governmental functions, including participation in interrogations of prisoners and intelligence gathering. Violations in which contractors have been implicated include the killing, torture and other abuses of Iraqi civilian detainees at U.S. run detention centers.[34] To date, however, no contractor has been prosecuted or held responsible for these grave crimes. Civil actions brought on behalf of former Iraqi detainees are on-going, but have faced challenges due to the invocation of derivative immunity or the so-called "government contractor defense." By claiming government contractor immunity, business actors claim that they are shielded from liability because they were hired by the U.S. government – even for actions that violate state, federal and international law, and fall outside the scope of their contract.[35] A petition for certiorari in one of these cases, *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), is being filed in April, 2010. It is expected that the Supreme Court will give the Executive

the opportunity to take an official position on the issue. Certain steps have been taken to close the impunity gap, notably the adoption of the Military Extraterritorial Jurisdiction Act, which allows for prosecution of serious crimes by military contractors. Yet, the recent dismissal of charges against private security contractors employed by Blackwater for the killing of Iraqi civilians in the notorious Nisoor Square, Baghdad shooting in September 2007 demonstrates[36] that a more robust legal regime is needed to hold contractors criminally accountable, matched by a serious commitment from the DOJ to prosecute and punish contractors who violate the law.

25. As another example, Chiquita admitted illegally funding paramilitary groups in Colombia who have carried out extrajudicial killings throughout the country. Chiquita pled guilty to U.S. criminal charges[37] and has since been sued in U.S. court by numerous victims of paramilitary violence, alleging complicity in war crimes and crimes against humanity pursuant to the ATS.[38] Because the U.S. government's plea agreement apparently includes confidentiality provisions, however, this has hindered criminal prosecution of Chiquita's executives in Colombia, and the U.S. government has not yet disclosed all of the evidence in its possession relating to Chiquita's crimes.[39]

Environmental abuses

26. U.S businesses have often been implicated in environmental pollution that threatens the rights to life and to health, among others. While the U.S. regulatory and judicial system provides some remedies for such violations inside the United States, the U.S. has failed to provide an effective remedy when such pollution occurs abroad. For example, in *Flores v. Southern Peru Copper Corp.*,[40] members of a Peruvian community alleged that a mining company's operations had caused severe lung disease and death. The federal court, however, determined that the victims could not sue under the ATS, because the "'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law."[41] At present, these rights cannot be vindicated in U.S. courts. The victims' claims in *Flores* were also dismissed on the basis of *forum non conveniens*,[42] which courts often invoke in cases involving pollution. In another case, for example, a group of indigenous Peruvians brought suit against a U.S. oil company for polluting their lands and waters, causing severe human health impacts including an epidemic of heavy metal poisoning. Even though the company was sued in its hometown, and despite the fact that the Peruvian courts had never provided a remedy against a corporation for toxic pollution, the U.S. court concluded that it would be "inconvenient" to litigate the case in the United States, and dismissed the case.[43] The dismissal is currently being appealed.

Forced relocation, forced labor, and murder in the oilfields

27. Several oil and gas companies have been sued under the ATS for their direct participation or complicity in serious international law violations, including forced relocation, forced labor and murder.[44] For example, in the landmark ATS corporate accountability case *Doe v. Unocal,* fifteen Burmese plaintiffs alleged that the U.S. oil company jointly participated with Burmese government officials in forced labor, rape, torture and murder in connection with a gas pipeline project. The evidence showed that Unocal paid the Burmese military to provide security for the Yadana Pipeline, that Unocal knew of the high likelihood that human rights violations would be committed in relation to the pipeline project, and knew that such violations were in fact occurring. Among other findings that corporations can be held liable for violations of international law, the federal appeals court found that Unocal could be held liable for aiding and abetting the abuses by the Burmese soldiers, including forced labor, murder and rape.[45] The victims ultimately were compensated in a confidential settlement, representing one of the few

times when the U.S. legal system has resulted in a remedy for such victims. But the legal system has not stopped the continuation of similar abuses committed by soldiers providing security for the pipeline project, as documented in reports as recently as 2009.[46]

Nonconsensual medical experimentation

28. In *Abdullahi v. Pfizer, Inc*, Nigerian children and their guardians sued the pharmaceutical company for failing to seek informed consent before including children in a trial of a new drug that the company knew caused serious joint and liver damage, leading to eleven deaths and many injuries. The claim was brought under the ATS as a violation of domestic and customary international law.[47] The Obama Administration, through the Solicitor General of the United States, has been invited to submit its views in a petition for certiorari currently pending before the Supreme Court. It remains to be seen whether the Obama Administration will advance the same arguments in this case as its predecessor did in other cases, as described above.

Violations of Indigenous Peoples' Rights

29. The United States was one of only four member States who opposed adoption of the Declaration on the Rights of Indigenous Peoples. Concurrently, U.S. Federal Indian Law and Policy falls far short of recognized international human rights standards as exemplified by the ongoing case of the Western Shoshone peoples, both at the CERD and the Inter-American Commission on Human Rights.[48] Businesses, therefore, have no incentive to change existing standards and activities when operating in or near indigenous lands, both in the U.S. and abroad. Furthermore, the antiquated General Mining Law Act of 1872 (30 U.S.C) gives private mining concerns primacy over considerations for the rights of indigenous peoples and the environment. Human rights violations caused by business activities include severe environmental damages, and rights to health, land, and culture. For example, the Western Shoshone have documented the involvement of corporations with respect to concerns regarding open pit mining, nuclear waste disposal and military testing, and new efforts to pipe massive quantities of water from under their traditional land base to water the growing metropolitan area of Las Vegas, Nevada.[49]

V. Key Recommendations

Recommendations related to the State Party's Obligation to Respect

- Refrain from supporting business activities which fail to respect internationally-recognized human rights standards, including the human rights of indigenous peoples, whether through direct government support, through government contracting (particularly of private security companies), through development or reconstruction projects, or through measures taken in the context of the OPIC, ExIm, the World Bank Group or other inter-governmental institutions. Requirements to prevent support for business-related abuses should be binding and enforceable, and should assure effective and independently-verified policies and procedures to prevent human rights abuses. The U.S. should state clearly that it will cease from contracting with or supporting those companies with a history of violating human rights or domestic laws enacted to protect human rights.

Recommendations related to the State Party's Obligation to Protect

- Reverse executive branch positions protecting businesses from legal accountability for human rights abuses, such as positions that defendants should not be liable for aiding and abetting

violations of international law, that the political question doctrine can shield businesses from liability for their violations of fundamental international law norms, and that defendants may not be sued in the U.S. for human rights violations that occurred outside of U.S. Clarify, if and as necessary, that contracting with the U.S. does not provide businesses who abuse human rights with immunity from criminal or civil liability.

- Take immediate measures to investigate and where appropriate prosecute and punish any business entity and their personnel, such as private military contractors, for involvement and/or complicity in killings, torture, and cruel, inhuman or degrading treatment or punishment, genocide, or war crimes.
- Take appropriate legislative, regulatory and/or policy measures to prevent the acts of transnational businesses under U.S. jurisdiction which negatively impact human rights, including the rights of indigenous peoples and economic, social and cultural rights. This should entail additional legislative or regulatory measures to make human rights abuses by businesses punishable under U.S. law regardless of where the incident occurs and what type of private enterprise it is.
    - Ensure that companies conduct adequate human rights due diligence. Regular, effective and independently-monitored reporting of information bearing on risks of human rights abuses by U.S.-registered companies must be required under law. The DOJ in this context should work collaboratively with other government agencies to enforce these provisions.
    - Incorporate business-related human rights abuses into its annual human rights reporting by the State Department.
    - Enact legislation to ensure that businesses, especially extractive industries, do not contribute to human rights abuses and promote transparency, such as through the Energy Security through Transparency Act and the Congo Conflict Minerals Act.
- Cease the outsourcing of government functions related to security, particularly in light of the gaps in accountability. As a first step, Congress is encouraged to adopt the Stop Outsourcing Security Act.
- Restructure and reform the U.S. NCP and the OECD Guidelines so that they clearly reflect human rights principles, laws and norms (as expressed more fully in the U.S. UPR submission by Accountability Counsel).
- Take steps to bolster the implementation of the Voluntary Principles on Security and Human Rights, including developing a mechanism for accepting complaints for violations of the Voluntary Principles from affected communities, requiring that members publically report on their implementation of the Voluntary Principles, and consulting with affected communities to gauge the effectiveness of such implementation. Ensure and where required provide the necessary resources for those government agencies responsible for preventing business complicity and negative impacts on human rights abuses worldwide to ensure they carry out their mandates effectively.
- Reform antiquated laws, such as the General Mining Act of 1872, which place private mining on public lands at a higher priority than any other concern.

Recommendations related to the State Party's Obligation to Provide Effective Remedy

- Ensure that victims of human rights violations involving business enterprises are able to exercise their right and access to effective remedy by supplementing or clarifying certain aspects of the current legislative framework and adopting policies that assist victims in accessing available judicial remedies. This accountability framework could be strengthened by providing greater support (technical, logistical, financial, and psychological) for victims in

exercising their right to remedy. This could include provision of a financial support fund for juridical costs of foreign victims of businesses under U.S. jurisdiction.

- Take appropriate adjudicative measures to prevent the acts of businesses under U.S. jurisdiction which negatively impact on the enjoyment of human rights, including the rights of indigenous peoples and economic, social and cultural rights.
- Ensure that measures taken by other countries to hold businesses and their personnel accountable for human rights abuses are respected in the United States, including the enforcement of judgments, the appearance of businesses before foreign courts, and the extradition of individuals to face prosecution. Where courts have jurisdiction over a case, they should guarantee the existence of an effective remedy by refraining from dismissing the case under *forum non conveniens* and other doctrines if those affected by business-related human rights abuses by state and non-state actors cannot access effective remedies in a third-party State.

Recommendations related to the International Framework on Business and Human Rights

- Affirm and operationalize the normative primacy and centrality of human rights law, and commit to giving human rights considerations priority in formulation of economic and antiterrorism policies.
- Articulate a clear position that, pursuant to international law, business actors bear certain human rights responsibilities wherever they are active, including legal responsibilities for their direct participation and complicity in abetting or otherwise contributing to violations of internationally-recognized human rights. Clarify that the U.S.—through its executive, legislative, administrative, adjudicative and/or policy tools—will hold companies accountable to these responsibilities.
- Commit to developing a stronger, clearer and more efficient regulatory framework and accountability infrastructure at the international level, as is necessary to ensure the positive duty to respect human rights is fully enforceable on companies and their directors in all their activities.

ADDENDUM

A. Scope and Nature of International U.S. Obligations vis-à-vis Business Actors under its Jurisdiction

The United States' obligations to respect, protect and provide effective remedy for human rights in the context of business activities arise from the United Nations Charter, the human rights treaties it has ratified, as well as applicable international humanitarian law and customary international law.

The duty to **respect** under international human rights law requires the State party to refrain from being involved in human rights violations. This duty to respect in the context of business activity requires that the State party prevent any of its institutions, departments or agencies from becoming complicit in or otherwise responsible for human rights violations in their relationships with business enterprises, at the behest of private interests, or to facilitate business activity. The State party may also violate its respect-bound obligations when enabling and/or effectively controlling a company or certain private activities—through the use of public agencies or public funds, for example—whose acts and omissions can be attributable to the State through general rules of State responsibility. These are in essence public organs, and can be treated as such under customary international law when analyzing their obligations, and bringing claims against them.[50]

In addition, the United States has the duty to **protect** against human rights abuses by third parties within their jurisdiction—be they business, banks, commodity traders, or any other non-state actors. The duty to protect implies that the State party must put in place measures and institutions to prevent business-related abuses, provide **effective remedies** for those harmed, and hold those responsible to account. Treaty bodies have generally affirmed the right to a remedy for all types of human rights' violations irrespective of who has committed the act.[51] Protection measures can be judicial, legislative or administrative in nature, and include duties to investigate, monitor, and regulate business, adjudicate when necessary as well as facilitate compensation for victims. Failure to act to protect against third party abuse equates to a violation under international human rights law.

While the primary responsibility to protect human rights rests with the State party in which the company operates, the duty to protect against abuse by business actors also implies an **extraterritorial dimension** in cases where the actions, decisions or failures of companies under the US' domestic or extraterritorial jurisdiction lead to human rights abuses in other countries. The extraterritorial nature of the duty to protect also finds a strong legal basis in the United Nations Charter, several well-respected and established jurisdictional bases under international law[52] and has been acknowledged by various UN treaty monitoring bodies.[53] Furthermore, the extension of extraterritorial jurisdiction is already quite developed in practice, in such areas as crimes under international law, financing of terrorism, corruption and bribery, human trafficking, sex tourism, and other human rights concerns. The failure to take adequate and reasonable measures— judicial, legislative or administrative—to prevent decisions and actions taken within the state's jurisdiction from impinging on the human rights of people outside the state's territory

may, in some cases, represent a breach of the State party's international legal obligations. Relatedly, the States party's duties to prevent and protect against human rights abuses of private actors remain operative when the State acts within inter-governmental institutions, such as the World Bank Group, which fund private sector projects which risk impinging on the realization of human rights.

B. Information on the Corporate Accountability Working Group Coalition

The submitting Corporate Accountability Working Group coalition was formed in 2004 to advocate for national and international corporate accountability for human rights abuses. The following organizations are herein submitting this report as a key input to the UN Office of the High Commissioner for Human Rights and the Human Rights Council as part of the basis of review of the United States under the Universal Period Review process in November, 2010.

Center for Constitutional Rights
The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has litigated several significant international human rights cases under the Alien Tort Statute (ATS), including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). It has represented victims of egregious human rights violations involving the direct participation or complicity of transnational business actors in case brought under the ATS, including *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88 (2d Cir. 2000); *Doe I v. Unocal Co*., 395 F.3d 932 (9th Cir. 2002); *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007); *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. Sept. 11, 2009); *In Re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009). CCR has also been involved in non-litigation corporate accountability advocacy.

EarthRights International
EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of earth rights. ERI specializes in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment. ERI's legal program seeks to apply domestic and international law to hold corporations and others accountable for their actions, often using the Alien Tort Statute, which allows lawsuits in federal courts for violations of international law. ERI has represented the

plaintiffs in lawsuits including *Doe v. Unocal*, *Wiwa v. Royal Dutch Petroleum*, *Bowoto v. Chevron*, and *Maynas Carijano v. Occidental*, among others.

Western Shoshone Defense Project

The Western Shoshone Defense Project (WSDP) is a non-profit indigenous organization formed in 1992. It is an affiliate of the Seventh Generation Fund for Indian Development. The WSDP's mission statement is to affirm Newe (Western Shoshone) decision-making within Newe Sogobia (Western Shoshone homelands) by protecting, preserving, and restoring Newe rights and lands for present and future generations based on cultural and spiritual traditions. The WSDP is guided by a Western Shoshone advisory board and executive director, Carrie Dann. Working to protect Western Shoshone homelands, the WSDP is engaged in one of the longest standing indigenous rights struggles in the U.S. The land base is one of the largest gold producing areas in the world wherein the 1872 Mining Law allows virtually unrestricted mining despite ongoing protests of the local Shoshone people. Hand in hand with the mining impacts are threats by ongoing military testing, nuclear waste storage and extractive industries expansion. The WSDP works with ally organizations and networks to ensure that such actions are monitored and where necessary, appropriate action taken to stop activities that will harm the land, air or water. The work is accomplished through domestic litigation, ongoing international legal work, corporate engagement strategies and direct action. The WSDP draws upon numerous networks, volunteer legal assistance and thousands of volunteer supporters to accomplish its mission statement.

Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net)

ESCR-Net—an ECOSOC-accredited non-governmental organization—is a global collaborative initiative serving organizations and activists from around the world working to secure economic and social justice through human rights. Its Corporate Accountability Working Group advocates for national and international corporate accountability for human rights abuses, involving support for international human rights standards for business. Throughout, the Working Group seeks to strengthen the voice of communities and grassroots groups who are challenging company abuses of human rights by documenting and highlighting particular cases, and by facilitating broad-based participation in United Nations and other international consultations. The Working Group also seeks to build the capacity of its participants by creating space for the exchange of information and strategies, connecting groups to one another, and providing resources for advocacy.

Endnotes

[1] For a summary of the United States' international obligations to respect, protect and provide effective remedy vis-à-vis the activities of business actors within its jurisdiction, see Addendum A. The primarily transnational focus of this report should not be understood to ignore or in any way discount the serious examples of domestic business-related abuses, such as discriminatory treatment in the workplace, or adverse impacts of business in healthcare, housing and the election system.

[2] See *Protect, Respect and Remedy: A Framework for Business and Human Rights,* A/HRC/8/5, 7 April 2008.

[3] See H.R. Consolidated Appropriations Act, 2010, H.R. 3288, 6 Jan 2009, stating that "the President of the Overseas Private Investment Corporation is hereby authorized and directed to issue, not later than 9 months after the date of enactment of this Act, a comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation…", available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf (p. 363)

[4] See Senate Judiciary Committee, Sub-Committee Human Rights and the Law, "Extracting Natural Resources: Corporate Responsibility and the Rule of Law," September 24, 2008, available at http://judiciary.senate.gov/hearings/hearing.cfm?id=3572

[5] For a discussion on Executive submission in human rights cases against corporate defendants, see B. Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 Brooklyn J. Int'l L. 773 (2008).

[6] See, e.g., *Mujica v. Occidental Petroleum Corp.,* 381 F. Supp. 2d 1134 (C.D. Cal. 2005).

[7] See, e.g., *Doe v. Exxon Mobil Corp.*; *Mujica v. Occidental Petroleum Corp.; Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007).

[8] See *Mohamed v. Jeppessen Dataplan, Inc*., 579 F.3d 943 (9th Cir. 2009), *rehearing en banc granted*.

[9] See, e.g., Amicus Brief filed by the United States in *Corrie v. Caterpillar*, available at http://ccrjustice.org/files/us_amicus_brief-AS-FILED.pdf.

[10] See, e.g., *Khulumani v. Barclay National Bank, Ltd*., 504 F.3d 254 (2d Cir. 2007).

[11] Notably, the UN Special Representative of the Secretary General on Business and Human Rights has found, after conducting a comprehensive study of the legal regimes in a number of countries, that complicity, including aiding and abetting, is an appropriate means for defining corporate liability. He has further clarified that the *mens rea* for aiding and abetting is knowledge, and the *actus reus* is providing practical assistance that has a substantial effect on the commission of the violation.

[12] For more information on this case and for the case filings, see: http://www.ccrjustice.org/ourcases/current-cases/corrie-et-al.-v.-caterpillar.

[13] See 503 F.3d 974 (9th Cir. 2007).

[14] See (1) International Covenant on Civil and Political Rights Report 2006, CCPR/C/USA/CO/3/Rev.1; and (2) Committee Against Torture Report 2006 CAT/C/USA/CO/2.

[15] See UN News Center, "US must ensure that private contractors do not infringe rights – UN experts," (3 Aug. 2009), available at http://www.un.org/apps/news/story.asp?NewsID=31667&Cr=human+rights&Cr1=experts.

[16] See Press Statement, Philip Alston, Special Rapporteur on extrajudicial, summary and arbitrary executions, visit to USA, (30 June 2008), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8815&LangID=E.

[17] See CERD Report 2008, CERD/C/USA/CO/6, para. 28, p. 9.

[18] See (1) *Id.*, para. 30, p. 10; (2) and CERD Urgent Action Procedure 2006, CERD/C/USA/DEC/1.

[19] See IACHR, Final Report 75/02, Case No. 11.140 and CERD Decision 1 (68).

[20] See Mission to the United States of America (30 April-18 May 2007), A/HRC/7/12/Add.2.

[21] See (1) International Labor Rights Forum (ILRF), *Firestone Rubber & Latex Company: Prospering from Child Labor and Enslavement in Liberia*, Jamie Menutis (4 Dec. 2007) available at http://www.laborrights.org/stop-child-labor/stop-firestone/news/11244 (Liberians file class action suit under ATS against Firestone claiming forced child labor); (2) Germanwatch, Coalition against Bayer Dangers and Global March against Child Labour, *Organisation for Economic Cooperation and Development (OECD) Complaint Against Bayer because of Child Labour in India, Current Investigation: Children die due to poisoning by pesticides at Cotton Seed farms in India* (11 Oct. 2004) http://www.germanwatch.org/presse/2004-10-11e.htm (Emergent Genetics and Monsanto allegedly responsible for child labor in Indian cottonseed farms); and (3) Human Rights Watch (HRW), *Turning a Blind Eye: Hazardous*

United States of America

Submission to the United Nations
Universal Periodic Review

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Report on the United States' Compliance with Its Human Rights Obligations In the Area of Women's Reproductive and Sexual Health

Jointly Submitted by:

Center for Reproductive Rights

SisterSong Women of Color Reproductive Justice Collective

Rebecca Project for Human Rights

Law Students for Reproductive Justice

National Asian Pacific American Women's Forum

National Abortion Federation

Women On the Rise Telling HerStory

Endorsed by: Asian Communities for Reproductive Justice**;** Human Rights Caucus, Northeastern Law School**;** Justice Now**;** Metro Atlanta Task Force for the Homeless**;** National Advocates for Pregnant Women**;** National Network of Abortion Funds**;** Physicians for Reproductive Choice and Health**;** Public Interest Projects**;** Risa Kaufman, Executive Director of the Human Rights Institute at Columbia Law School*; The Woodhull Freedom Foundation**;** Three Treaties Task Force of the Social Justice Center of Marin**;** U.S. Positive Women's Network**;** Ute Ritz-Deutch, Ph.D.**;** Women Organized to Respond to Life-threatening Disease.

* Organization named for identification purposes only.

A. EXECUTIVE SUMMARY

1. A woman's right to make fundamental decisions about her life and her family, her right to access reproductive health services and her ability to decide when and whether to have children are based on a number of fundamental human rights. Among others, these rights include life, health, dignity, equality, self-determination, information, education, privacy and freedom from cruel, inhuman and degrading treatment. This report focuses on three areas of reproductive rights that treaty monitoring bodies have identified as issues of human rights concern: (1) pervasive racial disparities in reproductive and sexual health; (2) obstacles to women's access to safe, legal abortion; and (3) the practice of shackling incarcerated pregnant women. The report uses the framework set out in the General Guidelines for the Preparation of Information under the Universal Periodic Review: Section B provides an overview of the legal and policy framework, Section C details the parameters of the human rights problems, and Section D provides recommendations of concrete steps the U.S. should take to respect, protect and fulfill reproductive rights on a basis of equality.

B. FRAMEWORK FOR PROMOTION AND PROTECTION OF HUMAN RIGHTS

2. Women's access to comprehensive sexual and reproductive healthcare in the United States is neither uniform nor guaranteed. The federal Constitution does not explicitly protect the right to health and, as a result, healthcare is available through a patchwork of private and public coverage that leaves many without adequate access to care.

3. The majority of people in the U.S. rely on employer-based insurance for their healthcare.[1] Many of those without employer-based insurance receive coverage through government programs, if they meet eligibility requirements; others either purchase an individual plan or go without coverage entirely. New healthcare reform legislation promises to extend coverage to more people, but has serious limitations in the areas of sexual and reproductive health. People of color in the U.S. are more likely than the majority white population to lack private health insurance, to rely on government programs for health coverage, and to go without coverage.[2] Women of color are far more likely than white women to lack affordable healthcare through either private health insurance or a government healthcare program: 30 percent of Latinas, 19 percent of Asian/Pacific Islander women, and 18 percent of African American women lack affordable healthcare, as compared to 10 percent of white women.[3]

4. Medicaid is the government health coverage program that provides the largest source of funding for medical and health-related services for low-income and indigent people in the U.S., providing coverage for nearly 45 million people.[4] It is also the primary source of sexual and reproductive healthcare coverage for low-income women. Roughly 12 percent of all women of reproductive age in the U.S.—and 37 percent of women of reproductive age in low-income families—rely on Medicaid for their healthcare coverage.[5] As compared to white women, Latinas are twice as likely, and African American women nearly three times as likely, to rely on Medicaid coverage for their healthcare.[6]

5. Safe, legal abortion is an integral part of reproductive healthcare and an essential component of reproductive rights. Human rights bodies have recognized that where abortion is legal, women must have meaningful access to the procedure.[7] In the U.S., the constitutional right to abortion was recognized in the Supreme Court's 1973 *Roe v. Wade* decision.[8] Since then,

however, the Court's rulings have accommodated an increasing number of restrictions that impede women's access to abortion services.[9] As a result, dozens of state laws now restrict women's access to abortion in ways that had been previously struck down as unconstitutional. These laws often bear no relationship to medical evidence about the safety of the abortion procedure or about patient care; they are meant to make abortion more difficult to obtain. In addition, the persistent intimidation and harassment of abortion providers without effective law enforcement response has created a shortage of services that further jeopardizes women's ability to access abortion. Federal restrictions on the use of federal and private funds for abortion coverage create additional obstacles.

6. As of December 31, 2008, 114,852 women were incarcerated in federal and state prisons,[10] 85 percent for non-violent crimes.[11] The vast majority of incarcerated women are held in state custody; about ten percent are in federal custody.[12]

7. Women of color are imprisoned at alarmingly disproportionate rates. The U.S. government estimates that seven times as many African American women—and three times as many Hispanic women—as white women will be incarcerated at some point in their lifetime. And while African American women constitute only 13 percent of all women in the U.S, they represent nearly 50 percent of incarcerated women. [13]

8. Nationally, an estimated six to ten percent of incarcerated women are pregnant.[14] Prison facilities have generally failed to adequately address the unique health needs of pregnant women, including prenatal and postnatal care and proper nutrition.[15] Pregnant women incarcerated in state facilities are frequently shackled while traveling to and from medical appointments and during childbirth, jeopardizing their health and unjustifiably subjecting them to a cruel, inhuman and degrading practice.

C. IMPLEMENTATION AND EFFICIENCY OF HUMAN RIGHTS FRAMEWORK

1. Persistent Racial Disparities in Reproductive and Sexual Health

9. Women of color fare worse than white women in every aspect of reproductive health, with disparities particularly pronounced in three areas: maternal mortality, sexually transmissible infections (STIs), and unintended pregnancies. In 2008, the Committee on the Elimination of Racial Discrimination recognized these pervasive racial disparities in women's sexual and reproductive health as a human rights concern and called on the U.S. to improve women's access to reproductive and sexual healthcare, including contraception and sexuality education.[16] Although the causes of racial disparities are complex and systemic, and long-term interventions are likely needed to eradicate them, the U.S. can—and should—modify its policies to improve access to reproductive and sexual healthcare in the short term. Continued failure to address these disparities threatens the human rights of women of color.

10. Today, and for the last fifty years, African American women die in pregnancy or childbirth at three to four times the rate of white women.[17] No single factor fully explains this racial disparity in maternal mortality, but the Centers for Disease Control and Prevention have recognized that access to prenatal care can reduce maternal mortality and other negative pregnancy outcomes.[18] Most pregnancy-related deaths occur after a live birth, and women who do not receive prenatal care are three to four times more likely to die after a live birth than women who attend even one prenatal appointment.[19]

11. The U.S. government could improve access to prenatal care by eliminating two discriminatory policies that preclude low-income women, who are overwhelmingly likely to be women of color,[20] from enrolling in Medicaid. First, the U.S. government should repeal the policy that bars immigrants who have resided in the U.S. for less than five years from Medicaid enrollment. Since this policy went into effect, Medicaid enrollment has declined by half among immigrant women, including those who did not fall within the scope of the bar. Second, the U.S. government should rescind the policy that requires Medicaid applicants to produce proof of U.S. citizenship or legal immigrant status. Low-income individuals often lack a passport or a birth certificate, and the cost of procuring those documents can be prohibitive. This policy delays women from getting Medicaid coverage for time-sensitive services like prenatal care and has caused a significant decline in the Medicaid enrollment rate, especially for poor African American citizens.

12. Disparities in access to reproductive and sexual healthcare and to medically accurate sex education are paralleled by persistent racial disparities in every major reportable STI and in rates of unintended pregnancy. Nearly all minority groups contract STIs at much higher rates than the majority white population. Together, African American women and Latinas account for 80% of reported female HIV/AIDS diagnoses, even though they represent only 25% of the U.S. female population. [21] And while women of color are much more likely to die of cervical cancer than are white women, with the exception of African American women, they are less likely to receive regular Pap smears, a crucial screening mechanism.[22]

13. Although the overall rate of unintended pregnancy has declined over the last fifteen years, it has remained consistently high among poor women of color. As at least one human rights body has recognized, the cost of contraception and the lack of medical insurance coverage can be barriers for low-income women seeking to avoid pregnancy.[23] Since 2002, rates of contraception use have declined due to nonuse among low-income women of color.[24] Low-income Latinas are nearly twice as likely as low-income white women to have an unintended pregnancy. Almost half of all unintended pregnancies in the U.S. end in abortion; African American women, who are three times as likely as white women to experience an unintended pregnancy, are also three times as likely as white women to obtain abortion services.[25]

14. Improving access to Medicaid is an important way to increase access to prevention, testing and treatment for STIs and to contraception. In addition, the U.S. government could increase funding for Title X, a federal program that provides funding to clinics that offer those reproductive healthcare services. The program serves 6.6 million low-income women, 40% of whom are women of color. However, the federal government consistently fails to fund Title X at the level necessary to meet the reproductive healthcare needs of its target population. Taking inflation into account, funding for Title X in constant dollars is actually 62% *lower* today than it was in 1980.[26] The need for services has increased, and the challenge of meeting a rising demand for services with less government funding has forced more than half of clinics to make cutbacks in staffing and/or services offered.[27]

15. The U.S. government could also address racial disparities in STIs and unintended pregnancy rates by improving access to comprehensive and scientifically accurate sex education. Beginning in 1981, the federal government poured hundreds of millions of dollars each year into programs teaching that abstinence until marriage is the only acceptable form of sexuality. These programs—whose efficacy at delaying sexual activity has been debunked—exclude any discussion of contraception, except to emphasize failure rates, and many include

content with negative stereotypes about women, people of color, and LGBT people. The Obama administration took an important step away from these programs by defunding them in the fiscal year 2010 budget. However, the new healthcare reform bill contains $250 million over the next five years in further funding for these programs.

2. Limitations on Women's Access To Abortion

16. Abortion has been legal in the U.S. for almost forty years, but many women face significant challenges in obtaining the procedure. There are three key obstacles that women face. Pervasive attacks on the doctors and healthcare workers who provide abortions have significantly decreased the availability of abortion services, to the detriment of women's ability to exercise their reproductive rights. Medically unnecessary requirements imposed on providers and patients make care more costly to provide and more difficult to obtain. Access is further undermined by discriminatory policies which single out and exclude abortion care from Medicaid coverage and in the newly created health insurance exchanges.

a. Attacks on Abortion Providers

17. Abortion providers ensure women's access to reproductive health services and enable them to exercise their human rights. Their crucial work often exposes abortion providers to threats, violence and harassment, jeopardizing their safety and violating their human rights. The National Abortion Federation compiled reports of 16 death threats, 9 incidents of assault and battery, 144 incidents of trespassing or vandalism, and 1,699 incidents of harassing phone calls or hate mail directed against abortion providers in 2009.[28]

18. On May 31, 2009, Dr. George Tiller was murdered in his church in Wichita, Kansas. Dr. Tiller was one of the small number of physicians who provide abortions, and one of the even smaller number who provide abortions late in pregnancy. For years, he was subjected to harassment and intimidation and violent attacks including a shooting in 1993. The man who murdered him stated that he did so because Dr. Tiller was an abortion provider.

19. In a 2009 fact-finding report, CRR documented the ongoing intimidation and harassment of abortion providers throughout the U.S.[29] One clinic staff member remarked, "anyone could walk in anytime off the street. . . . It wears on you, being cautious all the time, looking to see if someone is following you." To protect physicians and clinic staff, many clinics employ full time security managers and armed guards or install surveillance cameras and metal detectors. Abortion providers are not only targeted at clinics, but also at their homes. One doctor, in Pennsylvania, has been targeted at home for the past ten years; protestors have followed him each time he has moved. Another doctor stopped providing abortions after dead animals were left on her doorstep and her house broken into.[30]

20. Federal and state laws provide some protection to abortion providers and clinic access, but their efficacy is limited by lax enforcement. The federal Freedom of Access to Clinic Entrances Act of 1994 protects both providers and recipients of reproductive healthcare services from violent, obstructionist, or damaging conduct, including threats, harassment, assault, trespass and vandalism. State and local laws regulating the time, place and manner of protests, such as permit and noise ordinances, may also help individual clinics. In particular, providers have reported that laws creating "buffer zones"—delineated areas around a health facility and/or individuals entering or leaving it in which anti-abortion activity is restricted—can decrease the level, aggression, and effects of anti-abortion activity.

But police often misunderstand these laws or refuse to enforce them. For example, when the entrances to a clinic in Pennsylvania were completely obstructed by a hundred protestors in 2007, police responded not by dispersing the protestors and clearing the entrances but rather by locking patients and staff in and out of the clinic for three hours, disrupting patient care. [31]

21. The extreme toll taken by routine intimidation and harassment is a significant factor in the scarcity of abortion providers, which harms patients. Mississippi and North Dakota have only a single clinic each, and many of their patients must travel four or five hours to reach them. Elsewhere, providers are clustered together, often in urban areas. Only a limited number of physicians provide abortions, and some travel hundreds of miles to provide care at multiple clinics. The shortage of providers increases the difficulty women—especially poor and rural women—experience in trying to access abortion. Many abortion clinics do not provide abortions past the first trimester of pregnancy, so women seeking abortions later in pregnancy must travel even farther.[32]

b. Discriminatory Legal Restrictions

22. In many states, legislatures and regulatory bodies have singled out abortion providers and patients for onerous and medically unnecessary regulation in order to obstruct the provision of services. Such restrictions harm providers and patients in several ways; among other things, they increase the cost of providing and accessing services to a point that is nearly impossible for some providers and/or patients to bear.

23. One ubiquitous form of medically unjustified over-regulation is a requirement that before a woman can obtain an abortion, she must receive biased and sometimes inaccurate state-mandated information in the form of a lecture and written materials. The information is overtly designed to dissuade women from obtaining an abortion and is often inappropriate for a woman's circumstances. These requirements bear no relationship to the patient-driven and patient-centered information and counseling that already occurs, in accordance with medical ethics, as part of the informed consent process. These laws violate the free speech rights of doctors and patients and the right of patients to receive accurate information that allows them to protect their health. Some states require that a woman wait a certain amount of time, often 24 hours, after receiving the state-mandated lecture and materials before she may obtain an abortion. These laws force women to delay abortions without medical justification and, in some cases, even though the delay is detrimental to a woman's health. In their most burdensome form, these laws require women to travel twice to the clinic to first hear the lecture in person and then obtain the abortion. Clinic and provider schedules, as well as the patient's logistical hurdles, can often result in delays of a week or longer.[33] Women who have few financial resources, are geographically isolated from providers, need to protect against the risk of disclosure or have later pregnancies are most at risk of being harmed by these mandatory delays.

c. Restrictions On The Use Of Public And Private Funds

24. Women who rely on government health insurance programs, like Medicaid, are further impeded in accessing abortion by restrictions on the use of federal funds for abortions, except where a woman's pregnancy results from rape or incest or endangers her life. The Hyde Amendment, which restricts the use of Medicaid funds for abortion, leaves low-income women without coverage for abortions even when necessary to preserve their health.[34] It discriminates against women, because abortion is the only medically necessary service that is

excluded from Medicaid coverage and is a service that only women need. Although a 1980 Supreme Court decision held that the Hyde Amendment did not violate the federal Constitution,[35] courts in thirteen states have held that comparable restrictions on state funds violate women's equality and/or privacy rights, interfering with women's ability to exercise their constitutional right to abortion and to protect their right to health. In those states, and four others, state funding is available for medically necessary abortions.

25. Funding restrictions place an additional obstacle in the path of low-income women who seek abortion. The costs of arranging for an abortion—including transportation, child care and loss of wages—are significant for low-income women, and can be prohibitive even if funding assistance can be secured. Delaying an abortion to raise the necessary funds can result in later procedures, potentially increasing the risk to a woman's health, loss of income, and costs of the procedure and additional travel and child care. For low-income women, who are already vulnerable to rights violations, the Hyde Amendment makes it logistically and financially harder to obtain an abortion and can result in complete obstruction.[36]

26. Troublingly, although recently-enacted healthcare reform legislation increases opportunities for health insurance coverage, that law and its accompanying Executive Order have also created new restrictions on insurance for abortions. Healthcare insurance plans on government insurance exchanges that provide coverage for abortion are required to have enrollees opt into coverage—using a separate payment—at enrollment. State governments also have the option of excluding abortion coverage from insurance policies purchased through the exchanges. This runs contrary to the market mechanisms and general practices of insurance, in which coverage extends to a set of health conditions regardless of whether a policyholder needs those services. The distinction stigmatizes and burdens the choice of a plan that provides abortion coverage. And, for the first time, federal law restricts the scope of coverage in the private insurance market, in a way that interferes with women's rights to choose abortion and protect their health.[37]

3. Shackling Incarcerated Pregnant Women

27. The use of shackles to restrain pregnant women during the birthing process is a cruel, inhuman and degrading practice that needlessly inflicts excruciating pain and humiliation. The Committee Against Torture has expressed concern regarding the treatment of detained women in U.S. prisons and jails.[38] Similarly, the Human Rights Committee expressed concern about the persistence of shackling pregnant prisoners in childbirth and urged the United States to prohibit the practice.[39] After visiting prisons in six states in 1998, the Special Rapporteur on Violence Against Women concluded that the use of restraints on pregnant women in the manner employed by prison officials violates international standards and "may be said to constitute cruel and unusual practices."[40]

28. Yet pregnant women incarcerated in prisons and jails in the U. S. are routinely restrained by their ankles and/or wrists when transported for medical care. Shackles are also used on pregnant women detained because of their immigration status.[41] Incarcerated pregnant women often remain shackled during labor, delivery, and the post-delivery recovery period for hours, or even days, despite the constant presence of armed guards.

29. Only seven states have enacted legislation restricting the use of shackles during labor and delivery.[42] And while several other states have policies prohibiting the practice, the absence of a statutory prohibition leaves officials free to change their policies. Lawyers, journalists

and human rights advocates continue to gather evidence that the use of restraints on incarcerated pregnant women during labor and delivery remains standard, even in states where the practice is prohibited.[43]

30. In addition to being punitive and traumatizing, shackling pregnant women can create health risks.[44] Two leading professional organizations have condemned the use of shackles on pregnant women during labor and delivery because of the negative effects on women's physical and psychological health and wellbeing.[45] Shackling a woman during transport increases the risk of falling and restraints prevent her from protecting herself by breaking her fall. Shackling women during childbirth hampers physiological management of labor, which slows labor, intensifies pain and causes undue physical stress on both mother and baby. Restraints also impede repositioning or surgical access in the event of an emergency. Finally, leg shackles inhibit a woman's recovery, as many experts recommend walking to rehabilitate muscles.

D. RECOMMENDATIONS FOR ACTION

31. The U.S. government should take concrete steps to address racial disparities in reproductive and sexual health, including the following: (a) Eliminate barriers to Medicaid coverage that disproportionately affect women of color, including the five-year bar for recent immigrants and the citizenship documentation requirements; (b) Increase Title X funding to meet the reproductive and sexual healthcare needs of its target population, including funding for measures that would increase accessibility of care, such as cultural and linguistic interpreters; (c) Integrate and co-locate reproductive and HIV/AIDS healthcare services to reduce the barriers to care and information faced by HIV-positive women; (d) Identify gaps in the data, particularly ethnically disaggregated data, and fund research into disparities in reproductive and sexual health access and outcomes in order to design and implement evidence-based programs to reduce these inequities; and (e) Secure funding for medically accurate, age-appropriate, comprehensive sexuality education at a level sufficient to ensure that children receive such education throughout the country.

32. The federal government should publicly condemn intimidation, harassment and physical attacks directed at healthcare providers who ensure access to fundamental human rights. The government should also take action to prevent such attacks, to protect healthcare professionals against such attacks, and to prosecute those who perpetrate attacks. The Declaration on Human Rights Defenders, adopted by the U.N. General Assembly in 1999 with the full support of the U.S., recognizes the central role played by those who promote the realization of human rights and sets out the special obligation of governments to protect them.[46] And U.N. expert reports have recognized that healthcare providers are entitled to special protection as human rights defenders where they fulfill their professional duties in a way that promotes human rights, such as the right to health.[47] The federal government should protect and expand women's access to abortion in several ways, including: (a) The Department of Justice (DOJ) should devote additional resources to provide training for and improve cooperation between federal, state, and local law enforcement agencies in responding to violence and threats of violence directed at abortion providers; (b) The DOJ should devote additional resources to enforcing the Freedom of Access to Clinic Entrances Act and related federal statutes; and (c) Repeal federal restrictions on the use of public funds for abortion, including the Hyde Amendment, and repeal federal restrictions on the use of

private funds for abortion coverage contained in the new healthcare reform legislation and accompanying Executive Order.

33. The federal government should take concrete steps to end the practice of shackling pregnant incarcerated women, including the following: (a) The White House should publicly condemn the practice of shackling pregnant incarcerated women during childbirth as a violation of women's human rights; (b) The Bureau of Prisons should ensure that jails, privately operated facilities, and/or community corrections centers with which it contracts comply with the Bureau of Prisons policy prohibiting shackling incarcerated pregnant women during childbirth; (c) As the Bureau of Prisons did in 2008, Immigrations and Customs Enforcement should prohibit the practice of shackling pregnant women held in immigration detention during childbirth; (d) The Attorney General of the United States and DOJ Justice should investigate all complaints that pregnant incarcerated women are shackled in violation of their constitutional and civil rights, and should use all available mechanisms to ensure that states eliminate the practice.

34. The U.S. government should ratify, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women.

35. President Obama took an important step toward ensuring women's sexual and reproductive health by rescinding the Global Gag Rule, which prevented foreign recipients of U.S. Agency for International Development funds from advocating for access to abortion. The federal government should mitigate the harms caused by the Global Gag Rule in several ways, including the following: (a) Continue to disseminate information that the Global Gag Rule has been rescinded; (b) Support efforts to strengthen information exchange, capacity building, and technical capacity necessary to implement the repeal of the Global Gag Rule; (c) Increase funding to strengthen local capacity to provide reproductive health services and information to women, and to advocate for reproductive rights, including the right to safe abortion; (d) Pass the Global Democracy Promotion Act or similar legislation to prohibit the imposition of restrictions on foreign organizations that it would be unconstitutional to impose on U.S. organizations; (e) Ensure that U.S. funding of foreign human rights institutions is consistent with the State Department commitments to promote and protect women's reproductive rights; and (f) Establish clear guidelines and oversight mechanisms to ensure that institutions receiving U.S. funding are not undermining or challenging these rights.

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[1] U.S. CENSUS BUREAU, INCOME, POVERTY, & HEALTH INSURANCE COVERAGE IN THE U. S.: 2008 23 (2009).
[2] Kaiser Family Foundation, *Issue Brief: The Role of Health Coverage for Communities of Color* 2 (Nov. 2009); *see also* Kaiser Family Foundation, *Race, Ethnicity & Health Care Fact Sheet* 2 (April 2008) (showing rates of uninsurance among non-elderly Asian Americans, Native Hawaiians and Pacific Islanders).
[3] NAT'L INST. OF HEALTH, WOMEN OF COLOR HEALTH DATA BOOK: ADOLESCENTS TO SENIORS 127 (2006). This report uses the term "white women" to refer to women who identify and are identified in the research cited in this report as non-Hispanic white women.
[4] Kaiser Family Found., *Medicaid Enrollment in the 50 States: December 2008* 1 (2010).
[5] Kaiser Family Found. & Guttmacher Inst., *Women's Issue Brief: Medicaid's Role in Family Planning* (Oct. 2007).
[6] Kaiser Family Found. *Key Facts: Race Ethnicity & Medical Care* 2 (Mar. 2004).
[7] *See, e.g.*, CENTER FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: ABORTION & HUMAN RIGHTS 5 & n.52 (2008) (citing multiple Concluding Observations from the Committee on the Elimination of All Forms of Discrimination Against Women where the Committee has urged states to provide safe abortion services or ensure access where abortion is permitted by law).
[8] *Roe v. Wade*, 410 U.S. 113 (1973).

[9] *See Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833 (1992) (replacing the highest level of judicial review, applied to restrictions of constitutional rights, with the determination that states may regulate abortion provision so long as the regulations do not place an "undue burden" in the path of women seeking abortions).
[10] BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PRISONERS IN 2008 (2009).
[11] BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS (1999).
[12] As of December 25, 2009, there were 13,625 women in federal custody. *See* Quick Facts About the Bureau of Prisons, http://www.bop.gov/news/quick.jsp#1 (last visited Jan. 19, 2010).
[13] U.S. Dep't of Justice, Nat'l Inst. Corrections, Gender-Responsive Strategies: Research Practice and Guiding Principles for Women Offenders 2-3 (2003).
[14] Jennifer G. Clarke et al., *Reproductive Healthcare and Family Planning Needs Among Incarcerated Women*, 96 AM. J. OF PUB. HEALTH 834, 834 (2006).
[15] *See generally* Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 487 (2009).
[16] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States*, 72d Sess., para. 33, U.N. Doc. CERD/C/USA/CO/6 (2008). The Human Rights Council and the Committee on the Status of Women have recognized that maternal mortality is an issue of human rights concern. *See* Preventable maternal mortality and morbidity and human rights, Hum. Rts. C. Res. U.N. Doc. A/HRC/11/L.16/Rev.1 (rev'd draft res. June 16, 2009); Eliminating preventable maternal mortality and morbidity through the empowerment of women, Comm. Status of Women Res., U.N. Doc. E/CN.6/2010/L.6 (advance unedited draft res. March 9, 2010).
[17] In 2006, the age-adjusted maternal mortality ratio was 32.7 maternal deaths per 100,000 live births for African American women, and 9.5 deaths for white women. Nat'l Ctr. for Health Stat., *Deaths: Final Data for 2006*, 57 NAT'L VITAL STAT. REP'T 13 (2009); Margaret Harper et al., *Why African American Women are at Greater Risk for Pregnancy-Related Death*, 17 ANN. EPIDEMIOLOGY 180 (2007); Nat'l Ctr. for Health Stat., *Maternal Mortality and Related Concepts*, 3 VITAL HEALTH STAT. 33 (Feb. 2007) (showing that since 1950, African American women have died in pregnancy or childbirth at a rate 3-5 times that of white women); Myra J. Tucker, et al., *The Black-White Disparity in Pregnancy-Related Mortality from 5 Conditions: Differences in Prevalence and Case-Fatality Rates*, 97 AM. J. PUB. HEALTH 247 (2007) (stating that "[f]or the past 5 decades, Black women have consistently experienced an almost 4 times greater risk of death from pregnancy complications than have White women.").
[18] Nat'l Ctr. for Health Stat., *Births: Final Data for 2004*, 55 NAT'L VITAL STAT. REP'T. 16 (Sept. 2006).
[19] Nat'l Ctr. for Health Stat., *Pregnancy-Related Mortality Surveillance—United States, 1991-1999*, 52 MMWR Surveillance Summary 1 (Feb. 2003).
[20] Women of color in the U.S. are significantly poorer than white women: 27% of African American women, 26% of Hispanic women, 21% of American Indian/ Alaskan Native women and 13% of Asian Pacific Islanders live in poverty, compared to 9% of white women. U.S. CENSUS BUREAU, INCOME, POVERTY, & HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006 18 (Aug. 2007).
[21] African American women are diagnosed with HIV, gonorrhea, chlamydia, and syphilis at rates from 8 to 26 times those of their white counterparts. Native American women are infected with HIV at a rate 4 times as high as their white counterparts, and with chlamydia at a rate 5 times as high. The rate of primary and secondary syphilis increased among all women in 2005, but jumped 37.5% among American Indian/ Alaska Native women and 18.2% among Asian/ Pacific Islander women, compared to 5.6% among non-Hispanic white women. CTRS. FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT, 2007 14, 17 (2009); CTRS. FOR DISEASE CONTROL, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2008 68-70 (Nov. 2009).
[22] CTRS. FOR DISEASE CONTROL, MINORITY WOMEN'S HEALTH: CERVICAL CANCER (2009); Akers, Newmann & Smith, *Factors Underlying Disparities in Cervical Cancer Incidence, Screening, and Treatment in the United States*, 31 CURRENT PROB. CANCER 157, 160-61 (2007).
[23] *See* CTR. FOR REPROD. RIGHTS, *supra* note 6, at 4 & nn.14-15 (collecting Concluding Observations from the Committee on the Elimination of All Forms of Discrimination Against Women).
[24] Nat'l Ctr. for Health Stat., *Fertility, Family Planning and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, 23 VITAL & HEALTH STAT. 101 (2005); *see also* Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 5 (2002).
[25] Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 3 (2008).
[26] Guttmacher Inst., *Title X Funding Chart*, Feb. 25, 2010 (memorandum on file with author).
[27] GUTTMACHER INST., A REAL-TIME LOOK AT THE IMPACT OF THE RECESSION ON PUBLICLY FUNDED FAMILY PLANNING CENTERS (2009).

[28] NATIONAL ABORTION FEDERATION, NAF VIOLENCE AND DISRUPTION STATISTICS (2009).
[29] CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT (2009).
[30] *Id.* at 74, 87-88.
[31] *Id.* at 85.
[32] *Id.* at 65, 91, 72, 56.
[33] *Id.* at 47.
[34] Similar restrictions obstruct access to abortion for women who rely on other federal health coverage programs, including women who use Indian Health Service, federal employees and their dependents, military personnel and their dependents, Peace Corps volunteers and women in federal prisons.
[35] *Harris v. McRae*, 448 U.S. 297 (1980).
[36] CTR. FOR REPROD. RIGHTS, REPORT ON THE IMPACT OF THE HYDE AMENDMENT ON POOR WOMEN SEEKING ABORTIONS (forthcoming 2010).
[37] Ctr. for Reprod. Rights, No Abortion Ban, http://reproductiverights.org/en/feature/no-abortion-ban-learn-more.
[38] *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 36th Sess., para. 33, U.N. Doc. CAT/C/USA/CO/2 (2006).
[39] *Concluding Observations of the Human Rights Committee: United States of America*, 87th Sess., para. 33, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006).
[40] *Report of the Mission to the United States of America on the Issue of Violence against Women in State and Federal Prisons*, 55th Sess., paras. 53–54, 55–63, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999).
[41] The policy of Immigration and Customs Enforcement allows security staff to use restraints on pregnant women with the consultation of a medical provider. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY, ICE/DRO DETENTION STANDARD, USE OF FORCE AND RESTRAINTS 6 (2008). *See generally* HUM. RTS. WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTHCARE IN UNITED STATES IMMIGRATION DETENTION (2009).
[42] California, Illinois, Vermont, New Mexico, Texas, New York and Washington have passed legislation limiting the use of restraints on incarcerated pregnant women. *See* Rebecca Project for Human Rights, *Shackling of Pregnant Women in Custody*; *see also* Act effective June 10, 2010, ch. 181, 2010 Wash. Sess. Laws.
[43] *See, e.g.*, Richard Winton, *Jail Care For Women Is Criticized: Sheriff's Department Monitor Says Some Prisoners Wait Months to Receive Requested Medical Care*, L.A. TIMES, July 12, 2008, at B3; Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006 at A16; Letter from WORTH, Women On The Rise Telling HerStory to N.Y. State Legislature, in Support of Anti-Shackling Legislation (May 20, 2009).
[44] *See* Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 678 (2008) (detailing health risks); Kendra Weatherhead, *Cruel But Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 450 (2003) (same).
[45] Letter from Ralph Hale, Executive Vice President, American College of Obstetricians and Gynecologists, to Malika Saada Saar, Executive Director, The Rebecca Project for Human Rights (June 12, 2007); AM. PUB. HEALTH ASS'N, TASK FORCE ON CORRECTIONAL HEALTHCARE STANDARDS, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 108 (2003).
[46] Declaration on Human Rights Defenders, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (1999).
[47] *See Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani*, 4th Sess. paras. 70-72, U.N. Doc. A/HRC/4/37 (2007) (reporting that since the establishment of her mandate, the Special Representative has sent 36 communications to countries in all regions concerning the right to health and has raised issues regarding threats to healthcare providers); *Report submitted by Ms. Hina Jilani, the special Representative of the Secretary-General on the Situation of Human Rights Defenders, pursuant to the Commission on Human Rights resolution 2000/61*, 59th Sess., Provisional agenda item no. 17(b) para. 50, U.N. Doc. E/CN.4/2003/104 (2003) (explaining that "human rights defenders in such capacities as medical personnel … make essential contributions to the achievement of [the Millennium Development] goals.").

Child Labor in El Salvador's Sugarcane Cultivation (Jun. 2004), available at http://www.hrw.org/reports/2004/elsalvador0604/elsalvador0604.pdf (Coca-coca allegedly uses sugar from an El Salvadorian mill supplied with sugarcane from child labor plantations).

[22] See EarthRights International (ERI), Supplemental Report: Forced Labor along the Yadana and Yetagun Pipelines, available at http://www.earthrights.org/files/Reports/supp.pdf (Unocal allegedly responsible for forced labor conscripted by military units in Burma pipeline projects).

[23] See (1) Human Rights First, *Private Security Contractors at War, Ending the Culture of Impunity* (2008), available at http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf (Private security contractors are not held criminally responsible by the Department of Justice for wounding and killing innocent civilians, as well as other excessive acts of violence and aggression); (2) Center for Constitutional Rights, *Current Cases: Saleh v. Titan*, available at http://www.ccrjustice.org/ourcases/current-cases/saleh-v.-titan (Class action lawsuit brought by about 250 Iraqi plaintiffs against Titan International and CACI International Inc for committing torture and other illegal acts of violence against detainees at various facilities including Abu Ghraib prison); (3) Earth Rights International, Factsheet: What Happened at Parabe?", available at http://www.earthrights.org/legalrelated/factsheet_what_happened_at_parabe.html (Chevron's Nigerian subsidiary participated in shooting, murder and torture of Nigerian villagers involved in an environmental protest against the company); (4) Cohen, Milstein, Hausfeld and Toll, *International Human Rights Cases, ExxonMobil – Aceh, Indonesia, Doe v. ExxonMobil*, available at http://www.cmht.com/cases_exxonmobilaceh.php (Eleven Indonesian citizens filed lawsuit against ExxonMobil for contracting security guards from the Indonesian military to commit kidnapping, torture and murder); and (5) Earth Rights International, *EarthRights International Launches New Law Suit Against Chiquita for Funding, Arming, and Supporting Colombian Terrorists* (17 Jul. 2007), available at http://www.earthrights.org/legalpr/eri_launches_lawsuit_against_chiquita.html (Federal class-action lawsuit charging Chiquita Brands International, Inc., with funding and arming known terrorist groups in Colombia in order to sustain its profitable control of Colombia's banana growing regions starting in the mid-1990s).

[24] See (1) Human Rights Watch, *"Race to the Bottom", Corporate Complicity in Chinese Internet Censorship,* Volume 18, No. 8(c) (2006), available at http://www.hrw.org/reports/2006/china0806/china0806web.pdf (China's ongoing Internet censorship being aided by corporate companies such as Yahoo!, Google, Microsoft and Cisco); (2) *People's Republic of China, State Control of the Internet in China* available at http://www.amnestyusa.org/document.php?lang=e&id=50A38A55EB758C0C80256C72004773CD (Chinese authorities have implemented several regulations restricting freedom of expression and circulation of information); (3) Justice Initiative, ARTICLE 19, Libertad de Información Mexico, Asociación Civil, Instituto Prensa y Sociedad (IPYS) of Peru and Access Info Europe. *Amicus brief* (Brief presented before the IACtHR, Case No. 12108, *Marcel Claude Reyes and others v. Chile,* in Mar. 2006), available at http://www.justiceinitiative.org/db/resource2?res_id=103162 (Amicus brief asking the Inter-American Court of Human Rights guarantees a general right of citizens to access information held by public authorities, and that Chile must improve its law regarding access to information); (4) *Petición de Caso ante la Comisión Inter-Americana de Derechos Humanos – Comunidad de La Oroya*, (Dec. 2006), available at http://www.earthjustice.org/library/legal_docs/human-rights-petition-on-la-oroya-to-iachr.pdf at 61 (Petition made to the Inter-American Court of Human Rights to ask Chile to comply with standards set in the American Convention of Human Rights); and (5) Baby Milk Action, *Help the Philippines stand up to company* bullying at http://www.babymilkaction.org/CEM/cemnov06.html (Baby food companies in Phillipines mislead consumers).

[25] See (1) War on Want (WoW), *ASDA Wal-Mart, the Alternative Report* (Sep. 2005), available at http://www.waronwant.org/download.php?id=369 (Rights of workers in Asda Wal-Mart stores increasingly violated due to costcutting); Clean Clothes Campaign (Europe), Oxfam Community aid Abroad (Australia), Oxfam Canada, Global Exchange (USA) and the Maquila Solidarity Network (Canada), *We are not machines: Nike and Adidas workers in Indonesia* (Mar. 2002), available at http://www.cleanclothes.org/documents/we_are_not_machines.pdf (Report discussing lack of improvement in working conditions in sport shoe factories producing for Nike and Adidas); (3) War on Want, *Coca-Cola, The Alternative Report* (Mar. 2006) at 8-9, available at http://www.waronwant.org/downloads/cocacola.pdf (Exposes Coca-Cola's adoption of anti-union tactics and its' involvement in death and disappearances of trade union activists across the globe); (4) Gladys Manzanerez Tercero, Zenayda Torrez Aviles, Harling Bobadilla, and Felix Rosales Sanchez v. C&Y Sportswear, Inc., Nien Hsing Textile Co., Ltd. and Chentex Garments, S.A., Complaint, available at http://www.nlcnet.org/campaigns/archive/sweatingforkohls/history.shtml#court_complaint (C&Y Sportswear officials and their subordinates were involved in attacks and intimidation against union leaders in Nicaragua); (5) Terry Collingsworth, *Summary of International Labor Rights Fund Cases Under the Alien Torts Claims Act*,

American Civil Liberties Union (ACLU) International Civil Liberties Report (2003), available at http://www.sdshh.com/ICLR/ICLR_2003/16_Collingsworth.pdf (Guatemalan trade union leaders brought case under Alien Tort Claim Act against Fresh Del Monte Produce Inc for complicity in security forces' execution of human rights violations); (6) *Doe v. Chiquita Brands Official Complaint* (2007), available at http://www.earthrights.org/cbi_final_complaint.signed.pdf (Plaintiffs brought class action suit against Chiquita Brands International Inc for arming and supporting paramilitary groups that targeted and killed banana workers and trade unionists); and (7) Global Policy Forum, *DaimlerChrysler Sued Over Alleged Argentine Abuses*, Pablo Bachelet (14 Jan. 2004), available at http://www.globalpolicy.org/intljustice/atca/2004/0114daimler.htm (DaimlerChrysler AG was sued over role in disappearance and torture of union leaders and Mercedes-Benz plant workers in the suburbs of Buenos Aires).

[26] See (1) Equal Rights Advocates, *6 Women Sue Wal-Mart, Charging Bias*, Reed Abelson (20 Jun. 2001), available at http://www.equalrights.org/media/nytimes_walmart.asp (Six female employees file lawsuit against Wal-Mart for engaging in widespread discrimination against women); (2) The New York Times, *Limbo for US Women Reporting Iraq Assaults*, James Risen (13 Feb. 2008), available at http://www.nytimes.com/2008/02/13/world/middleeast/13contractors.html?_r=1&oref=slogin (Female Ohio resident employed as a military contractor in Iraq accuses KBR Inc workers of sexual assault and harassment of women); (3) International Labor Rights Forum, Rights for Working Women Campaign, *Sexual Harassment in the Workplace: A Report from Field Research in Thailand*, Ubon Kompipote (Jun. 2002), available at http://www.laborrights.org/files/Thailand.pdf (A research study conducted in Thailand revealed that women workers in export industries in Thailand endure violent sexual abuse and discrimination); and (4) Human Rights Watch, *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector* (1996), available at http://hrw.org/reports/1996/Mexi0896.htm (Women working in Mexico's maquilas are required to have pregnancy tests done as a condition for employment, and can be dismissed or denied work if pregnant).

[27] See (1) Terra de Direitos, *Fumo: servidão moderna e violação de direitos humanos,* Guilherme Eidt Gonçalves de Almeida, (Curitiba: 2005), available at http://www.terradedireitos.org.br/wp-content/uploads/2008/02/livro-fumo1.pdf (Addresses misuse of pesticides and effect on health of farmers); and (2) Germanwatch, Coalition against Bayer Dangers and Global March against Child Labour, *Organisation for Economic Cooperation and Development (OECD) Complaint Against Bayer because of Child Labour in India, Current Investigation: Children die due to poisoning by pesticides at Cotton Seed farms in India* (11 Oct. 2004), available at http://www.germanwatch.org/presse/2004-10-11e.htm (Children exposed to pesticides while working on cotton seed farms dying).

[28] For detailed descriptions of each of these incidents involving U.S. companies, see ESCR-Net, "Collective Report on Business and Human Rights: Submission to the 8th Session of the United Nations Human Rights Council," June 2008, available at: http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=693486

[29]See *Roe v. Bridgestone Corp*., 492 F. Supp. 2d 988 (S.D. Ind. 2007). (children's claims that their working conditions on the Firestone Plantation in Liberia violated international law were allowed to proceed). The case is still proceeding in the district court.

[30] See *Adhikari v. Daoud,* 09-cv-1237, 2009 U.S. Dist. LEXIS 126195 (S.D. Tex. Nov. 3, 2009.) (granting in part and denying in part defendant's motion to dismiss). Plaintiffs' case is proceeding in the district court.

[31] See *Aldana v. Del Monte Fresh Produce, N.A*., 578 F.3d 1283 (11th Cir. Aug. 13, 2009) (affirming dismissal of Guatemalan plaintiffs alleging inter alia plaintiffs' claims of torture in retaliation for labor union activities on *forum non conveniens* grounds); *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252 (11th Cir. Aug. 11, 2009) (affirming dismissal of claims for murder and torture of Colombian trade unionists; finding they did not sufficiently allege state action); and *Romero v. Drummond Co*., 552 F.3d 1303 (11th Cir. 2008) (affirming summary judgment dismissal of claims against Colombian subsidiary of an Alabaman coal mining company for torture and assassination of leaders of a Colombian trade union). See also *Estate of Rodriquez v. Drummond Co*., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (finding that rights to associate and organize were actionable under the ATS). The *Rodriquez* plaintiffs lost at trial in 2007. Another case brought against Drummond by Colombian plaintiffs is currently pending defendant's motion to dismiss. *Doe v. Drummond*, 7:09-CV-01041 (N.D. Ala. Nov. 9, 2009) (permitting plaintiffs to amend their complaint with regard to aiding and abetting).

[32] See, e.g. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (dismissing plaintiffs' allegations that Adidas subsidiary in China conspired with Chinese government officials to operate forced labor camps); and *Does 1 v. Gap, Inc*., 2001 U.S. Dist. Lexis 25035 (Dist. N. Mariana Islands 2001.) (permitting garment workers' claims for labor violations in Saipan to proceed). The case settled in 2002.

[33] See, e.g., "HUMAN RIGHTS FIRST, *Private Security Contractors at War: Ending the Culture of Impunity*," Human Rights First (2008).
[34] See (1) Taguba Report with annexes (AR 15-6 investigation of the 800th Military Police Brigade), available at http://www.dod.gov/pubs/foi/detainees/taguba/ and (2) Fay/Jones Report: Investigation of Intelligence Activities At Abu Ghraib available at http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf
[35] See e.g. *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. Sept. 11, 2009); *Al Shimari v. CACI Premier Technology, Inc*., 2009 U.S. Dist. LEXIS 29995 (E.D. Va. Mar. 18, 2009); and *Al-Quraishi v. Nakhla and L-3 Services, Inc*., (summary of pleadings available at: http://ccrjustice.org/ourcases/current-cases/al-quraishi-et-al-v.-nakhla-et-al).
[36] See *United States v. Slough et al.* 2009 U.S. Dist. LEXIS 121809 (D.D.C. Dec. 31, 2009). Civil actions were also brought against Blackwater and its founder, Erik Prince. Seven cases, which included violations of international law brought under the ATS, were recently settled pursuant to a confidential settlement agreement. For more information on these cases, see *In Re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009) reflects the consolidated cases against Xe (formerly Blackwater Worldwide) including *Abtan, et al. v. Prince, et al*. (alleging inter alia war crimes for killings and other serious injuries sustained by Iraqi civilians following shooting in Nisoor Square) and *Albazzaz et al v. Prince et al* (alleging inter alia war crimes for killing of Iraqi civilians following shooting in al Watahba Square).
[37] See Factual Proffer, *United States v. Chiquita Brands Int'l, Inc.*, Crim. No. 07-055 (D.D.C. Mar. 19, 2007), available at http://law.du.edu/images/uploads/corporate-governance/international-us-chiquita-factual.pdf
[38] See Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholders Derivative Litig., No. 08-MD-01916 (S.D. Fla.); see also Business and Human Rights Resource Centre, "Case profile: Chiquita lawsuits (re Colombia)," available at: http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChiquitalawsuitsreColombia

[39] See e.g. Colectivo de Abogados José Alvear Restrepo, "Chiquita Board Members: Total Identification,"(July 23, 2008) available at: http://www.colectivodeabogados.org/IMG/pdf/0807_chiquita_id_eng.pdf
[40] See *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).
[41] *Id.* at 254.
[42] *Id.* at 266.
[43] See *Maynas Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823 (C.D. Cal. 2008).
[44] Other cases brought against the extractive industries include: *Wiwa v. Royal Dutch Petroleum/Shell* (brought by Nigerians who were injured or had family members killed in relation to Shell's activities in the Niger Delta; after more than 12 years of litigation, resulted in $15.5 million settlement); *Mujica v. Occidental Petroleum Corporation,* 564 F.3d 1190 (9th Cir. May 11, 2009) (American oil company operating in Colombia); *The Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244 (2d Cir. Oct. 2, 2009) (Canadian oil company alleged to have aided and abetting war crimes and crimes against humanity committed in Sudan); *Doe v. Exxon Mobil Corporation* (claims by Indonesian villagers bringing claims of for killings and torture committed by military security forces paid by ExxonMobil Oil Indonesia); and *Bowoto v. Chevron Corporation* (Nigerian plaintiffs brought claims against Chevron, including torture and summary execution).
[45] See *Doe I v. Unocal Co*., 395 F.3d 932 (9th Cir. 2002).
[46] EarthRights International, *Total Impact* (September 2009), available at http://www.earthrights.org/sites/default/files/publications/total-impact.pdf.
[47] See *Abdullahi v. Pfizer, Inc* 562 F.3d 163, 175-188 (2d Cir. 2009) (finding that "prohibition in customary international law against nonconsensual human medical experimentation" can be enforced through the ATS because it is (i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern).
[48] See Decision 1 (68) (United States of America), U.N. ESCOR, CERD, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006); Concluding Observations of the Committee on the Elimination of Racial Discrimination: (United States of America) U.N. Doc. No. CERD/C/59/Misc.17/Rev.3, para. 5 (August 2001); Concluding Observations of the Committee on the Elimination of Racial Discrimination (United States of America), U.N. ESCOR, CERD, 72nd Sess., U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008); *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002) available at http://www.cidh.org/annualrep/2002/eng/USA.11140.htm).
[49] See Western Shoshone Defense Project, "Update To The Committee on the Elimination of Racial Discrimination 76th Session In Relation To Early Warning And Urgent Action Procedure Decision 1(68) & Concluding Observations 6(72) (United States)" (March, 2010)

[50] See International Law Commission, *Draft Articles on State Responsibility*, Art. 5: "the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."
[51] See, for example, Human Rights Committee General Comment 31, para. 8.
[52] These include the principles of active personality, passive personality and universality.
[53] Treaty bodies are increasingly recognizing extraterritorial obligations in relation to the meaning of international cooperation under international law. See for example, GC 19 of the CESCR at para. 54: "States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law."

United States of America

Submission to the United Nations
Universal Periodic Review

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Indigenous Peoples Rights

Submitted by:

Indigenous Environmental Network
International Indian Treaty Council
International Justice Program Owe Aku (Bring Back the Way)
Laguna Acoma Peoples for a Safe Environment
Nation of Hawaii (Oahu and Maui Hawaii)
National Native American Prisoners' Rights Coalition
Pit River Tribe and Wintu Nation
Venetie Traditional Council, Gwich'in in Athabascan Nation
Wanblee Wakpa Oyate, Pine Ridge Reservation
Western Shoshone Defense Project

Endorsed by:

Organizations: Eagle and Condor Indigenous Peoples' Alliance; Hawaii Institute for Human Rights; Los Angeles Indigenous Peoples Alliance; Metro Atlanta Task Force for the Homeless; Public Interest Projects; Seminole Sovereignty Protection Initiative; The Confederacy of Treaty Six First Nations; Treaties Task Force of the Social Justice Center of Marin; United Confederation of Taino People, Consejo General de Tainos Borincanos and Tainos Roca de Amor del Turey; White Clay Society, Gross Ventre Nation; Yoemem Tekia Foundation

Individuals: Anita L. Beaty, Board member of Habitat International Coalition; **Joyce Carruth**; **Ute Ritz-Deutch, Ph.D**., Tompkins County Immigrant Rights Coalition; **John Trimbach**, Wounded Knee Victims and Veterans Assoc..

1. In its 2006 examination of the United States under the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee (HRC) noted its concern over the "extinguishment" of aboriginal title and violations of the right to decision making by Indigenous Peoples over activities affecting their traditional territories. The HRC recommended that the United States, "… should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. It should take further steps in order to secure the rights of all indigenous peoples under articles 1 and 27 of the Covenant to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture."[1]

2. ICCPR Article 1 refers to the right of all peoples, including Indigenous Peoples, to Self Determination; Article 27 recognizes the right to practice language, culture and religion. The HRC determined that for Indigenous Peoples, their right to practice their cultures includes the right to control the lands and natural resources necessary for the maintenance of these cultures. Positive measures to ensure the effective participation of communities in decisions which affect them must also be ensured.[2]

3. The United States continues to allow the destruction, depletion and desecration of ancestral lands of Indigenous Peoples subject to Aboriginal Title. These include areas of profound religious, spiritual and cultural significance as well as lands and waters essential for their subsistence ways of life. Corporations are issued permits to extract uranium, coal, oil, timber, gas and other resources and to release and use all types of persistent and deadly pollutants on or near Indigenous lands and communities, causing detrimental impacts, and in some cases, irreversible damage, to their spiritual, cultural, social and physical survival and health.

4. For example, in Alaska, essential subsistence use areas are threatened by proposed oil and gas development including within the Arctic National Wildlife Refuge, Yukon Flats Wildlife Refuge, and Teshekpuk Lake of the National Petroleum Reserve. On March 31st, 2010 the President of the United States announced government approval of exploration on oil leases in the Beaufort and Chukchi Seas, and in Cook Inlet within the Outer Continental Shelf (OCS) of Alaska. Mining projects, including the proposed Donlin Creek and Pebble Mines, as well as the Elim and Bokan Uranium Mines, threaten essential subsistence areas. Coal mining is also proposed within regions in Alaska that are critical to subsistence. By allowing fossil fuel development and mineral extraction in these lands and waters, the United States is violating the right of Alaska Indigenous Peoples to their means of subsistence in violation of Article 1.2 of the ICCPR, to which the United States is obligated. Fossil fuel development also directly contributes to critical violations of human rights caused by Climate Change for Indigenous Peoples in Alaska and elsewhere. These include the right to food and subsistence, adequate housing, culture and health among others.

5. The Pueblo, Navajo, Hopi, Havasupai, and Western Shoshone Peoples were exposed to the ruinous effects of uranium mining milling, waste storage and weapons testing, since the late 1940's. Uranium production has killed hundreds of Indigenous Peoples, including hundreds of miners still dying from radiation poisoning and cancers of all sorts. Radioactive residue blown by

the wind and seeping into surface and ground water in a continual poisoning of Indigenous communities has never been remedied. Governmental "remediation measures" consist only of leveling out the abandoned uranium mines and bulldozing dirt over the poisoned Earth. The groundwater upon which the Peoples and wildlife depend can never be restored. President Obama's call for increased nuclear energy development is posing a renewed threat to Indigenous Peoples, as well as sacred sites such as the Grand Canyon, Arizona, and Mt. Taylor in New Mexico. As reported by the Denver Post[3] , in the five Western states where uranium is mined in the US, 4,333 new claims were filed in 2004, according to the Interior Department; in 2009 the number swelled to 43,153. Most if not all such claims are on lands where Indigenous Peoples live and conduct religious ceremonies. These lands are subject to aboriginal title and traditional use as noted by the HRC. The views of the Indigenous Peoples and communities who will be directly affected is yet again, not considered.

6. The Lakota Nation and the Pine Ridge Reservation located in South Dakota, have been subjected to the same deleterious effects including illness, deaths and environmental ruination by uranium mining in the Sacred Black Hills, which are recognized and protected by the 1868 Ft. Laramie Treaty with the US and are also subject to Aboriginal Title. The Lakota are now in a struggle against the expansion of a uranium mine licensed by the Nuclear Regulatory Commission (NRC) of the United States. The mining company, CAMECO, the world's largest producer of uranium proposes an "in situ leaching" process (ISL) that would pump millions of gallons of toxic and radioactive substances such as Arsenic, Radium 226 & 228, Thorium 230 into the Earth and groundwater. The licensing of the CAMECO expansion is in litigation. The proposed ISL would undoubtedly affect the regional watershed but CAMECO's scientists claim that the watersheds are unrelated and that "no one uses" the affected watershed in the homeland of the Lakota Nation.

7. In these examples, representing cases which are too numerous to mention in this brief submission, the rights to life, health, self determination and means of subsistence of Indigenous Peoples, as well as the right to practice their culture and religion continues to be affected by the United States failure to implement the 2006 recommendations of the Human Rights Committee and their obligations under the International Covenant on Civil and Political Rights.

8. The UN Committee on the Elimination of Racial Discrimination (CERD) made similar recommendations to the United States regarding their failure to uphold and consider the rights of Indigenous Peoples concerning the protection of sacred sites and areas of cultural importance which continue to be threatened, desecrated and destroyed by imposed development and resource extraction carried out without their consent. In their 2008 examination of the United States' compliance with the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) the CERD voiced concern "… about reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining or logging, carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention (arts. 5 (d) (v), 5 (e) (iv) and 5 (e) (vi))."

9. "The Committee recommends that the State party take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, – to ensure that activities carried out in areas of spiritual and cultural significance to

Native Americans do not have a negative impact on the enjoyment of their rights under the Convention. The Committee further recommends that the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans."[4]

10. The United States as a matter of practice, does not consult in good faith with Indigenous Tribes, Peoples and Nations affected by these and other devastating projects on lands outside of reservation boundaries, even though many of these are Sacred Areas are of great cultural and spiritual significance to Native Peoples and are subject to Aboriginal Title as well as legally-binding Treaties between Indigenous Peoples and the State. The United States regularly and consistently allows the destruction or desecration of Sacred Areas, as well as traditional subsistence use areas by private corporate interests. The balancing required by article 18 of the ICCPR on the right to religious practice, as found by the Special Rapporteur on Religious Intolerance in his 1999 visit to the United States, is not carried out in either policy or practice.[5]

11. In an Urgent Action/Early Warning decision[6] the CERD made recommendations to the United States regarding the Western Shoshone's rights to their lands and resources, specifically calling upon the United States to "Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers and desist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples." In its 2008 examination of the United States the CERD regretted the lack of compliance with its decision: "**The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein."**[7] According to the Western Shoshone, the United States has not complied.

12. In spite of the CERD Decision and an earlier decision of the Inter American Commission on Human Rights (IACHR) ruling favorably for Western Shoshone property rights, their livestock has been impounded and mining interests have continued to expand their operations in their traditional homelands. A private gold mining company is currently crushing Sacred Mount Tenabo to dust, soaking it with cyanide, a devastating attack on Western Shoshone Spiritual practice, as well as on their ground and surface waters, their means of subsistence and environment. This violation of their human rights is being carried out with impunity in utter disregard of recommendations of the CERD to the US addressing this critical matter.

13. In another example of private economic interests taking precedence over Indigenous Peoples' cultural and religious freedom rights, the United States allowed a ski resort to pollute San Francisco Peaks in Arizona with artificial snow made of sewage, desecrating the sanctity of the area. This has been carried out not only without consent, but in the face of vehement and united protest by Indigenous Peoples who consider it to be sacred, including the Navajo, Yavapai-Apache White Mountain Apache, Hopi, Havasupai and Hualapai Nations. Their legal challenge to the government's decision to permit this activity has been denied. The United States has once again failed to uphold its international obligations to respect, protect and uphold the rights of Indigenous Peoples to maintain their religious practices and cultures.

14. The United States entered into and ratified more than 400 Treaties with Indigenous Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships including mutual recognition of sovereignty, peace and friendship, land rights, health, housing, education and subsistence rights (hunting, fishing and gathering) among others. Even though Congress ended US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding today.

15. It is of utmost importance for this UPR process to note that the Western Shoshone, Navajo Nation and the Lakota Nation, along with hundreds of other Indigenous Nations, entered into legally binding, Nation to Nation Treaties with the United States that should ensure that such activities as mentioned above would not be allowed without the free prior and informed consent of the Indian Nations Treaty parties. The Western Shoshone entered into the peace and friendship Treaty of Ruby Valley with the United States in 1863, recognizing Western Shoshone Territory. The Lakota (Sioux) Nation's territory was recognized by the United States (in perpetuity) by the 1868 Fort Laramie Treaty. The Kingdom of Hawaii entered into friendship, commerce and navigation Treaties with the United States in 1826, 1849, 1875 and 1884. The United States violated these Treaties and committed an Act of War against the Kingdom of Hawaii by invading and overthrowing it in 1893, annexing it through the Newlands Resolution in 1898, and finally making it a State through the Statehood Act of 1959.

16. Treaties with Indigenous Nations, and the range of rights they affirm, continue to be consistently violated by the United States. Currently all the Supreme Court of the United States requires to legitimate the abrogation of Treaties is the expression of a clear legislative intent on the part of Congress; there is nothing illegal, immoral or unjust, according to the Supreme Court, in the abrogation of Treaties concluded in good faith between indigenous peoples and the United States.[8] This is the "Plenary Powers" Doctrine challenged by the Human Rights Committee. The review of this policy recommended by the Committee has never taken place.

17. Yet, the US Supreme Court has affirmed the lack of good faith by the US in addressing its Treaty obligations with Indian Nation Treaty Parties. In 1980, regarding violations of the 1868 Ft. Laramie Treaty with the "Great Sioux Nation" (Lakota, Dakota and Nakota), the Supreme Court affirmed a statement by the Court of Claims that "a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation".[9] However, despite this clear acknowledgement of wrongdoing by the US Supreme Court, the Treaty lands which were illegally-confiscated, including the sacred Black Hills, have never been returned. A just, fair process in the US to address, adjudicate and correct these and other Treaty violations with the full participation and agreement of *all* Treaty Parties has never been established.

18. This denial of due process relating to appropriating Indigenous Peoples' lands was addressed by the CERD in its recommendations to the US in 2006 in response to a submission by the Western Shoshone National Council et al under the CERD's Early Warning and Urgent Action Procedure[10.] CERD identified the unilateral process established by the US for addressing violations of Treaties with Indigenous Nations, the "Indian Claims Commission" established in 1946 and dissolved in 1978, as a denial of due process which did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result

of **"gradual encroachment" and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.**[11]

19. In light of these persistent and ongoing violations, it is of particular importance that CERD, in its 2008 Concluding Observations, while noting the position of the United States on the United Nations Declaration on the Rights of Indigenous Peoples[12] recommended that the UNDRIP be used as a guide to interpret the State party's obligations under the Convention relating to Indigenous Peoples.[13] The UNDRIP is a standard that the United States is therefore required to comply with in its obligations under the ICERD. A range of rights recognized by the HRC and CERD are affirmed in the UNDRIP including the right of Self Determination (article 3); the recognition, observance and enforcement of Treaties concluded with States (article 37); and the right of Free Prior and Informed Consent, recognized in a number of articles.

20. The CERD in its General Recommendation XXIII requires States to ensure that no decisions directly relating to their rights and interests are taken without their free, prior and informed consent. The UNDRIP also recognizes this right in a number of articles, including, *inter alia* Articles 19 and 32. At all international fora where the United States is compelled to respond, it claims that it "consults" with "recognized" tribal governments. The United States has terminated hundreds of so-called "recognized tribal governments" and refuses to reinstate or to formally recognize many Indigenous Peoples. Nevertheless, the right of free, prior and informed consent called for by the CERD Committee[14] and HRC Committee Conclusions and Recommendations, as well as the UNDRIP, must be applied and respected. It should be noted that a State's formal recognition of Indigenous Peoples is not required in order to apply these international standards.

21. It is time that the United States is called upon to commit itself to respect and observe not only its multilateral human rights treaties, but its Treaties with Indigenous Nations. An essential first step will be to establish, with the full and equal participation of the Indigenous Treaty parties, a just and effective process for redressing Treaty violations based on the firmly established international human rights principles of self-determination, due process and free prior informed consent. The deficiencies in compliance with the ICCPR and ICERD should be brought to the attention of the United States in this UPR process, including its failure to implement to UNDRIP as recommended by the CERD. In addition, we recommend that the US be questioned regarding:

1. The failure to comply with the CERD Decision (and the appurtenant OAS- IACHR decision) regarding the Western Shoshone and their right to property and due process;
2. The destruction, desecration of, and denial of access to Indigenous Sacred Areas, a denial of Indigenous Peoples' right to practice their religion and maintain their culture;
3. The failure to consult in good faith with Indigenous Peoples (whether or not the Peoples affected are "recognized" by the United States) and the failure to acquire their free, prior and informed consent with regard to matters that directly affect their interests; and,
4. The unilateral termination or abrogation of Treaties with Indigenous Peoples and failure to implement a fair, just and bilateral process to address violations of these Treaties.

[1] Human Rights Committee, Concluding Observations, United States of America, Eighty-seventh session, 10-28 July 2006, UN Doc. CCPR/C/USA/CO/3, 15 September 2006 Para. 37.

[2] Human Rights Committee General Comment (Article 27) 23.7.

[3] http://www.denverpost.com/ci_9227230?source=rss, visited April 13, 2009.

[4] Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 February - 7 March 2008, Concluding observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 29.

[5] See, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18,Addendum, Visit to the United States of America, E/CN.4/1999/58/Add.1 9 December 1998, para. 82.

[6] Committee for the Elimination of Racial Discrimination, Sixty- eighth session Geneva, 20 February – 10 March 2006 Early Warning and Urgent Action Procedure, Decision 1 (68). United States of America, UN Doc. CERD/C/USA/DEC/1.

[7] Fn, 4 Supra, Para. 19.

[8] *See, e.g.* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[9] United States v. Sioux Nation, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in United States v. Sioux Nation of Indians, 448 U.S. 371 at 388 (1980).

[10] Fn. 6, Supra.

[11] Id,, at Paragraph 6: "The Committee is concerned by the State party's position that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party's position is made on the basis of processes before the Indian Claims Commission, "which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests", as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)."

[12] United Nations Declaration on the Rights of Indigenous Peoples (2007). UN Doc. A/RES/61/295 (Hereinafter "UNDRIP,").

[13] Fn. 4, Supra.

[14] See also, CERD General Recommendation XXIII (5) on Indigenous Peoples.

United States of America

Submission to the United Nations
Universal Periodic Review

Ninth Session of the Working Group on the UPR
Human Rights Council
1-12 November 2010

Migrants, Refugees and Asylum Seekers

Submitted by:

The Advocates for Human Rights[*]

Endorsed by the following 56 Organizations and 57 Individuals:

Organizations: Advocacy for Justice & Peace of the Sisters of St. Francis of Philadelphia; Battered Women's Legal Advocacy Project; Casa Esperanza; Casa Guadalupana; Center for Victims of Torture; Chaldean Federation of America; Champaign-Urbana (Illinois) Citizens for Peace and Justice; Church World Service, Immigration and Refugee Program; Cidadao Global; Columbian Center for Advocacy and Outreach; Disciples Justice Action Network; Farmworker Legal Services of NY, Inc.; Friends Committee on National Legislation; Georgia Latino Alliance for Human Rights; Gloria Dei Lutheran Church; Human Rights Advocates; Human Rights Caucus, Northeastern University School of Law; Human Rights First; Human Rights Litigation and International Advocacy Clinic, University of Minnesota; Human Rights Project of Michigan; Immigrant Law Center of Minnesota; Institute for Justice and Democracy in Haiti ; International Immigration Resources Inc.; Justice Commission of the Sisters of St. Joseph of Carondelet and Consociates (St. Paul Province); Latino Justice PRLDEF; Leonard Peltier Defense Offense Committee; Lutheran Immigrant and Refugee Services; Metro Atlanta Task Force for the Homeless; Midwest Coalition for Human Rights; National Immigrant Justice Center; National

[*] Contributors to the drafting of this report include the National Immigration Forum, Human Rights First, and the Detention Watch Network.

Immigrant Solidarity Network; National Immigration Forum; National Lawyer's Guild; New Sanctuary Coalition of New York City; No More Deaths; Northwest Immigrant Rights Project; OBF The People!; Organization of Liberians in Minnesota; Peace and Hope International; Pennsylvania Immigration Resource Center; Physicians for Human Rights; Project Puente; Public Interest Projects; Refugee and Immigration Ministries of the Christian Church (Disciples of Chirst); San Diego Renters Union; Sarah's…An Oasis for Women Advisory Council (St. Paul, MN); South Bay Communities Alliance; Tahirih Justice Center; Three Treaties Task Force of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition; Topanga Peace Alliance; UFCW Local 789; Women's Refugee Commission; World Organization for Human Rights USA; World Relief; Youth Justice Coalition

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Executive Summary

1. International law recognizes that while the United States has the right to control immigration that right is tempered by its obligations to respect the fundamental human rights of all persons. With few exceptions, the United States may not discriminate on the basis of national origin, race, or other status. In designing and in enforcing its immigration laws, the rights to due process, fair deportation procedures, freedom from arbitrary and inhumane detention, and other fundamental human rights must be protected.

2. The United States' immigration system, while generous in many ways, is riddled with systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice.

3. We welcome the recent efforts of the United States to begin to correct some of the most egregious human rights violations in the immigration system. Nonetheless, serious human rights violations continue. Expansion of the U.S. immigration enforcement system has tremendous, negative implications on the protection of the human rights of non-citizens in the United States.[1]

4. Similarly, problems with the asylum and refugee protection systems have resulted in denial of protection to *bona fide* refugees. The arbitrary one-year filing deadline for filing asylum claims, denial of protection against *refoulement* for those who have been convicted of minor crimes, and a sweeping definition of "material support" of "terrorist activities" have seriously undermined the United States' compliance with the obligations under the Refugee Convention.

5. Finally, the United States regularly fails in its obligation to consider the unity of the family in its immigration laws, policies, and practices. Mandatory deportation and detention laws, bars to permanent residency for those who entered the U.S. without inspection and have been unlawfully present in the U.S., and extraordinarily long backlogs for immigrants visas based on close family relationships mean that families face years, decades, and even permanent separation. Refugees also face prolonged separation from families. Denial of asylum based on the one-year filing deadline, denial of reunification for families based on alleged "material support" of terrorism, the indefinite closure of refugee resettlement based on family unification, and a legal definition of family relationships that fails to recognize the reality of family disruption in refugee crises all contribute to the United States' failure to respect the unity of the family.

6. In this submission, U.S.-based civil society organizations provide information under Sections B, C and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.[2] These organizations provide services to or advocate on behalf of the rights of immigrants, refugees, and asylum seekers in the United States. In addition, this report is endorsed by individuals around the United States.

I. Priority Recommendations

7. **Reform of the U.S. immigration system to ensure that the ICCPR's obligations to protect due process and family unity are met. Ending of automatic criminal prosecutions for border crossers and other streamlined procedures which fail to protect non-citizens' rights to due process, access to counsel, presentation of their case before a judge, and other fundamental safeguards of fairness.** Pending legislation to address key concerns: H.R. 182 - Child Citizen Protection Act; S. 1085 - Reuniting Families Act; H.R. 3531 - Humane Enforcement and Legal Protections for Separated Children Act (HELP Separated Children Act); H.R. 1215 - Immigration Oversight and Fairness Act.

8. **Reform of immigrant detention system to end reliance on detention as a cornerstone of immigration enforcement policy, end arbitrary detention by providing individualized custody hearings for all detainees and ensure that all those who must be detained are held in non-penal facilities and afforded humane treatment which recognizes their inherent human dignity and immediate passage of enforceable rights-respecting detention standards. Ensure that all places of immigrant detention, including short-term facilities, adhere to these standards.** Pending legislation to address key concerns: H.R. 3531 - Humane Enforcement and Legal Protections for Separated Children Act (HELP Separated Children Act); S. 1550 - The Strong STANDARDS Act (Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System); S. 1549 - The Protect Citizens and Residents from Unlawful Detention Act; S. 1594 – Secure and Safe Detention and Asylum Act; H.R. 1215 – Immigration Oversight and Fairness Act.

9. **Reform of the U.S. refugee and asylum system to ensure that the United States meets obligations under the 1951 Convention and ensure that exclusions from refugee protection complies with the 1951 Convention.** Pending legislation to address key concerns: S. 3113 Refugee Protection Act; H.R. 4800 – Restore Protection to Victims of Persecution Act.

II. BACKGROUND AND FRAMEWORK

a. Scope of international obligations

10. Pursuant to the International Covenant on Civil and Political Rights (ICCPR), non-citizens in the U.S. have a right to **due process and fair deportation procedures,**[3]" including international standards on proportionality.[4] Non-citizens enjoy the right to private life guaranteed by ICCPR article 17.[5] Non-citizens also enjoy the right to freedom from discrimination under article 2 of the ICCPR and the obligations imposed by the Convention on the Elimination of all forms of Racial Discrimination (ICERD).[6]

11. Both the Universal Declaration of Human Rights and the ICCPR guarantee the right to **liberty and security of person**.[7] The ICCPR guarantees the right to life.[8] Further, no one should be subjected to arbitrary arrest or detention.[9] Non-citizens who are detained have a **right to humane conditions of detention,**[10] **and are entitled to prompt review of their detention by an independent court.**[11] Further, detention of refugees and asylum seekers

should be avoided when possible; if refugees and asylum seekers must be detained, adequate safeguards should be in place to avoid arbitrary detention.[12]

12. Pursuant to the international legal obligations undertaken by the U.S. government, individuals also have a right **to seek and enjoy asylum from persecution and protection from *refoulement***.[13] Similarly, the Convention Against Torture prohibits a State from expelling, returning, or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[14]

13. Regardless of immigration status, individuals in the U.S. have a **right to family unity**."[15] In interpreting the obligations of the ICCPR, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.[16]

b. Legislative and policy framework

14. In the United States, Congress holds the authority to make the laws that govern admission, protection, and removal of non-citizens. Federal immigration law, however, must be understood in its context within the U.S. tripartite system of government. The Executive branch agencies, including the Department of Homeland Security, the Department of Justice, and the Department of State, promulgate regulations that directly govern the application of U.S. immigration law. There are a myriad of public and internal policy guidance that spells out how the U.S. immigration system operates in practice. Federal courts also play a role in providing a final review of individual decisions made in removal proceedings in administrative courts.

15. Federal immigration law in the U.S. continues to be based on the Immigration and Nationality Act of 1952 (INA)[17]. Reforms to the INA were made in 1965 and again with the Immigration Act of 1990, which amended the INA to set a permanent annual worldwide level of immigration divided into categories for (1) family-related immigrants, (2) employment-based immigrants, and (3) diversity immigrants. Refugees were excluded from these numerical limits; the Refugee Act of 1980 defines the U.S. laws relating to refugees.[18] In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to toughen criminal sanctions for employers who hired undocumented persons and limit access to federally funded welfare benefits.

16. The Immigration Act of 1990 substantially expanded the "aggravated felony" category of deportable crimes, first added to the INA in 1988.[19] In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[20] and the Antiterrorism and Effective Death Penalty Act[21] added additional crimes to the aggravated felony ground for deportation and reduced term of imprisonment threshold requirement to one year,[22] drastically increasing the number of people subject to prolonged and indefinite detention. The IIRIRA also created a new "expedited removal" system for arriving aliens without proper documentation for admission.[23]

17. The USA PATRIOT Act of 2001,[24] passed just weeks after the 9/11 terrorist attacks, and the REAL ID Act of 2005[25] expanded the class of individuals who are inadmissible to the U.S. for having provided "material support" to terrorism. In guidance effective February 26, 2007,

the U.S. Secretary of Homeland Security exercised his waiver authority regarding the application of the "material support" bar.[26]

18. The Department of Homeland Security (DHS) was created in 2003 as part of federal agency reform in the aftermath of the 9/11 terrorist attacks, shifting immigration enforcement into the arena of anti-terrorism policy. The INS was replaced with three different agencies within DHS: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE).

19. Because immigration is a matter of federal law, state and local governments in the U.S. have historically played a very limited role in immigration enforcement. Recent policies, however, have shifted federal responsibility for enforcing civil immigration laws to state and local police through formal and informal programs, such as the 287(g) program, the Criminal Alien Program (CAP), and Secure Communities.[27]

III. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

a. Right to Due Process and Fair Deportation Procedures

20. The U.S. immigration enforcement system is an enormous operation, today accounting for 30% of the Department of Homeland Security's budget of US$56,335,737,000.[28] In fiscal year 2009, ICE completed 387,790 removals, an increase of 18,569 over the previous year. Through its Criminal Alien Program, ICE placed 234,939 detainers, made 249,486 arrests, of which 101,779 were non-citizens with criminal convictions, and screened over 300,000 people.[29] ICE attorneys represented the United States in 389,352 new matters before the Immigration Courts and completed 351,234 cases.[30] U.S. immigration courts complete more than 280,000 proceedings each year, with the Board of Immigration Appeals deciding more than 30,000 cases annually.[31]

21. CBP apprehended over 556,000 people between ports of entry, and encountered over 224,000 inadmissible non-citizens at the ports of entry.[32] CBP operates a combination of 32 permanent and 125 tactical traffic checkpoints nationwide as "part of a three-tiered, defense-in-depth strategy to secure our nation's border" between ports of entry.[33] "This strategy involved the use of line-watch operations on the border, roving patrol operations near the border and traffic checkpoints on highways leading away from the border."[34]

22. In violation of ICCPR article 13, United States immigration laws impose **mandatory removal (deportation) without a discretionary hearing** in a broad category of cases.[35] Lawful permanent residents, refugees, and others lawfully present in the U. S. who are convicted of criminal offenses ranging from murder to misdemeanor drug possession are defined as "aggravated felons,"[36] and thus are barred from an opportunity to submit the reasons against their expulsion.[37] While cases may be heard before administrative immigration judges, over 4000 cases were completed through an "administrative removal" process without any appearance before an immigration judge.[38] An additional 29,000 people in fiscal year 2009 alone were removed under "stipulated orders of removal,"[39] where the non-citizen signed an agreement to be deported without a hearing before an immigration judge to present any reasons against their removal.[40]

23. While U.S. law provides that aliens in removal proceedings have "the privilege of being represented," representation must be "at no expense to the Government."[41] The United States' **failure to ensure that all non-citizens have access to representation** during their expulsion hearings violates ICCPR article 13. In 2008, approximately 57% of all removal cases completed were unrepresented.[42] According to a recent report of the American Bar Association, there is "strong evidence that representation affects the *outcome* of immigration proceedings."[43] **Access to counsel**, and by extension to fair deportation proceedings, is severely **jeopardized by U.S. detention practices**, including frequent transfers between immigration jails and geographically remote detention. 1.4 million individuals were transferred between detention facilities in the last 10 years, 53% in last 3 years. Approximately 84% of detained cases were unrepresented.[44]

24. **Racial profiling pervades immigration enforcement at the border and throughout the United States.** For example, CBP and other law enforcement agencies in the border region practice arbitrary and race-based enforcement against Latino residents on a regular basis, using checkpoints that often result in the questioning of drivers about their immigration status occur throughout the border region.[45] The "transportation checks" occur more frequently in communities with high numbers of Latino immigrants.[46]

25. Racial profiling also permeates immigration enforcement throughout the interior of the United States. Enforcement programs known collectively as ICE ACCESS provide an "umbrella of services" for state and local law enforcement agencies to cooperate with federal immigration authorities.[47] These programs, including the 287(g) program, the Criminal Alien Program, and the Secure Communities program, all have drawn substantial criticism for engendering racial profiling practices.[48] Outside of the ICE ACCESS programs, in some cases state and local authorities enforce immigration law without any training or agreement, relying on an interpretation of their "inherent authority" to enforce the law or creating informal processes for turning people suspected of being non-citizens over to the Department of Homeland Security.[49] These practices have created a climate of fear in many immigrant communities, where activities such as traffic checkpoints set up outside of Latino churches have been documented.[50]

26. **Automatic prosecutorial programs** belie the right to an individual, case-by-case assessment of the need to detain and criminally prosecute. Operation Streamline, begun in 2005, requires the federal criminal prosecution and imprisonment of all unlawful border crossers.[51] The program mainly targets migrant workers with no criminal history.[52] Operation Streamline violates international standards of proportionality of the intended objective - deterrence of illegal immigration - to the deprivation of liberty.

b. Right to Liberty and Security of the Person and Freedom from Arbitrary Detention

27. Immigrant detention has become a cornerstone of U.S. immigration enforcement. Today ICE operates the largest detention and supervised release program in the United States, with a total of 378,582 non-citizens from 221 countries in custody or supervised by ICE in fiscal year 2008.[53] Sixty-six percent of the 31,075 people detained on September 1, 2009, were

subject to mandatory detention.[54] In violation of ICCPR articles 9(1) and 9(4), U.S. law imposes **mandatory detention without an individualized custody determination by a court** in a broad category of cases, including arriving asylum seekers[55] and non-citizens convicted of certain crimes.[56] Individuals subject to "mandatory detention" in the United States are not entitled to a bond hearing before an immigration judge.[57]

28. Arriving **asylum seekers in expedited removal proceedings** are subject to mandatory detention and may not be released while awaiting their initial "credible fear" review to determine whether they may apply for asylum before an immigration judge.[58] Following determination of credible fear, asylum seekers may be released on parole pending their asylum hearings before an immigration judge or while on appeal, but if the detaining authority (ICE) denies parole, the asylum seeker is prevented under regulations from having an immigration court assess the need for his continued custody.[59] ICE revised its parole guidelines effective January 2010, but ICE has not put these guidelines into regulations.[60]

29. **U.S. border enforcement policies, tactical infrastructure, and restricted legal entry options have placed migrants in mortal danger along the Mexico/United States border**, in violation of ICCPR Article 6. The Mexico/U.S. border has become increasingly militarized.[61] The dangers migrants risk in crossing are known to the US, yet the United States has failed to minimize the threats to safety. Instead, deployment of heavy security near population centers has pushed migrant flows to more treacherous and remote corridors where they are dependent on smugglers.[62] This funnel effect has increased the risk of death. According to DHS numbers, over one migrant per day perished in FY08.[63] Mexican estimates for 2008 are over 725 deaths.[64]

c. Right to Humane Conditions of Detention

30. In FY 2009, the United States detained an estimated 378,582individuals in ICE custody, including those under ICE supervision.[65] Immigrant detainees are held in over 350 facilities around the United States,[66] operating variously by the U.S. Department of Homeland Security, state and local governments, and private prisons.[67] Virtually all immigrant detainees are held in prison- or jail-like settings,[68] which fail to adhere to guarantees in ICCPR articles 10(1) and 10(2)(a).[69] Immigrant detainees wear prison uniforms, are regularly shackled during transport and in their hearings, and are held behind barbed wire.[70] Depending upon where they are detained, they may not be permitted contact visits with family,[71] may be subject to degrading conditions including strip searches,[72] and may face barriers to communicating with their family, counsel, or other support systems.[73] Immigrants in detention may be held for prolonged periods of time without access to the outdoors.[74] Appropriate psychological and medical services for torture survivors are universally unavailable.[75] Immigrant detainees routinely are commingled with convicted people.[76] In August and October 2009, ICE announced plans to reform the immigrant detention system, but thus far there has been limited progress toward a shift to non-penal facilities in cases where detention is required.[77]

31. **Highly publicized cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity.[78]** Between 2003 and April 2009, ICE reported over 90 deaths of non-

citizens in their custody.[79] Shocking reports of the United States' failure to provide care to ill or injured persons in its custody abound.[80] Although the United States has adopted detention standards, the standards are not enforceable and have significant deficiencies in monitoring and oversight, little transparency, and no consequences for non-compliance with standards.[81] Reports indicate that the United States failed to report deaths in a transparent way.[82] Between 2007 and 2009, at least 26 reports on the failures of the U.S. immigrant detention system have been released.[83]

32. Migrants, including minor children, apprehended by CBP often are detained in **short-term custody facilities** which hold immigration detainees for less than 72 hours.[84] During apprehension, transport, and detention in CBP's custody, migrants have reported verbal and physical abuse, denial of access to medical aid, misleading legal information, and deprivation of Constitutional and human rights. Some holding cells are compared to large cages in the desert.[85] The GEO Group, and other privately contracted transportation buses are utilized as virtual detention centers where individuals are held until the bus departs.[86] Provision of food, water and medical care for those awaiting repatriation on the buses are inconsistent and inadequate. CBP has an agreement that they will not repatriate individuals until Mexican officials have been notified, but officers will consider this satisfied by a phone call made even after the Mexican immigration offices are closed, rendering the notification meaningless.[87]

d. The Right to Protection from *Refoulement* to Persecution or Torture

33. United States law denies asylum to *bona fide* refugees who fail to file their **asylum claims within one year of arriving** in the United States**.**[88] Rather than preventing fraud, which was the stated purpose behind the filing deadline,[89] in practice the deadline penalizes *bona fide* asylum seekers and disproportionately affects those most in need of protection,[90] including survivors of torture. Rushed asylum applications can lead to denials based on credibility, particularly for torture survivors who struggle with memory loss, PTSD, depression, and other barriers to quickly applying for asylum.

34. Exceptions[91] to the one-year filing deadline are granted inconsistently.[92] For some asylum seekers, this means years of delay while their case is heard before an immigration judge; for others, it means denial of asylum.[93] Most federal courts of appeal have held that they do not have jurisdiction to review determinations relating to the one year filing deadline for asylum applications.[94]

35. **United States law denies protection to refugees with criminal convictions in violation of the Refugee Convention**. Withholding of removal,[95] which implements the United States' obligation against *refoulement* under Article 33 of the Refugee Convention for those deemed ineligible for a discretionary grant of asylum, is *per se* unavailable to non-citizens who are determined to have been convicted of a particularly serious crime.[96] The massive expansion of the "aggravated felony" definition made by changes to the INA in 1996 has resulted in cases considered "particularly serious crimes" which are far outside the scope of the Refugee Convention.[97]

36. **While federal regulations implementing Article 3 of the Convention Against Torture (CAT) allow individuals to raise protection claims, the U.S. has failed to create an adequate legal mechanism implementing fully the obligations of Article 3.** The U.S. imposes heightened standards[98] which are inconsistent with the Convention.[99] The U.S. also applies a heightened standard regarding government acquiescence in the torture. In 2002, the Board of Immigration Appeals held that *refoulement* protection does not extend to persons who fear torture by private entities a government is unable to control.[100] Although at least one U.S. federal appellate court has held that Article 3 prohibits return when the government in the receiving country is aware of a private entity's behavior and does nothing to stop it,[101] the United States continues to apply a different understanding of the term "acquiescence" in immigration cases.[102]

37. **The USA PATRIOT Act of 2001[103] and the REAL ID Act of 2005[104] expanded the class of individuals who are inadmissible to the U.S. for having provided material support to a terrorist organization, rendering *bona fide* refugees and asylum seekers ineligible for protection.**[105] The political activities which form the very basis of many refugees' claims for protection have, under U.S. law, now been defined as "terrorist activities" barring them from refugee status, asylum, family reunification, or permanent resident status.[106] Human Rights First, which has extensively documented the crisis created by the "material support" bar, cites numerous examples of denial of protection for *bona fide* refugees because of testimony they gave when seeking refugee or asylum status.[107]

38. Under U.S. immigration law, "terrorist activity" is extremely broadly defined.[108] That overbroad definition, combined with the creation of the so-called Tier III terrorist category,[109] and a definition of "material support" which the U.S. is applying to *de minimis* or coerced acts, has resulted in widespread denial or prolonged delay in protection of bona fide refugees.[110] While the law gives the Executive Branch of the U.S. broad discretion to waive application of the "terrorism"-related provisions of the immigration law to individual cases,[111] this approach turns eligibility for forms of protection mandatory under international law into a matter of executive grace for many applicants, and has failed to provide protection to several categories of individuals who should be protected under the Refugee Convention and Protocol. The practical implementation of the waiver authority has been extremely slow, and has yet to reach the large number of applicants who had voluntary associations with groups now considered to be "Tier III terrorist organizations."[112]

e. Right to Family Unity

39. In violation of ICCPR article 23 and article 17, **the U.S. fails to protect family unity in removal proceedings by imposing mandatory deportation without a discretionary hearing that takes into account the non-citizen's family ties.**[113] An estimated 1,012, 734 family members have been separated by deportation between 1997 and 2007.[114] The impact of deportation upon the families in the United States have been dramatic and painful.[115]

40. **The U.S. immigrant detention system contravenes the United States' obligations to protection family unity.** Family unity cannot be considered in mandatory detention cases, and the United States routinely fails to consider family unity when making discretionary

detention decisions. Transfer of detainees to facilities far from family members has increased sharply in the last decade.[116]

41. **Measures penalizing people for illegal entry into or presence in the United States seriously undermine the United States' protection of the family.** Migrants who enter the United States without inspection are barred from adjusting status to lawful permanent resident and must process their applications for residency at a U.S. consulate abroad.[117] At the same time, any person who has been unlawfully present in the U.S. for more than 6 months is barred from returning to the U.S. after departing; if unlawfully present for more than 1 year, they face a 10 year bar to returning to the U.S.[118] While discretionary waivers of the 3 and 10 year bars are statutorily available, applicants must demonstrate extreme hardship due to separation, without appeal of adverse decisions.[119] Even in cases where waivers are granted, the bars result in prolonged separation of families.[120]

42. While the United States' immigration system is based on reunification of families, [121] **long backlogs for visa issuance** exist. A United States citizen who petitions for his or her spouse, parent or child may wait months or years for the paperwork and background checks to be completed. Adult sons and daughters and siblings of United States citizens must wait in visa queues for anywhere between five and twenty years. The spouses and children of lawful permanent residents in the United States face similar visa backlogs, waiting between five and ten years for their family members to be issued visas to the United States.[122]

43. The United States' increased **reliance on DNA testing to establish family relationships**, even where credible documentation of the relationship is provided, has caused unnecessary separation of families. The expense of DNA testing, provided by private contractors, is born by the families.[123] On October 22, 2008, the United States stopped accepting all applications for the Priority 3 (P-3) refugee resettlement program, which gives certain refugees access to resettlement in the U.S. based on a family relationship with an individual permanently residing in the United States.[124] The suspension of P-3 refugee family unification followed mandatory DNA testing of applicants for resettlement which, according to the U.S., resulted in high rates of fraudulently-claimed family relationships.[125]

44. **The exclusion of many asylum seekers from asylum, and relegation to protection against *refoulement* through the withholding of the removal order, fails to protect family unity.** Withholding of removal, while protecting the individual against deportation to the country of feared persecution, does not permit reunification with family members, travel outside the United States to visit family members, or the eventual acquisition of U.S. citizenship so as to immigrate family members. For some asylum seekers in the United States, the decision to avail themselves of the right to be free from *refoulement* is rendered meaningless if family members cannot also be brought to safety.

IV. ACHIEVEMENTS AND CHALLENGES

45. In September 2009, **the United States stopped detaining families at the T. Don Hutto Family Residential Facility (Hutto) in Texas**. However, the United States continues to detain women at Hutto and has ann*-ounced plans to consolidate the female populations from three disparate facilities—Willacy, Pearsall, and Port Isabel—into Hutto. Family

detention has not been ended as a policy. While the closure of Hutto as a family detention facility is a welcome first step, detention of families should end.

46. **ICE began to implement new parole guidance in January 2010 that provides that all arriving asylum seekers who pass through the "credible fear" screening process be assessed for release by ICE, and allows for the release of those who can establish their identity, and do not present a flight risk or danger to the community.** While the new parole guidance is a positive first step in revising flawed policies that have led to the prolonged and unnecessary detention of asylum seekers, additional reforms are necessary to ensure that arriving aliens, including asylum seekers, are not detained arbitrarily for extended periods of time. Specifically, the United States should codify the parole criteria and revise the regulatory language that prevents arriving aliens, including arriving asylum seekers, from accessing custody/bond hearings before an immigration judge.

47. **In October 2009, the United States announced detention reform efforts focusing on greater federal oversight, specific attention to the care of detained individuals, uniformity at detention facilities, and review of the use of the penal system for immigrant detention.** The United States also created the Office of Detention Policy and Planning. While the detention reform announcement is a welcome acknowledgement of the fundamental failures of the immigrant detention system, the announcement does not alter the U.S. commitment to detention as a cornerstone of immigration enforcement. Immediate steps must be taken to ensure only those who must be detained are detained and to ensure that every person in custody is held under humane conditions.

48. **The United States has announced plans to launch an On-line Detainee Locator System (ODLS) in June 2010.** The tracking system will be available on a government website and will be designed to disclose the facility where an individual is being detained, its location and visiting hours. The United States does not have plans to develop a telephonic locator system at this time which would provide much greater accessibility for individuals without internet access.

V. CONCLUSION

49. The United States immigration system fails to protect fundamental human rights to due process, fair deportation proceedings, freedom from arbitrary detention, humane detention conditions, freedom from *refoulement* to persecution or torture, and family unity. The vast apparatus of the U.S. immigration system, including the oft-amended Immigration and Nationality Act and the gargantuan bureaucracies which enforce, interpret and administer the law, do not fundamentally reflect the United States' commitment to human rights protection. As the United States implements existing laws and develops new statutes, regulations, and policies, it must turn to its international human rights obligations as the starting point for policy development. Without a commitment to human rights implementation at the core of immigration policy, the United States will continue to struggle to meet its obligation to ensure that the human dignity of every person within its borders is respected.

APPENDIX: REFERENCES

[1] *See* NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT IMMIGRATION ENFORCEMENT REPORTS (Apr. 2010) (summarizing 20 reports of human rights and other violations issued by both non-governmental organizations and the U.S. government since the end of 2008), *available at* http://www.immigrationforum.org/images/uploads/2010/EnforcementReportSummaries.pdf.
[2] U.N. Human Rights Council [UNHRC] Dec. 6/102, Follow-up to Human Rights Council Res. 5/1 (Sept. 27, 2007).
[3] International Covenant on Civil and Political Rights (ICCPR), art. 13, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). *See also* UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants,* ¶ 12, U.N. Doc. A/HRC/7/12/Add.2, (Mar. 5, 2008) (*prepared by* Jorge Bustamante, Mission to the United States of America) (noting that the Human Rights Committee has interpreted the phrase "lawfully in the territory" to include non-citizens who wish to challenge the validity of the deportation order against them. The Committee has clarified: ". . . if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13." and further: "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one").
[4] *Report of the Special Rapporteur on the Human Rights of Migrants*, *supra* note 3, ¶ 10.
[5] *Id.*
[6] ICERD, art. 1, ¶ 2 (providing for the possibility of differentiating between citizens and non-citizens); *but see* CERD, Gen. Rec. 11 (noting regarding the rights of non-citizens, art. 1, ¶ 2, must not detract from the rights and freedoms recognized and enunciated in other human rights instruments and "must be construed so as to avoid undermining the basic prohibition of discrimination"); Gen. Rec. 30, at ¶ 2 (noting that "Under the Convention, differential treatment based on citizenship or immigration status 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").
[7] Universal Declaration of Human Rights (UDHR), art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); ICCPR, *supra* note 3, art. 9.
[8] ICCPR, *supra* note 3, art. 6.
[9] UDHR, *supra* note 7, art. 9; ICCPR, *supra* note 3, art. 9(1) (stating no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law); *id.* art. 9(2) (guaranteeing that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him); *id.* art. 9(4) (requiring that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful). *See also* UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (reminding states that the legality of detention must be open for challenge before a court and 2); UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (reminding states of the right of the detained to a prompt review).
[10] ICCPR, *supra* note 3, art. 7 (stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); ICCPR art. 10(1) (requiring that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2) (requiring that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).
[11] ICCPR, *supra* note 3, at art. 9(4).
[12] UNHCR, Exec. Comm., *Detention of Refugees and Asylum Seekers, Conclusion No. 44* (XXXVII) UN Doc. A/41/12/Add.1 (Oct. 13, 1986) (stating that "in view of the hardship which it involves, detention should normally be avoided" and sets out the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. Those detained must have access to either an administrative or judicial review, an essential safeguard against arbitrary detention). *See also*, UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers,* Feb. 26, 1999.

[13] UDHR, *supra* note 7, art. 14; 1951 Convention relating to the Status of Refugees, art. 33(1) July 28, 1951, 189 U.N.T.S. 137 [*hereinafter* Refugee Convention] (stating that no State shall expel or return (*"refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). *Id.* art. 31 (recognizing that refugees and asylum seekers may be forced by their circumstances to enter a country illegally in order to escape persecution, and providing that States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence).

[14] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [*hereinafter* Convention Against Torture or CAT] (stating that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights).

[15] UDHR, *supra* note 7, art.16 (3); ICCPR, *supra* note 3, art. 23 (1), (3) (stating that the right of men and women to marry and found a family shall be recognized and that this right includes the right to live together); *id.* art. 17(1) (stating that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence . . . .").

[16] UNHRC, 7th Session, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 17, A/HRC/7/12/Add.2 (Mar. 5, 2008) (*prepared by* Jorge Bustamante).

[17] The INA of 1952 also created the Immigration and Naturalization Service (INS), the federal agency responsible for administering immigration law and policy until the creation of the Department of Homeland Security in 2003. *See* Immigration and Nationality Act, 8 U.S.C. § 1187 (2006).

[18] The term "refugee" means "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42).

[19] *See* INA § 101(a)(43). *See also* The Anti-Drug Abuse Act of 1988, Pub. L. 100-690, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating a separate ground of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices), Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1999) (substantially expanding the category of aggravated felony).

[20] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[21] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[22] *See* INA § 101(a)(43).

[23] INA § 235.

[24] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[2525] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005).

[26] 72 Fed. Reg. 9958 (Mar. 6, 2007) Notice of Determination.

[27] Local enforcement of immigration laws has resulted in problems with racial discrimination and profiling. *See generally* U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS (Mar. 2010); ACLU OF N.C. LEGAL FOUND. AND IMMIGR. AND HUM. RIGHTS POL'Y CLINIC AT THE U. OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS, 287(G) PROGRAM IN NORTH CAROLINA, (Feb. 2009), *available at* http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf; GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (Jan. 2009), *available at* http://www.gao.gov/new.items/d09109.pdf; TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY AT THE U.C. BERKELEY L. SCH., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM, (Sept. 2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[28] U.S. DEPT. OF HOMELAND SECURITY, FY 2011 BUDGET IN BRIEF, at 15 [*hereinafter* DHS BUDGET IN BRIEF].

[29] *Id.* at 63.
[30] *Id.* at 64.
[31] ABA, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5 (2010) [*hereinafter* REFORMING THE IMMIGRATION SYSTEM], *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.
[32] DHS BUDGET IN BRIEF, *supra* note 28, at 54.
[33] *Id.* at 54.
[34] *Id.* at 54.
[35] *See* INA § 236(c) (directing that the Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in INA § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense).
[36] *See id.* § 101(a)(43). *See also Carachuri-Rosendo v. Holder*, 570 F.3d 263, 264 (5th Cir. 2009) (pet'n for cert. pending) (holding that lawful permanent resident aliens who have been convicted of misdemeanor simple possession of a controlled substance are barred from applying for cancellation of removal because an "aggravated felony" includes any felony under the Controlled Substances Act, and under that Act, simple possession of most narcotics is a misdemeanor but possession of a controlled substance by an individual who has a prior conviction for possession is a felony).
[37] *See* INA § 240A(a)(3) (stating that the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been lawfully admitted for permanent residence for not less that 5 years, has resided in the United States continuously for 7 years after having been admitted in any status, and has not been convicted an any aggravated felony).
[38] *See id.* § 238(b); DHS BUDGET IN BRIEF, *supra* note 28, at 64. (citing 4,112 administrative removal cases completed by ICE attorneys in FY 2009).
[39] DHS BUDGET IN BRIEF, *supra* note 28, at 64.
[40] The National Immigrant Justice Center, analyzing data obtained through a Freedom of Information Act request, found that 94 percent of the 80,844 stipulated orders of removal signed between April 1997 and February 2008 were by immigrants who spoke primarily Spanish, and most had not been charged with a crime. *See* NAT'L IMMIGR. JUSTICE CTR., LANGUAGE BARRIERS MAY LEAD IMMIGRANTS TO WAIVE RIGHT TO HEARING BEFORE DEPORTATION (Jun. 3, 2008), *available at* http://www.immigrantjustice.org/news/detention/preleasestiporderdata20080603.html.
[41] INA § 292. See also, ABA, Reforming the Immigration System, *supra* note 30, at 40 (noting that while courts may apply a case-by-case approach to determining whether the assistance of counsel would be necessary to provide fundamental fairness, under the United States Constitution's Fifth Amendment due process guarantee, appointment of counsel has been denied in every published case).
[42] REFORMING THE IMMIGRATION SYSTEM, *supra* note 31, at 39.
[43] *Id.*
[44] *Id.*
[45] *See* BORDER NETWORK FOR HUM. RTS., HUMAN RIGHTS ABUSE DOCUMENTATION REPORT 2009: EL PASO, TEXAS – SOUTHERN NEW MEXICO (Dec. 9, 2009).
[46] In a survey conducted with over 300 families in Arizona border communities, the Border Action Network found that a startling majority of residents (41% in Pirtleville, 66% in Naco, 70% in Nogales, and 77% in Douglas) felt that Border Patrol Agents stopped people for simply having brown skin.
[47] U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, ICE ACCESS, *available at* http://www.ice.gov/partners/dro/iceaccess.htm
[48] *See* Submission to the Office of the High Commissioner for Hum. Rts., United Nations Universal Periodic Review (UPR): United States of America, Nov. 26, 2010, Ninth Session of the Working Group on the UPR, Human Rights Council, "The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin" at ¶¶ 20-27.
[49] *Id.* at ¶ 26. The Advocates for Human Rights has documented cases of state and local law enforcement officers calling in federal immigration authorities for use as "interpreters" when making traffic stops of Latinos in the Upper Midwest region of the United States.

[50] *See, e.g.* AM. CIVIL LIBERTIES UNION OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (Mar. 2010) (demonstrating impact of the 287(g) program on the Gwinnett County, Georgia community and documenting exacerbation of racial profiling that has taken place after the implementation of 287(g)); MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (Mar. 2010); UNIV. OF N.C. AT CHAPEL HILL, THE 287(G) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES, (February 2010) (examining available data on the 287(g) program related to public safety, financial cost, and the relationship between immigration and crime and examining effects on community relationships between police and Hispanic populations); CARDOZO IMMIGR. JUSTICE CLINIC, IMMIGRATION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS (July 2009) (analyzing ICE arrest records from home raids in NY and NJ, finding a far-reaching pattern of misconduct and constitutional violations by ICE agents); POLICE FOUNDATION, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES (April 2009) (discussing implications of state and local police enforcing federal immigration laws through the ICE 287(g) program, and the effect this enforcement has on the ability of local police to maintain trust and cooperation with immigrant communities); ACLU OF N.C. LEGAL FOUNDATION AND IMMIGR. & HUM. RGTS. POLICY CLINIC, UNIVERSITY OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA (Feb. 2009); (finding shortcomings in complaint mechanisms, designation of functions, nomination of personnel, training of personnel, certification and authorization, ICE supervision, civil rights standards and provision of interpreters, required steering committee, community outreach, media relations/discretion, modification, and duration); JUSTICE STRATEGIES, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT (Feb. 2009) (finding 287(g) programs were not targeted at high-crime areas but did target race); MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM (Feb. 2009) (examining the National Fugitive Operations Program (NFOP), run by ICE, comparing apprehension and detention data from Fugitive Operations Teams (FOTs) to stated program objectives and finding that 73 percent of FOT apprehensions from the beginning of the program in 2003 to FY 2008 had no criminal conviction); U.S. GOVT. ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (Jan. 2009) (finding that 287(g) program lacks "documented program objectives," that 4 of 29 287(g) participants reviewed used the agreement to process minor crimes, such as speeding; that ICE does not describe in detail its supervision over 287(g) participants, creating a "wide variation in the perception" of supervisory responsibilities for ICE field officials; and that over half of the 29 agencies surveyed reported concerns from community members that local law enforcement would engage in racial profiling and intimidation).

[51] *See* U.S. Dept. of Homeland Security, Custom and Border Protection, Press Release: Border Patrol Introduces, Reiterates Enhanced Enforcement Operations (Mar. 28, 2008) *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/march_2008/03282008_5.xml; *Operation Streamline*, WASH. POST, June 2, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/graphic/2008/06/02/GR2008060200068.html?sid=ST2008060102603.

[52] JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, U. OF CAL., BERKLEY LAW SCHOOL (Jan. 2010) (noting that the "program has fundamentally transformed DHS's border enforcement practices. Before Operation Streamline began, DHS Border Patrol agents voluntarily returned first-time border crossers to their home countries or detained them and formally removed them from the United States through the civil immigration system. The U.S. Attorney's Office reserved criminal prosecution for migrants with criminal records and for those who made repeated attempts to cross the border").

[53] DR. DORA SHRIRO, U.S. DEPT. OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009) at 2.

[54] *Id.*

[55] INA § 235(b)(1)(B)(iii)(IV).

[56] Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien

is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
[57] *See Id.* § 236(c).
[58] INA § 235(b)(1)(B)(iii)(IV).
[59] *See* HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT (Mar. 2010) at 10 (noting that while Immigration Judges can review ICE's custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of "arriving aliens," a group that includes asylum seekers who arrive at airports and other U.S. entry points under regulations located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3). *See also* U.S. Comm'n on Int'l Religious Freedom, ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States (Dec. 23, 2009) (noting low rates of release on parole and citing that New Orleans released only 0.5 percent of asylum seekers, New Jersey less than four percent, and New York eight percent following a finding of credible fear), *available at* http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126.
[60] U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, News Release: ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives (Dec. 16, 2009), available at http://www.ice.gov/pi/nr/0912/091216washington.htm.
[61] *See* DHS BUDGET IN BRIEF, *supra* note 28, at 52 (noting that "CBP increased the number of miles of border under effective control from 757 in FY 2008 to 939 miles by the end of FY 2009").
[62] *See* ACLU OF SAN DIEGO AND IMPERIAL COUNTIES AND MEXICO'S NAT'L COMM'N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER (Oct.1, 2009) at 19.
[63] *Id.* at 5.
[64] *Id.* at 17.
[65] SHRIRO, *supra* note 53, at 2.
[66] *See* NAT'L IMMIGR. L. CTR., ACLU OF S. CAL., AND HOLLAND & KNIGHT, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 4 (2009) [*hereinafter* A BROKEN SYSTEM].
[67] *See e.g.,* DETENTION WATCH NETWORK, ABOUT THE U.S. DETENTION AND DEPORTATION SYSTEM, *available at* www.detentionwatchnetwork.org/aboutdetention.
[68] SHRIRO, *supra* note 53, at 2.
[69] ICCPR, *supra* note 3, art. 10(1) (guaranteeing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2)(a) (providing that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).
[70] *See* Human Rights Advocates, Submission to the Human Rights Council, 11th Session, Agenda Item 3: Rights of Migrants.
[71] County jails holding immigrant detainees in Minnesota have "video visits" with family members, where detainees see and speak with their family members via closed circuit television.
[72] *See* A BROKEN SYSTEM, *supra* note 666, at 14-15.
[73] *See, e.g.*, KATHERINE FENNELLY AND KATHLEEN MOCCIO, U. OF MINN. HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, ATTORNEYS' PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA (Nov. 2009).
[74] County jails, designed for short periods of detention, do not necessarily have outdoor recreation facilities. The Ramsey County Law Enforcement Center in St. Paul, Minnesota, has an average daily immigrant detainee population over 100. The facility has no outdoor recreation access. *See also* A BROKEN SYSTEM, *supra* note 666, at 21.
[75] See Dana Priest & Amy Goldstein, *Caught Without Care*, THE WASH. POST, May 13, 2008 (reporting that suicide is the most common cause of death among detained immigrants with 15 of 83 deaths since 2003 the result of suicide and stating, "No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent -- about 4,500 -- are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention"). *See also* PHYSICIANS FOR HUMAN RIGHTS, BELLEVUE/NYU CENTER FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), *available at* http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf.

[76] A client of The Advocates for Human Rights seeking asylum from Ethiopia and being treated for depression and Post-Traumatic Stress Disorder, was detained for over one year in the Ramsey County Adult Detention Center in St. Paul, Minnesota, following her asylum hearing in front of an immigration judge. While detained, she never saw the outdoors and was co-mingled with the general convicted population because the facility with which ICE contracts lacks the facilities.
[77] U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Press Release: ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm; U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Fact Sheet: ICE DETENTION REFORM: PRINCIPLES AND NEXT STEPS: Sec. Napolitano Announces New Immigration Detention Reform Initiatives (Oct. 6, 2009), *available at* http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.
[78] The New York Times alone contained at least 25 reports of problems with conditions in detention, including deaths in detention, between 2005 and March 2010.
[79] Immigration and Customs Enforcement, List of Detainee Deaths Since October 2003, *available at* http://graphics8.nytimes.com/packages/pdf/nyregion/ICE_FOIA2.pdf.
[80] Nina Bernstein, *Hong Kong Emigrant's Death Attracts Scrutiny of U.S. Detention System*, N.Y. TIMES, Aug. 13, 2008 (reporting that "[i]n April, [Hiu Lui] Ng began complaining of excruciating back pain. By mid-July, he could no longer walk or stand. And last Wednesday, two days after his 34th birthday, he died in the custody of Immigration and Customs Enforcement in a Rhode Island hospital, his spine fractured and his body riddled with cancer that had gone undiagnosed and untreated for months.").
[81] *See* A BROKEN SYSTEM, *supra* note 66, at 4-5.
[82] Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, *available at* http://www.nytimes.com/2010/01/10/us/10detain.html.
[83] *See* NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT REPORTS ON IMMIGRATION DETENTION 2007-2009 (Feb. 2010), *available at* http://www.immigrationforum.org/images/uploads/DetentionReportsSummaries2007-2009.pdf
[84] 8 U.S.C. § 236; 8 C.F.R. § 236.1; CBP Directive No. 3340-030A (Mar. 9, 2004), *available at* http://foia.cbp.gov/streamingWord.asp?i=10.
[85] NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER 13 (Sept. 2008) [*hereinafter* CROSSING THE LINE]..
[86] Adam Borowitz, *Wackenhut Worries: A Company with a Sketchy Record has Quietly Taken Over Deportation Duties from the Border Patrol*, THE TUCSON WEEKLY, May 2, 2007.
[87] CROSSING THE LINE, *supra* note 85, at 20.
[88] INA § 208(a)(2)(B).
[89] "We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system." 142 Cong. Rec. S4468 daily ed. (May 1, 1996) (statement of Sen. Simpson).
[90] "[T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted [and] brutalized by their own governments. They have an inherent reluctance to come forward . . . before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to do it" 142 Cong. Rec. S3282 daily ed. (April 15, 1996) (statement of Sen. Kennedy).
[91] INA § 208(a)(2)(D) (permitting grant of asylum filed more than one year after arrival only where the applicant can demonstrate (1) "changed circumstances which materially affect the applicant's eligibility for asylum," or (2) "extraordinary circumstances relating to the delay in filing the application").
[92] *See* TAHIRIH JUST. CTR., PRECARIOUS PROTECTION: HOW UNSETTLED POLICY AND CURRENT LAWS HARM WOMEN AND GIRLS FLEEING PERSECUTION 33 (Oct. 2009).
[93] A client of The Advocates for Human Rights, a Guinean political activist who was detained for over 2½ years and tortured by the Guinean government fled to the US. He entered on a false passport and could not prove his date of entry. He filed his application within 1 year of arrival and submitted some proof of entry, but he could not prove his date of entry to the satisfaction of either the asylum office or the immigration judge. He was denied asylum and ordered removed from the United States; he remains in the U.S. under an order of withholding of removal.
[94] INA § 208(a)(3). Note that INA § 242(a)(2)(D), added to the INA by the REAL ID Act of 2005, provides courts with jurisdiction over all constitutional claims or questions of law notwithstanding other restrictions on review in the INA. *See Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007) (reversing BIA's timeliness finding because BIA misinterpreted the regulation regarding when a document is deemed filed); *Diallo v. Gonzales*, 447 F.3d 1274 (10th

Cir. 2006) (reversing BIA's interpretation of INA § 208(a)(2)(B) for purposes of determining whether petitioner filed within one year); *Mabasa v. Gonzales*, 455 F.3d 740 (7th Cir. 2006) (finding jurisdiction to review allegation that BIA failed to provide meaningful review because BIA wrongly analyzed claim as extraordinary circumstances when it should have been analyzed as changed circumstances); *Wijono v. Gonzales*, 439 F.3d 868 (8th Cir. 2006) (recognizing that court can review due process violation, but finding claim not exhausted).

[95] INA § 241(b)(3) provides that the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

[96] INA § 241(b)(3)(B)(ii) defines what constitutes a "particularly serious crime." Under that provision, a determination about whether a conviction for aggravated felony constitutes a conviction for a "particularly serious crime" is based primarily on the length of the sentence that the criminal court imposed. If the sentence imposed is five years or more of imprisonment, the conviction is for a "particularly serious crime." A conviction of an aggravated felony with a sentence of less than five years' imprisonment may be a "particularly serious crime." *Id.* § 241(b)(3)(B)(ii).

[97] *See e.g. Matter of Y-L-, A-G- and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (holding that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of § 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2000), and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) (holding that in order to be considered a particularly serious crime an offense need not be an aggravated felony under INA § 101(a)(43) and that once the elements of an offense are found to potentially bring it within the ambit of a particularly serious crime, all reliable information may be considered in determining whether the offense constitutes a particularly serious crime, including but not limited to the record of conviction and sentencing information).

[98] Pursuant to the implementing regulations, the claimant must show that "it is more likely than not that he would be tortured" in order to be granted CAT relief. 8 C.F.R. § 208.17.

[99] Article 3 of the CAT requires protection against *refoulement* "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, *supra* note 14, art. 3.

[100] *See Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000).

[101] *See Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. Jun 18, 2003); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Perez v. Loy*, 356 F.Supp.2d 172 (D. Conn. Feb 17, 2005).

[102] *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[103] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (adding a definition of "terrorist organization" consisting of three categories of armed groups, including Tier III organizations defined as any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" "terrorist activity" as defined by the INA and defining "material support" to a "terrorist organization" as "terrorist activity" in its own right). *See* HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 21 (2009) [*hereinafter* DENIAL AND DELAY].

[104] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005) (REAL ID Act) (expanding terrorism-related grounds of inadmissibility and deportation) According to Human Rights First, because of the interplay within the INA between the grounds of inadmissibility and deportation, "with the passage of the REAL ID Act, anyone described in *any* of the new long list of inadmissibility grounds at section 212(a)(3)(B) is now barred from all forms of refugee protection). *See also* DENIAL AND DELAY, *supra* note 1033, at 22.

[105] The Human Rights Committee in its Concluding Observations noted at ¶ 17 that the Committee is concerned the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided "material support" to a "terrorist organization", whether voluntarily or under duress. The Committee noted regret at having received no response on this matter from the State party. The Committee observed that the State party should ensure that the "material support to terrorist organizations" bar is not applied to those who acted under duress. UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

[106] The following cases of The Advocates for Human Rights illustrate the "material support" problem: A Nepalese woman sought asylum in the US because Maoist insurgents had kidnapped her son. We had to advise her that she would be considered a "terrorist" under the material support guidelines because she paid the ransom for her son's

release. A Zimbabwean man was granted asylum in August 2008 on account of imputed political opinion, because the Zimbabwean government suspected him of supporting the Movement for Democratic Change. He petitioned for his wife and children to join him in the US in September 2008. In June 2009, The Advocates for Human Rights received notice that the cases are on "hold" under INA section 212(a)(3) – security related bars. An Oromo man was granted asylum by the immigration judge on account of the persecution and torture he suffered at the hands of the Ethiopian government. He applied for adjustment of status, but his application was placed on hold because of his affiliation with the Oromo Liberation Front. In the fall of 2009, The Advocates for Human Rights was contacted by a therapist practicing in St. Paul who was worried that her Hmong clients, who were receiving that their applications for permanent residence or family reunification were "on hold" for material support of terrorism, could commit suicide

[107] DENIAL AND DELAY, *supra* note 103.

[108] Terrorist activity includes "any activity which is unlawful under the laws of the place where it is committed" and which involves any of a range of acts including "the use of any … explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." INA § 212(a)(3)(B)(iii)(V).

[109] Tier III terrorist organizations include any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" "terrorist activity" as defined by the INA.

[110] *See generally* DENIAL AND DELAY, *supra* note 103.

[111] *See* 72 Fed. Reg. 9958 (Mar. 6, 2007) Notice of Determination.

[112] *Id.*

[113] INA § 240A(a)(3).

[114] HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 5 (Apr. 2009).

[115] *See, e.g.* DORSEY & WHITNEY L.L.P. AND THE URBAN INST., SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY (March 2009).

[116] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009), *available at* http://trac.syr.edu/immigration/reports/220/ (finding that the number of detainees that ICE has transferred each year has grown much more rapidly than the already surging population held in custody by the agency, with over 50% of detainees transferred at least once and nearly 25% of detainees transferred multiple times while detained).

[117] INA § 245(a).

[118] *Id.* § 212(a)(9)(B).

[119] *Id.* § 212(a)(9)(B)(v) (stating that the Attorney General has sole discretion to waive unlawful presence bars in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause).

[120] For example, U.S. citizen Kimberly Anderson married Seferino Aulis Morales, a Mexican citizen. Seferino had entered the U.S. without inspection and was required to leave the U.S. to process his visa abroad. Kim and Seferino were separated for over 2 years before their second waiver application was approved. The impact on families in the U.S. is vast, with an estimated 3.2 million noncitizens married to U.S. citizens. *See* Nina Bernstein, *A Fatal Ending for a Family Forced Apart by Immigration Law*, N.Y. TIMES, Feb. 11, 2010, *available at* http://www.nytimes.com/2010/02/12/nyregion/12family.html.

[121] *See* INA § 203(a) (outlining the preference allocation for family-sponsored immigrant visas to include (1) unmarried sons and daughters of U.S. citizens, (2)(a) spouses and children of lawful permanent resident aliens, (2)(b) unmarried sons and daughters of lawful permanent resident aliens, (3) married sons and daughters of U.S. citizens, and (4) siblings of U.S. citizens.

[122] *See, e.g.*, U.S. DEPT. OF STATE, VISA BULL., Apr. 2010 (indicating that the most current family reunification visas being processed are those filed in June 2006 for spouses and children of lawful permanent residents. Visa petitions for siblings from the Philippines filed in September 1987 are being processed).

[123] *See* U.S. DEPT. OF STATE, DNA AND PARENTAGE BLOOD TESTING, *available at* http://travel.state.gov/visa/immigrants/info/info_1337.html.

[124] *See* U.S. DEPT. OF STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: FRAUD IN THE REFUGEE FAMILY REUNIFICATION (PRIORITY 3) PROGRAM, Feb. 3, 2009, *available at* http://www.state.gov/g/prm/rls/115891.htm.
[125] *Id.*

United States of America

Submission to the United Nations
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Migrant Labor Rights

Submitted by:

Albany Chapter, Labor Council for Latin American Advancement (LCLAA)
Comité de Apoyo a los Trabajadores Agricolas / Farmworker Support Committee (CATA)
Centro de los Derechos del Migrante, Inc. (CDM)
Friends of Farmworkers, Inc.
Global Workers Justice Alliance
Immigrants Legal Assistance Project, North Carolina Justice Center
Northwest Workers' Justice Project
Transnational Legal Clinic, University of Pennsylvania Law School

Endorsed by:

Organizations: The Advocates for Human Rights; AFL-CIO; Cidadao Global; Coalition of Immokalee Workers (CIW); Human Rights Advocates (HRA); Human Rights Caucus, Northeastern University School of Law; Human Rights Project of Michigan; Human Rights Project, Urban Justice Center; La Raza Centro Legal, Inc; Latin American and Caribbean Community Center; LatinoJustice PRLDF; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self-Determination; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; National Economic and Social Rights Initiative (NESRI NY); National Employment Law Project (NELP); National Immigrant Justice Center; National Lawyers Guild; National Network for Immigrant and Refugee Rights (NNIRR); Paso del Norte Civil Rights Project, El Paso, Texas; Public Interest Projects; South Bay Communities Alliance; Three Treaties Task Force of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition

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Executive Summary

The United States is the largest migrant receiving nation in the world, and the majority of those migrants are in the United States for purposes of work. An examination of the treatment of migrant laborers reveals, however, that despite the promise of great opportunity, the migrant worker experience is marred by systemic failures by the United States to protect their human rights. This report highlights the violations of the human rights of migrant labor in the United States from the moment of recruitment through the conclusion of their employment relationship and attempts to seek redress for workplace violations.

1. From the point of recruitment and entry into the United States, rising border deaths signal an escalating humanitarian crisis and require more effective governmental responses in line with the obligation to prioritize life over death.
2. Throughout the duration of their time as workers in the United States, workers may experience unredressed exploitation such as untreated work place injuries, underpayment of minimum and overtime wages, and sexual harassment are commonplace for migrant workers in the United States.
    - Exploitation in the workplace is exacerbated by statutory exclusions that would otherwise protect them, such as the exclusion of agricultural workers and domestic workers from protections under the National Labor Relations Act and certain provisions of the federal Fair Labor Standards Act, that work to deny large numbers of migrant workers the right to freedom of association, to join and participate in union activity, and the right to certain minimum wage and overtime protections.
    - Judicial decisions further restrict a migrant worker's access to remedies when their rights have been violated: in recent decisions, the United States' highest court and various state courts have excluded undocumented workers from employment rights and remedies available to their documented counterparts.
3. After separation from the exploitative working situation, migrant workers further face substantial legal and practical barriers that prevent them from accessing justice in the United States.

The lack of full protections and robust enforcement mechanisms aimed at protecting all labor and employment rights of all migrant workers regardless of migration status, often gives rise to conditions of forced labor.

This report calls on the government to take specific steps to eliminate the conditions that contribute to the exploitation and abuse of migrant laborers, and recognizes the need to enhance migrant worker protections across the board to guard against situations ripe for forced labor and human trafficking.

In this report, the above-listed U.S.-based civil society organizations and individuals who provide direct services to, advocate on behalf of, and are committed to the just and equal treatment of migrant workers, submit information under Sections B, C and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.[1]

INTRODUCTION

1. Immigrants comprise 15.5 percent of the U.S. labor force. There were 23.9 million foreign-born workers in the United States in 2009 and the median weekly earnings of foreign-born full-time wage and salary workers were less than 80 percent of those of their native-born counterparts.[2] Migrant laborers make up a large share of all workers in many low-wage industries, including farming occupations, cleaning, construction, and food preparation.

2. Despite guarantees under international law, migrant laborers in the United States endure the denial of rights and full remedies from the inception of their journey as a migrant worker and extending beyond their separation from employment and return to their country of origin. Insufficient mechanisms exist to prevent border deaths, human trafficking and forced labor, and in some instances, child labor. Once engaged in employment, migrant laborers face *de jure* and *de facto* discrimination. Immigration enforcement raids at places of employment and homes have a chilling effect on the ability and willingness of individuals to seek protection from abuse and exploitation when their rights are being violated, further contributing to rights violations. Compounding the discrimination and exploitation often experienced by migrant workers, recent decisions of the United States Supreme Court and various state courts have specifically excluded the undocumented subgroup of migrant laborers from full employment rights and remedies available to their citizen counterparts. Although international law recognizes the right of States to control their borders, international law prohibits many forms of discrimination against non-nationals, whether or not the individuals are legally authorized to work.

I. BACKGROUND & FRAMEWORK

3. International law clearly establishes the affirmative obligations of States to guard against discrimination on the basis of migration status. These obligations include the Universal Declaration of Human Rights (Art. 2, UDHR), the International Covenant on Civil and Political Rights (Art. 2, ICCPR) and the American Declaration of the Rights and Duties of Man (Art. 2, AmDecl.).[3] The Inter-American Court on Human Rights held in an Advisory Opinion on the Juridical Rights of Undocumented Migrants that discrimination against persons on the basis of migration status violates customary international law.[4] Specifically, the Court stated that irregular migrants "possess the same labor rights as those that correspond to other workers . . . and [the State] must take all necessary measures to ensure that such rights are recognized and guaranteed in practice."[5]

II. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

A. From Recruitment to Site of Employment

Border Deaths

4. Migrant workers come to the United States having been recruited either directly or indirectly for employment. Yet an alarming number of them die en route, never making it to their destination in violation of The Universal Declaration of Human Rights guarantee that "no one shall be subject to cruel, inhumane or degrading treatment . . . [that] everyone is entitled to the

rights and freedoms set forth in this declaration, without distinction of any kind, such as race . . . or other status.[6]

5. Border deaths have become a major concern of human rights advocates since the U.S. government implemented a border enforcement policy named "prevention through deterrence" in 1994.[7] The strategy assumed that as the urban areas were controlled, the undocumented migrants would "funnel" to more remote regions where natural barriers and extreme environment would deter the illegal entry. Nevertheless, the strategy has not worked. In the 15 years since the United States began to patrol along the 2,000-mile border, estimates of the death toll range from 3,861 to 5,607[8] Border deaths continue despite economic downturn, fewer migrant crossers, and a steady drop in apprehensions. By August 31, 2009, U.S. Border Patrol (USBP) has reported a historical low of 519,394 apprehensions. We have witnessed a slight decline in deaths with 416 deaths during the same period, compared with 492 in 2005, the decade's peak.[9]

B. During Employment

Statutory Exclusions from Labor & Employment Law Protections

6. The rights of domestic workers and agricultural workers are violated by statutory exclusions from protections under major national statutes aimed at protecting and promoting worker rights. The National Labor Relations Act (NLRA) guarantees workers the right to organize and join labor unions and the Fair Labor Standards Act (FLSA) sets minimum standards for wages, overtime provisions and child labor laws. However, while these federal laws impose limits on the exploitation of labor, both acts contain exclusions for domestic workers and agricultural workers. This has particularly deleterious effects on women and girl migrant laborers, who are often effectively invisible workers in private homes as caretakers, or in fields removed from public eye as agricultural workers, making them more vulnerable to exploitation and abuse. These group rights are further violated by the domestic workers exclusion from protections under the Occupational Safety and Health Act (OSHA), depriving them of the right to a safe and healthy work environment.[10] Furthermore, agricultural workers brought in under the H-2A guestworker visa are excluded from the main federal protective statute for farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act. 29 U.S.C. Section 1802(8)(B)(2). As a result, most H-2A workers have only administrative remedies (i.e. a DOL complaint) for any violations of their contracts and their rights as H-2A workers are quite attenuated. Workers classified as independent contractors are similarly excluded from the full protection of labor laws creating uneven standards across different labor sectors.[11] Because labor and employment laws assign rights to "employees"—a status that is very narrowly defined—employers often misclassify their employees as independent contractors or subcontractors denying them workplace protections.[12]

Judicial Exclusions from Labor and Employment Law Protections

7. In recent decisions, the United States Supreme Court and various state courts have excluded undocumented workers from employment rights and remedies available to their documented counterparts. Discrimination against undocumented workers is rooted in a decision by the United States Supreme Court, *Hoffman Plastic Compounds, Inc. v. National Labor Relations*

Bd.,[13] in which the country's highest court limited undocumented workers' right to an effective remedy for violation of their freedom of association.

8. The *Hoffman* case involved a worker named Jose Castro. Mr. Castro was working in a factory in California and was fired, along with other co-workers, for his organizing activities. The National Labor Relations Board (NLRB), the agency that administers the National Labor Relations Act (NLRA)—the primary law under which workers are guaranteed the right to organize trade unions and bargain collectively in the United States—ordered the employer to cease and desist, to post a notice that it had violated the law and to reinstate Mr. Castro, and to provide him with back pay for the time he was not working because he had been illegally fired. During a hearing on his case, Mr. Castro admitted he was not legally authorized to work. The U.S. Supreme Court ultimately held that undocumented workers cannot receive back pay under the NLRA. Under the Act, back pay is the only remedy awarded to a victim of an illegal anti-union firing in order to compensate him for wages he would have earned had he not been wrongfully fired. The Court also reinforced that undocumented workers are not entitled to reinstatement, the only other remedy to the individual for violations of the Act.

9. In *Hoffman*, there was no question that the employer had violated the NLRA: in fact, one justice referred to the employer's violation of the law as "crude and obvious."[14] However, a majority of the justices nevertheless held that the immigration policy underlying the Immigration Reform and Control Act of 1986—which prohibits the employment of unauthorized aliens in the United States—required the Court to deny the remedy of back pay to undocumented workers. The elimination of the only meaningful remedy to such wrongfully discharged workers has had the practical effect of limiting undocumented workers' right to freedom of association and eliminating the enforceability of this right. This has left workers more vulnerable to exploitative working conditions because, without an effective remedy available, undocumented workers are less likely to risk job loss by attempting to form or join a union, or speak out about poor working conditions.

10. Despite contentions that undocumented workers receive the same protections as citizen workers in their rights under the NLRA, the reality is very different. Employers have used the *Hoffman* decision to deter employees from pursuing their employment rights and from voting in union elections, and unauthorized workers and others working with them are now more vulnerable to intimidation from their employers. Because *Hoffman* arguably made immigration status relevant to many workplace rights, employer-defendants often seek discovery of the immigrant-plaintiffs' immigration status, an action that serves to chill immigrants' willingness to pursue their workplace rights. States have further limited the rights and remedies available to undocumented workers under state law, extending far beyond the denial of the right to freedom of association, by, for example, limiting or eliminating basic workplace protections such as access to compensation for workplace injuries, freedom from workplace discrimination, and entitlement to hold an employer responsible for a workplace injury.[15]

11. Although international law recognizes the right of States to control their borders, international law prohibits many forms of discrimination against non-nationals, whether or not the individuals are legally present in the state. Non-nationals are protected by fundamental human rights in the workplace such as the prohibition against discrimination and the protection

of freedom of association. Article 23.4 of the UDHR states that, "Everyone has the right to form and to join trade unions for the protection of his interests." Similarly, the ICERD provides under Article 5 of the Convention that countries must guarantee the "right to freedom of peaceful assembly and association" and "the right to form and join trade unions." Read under Article 2 of the Convention, such guarantees must be provided without discrimination. Further, the ICCPR protects freedom of association and trade union rights in Article 22.

12. However, as a result of the *Hoffman* decision, millions of immigrants who have left their home countries in search of work are subject to government-imposed discrimination and severely undermined labor protections. As the CERD observed during its recent periodic compliance review, cases such as *Hoffman* "have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses," calling into question the United States' compliance with Articles 5(e)(i) and 6 of the ICERD.[16] Further, the International Labour Organization, in examining whether the outcome of *Hoffman* denies workers' fundamental right to freedom of association, concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."[17] As we recommend below, the CERD encouraged the government to "explore all possible solutions, including amending . . . legislation to bring it into conformity with freedom of association principles . . . with the aim of ensuring effective protection for all workers against acts of anti-union discrimination."[18]

ICE Raids

13. The U.S. government's heavy reliance on workplace raids and the involvement of state and local police in immigration enforcement has severely denied migrant workers their labor and employment rights. Between 2005 and 2008, ICE conducted raids at workplace and home and even arrested workers on the courthouse steps while they were standing up for their rights. ICE's aggressive and hostile wholesale sweeps of workplaces violates fundamental rights to life, liberty and security. Article 23.4 of the UDHR states that, "Everyone has the right to form and to join trade unions for the protection of his interests." Similarly, the ICERD provides under Article 5 of the Convention that countries must guarantee the "right to freedom of peaceful assembly and association" and "the right to form and join trade unions." The ICCPR protects freedom of association and trade union rights in Article 22.

14. ICE's aggressive and hostile wholesale sweeps of workplaces violate fundamental rights to life, liberty and security. Josue Diaz, an immigrant worker who was recruited from a day laborer corner in New Orleans to work on reconstruction efforts in Texas after Hurricanes Ike describes his experience: "We were forced to live in tents in an isolated labor camp at an abandoned oil refinery, we were made to work in toxic conditions without safety equipment, we were subjected to racist and dehumanizing treatment, and when we protested the discrimination and illegal treatment, our employer . . . called local police and ICE. We were arrested immediately. Instead of enforcing our labor rights against the company, the police and ICE tried to turn us into criminals."[19]

15. The cooperation between the Department of Homeland Security and the Department of Justice in the famous Postville[20] raid caused further due process violations with life-long implications. The individual victims of the Postville raid and the subsequent prosecutions did not understand what was transpiring against them, nor were they provided with proper counseling on the consequences of the pleas. These actions resulted in violations of the right to a fair trial and judicial protection. The United States' failure to ensure that all noncitizens have access to representation subsequent to the raids violates ICCPR Article 13. Most significantly, similar ICE raids have had a dramatic chilling effect on workers seeking to pursue any of their basic human rights to decent working conditions and in some situations, even any compensation for their labor.

Vulnerable Populations

Guest Workers

16. Both H-2A and H-2B programs impose on foreign workers a temporary, non-immigrant status that ties workers to particular employers and makes their ability to obtain and retain a visa dependent on remaining in the good graces of their employer. In extreme cases, workers find themselves in situations of indentured servitude or forced labor because they signed over deeds to property in their home countries and have to pay back the huge sums to get to the U.S. with interest.[21] The lack of visa portability, tying workers' status in the U.S. directly to the employer, combined with exploitation in recruitment and subcontracting, leave workers in extremely vulnerable situations. The employer's designation of an exclusive recruiter initiates the climate of coercion and vulnerability. Transportation, visa, and recruiter costs are often incurred as a heavy burden by the laborer and often primarily to benefit the employer. [22] The incurred costs are conveyed as an owed debt[23]. The language, social and physical barriers further hinder workers from obtaining assistance.[24]

17. Furthermore, congressional regulations prohibit federally funded legal service programs from assisting migrant workers who labor with an H2B visa, the temporary guest worker program for non-agricultural work. This regulation prevents approximately 100,000 workers from accessing the most widely available legal services.[25] The services that are available to low-wage workers are not nearly sufficient to meet the demands of H2 work visa holders or the six million undocumented laborers, also denied access to legal services provided by federally-funded programs.

Victims of Human Trafficking and Forced Labor/Slavery

18. Through the Trafficking Victims Protection Act of 2000 (TVPA), the United States sought to combat human trafficking, specifically recognizing as victims of human trafficking individuals who are recruited through force, fraud or coercion for the purpose of sexual exploitation or forced labor are then subjected to forced labor or sexual exploitation.[26] The TVPA also created the T visa, providing legal status survivors of trafficking who meet certain qualifications.[27] The TVPA and the protections afforded, however, have been criticized for requiring survivors of trafficking to agree to and to demonstrate cooperation with federal law enforcement officials. If they are unable to obtain law enforcement endorsement, they may face deportation regardless of

the exploitation they suffered while being forced to work in the United States. The system for identifying and providing protection to survivors of trafficking and their family members needs to better reflect the realities and the fears of the trafficking survivors. Almost all victims of trafficking are subject to some form of debt-bondage, including debts incurred in paying for transportation fees and living expenses in the United States. Traffickers often threaten victims with injury or death and take away the victims' travel documents. Many victims trafficked into the U.S. do not speak English and are unable to escape or obtain outside help.

19. In order to effectively combat human trafficking, the United States needs to recognize how strict immigration laws and lack of labor and employment law enforcement in all low-wage industries contribute to the continuing existence of human trafficking in the United States. The demand for cheap, unskilled labor continues to beckon immigrants while the number of available visas and routes for legal migration are far from enough to meeting this demand. At the same time, the United States needs to similarly recognize that by focusing its anti-trafficking enforcement efforts on sex trafficking and on the most extreme cases of forced labor, it allows other employers who exploit and abuse migrants working the shadows to operate with impunity.

20. To ensure that trafficking victims and all exploited workers enjoy protections without discrimination is part of the U.S.'s obligations under Art. 5 of the ICERD, further elaborated upon in General Recommendation 30.[28]

Child Labor

21. Child labor remains a problem in the United States, particularly in the agriculture industry. The U.S. child labor law allows a 12-year-old to perform back-breaking harvest work for 8-12 hours a day in 95-degree heat when that same child would not be allowed to work in an air-conditioned office.[29] The exact number of children laboring in the agriculture industry is not known, and the estimates range from 300,000 to 800,000.[30] Many farm worker children earn less than $2 an hour. Child farm workers risk pesticide poisoning, heat illness, injuries from scissors, knives and heavy equipment, and life-long disabilities. They suffer fatalities at four times the rate of children working in other jobs.[31] Overwhelmed by constant migration and exhaustion from arduous work, many of these children drop out of school; half never graduate.

22. The dangerous working conditions and severe health impact agricultural work has on children violate Section 213(c)(2) of Fair Labor Standards Act (FLSA) as well as ICERD Article 5(e)(i) and (iv). Furthermore, child laborers' right to education as articulated in FLSA Section 214(d) and ICERD Article 5(e)(v) is frequently violated. Unequal protection and ineffective enforcement available to child farm workers violate Article 6 of the ICERD.

C. Post-Employment

Access to judicial and administrative remedies post-separation from employment

23. Migrant workers who leave the United States either voluntarily or otherwise after their separation from employment face many barriers in their pursuit of judicial and administrative remedies for workplace rights violations.

24. During the course of litigation—whether it is to recover stolen wages or to secure medical treatment for a workplace injury—workers must often appear in-person in U.S. courts to pursue their claims. Workers compensation claimants often have to testify or attend a medical examination with a state-specific approved insurance doctor. But legal barriers and resource constraints make it very difficult, and at times impossible, for workers to return to the United States to attend medical examinations or administrative or judicial hearings. Without a right, or at least a presumptive right to return, migrant workers – particularly those who came as guestworkers or who are without legal status in the United States – have few options for returning to ensure justice. Workers may try to obtain a tourist visa which U.S. consular officials issue on a highly discretionary basis, and others may seek entry through a mechanism called humanitarian parole. But even with direct intervention from worker advocates, migrant workers are routinely denied these visas because it is presumed they will use the visa to remain unlawfully in the U.S. Denial of the visa often results in a total denial of justice and workers are forced to abandon their claims.

25. This situation is a particularly problematic aspect of the U.S. guest worker program through which employers bring persons to the United States through U.S. government-sponsored mechanisms to work temporarily in low-wage manual labor jobs, and when the visa expires or the employee is terminated from employment (whether lawfully or not), the workers must return home. The guest worker system, however, does not provide a right for those workers to return, or mechanisms for them to seek redress for the violations they may have suffered in the U.S. after they return home. In fact, the system makes it so difficult for workers to find legal redress once they leave that the result is a guest worker system that supplies the United States with a steady stream of highly marginalized and precarious workers.

26. To comply with U.S. commitments under international treaties, the United States must provide guest workers with access to justice and equal opportunity before the law and ensure the portability of justice. Portable justice is the right and ability of transnational migrant workers to access justice in the countries of employment even after they have departed for their home countries.

III. RECOMMENDATIONS

27. As described, some violations result from the federal laws affecting migrant laborers, while others are a matter of administrative policy or agency practice. We welcome the efforts of the United States to begin to correct some of the most egregious human rights violations against migrant laborers. In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to address various aspects of trafficking in person both in the U.S. and abroad. While certainly a first step, there are a number of gaps that TVPA leave for victims of trafficking. We further commend the recent initiatives of the U.S. Department of Labor to stop the practice of wage-theft in the United States, and the launching of increased enforcement efforts to ensure that workers who are denied minimum wage and overtime as required under the law are able to recover those wages without discrimination. Despite those efforts, however, laws and practices continue to leave large numbers of workers unprotected and without access to remedies when their workplace rights are violated.

28. In order to fix these systemic violations and uphold its international legal obligations toward migrant laborers, the United States Government should:

i. Ensure compliance with the requirement under int'l law of equality and non-discrimination in the rights and remedies afforded to workers, regardless of migration status.

a. Expand the legal and legislative framework to ensure that labor protections and post-separation remedies are available to migrant workers regardless of immigration status.

b. Amend laws, policies and jurisprudence to comport with international obligations to apply workplace protections in a nondiscriminatory manner and protect the freedom of association of all workers.

c. Enact comprehensive legislation that would prohibit a distinction in federal or state law between employment and labor rights based on immigration status.

d. Instruct state and federal courts to prohibit employer inquiries into the immigration status of a worker asserting his or her employment and labor rights to avoid chilling and discouraging attempts by undocumented workers to enforce their rights through litigation and complaints to administrative bodies.

e. Make available temporary work visas so that migrant workers may return to the United States to pursue non-frivolous legal cases combating exploitation and abuse.

f. Extend statutes of limitations for issues involving migrant workers.

ii. Ensure adequate protections and enforce fair regulations for all workers from the point and place of recruitment onward to prevent border deaths, exploitation of guest workers, and recruitment of child laborers and victims of trafficking.

a. Examine the continued presence and completion of the administrative process that provide endorsement of the victim for the purpose of a T-visa.

b. Continue to promote state anti-trafficking legislation in a victim-centered approach and training for state and local law enforcement on human trafficking.

c. Enhance recognition, and ability to meet the needs, of all trafficking victims, regardless of national origin, including exploration of intensive case management practices for both foreign citizens and U.S. citizens.

d. Take actions to combat the use of child labor through support for legislation such as Pass the Children's Act for Responsible Employment (CARE), which would prohibit large numbers of 12- and 13-year-olds from working for wages in the agriculture industry under trying and dangerous conditions, while preserving the family farm exemption to permit farmers to pass on work skills to their own children.

iii. Take further steps to enforce internal firewalls between immigration enforcement and labor and employment law protections.

a. Encourage and gather complaints from migrant workers who have suffered discrimination in the workplace and make the information public for private actions against scofflaw employers.

b. Provide multi-lingual education at the time visas are issued and at the worksite to assist with information collection.

c. Provide migrant workers who have faced discrimination an opportunity to seek other employment and be given extended legal status in the U.S. to pursue claims.

d. Investigate and prosecute aggressively employers who are discriminating in the workplace.

e. Modify the current H-2a and H-2b guestworker program to allow for visa portability. The current system only allows guest workers to work for the employers whose names appear in the immigration document, which makes it very risky if not impossible for guest workers to leave their original employers.

f. Expand the criminal liability from those individuals who actually assisted in recruiting guestworkers into situations of forced labor, indentured servitude or slavery to all who profit from their labor.

iv. The US should take a leadership role before the international community in signing and seeking from Congress ratification of the U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Appendix – Reports Addressing Human Rights of Migrant Workers in the United States

Cathleen Caron, *Portable Justice, Global Workers, and the United States*, 40 CLEARINGHOUSE REV. 549 (Jan.–Feb. 2007), *available at* http://globalworkers.org/PDF/clearinghouse.pdf.

Nat'l Employment Law Project, *Report on Excluded Workers* (forthcoming 2010) (on file with author).

The Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, Mar. 2007, *available at* http://www.splcenter.org/get-informed/publications/close-to-slavery-guestworker-programs-in-the-united-states.

U.S. Human Rights Network, *ICERD Shadow Report 2008: Rights of Immigrants and Migrants to the United States*, Jan. 15, 2008, *available at* http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2_Immigrant%20Rights.pdf.

U.S. Human Rights Network Labor Caucus, *ICERD Shadow Report 2008: Labor and Employment Rights*, Feb. 2008, *available at* http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/23_Labor%20and%20Employment.pdf.

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[1] U.N. Human Rights Council [UNHRC] Dec. 6/102, Follow-up to Human Rights Council Res. 5/1 (Sept. 27, 2007).
[2] Bureau of Labor Statistics, U.S. Dept. of Labor, Foreign-born Workers: Labor Force Characteristics, *available at* http://www.bls.gov/news.release/pdf/forbrn.pdf.
[3] U.S. is bound by the American Declaration of the Rights and Duties of Man (AmDecl.) by virtue of its membership in the Organization of American States.
[4] Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, OC-18, ¶60.
[5] *Id*. at ¶160.
[6] The Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d sess., 1st plen. Mtg., U.N. Doc A/810 (December 12, 1948), Arts. 2 & 5.
[7] U.S. Cong. Senate 106th Second Sess. Subcommittee on Immigration of the Committee of the Judiciary, *Enhancing Border Security*. Feb., 2000, U.S. Gov. Printing Office, Washington 4.
[8] Maria Jimenez, *Humanitarian Crisis: Migrant Deaths at the U.S.- Mexico Border*, October 1, 2009 17.
[9] Spencer S. Hsu, *Border Deaths are Increasing*, The Wash. Post, September 30, 2009.
[10] *Id.*
[11] Economic Research Service, U. S. Dept. of Agric., Rural Labor and Education: Farm Labor:, *available at* http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm#demographic.
[12] National Employment Law Project, Independent Contractor Misclassification and Subcontracting, *available at* http://www.nelp.org/site/issues/category/independent_contractor_misclassification_and_subcontracting.
[13] *Hoffman Plastic Compounds Inc. v. Nat'l Labor Relations Bd.,* 535 U.S. 137, 122 S.Ct. 1275, 152 L.2d 271 (2002).
[14] *Id.* at 153.
[15] *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004), *cert. denied*, *Crespo v. Evergo Corp.*, 180 N.J. 151 (2004) (holding that an undocumented worker suing for discriminatory termination could not recover either economic or non-economic damages absent egregious circumstances during the period of employment such as extreme sexual harassment); *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003), *cert. denied*, *Sanchez v. Eagle Alloy Inc.*, 471 Mich. 851 (Mich. 2004) (finding that undocumented workers are covered by Michigan workers' compensation law and are entitled to full medical benefits if injured on the job but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work); *Reinforced*

Earth Co. v. Workers' Compensation Appeal Board (Astudillo), 570 Pa. 464 (2002) (holding that although undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disability).

[16] U.N. Committee on the Elimination of Racial Discrimination [CERD], Concluding Observations of the CERD, ¶ 28, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

[17] *Case No. 2227 (United States)*, ILO Committee on Freedom of Association, 332nd Report of the Committee on Freedom of Association, GB.288/7 (Part II) (November 2003) 142, ¶ 610, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf.

[18] *See Id.* ¶ 612.

[19] American Rights at Work, Immigration Study Finds Enforcement Has Undermined Workers' Rights (Oct 27, 2009), *available at* http://www.americanrightsatwork.org/press-center/2009-press-releases/immigration-study-finds-enforcement-has-undermined-workers-rights-20091027-842-374-374.html.

[20] One of the largest immigration raids in United States history. This occurred in May 2008.

[21] The Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, Mar. 2007, *available at* http://www.splcenter.org/get-informed/publications/close-to-slavery-guestworker-programs-in-the-united-states.

[22] David Twomey, LABOR AND EMPLOYMENT LAW: TEXTS AND CASES 669 (14th ed. 2010).

[23] Lucas Benitez, Congressional Testimony. *Coalition of Immokalee Workers, Government Reform Committee, available at* http://www.rfkcenter.org/node/244.

[24] *Id.* at 37.

[25] Sarah Paoletti, *Submission to the UN Special Rapporteur on the Rights of All Migrant Workers and Members of their Families* (2006).

[26] Trafficking Victims Protection Act of 2000 [TVPA], Pub. L. No. 106-386, 22 U.S.C. 7102(8). TVPA defines "Severe Forms of Trafficking in Persons" as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age" or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."

[27] *See Id*. § 107(n)(4).

[28] The Committee urges States Parties "take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particularly by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault. General Recommendation No. 30: Discrimination against Non-Citizens, Committee on the Elimination of Racial Discrimination, Jan. 10, 2004 ¶34.

[29] Fair Labor Standard Act, Pub. L. No. 75- 718 § 213(c)(1)(B), 29 U.S.C. 201.

[30] U.S. General Accounting Office's estimate in 1998 was 300,000. The Association of Farmworker Opportunity Programs estimated in its 2007 report that there are between 400,000 to 500,000 child farmworkers in the U.S., while the United Farm Workers' estimate in May 2007 that as many as 800,000 children worked on U.S. farms.

[31] Mining is considered to be the most dangerous industry and agriculture ranks second. However, children younger than 18 are not allowed to work in mining. *See* Child Labor Coalition, *Children in the Fields Campaign Fact Sheet*, *available at* http://www.stopchildlabor.org.

United States of America

Submission to the United Nations
Universal Periodic Review

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THE NEGATIVE IMPACT OF U.S. FOREIGN POLICY ON HUMAN RIGHTS IN COLOMBIA, HAITI AND PUERTO RICO

Submitted by:

International Committee of National Lawyers Guild,

Proceso de Comunidades Negras de Colombia,

AFRODES USA,

Institute for Justice & Democracy in Haiti, and

RightRespect

Endorsed by:

Organizations: American Association of Jurists; Colegio de Abogados (Puerto Rico); Human Rights Advocates; Human Rights Caucus of Northeastern University School of Law; Latin American and Caribbean Community Center; MADRE; Metro Atlanta Task Force for the Homeless; National Conference of Black Lawyers/Chicago; Public Interest Projects; Three Treaties Task Force of the Social Justice Center of Marin; You.Me.We.

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Executive Summary

U.S. foreign policy relationships and assistance to Colombia, Haiti and Puerto Rico have resulted in human rights violations in those countries. For 10 years, Plan ***Colombia****, a U.S. aid program to the Colombian government, has been in effect. Until 2007, 80 % of the $6.7 billion has been spent on the military. This has resulted in massive loss of life, internal displacement, a food crisis and economic instability, particularly in indigenous and communities of Afro-descendents. We oppose the U.S.-Colombia Free Trade Agreement and urge U.S. legislators to cease further military and fumigations operations and refuse to certify Colombia as being in compliance with human rights standards. In* ***Haiti****, U.S. economic policies have created a captive labor force which has contributed to overpopulation and a cycle of poverty, leaving Haitians vulnerable to damage from the recent earthquake. U.S. aid policies, while benefiting U.S. corporations, have reduced Haiti's autonomy and ability to provide basic services that would have reduced vulnerability from the earthquake. The U.S. recently undermined Haiti's democracy by providing political and financial support to unlawful parliamentary elections and illegally excluding several political parties, including Haiti's largest party. We urge the United States to adopt a human rights-based foreign policy in Haiti.* ***Puerto Rico*** *continues to be a colony of the United States. The U.S. maintains authority over Puerto Rico's defense, international relations, external trade and monetary matters. The presence of the FBI and its repression of the independence movement, lack of accountability for assassination of a pro-independence leader, and assaults on the nation's journalists are current manifestations of the colonial relationship. The presence of the U.S. military has resulted in dire environmental destruction, and the lack of local control over the environment has caused devastating adverse effects on the health of the Puerto Rican people, as well as to the land, water, air, flora and fauna. Political prisoners from Puerto Rico, including two who have served 29 and 30 years behind bars, remain incarcerated for their participation in the struggle for independence.*

<u>Colombia</u>

1. In 2000, "Plan Colombia" (Public Law 106-246) was signed into effect by President Bill Clinton, effectively waiving several key human rights conditions. After ten years and $6.7 billion spent mostly on military operations tied to aerial aspersion of coca crops, the war on drugs, counter-insurgency and counter-terrorism strategies (80% until 2007),[1] Plan Colombia has resulted in massive loss of life, internal displacement, food crisis, economic instability - mostly in indigenous and Afro-descendant communities - and serious undermining of autonomy and self-determination. At the same time, coca cultivation, production and exportation appear to have increased.[2] By approving policies that disregard human rights protections, the Colombian government only had to superficially meet its requirements in order to obtain aid. Overall, the United States has failed to protect human rights in Colombia and provide the desired security for American citizens.

2. The five decade internal armed conflict in Colombia is deeply rooted in the structural social, economic and political inequalities, racial discrimination and endemic corruption at all state levels, and is linked to economic interests and the struggle over

access and control of resources, particularly land. Characterized by egregious violations of human rights and international humanitarian law for which all the armed actors, including state forces, are responsible, the internal armed conflict has concentrated on indigenous and Afro-descendant territories. Although the struggle for territorial control is the core of the internal armed confrontations and violence, it has been mostly obscured by the sensationalism of drug trafficking and terrorism, the key components of U.S. foreign policy Plan Colombia. The United States has heavily supported militarization, despite the fact that State army in collusion with paramilitary structures is responsible for massive killing of civilians for socio-political reasons, most of which are Afro-Colombians. The United States also gave $20 million to the Colombian government to support the demobilization process of paramilitaries, as demonstrated by the 2010 Human Rights Watch Report,[3] which has also failed. Re-grouped paramilitary structures declared Afro-Colombian and indigenous leaders, organizations and Community Councils as "military targets" and intensified the assassination of leaders in the last two years. Moreover, the amnesty granted to paramilitaries and the extradition of some of them has left in judicial limbo cases involving massacres, murders, disappearances and land dispossession, and has violated the victims' rights to true justice and reparation.

3. UNHCR concurred with various U.N. bodies and human rights NGO reports that African descendants are disproportionately affected by the internal armed conflict and violence in Colombia. Nearly half of Afro-Colombians (26% of Colombian population) are affected by forced internal displacement. Structural exclusion and discrimination, large scale economic projects, and lack of adequate judicial and institutional protection for Afro-Colombians' collective territories, which facilitates the presence of illegally armed actors in their lands, are the principal reasons for the disproportional internal displacement.[4] Statistics from the 2005 Census demonstrate how severely Afro-descendants' have been devastated by internal armed conflict and paramilitary actions. For instance, 89% today live in extreme poverty. One of the largest settlements of Afro-descendants, located on the Pacific Coast, is among the most affected groups, as 72% of the population has lost their means of subsistence (i.e.- land, crops, jobs). While 82% of the population in the Pacific region owned their homes in 1991, only 3.5% own property today. Afro-Colombians are protected by national laws, such as Law 70 of 1993, which recognizes cultural, political, economic and territorial rights, and international agreements such the ILO Convention No.169 (to which Colombia is subscribed), which establishes the right of ethnic groups to be consulted and integrated into the decision-making process on issues that potentially affect their integrity and territorial rights. Nevertheless, land seizure by violent or fraudulent methods has affected about 79% of collective land owners and economic mega-projects, such as oil palm cultivation, mining exploitation and large scale infrastructure, are taking over their ancestral territories.

4. Since 1996, the intensification of the armed conflict in Afro-Colombian communities has coincided with the process to collectively title their lands and the implementation of Plan Colombia. Three major areas have been hard hit by the violence: (1) Jiguamiandó-Curvaradó river basin zone (Chocó region), where over 120 leaders and community members were assassinated between 1996 and 2009, and more than 140,000

acres of collective land were fraudulently appropriated by oil palm corporations with proved links to paramilitary structures and drug traffickers; (2) Buenaventura (Valle de Cauca region), one of the biggest recipients of IDPs, where 797 murders were registered between 2006 and 2007, 117 disappearances and 175 violent deaths were registered between January and August 2009 alone, and a large scale economic project to transform the second most important port in the country has 3,500 persons facing displacement; and (3) Tumaco (Nariño region), one of the strongest paramilitary centers of operations, is a recipient of funds from the U.S. Agency for International Development (or "USAID") for demobilization and coca eradication projects, whereas Diocese of Nariño noted that between January and June of 2009 at least 206 people were assassinated.[5]

5. Despite the requirement that Colombia protect property owners and prevent human rights violations by armed forces,[6] and despite the fact that fumigations had proved ineffective on reducing coca cultivation and production, continued experiments with intensive aerial aspersion, commonly linked to counter-insurgency activities, have caused massive internal displacements, loss of farm crops, military abuses, and a humanitarian crisis. Only this year, intensive fumigations were reported by the Community Councils of Alto y Bajo Mira (Tumaco), Timbiqui and Guapi (Caucus), and Naya and Anchicaya rivers (Buenaventura); some of these are recipients of USAID funding. Fumigations happen in disregard not only of the provision on the 2008 aid bill, but also in violation of the right to previous consultation. Some Community Councils in the Buenaventura and Tumaco regions already have autonomous manual eradication initiatives that the Colombian government does not support. In 2007, the Community Council of Yurumangui River manually eradicated 27 hectares of coca in two days without any government support or follow up.

6. For decades, institutional intervention has eroded the autonomously productive activities of local communities. The USAID strategy for substitution of coca cultivation and economic development is just one example. While communities and leaders are harassed, persecuted and murdered by armed actors because of their participation in local projects, the eradication and substitution projects do not respect and promote their autonomy or cultural integrity and offer even less support for self-protection initiatives formulated by Community Councils. Despite appropriating $15 million annually since 2008, USAID funds have yet to offer any support for Afro-Colombian economic development at a local level. Furthermore, it has been proved that USAID strategy has indirectly contributed to the violation of human rights and illegal seizure of lands.[7] For example, in 2005, USAID funding supported a coca substitution project that established an oil palm factory under the Labor Union of Urapalma, a corporation under investigation for illegal appropriation of lands in the Cacarica region and links to paramilitaries and drug dealers.

7. As the Colombian government has failed to protect and guarantee human rights to African descendants and indigenous communities, such as access to land and food and the right to live, U.S. policies contribute to the undermining and violation of those rights by certifying that Colombia is in compliance with human rights standards.

A call on the Colombia-US Free Trade Agreement

8. By approving the U.S.-Colombia FTA, the U.S. government would effectively be continuing the policies of Plan Colombia and undermining African descendants' rights to self-determination. In 2008, 168 grassroots organizations and Community Councils manifested their opposition to the U.S.-Colombia FTA because the policy lacks meaningful provisions to strengthen human rights protections, particularly those of African descendants.[8] In order to keep the economic preferences granted by the reciprocal U.S. trade policy, President Uribe's government made significant concessions regarding intellectual property, environment and labor, which further weakened enforcement and penalty mechanisms in the labor and economic chapters of the U.S.-Colombia FTA. This will disproportionately affect already vulnerable communities already vulnerable under unfair competitive conditions. Besides failing to include regulations to prohibit racial discrimination in labor law, the U.S.-Colombia FTA does not include provisions to articulate national development goals with those of Long Term Developmental Plan for the Black, Raizal and Palenque communities. Furthermore, the U.S.-Colombia FTA was elaborated and approved by the Colombian government in violation of the communities' right to consultation. In the actual context of violence and impunity directly affecting Afro-descendant and indigenous communities, approval of this policy will only invite continuity of existing abuses and legitimization of a government that is failing on basic democratic principles.

Positive Developments and Recommendations

9. In 2008 aid bill (H.R. 27654) specific language and funds were appropriated for social and economic development of Afro-Colombian communities, and conditions on fumigations and human rights were strengthened. In November 2009, the United States agreed with the U.N. Third Committee of the General Assembly to "adopt energetic and effective measurements to protect human rights defenders." Also, in approving the 2010 Foreign Operations Appropriations Law, the U.S. Congress established new conditions on granting aid to Colombia, requiring the Colombian government to protect human rights defenders. This provision will require the State Department to reinforce diplomatic efforts to encourage the Colombian government to comply with this new condition.

10. While these steps indicate progress towards improving human rights conditions in Colombia, we recommend that U.S. legislators remove further military and fumigations appropriations from foreign aid policies with Colombia and that the State Department refuse to certify Colombia as compliant with human rights standards until this government recognizes the existence of internal armed conflict, the re-configuration of paramilitary structures, and the structural discrimination and exclusion of African descendants as significant factors of their current plight. Without these recognitions, the Colombian government is *not* in compliance with basic human rights protections.

11. U.S. policies toward Colombia should prevent further violation of Afro-Colombian rights. The U.S. government must ensure that the Colombian government creates the conditions for Afro-Colombians to return to their ancestral territories, rectify any negative impact on Afro-Colombians that resulted from Plan Colombia, and ensure

that any development or usage of land and resources of Afro-descendants only proceed after effective consultation.

Haiti

12. In the aftermath of Haiti's devastating earthquake, released figures put the death toll at an estimated 200,000 to 250,000 people, claiming more lives as a percentage of a country's population than any recorded disaster. A study by the Inter-American Development Bank predicted that, ten years after the disaster, Haiti's economic output is likely to be roughly 30% lower than it otherwise would have been.

13. There are several direct connections between U.S. economic and political policies and earthquake mortality in Haiti. First, U.S. economic policies created a captive labor force for assembly manufacturing in Port au Prince, which contributed to the city's over-population. Over the last 20 years, Haitian farmers have been forced out of business and off their land through food aid, forced tariff reductions, and forced reduction in governmental rural investment through conditions imposed by International Financial Institutions (IFIs) and other donors – all policies sponsored by the U.S. to benefit American corporations.

14. For example, in 1986 the United States and the International Monetary Fund (IMF) forced Haiti to drop tariffs as a condition for urgently needed loans. As a result, cheap, subsidized U.S. rice flooded Haiti and destroyed the Haitian rice market. Haitian farmers could not compete and the Haitian rice market collapsed. Before 1987, Haiti grew nearly all of its own rice. As of 2009, Haiti imported 80% of its rice, mostly from the United States.[9] Former President Bill Clinton acknowledged that his free-trade policies forced dramatic tariff reductions and helped destroy Haiti's rice production. "It may have been good for some of my farmers in Arkansas, but it has not worked. It was a mistake," said Clinton to a U.S. Senate Committee in March 2010. "I had to live everyday with the consequences of the loss of capacity to produce a rice crop in Haiti to feed those people because of what I did."[10]

15. U.S. "aid" policies have helped create a cycle of poverty that left poor Haitians vulnerable to the earthquake. Before the earthquake, 80% of the population lived below the poverty line and 54% lived in extreme poverty, barely surviving on less than $1 per day.[11] The majority of those that suffered from extreme poverty in Haiti lived in rural areas, where domestic farming had been undermined by foreign trade with the U.S. Impoverished Haitians left the countryside to find work in the city, but Port au Prince lacked the infrastructure to support such massive migration. Work was hard to find and 66% of the Haitian workforce still did not have consistent work. Desperate to find housing, Haitians moved into substandard housing on steep slopes of Port au Prince, which collapsed in the earthquake.

16. Secondly, U.S. "aid" policies, while benefiting U.S. corporations, reduced the Haitian government's autonomy and ability to provide the basic government services that would have reduced vulnerability to the earthquake. The United States and IFIs

conditioned aid to Haiti on the government making "Structural Adjustments," including privatization, trade liberalization, and reduced social service spending. Funds were diverted from essential services, such as health care, roads, rural programs like agriculture, education, urban planning, and enforcement of building codes. Without basic infrastructure, the Haitian government was unable to enforce building standards, provide safe housing, or adequately respond to a disaster of this magnitude.

17. Thirdly, the Haitian government has been further destabilized by U.S. political interference. In the 1990s, former Haitian President Aristide questioned implementation of the "Structural Adjustment" conditions on aid that was weakening the country. After Aristide was re-elected President in 2000 (by 90% of the vote), the United States imposed a development assistance embargo on Haiti, holding up over $200,000,000 in aid. The U.S. government financed Haitian organizations that were working to undermine and overthrow the Haitian government and, on February 29, 2004, Haiti's President Aristide was forcibly removed and sent to exile in Africa on a U.S. government plane. The U.S. replaced the constitutional government with an unelected Prime Minister flown in from Florida.[12] By contrast, the United States gave over $40,000,000 to the Duvalier dictatorship during its bloodiest years, much of it without condition, which the Haitian people have been forced to pay back. Repayment of such odious loans cost Haiti over $1 million dollars a week, further weakening the country.[13] Fortunately, the United States led the effort in canceling Haiti's $1.2 billion in external debt owed to lenders including the IMF, World Bank, and the U.S. government itself, which was cancelled in June 2009.

18. The U.S. recently undermined Haiti's democracy by providing political and financial support to unlawful parliamentary elections in Haiti held in April and June 2009. The 2009 elections illegally excluded several political parties, including Haiti's largest political party, *Fanmi Lavalas.*

19. Outside of the effects of US foreign policy to earthquake mortality, US trade policies with Haiti through the Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act and the subsequent HOPE II have drawn considerable criticism for their lacking human rights and labor protections, particularly on union rights.

20. Recently, a group of apparel-industry executives, with Haitian and U.S. trade officials, announced a program intended to encourage retailers to produce 1% of their U.S. imports in Haiti. The new program, called Plus 1 for Haiti, is an extension of HOPE II and allows duty-free sales in the U.S. of Haitian-made apparel.

21. The efforts of the HOPE Act and of the Plus 1 Program are aimed at expanding the low-wage subcontracting apparel industry in Haiti. This form of investment leads to minimal improvements in infrastructure or knowledge spillover to local populations. Further, problems persist with the HOPE Acts as labor rights are suppressed by the owners of the production facilities. According to Paul Loulou Chery, General Secretary of the Confederation of Haitian Workers, Haiti's largest union center, "We have to tell you that the Hope Act is not the best option, but we have to use the

Hope Act to create jobs so some people can get jobs and create unions and social organizations inside the companies. Unfortunately, still with Hope I and Hope II, the owners say that if you get a union, you will lose your jobs."

Recommendations:

1. We urge the US to overcome the mistakes of the past and to adopt a human rights-based response to the earthquake, which requires empowering the Haitian people, strengthening the capacity of the government to sustainably guarantee human rights, and making assistance accountable and transparent to the Haitian people—for all assistance to Haiti.

    I. As a part of this "rights-based response," we urge the US to empower Haitian people to build a stronger Haiti by:
        a. assuring that projects are Haitian-led and community-based at every stage of the process, so that the bulk of the leadership and work goes to Haitians;
        b. strengthening the Haitian government's capacity to guarantee human rights by working directly with the Government of Haiti to identify needs and to develop, implement, and monitor programs to sustainably provide basic public services, including education and public health, water, and sanitation services;
        c. make assistance accountable and transparent to the People of Haiti, including funding a mechanism, established together with the Government of Haiti, to: (a) deliver information about assistance projects to the Haitian people; (b) measure, monitor, and make public the outcomes of assistance projects at the community level; (c) provide a mechanism for Haitians to register complaints about problems with project implementation.

2. We urge the US government to amend trade policy with Haiti through the HOPE Act and its progeny and clearly link trade with promoting investments in infrastructure and labor. Clear standards and protections need to be placed over such investments, including independent and transparent monitoring efforts to ensure that workers rights are protected and that investments are tied to promoting rather than inhibiting basic human rights.

<u>Puerto Rico</u>

22. Since the U.S. militarily invaded and occupied Puerto Rico in 1898, Puerto Rico has continued to be a colony, or non-self-governing territory, with the United States maintaining authority over Puerto Rico's defense, international relations, external trade and monetary matters. While people born in Puerto Rico are eligible for U.S. citizenship, they do not have the right to vote in the U.S. unless they reside in the metropolis, and they have no voting representation in either house of the U.S. legislature.

23. In 1952, the U.S. permitted Puerto Rico to adopt a U.S.-approved Constitution and elect its own governor, representing to the United Nations that Puerto Rico thus attained a full measure of self-government and decided freely and democratically to enter into a free association with the United States and was, therefore, beyond the purview of United Nations consideration.

24. Reports from the United States President's Task Force on Puerto Rico's Status virtually acknowledge that, regardless of what the U.S. said in its 1953 report to the United Nations in order to remove Puerto Rico from the list of non-self-governing territories, Puerto Rico remains a juridical colony, a non-self-governing territory, subject to the U.S. Congress' plenary authority under the Territory Clause.[14] Under this power, the report says, Congress could even cede Puerto Rico to another nation.[15]

25. For nearly three decades, the United Nations Decolonization Committee has adopted annual resolutions reaffirming the inalienable right of the people of Puerto Rico to self-determination and independence in conformity with General Assembly Resolution 1514 (XV) and the applicability of the fundamental principles of that resolution to the question of Puerto Rico, and calling upon the U.S. to expedite a process that will allow the Puerto Rican people fully to exercise their inalienable right to self-determination and independence, as well as to release the long-held political prisoners serving sentences in U.S. prisons for cases related to the struggle for the independence of their nation.[16]

26. The U.S. has repeatedly and continually failed to comply with international law and the resolutions of the Decolonization Committee, and maintains to this day colonial control over the people of Puerto Rico. Legislation pending in U.S. Congress removes the initiative from the people of Puerto Rico, where a true process of self-determination belongs, and fails to provide for the necessary procedural consensus that could allow the people of Puerto Rico to present a collective expression of its aspirations for self-determination. Instead, the proposed legislation places the Congress of the metropolis and the U.S. court in Puerto Rico in full control - most certainly not a means to resolving the colonial status, as it skirts international law and avoids convening a Constitutional Assembly, the process advocated by the Puerto Rico Bar Association.[17]

27. Current manifestations of the colonial relationship include:

* the presence of the FBI and its ongoing repression of the independence movement, its lack of accountability for its assassination of pro-independence leader Filiberto Ojeda Ríos and for its assaults on the nation's journalists, its former agents serving as chief of Puerto Rico Police Department, and its insertion into local law enforcement matters;
* the presence of the U.S. federal court, and its intervention into local matters, such as commonwealth elections;
* the presence of the U.S. military, its dire environmental destruction, and its active recruitment in public schools and universities;
* the lack of control over the economy, causing:
    - migration to the extent that the population of Puerto Ricans in the diaspora is greater than that of the island, a migration also referred to as a "brain drain";

and

- destruction of Puerto Rican small business, with the inundation of U.S. "big box" stores and franchises such as Walgreens, Walmart, Home Depot, Costco, Sam's Club, Borders, McDonalds, Subway, etc.

* the lack of control over cultural and civic institutions, undermining groups and institutions who protect and defend the Puerto Rican culture, such as the School of Plastic Arts, and Puerto Rican self-determination, such as the Puerto Rico Bar Association;
* the isolation of Puerto Rico from neighboring Caribbean and Latin American countries in cultural, political and commercial affairs;
* the use of non-Puerto Rican immigrants to support the political agenda of the colonial electoral parties, such that elections are decided by pro-annexationist foreigners;
* the increasing imposition of the use of the English language, including in renaming cities and in signs in the public way;
* the lack of control over the environment, causing devastating adverse consequences to the health of the Puerto Rican people as well as to the land, water, air, flora and fauna;
* the imposition of the U.S. death penalty, in spite of the Puerto Rico constitutional prohibition; and
* maintaining in U.S. prisons political prisoners for their participation in the struggle for independence, including two who have served 29 and 30 years behind bars.

Recommendations

1. The United States should expedite the process to allow Puerto Ricans to exercise fully their inalienable right to self-determination and independence, in conformity with General Assembly Resolution 1514 (XV) and the applicability of the fundamental principles of that resolution.

2. As part of that process, the United States should withdraw its military, courts, the FBI and other repressive forces from Puerto Rico; disclose all documents documenting the repression of the independence movement, including those documenting the assassination of its members and leaders; and release Puerto Rican political prisoners serving prison sentences for cases relating to the struggle for the independence of Puerto Rico.

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1. Plan Colombia is primarily funded by the Andean Counterdrug Initiative (ACI). In addition Colombia also benefits from the Foreign Military Financing (FMF) program, and the Department of Defense's central counternarcotics account. ACI funding also supports alternative development programs administered by the U.S. Agency for International Development –USAID.
2. WOLA, "La Estrategia Colombia Estados UNidos en la erradicaciond e cultivos ilicitos. Revista Javeriana. Junio, 2008. See also ONODC, Junio 2006.
3. See, HRW, "Paramilitares Heir's. The new face of violence in Colombia". February 2010. According with the report "new groups cropped up all over the country, taking the reins of the criminal operations that the AUC leadership previously ran".
4. Colombian Constitutional Court. Auto 005 of 2009
5. NASGACC, "Comments Concerning Free Trade Agreement with the Republic of Colombia (Docket Number USTR-2009-0021)". September 15, 2009
6. U.S. 2008 Foreign Operations Appropriations Law (H.R. 2764)
7. See ACNUR, "Resistencia al desplazamiento por combatientes y agents de desarrollo: zonas humanitarias en el sur-occidente colombiano". Noviembre, 2007.

8. See, “El Tratado de Libre Comercio Colombia-Estados Unidos, es una grave amenaza para el proyecto de vida y los derechos territoriales, culturales, ambientales y laborales del pueblo Afrocolombiano”. 2008
9. http://www.oxfamamerica.org/whatwedo/emergencies/global_food_crisis/news_publications/haiti-no-longer-grows-much-of-its-own-rice-and-families-now-go-hungry
10. http://www.stwr.org/latin-america-caribbean/bill-clinton-admits-neoliberal-policies-in-haiti-were-a-mistake.html#Katz
11. *Haiti: Saving the Environment, Preventing Instability and Conflict*, at page 6, International Crisis Group, April 28, 2009, http://www.crisisgroup.org/home/index.cfm?id=60786; Maureen Taft-Morales, *Haiti: Current Conditions and Congressional Concerns*, Congressional research Service Report R40507, http://www.fas.org/sgp/crs/row/R40507.pdf.
12. http://www.globalpolicy.org/opinion/2006/0724beeton.htm
13. http://www.jubileeusa.org/fileadmin/user_upload/Resources/Haiti/2008/haiti_fact_sheet_2008.pdf
14. Report by the President’s Task Force on Puerto Rico’s Status, December 2007, at pp. 5-6; Report by the President’s Task Force on Puerto Rico’s Status, December 2005, at pp. 5-6.
15. Report by the President’s Task Force on Puerto Rico’s Status, December 2005, at p. 6.
16. A/AC.109/2009/L.13.
17. See, e.g., http://capr.org/dmdocuments/Protagonista_CAPR.pdf. The Bar Association has consistently opted for the Constitutional Assembly as the ideal means of resolving the status question, based on recommendations from the Commission on Constitutional Rights, comprised of members of all three ideological tendencies.

US HUMAN RIGHTS NETWORK

APPENDICES

A. UPR Planning Committee of the USHRN

B. Coordinators of the USHRN Joint UPR Reports

C. Concluding Observations of the UN Human Rights Committee with Respect to the United States' compliance with the International Covenant on Civil and Political Rights (2006)

D. Conclusions and Recommendations of the Committee Against Torture with Respect to the United States' compliance with the UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (2006)

E. Concluding Observations of the Committee on the Elimination of Racial Discrimination with respect to the United States' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (2008)

UPR Planning Committee of the USHRN

Ajamu Baraka - US Human Rights Network

Andrea Carmen - International Indian Treaty Council

Vienna Colucci - Amnesty International USA

Joshua Cooper - Four Freedoms Forum, University of Hawaii

Connie de la Vega - University of San Francisco, California

Ejim Dike - Urban Justice Center

Theresa Harris - Human Rights USA

Daniel Hazen - U.S. Network of Users and Survivors of Psychiatry

Sarah Paoletti - Transnational Legal Clinic, University of Pennsylvania School of Law

Jennifer Prestholdt – Advocates for Human Rights

Anja Rudiger - National Economic and Social Rights Initiative

Morton Sklar - Former Executive Director Human Rights USA

Cindy Soohoo - Center for Reproductive Rights

Eric Tars - National Law Center on Homelessness and Poverty

JoAnn Ward - Columbia Law School's Human Rights Institute

Coordinators of the USHRN Joint UPR Reports

Treaty Ratification and Implementation

– JoAnn Ward, Human Rights Institute at Columbia University School of Law

From Civil Rights to Human Rights: Implementing US Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination

– Ramona Ortega, CERD Taskforce

Racial Discrimination and Civil Rights

– Marcia Johnson-Blanco, Lawyers' Committee for Civil Rights Under Law

Racial Health Disparities and Discrimination

– Vernellia Randall, University of Dayton School of Law

Lesbian, Gay, Bisexual, and Transgender Rights

– Julie Dorf, Council for Global Equality

Death Penalty

– Sandra Babcock, Northwestern University Law School

Human Rights of Persons with Disabilities

– Tina Minkowitz, Center for the Human Rights of Users and Survivors of Psychiatry

Criminal and Juvenile Justice

– Jody Kent, Campaign for the Fair Sentencing of Youth

The Persistence in the United States of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin

– Margaret Huang and Aadika Singh, Rights Working Group

Political Repression - Political Prisoners

- Standish E. Willis, National Conference of Black Lawyers
- Efia Nwangaza, Malcolm X Center for Self-Determination

Political Repression: Continuum of Domestic Repression

– Efia Nwangaza, African American Institute for Policy Studies and Planning

Human Rights Abuses Committed by the New York Police Department

- Nahal Zamani, Center for Constitutional Rights

Environmental Justice

- Caroline Farrell, Center on Race, Poverty, and the Environment
- Gavin Kearney, New York Lawyers for the Public Interest

Right to Decent Work

- Ejim Dike, Urban Justice Center

Labor Rights

- Robin Alexander, United Electrical, Radio, and Machine Workers of America
- Angela Cornell, Cornell Law School
- Jeanne Mirer, International Commission on Labor Rights

Toward Economic and Social Rights in the United States: From Market Competition to Collective Goods

– Anja Rudiger, National Economic and Social Rights Initiative

Towards a Human Rights-Centered Macro-Economic and Financial Policy in the U.S.

– Radhika Balakrishnan & Margot Baruch, Center for Women's Global Leadership

On the Right to Education

– Philip Tegeler & Hanna Chouset, Poverty and Race Research Action Council

Right to Adequate Housing

– Eric Tars, National Law Center on Homelessness and Poverty

The Human Rights Crisis in the Aftermath of Hurricane Katrina

– Monique Harden, Gulf States Human Rights Working Group

Stakeholder Submission on United States Obligations to Respect, Protect, and Remedy Human Rights in the Context of Business Activities

– Niko Luisiani, International Network for Economic, Social, and Cultural Rights

Report on the United States' Compliance with its Human Rights Obligations in the Area of Women's Reproductive and Sexual Health

– Cynthia Soohoo & Michelle Movahed, Center for Reproductive Rights

Indigenous Peoples' Rights

– Andrea Carmen & Alberto Saldamando, International Indian Treaty Council

Migrants, Refugees, and Asylum Seekers

– Jennifer Prestholdt, The Advocates for Human Rights

Migrant Labor Rights

– Sarah Paoletti, University of Pennsylvania Law School Transnational Legal Clinic

The Negative Impact of U.S. Foreign Policy on Human Rights in Colombia, Haiti, and Puerto Rico

– Marjorie Cohn, Thomas Jefferson School of Law

UNITED
NATIONS

CCPR

International covenant on civil and political rights

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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

UNITED STATES OF AMERICA

1. The Committee considered the second and third periodic reports of the United States of America (CCPR/C/USA/3) at its 2379th, 2380th and 2381st meetings (CCPR/C/SR.2379-2381), held on 17 and 18 July 2006, and adopted the following concluding observations at its 2395th meeting (CCPR/C/SR.2395), held on 27 July 2006.

A. Introduction

2. The Committee notes the submission of the State party's second and third periodic combined report, which was seven years overdue, as well as the written answers provided in advance. It appreciates the attendance of a delegation composed of experts belonging to various agencies responsible for the implementation of the Covenant, and welcomes their efforts to answer to the Committee's written and oral questions.

3. The Committee regrets that the State party has not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory. The Committee notes however that the State party has provided additional material "out of courtesy". The Committee further regrets that the State party, invoking grounds of non-applicability of the Covenant or intelligence operations, refused to address certain serious allegations of violations of the rights protected under the Covenant.

4. The Committee regrets that only limited information was provided on the implementation of the Covenant at the State level.

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B. Positive aspects

5. The Committee welcomes the Supreme Court's decision in *Hamdan v. Rumsfeld* (2006) establishing the applicability of common article 3 of the Geneva Conventions of 12 August 1949, which reflects fundamental rights guaranteed by the Covenant in any armed conflict.

6. The Committee welcomes the Supreme Court's decision in *Roper v. Simmons* (2005), which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. In this regard, the Committee reiterates the recommendation made in its previous concluding observations, encouraging the State party to withdraw its reservation to article 6 (5) of the Covenant.

7. The Committee welcomes the Supreme Court's decision in *Atkins v. Virginia* (2002), which held that executions of mentally retarded criminals are cruel and unusual punishments, and encourages the State party to ensure that persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected.

8. The Committee welcomes the promulgation of the National Detention Standards in 2000, establishing minimum standards for detention facilities holding Department of Homeland Security detainees, and encourages the State party to adopt all measures necessary for their effective enforcement.

9. The Committee welcomes the Supreme Court's decision in *Lawrence et al. v. Texas* (2003), which declared unconstitutional legislation criminalizing homosexual relations between consenting adults.

C. Principal subjects of concern and recommendations

10. The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant; and (c) its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State party's ratification of the Covenant. (articles 2 and 40)

> **The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory,**

as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.

11. The Committee expresses its concern about the potentially overbroad reach of the definitions of terrorism under domestic law, in particular under 8 U.S.C. § 1182 (a) (3) (B) and Executive Order 13224 which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting terrorism (articles 17, 19 and 21).

The State party should ensure that its counter-terrorism measures are in full conformity with the Covenant and in particular that the legislation adopted in this context is limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it.

12. The Committee is concerned by credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end, without keeping the International Committee of the Red Cross informed. In such cases, the rights of the families of the detainees are also being violated. The Committee is also concerned that, even when such persons may have their detention acknowledged, they have been held incommunicado for months or years, a practice that violates the rights protected by articles 7 and 9. In general, the Committee is concerned by the fact that people are detained in places where they cannot benefit from the protection of domestic or international law or where that protection is substantially curtailed, a practice that cannot be justified by the stated need to remove them from the battlefield. (articles 7 and 9)

The State party should immediately cease its practice of secret detention and close all secret detention facilities. It should also grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict. The State party should also ensure that detainees, regardless of their place of detention, always benefit from the full protection of the law.

13. The Committee is concerned with the fact that the State party has authorized for some time the use of enhanced interrogation techniques, such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20-hour interrogations, removal of clothing and deprivation of all comfort and religious items, forced grooming, and exploitation of detainees' individual phobias. Although the Committee welcomes the assurance that, according to the Detainee Treatment Act of 2005, such interrogation techniques are prohibited by the present Army Field Manual on Intelligence Interrogation, the Committee remains concerned that (a) the State party refuses to acknowledge that such techniques, several of which were allegedly applied, either individually or in combination, over a protracted period of time, violate the prohibition contained by article 7 of the Covenant; (b) no sentence has been pronounced against an officer, employee, member of the Armed Forces, or other agent of the United States Government for using harsh interrogation techniques that had been approved; (c) these interrogation techniques may still be authorized or used by other agencies, including intelligence agencies and "private contractors"; and (d) the

State party has provided no information to the fact that oversight systems of such agencies have been established to ensure compliance with article 7.

The State party should ensure that any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant; the State party should also ensure that the current interrogation techniques or any revised techniques are binding on all agencies of the United States Government and any others acting on its behalf; the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques; the State party should ensure that the right to reparation of the victims of such practices is respected; and it should inform the Committee of any revisions of the interrogation techniques approved by the Army Field Manual.

14. The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations. The Committee regrets that the State party did not provide sufficient information regarding the prosecutions launched, sentences passed (which appear excessively light for offences of such gravity) and reparation granted to the victims. (articles 6 and 7)

The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations. The State party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime. The State party should adopt all necessary measures to prevent the recurrence of such behaviors, in particular by providing adequate training and clear guidance to its personnel (including commanders) and contract employees, about their respective obligations and responsibilities, in line with articles 7 and 10 of the Covenant. During the course of any legal proceedings, the State party should also refrain from relying on evidence obtained by treatment incompatible with article 7. The Committee wishes to be informed about the measures taken by the State party to ensure the respect of the right to reparation for the victims.

15. The Committee notes with concern that section 1005 (e) of the Detainee Treatment Act bars detainees in Guantanamo Bay from seeking review in case of allegations of ill-treatment or poor conditions of detention. (articles 7 and 10)

The State party should amend section 1005 of the Detainee Treatment Act so as to allow detainees in Guantanamo Bay to seek review of their treatment or conditions of detention before a court.

16. The Committee notes with concern the State party's restrictive interpretation of article 7 of the Covenant according to which it understands (a) that the obligation not to subject anyone to treatment does not include an obligation not to expose anyone to such treatment by means of transfer, rendition, extradition, expulsion or refoulement; (b) that, in any case, it is not under any other obligation not to deport an individual who may undergo cruel, inhumane or degrading treatment or punishment other than torture, as the State party understands the term; and (c) that it is not under any international obligation to respect a non-refoulement rule in relation to persons it detains outside its territory. The Committee also notes with concern the "more likely than not" standard the State party uses in non-refoulement procedures. The Committee is concerned that in practice the State party appears to have adopted a policy to remove, or to assist in removing, either from the United States or other States' territories, suspected terrorists to third countries. for the purpose of detention and interrogation, without the appropriate safeguards to protect them from treatment prohibited by the Covenant. The Committee is also concerned by numerous, well-publicized and documented allegations that persons sent to third countries in this way were indeed detained and interrogated under conditions grossly violating the prohibition contained in article 7, allegations that the State party did not contest. It is deeply concerned with the invocation of State-secrets privilege in cases where the victims of these practices have brought claim before the State party's courts (e.g. the cases of *Maher Arar v. Ashcroft* (2006) and *Khaled Al-Masri v. Tenet* (2006)). (article 7)

The State party should review its position, in accordance with the Committee's general comments No 20 (1992) on Article 7 and No 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. The State party should take all necessary measures to ensure that detainees, including in facilities outside its own territory, are not removed to another country by way of, *inter alia*, transfer, rendition, extradition, expulsion or refoulement, if there are substantial reasons to believe that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The State party should conduct thorough and independent investigations into allegations that persons have been removed to third countries where they have been victims of torture or cruel, inhuman or degrading treatment or punishment; modify its legislation and policies to ensure that no such situation will recur; and provide appropriate reparation to the victims. The State party should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures, with adequate judicial mechanisms for review, prior to removing any detainees to third countries. It should also establish effective mechanisms to monitor scrupulously and vigorously the removal of detainees to third countries. The State party should be aware that in countries where torture or cruel, inhuman or degrading treatment are common practice, it is likely to be used regardless of assurances to the contrary, however stringent any agreed follow-up procedures may be.

17. The Committee is concerned that the Patriot Act and the 2005 REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided "material support" to a "terrorist organization", whether voluntarily or under duress. It regrets having received no response on this matter from the State party. (article 7)

The State party should ensure that the "material support to terrorist organisations" bar is not applied to those who acted under duress.

18. The Committee is concerned that, following the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to determine and review the status of detainees, may not offer adequate safeguards of due process, in particular due to : (a) their lack of independence from the executive branch and the army, (b) restrictions on the rights of detainees to have access to all proceedings and evidence, (c) the inevitable difficulty CSRTs and ARBs face in summoning witnesses, and (d) the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainee Treatment Act, to weigh evidence obtained by coercion for its probative value. The Committee is further concerned that detention in other locations, such as Afghanistan and Iraq, is reviewed by mechanisms providing even fewer guarantees. (article 9)

The State party should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.

19. The Committee, having taken into consideration information provided by the State party, is concerned by reports that, following the September 11 attacks, many non-U.S. citizens, suspected to have committed terrorism-related offences have been detained for long periods pursuant to immigration laws with fewer guarantees than in the context of criminal procedures, or on the basis of the Material Witness Statute only. The Committee is also concerned with the compatibility of the Statute with the Covenant since it may be applied for up-coming trials but also to investigations or proposed investigations. (article 9)

The State party should review its practice with a view to ensuring that the Material Witness Statute and immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings. The State party should also ensure that those improperly so detained receive appropriate reparation.

20. The Committee notes that the decision of the Supreme Court in *Hamdan v. Rumsfeld*, according to which Guantanamo Bay detainees accused of terrorism offences are to be judged by a regularly constituted court affording all the judicial guarantees required by common article 3 of the Geneva Conventions of 12 August 1949, remains to be implemented. (article 14)

The State party should provide the Committee with information on its implementation of the decision.

21. The Committee, while noting some positive amendments introduced in 2006, notes that section 213 of the Patriot Act, expanding the possibility of delayed notification of home and office searches; section 215 regarding access to individuals' personal records and belongings; and section 505, relating to the issuance of national security letters, still raise issues of concern in relation to article 17 of the Covenant. In particular, the Committee is concerned about the

restricted possibilities for the concerned persons to be informed about such measures and to effectively challenge them. Furthermore, the Committee is concerned that the State Party, including through the National Security Agency (NSA), has monitored and still monitors phone, email, and fax communications of individuals both within and outside the U.S., without any judicial or other independent oversight. (articles 2(3) and 17)

The State party should review sections 213, 215 and 505 of the Patriot Act to ensure full compatibility with article 17 of the Covenant. The State party should ensure that any infringement on individual's rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.

22. The Committee is concerned with reports that some 50 % of homeless people are African American although they constitute only 12 % of the United States population. (articles 2 and 26)

The State party should take measures, including adequate and adequately implemented policies, to bring an end to such de facto and historically generated racial discrimination.

23. The Committee notes with concern reports of de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students. It also notes with concern the State party's position that federal government authorities cannot take legal action if there is no indication of discriminatory intent by state or local authorities. (articles 2 and 26)

The Committee reminds the State party of its obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. The State party should conduct in-depth investigations into the de facto segregation described above and take remedial steps, in consultation with the affected communities.

24. The Committee, while welcoming the mandate given to the Attorney General to review the use by federal enforcement authorities of race as a factor in conducting stops, searches, and other enforcement procedures, and the prohibition of racial profiling made in guidance to federal law enforcement officials, remains concerned about information that such practices still persist in the State party, in particular at the state level. It also notes with concern information about racial disparities and discrimination in prosecuting and sentencing processes in the criminal justice system. (articles 2 and 26)

The State party should continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials. The Committee wishes to receive more detailed information about the extent to which such practices

still persist, as well as statistical data on complaints, prosecutions and sentences in such matters.

25. The Committee notes with concern allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials. It notes with concern the failure to address such crime in the legislation on hate crime adopted at the federal level and in many states. It notes with concern the failure to outlaw employment discrimination on the basis of sexual orientation in many states. (articles 2 and 26)

The State party should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The State party should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence and that federal and state employment legislation outlaw discrimination on the basis of sexual orientation.

26. The Committee, while taking note of the various rules and regulations prohibiting discrimination in the provision of disaster relief and emergency assistance, remains concerned about information that the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit the United States, and continue to be disadvantaged under the reconstruction plans. (articles 6 and 26)

The State party should review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement, in matters related to disaster prevention and preparedness, emergency assistance and relief measures. In the aftermath of Hurricane Katrina, the State party should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare. The Committee wishes to be informed about the results of the inquiries into the alleged failure to evacuate prisoners at the Parish prison, as well as the allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana.

27. The Committee regrets that it has not received sufficient information on the measures the State party considers adopting in relation to the reportedly nine million undocumented migrants now in the United States. While noting the information provided by the delegation that National Guard troops will not engage in direct law enforcement duties in the apprehension or detention of aliens, the Committee remains concerned about the increased level of militarization on the southwest border with Mexico. (articles 12 and 26)

The State party should provide the Committee with more detailed information on these issues, in particular on the concrete measures adopted to ensure that only agents who have received adequate training on immigration issues enforce

immigration laws, which should be compatible with the rights guaranteed by the Covenant.

28. The Committee regrets that many federal laws which address sex-discrimination are limited in scope and restricted in implementation. The Committee is especially concerned about the reported persistence of employment discrimination against women. (articles 3 and 26)

The State party should take all steps necessary, including at state level, to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex, in particular in the area of employment.

29. The Committee regrets that the State party does not indicate that it has taken any steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are restricted to the most serious crimes, and that, despite the Committee's previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable. While taking note of some efforts towards the improvement of the quality of legal representation provided to indigent defendants facing capital punishment, the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party. (articles 6 and 14)

The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty.

30. The Committee reiterates its concern about reports of police brutality and excessive use of force by law enforcement officials. The Committee is concerned in particular by the use of so-called less lethal restraint devices, such as electro-muscular disruption devices (EMDs), in situations where lethal or other serious force would not otherwise have been used. It is concerned about information according to which police have used tasers against unruly schoolchildren; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; elderly people; pregnant women; unarmed suspects fleeing minor crime scenes and people who argue with officers or simply fail to comply with police commands, without in most cases the responsible officers being found to have violated their departments' policies. (articles 6 and 7)

The State party should increase significantly its efforts towards the elimination of police brutality and excessive use of force by law enforcement officials. The State party should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified, and in particular that they are never used against vulnerable persons. The State party

should bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

31. The Committee notes that (a) waivers of consent in research regulated by the U.S Department of Health and Human Services and the Food and Drug Administration may be given in case of individual and national emergencies; (b) some research may be conducted on persons vulnerable to coercion or undue influence such as children, prisoners, pregnant women, mentally disabled persons, or economically disadvantaged persons; (c) non-therapeutic research may be conducted on mentally ill persons or persons with impaired decision-making capacity, including minors; and (d) although no waivers have been given so far, domestic law authorizes the President to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces, if the President determines that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. (article 7)

The State party should ensure that it meets its obligation under article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation. The Committee recalls in this regard the non-derogable character of this obligation under article 4 of the Covenant. When there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.

32. The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers of severely mentally ill persons in these prisons, as well as in regular in U.S. jails.

The State party should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

33. The Committee, while welcoming the adoption of the Prison Rape Elimination Act of 2003, regrets that the State party has not implemented its previous recommendation that legislation allowing male officers access to women's quarters should be amended to provide at least that they will always be accompanied by women officers. The Committee also expresses concern about the shackling of detained women during childbirth. (articles 7 and 10)

The Committee reiterates its recommendation that male officers should not be granted access to women's quarters, or at least be accompanied by women officers. The Committee also recommends the State party to prohibit the shackling of detained women during childbirth.

34. The Committee notes with concern reports that forty-two states and the Federal government have laws allowing persons under the age of eighteen at the time the offence was committed, to receive life sentences, without parole, and that about 2,225 youth offenders are currently serving life sentences in United States prisons. The Committee, while noting the State party's reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10 (2) (b) and (3) and 14 (4) of the Covenant, remains concerned by information that treatment of children as adults is not only applied in exceptional circumstances. The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)

The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.

35. The Committee is concerned that about five million citizens cannot vote due to a felony conviction, and that this practice has significant racial implications. The Committee also notes with concern that the recommendation made in 2001 by the National Commission on Federal Election Reform that all states restore voting rights to citizens who have fully served their sentences has not been endorsed by all states. The Committee is of the view that general deprivation of the right vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 of 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

The State party should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommends that the State party review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The State party should also assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee with detailed information in this regard.

36. The Committee, having taken note of the responses provided by the delegation, remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant. (articles 2, 25 and 26)

The State party should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives.

37. The Committee notes with concern that no action has been taken by the State party to address its previous recommendation relating to the extinguishment of aboriginal and indigenous rights. The Committee, while noting that the guarantees provided by the Fifth Amendment apply to the taking of land in situations where treaties concluded between the Federal Government and Indian tribes apply, is concerned that in other situations, in particular where land was assigned by creating a reservation or is held by reason of long possession and use, tribal property rights can be extinguished on the basis of the plenary authority of Congress for conducting Indian affairs without due process and fair compensation. The Committee is also concerned that the concept of permanent trusteeship over the Indian and Alaska native tribes and their land as well as the actual exercise of this trusteeship in managing the so called Individual Indian Money (IIM) accounts may infringe upon the full enjoyment of their rights under the Covenant. Finally, the Committee regrets that it has not received sufficient information on the consequences on the situation of Indigenous Native Hawaiians of Public Law 103-150 apologizing to the Native Hawaiians Peoples for the illegal overthrow of the Kingdom of Hawaii, which resulted in the suppression of the inherent sovereignty of the Hawaiian people. (articles 1, 26 and 27 in conjunction with Article 2, paragraph 3 of the Covenant).

The State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.

38. The Committee sets 1st August 2010 as the date for the submission of the fourth periodic report of the United States of America. It requests that the State party's second and third periodic reports and the present concluding observations be published and widely disseminated in the State party, to the general public as well as to the judicial, legislative and administrative authorities, and that the fourth periodic report be circulated for the attention of the non-governmental organizations operating in the country.

39. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 12, 13, 14, 16, 20 and 26 above. The Committee requests the State party to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole, as well as about the practical implementation of the Covenant, the difficulties encountered in this regard, and the implementation of the Covenant at state level. The State party is also encouraged to provide more detailed information on the adoption of effective mechanisms to ensure that new and existing legislation, at federal and at state level, is in compliance with the Covenant, and about mechanisms adopted to ensure proper follow-up of the Committee's concluding observations.

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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Conclusions and recommendations of the Committee against Torture

UNITED STATES OF AMERICA

1. The Committee against Torture considered the second report of the United States of America (CAT/C/48/Add.3/Rev.1) at its 702nd and 705th meetings (CAT/C/SR.702 and 705), held on 5 and 8 May 2006, and adopted, at its 720th and 721st meetings, on 17 and 18 May 2006 (CAT/C/SR.720 and 721), the following conclusions and recommendations.

A. Introduction

2. The second periodic report of the United States of America was due on 19 November 2001, as requested by the Committee at its twenty-fourth session in May 2000 (A/55/44, para. 180 (f)) and was received on 6 May 2005. The Committee notes that the report includes a point-by-point reply to the Committee's previous recommendations.

3. The Committee commends the State party for its exhaustive written responses to the Committee's list of issues, as well as the detailed responses provided both in writing and orally to the questions posed by the members during the examination of the report. The Committee expresses its appreciation for the large and high-level delegation, comprising representatives from relevant departments of the State party, which facilitated a constructive oral exchange during the consideration of the report.

4. The Committee notes that the State party has a federal structure, but recalls that the United States of America is a single State under international law and has the obligation to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") in full at the domestic level.

5. Recalling its statement adopted on 22 November 2001 condemning utterly the terrorist attacks of 11 September 2001, the terrible threat to international peace and security posed by acts of international terrorism and the need to combat by all means, in accordance with the Charter of the United Nations, the threats caused by terrorist acts, the Committee recognizes that these attacks caused profound suffering to many residents of the State party. The Committee acknowledges that the State party is engaged in protecting its security and the security and freedom of its citizens in a complex legal and political context.

B. Positive aspects

6. The Committee welcomes the State party's statement that all United States officials, from all government agencies, including its contractors, are prohibited from engaging in torture at all times and in all places, and that all United States officials from all government agencies, including its contractors, wherever they may be, are prohibited from engaging in cruel, inhuman or degrading treatment or punishment, in accordance with the obligations under the Convention.

7. The Committee notes with satisfaction the State party's statement that the United States does not transfer persons to countries where it believes it is "more likely than not" that they will be tortured, and that this also applies, as a matter of policy, to the transfer of any individual, in the State party's custody, or control, regardless of where they are detained.

8. The Committee welcomes the State party's clarification that the statement of the United States President on signing the Detainee Treatment Act on 30 December 2005 is not to be interpreted as a derogation by the President from the absolute prohibition of torture.

9. The Committee also notes with satisfaction the enactment of:

(a) The Prison Rape Elimination Act of 2003, which addresses sexual assault of persons in the custody of correctional agencies, with the purpose, inter alia, of establishing a "zero-tolerance standard" for rape in detention facilities in the State party; and

(b) That part of the Detainee Treatment Act of 2005 which prohibits cruel, inhuman, or degrading treatment and punishment of any person, regardless of nationality or physical location, in the custody or under the physical control of the State party.

10. The Committee welcomes the adoption of National Detention Standards in 2000, which set minimum standards for detention facilities holding Department of Homeland Security detainees, including asylum-seekers.

11. The Committee also notes with satisfaction the sustained and substantial contributions of the State party to the United Nations Voluntary Fund for the Victims of Torture.

12. The Committee notes the State party's intention to adopt a new Army Field Manual for intelligence interrogation, applicable to all its personnel, which, according to the State party, will ensure that interrogation techniques fully comply with the Convention.

C. Subjects of concern and recommendations

13. Notwithstanding the statement by the State party that "every act of torture within the meaning of the Convention is illegal under existing federal and/or state law", the Committee reiterates the concern expressed in its previous conclusions and recommendations with regard to the absence of a federal crime of torture, consistent with article 1 of the Convention, given that sections 2340 and 2340 A of the United States Code limit federal criminal jurisdiction over acts of torture to extraterritorial cases. The Committee also regrets that, despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the extraterritorial criminal torture statute (arts. 1, 2, 4 and 5).

The Committee reiterates its previous recommendation that the State party should enact a federal crime of torture consistent with article 1 of the Convention, which should include appropriate penalties, in order to fulfil its obligations under the Convention to prevent and eliminate acts of torture causing severe pain or suffering, whether physical or mental, in all its forms.

The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to "prolonged mental harm" as set out in the State party's understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.

The State party should investigate, prosecute and punish perpetrators under the federal extraterritorial criminal torture statute.

14. The Committee regrets the State party's opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the "law of armed conflict" is the exclusive *lex specialis* applicable, and that the Convention's application "would result in an overlap of the different treaties which would undermine the objective of eradicating torture" (arts. 1 and 16).

The State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its articles 1 and 16.

15. The Committee notes that a number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (arts. 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable.

The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.

16. The Committee notes with concern that the State party does not always register persons detained in territories under its jurisdiction outside the United States, depriving them of an effective safeguard against acts of torture (art. 2).

The State party should register all persons it detains in any territory under its jurisdiction, as one measure to prevent acts of torture. Registration should contain the identity of the detainee, the date, time and place of the detention, the identity of the authority that detained the person, the ground for the detention, the date and time of admission to the detention facility and the state of health of the detainee upon admission and any changes thereto, the time and place of interrogations, with the names of all interrogators present, as well as the date and time of release or transfer to another detention facility.

17. The Committee is concerned by allegations that the State party has established secret detention facilities, which are not accessible to the International Committee of the Red Cross. Detainees are allegedly deprived of fundamental legal safeguards, including an oversight mechanism in regard to their treatment and review procedures with respect to their detention. The Committee is also concerned by allegations that those detained in such facilities could be held for prolonged periods and face torture or cruel, inhuman or degrading treatment. The Committee considers the "no comment" policy of the State party regarding the existence of such secret detention facilities, as well as on its intelligence activities, to be regrettable (arts. 2 and 16).

The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention. The State party should investigate and disclose the existence of any such facilities and the authority under which they have been established and the manner in which detainees are treated. The State party should publicly condemn any policy of secret detention.

The Committee recalls that intelligence activities, notwithstanding their author, nature or location, are acts of the State party, fully engaging its international responsibility.

18. The Committee is concerned by reports of the involvement of the State party in enforced disappearances. The Committee considers the State party's view that such acts do not constitute a form of torture to be regrettable (arts. 2 and 16).

The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.

19. Notwithstanding the State party's statement that "[u]nder U.S. law, there is no derogation from the express statutory prohibition of torture" and that "[n]o circumstances whatsoever … may be invoked as a justification or defense to committing torture", the Committee remains concerned at the absence of clear legal provisions ensuring that the Convention's prohibition against torture is not derogated from under any circumstances, in particular since 11 September 2001 (arts. 2, 11 and 12).

The State party should adopt clear legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogation. Derogation from this principle is incompatible with paragraph 2 of article 2 of the Convention, and cannot limit criminal responsibility. The State party should also ensure that perpetrators of acts of torture are prosecuted and punished appropriately.

The State party should also ensure that any interrogation rules, instructions or methods do not derogate from the principle of absolute prohibition of torture and that no doctrine under domestic law impedes the full criminal responsibility of perpetrators of acts of torture.

The State party should promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates.

20. The Committee is concerned that the State party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. The Committee is also concerned by the State party's rendition of suspects, without any judicial procedure, to States where they face a real risk of torture (art. 3).

The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of *refoulement.*

21. The Committee is concerned by the State party's use of "diplomatic assurances", or other kinds of guarantees, assuring that a person will not be tortured if expelled, returned, transferred or extradited to another State. The Committee is also concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured (art. 3).

When determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the State party should only rely on "diplomatic assurances" in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return

monitoring arrangements. The State party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided.

22. The Committee, noting that detaining persons indefinitely without charge constitutes per se a violation of the Convention, is concerned that detainees are held for protracted periods at Guantánamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention (arts. 2, 3 and 16).

The State party should cease to detain any person at Guantánamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State where they could face a real risk of being tortured, in order to comply with its obligations under the Convention.

23. The Committee is concerned that information, education and training provided to the State party's law-enforcement or military personnel are not adequate and do not focus on all provisions of the Convention, in particular on the non-derogable nature of the prohibition of torture and the prevention of cruel, inhuman and degrading treatment or punishment (arts. 10 and 11).

The State party should ensure that education and training of all law-enforcement or military personnel, are conducted on a regular basis, in particular for personnel involved in the interrogation of suspects. This should include training on interrogation rules, instructions and methods, and specific training on how to identify signs of torture and cruel, inhuman or degrading treatment. Such personnel should also be instructed to report such incidents.

The State party should also regularly evaluate the training and education provided to its law-enforcement and military personnel as well as ensure regular and independent monitoring of their conduct.

24. The Committee is concerned that in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that "confusing interrogation rules" and techniques defined in vague and general terms, such as "stress positions", have led to serious abuses of detainees (arts. 11, 1, 2 and 16).

The State party should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.

25. The Committee is concerned at allegations of impunity of some of the State party's law-enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment. The Committee notes the limited investigation and lack of prosecution in respect of the allegations of torture perpetrated in areas 2 and 3 of the Chicago Police Department (art. 12).

The State party should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment by law-enforcement personnel and bring perpetrators to justice, in order to fulfil its obligations under article 12 of the Convention. The State party should also provide the Committee with information on the ongoing investigations and prosecution relating to the above-mentioned case.

26. The Committee is concerned by reliable reports of acts of torture or cruel, inhuman and degrading treatment or punishment committed by certain members of the State party's military or civilian personnel in Afghanistan and Iraq. It is also concerned that the investigation and prosecution of many of these cases, including some resulting in the death of detainees, have led to lenient sentences, including of an administrative nature or less than one year's imprisonment (art. 12).

The State party should take immediate measures to eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction, and should promptly and thoroughly investigate such acts, prosecute all those responsible for such acts, and ensure they are appropriately punished, in accordance with the seriousness of the crime.

27. The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to habeas corpus petitions, or other claims by or on behalf of Guantánamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defense, have their status determined and reviewed by an administrative process of that department (art. 13).

The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees, as required by article 13 of the Convention.

28. The Committee is concerned at the difficulties certain victims of abuses have faced in obtaining redress and adequate compensation, and that only a limited number of detainees have filed claims for compensation for alleged abuse and maltreatment, in particular under the Foreign Claims Act (art. 14).

The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.

29. The Committee is concerned at section 1997 e (e) of the 1995 Prison Litigation Reform Act which provides "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury" (art. 14).

The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.

30. The Committee, while taking note of the State party's instruction number 10 of 24 March 2006, which provides that military commissions shall not admit statements established to be made as a result of torture in evidence, is concerned about the implementation of the instruction in the context of such commissions and the limitations on detainees' effective right to complain. The Committee is also concerned about the Combatant Status Review Tribunals and the Administrative Review Boards (arts. 13 and 15).

The State party should ensure that its obligations under articles 13 and 15 are fulfilled in all circumstances, including in the context of military commissions and should consider establishing an independent mechanism to guarantee the rights of all detainees in its custody.

31. The Committee is concerned at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering (arts. 16, 1 and 2).

The State party should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.

32. The Committee is concerned at reliable reports of sexual assault of sentenced detainees, as well as persons in pretrial or immigration detention, in places of detention in the State party. The Committee is concerned that there are numerous reports of sexual violence perpetrated by detainees on one another, and that persons of differing sexual orientation are particularly vulnerable. The Committee is also concerned by the lack of prompt and independent investigation of such acts and that appropriate measures to combat these abuses have not been implemented by the State party (arts. 16, 12, 13 and 14).

The State party should design and implement appropriate measures to prevent all sexual violence in all its detention centres. The State party should ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation.

33. The Committee is concerned at the treatment of detained women in the State party, including gender-based humiliation and incidents of shackling of women detainees during childbirth (art. 16).

The State party should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards.

34. The Committee reiterates the concern expressed in its previous recommendations about the conditions of the detention of children, in particular the fact that they may not be completely segregated from adults during pretrial detention and after sentencing. The Committee is also concerned at the large number of children sentenced to life imprisonment in the State party (art. 16).

The State party should ensure that detained children are kept in facilities separate from those for adults in conformity with international standards. The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment.

35. The Committee remains concerned about the extensive use by the State party's law-enforcement personnel of electroshock devices, which have caused several deaths. The Committee is concerned that this practice raises serious issues of compatibility with article 16 of the Convention.

The State party should carefully review the use of electroshock devices, strictly regulate their use, restricting it to substitution for lethal weapons, and eliminate the use of these devices to restrain persons in custody, as this leads to breaches of article 16 of the Convention.

36. The Committee remains concerned about the extremely harsh regime imposed on detainees in "supermaximum prisons". The Committee is concerned about the prolonged isolation periods detainees are subjected to, the effect such treatment has on their mental health, and that its purpose may be retribution, in which case it would constitute cruel, inhuman or degrading treatment or punishment (art. 16).

The State party should review the regime imposed on detainees in "supermaximum prisons", in particular the practice of prolonged isolation.

37. The Committee is concerned about reports of brutality and use of excessive force by the State party's law-enforcement personnel, and the numerous allegations of their ill-treatment of vulnerable groups, in particular racial minorities, migrants and persons of different sexual orientation which have not been adequately investigated (art. 16 and 12).

The State party should ensure that reports of brutality and ill-treatment of members of vulnerable groups by its law-enforcement personnel are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.

38. The Committee strongly encourages the State party to invite the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in full conformity with the terms of reference for fact-finding missions by special procedures of the United Nations, to visit Guantánamo Bay and any other detention facility under its de facto control.

39. The Committee invites the State party to reconsider its express intention not to become party to the Rome Statute of the International Criminal Court.

40. The Committee reiterates its recommendation that the State party should consider withdrawing its reservations, declarations and understandings lodged at the time of ratification of the Convention.

41. The Committee encourages the State party to consider making the declaration under article 22, thereby recognizing the competence of the Committee to receive and consider individual communications, as well as ratifying the Optional Protocol to the Convention.

42. The Committee requests the State party to provide detailed statistical data, disaggregated by sex, ethnicity and conduct, on complaints related to torture and ill-treatment allegedly committed by law-enforcement officials, investigations, prosecutions, penalties and disciplinary action relating to such complaints. It requests the State party to provide similar statistical data and information on the enforcement of the Civil Rights of Institutionalized Persons Act by the Department of Justice, in particular in respect to the prevention, investigation and prosecution of acts of torture, or cruel, inhuman or degrading treatment or punishment in detention facilities and the measures taken to implement the Prison Rape Elimination Act and their impact. The Committee requests the State party to provide information on any compensation and rehabilitation provided to victims. The Committee encourages the State party to create a federal database to facilitate the collection of such statistics and information which assist in the assessment of the implementation of the provisions of the Convention and the practical enjoyment of the rights it provides. The Committee also requests the State party to provide information on investigations into the alleged ill-treatment perpetrated by law-enforcement personnel in the aftermath of Hurricane Katrina.

43. The Committee requests the State party to provide, within one year, information on its response to its recommendations in paragraphs 16, 20, 21, 22, 24, 33, 34 and 42 above.

44. The Committee requests the State party to disseminate its report, with its addenda and the written answers to the Committee's list of issues and oral questions and the conclusions and recommendations of the Committee widely, in all appropriate languages, through official websites, the media and non-governmental organizations.

45. The State party is invited to submit its next periodic report, which will be considered as its fifth periodic report, by 19 November 2011, the due date of the fifth periodic report.

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Seventy-second session
Geneva, 18 February - 7 March 2008

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION

Concluding observations of the Committee on the Elimination of Racial Discrimination

UNITED STATES OF AMERICA

1. The Committee considered the fourth, fifth and sixth periodic reports of the United States of America, submitted in a single document (CERD/C/USA/6), at its 1853rd and 1854th meetings (CERD/C/SR.1853 and 1854), held on 21 and 22 February 2008. At its 1870th meeting (CERD/C/SR.1870), held on 5 March 2008, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the reports, and the opportunity to continue an open and constructive dialogue with the State party. The Committee also expresses appreciation for the detailed responses provided to the list of issues, as well as for the efforts made by the high-level delegation to answer the wide range of questions raised during the dialogue.

B. Positive aspects

3. The Committee welcomes the acknowledgement of the multi-racial, multi-ethnic, and multi-cultural nature of the State party.

4. The Committee notes with satisfaction the work carried out by the various executive departments and agencies of the State party which have responsibilities in the field of the

elimination of racial discrimination, including the Civil Rights Division of the U.S. Department of Justice, the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD).

5. The Committee welcomes the re-authorisation, in 2005, of the *Violence Against Women Act* of 1994 (VAWA).

6. The Committee also welcomes the re-authorisation, in 2006, of the *Voting Rights Act* of 1965 (VRA).

7. The Committee commends the launch, in 2007, of the *E-RACE Initiative* ("Eradicating Racism and Colorism from Employment"), aimed at raising awareness on the issue of racial discrimination in the workplace.

8. The Committee notes with satisfaction the *National Partnership for Action to End Health Disparities for Ethnic and Racial Minority Populations*, created in 2007, as well as the various programmes adopted by the U.S. Department of Health and Human Services (HHS) to address the persistent health disparities affecting low-income persons belonging to racial, ethnic and national minorities.

9. The Committee also notes with satisfaction the *California Housing Element Law* of 1969, which requires each local jurisdiction to adopt a housing element in its general plan to meet the housing needs of all segments of the population, including low-income persons belonging to racial, ethnic and national minorities.

C. Concerns and recommendations

10. The Committee reiterates the concern expressed in paragraph 393 of its previous concluding observations of 2001 (A/56/18, paras. 380-407) that the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in article 1, paragraph 1, of the Convention, which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. In this regard, the Committee notes that indirect – or *de facto* – discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Article 1 (1))

> **The Committee recommends the State party to review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure – in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.**

11. While appreciating that the Constitution and laws of the State party may be used in many instances to prohibit private actors from engaging in acts of racial discrimination, the Committee remains concerned about the wide scope of the reservation entered by the State party at the time of ratification of the Convention with respect to discriminatory acts perpetrated by private individuals, groups or organisations. (Article 2)

The Committee recommends that the State party consider withdrawing or narrowing the scope of its reservation to article 2 of the Convention, and to broaden the protection afforded by the law against discriminatory acts perpetrated by private individuals, groups or organisations.

12. The Committee notes that no independent national human rights institution established in accordance with the Paris Principles (General Assembly resolution 48/134 of 20 December 1993, annex) exists in the State party. (Article 2)

The Committee recommends that the State party consider the establishment of an independent national human rights institution in accordance with the Paris Principles (General Assembly resolution 48/134 of 20 December 1993, annex).

13. While welcoming the acknowledgement by the delegation that the State party is bound to apply the Convention throughout its territory and to ensure its effective application at all levels – federal, state, and local – regardless of the federal structure of its government, the Committee notes with concern the lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels. (Article 2)

The Committee recommends that the State party establish appropriate mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels.

14. The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling – including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* – such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 9/11 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa. (Articles 2 and 5 (b))

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, *inter alia* by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation no. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.

15. The Committee notes with concern that recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms. (Article 2 (2))

> **The Committee reiterates that the adoption of special measures "when circumstances so warrant" is an obligation arising from article 2, paragraph 2, of the Convention. The Committee therefore calls once again on the State party to adopt and strengthen the use of such measures when circumstances warrant their use as a tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial, ethnic and national minorities.**

16. The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. (Article 3)

> **The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:**
>
> **(i) support the development of public housing complexes outside poor, racially segregated areas;**
>
> **(ii) eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and**
>
> **(iii) ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of "steering" and other discriminatory practices carried out by private actors.**

17. The Committee remains concerned about the persistence of *de facto* racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court's landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address *de facto* segregation by prohibiting the use of race-conscious measures as a tool to promote integration. (Articles 2 (2), 3 and 5 (e) (v))

> **The Committee recommends that the State party undertake further studies to identify the underlying causes of *de facto* segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school de-segregation and providing equal educational**

opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures – including the enactment of legislation – to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

18. While appreciating that some forms of hate speech and other activities designed to intimidate, such as the burning of crosses, are not protected under the First Amendment to the U.S. Constitution, the Committee remains concerned about the wide scope of the reservation entered by the State party at the time of ratification of the Convention with respect to the dissemination of ideas based on racial superiority and hatred. (Article 4)

The Committee draws the attention of the State party to its general recommendations No. 7 (1985) and No. 15 (1993) concerning the implementation of article 4 of the Convention, and request the State party to consider withdrawing or narrowing the scope of its reservations to article 4 of the Convention. In this regard, the Committee wishes to reiterate that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas.

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1 (68) of 2006 (CERD/C/USA/DEC/1). (Article 5)

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

20. The Committee reiterates its concern with regard to the persistent racial disparities in the criminal justice system of the State party, including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African American persons, receive at various stages of criminal proceedings. (Article 5 (a))

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, according to which stark racial disparities in the administration and functioning of the criminal justice system, including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, may be regarded as factual indicators of racial discrimination, the Committee recommends that the State party take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other organs administering justice, including further studies to determine the nature and scope of the problem, and the implementation of national strategies or plans of action aimed at the elimination of structural racial discrimination.

21. The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole. (Article 5 (a))

> **The Committee recalls the concerns expressed by the Human Rights Committee (CCPR/C/USA/CO/3/Rev.1, para. 34) and the Committee against Torture (CAT/C/USA/CO/2, para. 34) with regard to federal and state legislation allowing the use of life imprisonment without parole against young offenders, including children. In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.**

22. While welcoming the recent initiatives undertaken by the State party to improve the quality of criminal defense programmes for indigent persons, the Committee is concerned about the disproportionate impact that persistent systemic inadequacies in these programmes have on indigent defendants belonging to racial, ethnic and national minorities. The Committee also notes with concern the disproportionate impact that the lack of a generally recognised right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities. (Article 5 (a))

> **The Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defense programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, *inter alia* by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs – such as housing, health care, or child custody – are at stake.**

23. The Committee remains concerned about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of studies, including a recent study released in October 2007 by the American Bar Association (ABA).[1] (Article 5 (a))

[1] American Bar Association, "State Death Penalty Assessments: Key Findings," 29 October 2007, http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc.

Taking into account its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices. The Committee wishes to reiterate its previous recommendation – contained in paragraph 396 of its previous concluding observations of 2001 – that the State party adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.

24. The Committee regrets the position taken by State party that the Convention is not applicable to the treatment of foreign detainees held as "enemy combatants", on the basis of the argument that the law of armed conflict is the exclusive *lex specialis* applicable, and that in any event the Convention "would be inapplicable to allegations of unequal treatment of foreign detainees" in accordance to article 1, paragraph 2, of the Convention. The Committee also notes with concern that the State party exposes non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or *refoulement* to third countries where there are substantial reasons to believe that they will be subjected to such treatment. (Articles 5 (a), 5 (b) and 6)

Bearing in mind its general recommendation no. 30 (2004) on non-citizens, the Committee wishes to reiterate that States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice, to the extent recognised under international law, and that Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination set out in article 1, paragraph 1, of the Convention.

The Committee also recalls its Statement on racial discrimination and measures to combat terrorism (A/57/18), according to which States parties to the Convention are under an obligation to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin.

The Committee therefore urges the State party to adopt all necessary measures to guarantee the right of foreign detainees held as "enemy combatants" to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violations. The Committee further request the State party to ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.

25. While recognising the efforts made by the State party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons

belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border. The Committee also notes with concern that despite the efforts made by the State party to prosecute law enforcement officials for criminal misconduct, impunity of police officers responsible for abuses allegedly remains a widespread problem. (Articles 5 (b) and 6)

The Committee recommends that the State party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the U.S.-Mexico border, *inter alia* by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee further requests the State party to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.

26. While welcoming the various measures adopted by the State party to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, the Committee remains deeply concerned about the incidence of rape and sexual violence experienced by women belonging to such groups, particularly with regard to American Indian and Alaska Native women and female migrant workers, especially domestic workers. The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered. (Articles 5 (b) and 6)

The Committee recommends that the State party increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, *inter alia* by:

(i) setting up and adequately funding prevention and early assistance centres, counselling services and temporary shelters;

(ii) providing specific training for those working within the criminal justice system, including police officers, lawyers, prosecutors and judges, and medical personnel;

(iii) undertaking information campaigns to raise awareness among women belonging to racial, ethnic and national minorities about the mechanisms and procedures provided for in national legislation on racism and discrimination; and

(iv) ensuring that reports of rape and sexual violence against women belonging to racial, ethnic and national minorities, and in particular Native American women, are independently, promptly and thoroughly investigated, and that perpetrators are prosecuted and appropriately punished.

The Committee requests the State party to include information on the results of these measures and on the number of victims, perpetrators, convictions, and the types of sanctions imposed, in its next periodic report.

27. The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system. The Committee notes with particular concern that in some states, individuals remain disenfranchised even after the completion of their sentences. (Article 5 (c))

Taking into account the disproportionate impact that the implementation of disenfranchisement laws has on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, the Committee recommends that the State Party adopt all appropriate measures to ensure that the denial of voting rights is used only with regard to persons convicted of the most serious crimes, and that the right to vote is in any case automatically restored after the completion of the criminal sentence.

28. The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterised by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including *Hoffman Plastics Compound, Inc. v. NLRB* (2007), *Ledbetter v. Goodyear Tire and Rubber Co.* (2007) and *Long Island Care at Home, Ltd. v. Coke* (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses. (Articles 5 (e) (i) and 6)

The Committee recommends that the State party take all appropriate measures – including increasing the use of "pattern and practice" investigations – to combat *de facto* discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention. The Committee further recommends that the State party take effective measures – including the enactment of legislation, such as the proposed Civil Rights Act of 2008 – to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi))

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to

ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.

30. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions. (Articles 2 (1) (d) and 5 (e))

In light of article 2, paragraph 1 (d), and 5 (e) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.

31. The Committee, while noting the efforts undertaken by the State party and civil society organisations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane. (Article 5 (e) (iii))

The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls on the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them.

32. While noting the wide range of measures and policies adopted by the State party to improve access to health insurance and adequate health care and services, the Committee is concerned that a large number of persons belonging to racial, ethnic and national minorities

still remain without health insurance and face numerous obstacles to access to adequate health care and services. (Article 5 (e) (iv))

> **The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services. The Committee requests the State party to collect statistical data on health disparities affecting persons belonging to racial, ethnic and national minorities, disaggregated by age, gender, race, ethnic or national origin, and to include it in its next periodic report.**

33. The Committee regrets that despite the efforts of the State party, wide racial disparities continue to exist in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among women and children belonging to racial, ethnic and national minorities, especially African Americans, the high incidence of unintended pregnancies and greater abortion rates affecting African American women, and the growing disparities in HIV infection rates for minority women. (Article 5 (e) (iv))

> **The Committee recommends that the State party continue its efforts to address persistent racial disparities in sexual and reproductive health, in particular by:**
>
> **(i) improving access to maternal health care, family planning, pre- and post- natal care and emergency obstetric services, *inter alia* through the reduction of eligibility barriers for Medicaid coverage;**
>
> **(ii) facilitating access to adequate contraceptive and family planning methods; and**
>
> **(iii) providing adequate sexual education aimed at the prevention of unintended pregnancies and sexually-transmitted infections.**

34. While welcoming the measures adopted by the State party to reduce the significant disparities in the field of education, including the adoption of the *No Child Left Behind Act* of 2001 (NCLB), the Committee remains concerned about the persistent "achievement gap" between students belonging to racial, ethnic or national minorities, including English Language Learner ("ELL") students, and white students. The Committee also notes with concern that alleged racial disparities in suspension, expulsion and arrest rates in schools contribute to exacerbate the high drop out rate and the referral to the justice system of students belonging to racial, ethnic or national minorities. (Article 5 (e) (v))

> **The Committee recommends that the State party adopt all appropriate measures – including special measures in accordance with article 2, paragraph 2, of the Convention – to reduce the persistent "achievement gap" between students belonging to racial, ethnic or national minorities and white students in the field of education, *inter alia* by improving the**

quality of education provided to these students. The Committee also calls on the State Party to encourage school districts to review their "zero tolerance" school discipline policies, with a view to limiting the imposition of suspension or expulsion to the most serious cases of school misconduct, and to provide training opportunities for police officers deployed to patrol school hallways.

35. While welcoming the clarifications offered by the State party with regard to the burden of proof in racial discrimination claims under civil rights statutes, the Committee remains concerned that claims of racial discrimination under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment must be accompanied by proof of intentional discrimination. (Articles 1 (1) and 6)

The Committee recommends that the State party review its federal and state legislation and practice concerning the burden of proof in racial discrimination claims, with a view to allowing – in accordance with article 1, paragraph 1 of the Convention – a more balanced sharing of the burden of proof between the plaintiff, who must establish a *prima facie* case of discrimination, whether direct or based on a disparate impact, and the defendant, who should provide evidence of an objective and reasonable justification for the differential treatment. The Committee calls in particular on the State Party to consider adoption of the Civil Rights Act of 2008.

36. The Committee regrets that despite the efforts made by the State party to provide training programmes and courses on anti-discrimination legislation adopted at the federal and state levels, no specific training programmes or courses have been provided to, *inter alia*, government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and other public officials in order to raise their awareness about the Convention and its provisions. Similarly, the Committee notes with regret that information about the Convention and its provisions has not been brought to the attention of the public in general. (Article 7)

The Committee recommends that the State party organise public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.

37. The Committee requests the State party to provide, in its next periodic report, detailed information on the legislation applicable to refugees and asylum seekers, and on the alleged mandatory and prolonged detention of a large number of non-citizens, including undocumented migrant workers, victims of trafficking, asylum seekers and refugees, as well as members of their families. (Article 5 (b), 5 (e) (iv) and 6)

38. The Committee also requests the State party to provide, in its next periodic report, detailed information on the measures adopted to preserve and promote the culture and

traditions of American Indian and Alaska Native (AIAN) and Native Hawaiian and Other Pacific Islander (NHPI) peoples. The Committee further requests the State party to provide information on the extent to which curricula and textbooks for primary and secondary schools reflect the multi-ethnic nature of the State party, and provide sufficient information on the history and culture of the different racial, ethnic and national groups living in its territory. (Article 7)

39. The Committee is aware of the position of the State party with regard to the Durban Declaration and Programme of Action and its follow up, but in view of the importance that such process has for the achievement of the goals of the Convention, it calls on the State party to consider participating in the preparatory process as well as in the Review Conference itself.

40. The Committee notes that the State party has not made the optional declaration provided for in article 14 of the Convention and invites it to consider doing so.

41. The Committee recommends that the State party ratify the amendment to article 8, paragraph 6, of the Convention, adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by the General Assembly on 16 December 1992 (resolution A/RES/47/111). In this connection, the Committee cites General Assembly resolution of 19 December 2006 (A/RES/61/148), in which the Assembly strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.

42. The Committee recommends that the State party's reports be made readily available to the public at the time of their submission, and that the observations of the Committee with respect to these reports be similarly publicised in the official and national languages.

43. The Committee recommends that the State party consult widely with organisations of civil society working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report.

44. The Committee invites the State party to update its core document in accordance with the harmonised guidelines on reporting under the international human rights treaties, in particular those on the Common Core Document, as adopted by the fifth inter-Committee meeting of the human rights treaty bodies held in June 2006 (HRI/GEN/2/Rev.4).

45. The State party should, within one year, provide information on the way it has followed up on the Committee's recommendations contained in paragraphs 14, 19, 21, 31 and 36, pursuant to paragraph 1 of rule 65 of the rules of procedure.

46. The Committee recommends that the State party submit its seventh, eighth and ninth periodic reports in a single document, due on 20 November 2011, and that the report be comprehensive and address all points raised in the present concluding observations.



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