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Introduction

Human Rights Watch submits this statement in advance of the Human Rights Committee's ("the Committee") upcoming pre-sessional review of the United States. We hope that the points raised in this submission will inform the Committee's understanding of the US government's compliance with the International Covenant on Civil and Political Rights (ICCPR).

On the whole, people in the US enjoy a democratic government, a broad range of civil rights and civil liberties, and recourse to a strong system of federal, state, and local courts. While human rights abuses continue, the existence of a vibrant civil society in the United States allows people to advocate for increased protection of their rights.

In the past several years, there have been positive developments affecting rights protected under the ICCPR in the United States. In January of 2009, President Barack Obama issued a series of executive orders attempting to turn the page on the previous administration's abusive counterterrorism policies. The orders banned torture, ended the use of secret CIA "black sites," made the Army Field Manual on interrogation a government-wide standard, and created a task force to review detention and interrogation policies.

In 2012, the US Department of Justice released the long-awaited national prison rape elimination standards, which provide guidance on how to prevent, detect, and respond to sexual abuse in all confinement facilities. The Department of Homeland Security has recently released its own draft standards for immigration detention facilities.

Despite a lack of legislative action on immigration policy reform, the Obama administration has undertaken some steps towards a fairer approach to immigration enforcement. The administration initiated a discretionary policy to temporarily defer the removal of certain unauthorized immigrants, closing cases of immigrants who are not security risks and who have various strong ties to the US. The 2012 Deferred Action for Childhood Arrivals program expanded this approach to allow for unauthorized immigrants who were brought to the US as children, have lived here for at least five years, and meet

certain requirements to apply for deferred action from deportation and for temporary work authorization.

There has also been some progress in protecting equal rights for lesbian, gay, bisexual, and transgender (LGBT) Americans, as well as progress in protecting the rights of women. Positive developments for the former included the repeal of the “Don’t Ask, Don’t Tell” policy preventing LGBT individuals from serving openly in the military, as well as the recent successful ballot initiatives in Maine, Maryland, and Washington for marriage equality. Positive developments for women have included the passage of the Lilly Ledbetter Fair Pay Act of 2009 and the rescinding of the “Global Gag Rule” that prohibited foreign organizations receiving US funding from providing abortions, counseling women about abortion, or engaging in advocacy for abortion rights, even if no US funds would be used in those efforts.

Yet despite these positive steps, the United States remains stubbornly attached to many practices that fail to respect basic human rights.

The United States has failed to fully repudiate abusive post-9/11 counterterrorism policies. Notwithstanding President Obama’s repeated commitment to closing Guantanamo Bay, the detention facility remains open and still houses 166 detainees. In its periodic report to the Committee, the United States failed to acknowledge that the protections of the ICCPR extend to persons under its control but outside the territory of the United States, as urged by the Committee in its concluding observations. This failure serves to deny fundamental rights to persons detained at Guantanamo Bay and in Afghanistan and will implicate the treatment of detainees who may be held at any other future detention site. In addition, the United States continues to support proceedings before fundamentally flawed military commissions at Guantanamo and fails to provide detainees in both Afghanistan and at Guantanamo with adequate opportunity to challenge their detention.

The stain of abuses, including torture, committed by the United States in the name of counterterrorism will remain intact so long as the US continues to deny the need to seek accountability for these abuses. When speaking about post-9/11 abuses, President Obama states that the country should “look forward.” He has paired this call with investigations that have failed to hold anyone accountable for violations of human rights. The only

investigation to date into detainee abuse was limited, and produced no charges. The US has also blocked every civil suit brought by former detainees, denying them redress.

Flawed US counterterrorism policies abroad have a poisoned twin within the country: the unjust targeting, profiling, and surveillance of Muslims in the US. The Department of Justice continues to support investigatory guidelines that allow for religious profiling for national security purposes. For several years, the New York Police Department has undertaken a vast and indiscriminate surveillance program against Muslims that has resulted in zero prosecutions. Congress has held multiple hearings specifically on the “radicalization” of Muslims but excluded review of “radicalization” or extremism among other groups.

The United States continues to fail to protect children by blurring the lines between children and adults in the criminal justice system. The US Supreme Court has recently helped to rein in the treatment of children as adults. In a 2012 ruling on the mandatory sentencing of child offenders to life without the possibility of parole, a sentence applied to children only in the United States, the court required at a minimum that courts consider the defendant’s youth before sentencing. Such consideration of the differences between children and adults in the criminal justice system, particularly when it comes to violent crimes, remains unusual in the United States. Almost every state in the nation allows for children to be tried as adults, with 15 states requiring it in certain circumstances. Children who are adjudicated delinquent of a sexual offense are placed on registries for decades or for life, like their adult counterparts, and face the same consequences as adults due to strict community notification laws. And youth continue to be placed in solitary confinement in jails and prisons without consideration of the severe impact such treatment can have on their development and rights.

US immigration policy also makes the mistake of treating children the same as adults. Millions of children live in the United States without authorized immigration status. Many of these children, having lived in the United States for many years after being brought to the country at a young age, have the same options to regularize their status as adults have—that is to say, practically none. The Obama administration has attempted to ameliorate this situation through the Deferred Action for Childhood Arrivals program, which temporarily defers the removal of young immigrants without legal status who meet certain requirements, but these children continue to have no reasonable path to

establishing legal residency in the country. Children are also expected to defend themselves in immigration removal proceedings in the same manner as adults. They are afforded no counsel or special considerations due to their youth.

Children working in agriculture in the United States are often offered no more workplace protections than adult workers, despite their greater vulnerability and the many dangers that often accompany this work. Sixteen children under age 16 were fatally injured at work in the US in 2010; 12 of them were working in agriculture. Children as young as 12 can work on farms of any size with parental permissions, can operate dangerous machinery, and can be exposed to harmful pesticides. Recently, the Obama administration backed down in the face of opposition to proposed administration regulations that would have protected children from the most dangerous of agricultural worksite practices.

The United States continues to support arbitrary and excessive sentencing and detention policies that fail to take into account a person's individual circumstances.

Immigration detention continues to grow in the United States, nearly doubling in size between 2005 and 2011 (from 233,417 persons detained in 2005 to 429,247 persons detained in 2011). This explosive growth in detention has been driven by misguided mandatory detention laws that fail to consider a person's individual circumstances. US laws, for example, require the detention of asylum seekers without certain forms of documentation, as well as the detention of lawful permanent residents who have been convicted of certain crimes (including minor non-violent drug crimes), no matter how many years past.

Arbitrariness also permeates the criminal justice system, often through mandatory juvenile transfer and sentencing laws. As mentioned above, certain juvenile cases in several states are required by law to be tried in adult criminal court, prohibiting consideration of a young offender's individual circumstances. Another common practice is the unabated use of mandatory minimum sentencing. The growth of mandatory minimum sentences at the federal and state levels, but for one notable exception, continues unabated. In 1991, 98 federal crimes required a mandatory minimum sentence; 20 years later, 195 federal crimes carry a mandatory minimum. These mandatory minimum laws result in arbitrary sentences, as they again eliminate judicial discretion or consideration of an offender's individual circumstances.

The notable departure from this trend of growing numbers of mandatory minimum sentences is passage of the Fair Sentencing Act of 2010 (FSA). The Fair Sentencing Act eliminated a federal mandatory minimum sentence of five years for simple possession of crack cocaine. However, when the US does remedy an arbitrary sentencing scheme, as it did through the FSA, it often refuses to apply that remedy to those who were previously sentenced under the revoked and arbitrary sentencing scheme. The US reflects this position in its fourth reservation to the ICCPR. This refusal to allow persons who have been sentenced to benefit from an improvement to an arbitrary sentencing scheme also occurred in response to the Supreme Court ruling on life without parole for young offenders. Even with the Court stating that mandatory sentencing of juveniles to life without the possibility of parole violates the US Constitution, many states have not applied this decision retroactively and have not resentenced youth who were sentenced under the old mandatory provisions.

The United States continues to ignore the consequences of discriminatory federal and state laws, policies, and practices. The United States has failed to address profound racial disparities cutting across the criminal justice system, where racial and ethnic minorities have long been disproportionately represented. For example, according to Bureau of Justice statistics, approximately 3.1 percent of African American men, 1.3 percent of Latino men, and 0.5 percent of white men are in prison. Because they are disproportionately likely to have criminal records, members of racial and ethnic minorities are more likely than whites to experience stigma and legal discrimination in employment, housing, education, public benefits, jury service, and the right to vote.

Due to increased prosecution of immigration violations, more Latinos are now entering federal prison than any other ethnic group. Latinos, immigrants, and those who are perceived to be foreign increasingly face discrimination and racial profiling, particularly in states that have enacted immigration enforcement measures. In the workplace context, Latino workers face a disproportionately higher risk of a workplace injury or fatality than non-Latinos. Immigrant women face an increased risk of sexual abuse and assault in the workplace.

Overall, the United States record of compliance with its obligations under the ICCPR is one rife with contradictions. The same United States that committed to end the use of torture in the counterterrorism context remains at ease in religiously profiling Muslims within that

same context. The same United States that in 2010 pushed to reduce racial disparities in certain drug sentencing continues to ignore the discriminatory effect in death sentencing or sentencing of youth to life without parole. And the same United States that has committed to protect unauthorized immigrant children from deportation has failed to stand up for children working in its fields. The message we urge the Committee to deliver in its upcoming review of the United States is that the US should seek greater consistency in its effort to uphold the protections it committed to when ratifying the ICCPR.

I. Abusive Counterterrorism Policies (articles 2, 7, and 9)

Detention without Due Process

The United States denies basic rights to detainees in its custody at Guantanamo Bay and in Afghanistan. In paragraph 10 of its concluding observations in 2006, the Committee recommended that the United States acknowledge the applicability of the ICCPR to individuals under its jurisdiction but outside its territory. In its report to the Committee, the United States notes its past failure to acknowledge the ICCPR's extraterritorial applicability, but it does not remedy the defect: the US presents the view of the Committee and the International Court of Justice that the ICCPR applies to such individuals, but it still fails to endorse the view. The US continues to maintain that rights such as habeas review are not available to detainees in US custody in Afghanistan. Though the US has begun providing detainees in Afghanistan with a type of administrative review, this review falls short of meeting due process protections; for example, detainees are not entitled to a lawyer through this review.¹

Human Rights Watch urges the Committee to request that the United States unambiguously acknowledge the applicability of the Covenant to individuals under its jurisdiction but outside the geographic boundaries of the United States, particularly those persons in custody at Guantanamo Bay and in Afghanistan.

Under article 9, the United States is bound to ensure that no one in its custody is subject to arbitrary arrest or detention. Yet the practice of indefinite detention without trial at Guantanamo Bay is now entering its eleventh year. Though hundreds of the 779 prisoners once detained at the facility have been released, 166 still remain—only six of whom currently face formal charges, in a fundamentally flawed military commission system.² The United States purports to properly hold these individuals indefinitely without trial under the laws of war. Congress codified this detention authority in the National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), and the same provisions are proposed

¹ Andrea Prasow (Human Rights Watch), "The Bagram Detainee Review Boards: Better, But Still Falling Short," commentary, *Jurist*, June 1, 2010, <http://www.hrw.org/news/2010/06/02/bagram-detainee-review-boards-better-still-falling-short>.

² For more information on Guantanamo, see Human Rights Watch, *Facts and Figures: Military Commissions v. Federal Courts*, <http://www.hrw.org/features/guantanamo-facts-figures>.

for the NDAA 2013. Yet the US does not have authority to detain indefinitely persons captured in the course of a non-international armed conflict and far from the battlefield. Individuals apprehended in these situations must be detained and prosecuted according to domestic law and international human rights law. Even if the detention were authorized under domestic law, the procedures for challenging such detention are woefully inadequate.

In paragraph 570 of its report to the Committee, the United States cites to habeas review in US federal courts and “periodic review” led by the Defense Department, available pursuant to Executive Order 13567, as examples of how detainees may challenge their detention. In addition to improperly using detention authority under international humanitarian law, instead of criminal law, as the standard for review, US courts deciding habeas claims have, among other things, given government evidence extraordinary and undue weight and relied on deficient facts in upholding continued detention. Executive Order 13567 was issued on March 7, 2011 and ordered periodic review of individuals at Guantanamo slated for indefinite detention, or prosecution of those who do not yet face charges, to commence within one year. Yet to date, the US has not held any periodic reviews. Following an extensive interagency review of each detainee’s case in 2009, the administration recommended nearly 100 detainees for release. But restrictions enacted by Congress as part of the 2012 NDAA make transferring these detainees to home or third countries extremely difficult. Not a single detainee to whom the Congressional restrictions apply has been transferred out of Guantanamo since the restrictions were put in place.

In both habeas review and periodic review under Executive Order 13567, detainees are denied access to classified evidence, even if it is used to justify their continued detention. Detainees are afforded no assistance in habeas cases and must either hire counsel or rely on volunteer attorneys. In the periodic review process, detainees are provided a government appointed “personal representative” who is not a lawyer. While detainees may have the assistance of private counsel, the rules contemplate circumstances (e.g., claims of national security) in which information is provided only to the personal representative and not to counsel, despite the attorney’s security clearance.

The United States also continues to use military commissions at Guantanamo Bay to try terrorism suspects, despite the fact that there is concurrent jurisdiction in US federal courts, which adhere far more closely to fair trial standards. The Military Commissions Act

of 2009 is an improvement over prior military commissions in that, among other changes, it enacted important restrictions on the use of hearsay and evidence derived from torture and cruel, inhuman, and degrading treatment. However, the military commissions still fail to provide adequate due process.

Among other things, the military commissions lack any genuine protection of the right to a speedy trial. The defendants in the two cases currently being tried before the commissions have been detained for almost 10 years. The commissions also allow the use of evidence obtained by coercion, lack adequate public access, lack independence in that a military official appoints the judge and picks the jury pool, and require the defense go through the prosecution when seeking to subpoena witnesses or access investigative resources. The continued US use of military commissions for these cases sets a dangerous example for other governments, who may point to them when they want to create their own alternative systems of justice that circumvent longstanding fair trial standards.

Torture and Lack of Accountability

The United States continues to fail to fulfill its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). In paragraph 175 of its report to the Committee, the United States points to codification of the Convention against Torture, at 18 U.S.C. 2340A, as evidence of compliance with its obligations under article 7 of the ICCPR. Yet enacting legislation is just the first step in the process. In order to give codification effect, the US must also investigate credible allegations of violations, prosecute cases where warranted, and provide redress to victims.

Credible allegations of acts of widespread and systematic torture and ill-treatment by the US, authorized at the highest levels of government in the post-9/11 period, are well documented. In its report, the United States claims it “takes vigilant action” to prevent the use of torture and “hold perpetrators accountable for their wrongful acts.” It also claims that “several avenues for the domestic prosecution of U.S. Government officials and contractors who commit torture and other serious crimes overseas” exist, pointing to codification of the Convention against Torture as an example. Yet the United States has not

prosecuted a single US government official under its anti-torture laws.³ In fact, the only time the US has prosecuted someone using laws codified under the Convention against Torture was in 2008, when the son of former Liberian President Charles G. Taylor was convicted for the torture of people in Liberia between April 1999 and July 2003. Only a few low-ranking enlisted military personnel have been punished for the abuse of detainees in US custody, and according to the US report, two contractors were prosecuted using US criminal law.⁴

A Department of Justice investigation into alleged abuses of 101 detainees in Central Intelligence Agency (CIA) custody, including two who died, only looked into abuses that went beyond what had been formally authorized by the Department of Justice in a series of legal memos. This was the case despite the fact that certain forms of torture and other ill-treatment, including waterboarding, were expressly authorized, meaning the investigation did not cover those instances of torture. That limited investigation closed in 2012 without anyone being criminally charged.⁵

In civil suits brought by alleged victims of torture while in US custody, the United States continues to invoke claims of immunity for government officials and state secrecy laws to evade liability. No national legislation exists, or has even been proposed, seeking to provide a non-judicial remedy for those who can credibly show torture in US custody. States have an obligation under the Convention against Torture not only to prohibit torture and other violations of the convention, but also to ensure there is an effective remedy. The US has fallen far short of its obligations in this regard.

Human Rights Watch urges the Committee to ask the United States whether it believes it is required to hold fully accountable all persons responsible for the torture of detainees in its custody, including those senior officials who approved the torture of detainees.

³ “US: Torture and Rendition to Gaddafi’s Libya,” Human Rights Watch news release, September 6, 2012, <http://www.hrw.org/news/2012/09/05/us-torture-and-rendition-gaddafi-s-libya>.

⁴ Center for Constitutional Rights, “CCR Files Lawsuit Against Private Contractors for Torture Conspiracy,” <http://ccrjustice.org/newsroom/press-releases/ccr-files-lawsuit-against-private-contractors-torture-conspiracy> (accessed December 21, 2012).

⁵ “Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees,” Department of Justice news release, August 30, 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html> (accessed December 21, 2012).

Regarding future treatment of detainees, the United States should be commended for issuing a series of executive orders reiterating its commitment to the prohibition against torture and making the Army Field Manual (AFM) the government-wide standard for all interrogations. However, there are some portions of the AFM that still allow room for abuse. For example, as Human Rights Watch and other concerned organizations have made clear in numerous letters to officials and agencies, Appendix M of the AFM may be interpreted to allow for the use of sleep manipulation and sensory deprivation.⁶ Further, methods used to implement the technique of “separation,” including sleep manipulation combined with other techniques, can amount to torture or ill-treatment.

Human Rights Watch urges the Committee to ask the United States whether it believes that sleep manipulation and sensory deprivation allowable under Appendix M of the Army Field Manual amounts to torture or ill-treatment, and, if so, what the basis for this belief is.

Rendition

In addition to prohibiting torture, the Convention against Torture and article 7 of the ICCPR absolutely prohibit returning a person to a country where he or she is in danger of being tortured or ill-treated. It is well documented that, especially during the post-9/11 period, the US transferred numerous individuals to countries where they faced such a risk. For these transfers, the US purportedly relied upon assurances that receiving countries would treat those being transferred humanely—commonly referred to as “diplomatic assurances.” However, it is also well documented that these “diplomatic assurances” do not protect against abuse.⁷

Although in 2009 the United States set up a task force that reviewed transfer policies, it has failed to renounce reliance on diplomatic assurances. Detainees who raise credible fears of torture continue to be transferred against their will, without being given an opportunity to raise their concerns before an independent adjudicator. The task force recommended that, when negotiating transfers using diplomatic assurances, the US maintain the ability to monitor treatment of detainees post-transfer, with private access

⁶ Amnesty International, “The Army Field Manual: Sanctioning Cruelty?” March 19, 2009, <http://www.amnesty.org.au/hrs/comments/20575/> (accessed December 21, 2012).

⁷ Andrea Prasow (Human Rights Watch), “Diplomatic Assurances: Empty Promises Enabling Torture,” commentary, *Jurist*, October 6, 2011, <http://www.hrw.org/news/2011/10/06/diplomatic-assurances-empty-promises-enabling-torture>.

and minimal advance notice. Yet these measures do not sufficiently safeguard against abuse and there continues to be a lack of transparency to the process, transfer procedures, and agreements. Many forms of torture—such as sexual violence, prolonged solitary confinement, waterboarding and other mock executions, and sleep deprivation—leave no visible marks and can therefore be hidden. Detainees are also often afraid to report abuse to outside monitors for fear of reprisal.

Targeted Killings

The acceptance of the extraterritorial application of the ICCPR is crucially important in light of the expanding US targeted killing policy. Under article 6, no one is to be deprived of the right to life arbitrarily. Yet over the past decade, US targeted killings, particularly by aerial drone strikes, have increased dramatically in a number of places across the globe. They have reportedly taken place in Afghanistan, Iraq, Libya, Pakistan, Somalia, and Yemen. Although the numbers cannot be confirmed, media reports indicate that they have resulted in more than two thousand deaths, including of civilians. The US has sought to justify these attacks generally as a lawful use of military force and as being in accordance with self-defense. For those attacks to which human rights law applies (including applicable human rights law during times of armed conflict), the US has failed to disclose what procedures it follows to ensure that those targeted are not arbitrarily deprived of their lives. Of particular concern is the US failure to disclose information about civilian casualties from targeted killings or whether any steps have been taken to compensate those unlawfully harmed.⁸ In order to establish its compliance with article 6, the US should disclose its legal rationale for targeted killings and the measures it takes to minimize harm to bystanders, and provide prompt and adequate compensation to victims of article 6 violations.

⁸ For more information on targeted killings, see “Q & A: US Targeted Killings and International Law,” Human Rights Watch news release, December 19, 2011, <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>.

II. Mistreatment of Children (articles 7, 9, 10, and 24)

The United States has reserved the right to treat children like adults in “exceptional circumstances,” yet there are tens of thousands of children in the United States who have been tried and sentenced as adults. While we question the underlying compatibility of the reservation with US human rights obligations, at minimum the United States has vastly exceeded the scope of its reservation.

Human Rights Watch urges the Committee to request that the United States explain in what sense—in light of research showing that over 200,000 youth are tried as adults in the US criminal justice system every year⁹—the US can be said to treat youth as adults only in “exceptional” circumstances, as it states in one of its reservations in its ratification of the Covenant.

The United States continues to apply the sentence of life without the possibility of parole for individuals who committed a crime while under the age of 18. Human Rights Watch estimates that over 2,500 people are serving life without parole for crimes they committed as a child, in 38 states and in federal prisons.¹⁰ While two recent US Supreme Court decisions have limited the use of the sentence for juveniles, the Court has not barred the sentence outright.¹¹ Any application of the sentence can no longer be mandated by law—courts must take into account the individual circumstances of each case. However, Human Rights Watch believes that any life without parole sentence that precludes the ability of a child to show rehabilitation and seek provisional release denies children recognition of their needs and potential and denies them their rights.

In addition, children who commit sexual offenses are often punished in the same manner as adults. Children as young as eight have been placed on sex offender registries in the United States. Often, their cases simply involve consensual teen sex or relatively innocent behavior, yet the registration requirements can apply for decades or even their entire lives.

⁹ Campaign for Youth Justice, “Key Facts: Youth in the Justice System,” June 2010, http://www.campaignforyouthjustice.org/documents/FS_KeyYouthCrimeFacts.pdf (accessed December 21, 2012).

¹⁰ Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008*, May 2008, <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>.

¹¹ *Miller v. Alabama*, 567 U.S. ____ (2012).

Youth sex offender registration laws ignore the fact that children are still developing and are more likely to be rehabilitated and never re-offend.

Sex offender registration and notification laws can stigmatize children and directly impede their rehabilitation. Residency restrictions often banish registrants from entire urban areas, forcing them to live far from their homes and families. The resulting public humiliation, family separation, and de facto community banishment can be particularly harmful for youth. These same laws can prohibit children from attending school or interacting with their peers, which harms their long-term prospects for education, socialization, and, later in life, employment. These excessive and unnecessary punishments work in direct opposition to the primary responsibility to rehabilitate child offenders.

Youth in some juvenile and many adult facilities throughout the country are regularly subjected to prolonged solitary confinement, despite the fact that children are especially vulnerable to the destructive impact of isolation.¹² Because young people are still developing, traumatic experiences like solitary confinement may have a profound effect on their chance to rehabilitate and grow. Solitary confinement can exacerbate short- and long-term mental health problems or make it more likely that such problems will develop. Young people in solitary confinement are routinely denied access to treatment, services, and programming required to meet their medical, psychological, developmental, social, and rehabilitative needs. One youth interviewed by Human Rights Watch for its recent report on youth in solitary confinement described the feeling of solitary as being “on an island all alone, dying from the inside out.” UN special rapporteur on torture and other cruel, inhuman, or degrading treatment, Juan Mendez, has called for an outright ban of the use of prolonged solitary confinement for youth under the age of 18.

Lack of protection for children extends into the immigration enforcement system as well. Every year, thousands of immigrant children in the United States, some as young as five or six years old, fight their removal in immigration court without the assistance of an attorney. US law does not require that these children be assisted in any way in formulating their

¹² For more information, see the Human Rights Watch Report, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, October 4, 2012, <http://www.hrw.org/reports/2012/10/10/growing-locked-down>.

defenses to removal or requesting an immigration remedy, such as asylum.¹³ The United States treats these children in the same manner as adults when it comes to removal proceedings, even when studies show that 40 percent of detained immigrant children are eligible for some form of relief from removal (but less than 1 percent are currently granted relief).¹⁴

Every year in United States schools, at least 220,000 students are subject to corporal punishment, which is legal in 19 states. Students who receive corporal punishment can be injured, degraded, and become disengaged from the process of learning. Corporal punishment in the United States typically takes the form of “paddling,” when an administrator or teacher hits a child repeatedly on the buttocks with a long wooden board, causing pain, humiliation, and in some cases deep bruising or other serious injuries.¹⁵ Students of all ages are punished in this way, including in some cases for minor infractions such as chewing gum or tardiness, as well as for more serious transgressions such as fighting.

African American students and students with mental or physical disabilities receive corporal punishment at disproportionate rates, creating a hostile environment in which these students may struggle to succeed. According to data from the United States Department of Education, Office for Civil Rights, in the 2006-2007 school year African American students made up 17.1 percent of the nationwide student population, but were 35.6 percent of those paddled. In the 13 states that use paddling most heavily, African American girls are more than twice as likely to be subjected to paddling as their white counterparts.

In one facility in the United States, the Judge Rotenberg Center (JRC) in Canton, Massachusetts, children with disabilities are subjected to electric shocks as punishment for certain behaviors. JRC refers to this practice as “aversive therapy.” With the approval of

¹³Meredith Hoffman, “Some Young Migrants Face Deportation With No Lawyer,” *City Limits*, June 13, 2011, <http://www.citylimits.org/news/articles/4342/some-young-migrants-face-deportation-with-no-lawyer/2#.UNPe3YnjK70> (accessed December 21, 2012).

¹⁴Olga Byrne and Elise Miller, Vera Institute of Justice, “The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers,” March 2012, <http://www.vera.org/download?file=3483/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> (accessed December 21, 2012).

¹⁵For more information, see the joint Human Rights Watch/ACLU report, *Impairing Education: Corporal Punishment of Students with Disabilities in US Public School*, August 10, 2009, <http://www.hrw.org/node/84950>.

a patient's parent and a state court, JRC can apply "skin shocks" in response to perceived negative behavior by the child. These shocks, according to the JRC website, last two seconds and are applied "to the surface of the skin, usually on the arm or leg." Shocks, according to JRC, are applied to about 42 percent of school-age children in their care, an average of once per week. Children as young as nine years old can receive these shocks. The Department of Justice initiated an investigation into the practices at JRC almost three years ago but had failed to issue any findings as of this writing.¹⁶

¹⁶ Letter from Jonathan Young, Chairman, National Council on Disability, to Allison Nichol, Chief, Department of Justice Disability Rights Section, regarding the Judge Rotenberg Center Investigation, April 12, 2012, <http://www.ncd.gov/publications/2012/DOJApril132012/> (accessed December 21, 2012).

III. Arbitrary and Excessive Sentencing and Detention (articles 7, 9, 10, 14, 15, and 25)

Criminal Justice System

While 17 states have rejected the death penalty (five since 2007), the US continues to allow capital punishment without consideration of the basic human rights implicated by the penalty. For example, contrary to its statement in paragraph 151 of its report to the Committee, the United States continues to allow the execution of people with intellectual disabilities. The state of Texas executed Marvin Wilson on August 7, 2012, even though he had an IQ of 61 and a neuropsychologist had diagnosed him as having an intellectual disability.¹⁷ Texas sidesteps the US Supreme Court's ban on the use of capital punishment on people with intellectual disabilities by redefining the term, narrowing qualification for "intellectual disability" to an unjust level. The American Association on Intellectual and Developmental Disabilities has stated that the Texas method of defining intellectual disabilities is "based on false stereotypes ... that effectively exclude all but the most severely incapacitated."

The state of Georgia requires defendants to prove their intellectual disability beyond a reasonable doubt, an extreme requirement not allowed by any other state. Warren Lee Hill, who tested as having an IQ of 70, failed to meet this stringent requirement and was scheduled to be executed by the state earlier this year (the Supreme Court of Georgia has stayed the execution pending review of the state's lethal injection protocol).¹⁸

Courts in the state of Pennsylvania continue the problematic practice of not informing capital juries that the alternative to a death sentence is a life sentence without the possibility of parole.¹⁹ Pennsylvania continues to be the only state in the nation to

¹⁷ "US/Texas: Halt Execution of Man with Intellectual Disabilities," Human Rights Watch news release, August 7, 2012, <http://www.hrw.org/news/2012/08/07/ustexas-halt-execution-man-intellectual-disabilities>.

¹⁸ "US Supreme Court: Halt Georgia Execution," Human Rights Watch news release, July 19, 2012, <http://www.hrw.org/news/2012/07/19/us-supreme-court-halt-georgia-execution>.

¹⁹ Nicole Flatow, "Pa. Inmate Faces Execution for Killing Men Experts Say Sexually Abused Him," post to "Think Progress" (blog), September 7, 2012, <http://thinkprogress.org/justice/2012/09/07/810371/pa-inmate-faces-execution-for-killing-men-experts-say-sexually-abused-him/> (accessed December 21, 2012).

withhold this information from juries. In effect, it requires juries to make life or death decisions on the basis of incomplete information.

In addition, the United States continues to fail in its obligation to comply with the Vienna Convention on Consular Relations and inform prisoners who are foreign nationals of their right to consular notification. In 2011, the state of Texas executed Humberto Leal, a Mexican national living in the United States, even though it failed to inform him of his right to consular notification. Texas has stated that it is not bound by the Vienna Convention, and the Supreme Court has held that the United States must pass legislation to make the Convention enforceable.²⁰

US states continue to embrace the use of solitary confinement in their jails and prisons. Tens of thousands of people in the United States are being held in prolonged solitary confinement (sometimes referred to as segregation, either punitive or administrative). These prisoners typically spend 22 to 24 hours a day locked in small, sometimes windowless, cells sealed with solid steel doors. They lack opportunities for meaningful social interaction with other prisoners; phone calls and visits by family and loved ones are severely restricted or prohibited. Prisoners often have extremely limited or no access to educational and recreational activities or other sources of mental stimulation, and they are usually handcuffed, shackled, and escorted by correctional officers every time they leave their cells. Assignment to super-maximum security facilities devoted solely to solitary confinement—for example, Colorado State Penitentiary or Pelican Bay State Prison in California—is usually for an indefinite period that often lasts for years. Even though the UN special rapporteur on torture and other cruel, inhuman, or degrading treatment, Juan Mendez, has stated that more than 15 days in solitary confinement could lead to a violation of an inmate's human rights, many people in the United States have been held in solitary confinement for decades—some for over four decades.²¹

In some prison systems, prisoners who follow the rules and who engage in prescribed programs can earn their way out of solitary confinement; in others, prisoners can languish in segregation for years, even decades, with little idea of what—if anything—they can do to

²⁰ *Medellín v. Texas*, 552 U.S. 491 (2008).

²¹ For more information, see the Human Rights Watch testimony submitted to the US Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights, *US: Look Critically at Widespread Use of Solitary Confinement*, June 18, 2012, <http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement>.

be re-assigned to a less harsh form of imprisonment. In most jurisdictions, the criteria for determining entry to and exit from administrative segregation, particularly in super-maximum security facilities, are so vague that arbitrariness and unfairness are inevitable. Few jurisdictions have careful internal review systems to provide an effective check on unnecessary or prolonged solitary confinement, particularly when imposed as administrative segregation.

The United States continues to unfairly limit prisoners' ability to seek redress for abuse, assault, or dangerous conditions of confinement. The Prison Litigation Reform Act (PLRA), passed in 1996, creates various obstacles to prisoners seeking protection through the courts. For example, the PLRA requires prisoners to follow often byzantine internal complaint procedures before being able to file a complaint in federal court; any failure to follow even the most technical of requirements bars the prisoner from accessing the courts. The PLRA also requires that prisoners prove a physical injury to sue in federal courts—mental injury is insufficient. Prisoners who have been sexually assaulted have been denied access to courts under this requirement.²²

The United States is failing to address the human rights implications of a rapidly expanding geriatric population within its prisons. Older prisoners often have mobility, hearing, and vision impairments and can also suffer chronic and disabling illnesses, including terminal illnesses and diminishing mental capacity. Their needs go unaddressed due to prisons built without consideration of the physical challenges of aging, limited medical facilities, and staff not trained to respond to the needs of an elderly population.²³

The US federal government is also failing to fairly consider requests for early release (commonly known as “compassionate release”) when circumstances arise that make serving the full term of a prison sentence disproportionate, unnecessary, or cruel. US law gives federal courts the authority to grant compassionate release for “extraordinary and compelling” reasons, such as imminent death or serious incapacitation. Prison terms that may have been proportionate at the time imposed may call for reexamination under these new circumstances. To be consistent with human rights, a decision regarding whether a

²² For more information, read the 2009 Human Rights Watch report, *No Equal Justice: The Prison Litigation Reform Act in the United States*, June 17, 2009, <http://www.hrw.org/reports/2009/06/16/no-equal-justice-o>.

²³ For more information, see Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, January 28, 2012, <http://www.hrw.org/reports/2012/01/27/old-behind-bars-o>.

prisoner should remain confined despite, for example, terminal illness or serious incapacitation, should include careful consideration of whether continued imprisonment would be inhumane, degrading, or otherwise inconsistent with human dignity.

Congress intended for the Bureau of Prisons, under the Department of Justice, to perform a limited screening function, verifying whether a prisoner's application is accurate—for example, whether a prisoner has a terminal illness—and if so, sending the case to the courts. But prison wardens and other officials of the Bureau of Prisons have substituted their own judgment for that of the court system in weighing the seriousness of the crime, the adequacy of punishment, and the likelihood of reoffending, with the result that applications are rarely sent to the courts for review.²⁴

The usurpation by the Bureau of Prisons of the role of the judiciary in sentencing fails to respect the protections of article 14, which include the requirement of a fair and public hearing by a competent, independent, and impartial tribunal established by law. As former UN special rapporteur on torture and other cruel, inhuman, or degrading treatment Manfred Nowak has stated, “The primary institutional guarantee of Art. 14 is that rights and obligations in civil suits or criminal charges are not to be heard and decided by political institutions or by administrative authorities subject to directives; rather this is to be accomplished by a competent, independent and impartial tribunal established by law.”

Also regarding sentencing, article 15 states that if the length of a criminal sentence for a given category of crime is reduced, persons imprisoned under the previous sentencing regime should have a chance to benefit from the reduction. The United States has implicitly defended its practice of keeping people imprisoned under outdated, amended, or repealed statutes through its fourth reservation to ratification of the ICCPR. This position has led to unfair results. When the US Supreme Court stated earlier this year that the mandatory application of the sentence of life without parole for juvenile offenders was unconstitutional, many states refused to apply that holding retroactively. This means, for example, that the 444 people currently serving a mandatory life without parole sentence in Pennsylvania for crimes committed as children continue to serve that sentence without change. Because they were sentenced before 2012, they are destined to die in prison,

²⁴For more information, see the joint Human Rights Watch/FAMM report, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, November 30, 2012, <http://www.hrw.org/reports/2012/11/30/answer-no>.

sentenced in a manner recognized by the highest US judicial authority as cruel and unusual punishment outlawed by the US constitution.

Finally, the United States continues to embrace “civil death” punishments that continue long after a person’s release from prison. For example, almost six million people in the US—overwhelmingly minorities and disproportionately low-income—have lost the right to vote due to felony convictions.²⁵ Several states impose a lifetime ban from voting on felons, regardless of the facts of the individual case, and require either an act of clemency or legislation for reinstatement of the right to vote. Two states, Florida and Iowa, have recently rolled back efforts to make it easier to reinstate voting rights. These lifetime punishments are excessive, are discriminatory in their application, and fray the ideal of the universal franchise.

Immigration System

Within the immigration enforcement system, mandatory detention laws have contributed to the growing number of incarcerated [or “detained”] individuals. Mandatory detention laws require the detention of immigrants who are seeking asylum but lack identification documents, and can require the detention of members of vulnerable groups such as unaccompanied minors and persons with physical or mental disabilities, and immigrants who are not flight or safety risks. Mandatory detention requires the detention of immigrants who have committed nonviolent crimes, including possession of a controlled substance or shoplifting. Mandatory detention is only appealable if the immigrant is claiming that he or she does not meet the circumstances requiring detention. These laws require ignoring the individual circumstances of each potential detainee. For example, mandatory detention requires the detention of lawful permanent residents, even though they are unlikely to be flight risks because they have a vested interest in maintaining their legal status by appearing in court, and they usually have employment and residential ties to the community. Such residents also often have strong family ties to the United States; many are the parents and spouses of US citizens.

The unnecessary detention of persons who are not flight or safety risks, without consideration of their individual circumstances or the collateral damage to the rights of

²⁵ The Sentencing Project, “Felony Disenfranchisement,” <http://www.sentencingproject.org/template/page.cfm?id=133> (accessed December 21, 2012).

others such as family members, makes what might be otherwise a lawful detention into an arbitrary one.²⁶

Human Rights Watch urges the Committee to request that the United States explain how its mandatory sentencing and detention laws (in both the criminal justice and immigration systems) comport with the Covenant’s prohibitions on arbitrary arrest, sentencing, and detention. Furthermore, we urge the Committee to ask the US to explain how failure to grant persons in custody the benefit of reduced sentencing laws comports with the Covenant’s requirements of equal protection under the law and the protections of article 15.

The United States also arbitrarily detains refugees and holds them indefinitely for failing to apply for legal permanent resident status after one year. Human Rights Watch reported on this issue in 2009, documenting the strange interpretation of federal law by Immigration and Customs Enforcement to require the indefinite detention of refugees who have been in the US and have not filed to adjust their status.²⁷ Refugees interviewed for the 2009 report were often unaware that they were required to file for adjustment of status. Human Rights Watch recommended in its report that the United States automatically grant lawful permanent status to all recognized asylees and refugees instead of requiring their detention for not meeting an arbitrary deadline.

Though the United States has made repeated overtures about reshaping its immigration detention system into a more civil form of detention, immigration detention in the United States continues to be based on a punitive model of incarceration. Civil society organizations have documented a myriad of abuses faced by immigrants in detention over the last five years, including sexual abuse, insufficient access to necessary medical care, the prolonged use of solitary confinement and “locking down” detainees for minor infractions, limited access to phones, and the denial of contact visitation. Most immigration detainees are forced to wear prison uniforms and are shackled during transport. Many civil immigration detainees are also commingled with inmates convicted of crimes. Needed reforms are taking place, with new facilities reflecting a more civil form

²⁶ For more information, see Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 6, 2010, <http://www.hrw.org/reports/2010/05/06/costly-and-unfair-o>.

²⁷ Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*, December 29, 2009, <http://www.hrw.org/reports/2009/12/29/jailing-refugees-o>.

of detention, but the pace of change is much too slow to meet the needs of immigration detainees.

Immigration and Customs Enforcement (ICE) runs the largest detention system in the United States, encompassing over 200 separate detention facilities. In operating such a vast nationwide system, ICE transfers immigrant detainees from facility to facility, often multiple times. Human Rights Watch has documented that there were over 2 million transfers between 1998 and 2010.²⁸ These transfers separate detainees from their attorneys, from evidence that can assist the detainees in fighting their removal, and from their families and other emotional support. In response to our findings, ICE implemented a transfer directive in early 2012 and we are awaiting statistics on whether the new directive has reduced the number of immigration detainee transfers.

²⁸ For more information, see Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, June 14, 2011, <http://www.hrw.org/reports/2011/06/14/costly-move-o>.

IV. Failure to Provide a Remedy (articles 2, 3, and 6)

Across the United States, sexual violence against women and men is often inadequately investigated. Nationally, fewer than 30 percent of sexual assaults are reported to police,²⁹ and in some jurisdictions even reported cases are not adequately investigated.

Human Rights Watch has reported on the failure of jurisdictions to test rape kits in a timely manner.³⁰ A rape kit is the DNA evidence gathered from an examination of the body of a victim of sexual assault, a process which can last between four and six hours. Cases in which a rape kit was collected, tested, and found to contain DNA evidence are more likely to move forward in the criminal justice system. For example, when New York City began to test every booked rape kit, the arrest rate for rape skyrocketed from 40 percent to 70 percent of reported cases. Our investigations revealed that only one in five rape kits were being tested in Illinois and uncovered over 12,000 untested rape kits in Los Angeles County, California. Jurisdictions such as Houston, Texas, and Wayne County, Michigan (which includes Detroit), are also still reporting significant backlogs in their rape kit testing schedules. Nonetheless, there has been some progress in efforts to reduce rape kit backlogs. The City of Los Angeles eliminated its backlog in 2011. Illinois passed legislation requiring law enforcement agencies to test all incoming rape kits. And Wayne County is reporting successes in identifying potential serial rapists in its efforts to reduce its own backlog. The US Congress is considering federal legislation to assist local governments in reducing their backlogs. Yet hundreds of thousands of rape kits remain untested.

Immigrant women working in US agriculture face disproportionately higher risks of sexual abuse and significant hurdles to obtaining justice.³¹ At least 50 percent of the agricultural workforce consists of unauthorized immigrants, who fear being deported if they complain about abuses. For example, a 2012 Human Rights Watch report on the risks faced by female farmworkers recounted the story of a woman who said she had been deported

²⁹ National Institute of Justice, "Reporting of Sexual Violence Incidents," <http://www.nij.gov/topics/crime/rape-sexual-violence/rape-notification.htm> (accessed December 21, 2012).

³⁰ See Human Rights Watch reports: "I Used to Think the Law Would Protect Me": Illinois's Failure to Test Rape Kits, July 7, 2010, <http://www.hrw.org/reports/2010/07/07/i-used-think-law-would-protect-me-o>; *Testing Justice: The Rape Kit Backlog in Los Angeles City and County*, March 31, 2009, <http://www.hrw.org/reports/2009/03/31/testing-justice-o>.

³¹ For more information, see Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, May 16, 2012, <http://www.hrw.org/reports/2012/05/15/cultivating-fear>.

while her sexual harassment lawsuit was pending. The increased involvement of local law enforcement in immigration enforcement, through federal programs like Secure Communities and state laws like SB 1070 in Arizona and HB 56 in Alabama, has increased the vulnerability of members of immigrant communities who have new reasons to fear turning to police and other governmental authorities when they are victims of crime or otherwise need assistance. Even the small proportion of immigrant farmworkers with guest worker visas are vulnerable because they are dependent on their employers to remain in legal status, and thus are often as reluctant to report workplace abuses as those without such visas.

In its submission to the Committee, the US addresses the rights of crime victims under article 6, including the availability of the U visa to immigrant victims of crime. However, the United States is unfairly restricting access to this form of immigration relief. The U visa is a temporary visa allowing an immigrant victim of a serious crime to stay in the US to assist law enforcement in investigating and prosecuting the crime. The number of visas is capped at 10,000 per year, and that cap has been reached for the last three years. The United States has failed to take action to remove this arbitrary bar to immigration relief. The cap needs to be raised if the U visa is to continue providing a trusted avenue for immigrant victims of crime to seek redress.

V. Lack of Due Process (articles 10 and 13)

The United States continues to separate families through its immigration policies, even removing immigrant parents on the basis of non-violent criminal offenses. Many of these immigrants have been living legally in the country for many years, sometimes decades. Human Rights Watch estimated in 2007 that over 1.6 million adults and children had been separated due to draconian immigration laws passed by the United States in 1996.³² These laws, cruel in their rigidity, preclude judges from considering family ties, community ties, military service, or other factors when persons face removal due to certain criminal violations. Additionally, US law fails to allow non-citizens who have been convicted of certain crimes the opportunity to fully defend against their deportation. US law currently prohibits immigration judges from considering these non-citizens' connection to the US, including their family ties, their length of time living in the US, or a showing of rehabilitation.

The United States also fails to respect the due process rights of immigrants with mental disabilities in removal proceedings. They are often unable to make claims against their deportation due to their disability, yet they are not provided with counsel by ICE. Their detention is often arbitrarily extended, often indefinitely, due to the interplay of inflexible mandatory detention laws and ICE's inability to undertake fair removal proceedings in light of the individual's mental disability. Human Rights Watch reported on these human rights violations in 2010, documenting cases in which persons in removal proceedings did not know their own names, were delusional, or did not understand that deportation meant removal from the United States.³³

In addition, the United States continues to fail to appoint counsel to indigent people who are faced with removal to their countries of origin in cases where they claim a fear of persecution or torture upon return. Only one in three affirmative asylum applicants is

³² Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 17, 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>.

³³ Human Rights Watch/ACLU, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, July 25, 2010, <http://www.hrw.org/reports/2010/07/26/deportation-default-o>.

represented by counsel; affirmative asylum seekers are six times more likely to be granted asylum if they have legal representation.³⁴

³⁴ See Bill Frelick's testimony: Human Rights Watch, *US: Renewing America's Commitment to the Refugee Convention: Statement of Bill Frelick to Senate Judiciary Committee on the Refugee Protection Act of 2010*, May 19, 2010, <http://www.hrw.org/news/2010/05/19/us-renewing-america-s-commitment-refugee-convention>.

VI. Discriminatory Federal and State Laws, Policies, and Practices (articles 2, 3, 7, 9, 10, 13, 17, 19, and 25)

Discrimination Against Persons of Color

US criminal justice statistics tell the story of a system still unable to achieve the goals of equality and nondiscrimination. While accounting for only 13 percent of the US population, African Americans represent 28.4 percent of all arrests.³⁵ As noted above, government figures show that approximately 3.1 percent of African American men, 1.3 percent of Latino men, and 0.5 percent of white men are in prison.³⁶

Whites, African Americans, and Latinos have comparable rates of drug use but are arrested and prosecuted for drug offenses at vastly different rates. African Americans are arrested for drug offenses, including possession, at three times the rate of white men.³⁷ In 2008, African American motorists were three times as likely as white motorists and twice as likely as Latino motorists to be searched during a traffic stop. In New York City, 86 percent of persons “stopped and frisked” by the police were African American or Latino, even though they represented 52 percent of the population. According to the New York Civil Liberties Union, in the first 9 months of 2012, 89 percent of those New Yorkers who were stopped were innocent of any wrongdoing.³⁸

Because they are disproportionately likely to have criminal records, members of racial and ethnic minorities are more likely than whites to experience stigma and legal discrimination in employment, housing, education, public benefits, jury service, and the right to vote.

Despite these damning statistics, many remedies to discrimination under US law require a finding of malicious intent. The US cites to such difficulties in justifying its record, but it

³⁵ Freddie Allen, “FBI Statistics Show Crime Down, But Black Arrests Up,” *The Sacramento Observer*, November 19, 2012, <http://sacobserver.com/2012/11/fbi-statistics-show-crime-down-but-black-arrests-up/> (accessed December 21, 2012).

³⁶ “U.S. Correctional Population Declined For Second Consecutive Year,” Bureau of Justice Statistics news release, December 15, 2011, <http://bjs.ojp.usdoj.gov/content/pub/press/p10cpus1opr.cfm> (accessed December 21, 2012).

³⁷ For more information, see Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 5, 2008, <http://www.hrw.org/reports/2008/05/04/targeting-blacks-o>.

³⁸ New York Civil Liberties Union, “Stop-and-Frisk Data,” <http://www.nyclu.org/content/stop-and-frisk-data> (accessed December 21, 2012).

could and should be doing more to address practices that have the effect of disproportionately harming certain categories of persons.

Human Rights Watch urges the Committee to ask the United States whether it believes that it is meeting its obligations under the Convention in circumstances where, though unclear if there is a discriminatory intent, there is a clear discriminatory effect.

Discrimination Against Immigrants

The United States, in an effort to enforce its immigration laws, has encouraged local law enforcement to serve as surrogate immigration agents, often with damaging results. The 287(g) program allows local police in participating jurisdictions to ask for proof of immigration status and to search immigration databases for people with whom the police have come in contact, often as a result of incidents as minor as traffic stops. These 287(g) agreements have resulted in claims of racial profiling of Latinos and in increased community distrust of police.

State governments have, on their own initiative, also attempted to play a role in federal immigration enforcement. States like Arizona, Alabama, South Carolina, Georgia, and Utah have all passed laws that require or authorize law enforcement agencies to check the immigration status of individuals during any lawful stop or arrest. These provisions have helped to create an unwelcoming climate for lawful residents, who fear being racially profiled, and for immigrants, many of whom are deciding not to interact with police, even when victims or witnesses of crime.³⁹

Discrimination Against Women

In the United States, laws to support workers of all kinds with family care obligations are minimal. This puts health, family finances, and careers at risk and contributes to gender inequality at work and at home. There is no federal guarantee of paid family leave. Just two states offer such leave, and six jurisdictions offer temporary disability insurance to pregnant women and new mothers. There is no national law establishing minimum standards for paid sick days. There is progress on legal protections for breastfeeding and

³⁹ Human Rights Watch, *No Way to Live: Alabama's Immigrant Law*, December 14, 2011, <http://www.hrw.org/reports/2011/12/14/no-way-live>.

pumping breast milk at work, but significant limitations remain. Explicit legal protections against discrimination on the basis of family care-giving responsibilities are absent in federal law and are only slowly emerging in state and local laws.⁴⁰

The federal Family and Medical Leave Act (FMLA) enables US workers with new children or family members with serious medical conditions to take unpaid job-protected leave, but it covers only about half the workforce. According to the Bureau of Labor Statistics, only 11 percent of civilian workers (that is, private industry and state and local government workers) have paid family leave benefits. Roughly two-thirds of civilian workers have some paid sick leave, but only about a fifth of low-income workers do. Several studies have found that the number of employers voluntarily offering paid family leave is declining.

This situation is at odds with a workforce revolution in which female participation in paid labor skyrocketed over the past century, especially among those with young children. In the US, more than 19 million families with children now have a mother as the primary or co-breadwinner, and 70 percent of children live in households in which all adults are in the labor force. Married women with children under age six were almost four times more likely to be in the paid workforce in 2008 than they were in 1950.

With Australia in 2011 becoming the 178th country to guarantee paid leave for new mothers, with over 50 countries offering paid leave for new fathers, and with many countries offering paid leave to care for sick family members, the US is increasingly isolated in lacking paid leave under national law.

Discrimination Against LGBT Persons

The US has taken important steps in addressing discrimination against lesbian, gay, bisexual, and transgender (LGBT) people. Maine, Maryland, and Washington all passed ballot initiatives this year supporting full marriage equality (joining Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont). President Obama repealed the “Don’t Ask, Don’t Tell” policy that effectively banned openly LGBT persons from serving in the military. Immigration and Customs Enforcement now views same-sex partnerships as family relationships when considering staying a

⁴⁰ Human Rights Watch, *Failing its Families: Lack of Paid Leave and Work-Family Supports in the US*, February 23, 2011, <http://www.hrw.org/reports/2011/02/23/failing-its-families-o>.

deportation. The Department of Justice is no longer defending certain cases involving enforcement of the federal Defense of Marriage Act (DOMA). Yet DOMA continues to be enforced in many contexts, discriminating against same-sex couples by barring recognition of same-sex marriages for federal law purposes, thereby denying a wide range of federal benefits to same-sex couples (including Social Security, pension benefits, and immigration benefits).

Discrimination Against Sex Workers

In its first Universal Periodic Review, the United States accepted a recommendation that the US “[u]ndertake awareness-raising campaigns for combating stereotypes and violence against gays, lesbians, bisexuals and transsexuals, and ensure access to public services paying attention to the special vulnerability of sexual workers to violence and human rights abuses” (rec. 92.86). Some jurisdictions have taken important steps to improve interactions between police and the transgender community. In 2012, for example, the New York Police Department announced reforms to its Patrol Guide, and the Los Angeles Police Department (LAPD) adopted specific policies regarding law enforcement interactions with transgender individuals. The City of Los Angeles’ Transgender Working Group, which includes law enforcement, local government officials, and representatives from the transgender community, worked closely with the LAPD to develop these guidelines, and remains engaged in promoting additional policies to improve police/transgender community relations.

However, sex workers and LGBT people continue to face high levels of abuse, harassment, and violence, including in state custody (police custody or prison) and by law enforcement officials.⁴¹ Sex workers and transgender women in Los Angeles, Washington, DC, and New York have described to Human Rights Watch abusive and unlawful police behavior—including verbal harassment, public humiliation, and extortion for sex, both in and out of detention settings—but few filed complaints, fearing further abuse and lacking faith in police to respond with fairness and integrity. Sex workers and transgender women who are immigrants reported additional barriers to reporting abuse, as prostitution and related offenses are grounds for removal and detention. Transgender persons who are not citizens fear deportation to countries where they face life-threatening abuse and discrimination.

⁴¹Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, July 19, 2012, <http://www.hrw.org/reports/2012/07/19/sex-workers-risk-o>.

Moreover, in at least four major US cities (Los Angeles, San Francisco, Washington, DC, and New York) police are using condoms as evidence to support prostitution and related charges, making sex workers and transgender women reluctant to carry sufficient numbers of condoms and thus making the spread of disease and unwanted pregnancy more likely. This practice is the subject of ongoing Human Rights Watch investigation in other locations as a criminal justice policy that conflicts with human rights, public health, and the goals of the National HIV/AIDS Strategy.

In its 2011 review in the Human Rights Council, the US government stated that “No one should face violence or discrimination in access to public services based on sexual orientation or their status as a person in prostitution.” Yet US restrictions on anti-AIDS funding threaten this commitment. The United States Leadership Act Against HIV/AIDS, Tuberculosis and Malaria of 2003 requires funding recipients to adopt and espouse a specific, organization-wide policy “explicitly opposing prostitution and sex trafficking” as a condition of receiving funds. The Second Circuit Court of Appeals ruled in July 2011 that forcing US organizations that get funding for international anti-AIDS work to pledge their opposition to prostitution violated fundamental free speech rights, and enjoined its application.⁴² But its ruling applies only to US organizations and does not affect the Leadership Act's application to foreign (non-US) organizations receiving US HIV/AIDS funding, which play a critical role in the global fight against the epidemic.

Domestic and international health organizations—including the US Centers for Disease Control, the World Health Organization, and UNAIDS—agree that partnerships between sex workers and public health organizations are critical in ensuring effective HIV prevention and treatment efforts. Imposing conditions on aid, such as forcing organizations to sign an “anti-prostitution pledge,” disrupts outreach efforts and makes it more difficult to reach these key target populations, undermining both the right to health and the right to free expression.

Discrimination Against People with HIV/AIDS

⁴² “US: Court Overrules Anti-Prostitution Gag Rule for US Groups,” Human Rights Watch news release, July 8, 2011, <http://www.hrw.org/news/2011/07/08/us-court-overrules-anti-prostitution-gag-rule-us-groups>.

As a state party to the ICCPR, the United States is obligated to protect the right to life, a fundamental right that is implicated in any policy that interferes with prevention or treatment of HIV. Indeed, the Committee has interpreted the treaty to require governments to take positive steps to curb epidemics and other threats to the public health. These rights are to be ensured to all, without respect to race, sex, or social origin. Yet in the United States, HIV infections continue to disproportionately affect minority communities, men who have sex with men, and transgender women. HIV-related health disparities in the US are stark, with African Americans representing 14 percent of the US population but 44 percent of all new HIV infections. Nowhere are racial disparities more evident than in the southern United States, a region home to the most people living with HIV and dying of AIDS. In the state of Mississippi, for example, African Americans comprise 38 percent of the population but 78 percent of those living with HIV.⁴³

The United States has developed a National HIV/AIDS Strategy that establishes goals for reduction of HIV infections and increase of access to treatment by 2015. These goals, however, will not be realized unless state policies that block and undermine effective HIV prevention and treatment are addressed by both the federal and state governments. Human Rights Watch has documented how many states, particularly in the south, continue to undermine human rights and public health with restrictions on sex education, inadequate legal protections for HIV-positive persons, resistance to harm-reduction programs such as syringe exchanges, and failure to fund HIV prevention and care. Harmful criminal justice policies include laws that target people living with HIV for enhanced penalties and segregation of HIV-positive prisoners.

The state of South Carolina continues to discriminate against HIV-positive prisoners by segregating them from the rest of the prison population. On December 21, 2012, a federal judge enjoined a similar practice in Alabama. Prisoners in these designated HIV units face stigma, harassment, and systematic discrimination that amount to inhuman and degrading treatment. Prisoners in the HIV units are forced to wear armbands or other indicators of their HIV status, are forced to eat and even worship separately, and are denied equal participation in prison jobs, programs, and re-entry opportunities that facilitate their transition back into society.

⁴³ Human Rights Watch, *Southern Exposure: Human Rights and HIV in the Southern United States*, November 26, 2010, <http://www.hrw.org/news/2010/11/26/southern-exposure>.

HIV-positive prisoners segregated from the rest of the prison population are routinely denied opportunities that could shorten their prison stays and assist their transition into society. In Alabama, for example, HIV-positive prisoners were ineligible for “faith-based” or “honor” dorms and for residential drug treatment or pre-release programs that are linked to support groups in the community. In South Carolina, HIV-positive prisoners may not work at the house of the prison director, join the bloodhound security detail, or earn “trustee” status—elite jobs that are earned through good behavior and are looked upon favorably by the parole board. HIV-positive prisoners are also barred from working in the kitchen, a job that assists prisoners with employment after they return to society and that, in South Carolina, earns extra “good time” credits toward early release. And solely because of their HIV status, prisoners with sentences as short as 90 days must serve their sentences in the maximum-security prison at Broad River, a more violent facility that also houses death row.⁴⁴

Discrimination Against Persons With Low Income

The bail money system in use in many jurisdictions in the United States penalizes persons with low income by keeping them in pre-trial detention even for the smallest of misdemeanors. Human Rights Watch research on New York City policies showed that 87 percent of defendants arrested for non-felonies who had bail set at \$1,000 or less remained in pre-trial detention. These minor crimes included turnstile jumping, trespassing, and smoking marijuana in public.⁴⁵

Discrimination Against Muslims

The profiling and unsubstantiated surveillance of Muslims by US law enforcement continues unabated. The Department of Justice continues to explicitly allow for religious profiling for national security reasons in its “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.” The Federal Bureau of Investigation (FBI) and the New York Police Department (NYPD) have been using investigative practices that require no

⁴⁴ For more info, see the joint Human Rights Watch/ACLU report, *Sentenced to Stigma: Segregation of HIV-Positive Prisoners in Alabama and South Carolina*, April 14, 2010, <http://www.hrw.org/reports/2010/04/14/sentenced-stigma-o>.

⁴⁵ Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, December 3, 2010, <http://www.hrw.org/reports/2010/12/02/price-freedom-o>.

suspicion of wrongdoing to undertake surveillance of Muslims in the United States.⁴⁶ One NYPD surveillance operation involved plainclothes officers infiltrating and photographing dozens of mosques, Muslim student organizations, and businesses owned or frequented by Muslims in the greater New York City region. Using this information, the police department built databases showing where Muslims live, pray, buy groceries, and use internet cafes. The NYPD also monitored Muslim college students throughout the northeastern United States.

Human Rights Watch urges the Committee to ask whether the United States allows for the investigation and surveillance of people on the basis of their religious affiliation, or on the basis of two or more protected classifications, like religion and gender or age. The Committee should also ask whether the United States allows for states to undertake such types of religious profiling.

Discrimination Against Persons With Disabilities

Many people with disabilities face physical and other barriers when they seek to exercise their right to vote. Federal laws like the Americans with Disabilities Act and the Help America Vote Act require accessible voting systems in order to ensure equal access and participation for people with physical and visual disabilities. But according to a 2009 US Government Accountability Office study, more than two-thirds of polling places were not fully accessible and nearly 25 percent did not have equal access to a secret and independent ballot.⁴⁷

Moreover, people with intellectual and psychosocial disabilities may be barred from voting by state laws disqualifying voters judged “mentally incompetent” by a court (as permitted by 39 US states, according to a study published before the 2008 election) or because election officials or service providers improperly screen out those they determine incompetent to vote.⁴⁸ In Virginia, for example, election officials refused to provide absentee ballots for people in state psychiatric facilities because they read the state law to

⁴⁶ “US: Investigate New York Police Surveillance of Muslims,” Human Rights Watch news release, March 20, 2012, <http://www.hrw.org/news/2012/03/20/us-investigate-new-york-police-surveillance-muslims>.

⁴⁷ United States Government Accountability Office, Report to Congressional Requesters, “Voters With Disabilities: Additional Monitoring of Polling Places Could Further Improve Accessibility,” GAO report number GAO-09-941, September 30, 2009, <http://www.gao.gov/assets/300/296294.pdf> (accessed December 21, 2012).

⁴⁸ Rebecca Schleifer, “Disabled and Disenfranchised,” *The Huffington Post*, September 5, 2012, http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-rights_b_1853234.html (December 21, 2012).

authorize such ballots only for people with physical disabilities. A 2008 study of nursing homes in Philadelphia, Pennsylvania, found that staff were denying residents the right to vote based on their own assessment of capacity to vote, notwithstanding that Pennsylvania law does not require that voters be deemed competent to cast a ballot.