



**United States' Compliance with the
International Covenant on Civil and Political Rights**

**American Civil Liberties Union
Suggested List of Issues to Country Report Task Force on the United States**

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American Civil Liberties Union
125 Broad St, 18th Floor
New York, NY 10004

P: 212 519 7884
humanrights@aclu.org

¹ Human Rights Committee, *Consideration of reports and country situations in the absence of a report*, <http://www2.ohchr.org/english/bodies/hrc/hrcs107.htm> (last visited Dec. 10, 2012).

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Introduction

Today we celebrate the 64th anniversary of the adoption of the Universal Declaration of Human Rights (UDHR). This monumental document inspired millions of people across the globe who fought and continue to fight for the simple but powerful idea that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

While not a legally binding document, the UDHR has become a powerful instrument of moral force used universally to assert and protect a broad spectrum of fundamental rights and freedoms including economic, civil, social, political, and cultural rights of all people without any distinction or discrimination. The UDHR was also the inspirational foundation for the adoption of ten subsequent international human right instruments that cover specific areas including civil and political rights (ICCPR); economic, social and cultural rights (ICESCR); racial discrimination (CERD); discrimination against women (CEDAW); torture (CAT); children’s rights (CRC); migrant workers (ICRMW); protection against enforced disappearance (CPED); and disability rights (CRPD).

Although the recognition that all humans enjoy certain universal rights represented a profound promise and a great step forward, the decisions of the U.S. government during the past six decades often have significantly undermined the realization of these rights, both at home and abroad. Beginning with the debate, during and immediately following World War II, over the creation of an international human rights system, the U.S. pushed for and ultimately succeeded in creating a non-binding declaration, instead of a binding covenant. This decision was made to pacify segregationists in the U.S. Congress. Further impeding the realization of the UDHR are believers of “American exceptionalism,” who consider the UDHR and other international human rights instruments unnecessary at home, and view human rights as exclusively a tool of U.S. foreign policy. Sadly, domestic opposition to international human rights is alive and well, as the Senate’s failure to ratify the disability rights convention demonstrated last week. The Senate vote and the public debate that followed confirm that much more work is needed to advance human rights in the United States, not only rhetorically, but also through public education, documentation, and organizing, as well as effective legal and legislative advocacy that can turn human rights commitments into realities, and lead to structural reforms that change peoples’ lives for the better.

The U.S. undoubtedly continues to provide global leadership on some human rights issues. For example, the current administration has been actively engaging international bodies and was recently re-elected to the Human Rights Council, providing vigorous leadership in the fight for LGBT and gender equality as well as championing internet and religious freedom, free speech and assembly rights.

But while some U.S. laws and policies have been comparatively advanced in protecting civil rights and civil liberties, the U.S. has fallen behind in protecting other universal human rights recognized by the UDHR, especially in the areas of racial discrimination as well as criminal and economic justice. The U.S. government has only partially and selectively embraced

these rights, ignoring international obligations and widening the gap between the United States' sixty-four-year-old promise and its own current practice. Notably, the United States has fallen short of fully implementing its legal obligations under treaties ratified in the early 1990s -- namely, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

This year marked the 20th anniversary of U.S. ratification of the ICCPR, a key human rights treaty the United States has promoted worldwide. Despite professed support for the treaty on the international stage, discussions of its implementation in the U.S. are few and far between: You can hardly find an act of Congress that cites the treaty, even though some Bill of Rights protections and civil rights laws are mirrored in the treaty provisions. The first and only hearing in Congress on treaty implementation was held in 2009, and it covered all ratified treaties - not only the ICCPR. The executive branch has yet to create a robust, transparent and effective structure to implement the ICCPR across departments and agencies, and sadly, the U.S. has effectively downsized its treaty obligations to periodic reporting to the Committee, and even that is often delayed or lacking. Moreover, much of the American public and the media remain unaware of the significance of the ICCPR and other ratified human rights treaties.

The good news is that there is a growing civil society movement that is determined to hold the U.S. accountable to its international human rights commitments.

In 2004, the ACLU made a long-term and unwavering institutional commitment to increase its efforts to support the U.S. human rights movement by creating a Human Rights Program. Working closely with ACLU national legal projects, the Washington Legislative Office and affiliates across the nation, the Human Rights Program has been on the forefront of the struggle to hold the United States accountable to its human rights obligations. This report builds on the knowledge and expertise of ACLU staff and advances ACLU founder Roger Baldwin's legacy of promoting international law and justice.

Earlier this year, the ACLU co-convened a diverse group of nearly 200 U.S. advocates to participate in a first-of-its-kind conference on the ICCPR. Building on lessons from the 2006 ICCPR review -- the first with wide civil society participation -- and subsequent treaty reviews as well as the Universal Periodic Review (UPR), advocates and officials, from novices to internationally renowned experts, gathered in New York City for two days to explore the history, impact and engagement opportunities presented by this human rights instrument and its monitoring body. Attendees had unprecedented access to the workings of the U.N. Human Rights Committee by observing them in session as well as engaging with Committee members during an evening program and Continuing Legal Education symposium. U.S. government representatives also participated in these events, and used the occasion to announce plans for the implementation of recommendations issued during last year's UPR. To continue this collaborative effort, the ACLU is currently co-chairing the U.S. Human Rights Network ICCPR Task Force, which is tasked with coordinating and facilitating U.S. civil society participation in the U.S. ICCPR review process.

This report is submitted to the Human Rights Committee as part of a larger civil society effort to inform the international human rights community about the situation of human rights in the United States. While the ACLU will provide additional information, both formally and informally, to the Human Rights Committee in the next weeks and months in preparation for the U.S. review before the Committee in October 2013, this report focuses on 6 critical priority issues for the ACLU that highlight the accountability gap between U.S. human rights obligations and current law, policy and practice. As our submission discusses, some of these abuses are committed by state and local government actors, but are encouraged and exacerbated by federal policies (such as the "Section 287(g) Agreements" and "Secure Communities" programs operated by the Department of Homeland Security). Under international human rights law, the federal system does not diminish or absolve state and local authorities of their obligations to uphold human rights. The ACLU submission identifies specific questions and recommendations for the Human Rights Committee to consider in the areas of **anti-immigrant measures, killings on the U.S.-Mexico border, accountability for torture and abuse during the Bush Administration, domestic violence, solitary confinement, and the death penalty.**

While the U.S. report to the Committee included many issue areas where the U.S. record has clearly improved since its previous review by the Committee in 2006, especially in the area of LGBT rights and civil rights enforcement led by Justice Department Civil Rights Division, the report lacked concrete information on state and local compliance with the ICCPR, ignored serious ICCPR violations that occurred in the context of Occupy protests across the country, and in some areas even failed to respond to prior recommendations made by the Committee.

The Obama administration will have an opportunity in the first year of its second term to put muscle behind its rhetoric and make significant steps towards fulfilling human rights commitments made under the ICCPR and through the Universal Periodic Review Process. We look forward to the United States' review before the Human Rights Committee next year and will hold the government accountable to its own words that the ICCPR "report is not an end in itself, but an important tool in the continuing development of practical and effective human rights strategies by the U.S. Government."

Jamil Dakwar
Director, ACLU Human Rights Program

December 10, 2012

1. **Anti-Immigrant Measures at the State and Federal Level** (Article 2(1) (right of non-discrimination); Article 9 (right of protection from arbitrary arrest or detention); Article 26 (right of equal protection))

I. Issue Summary

Following the 2010 passage of Arizona's notorious anti-immigrant law (SB 1070), several other states have passed similar legislation targeting immigrants and people of color for harassment, intimidation, and punitive sanctions.¹ Although considerable attention was paid to Arizona's law, there has been less scrutiny of similar bills that have passed in Alabama, Georgia, Indiana, South Carolina, and Utah.² All of these laws have as their common focus the investigation and detention of persons who are suspected of lacking the required authorization to live or work in the United States. The bills also share the common problem of having no standards to guide law enforcement personnel in assessing whether there is a "reasonable suspicion" that a person is an undocumented immigrant, leaving individual officers no choice but to resort to racial and ethnic profiling as tools of law enforcement, even where the bills include blanket prohibitions against such practices. Because all of these bills rely on state and local police to make a preliminary assessment of whether an individual may be unauthorized, they are inviting profiling based upon perceived race, nationality, and language proficiency as there is no way to tell by looking at or listening to a person whether they are in the U.S. with or without lawful status.

The ACLU, along with other groups, has filed lawsuits in all six of the states that have passed this type of discriminatory legislation. The lawsuits charge that these laws violate the United States Constitution by discriminating on the basis of perceived race or nationality, requiring unreasonable searches and seizures, arrests, and illegal detentions, and interfering with federal authority over immigration. Federal courts have at least partially blocked implementation of the laws in all six states; however, the Supreme Court has reinstated the core provisions of SB1070 that require ordinary state and local police to demand immigration status documentation if they have "reasonable suspicion" about a person's authorization to be in the United States.

Although the U.S. Department of Justice has filed lawsuits challenging Arizona's SB1070 and similar measures in other states, federal policy contributes to exacerbate the violations of civil and political rights permitted by state legislation. Two prominent examples are "Section 287(g) Agreements" and "Secure Communities," programs operated by the Department of Homeland Security ("DHS"). Section 287(g) of the federal immigration law allows state and local law enforcement agencies to enter into an agreement with Immigration and Customs Enforcement ("ICE") in order to enforce immigration law within their jurisdictions. In effect, it turns state and local law enforcement officers into immigration agents, albeit ones with minimal training and virtually no oversight or accountability.³ "Secure Communities" is a program under which everyone arrested and booked into a local jail has their fingerprints checked against ICE's immigration database, regardless of the state or localities assent to the practice; some police engage in unjustified and pretextual arrests in order to put people through the screening process, actions for which DHS has failed to develop oversight mechanisms.⁴

II. Concluding Observations from 2006

At the time of the United States' previous review by the Human Rights Committee in 2006, there existed some federal, state, and local policies that singled out undocumented communities and fueled racial profiling and other abuses. Accordingly, in 2006 the Human Rights Committee recommended that the U.S. continue and intensify its efforts to put an end to racial profiling by federal and state law enforcement officials. The Committee also requested more detailed information about the extent to which racial profiling practices still persist, as well as statistical data on related complaints, prosecutions and sentences.⁵ Following the prior review by the Committee, the nation's anti-immigrant climate has intensified resulting in a wave of anti-immigrant measures and increased complaints of racial profiling against immigrants.

III. U.S. Government Report

In its most recent report to the Human Rights Committee, the U.S. federal government mentioned concerns about all six of the state laws mentioned above, and described lawsuits it had filed through the Department of Justice to block those laws in Arizona, Alabama, South Carolina, and Utah, and explained that the laws in Georgia and Indiana were under review. Notably, in its report (and in the lawsuits themselves) the government explained that it filed these suits on the grounds that the state laws are "preempted under the Constitution and federal law because (they) unconstitutionally interfere with the federal government's authority to set and enforce immigration policy."⁶

IV. Other UN and Regional Human Rights Bodies Recommendations

The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has addressed the issue in recent years, based on his visit to the U.S. in 2008.⁷ In September of 2009, the UN CERD Committee sent a follow up letter to the Obama Administration urging urgent action on the issue of racial profiling, specifically by making all efforts to pass the End Racial Profiling Act (ERPA) and reconsidering its 287(g) policy.⁸ In May 2010, a group of UN independent experts issued a joint statement condemning the passage of SB1070 and warning against "a disturbing pattern of legislative activity hostile to ethnic minorities and immigrants."⁹

In November 2010, during the UPR session, after a number of member states (including Guatemala, Bolivia, and Mexico among several others) expressed serious concerns about racial profiling in relation to immigration enforcement issues, the U.S. delegation assured the Council that it condemns racial and ethnic profiling in all of its forms, and claimed to be "conducting a thorough review of policies and procedures to ensure that none of its law enforcement practices improperly target individuals based on race or ethnicity."¹⁰ In the context of immigration enforcement, the United States recognized "concerns regarding racial and ethnic profiling by local law enforcement officials and reaffirmed its commitment and recent actions to combat profiling through significantly strengthened protections and training against such discrimination."¹¹

The Inter-American Commission on Human Rights has emphasized that these federal policies “open up the possibility of racial profiling,” and that “ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling.”¹² The DHS Inspector General has issued reports affirming concerns that 287(g) has contributed to racial profiling.¹³

V. Recommended Questions

1. The 287(g) program has been roundly criticized by the Government Accountability Office, the DHS Inspector General, and scores of civil society organizations. When will the United States government abandon both the task force and jail partnership agreements under this program?
2. The “Secure Communities” program has been shown to foster racial profiling, undermine community policing, and harm public safety. The loud public outcry against this federal program has translated into state and local advocacy efforts to push back against excessive deportations. The outcry has included the California TRUST Act and over a dozen municipal ordinances or resolutions passed to curb the impact of “Secure Communities” and immigration detainers, the later of which are frequently issued without sufficient evidence that the person is subject to deportation, without judicial approval, and without due process protections. Some civil society advocates are predicting that such state and local measures will increase in the next term as communities, in the face of unstinting DHS enforcement, will stop waiting for reform and choose to establish limits to federal immigration programs. When will the U.S. government heed the growing number of groups across the country and put an end to “Secure Communities” and fundamentally reform the detainer process so that it adheres to due process standards?
3. The United States and NGOs have succeeded in blocking many, but not all, of the anti-immigrant measures enacted by states. What will the United States government do to neutralize the remaining provisions, and any new ones enacted by states? And what will the United States government do to protect immigrants in states where some anti-immigrant measures have gone into effect?
4. The UN CERD Committee, the rapporteur on racism, and members of the UN Human Rights Council have encouraged the United States government to pass the End Racial Profiling Act. What steps has the current administration taken to encourage the general public or members of Congress to support passage of this important piece of legislation?
5. Will the administration commit to making the Department of Justice’s Guidance Regarding the Use of Race enforceable and revising it to prohibit profiling based on religion or national origin; cover border enforcement and national security operations; and apply to state and local law enforcement?

VI. Suggested Recommendations

1. End the 287(g) program, including all jail partnerships and task force agreements.
2. End the “Secure Communities” program.
3. Support the passage of the End Racial Profiling Act (ERPA).
4. Vigorously oppose existing and new state and local anti-immigrant measures, and take steps to protect immigrant communities where such measures have taken effect.
5. Detail steps taken by the U.S. government to inform and educate state and local governments on their obligations with respect to immigration enforcement under the Covenant.
6. Revise the Department of Justice’s Guidance Regarding the Use of Race to (1) prohibit profiling based on religion or national origin; (2) end exceptions for border integrity and national security; (3) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; and (4) make the Guidance enforceable.

¹ Infographic, What’s at Stake: SB 1070 at the Supreme Court, American Civil Liberties Union (last accessed Dec. 4, 2012) *available at* <http://www.aclu.org/immigrants-rights/whats-stake-sb-1070-supreme-court-infographic>.

² The texts of the individual bills can be found at the following URLs: Alabama’s HB 56: <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=HB56&DOCPATH=searchableinstruments/2011RS/Printfiles/&PHYDOCPATH=/alisondb/acas/searchableinstruments/2011RS/PrintFiles/&DOCNAMES=HB56-int.pdf,HB56-eng.pdf,HB56-enr.pdf>; South Carolina’s SB-20: http://www.scstatehouse.gov/sess119_2011-2012/prever/20_20110615.htm; Indiana’s SEA 590: <http://www.in.gov/legislative/bills/2011/PDF/SE/SE0590.1.pdf>; Georgia’s HB 87: http://www.legis.ga.gov/legis/2011_12/pdf/hb87.pdf; Utah’s HB 497: <http://le.utah.gov/~2011/bills/hbillenr/hb0497.htm>.

³ See Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* 21 (Migration Policy Institute, 2011) [hereinafter “MPI Report”] *available at* <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>; DHS, Office of Inspector General, *The Performance of 287(g) Agreements: Report Update*, 10-11 (Sept. 2010) *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf.

⁴ Letter from American Civil Liberties Union to Charles K. Edwards, Acting Inspector General on Secure Communities (Jun. 20, 2011) *available at* http://www.aclu.org/files/assets/letter_to_dhs_oig_re_scomm_audit.pdf.

⁵ Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶24, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) [hereinafter “Concluding Observations 2006”] *available at* <http://www1.umn.edu/humanrts/usdocs/hruscomments2.html>.

⁶ Human Rights Comm., Fourth Periodic report: United States of America, ¶¶ 636-640, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) [hereinafter “Fourth Periodic Report”] *available at* <http://www.state.gov/j/drl/rls/179781.htm>.

⁷ The Special Rapporteur issued two recommendations regarding the elimination of racial profiling following his 2008 visit to the United States. Special Rapporteur on racism, racial discrimination, xenophobia and related intolerance, *Addendum: Mission to the United States of America*, ¶¶101-102, U.N. Doc A/HRC/11/36/Add.3 (Apr. 28, 2009) (by Doudou Diène) *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.36.Add.3.pdf>.

⁸ Letter from Fatimata–Binta Victoire Dah, Chairperson of the Committee on the Elimination of Racial Discrimination, U.N. High Commission for Human Rights (Sept. 28, 2009), *available at* http://www.aclu.org/files/pdfs/humanrights/uncerdresponse_racialdiscrimination.pdf.

⁹ The statement was issued by the Special Rapporteur on the human rights of migrants, Jorge Bustamante; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous

people, James Anaya, the Independent Expert in the field of cultural rights, Farida Shaheed, the Special Rapporteur on the right to education, Vernor Muñoz Villalobos, and the Independent Expert on minority issues, Gay McDougall, anti-immigrant measures. United Nations Office of the High Commissioner for Human Rights, *Arizona: UN experts warn against “a disturbing legal pattern hostile to ethnic minorities and immigrants”* (May 10, 2010) available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10035&LangID=E>.

¹⁰ Human Rights Council, 16th Sess., Rep. of the Working Group on the Universal Periodic Review: United States, ¶72, U.N. Doc A/HRC/16/11 (Jan. 4, 2011) [hereinafter “U.S. UPR Report 2011”] available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2FHRC%2F16%2F11&Submit=Search&Lang=E.

¹¹ *Id.*, ¶ 74.

¹² See Inter-Am. Comm’n H.R., Report on Immigration in the United States: Detention and Due Process, 66, 144, OEA/Ser.L./V/II, doc. 78/10 (Dec. 30, 2010) available at <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.

¹³ Dep’t of Homeland Sec. Office of Inspector General, The Performance of 287(g) Agreements (Mar. 2010) available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf; Dep’t of Homeland Sec. Office of Inspector General, The Performance of 287(g) Agreements Report Update (Sept. 2010) available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf; Dep’t of Homeland Sec. Office of Inspector General, The Performance of 287(g) Agreements FY 2011 Update (Sept. 2011), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_11-119_Sep11.pdf; Dep’t of Homeland Sec. Office of Inspector General, The Performance of 287(g) Agreements FY 2012 Update (Sept. 2012), http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-130_Sep12.pdf.

2. **Killings on the U.S.-Mexico Border** (Article 4 (non-derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18); Article 6 (right to life); Article 7 (protection from torture and cruel, inhuman or degrading treatment or punishment))

I. **Issue Summary**

In the last decade, the United States has relied heavily on enforcement-only approaches to address migration, using deterrence-based border security strategies to control its borders. The U.S. government has expanded the powers of federal authorities by creating “Constitution-Light” or “Constitution-Free” zones within 100 miles of land and sea borders and has increasingly criminalized unauthorized migration by expanding criminal prosecution of individuals who violate federal immigration laws rather than relying on the extensive federal civil enforcement scheme. The creation of an “exceptionalized” space along the border and criminalization of migration have served to justify the militarization of the U.S.-Mexico border and the promulgation of border security policies and practices that lead to extensive civil and human rights abuses, including the deaths of more than 5,600 unauthorized border crossers. In addition, fatal Border Patrol shootings have occurred with alarming frequency. As of November 30, 2012, at least 18 individuals have died since January 2010 as the result of alleged excessive use of force by U.S. Customs and Border Protection (CBP) officials, including six who were under the age of 21 and five who were U.S. citizens. At least two other individuals survived serious injuries inflicted by CBP officers in the same timeframe. Despite the number of well-documented cases of abuses by CBP officials, a federal investigation has only been concluded in one case.

Cases reported extensively by the U.S. and Mexican media include the killings of 16-year-old Jose Antonio Elena Rodriguez (fatally shot seven times in the back on October 10, 2012, when a CBP agent from Nogales, Arizona fired across the border at a group of rock throwers in Mexico); Guillermo Arévalo Pedroza (killed September 3, 2012, by a bullet fired from a U.S. Border Patrol boat while picnicking with his wife and two young girls on the south side of the Rio Grande, near Laredo, Texas); Juan Pablo Pérez Santillán (near Brownsville, Texas on July 7, 2012); U.S. citizen Carlos Lamadrid, 19 (shot in the back four times while allegedly fleeing to Mexico near Douglas, Arizona on March 21, 2011); and 15-year-old Sergio Adrián Hernández Guereca (near El Paso, Texas on June 7, 2010). Additionally, in October 2012 two unarmed, undocumented immigrants hiding in the bed of a truck were fatally shot by a Texas state trooper in a helicopter flying over La Joya, Texas.

II. **U.S. Government Report and Prior Recommendations**

The U.S. did not address abuses on the U.S.-Mexico border in its Fourth Periodic Report, but did respond to recommendations provided by the Human Rights Committee in 2006. The Committee expressed concern about the increasing militarization of the U.S.-Mexico border, and asked the United States to provide detailed information on measures taken to ensure border enforcement agents receive adequate training on immigration laws, which should be compatible with the Covenant.¹ The U.S. responded that it has pursued a “comprehensive, multi-layered,

targeted approach” to border security,² and that it trains CBP agents on human rights and constitutional law.³

III. Other UN and Regional Human Rights Bodies Recommendations

In 2008, the UN Committee on the Elimination of Racial Discrimination (CERD 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, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border.”⁴ The Committee further noted with concern widespread impunity of those police officers responsible for alleged abuses. The Committee urged the U.S. to ensure reports of excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.⁵ The Human Rights Committee should note that the U.S. report to the CERD Committee was due on November 20, 2011 and as of this writing has not been submitted.

During its Universal Periodic Review (UPR) in 2010, a number of States raised concerns with the treatment of migrants by U.S. border patrol agents. For instance, Mexico urged the U.S. to “prohibit, prevent and punish the use of lethal force in carrying out immigration control activities.”⁶ Cuba, Uruguay, Cyprus, and Sudan also recommended the U.S. end violence and discrimination against migrants, and guarantee that incidents of excessive use of force will be investigated and the perpetrators appropriately prosecuted.⁷ Guatemala recommended the U.S. evaluate constantly the enforcement of immigration federal legislation with a view to promoting and protecting human rights.⁸ The U.S. committed to “prohibit, prevent and punish the use of lethal force in carrying out immigration control activities.”⁹

After U.S. border patrol agents opened fire on a group of rock throwers in Mexico in October 2012, shooting dead one Mexican teen, the U.N. High Commissioner for Human Rights condemned the use of excessive force against immigrants along the U.S.-Mexico border.¹⁰ Calling the disproportionate use of lethal force during immigration control “unacceptable under any circumstances,” the High Commissioner urged the U.S. and Mexico to independently and transparently investigate these incidents.¹¹ The Inter-American Commission on Human Rights (IACHR) similarly urged the United States to investigate the incident and punish those responsible, and expressed concern that this was the third case about which the Commission received information in the last four months where Mexican nationals allegedly died as a result of lethal force by U.S. border patrol officers.¹²

The frequency and regularity of CBP’s use of lethal force is alarming and demands a comprehensive, independent investigation of CBP policies and practices, as requested by members of Congress, the Inter-American Commission on Human Rights, the United Nations High Commissioner for Human Rights, and the Southern Border Communities Coalition of 60 non-governmental organizations, including the ACLU.¹³ In response to these calls for investigation, the DHS Office of Inspector General launched a pending investigation into CBP’s use-of-force protocols and practices.¹⁴ A permanent, arm’s-length, independent oversight commission for CBP must also be created, in addition to the DHS’s pending internal review.

IV. Recommended Questions

1. What does CBP require of supervisors to document when an agent uses force; what information is recorded? What criteria are used to determine if a specific incident will be referred for review by individuals higher up in the command structure? What are the various channels through which incidents are referred for further investigation (internal affairs, other agencies or offices, etc.)?
2. What is CBP's standardized model or continuum for when use of force is deemed appropriate? How are CBP agents trained both initially and on an on-going basis regarding use of force policy? Please describe what guidance and technologies (pepper spray launchers, water cannons, etc.), if any, are provided to encourage use of de-escalation techniques during encounters.
3. What statistics does CBP have regarding assaults committed against CBP officers or deaths of agents while on duty? What data does CBP have regarding assaults or deaths of agents specifically relating to rock throwing incidents?
4. An effective complaint process could improve the agency's oversight of field offices and agents, provide essential information about commonly raised issues, build greater public trust in the agency, and enhance CBP's overall accountability to the public it serves. What are CBP's policies and practices for receiving administrative complaints and are any considerations being made to improve the current complaint process for those who interact with CBP?
5. What is the official policy regarding Border Patrol agents patrolling alone? With the recent increases in staffing of agents over the last few years, are more agents patrolling with partners? Does CBP have a policy or practice of Border Patrol agents utilizing cameras to record encounters? Many other law enforcement agencies utilize video equipment to clarify disputes about facts surrounding encounters.

V. Suggested Recommendations

1. Border Patrol and CBP agents should be held accountable for human rights abuses at the border, which should include the adoption of a zero-tolerance policy for abuses and publicly-released investigations and disciplinary actions for agents who commit lethal and non-lethal abuse.
2. CBP should reform its use-of-force training and policies, including the incorporation of de-escalation techniques commonly used as best practices by police departments in the United States and the provision of defensive equipment that reduces the need to use force.
3. The U.S. Congress should establish a permanent external, independent oversight commission that is charged with investigating and responding to complaints about CBP abuses.

4. Victims of CBP abuse should be ensured access to information about investigations and the right to judicial and administrative remedies to recover damages, especially in deadly-force incidents.

¹ Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶ 27, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) [hereinafter “Concluding Observations 2006”] *available at* <http://www1.umn.edu/humanrts/usdocs/hruscomments2.html>.

² Human Rights Comm., Fourth Periodic report: United States of America, ¶ 634, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) [hereinafter “Fourth Periodic Report”] *available at* <http://www.state.gov/j/drl/rls/179781.htm>.

³ Fourth Periodic Report, *supra* note 2, ¶ 635.

⁴ Comm. on the Elimination of Racial Discrimination, 72nd Sess., Feb. 18 – Mar. 7, 2008, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶25, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) *available at*

<http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>.

⁵ *Id.*

⁶ Human Rights Council Working Grp. on the Universal Periodic Review, 9th Sess., Nov. 1-12, 2010, Draft Report of the Working Group on the Universal Periodic Review: United States of America, ¶92.208, U.N. Doc. A/HRC/WG.6.9/L.9 (Nov. 10, 2010) [hereinafter U.S. UPR Report 2010] *available at*

http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf.

⁷ *Id.*, ¶¶92.207, 92.105, 92.144, 92.209.

⁸ *Id.*, ¶92.80

⁹ Humanrights.gov, Accepted UPR Recommendations (Mar. 2012) ¶¶ 208-209 *available at*

<http://www.humanrights.gov/wp-content/uploads/2012/03/USAcceptedRecommendations-2010UPR.pdf>. In accepting these recommendations the United States noted that “law enforcement and immigration officers are lawfully permitted to use deadly force under certain exceptional circumstances, e.g., self-defense or defense of another person.” U.S. Dep. of State, U.S. Response to U.N. Human Rights Council Working Grp. Rep., ¶7 (Mar. 10, 2011) *available at* <http://www.state.gov/j/drl/upr/157986.htm>.

¹⁰ Stephanie Nebehay, *U.S. Uses Excessive Force Along Mexican Border: U.N.*, Reuters (Oct. 18, 2012) *available at* <http://www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018>.

¹¹ *Id.* In March 22-23, 2012 the Office of the High Commissioner for Human Rights (OHCHR) and Global Alliance Against Traffic in Women (GAATW) held an expert consultation on human rights at international borders. The U.S. was cited as an example of increased spending and personnel on border control. OHCHR-GAATW, Expert Consultation on Human Rights at International Borders: Exploring Gaps in Policy and Practice (Mar. 22-23, 2012), Background Paper, 4, *available at*

http://www.ohchr.org/Documents/Issues/Migration/Events/HumanRightsatInternationalBorders_backgroundpaper2012.pdf. Additionally, experts faulted the U.S. for “Operation Gatekeeper,” which sought to deter irregular immigration by pushing migrants into dangerous desert routes. *Id.* at 18.

¹² Press Release, IACHR Expresses Concern over Killing of Mexican Teenager by the US Border Patrol (Oct. 23, 2012) *available at* http://www.oas.org/en/iachr/media_center/PReleases/2012/126.asp.

¹³ Letter from members of Congress to Secretary of Homeland Security, Janet Napolitano (May 10, 2012) *available at* <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>; Letter from members of Congress to acting Inspector General, Charles K. Edwards (May 10, 2012) *available at*

<http://serrano.house.gov/sites/serrano.house.gov/files/DHSIGletter.pdf>; Letter from members of Congress to Attorney General Eric Holder (May 10, 2012) *available at* <http://serrano.house.gov/sites/serrano.house.gov/files/DoJLetter.pdf>; Press Release, IACHR Expresses Concern over Killing of Mexican Teenager by the US Border Patrol, *supra* note 12; Letter from Southern Border Communities coalition to President Barack Obama (Jan. 2013).

¹⁴ Associated Press, *Border Patrol Under Scrutiny for Deadly Force* (Nov. 14, 2012),

<http://www.google.com/hostednews/ap/article/ALeqM5iDjl-WlLeJtQx9MxZjcGD6Uos44w?docId=a1337a3be8aa419281d1d51329b4e24b>.

3. **Accountability for Torture** (Article 2(3) (right to effective remedy); Article 4 (non-derogation from articles 6, 7, 8 (paras I and 2), 11, 15, 16 and 1); Article 6 (right to life); Article 7 (protection from torture and cruel, inhuman or degrading treatment or punishment))¹

I. Issue Summary

Definitive evidence has come to light that Bush administration officials committed serious crimes under the U.S. Constitution and international law by authorizing the torture and cruel, inhuman or degrading treatment of detainees in U.S. custody. A Senate Select Committee on Intelligence investigation into the CIA's interrogation and detention program, the results of which the Committee has not committed to making public, led the Chairwoman to conclude that the "coercive and abusive treatment of detainees in U.S. custody was far more systematic and widespread than we thought." Although the current administration has rightly disavowed torture, it has shielded former senior government officials who authorized torture and abuse from accountability, civil liability, and public scrutiny. To date, no senior government official responsible for the creation and implementation of the Bush administration's torture program has been charged with a crime. While a series of courts-martial were ordered against low-ranking soldiers for alleged abuses against detainees in U.S. custody, there have been no prosecutions of higher-ranking members of the military. Furthermore, in August 2012, the U.S. Attorney General closed the last two open criminal inquiries into abusive interrogations by CIA officials, meaning that not a single CIA official will be prosecuted in federal courts for the abuse, torture, and even death that took place at the hands of CIA officers and contractors. To the contrary, some architects of the torture program have received official honors for their work in government, or have been appointed to more prominent government positions.

Moreover, through invoking immunity doctrines and an over-expansive interpretation of the "state secrets" privilege, the U.S. government has sought to end civil lawsuits brought by torture victims seeking redress under the U.S. Constitution and international law, and the courts have deferred to those arguments. Most recently, the U.S. Supreme Court in June refused to review a civil damages lawsuit against senior Bush administration officials for their roles in the unlawful detention and torture of U.S. citizen Jose Padilla. As a result of jurisdictional and immunity doctrines, not a single victim of the Bush administration's torture regime has received his day in a U.S. court, and torture survivors have been denied recognition as victims of illegal U.S. government policies and practices, compensation for their injuries, and even the opportunity to present their cases. Finally, the U.S. government continues to withhold from the public key documents relating to the CIA's rendition, detention, and interrogation program.

II. U.S. Government Report and Previous Recommendations

In its Fourth Periodic Report, the U.S. stated that the Attorney General began a preliminary review of violations of federal laws in connection with detainee investigations, and that the Justice Department opened a full criminal investigation into the deaths of two individuals in CIA custody overseas.²

The U.S. responded to a series of recommendations made by the Human Rights Committee in 2006. The Committee recommended the U.S. "ensure that there are effective means of

recourse against abuses committed by agencies operating outside the military structure; [] sanction those who used or approved the use of the now withdrawn techniques; [and] provide reparation to those upon whom they were applied.”³ The U.S. responded that while it is not mandated to pay reparations, it may do so in certain circumstances.⁴ The U.S. also referenced a series of civil suits against contractors for detainee abuse.⁵ This response fails to take into account actions actively taken by the U.S. government to deny remedy to victims of torture in a series of civil lawsuits⁶ and petitions lodged in the Inter-American Commission on Human Rights,⁷ thus ensuring victims of abuses by government officials and contractors are left with no recourse. Additionally, the U.S. did not discuss its failure to provide non-judicial remedies, such as reparations, in response to a number of administrative claims.

The Human Rights Committee further recommended the U.S. promptly and independently investigate allegations of suspicious deaths, torture, and other abuses, and ensure those responsible are prosecuted and punished appropriately.⁸ In response, the U.S. described administrative and criminal investigations of detainee mistreatment and discussed the legal recourse available to victims of such abuses.⁹ However, the U.S. did not independently investigate all allegations of torture and other abuses, as recommended by the Committee, and has since closed the investigation into deaths in CIA custody referenced in its report. Moreover, despite releasing some documents (as a result of litigation by organizations such as the ACLU), the Obama Administration continues to keep classified significant documents relating to the torture and mistreatment of detainees.

The Human Rights Committee finally recommended the U.S. conduct “thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment...and provide appropriate remedy to the victims....”¹⁰ The U.S. responded that it has set up a Special Interagency Task Force on Interrogations and Transfer Policy Issues to ensure that U.S. transfer practices comply with domestic and international laws.¹¹ It is well documented that the U.S. has transferred individuals to countries where they faced a significant risk of being tortured. Yet in its response, the U.S. neglected to acknowledge these transfers, or address that it has failed provide remedy to victims of rendition to countries where they suffered torture and other grave abuses.

III. Other UN Human Rights Bodies Recommendations

During the November 2010 Universal Periodic Review (UPR) of the United States, numerous governments articulated their concern that the U.S. government is promoting impunity rather than accountability for torture. The government of Brazil expressed concern about “the persistent impunity” of officials responsible for torture under the United States’ counterterrorism policy, and recommended that “the U.S. take[] measures to ensure . . . the accountability of those responsible for such acts.”¹² Brazil also expressed concern about “the lack of reparation and rehabilitation of the victims of torture,” and recommended that “the U.S. takes measures to ensure reparation to victims of acts of torture under United States’ control.”¹³ The government of Norway recommended that the U.S. government investigate acts of torture and ill-treatment of detainees by military or civilian personnel.¹⁴ In an advance question submitted to the United States, Mexico asked about the mechanisms in place to punish torture.¹⁵ The Russian Federation

called on the United States to “[c]onduct [a] thorough and objective investigation of facts concerning [the] use of torture against imprisoned persons in the secret prisons of United States of America and detainees of the detention centres in Bagram and Guantanamo” and to “bring those who are responsible for these violations to justice.”¹⁶

In 2006, the Committee Against Torture recommended that the U.S. investigate, prosecute, and punish perpetrators of torture as well as “senior military and civilian officials authorizing, acquiescing, or consenting, in any way, to acts of torture committed by their subordinates.”¹⁷ The Committee also recommended victims of torture have access to mechanisms to obtain full redress, compensation and rehabilitation, and stated that the U.S. must not “limit the right of victims to bring civil actions.”¹⁸ These issues will come up again in the U.S. Third Periodic Report to the Committee Against Torture, which was due in July 2011 and—as of this writing—has not yet been submitted.

IV. Recommended Questions

1. What measures have been taken to comprehensively and effectively investigate and prosecute the torture and cruel, inhuman or degrading treatment of detainees in U.S. custody since September 11, 2001?
2. Despite well-documented and credible evidence of the deliberate and widespread use of torture and other illegal abuse during the Bush administration, the U.S. has failed to criminally prosecute any senior government official responsible for the creation and implementation of the Bush administration’s torture program and has closed the last two open criminal inquiries into torture and other abuses by CIA officials. How does the persistent failure to ensure accountability for torture and other abuses reconcile with the U.S.’ obligations under ratified treaties and other international law to investigate and prosecute civilian and military leaders who ordered and approved the use of torture?
3. Given U.S. government officials’ practice of securing the dismissal of civil suits brought by torture victims by asserting the state secrets privilege and claiming effective immunity from suit, what actions are the State Party taking to ensure that torture victims are ensured effective remedy and justice?
4. What measures have been taken by each branch of the U.S. government—the executive branch, Congress, and the federal courts—to ensure full transparency regarding the use of torture during the Bush administration?

V. Suggested Recommendations

1. Congress should publicly disclose the results of its investigation into the role of the CIA in the use of torture and abuse, and Congress should investigate, and make public, the role of officials in the White House during the Bush administration in authorizing or ordering the use of torture and abuse.

2. Congress should pass legislation that creates procedures to prevent the abuse of the state secrets privilege and protect the rights of those seeking redress through our court system.
3. The U.S. government should release critical documentation of torture and abuse, sought under the Freedom of Information Act (FOIA).
4. The U.S. should establish a fund for reparations or other compensation to victims of torture and abuse in U.S. custody or control.

¹ The Human Rights Committee issued General Comment No. 20 to clarify States Parties' obligations under Article 7. Specifically, States Parties must prevent and punish acts of torture, and may not deprive individuals of the right to an effective remedy. Human Rights Comm., 44th Sess., General Comment 20 (Article 7), U.N. Doc. HRI/GEN/1/REV.1 (1994) *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>. In General Comment 29, the Human Rights Committee stressed that certain rights, such as the right to be free from torture, are non-derogable. The Committee also stated that although the right to remedy is not explicitly recognized as non-derogable, it "constitutes a treaty obligation inherent in the Covenant as a whole" and that even during an emergency, the State party "must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." Human Rights Comm., General Comment No. 29, States of Emergency (Article 4), ¶¶ 11, 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) *available at* <http://www1.umn.edu/humanrts/gencomm/hrc29.html>. In General Comment 31, the Human Rights Committee stated that States Parties must ensure that individuals whose Covenant rights have been violated have access to effective remedies and reparations. Human Rights Comm., 80th Sess., General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on states Parties to the Covenant, ¶16, U.N. Doc. CCPR/C/21/REV.1/ADD.13 (2004) *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?OpenDocument>.

² Human Rights Comm., Fourth Periodic report: United States of America, ¶182, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) [hereinafter "Fourth Periodic Report"] *available at* <http://www.state.gov/j/drl/rls/179781.htm>.

³ Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶13, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) [hereinafter "Concluding Observations 2006"] *available at* <http://www1.umn.edu/humanrts/usdocs/hruscomms2.html>.

⁴ Fourth Periodic report, *supra* note 2, ¶527.

⁵ *Id.*, ¶528.

⁶ *See, e.g., El Masri v. Tenet*, 479 F.3d 296, 296-314 (4th Cir. 2007), *Ali v. Rumsfeld*, 549 F.3d 762, 762-799 (C.A.D.C. 2011), *Mohammad v. Jeppssen Dataplan*, 131 U.S. 2442 (2011), *Padilla v. Kentucky*, 130 U.S. 1473, 1473-1497 (2010).

⁷ *See, e.g.* Petition Alleging Violations of the Human Rights of Khaled El Masri by the United States of America with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (2008); Petition Alleging Violations of the Human Rights of Thahe Mohammed Sabar et. al. by the United States of America with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (2012); Petition Alleging Violations of the Human Rights of Binyam Mohamed et. al. by the United States of America with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (2011); Petition Alleging Violations of the Human Rights of Jose Padilla by the United States of America with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (2012).

⁸ Concluding Observations 2006, *supra* note 3, ¶14.

⁹ U.S. Fourth Periodic Report, *supra* note 2, ¶¶530-548.

¹⁰ Concluding Observations 2006, *supra* note 3, ¶16.

¹¹ Fourth Periodic report, *supra* note 2, ¶¶553-555.

¹² Human Rights Council Working Grp. on the Universal Periodic Review, 9th Sess., Nov. 1-12, 2010, Draft Report of the Working Group on the Universal Periodic Review: United States of America, ¶92.148, U.N. Doc. A/HRC/WG.6.9/L.9 (Nov. 10, 2010) [hereinafter U.S. UPR Report 2010] *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf (Intervention by H.E. Ambassador Maria Nazareth Farani Azevêdo, Permanent Representative of Brazil).

¹³ U.S. UPR Report 2010, *supra* note 12, ¶92.148.

¹⁴ *Id.*, ¶ 92.139.

¹⁵ Human Rights Council Working Grp. on the Universal Periodic Review, 9th Sess., Nov. 1-12, 2010, Advance Questions to the United States of America, Add.3, *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USA_Add3.pdf.

¹⁶ U.S. UPR Report 2010, *supra* note 12, ¶ 92.147.

¹⁷ Comm. Against Torture, 36th Sess., May 1-19, 2006, Conclusions and recommendations of the Committee against Torture: United States of America) ¶¶ 19, 25, 26, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) *available at* <http://www.state.gov/documents/organization/133838.pdf> (“CAT Committee recommendations 2006”).

¹⁸ *Id.*, ¶¶ 28, 29.

4. **Lack of Remedies for Female Victims and Survivors of Domestic Violence** (Article 2(1) (right to non-discrimination); Articles 2(2) and 2(3) (affirmative obligation to guarantee rights from violation by state and non-state actors); Article 2(3) (right to an effective remedy); Article 6 (right to life); Article 7 (protection from torture and cruel, inhuman or degrading treatment or punishment); Article 26 (right of non-discrimination))¹

I. Issue Summary

Gender-based violence, including domestic violence, is a serious criminal, public health, economic, and social issue in the U.S. Women and girls are disproportionately impacted by such violence. Nearly one in five women are raped at some point in their lives, and more than one in three women have experienced violence perpetrated by an intimate partner.²

Despite the scope of the problem, victims and survivors of domestic violence face court-created obstacles to obtaining state, federal, and international remedies for violations of their fundamental human rights.³ In addition, there are no enforceable requirements or standards under U.S. law to ensure that law enforcement authorities act with “due diligence” to protect victims and survivors of domestic violence.⁴ Without uniform federal legislation making explicit provision for remedies for victims and survivors of domestic violence and compelling law enforcement to take reasonable measures through the adoption of laws, policies and practices aimed at better preventing domestic violence, many victims and survivors of domestic violence remain unprotected and without an effective remedy for violations of their fundamental human rights that result from such violence.

The situation of domestic violence survivors in the United States stands in stark contrast to positions recently advanced by the U.S. on the international stage in relation to women’s human rights. In September 2012, before the United Nations General Assembly, the U.S. pledged to take steps to reduce violence against women, including domestic violence fatalities.⁵ This pledge demonstrates a recognition by the U.S. of its human rights obligations to survivors of gender-based violence. However, as noted, at the domestic level, the U.S. has failed to comprehensively translate its human rights commitments and obligations into policies and practices that would more effectively address domestic violence, programming, education and outreach to governmental and nongovernmental actors; in particular, the U.S. lacks any coordinated mechanisms for this process. Until the U.S. provides for this, the pervasive problems of gender-based violence, including prevention of domestic violence and provision of remedies for its survivors, will persist.

The prevalence of domestic violence in the United States, and the failure on the part of the U.S. government to adopt reasonable measures aimed at effectively preventing it, constitutes violations of the ICCPR.

II. U.S. Government Report

In its Fourth Periodic Report to the Human Rights Committee, the U.S. described measures taken to improve guidelines and training for law enforcement authorities in tackling gender-

based violence, including domestic violence, particularly in tribal communities.⁶ The U.S. also discussed the expanded legal tools and grant programs available to address domestic violence in the Violence against Women Act (VAWA)⁷ and funding from the 2009 American Recovery and Reinvestment Act for Office of Violence Against Women programs.⁸ In addition to protection under VAWA, the U.S. explained that victims and survivors of domestic violence are protected under the Fair Housing Act's prohibitions against sex discrimination in situations where housing issues are implicated.⁹ The U.S. additionally noted DOJ/CRD's first ever finding that a police department engaged in gender-biased policing by systematically failing to investigate sexual assaults and domestic violence.¹⁰

III. Other UN and Regional Human Rights Bodies Recommendations

In her report based on her official visit to the United States in January-February 2011, the U.N. Special Rapporteur on Violence against Women, its Causes and Consequences noted that many women around the U.S. suffer from the effects of inadequate protection from acts of domestic violence, and called for the creation of uniform remedies for victims and survivors of such violence.¹¹

In 2011, the Inter-American Commission on Human Rights (IACHR) found that the U.S. violated numerous provisions of the American Declaration on the Rights and Duties of Man by failing to respond to the domestic violence perpetrated against Jessica Lenahan (formerly Gonzales) and her three daughters, including violations of their rights to life, non-discrimination, and judicial protection.¹² As well as recommending individual redress for Ms. Lenahan, the IACHR made several findings in relation to the lack of "due diligence" on the part of U.S. law enforcement authorities in tackling domestic violence and recommended the implementation of specific reforms and remedies to more effectively address the pervasive problem of domestic violence in the United States and the lack of effective remedies for domestic violence victims and survivors.¹³

Gender-based violence, including domestic violence, is proscribed in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In General Recommendation 19, the Committee on the Elimination of Violence Against Women stated that gender-based violence constitutes discrimination under article 1 of CEDAW.¹⁴ The Committee further stated that, "Family violence is one of the most insidious forms of violence against women," putting women's health at risk and impairing "their ability to participate in family life and public life on a basis of equality."¹⁵ The Human Rights Committee should take note that the U.S. is one of only six countries that have yet to ratify CEDAW.

IV. Recommended Questions

Despite an acknowledgement on the part of the United States that gender-based violence, including domestic violence, is a pervasive problem in the country and efforts to tackle it, the problem and attendant human rights violations persist. The United States has also acknowledged that the adoption of human rights laws and standards relevant to domestic violence is an important approach to effectively addressing domestic violence. In light of this:

1. What specific measures has the United States adopted at the national, state and local levels through the adoption of laws, policies and practices to incorporate human rights laws and standards into law enforcement operations to ensure that agencies adopt a “due diligence” approach to tackling domestic violence?
2. What measures has the United States taken to ensure that survivors of domestic violence are afforded access to effective remedies at the federal, state and local levels for violations of their rights?

V. Suggested Recommendations

The U.S. should take effective measures at the national, state and local levels to promote and proactively incorporate international human rights standards into domestic policies, programs, outreach, and education that seek to address and prevent violence against women and girls. In this process, the United States should pay particular attention to the following:

1. Understanding the “due diligence” standard as it pertains to addressing domestic violence and integrating it into governmental responses to such violence, and particularly those areas of law and practice where domestic law may establish a lower standard of legal responsibility on U.S. government officials;
2. Disseminating accessible and actionable information on relevant human rights laws and standards to federal, state and local governments and all agencies that provide protection, services, and remedies to victims and survivors, including U.S. courts and government agencies focused on law enforcement, housing, economic and employment issues, and child welfare, among others; and
3. Engaging governmental and nongovernmental stakeholders, including advocates and survivors, in identifying programmatic areas that could be strengthened through the use of human rights laws and standards relevant to the issue of gender-based violence, instituting accountability mechanisms therefor, and creating and evaluating best practices in this area of U.S. law and practice.

¹ In General Comment 28, the Human Rights Committee stated, “to assess compliance with article 7 of the Covenant, as well as with article 24...the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape.” Human Rights Comm., General Comment No. 28, Equality of rights between men and women (article 3), ¶11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>.

² Ctrs. for Disease Control, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (2011).

³ See *DeShaney v. Winnebago City Dept. of Soc. Servs.*, 489 U.S. 189 (1989); *United States v. Morrison*, 529 U.S. 598 (2000); *Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (July 2011), available at <http://www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc>.

⁴ See e.g., *Jessica Lenahan (Gonzales) v. United States, Id.*

⁵ United States of America, *Statement of the United States of America On the Occasion of the 67th Session UN General Assembly’s Rule of Law High Level Meeting* (Sept. 24, 2012), available at <http://unrol.org/files/Pledges%20by%20the%20United%20States%20of%20America.pdf>.

⁶ Human Rights Comm., Fourth Periodic report: United States of America, ¶29, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement> (“Fourth Periodic Report”).

⁷ *Id.*, ¶¶ 53, 134-136.

⁸ *Id.*, ¶137.

⁹ *Id.*, ¶¶ 141-142.

¹⁰ *Id.*, ¶ 183.

¹¹ Special Rapporteur on violence against Women, its causes and consequences, *Addendum - Mission to the U.S.*, ¶71, U.N. Doc. A/HRC/17/26/Add.5 (Jun. 2011) (by Ms. Rashida Manjoo) *available at* <http://www.unhcr.org/refworld/docid/4ef1ad5d2.html>.

¹² Jessica Lenahan (Gonzales) et al. v United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 5, 107 (2011).

¹³ *Id.* at 56-57.

¹⁴ Comm. On the Elimination of discrimination against women, 11th Sess., General Recommendation No. 19 (1992) *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

¹⁵ *Id.*, ¶23

5. **Solitary Confinement** (Article 7 (protection from torture and cruel, inhuman or degrading treatment or punishment); Article 10 (right to be treated with humanity and with respect for the inherent dignity of the human person when deprived of their liberty); and Article 24 (right of children to measures of protection as required by their status as minors))¹

I. Issue Summary

Recent decades have seen an explosion in the use of solitary confinement in detention facilities in the United States. This includes physical and social isolation by administrative designation in ‘supermaximum’ security facilities, which can stretch on for decades, as well as punitive, protective, or medical isolation for days, weeks, months or years. Persons with mental disabilities are dramatically overrepresented in solitary confinement.² Children are subjected to solitary confinement in juvenile facilities as well as in jails and prisons that otherwise house adults.³ Vulnerable LGBTI prisoners and immigration detainees are also placed in solitary confinement, both in civil and criminal detention facilities.⁴ Researchers estimate that over 80,000 prisoners are held in forms of housing that involve substantial social isolation.⁵

A substantial body of research has demonstrated the harmful, and sometimes devastating, effects of solitary confinement on physical and mental health.⁶ These harmful effects are most starkly illustrated by the significantly higher rates of suicide among prisoners in solitary confinement than among those in the general prison population.⁷ Some groups, such as children and persons with mental illness, are particularly vulnerable. In the case of children, some research suggests that the harmful effects of solitary confinement are exacerbated by the developmental immaturity of the isolated individual.⁸ In order to fully understand the impact of solitary confinement on children, more research is needed.

The harms of solitary confinement are closely tied to its duration. One study found measurable changes in brain activity after only seven days of solitary confinement.⁹ In 2005, a group of psychiatrists and psychologists surveyed the existing literature and concluded that, “no study of the effects of solitary ... confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”¹⁰

The human rights violations associated with widespread use of solitary confinement as an administrative, punitive, protective, and medical measure in the United States are manifold.¹¹

II. Concluding Observations from 2006 Review

In its 2006 Concluding Observations, the U.N. Human Rights Committee reiterated its concern that conditions in some maximum security prisons – including prolonged cell-confinement – are incompatible with the obligation contained in article 10(1) of the ICCPR to treat detainees with humanity and respect for the inherent dignity of the human person and cannot be reconciled with the requirement in article 10(3) that reformation and social rehabilitation shall be the essential aim of treatment received in the penitentiary system. Accordingly, the Committee recommended that the United States scrutinize conditions of detention in prisons, and in particular maximum-security prisons. The United States government did not respond to that recommendation.¹²

III. U.S. Government Report

In its December 2011 report to the Committee, the U.S. Government indicated that the U.S. Department of Justice recommended that its organs instruct prisons to consider alternatives to automatic isolation of prisoners who allege sexual abuse.¹³ The U.S. Government also noted that the U.S. Supreme Court has held that a 30-day period of disciplinary segregation of prisoners from the general population does not give rise to a constitutional liberty interest that would require a full due process hearing prior to imposition of the punishment, though any “atypical and significant” confinement might give rise to such an interest.¹⁴ The submission further notes that in 2005, the U.S. Supreme Court determined that segregation of detainees in the “supermax” maximum security prison of a particular jurisdiction, Ohio, did give rise to a constitutional liberty interest and that the process provided by Ohio officials was adequate due process to meet the constitutional requirement.¹⁵

IV. Other UN Human Rights Bodies Recommendations

In a groundbreaking global study on solitary confinement published in 2011, the U.N. Special Rapporteur on torture concluded that solitary confinement is a harsh measure that can cause serious and adverse psychological and physiological effects, and can amount to cruel, inhuman or degrading treatment or punishment and even torture in a range of circumstances. He recommended its use as a punishment be prohibited, and also called for increased safeguards from abusive and prolonged solitary confinement, the universal prohibition of solitary confinement for more than 15 days, and a complete discontinuance of the usage of solitary confinement for children and the mentally ill.¹⁶

During the U.S. Universal Periodic Review (UPR) the U.S. committed to “ensure the full enjoyment of human rights by persons deprived of their liberty, including by way of ensuring treatment in maximum security prisons in conformity with international law.”¹⁷ Given the interim report of the Special Rapporteur and the growing consensus that prolonged solitary confinement constitutes a form of cruel, inhuman, or degrading treatment, the ACLU believes that this commitment can only be fully implemented if solitary confinement is strictly limited or banned altogether.

V. Recommended Questions to the Committee

1. The Director of the U.S. Bureau of Prisons has testified that at any given time approximately 7% of detainees in its custody are in a form of segregation that amounts to solitary confinement (physical and social isolation for more than 22 hours per day) (<http://solitarywatch.com/wp-content/uploads/2012/06/transcript-of-the-hearing.pdf>). Please provide additional data:
 - A. State the number of prisoners in the custody of the Federal Bureau of Prisons who have been held in solitary confinement for more than 15 days.
 - B. For those prisoners identified in question 1A, state the following:

- a. The institutions where the prisoners are held and the number of prisoners in solitary confinement in each facility;
 - b. The mean and median length of stay in solitary confinement in each facility where prisoners are so confined;
 - c. The number of prisoners held in solitary confinement in the last 24 months who have a Medical Duty Status (MDS) Assignment for mental illness or mental retardation, as set forth in Chapter 2 of the Federal Bureau of Prisons, Program Statement 5310.12 "Psychology Services Manual" (pp. 12-13);
 - d. The reason for placement in or classification to solitary confinement for each prisoner so held; and
 - e. The number of suicides or other incidents of "self harm" in the last 24 months for prisoners held in solitary confinement.
2. Please provide such data for detainees held in solitary confinement in federal civil detention in connection with their immigration status (or held under contract in facilities that hold such detainees) and in federal juvenile facilities (or held under contract in facilities that hold such detainees).
 3. Please provide such data for all individuals in the United States held in solitary confinement by state and local officials in juvenile facilities, jails, prisons or any other places of detention.
 4. What measures are required by federal, state, and local governments to limit or regulate the imposition of solitary confinement on particularly vulnerable detainees, including children, non-citizens, the elderly, persons with mental disabilities, and LGBTI inmates?

VI. Suggested Recommendations

1. The federal, state and local governments should promote transparency with regard to all physical and social isolation practices by making public all relevant rules and regulations governing placement and conditions in isolation, the costs associated with these practices, and data about rates and duration of physical and social isolation practices, and particularly solitary confinement.
2. The federal, state and local governments should ban prolonged solitary confinement and strictly regulate all other physical and social isolation practices.
3. The federal, state and local governments should ban the solitary confinement of children and persons with mental disabilities.
4. The federal, state and local governments should compile data on the effect of isolation, and particularly solitary confinement, on children.

¹ The Human Rights Committee articulated its view of solitary confinement under international law in a series of general comments. In General Comment No. 7, the Human Rights Committee stated that solitary confinement may run afoul of Article 7. Human Rights Comm., 16th Sess., General Comment No. 7 (Article 7), ¶2 (1982) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e9dbcf014061fa7c12563ed004804fa?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e9dbcf014061fa7c12563ed004804fa?Opendocument). The Human Rights Committee issued general comment 9 regarding article 10, stating that "...the segregation and treatment of juvenile offenders should be provided for on such a way that it promotes their reformation and social rehabilitation." Human Rights Comm., 16th Sess., General Comment No. 9 (Article 10), ¶4 (1982) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/a4f543b9dadd08a7c12563ed00487ed8?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a4f543b9dadd08a7c12563ed00487ed8?Opendocument). In General Comment 17 regarding the rights of the child, the Committee stated that accused juveniles should be separated from adults in a way that is "appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation." Human Rights Comm., 35th Sess., General Comment No. 17 (Article 24) ¶2 (1989) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument). Replacing General Comment 7, the Human Rights Committee issued General Recommendation 20 in 1992, and stated that prolonged solitary confinement of an imprisoned individual may "amount to acts prohibited by article 7." Human Rights Comm., 44th Sess., General Comment No. 20 (Article 7), ¶6 (1992) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument). Also in 1992, the Human Rights Committee replaced General Comment 9 with General Comment 21, requesting information on specific measures applied during detention, and stating that, "Under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned...the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice." Human Rights Comm., 44th Sess., General Comment 21 (Article 10) ¶13 (1992) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3327552b9511fb98c12563ed004cbe59?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument).

² Jeff Metzner, Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYC. L. 104 (2010).

³ The ACLU and Human Rights Watch released a joint report about the solitary confinement of juveniles in the United States in October 2012. The report goes into detail about the practice of isolating children in prison and the effects this isolation can have. *See* American Civil Liberties Union & Human Rights Watch, *Growing Up Locked Down* (Oct. 2012), *available at* <http://www.aclu.org/files/assets/us1012webwcover.pdf>.

⁴ Heartland Alliance's National Immigrant Justice Center & Physicians for Human Rights, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention* (Sept. 2012) *available at* http://www.immigrantjustice.org/press_releases/invisible-in-isolation#.UMOu05Pjmq8.

⁵ Angela Browne, Alissa Cambier, Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 Fed'l Sentencing Reporter 46 (2011).

⁶ *See, e.g.*, Sharon Shalev, *A Sourcebook on Solitary Confinement*, London: Mannheim Centre for Criminology, LONDON SCHOOL OF ECONOMICS (2008); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); S.L. Brodsky & F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (2003).

⁷ Jeff Metzner, Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYC. L. 104 (2010).

⁸ American Civil Liberties Union & Human Rights Watch, *Growing Up Locked Down* (Oct. 2012), *available at* <http://www.aclu.org/files/assets/us1012webwcover.pdf>.

⁹ Paul Gendreau, N.L. Freedman, & G.J.S. Wilde, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCH. 54, 57-58 (1972).

¹⁰ Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Supporting Respondents, *Wilkinson v. Austin*, United States Supreme Court, No 04-495t, 2005 WL 539137, at *4 (Mar. 3, 2005).

¹¹ *See* Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Judiciary Comm., 112th Cong. (2012) (statement of the American Civil Liberties Union).

¹² Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶32, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>

¹³ Human Rights Comm., Fourth Periodic report: United States of America, ¶ 230, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement> (“Fourth Periodic Report”).

¹⁴ *Id.*, ¶ 234

¹⁵ *Id.*

¹⁶ Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/66/268 (Aug. 5, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>.

¹⁷ Humanrights.gov, Accepted UPR Recommendations (Mar. 2012) ¶ 77, *available at* <http://www.humanrights.gov/wp-content/uploads/2012/03/USAAcceptedRecommendations-2010UPR.pdf>.

6. **The Death Penalty in the United States** (Article 2(3) (right to an effective remedy); Article 6 (right to life); Article 7 (protection from torture and cruel, inhuman or degrading treatment or punishment); Article 14 (right to fair trial and access to justice); Article 26 (right of equal protection)).¹

I. Issue Summary

Since 1976, when the modern death penalty era began in this country,² 1,319 people have been executed.³ As of April 2012, there were 3,170 people awaiting execution across the country.⁴ The U.S. death penalty system in 33 states, the federal system, and the military violates international law and raises serious concerns regarding the United States' international legal obligations under the ICCPR.

There have been some recent positive developments regarding the death penalty in the United States. These include the barring of the execution of juveniles, the intellectually disabled, and those who did not commit homicides.⁵ (The ban on non-homicide execution excludes certain crimes against the state, such as treason and espionage.) In addition, the number of new death sentences has dropped, and New York, New Jersey, New Mexico, Illinois, and Connecticut have all repealed the death penalty in recent years. On November 6, 2012, California also came close to repealing the death penalty, with 47% of voters supporting the ballot measure that would have banned use of the death penalty in the state.⁶

But despite these positive signs, the U.S. death penalty system remains fraught with problems. The death penalty is still imposed on the mentally ill and disabled, as well as the intellectually disabled, despite the constitutional prohibition on that practice.⁷ Additionally, death row prisoners often spend excessive time on death row before being executed, in violation of internationally-recognized prohibitions against cruel punishment and psychological mistreatment.⁸ The wait on death row can exceed several decades, and is often in solitary confinement. The use of lethal injection as a method of execution also risks cruel and unusual punishment. Although the Supreme Court has held that one current method of lethal injection used is constitutional,⁹ several condemned prisoners have suffered excruciating pain during execution and states are now increasingly moving to untested new protocols in recent executions, due to limited drug supply.

Furthermore, the death penalty is applied arbitrarily and disproportionately. Among thousands of potentially eligible cases, only a handful of those convicted are sentenced to death; worse, the factors that determine who is sentenced to death are not legal, but accidents of race, class, and geography.¹⁰ The death penalty system fails to protect the innocent: since 1973, 141 innocent people in 26 states have been exonerated from death row, and tragically not all innocent people have escaped execution.¹¹ Inadequate access to counsel is also a significant contributor to this problem. Many states fall woefully short of providing to indigent clients the qualified counsel and adequate resources that capital cases require.¹²

Yet another aggravating problem with the United States death penalty system is the lack of access to courts for those who have been sentenced to death. Federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹³ and the USA

PATRIOT Improvement and Reauthorization Act of 2005, as well as numerous Supreme Court decisions on federal habeas corpus, have greatly limited access to federal review of state court death penalty convictions. These laws drastically limit the availability of federal habeas corpus relief for defendants sentenced to death. As a result, defendants who are later able to present evidence establishing their innocence that may not have been available at the time of trial, and could have led to a different result if it had been presented, are left with no recourse. In addition to the denial of relief to defendants who have powerful evidence of their innocence, many defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, have been left without federal judicial recourse.

The federal government's decision to seek the death penalty in military commissions at Guantánamo Bay against numerous defendants accused of terrorism rather than in federal courts also raises troubling international law concerns.¹⁴ These commissions have been set up to achieve easy convictions and hide the reality of torture. The rules also violate due process by allowing under some circumstances hearsay evidence and coerced or secret evidence.¹⁵ As capital trials progress in Guantanamo, severe limitations on defense counsel and inadequate provision of resources for the accused continues.

II. U.S. Government Report and Previous Recommendations

The Human Rights Committee issued two concluding observations about the death penalty in the United States in 2006. The first welcomed the Supreme Court's decision in *Roper v. Simmons*, which forbid imposition of the death penalty on individuals who were under 18 when their crimes were committed, and reiterated the Committee's previous recommendation that the United States withdraw its reservation to article 6 (5) of the ICCPR.¹⁶

The second regretted that the United States had not reviewed federal and state legislation to determine whether application of the death penalty was restricted to the most serious crimes and noted that the United States had in fact extended the number of offenses for which the death penalty could be used as punishment, despite the Committee's previous observations. The Committee took note of efforts to increase access to adequate counsel among indigent defendants, but remained concerned about studies indicating that the death penalty is disproportionately applied in the United States.¹⁷

The Committee informed the United States that it should review legislation to ensure that the death penalty was restricted to the most serious crimes. The Committee also recommended that the United States assess the extent to which the death penalty is disproportionately imposed on minorities, as well as the reasons for this, and adopt appropriate measures to address the problem. Finally, the Committee recommended a moratorium on the death penalty in the meantime, bearing in mind the desirability of abolishing the death penalty.¹⁸

The United States responded to the Committee's observations in its 2011 report. It cited Supreme Court decisions that barred the death penalty for those who were under 18 when their crimes were committed, those who had not committed homicide (except in cases of crimes against the state), and those who were intellectually disabled.¹⁹ The report also claimed that use

of the death penalty was restricted to the “most serious offenses,” while also acknowledging that it extended to some non-homicide crimes, and cited the many procedural guarantees afforded to those accused of crimes which can carry the death penalty as punishment.²⁰

The United States government also acknowledged the racial and geographic disparities of the death penalty system, citing a study authorized by then-Deputy Attorney General Eric Holder during the Clinton Administration. It did not indicate that any further studies were in progress. It reported that in July 2011 the Department of Justice had initiated a new capital case review protocol designed to improve the Department’s decision-making process for federal death penalty cases.²¹

III. Other UN Human Rights Bodies Recommendations

In 2010, the United States reported on the death penalty to the Human Rights Council during its Universal Periodic Review (UPR), giving a statement very similar in substance to that given to this Committee.²² During the UPR process, several countries expressed concern about the death penalty in the United States, with some calling for an immediate moratorium with a view toward eventual abolition.²³ The United States committed to undertake studies to determine the factors of racial disparity in the application of the death penalty, and to prepare effective strategies aimed at ending possible discriminatory practices.²⁴

Moreover, in 2009 former Special Rapporteur on extrajudicial, summary or arbitrary executions Phillip Alston issued a report on his visit to the United States. Among other issues, the report discussed the death penalty in the states of Texas and Alabama and Guantanamo Bay. The Special Rapporteur found that despite the fact that “[i]t is widely acknowledged that innocent people have likely been sentenced to death and executed,” there was a “shocking lack of urgency with regard to the need to reform glaring criminal justice system flaws.”²⁵ In his March 2012 follow-up, Special Rapporteur Christof Heyns noted that the reforms proposed in Alston’s report were not under way and reiterated his predecessor’s due process concerns regarding the death penalty trials at Guantanamo Bay under the new Military Commission Act (2009).²⁶

IV. Recommended Questions

1. What progress, if any, has the United States made toward its promise in the UPR process to study the racial disparities of the death penalty?
2. What steps is the United States taking to ensure that the death penalty is not imposed disproportionately based on race, geography, and socioeconomic status?
3. What precautions will the United States take to ensure that it will not continue to impose the death penalty against and execute the innocent? The intellectually disabled? The severely mentally ill?

4. Without sacrificing critical due process guarantees, how will the United States address the psychological mistreatment caused by the lengthy delays in execution? How will the United States address the inhumane conditions on its death rows?
5. What steps will the United States take to guarantee that every capital defendant and death-sentenced prisoner has access to adequate counsel and sufficient resources?
6. What steps is the United States taking to address the due process concerns raised by the Special Rapporteur on extrajudicial, summary or arbitrary executions regarding the death penalty trials at Guantanamo Bay? What steps is the United States taking to ensure that Guantanamo detainees are tried before ordinary federal courts in full compliance with fair trial safeguards?
7. What actions is the U.S. government taking to amend the AEDPA legislation to ensure prisoners asserting claims of constitutional violations are guaranteed habeas corpus review?

V. Suggested Recommendations

1. The U.S. should impose a moratorium on all federal death penalty trials as well as executions.
2. The federal government should fulfill its commitment in the UPR process to study the racial disparities of the death penalty and fully implement the recommendations of the Special Rapporteur on extrajudicial, summary, or arbitrary executions.
3. Congress should amend the habeas-related provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that federal courts are more accessible to prisoners asserting claims of constitutional violations.
4. The U.S. should create and adequately fund state defender organizations that are independent of the judiciary and that have sufficient resources to provide quality representation to indigent capital defendants at the trial, appeal, and post-conviction levels. Require states to ensure that capital defense lawyers have adequate time, compensation, and resources for their work on each case.
5. The U.S. should implement its pledge made during the U.N. High-Level Meeting on the Rule of Law to elevate awareness of the importance of access to counsel and increase the availability of qualified attorneys for those in need.²⁷
6. The U.S. should implement measures to prevent police and prosecutor misconduct.
7. The U.S. should withdraw its reservation to article 6, paragraph 5 of the ICCPR, which bans the use of the death penalty for those who committed crimes when they were minors.

¹ In 1982 the Human Rights Committee adopted General Comment 6 clarifying ICCPR article 6. General Comment 6 concluded that all measures of abolition of the death penalty should be considered as progress towards enjoyment of the right to life under article 40. Human Rights Comm., 16th Sess., General Comment No. 6, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003), *available at*

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument). In 1992 the Human Rights Committee adopted General Comment 20 clarifying ICCPR article 7. General Comment 20 reiterates General Comment 6 and states that if it is carried out, the death penalty must be carried out in a way as to cause the least possible physical and mental suffering. Human Rights Comm., 44th Sess., General Comment No. 20 U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), *available at*

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

² *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

³ As of December 5, 2012. Death Penalty Information Center, Executions by Year, *available at* <http://www.deathpenaltyinfo.org/executions-year>.

⁴ NAACP Legal Defense and Educational Fund, Death Row U.S.A. (Spring 2012), *available at* http://www.naacpldf.org/files/publications/DRUSA_Spring_2012.pdf.

⁵ *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁶ Brian Evans, California Death Penalty Hangs On (Barely), Amnesty International Human Rights Now Blog (Nov. 7, 2012), *available at* <http://blog.amnestyusa.org/us/california-death-penalty-hangs-on-barely/>

⁷ Edwin Hart Turner Executed in Mississippi Despite Claims He Was Mentally Ill, Huffington Post (Feb. 8, 2012), *available at* http://www.huffingtonpost.com/2012/02/09/edwin-hart-turner-executed_n_1265535.html; See, e.g., Renee Feltz, Cracked, Texas Observer (Jan. 5, 2010), M. Kiefer, Execution to conclude shocking Arizona murder case, Arizona Republic News (Feb. 26, 2012).

⁸ See, e.g., *Pratt & Morgan v. AG for Jamaica*, 4 All. E.R. 769, Judicial Committee of the Privy Council (Nov. 2, 1993); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (Ser. A, No. 161) (July 7, 1989); Inter-Am. Comm'n H.R., *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, 185, OEA/Ser.L/V/II., doc. 68 (Dec. 31, 2011), *available at* <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>.

⁹ *Baze v. Rees*, 553 U.S. 35 (2008).

¹⁰ See, e.g., A. Mikulich & S. Cull, Diminishing All of Us: The Death Penalty in Louisiana, Jesuit Social Research Institute (Mar. 2012) (death penalty is applied in only 1% of Louisiana murders); L. Montgomery, Md. Questioning Local Extremes on Death Penalty, Wash. Post (May 12, 2002) (the city of Baltimore only had one person on death row while its surrounding county had 9 people on death row, with one-tenth less murders); R. Willing and G. Fields, Geography of the Death Penalty, USA Today (Dec. 20, 1999) (one county in Ohio produces about 25% of the state's death sentences, though only 9% of the state's murders occur there).

¹¹ Death Penalty Information Center, The Innocence List (Nov. 30, 2012), *available at*

<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>. In his recently released book, "Anatomy of a Wrongful Execution," Professor James Liebman examined the execution of Carlos DeLuna. He concluded that DeLuna had been wrongly convicted "on the thinnest of evidence: a single, nighttime, cross-ethnic eyewitness identification and no corroborating forensics." (James Liebman, Los Tocayos Carlos, Columbia Human Rights Law Review, Vol. 43, No. 3 (Summer 2012) *available at* <http://www3.law.columbia.edu/hrlr/ltr/>.) Also in May, the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University released a report entitled "Exoneration in the United States, 1989-2012" and launched the National Registry of Exonerations, providing an unprecedented look at the problem of wrongful convictions. (Samuel Gross and Michael Shaffer, Exonerations in the United States, 1989-2012, National Registry of Exonerations (May 2012) *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf).

¹² See, e.g., *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012) (citing American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 117-120 (June 2006)).

¹³ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 – 132, § 101 – 08, 110 Stat 1214 (1996).

¹⁴ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Human Rights Council, A/HRC/11/2/Add.5 (May 28, 2009), *available at*

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.5.pdf>; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/6/17/Add.3 (Nov. 22, 2007), *available at* <http://daccess-32.ods.un.org/TMP/9489911.html>.

¹⁵ U.S. Dep't of Defense, Manual for Military Commissions (Apr. 27, 2010), *available at*

http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf; Military Commissions Act of 2009, 10 U.S.C. § 47A.

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- ¹⁶ Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶ 6, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement> (“Concluding Observations 2006”).
- ¹⁷ Concluding Observations 2006, ¶ 29.
- ¹⁸ Concluding Observations 2006, ¶ 29.
- ¹⁹ Human Rights Comm., Fourth Periodic report: United States of America, ¶ 651, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement> (“Fourth Periodic Report”).
- ²⁰ Fourth Periodic Report, ¶ 657-58.
- ²¹ Fourth Periodic Report, ¶ 655.
- ²² Human Rights Council, Working Group on the Universal Periodic Review, 9th Sess., National Report: United States, ¶¶ 61-63, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf
- ²³ Sweden, the United Kingdom, Belgium, Switzerland, Italy, Uruguay, New Zealand, Cyprus, Australia, and Slovakia, among others, recommended a moratorium on the death penalty with a view to eventual abolition. France recommended that the United States undertake studies regarding racial disparities and the death penalty and develop strategies to end any discriminatory practices. Human Rights Council, 16th Sess., Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: United States, ¶¶ 92.118 – 92.130, 92.95, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.
- ²⁴ Humanrights.gov, *Accepted UPR Recommendations* (March 2012), <http://www.humanrights.gov/wp-content/uploads/2012/03/USAcceptedRecommendations-2010UPR.pdf>.
- ²⁵ Special Rapporteur on extrajudicial, summary, or arbitrary executions, *Addendum – Mission to the United States of America*, 2, U.N. Doc. A/HRC/112/Add.5 (May 2009) (by Philip Alston) *available at* <http://www.deathpenaltyinfo.org/documents/AlstonUN.pdf>.
- ²⁶ Follow-up report (A/HRC/20/22/Add.3) by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, to the 2008 fact-finding mission to the United States by the previous mandate holder, Professor Philip Alston (A/HRC/112/Add.5), ¶ 7.
- ²⁷ Statement of the United States of America, 67th Sess. UN General Assembly’s Rule of Law High Level Meeting (Sept. 24, 2012) *available at* <http://unrol.org/files/Pledges%20by%20the%20United%20States%20of%20America.pdf>.