



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

**American Civil Liberties Union
Shadow Report to the Fourth Periodic Report of the United States**

**109th Session of the Human Rights Committee, Geneva
14 October-1 November 2013¹**

13 September 2013

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¹ Human Rights Committee, *Consideration of reports and country situations in the absence of a report*, <http://www2.ohchr.org/english/bodies/hrc/hrcs109.htm> (last visited Sept. 9, 2013).

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Acknowledgments

ACLU staff from the following projects, departments, and affiliates researched, wrote, reviewed, and/or edited sections of the report: Human Rights Program, Immigrants’ Rights Project, Capital Punishment Project, National Prison Project, National Security Project, Women’s Rights Project, Affiliate Support and Advocacy, Washington Legislative Office, ACLU of New Mexico Regional Center for Border Rights, and ACLU of San Diego & Imperial Counties.

Introduction

This report supplements and updates the submission of the American Civil Liberties Union (ACLU) to the UN Human Rights Committee (“the Committee”) in December 2012.¹ Together, these submissions address issues raised by the government of the United States in its 4th periodic report on compliance with the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992. Their aim is to highlight for the Committee key areas in which the U.S. government has failed to uphold its human rights commitments under the ICCPR.

Last April, the Committee asked the United States a number of detailed questions on its compliance with the ICCPR, which the United States replied to in July. In October, the Committee will examine the U.S. periodic report and engage the U.S. government delegation in a dialogue on progress made towards implementing the treaty and challenges the U.S. has encountered in doing so. Following this examination, the Committee will issue a report on its findings, identifying areas of concern and incorporating recommendations on how to better implement the treaty.

Since the United States underwent its last review by the Committee in 2006, the U.S. record has shown a marked improvement in certain areas, most notably in the areas of LGBT rights and enforcement of civil rights by the Civil Rights Division of the Department of Justice. In other areas, however, there is need for improvement. Significantly, the U.S. report and subsequent written replies to the Committee’s questions lacked concrete information on state and local compliance with the ICCPR and ignored serious legal and policy questions raised by the Committee. In addition, in recent years, the U.S. has expanded dangerous policies and programs which have caused – and continue to cause – egregious violations of human rights at home and abroad, including the rights to life, privacy, and free expression. Most importantly, the U.S. report and written replies fail to provide a full picture of the state of civil and political rights in the U.S., which in many areas remains out of step with its international undertakings. Our submissions and those of other civil society organizations aim to address these shortcomings by providing the Committee with a more complete picture of U.S. implementation of the ICCPR at the federal, state and local levels.

Our submission incorporates updated as well as new information on key priority civil and human rights issues for the ACLU and seeks to highlight the accountability gap between U.S. human rights obligations and current law, policy, and practice. As our submission notes, the deficit is present at all levels of government. Our submission also includes additional questions for the Committee to pursue with the government during the review process and recommendations for the Committee to consider in regards to **anti-immigrant measures, militarization and killings on the U.S.-Mexico border, labor trafficking, domestic violence,**

accountability for torture and abuse during the Bush Administration, solitary confinement, the death penalty, targeted killings, and NSA surveillance programs.

In addition to the concerns raised here, the ACLU has endorsed several other reports submitted to the Committee by coalitions of civil society organizations on other issues, including the right to equitable education, shackling of incarcerated pregnant women, felon disenfranchisement, and religious freedom of prisoners belonging to indigenous communities.

President Obama has said “that international law is not an empty promise, and that treaties will be enforced.”² The review process presents the Administration with an opportunity to put these words into action in its second term by fulfilling the United States’ commitments under the ICCPR. The ACLU looks forward to engaging with the Committee and the government next month and hopes that concerns and recommendations raised in this submission will be meaningfully addressed by the U.S. government during its appearance before the Committee.

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13 September, 2013

¹ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), *available at* <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

² Press Release, Remarks by the President to the United Nations General Assembly, United Nations Headquarters (Sept. 23, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-United-Nations-General-Assembly.

Anti-Immigrant Measures at the State and Federal Level

I. Issue Summary

Following the 2010 passage of Arizona's notorious anti-immigrant law (S.B. 1070), several other states 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 publicity regarding similar bills that passed in Alabama, Georgia, Indiana, South Carolina, and Utah.² All of these laws have as a 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 many 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.

Federal courts have at least partially blocked implementation of the laws in all six states.³ In 2012, the U.S. Supreme Court issued an opinion striking down most of the S.B. 1070 provisions before the Court. However, the Court allowed the provision requiring 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 to go forward, provided that police do not stop, detain, or extend the detention of individuals in order to make immigration inquiries. Following the Supreme Court's decision, litigation against the Indiana law has concluded, with the challenged law permanently struck down. The cases against the other five laws continue, and while many of the provisions have been blocked, the provisions authorizing immigration verification during lawful stops remain.

Although the U.S. Department of Justice filed lawsuits challenging Arizona's S.B. 1070 and similar measures in other states, federal policy continues 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 U.S. 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.⁴

“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 locality's assent to the practice. Under this program, some police engage in unjustified stops and arrests in order to put people through the screening process, actions for which DHS has failed to develop sufficient oversight mechanisms.⁵ “Secure Communities” has been shown to foster racial profiling, undermine community policing, and harm public safety.⁶ 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 latter of which are frequently issued without sufficient evidence that the person is subject to deportation, without judicial approval, and without due process protections.⁷

In its most recent report to the Human Rights Committee, the U.S. government mentioned concerns about all six of the state laws mentioned above, and described lawsuits it 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.”⁸

The human rights abuses associated with anti-immigrant measures at the federal and state levels were addressed in detail in the ACLU List of Issues Submission from December 10, 2012.⁹

II. Relevant Questions in the Human Rights Committee’s List of Issues

- 5) *Please clarify which steps have been taken to eliminate and combat all forms of racial profiling against Arabs, Muslims and South Asians, and whether the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies covers profiling based on religion, religious appearance or national origin. Please provide information on the practices and justification of law enforcement practices involving the surveillance of Muslims in the State party, given that internal investigations of such practices have not resulted in a decision to prosecute. Please clarify whether there are plans to review all relevant immigration enforcement programs, including the Immigration and Customs Enforcement Agreements of Cooperation in Communities to Enhance Safety and Security – Criminal Alien Program, the Secure Communities program, and 287(g) agreements, to determine whether they*

result in racial profiling. Please provide information on the number of complaints regarding racial profiling received annually by the Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties against DHS personnel, as well as the results of the investigations and disciplinary action undertaken.

III. U.S. Government Response

In the U.S. government replies to the list of issues, the U.S. concedes that racial profiling is premised on erroneous assumptions, is ineffective, negatively impacts affected communities, and runs afoul of the U.S. Constitution and other laws and regulations of the United States. The U.S. notes its efforts to train law enforcement from the Federal Bureau of Investigation and the Department of Homeland Security's U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement to refrain from engaging in racial profiling, and states that immigration law enforcement agencies are subject to strict rules regarding profiling. The government also mentions efforts it has taken to investigate profiling, citing a statistic that between October 2011 and May 2013 the DHS Office for Civil Rights and Civil Liberties opened forty-two complaints regarding alleged discrimination on the basis of race, ethnicity, and/or national origin.¹⁰ Forty of these cases are pending or have been closed without recommendations.¹¹

In its replies, the U.S. government also references the June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("the Guidance"), which applies only to the use of race or ethnicity, and mentions that the Department of Justice has created a working group to undertake a comprehensive review of the Guidance, which is "ongoing." The government does not mention when (or if) it will commit to making the Guidance enforceable, nor does it commit to revising the Guidance to prohibit profiling based on religion or national origin. In addition, the government does not address whether the Guidance will be amended to include border enforcement, immigration enforcement, and national security operations, which it currently does not. Moreover, the government does not address whether or not the Guidance will be changed to enable it to apply to state and local law enforcement, at a minimum in the context of those entities that receive federal funds.

The U.S. replies also cite paragraphs 82-85 of the U.S. government's 2013 report to the Committee on the Elimination of Racial Discrimination ("CERD Committee") for additional information on racial profiling.¹² These paragraphs mention actions taken by the Department of Justice's Civil Rights Division to file legal challenges aimed at combating racial profiling and actions taken by DHS to ensure that its programs (including the 287(g) program) are free of racial or ethnic profiling.¹³ In its replies, the U.S. fails to acknowledge the widespread reports of civil and political rights violations which have emerged in 287(g) jurisdictions all over the

country.¹⁴ Moreover, while citing the notable work that DOJ has done in suing local jurisdictions that have engaged in a pattern and practice of racial profiling, the report fails to acknowledge that these same bad actors have frequently also received 287(g) agreements from the federal government.¹⁵ For example, the CERD report refers to a lawsuit that DOJ filed against the Maricopa County Sheriff's Office, which alleged racial profiling and anti-Latino bias, but the report omits the fact that Sheriff Joe Arpaio of Maricopa County, Arizona, had a 287(g) agreement with DHS.¹⁶

IV. 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. The government has ended its use of task force agreements, for the present, but will the United States government abandon the jail partnership agreements under this program? Does the government plan to expand the 287(g) program or renew existing agreements in the future?
2. When will the U.S. government heed the growing number of groups across the country that oppose "Secure Communities" and put an end to the program and fundamentally reform the detainer process – beyond the changes made in December 2012, the impact of which has not been assessed by the government itself – 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 U.S. government do to neutralize the remaining provisions, and any new ones enacted by states? And what will the U.S. government do to protect immigrants in states where some anti-immigrant measures have gone into effect?
4. The UN Committee on the Elimination of Racial Discrimination (CERD), the Special 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? Has the executive branch administratively implemented any portions of the Act?
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, immigration enforcement, and national security operations; and apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funds?

V. Suggested Recommendations

1. End the 287(g) program, including all jail partnerships and task force agreements.

2. End the “Secure Communities” program and reform the government’s use of immigration detainers.
3. Collect and make public data regarding the race, national origin, and religion of individuals stopped, apprehended, or detained pursuant to the 287(g) and “Secure Communities” programs.
4. Support the passage of the End Racial Profiling Act (ERPA).
5. Vigorously oppose existing and new state and local anti-immigrant measures, and take steps to protect immigrant communities where such measures have taken effect.
6. Detail steps taken by the U.S. government to inform and educate state and local governments about their obligations with respect to immigration enforcement under the Covenant.
7. 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. Revise the Department of Homeland Security’s April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates DOJ’s Guidance by reference, accordingly.

¹ Infographic, What’s at Stake: SB 1070 at the Supreme Court, American Civil Liberties Union (last visited Sept. 9, 2013), *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/Legislation/20112012/116631.pdf>; Utah’s HB 497: <http://le.utah.gov/~2011/bills/hbillenr/hb0497.htm>.

³ The ACLU, along with other groups, has filed lawsuits in all six of the states that passed this type of discriminatory legislation. The lawsuits charge that these laws violate the U. S. 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. *See Arizona, et al. v. United States*, 132 S. Ct. 2492 (2012); *Valle del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012); *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *Utah Coalition of La Raza v. Herbert*, 2:11-cv-401 CW, 2011 WL 7143098 (D. Utah May 11, 2011).

⁴ *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*, OIG 10-124, 10-11 (Sept. 2010), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf.

⁵ Letter from American Civil Liberties Union to Charles K. Edwards, Acting Inspector General on Secure Communities 7 (Jun. 20, 2011), *available at* http://www.aclu.org/files/assets/letter_to_dhs_oig_re_scomm_audit.pdf.

⁶ NIK THEODORE, DEP’T OF URBAN PLANNING & POLICY, UNIVERSITY OF ILLINOIS AT CHICAGO, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013); AARTI KOHLI, PETER L. MARKOWITZ, & LISA CHAVEZ, UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (2011).

⁷ Some civil society advocates are predicting that such state and local measures will increase in the next term as communities, in the face of unrelenting DHS enforcement, will stop waiting for reform and choose to establish limits to their entanglement with federal immigration enforcement programs.

⁸ 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>.

⁹ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), available at <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

¹⁰ United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International covenant on civil and Political Rights (ICCPR), ¶¶ 13, 14 (July 3, 2013), available at <http://www.state.gov/j/drl/rls/212393.htm>.

¹¹ *Id.*, ¶ 14.

¹² *Id.* The CERD Report (June 12, 2013) is available at http://www.state.gov/j/drl/rls/cerd_report/210605.htm.

¹³ Comm. on the Elimination of Racial Discrimination, 7th-9th Periodic Report of the United States, ¶¶ 82-85, U.N. Doc. CERD/C/USA/7-9 (June 12, 2013), available at http://www.state.gov/j/drl/rls/cerd_report/210605.htm.

¹⁴ See, e.g., Kohli, *supra* note 6; Press Release, American Civil Liberties Union, DHS Report Confirms Serious Civil Rights Problems with Local Immigration Enforcement Program (Apr. 2, 2010), available at <https://www.aclu.org/immigrants-rights/dhs-report-confirms-serious-civil-rights-problems-local-immigration-enforcement-pr>.

¹⁵ DHS, Office of Inspector General, *The Performance of 287(g) Agreements*, OIG-10-63, 23-24 (Mar. 10, 2010), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

¹⁶ *Homeland Security Limits Ties with Arizona’s Sheriff Joe Arpaio*, LA TIMES, Dec. 15, 2011, available at <http://latimesblogs.latimes.com/nationnow/2011/12/sheriff-joe-arpaio-arizona-maricopa.html>.

U.S.-Mexico Border Killings and Militarization of the Border

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. As a result, there has been a push to militarize U.S. borders, particularly the U.S.-Mexico border. Enforcement-only approaches include border defense strategies designed to funnel migrants into the deadliest regions of the desert, and the expanded use of criminal prosecutions to impose prison sentences on unauthorized border crossers.

In 2013, federal legislative proposals for “comprehensive immigration reform” have continued to emphasize a need to “secure the border” before any pathway to citizenship is made available to the estimated 11 million individuals living in the U.S. without authorization. This emphasis on border security ignores key facts: many U.S. border cities, like El Paso and San Diego, are among the safest cities in the country; apprehensions of undocumented immigrants are at or near 40-year lows; and border crossing deaths continue to rise. Moreover, border spending has already skyrocketed over the last decade, far out of proportion to security demands. Between FY2004 and FY2012, the budget for U.S. Customs and Border Protection (CBP) increased by 94 percent to \$11.65 billion, a leap of \$5.65 billion; this followed a 20 percent post-9/11 increase of \$1 billion.¹

Notwithstanding these well-documented trends, the Senate immigration reform bill developed in 2013—S. 744—includes provisions for a “border surge” that would increase the number of Southwest border patrol agents by 19,200, creating a total force exceeding 38,000. This figure equals one border patrol agent for every 270 feet of the Southwest border. The bill would also require the completion of 700 miles of border fencing, notwithstanding the fact that many experts view the border fence as a failed and costly enterprise. The bill allocates \$3.2 billion for military equipment and technology such as advanced surveillance systems, manned aerial vehicle, unmanned aerial vehicles (drones), radar, and much more.² Commenting on the bill, Senator John McCain remarked: “We’ll be the most militarized border since the fall of the Berlin Wall.”³ In fact, this is an understatement: the wall between the U.S. and Mexico would become seven times longer than the Berlin Wall, with four times as many personnel.

In the past decade, unprecedented investment in border enforcement without corresponding oversight mechanisms has led to an increase in serious human and civil rights violations—including:

- the deaths of more than 5,600 unauthorized border crossers;⁴
- widespread abuses in short-term Border Patrol custody;

- traumatic family separations in border communities;
- arbitrary and invasive searches and seizures of individuals and their property;
- suppression of video recordings of enforcement officers; and
- racial profiling and harassment of Native Americans, Latinos, and other people of color.⁵

Many victims of these violations are U.S. citizens or lawful permanent residents; some have lived in the border region for generations.

At least nineteen people have died since January 2010 as a result of alleged excessive use of force by CBP officials; five of these individuals were U.S. citizens and six were in Mexico when fatally shot.⁶ There have been no transparent investigations of these incidents that release the details of the events—including government video-recordings—to the public.⁷

Among the most shocking incidents of excessive force is the killing of 16-year-old José Antonio Elena Rodríguez, who was shot eleven times by a CBP agent (seven times in the back) on October 10, 2012. The CBP agent was in Nogales, Arizona, firing into Mexico when he killed the teenager, and Border Patrol's initial claims that the boy was throwing rocks over the wall were later contradicted by forensic evidence and eyewitnesses.⁸ When he was shot and killed, José Antonio Elena was carrying nothing other than the cell phone his grandmother had purchased for him.⁹

In another incident, reported by the Public Broadcasting Service (PBS) in April 2012, forty-two-year-old Anastacio Hernández Rojas, a father of five, was killed in an encounter with CBP officials on May 28, 2010.¹⁰ CBP officials maintain that Hernández was combative and resisting arrest; however, the PBS program featured video footage of a dozen CBP agents surrounding Mr. Hernández and repeatedly Taser and beating him while he was handcuffed, hog-tied, and lying prostrate on the ground.¹¹ The San Diego coroner classified Mr. Hernández's death as a homicide, noting in addition to a heart attack: "several loose teeth; bruising to his chest, stomach, hips, knees, back, lips, head and eyelids; five broken ribs; and a damaged spine."¹² On July 29, 2013—more than three years after the incident and only as the result of a wrongful death lawsuit filed by the family—a federal judge in San Diego finally lifted a protective order that had kept secret the names of the Border Patrol agents involved in this incident.¹³ The government had asserted a right to keep the agents' identities secret throughout public court proceedings. To date, the Department of Justice has not released the results of its investigation into this incident, nor has it pressed criminal charges against any of the agents involved.¹⁴

Other cases of lethal use of force include:

- Thirty-six-year-old Guillermo Arévalo Pedroza, who was killed 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 Nuevo Laredo, Tamaulipas, on September 3, 2012;¹⁵
- Thirty-year-old Juan Pablo Pérez Santillán, who was killed by a U.S. Border Patrol agent while standing on the banks of the Rio Grande in Matamoros just across from Brownsville on July 9, 2012;¹⁶
- Nineteen-year-old U.S. citizen Carlos La Madrid, who was killed after being shot in the back four times by Border Patrol agents while allegedly trying to flee to Mexico at the border fence near Douglas, Arizona, on March 21, 2011;¹⁷ and
- Fifteen-year-old Sergio Adrián Hernández Guereca, who was shot and killed by Border Patrol while standing in Juarez, Chihuahua, on June 7, 2010.¹⁸

In three of the nineteen cases, the U.S. Department of Justice has closed its review of the incidents with a press release announcing the agency's decision not to prosecute.¹⁹

Currently, little information is available as to what, if any, internal investigation or disciplinary action CBP undertakes in response to allegations of abuse. The DHS Office of Civil Rights and Civil Liberties (CRCL) receives and investigates civil rights complaints but has no authority to impose discipline or compel policy changes at CBP. The DHS Office of the Inspector General (DHS OIG), another oversight body, has itself been the subject of allegations of falsifying investigative reports.²⁰ Moreover, in recent years, the DHS OIG has had a backlog of complaints, causing it to transfer cases back to CBP for investigation, raising significant conflict of interest concerns.²¹

At this time, two independent reviews of CBP's use of force are being conducted: one by the DHS OIG that was announced more than a year ago and another internal report contracted from an independent, outside agency that was announced in December 2012. The reports are expected to be completed this fall, though the department has not indicated that it will release the results of the internal report.

II. Relevant Questions in the Human Rights Committee's List of Issues

13) Please provide information on:

- a. Steps taken to address cases of police brutality and excessive use of force, in particular against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the United States-Mexico border, and to hold responsible officers accountable for such abuses*

III. U.S. Government Response

Though the question was meant to address police brutality and abuse in federal immigration enforcement agencies, the U.S. response emphasized enforcement efforts against local police. The first three paragraphs (57, 58, and 59) focused on the Department of Justice’s Civil Rights Division (DOJ/CRT) investigations of complaints against local police for excessive use of force, profiling, and abuse of power.

Later discussion of allegations against federal agents was general and lacked the detail necessary to fully understand the scope of the problem. In paragraph 60, the U.S. writes: “[S]ince 2008, DOJ/CRT has opened 48 matters involving allegations of civil rights abuses by CBP agents working on the border, and five such cases have been prosecuted.” The paragraph does not mention the nature of the abuses alleged (whether, for example, they involved allegations of excessive use of force or due process issues), nor does it provide details on the five cases that have been prosecuted in the last six years.²² Nonetheless, even in high profile cases like those of Anastasio Hernández Rojas and José Antonio Elena Rodríguez, DOJ has yet to file charges.

Paragraph 61 also explains that DHS/ICE has a “zero tolerance policy for law enforcement brutality or excessive use of force against any individual, including undocumented migrants or those belonging to racial, ethnic or national minorities.” It does not mention if CBP has a similar policy.

Paragraph 63 provides a brief explanation of the complaints received and investigated by OIG, CRCL, ICE, CBP and other DHS components, but again does not explain the nature of the complaints nor provide a status report regarding complaints that were not investigated by OIG but were instead referred elsewhere.

IV. Recommended Questions

1. Have there been any revisions to CBP’s use-of-force policy and training on use of force as a result of internal or external investigations or complaints? If so, what have been the changes? Do these changes include disciplinary sanctions or other consequences to hold agents accountable? If sanctions exist, please describe.
2. What guidance does CBP provide its officers regarding when use of force is deemed appropriate, escalated or de-escalated? How are CBP agents trained, both initially and on an on-going basis, regarding use of force? Please describe what guidance and alternative technologies (e.g., pepper spray launchers, etc.) are provided to encourage de-escalation during encounters.
3. How are CBP officials held accountable if they are found to have committed civil and

human rights abuses? How many officials have been disciplined in recent years for improper use of force or violations of civil or human rights?

4. Does DHS have a public, central database for receiving, processing, and tracking complaints against CBP? What percent of complaints received are fully investigated by CBP or an external entity? What is the average amount of time it takes a complaint against CBP involving use of force to be investigated?
5. What measures are in place to prevent deaths of migrants crossing the U.S.-Mexico border in remote, rural locations?

V. Suggested Recommendations

1. CBP should reform its use-of-force policies to conform with best practices,²³ including stating in its written policy that human life is paramount and lethal use of force should be utilized only as a last recourse, and notifying or reminding personnel that officers who violate use-of-force guidelines will face timely and meaningful disciplinary action.
2. Any immigration reform proposal approved by the U.S. Congress should establish commensurate oversight and accountability mechanisms to ensure that immigration officials are held accountable for rights violations and abuses of authority. These mechanisms should include:
 - a. an independent, external government oversight office, such as an Ombudsman's Office for DHS, with the authority to adjudicate complaints transparently and provide redress;
 - b. body-worn cameras, with appropriate privacy protections, on all CBP enforcement agents (which can also exonerate agents when they have *not* committed any wrongdoing);²⁴
 - c. increased resource investments in oversight mechanisms, including within the DHS OIG and CRCL, to keep pace with the expansion of CBP personnel and operations;
 - d. increased transparency and authority for the CRCL, including: limited subpoena authority with appropriate due process protections; a requirement that all complainants receive detailed information regarding any findings of fact, investigations, or findings of law with regards to their complaints; and the authority to discipline officers CRCL believes have acted improperly, provide individual redress, and compel policy changes;
 - e. additional oversight and investigation of use-of-force incidents, including requiring DHS to:
 - f. Collect and make public data on all use-of-force incidents

³ See Daniel Strauss, *Sen. McCain: US Will Have 'Most Militarized' Border Since Berlin Wall*, THE HILL, June 25, 2013, available at <http://thehill.com/blogs/blog-briefing-room/news/307543-mccain-corker-hoeven-disproves-arguments-immigration-bill-doesnt-secure-border>.

⁴ See Maria Jimenez, *ACLU OF SAN DIEGO AND IMPERIAL COUNTIES AND THE COMMISSION NACIONAL DE DERECHOS HUMANOS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER* (2009), available at <http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf>.

⁵ See, e.g., UNIVERSITY OF ARIZONA, THE CENTER FOR LATIN AMERICAN STUDIES, *IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY* (2013), available at http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf; HUMAN RIGHTS WATCH, *TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS* (2013), available at <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals-0>; NO MORE DEATHS, *A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY* (2011), available at <http://www.nomoredeathsvolunteers.org/Print%20Resources/Abuse%20Doc%20Reports/Culture%20of%20Cruelty/CultureofCrueltyFinal.pdf>; NO MORE DEATHS, *CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER* (2008), available at <http://www.nomoredeathsvolunteers.org/Print%20Resources/Abuse%20Doc%20Reports/NMD%20-%20Crossing%20the%20Line.pdf>.

⁶ Another recent (non-lethal) excessive use of force claim involved an individual fired upon by Border Patrol officers near Campo Elementary School in San Diego while attempting to evade apprehension. See R. Stickney, Greg Bledsoe and Monica Garske, *Border Patrol Agent Shoots at Suspect in Campo*, NBC 7 SAN DIEGO, June 5, 2013, available at <http://www.nbcsandiego.com/news/local/Campo-School-Lockdown-Border-Patrol-Shooting-Agent-San-Diego-210271091.html>.

⁷ See, e.g., Fernanda Santos, *Shootings by Agents Increase Border Tensions*, N.Y. TIMES, June 10, 2013, available at <http://www.nytimes.com/2013/06/11/us/shootings-by-agents-increase-border-tensions.html?pagewanted=all&r=0> (“Since January 2010, not a single agent has been criminally charged in cases of lethal use of force, and the agency would not say whether disciplinary action had been taken.”).

⁸ See Bob Ortega, *New Details in Mexico Teenager’s Death by Border Patrol*, ARIZONA REPUBLIC, Apr. 11, 2013, available at <http://www.azcentral.com/news/arizona/articles/20130410border-patrol-new-details-mexico-teens-death.html>.

⁹ Santo, *supra* note 7.

¹⁰ See *Anastasio Hernandez-Rojas*, PBS NEED TO KNOW (last visited Sept. 9, 2013), <http://www.pbs.org/wnet/need-to-know/tag/anastasio-hernandez-rojas/>.

¹¹ See, e.g., Lydia Warren, *Chilling Video “Reveals Moment 12 Border Guards Tasered and Beat Mexican Illegal Immigrant to Death,”* DAILY MAIL (U.K.), Apr. 20, 2012, available at <http://www.dailymail.co.uk/news/article-2132920/Anastasio-Hernandez-Rojas-Video-reveals-moment-12-border-guards-tasered-beat-death-Mexican-illegal-immigrant.html>.

¹² See John Carlos Frey, *Opinion: What’s Going on With the Border Patrol?*, L.A. TIMES, Apr. 20, 2012, available at <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>.

¹³ See David Gotfredson, *Border Agents Involved in 2010 Tasing Death Identified*, CBS8.COM SAN DIEGO, July 30, 2013, available at <http://www.cbs8.com/story/22962281/judge-lifts-order-protecting-agent-names-in-2010-border-death>.

¹⁴ See, e.g., Roxana Popescu, *Prosecutions rare in Border Patrol shootings; Political climate, trust and evidence contribute to lack of accountability*, TUCSON SENTINEL, July 19, 2012, available at http://www.tucsonsentinel.com/local/report/071912_deadly_patrols_prosecution/prosecutions-rare-border-patrol-shootings/.

¹⁵ Santos, *supra* note 7.

¹⁶ See Melissa del Bosque, *U.S. Border Patrol Agent Fatally Shoots Man Across Border*, TEXAS OBSERVER, Aug. 30, 2012, available at <http://www.texasobserver.org/us-border-patrol-agent-fatally-shoots-man-across-border/>.

¹⁷ See Amanda Lee Myers, *Carlos La Madrid’s Mother, 19-Year-Old Killed By Border Patrol, Sues*, AP, June 11, 2012, available at http://www.huffingtonpost.com/2012/06/12/mother-of-carlos-lamadrid_n_1589549.html.

¹⁸ See *Family of Mexican Teen Killed By Border Agent Sues U.S.*, AP, Jan. 17, 2011, available at http://www.nbcnews.com/id/41125520/ns/world_news-americas/t/family-mexican-teen-killed-border-agent-sues-us/#.Ufmxg220Qbg.

¹⁹ See Press Release, Department of Justice Office of Public Affairs, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-crt-553.html>; Press Release, Department of Justice Office of Public Affairs, *Federal Officials Close Investigation into the Death of Ramses Barron-Torres* (Aug. 9, 2013), available at <http://www.justice.gov/opa/pr/2013/August/13-crt-908.html>; Press Release, Department of Justice Office of Public Affairs, *Federal Officials Close Investigation into the Death of Carlos LaMadrid* (Aug. 9, 2013), available at <http://www.justice.gov/opa/pr/2013/August/13-crt-907.html>.

²⁰ In April 2011, the Center for Investigative Reporting (CIR) reported that DHS Office of Inspector General agents in Texas were told to falsify reports ahead of an office inspection. That department’s chief investigator and a deputy were placed on administrative leave pending the conclusion of a U.S. Department of Justice and FBI investigation, and a federal grand jury was convened to hear testimony over whether agents fabricated “investigative activity” to show progress on misconduct cases involving homeland security employees. Additionally, the OIG was accused of “sit[ting] on cases rather than allow outside investigators from the FBI or Customs and Border Protection’s internal affairs to pursue them. See Andrew Becker, *Homeland security office accused of faking reports on internal investigations*, CENTER FOR INVESTIGATIVE REPORTING, Apr. 6, 2012, available at <http://cironline.org/reports/homeland-security-office-accused-faking-reports-internal-investigations>.

²¹ *Unresolved Internal Investigations at DHS: Oversight of Investigation Management in the Office of the DHS OIG: Hearing Before the Subcomm. on Government Organization, Efficiency and Financial Management of the H. Comm. on Oversight and Government Reform*, 112th Cong. 2 (2012) (Statement of Rep. Todd Russell Platts, Chairman).

²² The lack of detail and of accountability is consistent with news reporting about use of force claims against other federal law enforcement agencies. See, e.g., Charlie Savage and Michael S. Schmidt, *The F.B.I. Deemed Agents Faultless in 150 Shootings*, N.Y. TIMES, June 18, 2013, available at <http://www.nytimes.com/2013/06/19/us/in-150-shootings-the-fbi-deemed-agents-faultless.html?pagewanted=all>.

²³ An example of a “best practice” use-of-force policy is the one used by the Denver Police Department, which states upfront that the department “recognizes the value of all human life and is committed to respecting human rights and the dignity of every individual, and the Constitutional right to be free from excessive force, whether deadly or not, by a law enforcement officer.” It also makes it very clear that officers who do not abide by the policy will be held accountable, including to criminal laws. See <http://www.denvergov.org/Portals/720/documents/OperationsManual/105.pdf>.

²⁴ See, e.g., Randall Stross, *Wearing a Badge and a Video Camera*, N.Y. TIMES, Apr. 6, 2013, available at http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html?pagewanted=all&_r=0 (using police department in Rialto, California, to assess benefits of having officers wear video cameras, and noting that “[e]ven with only half of the 54 uniformed patrol officers wearing cameras at any given time, the department over all had an 88 percent decline in the number of complaints filed against officers, compared with the 12 months before the study, to 3 from 24.”).

Labor Trafficking of Domestic Workers Employed by Diplomats and of Guestworkers

I. Issue Summary

Across the U.S., domestic workers and foreign nationals employed on a temporary basis (“guestworkers”) are subjected to numerous civil and human rights violations including trafficking and forced labor. These migrant workers are especially prone to such abuse, due in part to the exploitation of visa application processes by duplicitous employers and recruiters and because of serious defects in the structure of the guestworker program. The United States is implicated in these abuses through its failure to take reasonable measures to prevent human rights violations and to protect victims and survivors. In particular, the government has failed to regulate and supervise visa schemes appropriately to prevent abuse and has also failed to amend provisions of the guestworker program that facilitate exploitation. When violations have occurred, the government has failed to vigorously enforce existing anti-trafficking and labor laws, policies, and practices to punish perpetrators and provide redress to victims and survivors.

Under U.S. law, diplomats may bring in domestic workers under A-3 visas; employees of international organizations may bring in workers under G-5 visas. Diplomats and international organization personnel exploit the A-3/G-5 visa application process to lure unsuspecting immigrant workers, the majority of them women, to the U.S. with promises of lucrative employment as domestic workers.¹ Once in the country, diplomats confiscate the women’s passports and employ other coercive measures to effectively trap them in the diplomats’ homes. The women are then forced to toil for extremely long hours for little or no pay. Some have reported being physically or sexually abused. Unlike other employers, foreign envoys are generally immune from civil, criminal, and administrative processes except when the diplomat’s sending country, on a formal request by the U.S., waives their immunity. Such requests are rarely made or granted in trafficking cases. Thus, even when victims have been able to escape their abusers and seek redress, diplomatic immunity laws are often used to prohibit courts from so much as considering their claims. Absent a waiver, diplomats enjoy total impunity to exploit and mistreat domestic workers—at least until they leave their diplomatic posts.

The United States administers two programs that allow employers to bring foreign guestworkers into the country for “unskilled” work on a temporary basis: the H-2(a) program for agricultural workers and the H-2(b) program for non-agricultural workers. Because of serious flaws in the structure of the latter, guestworkers become vulnerable to labor trafficking.² This program grants these foreign workers temporary, non-immigrant status in the United States; a status that binds workers to their “employer-sponsor” and makes the worker’s ability to obtain and retain status entirely dependent on their remaining on good

terms with their employer. This precarious legal situation renders workers disposable commodities of the employer, so, for example, if workers should complain about any aspect of their position, educate other workers about their legal rights, or protest about their compensation, their employer can very easily send them back to their country of origin, irrespective of the conditions of their employment. This power imbalance is exacerbated by the fact that guestworkers frequently arrive saddled with debt after paying the exorbitant recruitment fees recruiters charge.³ This debt is often multiplied by the high interest rates charged by “loan sharks” who some workers approach to fund payment of recruitment fees. Currently, there is no effective oversight of the recruitment process by the government to protect guestworkers from abuse. If guestworkers abandon their jobs, they must choose to either return to their home country in crippling debt, or join the ranks of the nation’s undocumented workers. Foreign recruitment networks need not register with the government, agree to follow U.S. law, or honestly disclose the terms and conditions of employment to recruits.

The abuses outlined above constitute violations of several articles of the ICCPR, including: Article 2(1) (right of non-discrimination); 2(3) (right to remedy); 7 (protection from cruel, inhuman, or degrading treatment or punishment); 8 (freedom from slavery and forced labor); and 26 (right of non-discrimination).⁴

II. Relevant Questions in the Human Rights Committee’s List of Issues

21) Please provide information on steps taken:

a. To combat human trafficking

III. U.S. Government Response

In the U.S. government replies to the list of issues, the U.S. discusses the agencies responsible for prosecuting human trafficking cases and mentions prosecutions in cases involving domestic workers, as well other forms of trafficking and forced labor. However, the U.S. replies do not address labor trafficking by diplomats, or the measures being taken by the United States to prevent and deter it and to provide redress to victims and survivors. The U.S. replies also fail to address labor trafficking facilitated by structural problems inherent in the guestworker program. Furthermore, the U.S. has to date failed to respond to the ACLU petition on behalf of domestic workers in the Inter-American Commission on Human Rights.⁵

IV. Recommended Questions

Trafficking of Domestic Workers by Diplomats

1. What concrete measures has the government adopted to better regulate the issuance of A-3 and G-5 visas to prevent exploitation, trafficking, forced labor, and other abuses of domestic workers by diplomats and personnel of international organizations? For example, does the United States screen domestic workers seeking to extend their employment in the United States before granting visa extensions?
2. What has the United States government done to prosecute diplomats who engage in trafficking, forced labor, and other abuses of domestic workers brought to the United States? Has the government sought waivers of immunity in appropriate cases, and if so, how many?
3. The Trafficking Victims Protection Reauthorization Act of 2008 requires the Secretary of State to suspend countries from the A-3/G-5 visa scheme where there has been one case of exploitation and the mission has tolerated the abuse. Has the United States suspended any countries with a history of trafficking by diplomats, such as India, Kuwait, and Tanzania?

Trafficking Pursuant to the U.S. Guestworker Program

1. What steps will the U.S. government take to address the flaws in its guestworker program so that it is no longer subject to abuse by employers and recruiters?
2. What steps will the U.S. government take to monitor the conditions of H-2(b) guestworkers in the United States?
3. What steps will the U.S. government take to ensure that guestworkers, domestic workers, and agricultural workers are protected by the full panoply of U.S. employment and labor laws, including the right to organize, minimum wage and overtime, worker safety protections, and effective remedies for abuse, harassment, and discrimination?

V. Suggested Recommendations

Trafficking of Domestic Workers by Diplomats

1. The United States should enhance governmental oversight of the A-3/G-5 visa schemes to prevent trafficking, forced labor, and other exploitation perpetrated by diplomats and international organization employees. Such oversight should include interviews, outside the presence of employers, with domestic workers in the United States seeking to extend their employment to screen for possible abuse.

2. The United States should prevent and vigorously prosecute and punish all acts of trafficking and forced labor by diplomats and international organization employees. This includes fully investigating all credible allegations of these abuses. Where the allegations against diplomats are credible, the U.S. government should seek waivers of immunity from sending countries. In appropriate cases, the U.S. should withdraw credentials from diplomatic perpetrators of these crimes and bar them from further diplomatic service in the United States.
3. The U.S. should hold diplomats and their sending countries criminally, civilly, and administratively accountable for trafficking and forced labor. The United States government should assist in the enforcement of civil judgments obtained by victims pursuing cases against their traffickers, and in appropriate cases demand that diplomats' sending countries make *ex gratia* payments to victims of trafficking and forced labor.

Trafficking Pursuant to the U.S. Guestworker Program

1. The U.S. should ensure that in any temporary visa program, workers have the ability to leave abusive U.S. employers and seek employment with other U.S. employers without having to leave the U.S. and return to their country of origin, and that employers bear the recruitment, visa processing, and travel costs of workers.
2. The U.S. should ensure that in any temporary visa program, workers have a path to permanent residency and citizenship (with their families).
3. The U.S. should ensure that in any temporary visa program, there exists robust governmental oversight of labor conditions, and enforcement mechanisms verifying that employers comply with the terms of the contract. The U.S. government should also ensure that guestworkers, domestic workers, and agricultural workers are protected by the full panoply of U.S. employment and labor laws, including the right to organize, minimum wage and overtime, worker safety protections, and effective remedies for abuse, harassment and discrimination.
4. The U.S. should ensure that in any temporary visa program, there exists a rigorous and streamlined governmental process to deny visa applications of employers who have violated workers' rights under prior contracts.

¹ See, e.g., *Sabbithi v. Al Saleh*, 623 F.Supp.2d 93, 93-98 (D.D.C. 2009); *Doe v. Amal*, No. 1:12-cv-01359 (E.D. Va. filed Nov. 27, 2012); Trafficking Victims Protection Act, 22 U.S.C.A. § 7101 (2000); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970).

² *David v. Signal Intern., LLC*, No. 08-1220 (E.D. La., filed Mar. 7, 2008); SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2013), available at <http://www.splcenter.org/get-informed/publications/close-to-slavery-guestworker-programs-in-the-united-states>.

³ Importantly, in 2012, the Department of Labor issued new guidelines on the H-2(b) program which would greatly curb this avenue of exploitation by requiring employer-sponsors to pay for the costs of transportation and recruitment for workers. However, the Department of

Labor's implementing regulations have never come into force following the grant of an injunction in a legal challenge against them brought by a coalition of business interests. *Bayou Lawn & Landscape Services v. Solis*, No. 12-cv-00183-RV-CJK (N.D. Fla., Filed Apr. 26, 2012).

⁴ In General Comment 28 regarding Article 3 (equality of rights between men and women), the Human Rights Committee stated that States Parties should inform the Committee of measures taken to eliminate trafficking of women and children and to protect foreign women and children from slavery disguised as domestic service. Human Rights Comm., General Comment No. 28, Equality of Rights Between Men and Women (Article 3), ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Ad.10 (2000), available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>. 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 (May 26, 2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>.

⁵ *Domestic Workers Employed by Diplomats v. United States*, P-1481-07, Inter-Am. Comm'n H.R. (2008).

Lack of Remedies for Female Victims and Survivors of Domestic Violence

I. Issue Summary

Gender-based violence, including domestic violence, is a serious criminal, public health, economic, and social issue in the United States. Domestic violence impacts individuals and families in every racial, ethnic, religious, and age group, regardless of sex, gender identity, or sexual orientation. But, women are disproportionately impacted, as they are five to eight times more likely to be victims of domestic violence than are men. Overall, more than one out of every three women will experience intimate partner violence during their lives.¹

The U.S. government is obligated under the U.S. Constitution and civil and human rights laws to ensure that these crimes, which disproportionately impact women, receive the same treatment, attention, and resources as other serious crimes of violence. In addition to ensuring that the U.S. government, as well as state and local governments, do not discriminate against women by treating domestic violence and sexual assault differently from other crimes, the due diligence standard also imposes an obligation to proactively prevent these acts of violence against women – whether committed by the State or by private individuals.²

Recently, the U.S. government has taken historic strides to address violence against women, including the launch of the first-ever U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally,³ and several recent consent decrees and agreements reached by the Department of Justice with police departments in New Orleans, Louisiana; Missoula, Montana; and Puerto Rico to prevent and remedy gender discrimination in the policing of domestic violence and sexual assault.⁴ The next crucial step is for the Department of Justice to build upon this growing body of materials on best practices and principles to create a general guidance document for state and local law enforcement on policing domestic violence and sexual assault crimes. While the agreements with police departments in New Orleans, Missoula, and Puerto Rico are important steps, they do not replace a guidance document that would help inform state and local law enforcement practices and procedures for preventing domestic violence and sexual assault, investigating allegations of abuse, and prosecuting gender-based crimes. Such guidance would also clarify the constitutional, civil, and human rights protections against sex discrimination arising from law enforcement treatment of gender-based crimes differently from other violent crimes.

Further, the U.S. government must look beyond law enforcement to develop a holistic approach toward preventing and redressing domestic violence. When a woman ends a relationship with her abuser or escapes an abusive situation, not only is she vulnerable to a physical attack, but her life is often up-ended. Frequently, she must move out of her home in

order to escape the dangerous situation, which could impact her ability to maintain housing and employment. She may be raising minor children, who are frightened or traumatized from being exposed to violence or experiencing it themselves; they must also move homes, and may need to transfer to new schools. It is for these reasons that domestic violence is, sadly, a primary cause of homelessness among women. In order to ensure that housing does not become a barrier for women experiencing domestic violence, the U.S. government must work to provide access to both short-term, emergency housing, as well as permanent housing options. The Department of Housing and Urban Development should ensure that the new housing protections in the recently reauthorized Violence Against Women Act are vigorously enforced, and that all relevant grant programs are fully funded.⁵

Finally, access to counsel and judicial remedies for domestic violence survivors are necessary to break the cycle of violence.⁶ Ending an abusive relationship may implicate a variety of civil matters, including divorce, child custody, and immigration status – any of which could be used by the abusive partner to manipulate the domestic violence survivor and prolong the situation of abuse. Legal counsel for domestic violence survivors not only ensure that their clients obtain access to appropriate legal relief and benefits, they also guarantee that survivors are not forced to negotiate directly with their abusive former partners. The Department of Justice’s new Access to Justice Initiative is a significant step towards recognizing the civil and human rights imperative of access to civil counsel, particularly for people who lack resources or are otherwise marginalized.⁷ Building upon the Access to Justice Initiative, the Department of Justice – in conjunction with other administrative agencies – should develop a national plan for providing access to counsel for domestic violence survivors, their dependent children, and other impacted family members. The Department of Justice, the Department of Housing and Urban Development, and the Department of Health and Human Services, among other agencies, should also work with Congress to maintain full funding for all federal grant programs that provide, facilitate, or coordinate direct services for domestic violence survivors.

The abuses outlined above, and detailed in the ACLU’s December 2012 List of Issues submission,⁸ constitute violations of several articles of the ICCPR, including: Article 2(1) (Right to nondiscrimination); Article 2(2) (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 (Right to be free from torture and other forms of cruel, inhuman or degrading treatment); and Article 26 (Right of nondiscrimination of the ICCPR).

II. Relevant Questions in the Human Rights Committee’s List of Issues

20) Please provide information on steps taken:

- a. to prevent and combat domestic violence, and the impact measured, as well as*
- b. to ensure that acts of domestic violence are effectively investigated and that perpetrators are prosecuted and sanctioned.*

- c. Please clarify what steps have been taken to improve the provision of emergency shelter, housing, child care, rehabilitative services and legal representation for women victims of domestic violence.*

III. U.S. Government Response

In its response to this question, the U.S. government focused on the expanded legal jurisdiction and law enforcement tools provided through the 1994 Violence Against Women Act (VAWA), which was most recently reauthorized this year. While VAWA has significantly improved the investigation and prosecution of domestic violence nationally, it remains a highly under-reported, under-investigated, and under-prosecuted crime, and the U.S. government's response failed to address the Committee's inquiry about the measured impact of its efforts in this area.⁹

The U.S. government also described its key priorities in this area as ensuring safety for victims and holding offenders accountable, but domestic violence will only be effectively prevented and addressed if the government adopts a holistic approach. Such an approach would require, at a minimum, the elements mentioned in the inquiry from the Human Rights Committee – emergency shelter, housing, child care, and access to medical care, counseling, and legal representation. While the U.S. government response mentions grant programs and community partnerships in this area funded by VAWA, the Family Violence Prevention and Services Act (FVPSA), and the Department of Health and Human Services (HHS) Centers for Disease Control and Prevention (CDC), it does not specifically address whether the funding for these programs is sufficient to meet the short and long-term needs of domestic violence survivors and their families. In particular, the U.S. government did not provide information on the extension of legal representation to those impacted by domestic violence, despite the fact that the reporting and prosecution of these crimes may significantly impact a range of civil matters, including divorce, child custody, and immigration status.

Despite an acknowledgement on the part of the U.S. that gender-based violence, including domestic violence, is a pervasive problem in the country, efforts to address domestic violence and attendant human rights violations persist. The U.S. 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.¹⁰

IV. Recommended Questions

1. What specific measures has the United States adopted at the national, state, and local levels through 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 preventing and redressing domestic violence and other forms of gender-based violence?

2. What steps has the U.S. taken to ensure that survivors of domestic violence are afforded access to an effective remedy at the federal, state, and local levels for violations of their rights?
3. What steps has the U.S. taken to inform and train state and local government and law enforcement about their human rights obligations and best practices consistent with the “due diligence” standard to prevent, redress, and provide a remedy for domestic and other gender-based violence?

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 U.S. 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, particularly those areas of law and practice where domestic law may establish a lower standard of legal responsibility on the U.S. government officials;
2. Disseminating accessible and actionable information on relevant human rights laws and standards to federal, state, and local governments and to 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 thereafter, and creating and evaluating best practices in this area of U.S. law and practice.

¹ CTRS. FOR DISEASE CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011).

² See, e.g., American Civil Liberties Union, Written Statement submitted by the American Civil Liberties Union to the Commission on the Status of Women (Nov. 15, 2012), *available at* https://www.aclu.org/files/assets/121115_csw_final.pdf; Declaration on the Elimination of Violence Against Women art. 4(c), Dec. 18, 1979, 1249 U.N.T.S. 13; Comm. On the Elimination of Discrimination Against Women, Gen. Rec. No. 19, ¶ 9, U.N. Doc. A/47/38 (Jan. 29, 1992).

³ U.S. DEP’T OF STATE, UNITED STATES STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY (2012), *available at* <http://www.state.gov/documents/organization/196468.pdf>.

⁴ Press Release, U.S. Dep’t of Justice, Justice Department Announces Consent Decree with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department (July 24, 2012), *available at* <http://www.justice.gov/opa/pr/2012/July/12-ag-917.html>; Press Release, U.S. Dep’t of Justice, Justice Department Files Lawsuit Against the Puerto Rico Police Department for Race, Color and Religious Discrimination (July 22, 2013), *available at* <http://www.justice.gov/opa/pr/2013/July/13-crt-826.html>; U.S. Dep’t of Justice, Justice Department Reaches Settlement to Reform the Missoula, Mont. Police Department’s Response to Sexual Assault (May 15, 2013), *available at* <http://www.justice.gov/opa/pr/2013/July/13-crt-826.html>.

⁵ Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (1st Sess. 2013).

⁶ 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>.

⁷ U.S. Dep't of Justice, *The Access to Justice Initiative* (last visited Sept. 9, 2013), <http://www.justice.gov/atj/>.

⁸ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), available at <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

⁹ See, e.g., American Civil Liberties Union, *Violence Against Women* (last visited Sept. 9, 2013), <https://www.aclu.org/womens-rights/violence-against-women>.

¹⁰ 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>.

Solitary Confinement

I. Issue Summary

Recent decades have seen an explosion in the use of solitary confinement in detention facilities in the United States. Solitary confinement takes many forms, including physical and social isolation by administrative transfer to “supermaximum” security facilities, which can stretch on for decades, as well as punitive, protective, or medical isolation for days, weeks, months, or years. Any prisoner or detainee, regardless of age, gender or, physical or mental health, may be subject to solitary confinement. Persons with mental disabilities are dramatically overrepresented in solitary confinement.¹ Children are subjected to solitary confinement in juvenile facilities as well as in jails and prisons that otherwise house adults.² Vulnerable LGBTI prisoners and immigration detainees are also placed in solitary confinement, in both civil and criminal detention facilities.³ Researchers estimate that over 80,000 U.S. prisoners nationwide are held in conditions that involve substantial social isolation.⁴

Since our last submission, which detailed the human rights violations associated with the practice of solitary confinement,⁵ serious issues remain in the practice of solitary confinement; however there have been the following notable developments at the state, federal, and regional level:

- In January, the U.S. state of Illinois closed its supermaximum security prison, Tamms Correctional Center, which was designed to house prisoners in complete isolation. According to the Illinois Department of Corrections, Tamms was selected to close in part because it was the most expensive facility to operate; it cost over \$60,000 a year – more than three times the state average – to house a prisoner at Tamms.⁶
- In February, the U.S. Bureau of Prisons (BOP) announced that it would submit to a comprehensive and independent assessment of the use of solitary confinement in the nation’s federal prisons.⁷ The Bureau of Prisons holds more than 215,000 prisoners.⁸ In June 2012, the Director of the Bureau stated in a hearing before the U.S. Senate Judiciary Committee that approximately 7% of its population was held in some form of restricted housing that constitutes solitary confinement at any given time.⁹
- In March, in response to reports that solitary confinement practices are widespread in U.S. immigration detention, with 300 immigrants in solitary confinement on any given day, including non-citizens with mental disabilities and LGBTI individuals, U.S. Department of Homeland Security Secretary Napolitano stated that the agency would be reviewing these practices.¹⁰ On September 5, 2013, ICE released a new directive regulating the use of solitary confinement in ICE detention centers, increasing monitoring of the use of solitary confinement, and setting important limits

on its use, especially for vulnerable populations such as individuals with mental disabilities and alleged victims of sexual assault.¹¹

- In March, the Inter-American Commission on Human Rights (IACHR) convened a thematic hearing on solitary confinement in the Americas. This hearing included testimony on solitary confinement in the United States, including by the United Nations Special Rapporteur on Torture.¹² In its concluding statement, the IACHR stated:

[b]ased on the fact that the prohibition of torture and cruel, inhuman, and degrading treatment may not be abrogated and is universal, the OAS Member States must adopt strong, concrete measures to eliminate the use of prolonged or indefinite isolation under all circumstances ... [T]his practice may never constitute a legitimate instrument in the hands of the State. Moreover, the practice of solitary confinement must never be applied to juveniles or to persons with mental disabilities.¹³

- In May, the United States Government Accountability Office (GAO) issued a report on the use of solitary confinement in the U.S. BOP. The report criticized the BOP for failing to conduct any research to determine whether the practice has an adverse effect on prisoners or contributes to facility safety.¹⁴
- Bills to restrict solitary confinement were introduced in the state legislatures of California, Florida, Massachusetts, Montana, and New Hampshire. The state of Nevada enacted restrictions on the solitary confinement of juveniles, and Texas enacted a law requiring a study of solitary confinement in the state.
- In July, the United States Department of Justice sent a letter to the Governor of the state of Pennsylvania stating its finding that the use of isolation on persons with serious mental illness at the state prison at Cresson violates the United States Constitution.¹⁵
- In July, the United States Department of Justice issued a letter in response to a coalition of groups calling for a ban on the solitary confinement of children, stating: “The Department has stated in various contexts that isolation of children is dangerous and inconsistent with best practices and that excessive isolation can constitute cruel and unusual punishment” under the United States Constitution.¹⁶

II. Relevant Questions in the Human Rights Committee’s List of Issues

The most relevant question in the list of issues is included at paragraph 16, related to prolonged cellular confinement. However, this issue is also implicated in the questions included at paragraph 18, related to the treatment in detention of children in conflict with the law (including their separation from adults); and at paragraph 19(c), related to conditions of confinement for non-citizens deprived of their liberty. The questions are excerpted below.

- 16. Please provide information on steps taken to reduce the practice in some maximum security prisons of holding detainees in prolonged cellular isolation, including children and persons with mental disabilities, as well as to improve the conditions and duration of out-of-cell recreation.*
- 18. Please provide information on measures taken to ensure that all juveniles are separated from adults during pretrial detention and after sentencing. Please also clarify whether the State government will take steps to ensure that juveniles are not transferred to adult courts but are tried in juvenile courts with specific juvenile protections.*
- 19. Please clarify: ... (c) Which steps are taken to ensure that immigrants, in particular those with children, and unaccompanied alien children, are not held in jails or jail-like detention facilities.*

III. U.S. Government Response

In the U.S. government replies to the list of issues, the U.S. stated that solitary confinement violates the Eighth and Fourteenth Amendments to the U.S. Constitution under certain circumstances, and especially with regard to persons with serious mental illness and juvenile detainees; that, for persons with disabilities, its use is restricted and regulated by the Americans With Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Prison Rape Elimination Act of 2003, as well as the respective implementing regulations; and that the Department of Justice has completed or is in the process of completing several investigations of state and local detention facilities for patterns and practices of violations of federal statutory and constitutional law.

These statements, in conjunction with the fact that use of solitary confinement by federal and state corrections officials is widespread and systematic across local, state, and federal detention facilities, suggests that violations of federal statutory and constitutional law and regulations as well as various provisions of the ICCPR, including 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) are also widespread.¹⁷

These statements also acknowledge that there is no comprehensive federal ban (in statute or regulation or by judicial decree) on the prolonged solitary confinement of persons deprived of their liberty, the solitary confinement of persons with disabilities, or the solitary confinement of children. There is also very little publicly available data or policies and procedures regarding the use of solitary confinement in local, state, and federal detention facilities in the United States, including the BOP.

IV. **Recommended Questions**

1. Please provide data regarding the use of solitary confinement in the Federal Bureau of Prisons, including:
 - A. State the number of prisoners in the custody of the Federal Bureau of Prisons who have been continuously 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.
 - C. 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).

2. Please provide equivalent 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.
3. 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 persons?

V. 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 Jeff Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010). See also AMERICAN CIVIL LIBERTIES UNION OF COLORADO, OUT OF SIGHT, OUT OF MIND (July 2013), available at http://aclu-co.org/sites/default/files/imce/ACLU-CO%20Report%20on%20Solitary%20Confinement_2.pdf.

² See AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN (Oct. 2012), available at <http://www.aclu.org/files/assets/us1012webwcover.pdf>.

³ 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.

⁴ Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46 (2011).

⁵ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), available at <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

⁶ Office of Illinois Governor Pat Quinn, *Fiscal Year 2013 Budget: Efficiencies Fact Sheet – FY2013 Budget*, available at <http://www2.illinois.gov/gov/budget/Documents/Budget%20Book/FY%202013/FINAL%20Efficiencies%20Fact%20Sheet%20-%20FY2013%20Budget.pdf>.

⁷ United States Senator Dick Durbin, *Durbin Statement on Federal Bureau of Prisons Assessment of its Solitary Confinement Practices* (Feb. 2013) <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=07260483-4972-4720-8d43-8fc82a9909ac>.

⁸ UNITED STATES FEDERAL BUREAU OF PRISONS, WEEKLY POPULATION REPORT, http://www.bop.gov/locations/weekly_report.jsp.

⁹ 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), available at <http://solitarywatch.com/wp-content/uploads/2012/06/transcript-of-the-hearing.pdf>.

¹⁰ Ian Urbina, *Officials to Review Immigrants' Solitary Confinement*, N.Y. TIMES, Mar. 27, 2013, at A16, available at <http://www.nytimes.com/2013/03/27/us/immigrants-solitary-confinement-to-be-reviewed.html>; Ian Urbina, Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Months*, N.Y. TIMES, Mar. 24, 2013, at A1, available at <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all>.

¹¹ Press Release, American Civil Liberties Union, New Directive Issued on Use of Solitary Confinement in Immigration Detention (Sept. 5, 2013), available at <https://www.aclu.org/immigrants-rights/new-directive-issued-use-solitary-confinement-immigration-detention>.

¹² See, e.g., Statement of Special Rapporteur on Torture Juan Mendez (Mar. 2013), available at http://www.aclu.org/files/assets/presentacion_del_relator_especial_sobre_la_tortura_-_cidh_audiencia_aislamiento_solitario_en_las_americanas_3_-12-_13.pdf.

¹³ Inter-American Commission on Human Rights, *Annex to the Press Release Issued at the Close of the 147th Session* (Apr. 2013), http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp.

¹⁴ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING (May 2013), available at <http://gao.gov/assets/660/654349.pdf>.

¹⁵ Letter from Thomas E. Perez, Assistant Attorney General to Honorable Tom Corbett, May 31, 2013, http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

¹⁶ Letter from Robert L. Listenbee to Jesselyn McCurdy, ACLU Senior Legislative Counsel, July 5, 2013, https://www.aclu.org/sites/default/files/assets/doj_ojdp_response_on_jj_solitary.pdf; Grace Bauer, *What Happened to My Son Should Never Happen Again*, ACLU (Aug. 28, 2013), <https://www.aclu.org/blog/criminal-law-reform-prisoners-rights/what-happened-my-son-should-never-happen-again>.

¹⁷ 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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/7e9dbcf014061fa7c12563ed004804fa?Opendocument](http://www.unhcr.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 in 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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a4f543b9dadd08a7c12563ed00487ed8?Opendocument](http://www.unhcr.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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument). Replacing General Comment 7, the Human Rights Committee issued General Comment 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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3327552b9511fb98c12563ed004cbe59?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument).

The Death Penalty

I. Issue Summary

Since 1976, when the modern death penalty era began in this country,¹ 1,340 people have been executed.² As of January 2013, there were 3,125 people awaiting execution across the country.³ The U.S. death penalty system in 32 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 continue to be positive developments regarding the death penalty in the United States. The number of new death sentences continues to drop, and on May 2, 2013, Maryland became the sixth state in six years to repeal the death penalty. Three other states – Delaware, Nebraska, and Colorado – came very close to repeal this year. Two state governors issued unexpected reprieves from executions for death row prisoners, including the governor of Oregon and the governor of Colorado. Other governors, in Arkansas, Kentucky, and Ohio, including some Republicans, have expressed deep concerns about implementation of capital punishment.

Despite these positive signs, the U.S. death penalty system remains fraught with problems, as addressed in detail in the ACLU List of Issues Submission from December 10, 2012,⁴ and with respect to the U.S. government's replies to the Human Rights Committee's questions, which will be addressed more fully below.

II. Relevant Questions in the Human Rights Committee's List of Issues

6) *Please provide information on:*

- a. *Death sentences imposed, the number of executions carried out, the grounds for each conviction and sentence, the age of the offenders at the time of committing the crime, and their ethnic origin;*
- b. *Whether the death penalty has been imposed on people with mental or intellectual disabilities since the 2002 Supreme Court ruling in Atkins v. Virginia exempting people with "mental retardation" from the death penalty;*
- c. *Steps taken to guarantee access to federal review of state court death penalty convictions, in the light of the drastic limits imposed by the Antiterrorism and Effective Death Penalty Act of 1996 and the USA Patriot Improvement and Reauthorization Act of 2005 on the availability of federal habeas corpus relief for defendants sentenced to death;*
- d. *Steps taken to ensure that the death penalty is not imposed on the innocent;*
- e. *Steps taken to improve criminal defence programmes and legal representation for indigent persons in capital cases, including in Alabama and Texas, as well as civil proceedings, in particular for defendants belonging to racial, ethnic and national minorities.*

III. U.S. Government Response

While the death penalty is practiced primarily at the state level, the federal government continues to retain the penalty and fails to do its share to rid the country of this reviled punishment. For example, the federal government could issue a moratorium on all federal executions. It could also take interim actions to minimize the widespread problems in the imposition of the penalty, especially with regard to access to effective counsel and racial disparities in the system. As discussed below, the U.S. response leaves out vital information pertinent to the application of the death penalty in the United States.

Issue 8(a). The death penalty continues to be applied arbitrarily and disproportionately in the United States. 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 based less on the law and facts of a case and more on race, class, and geography. The U.S. government offers outdated numbers from 2010 in its report. Current numbers confirm that the death penalty continues to be disproportionately imposed against people of color. As of January 1, 2013, 42% of defendants under sentence of death were Black/African-American, and 43% were white.⁵ In light of these numbers, and substantial evidence that death sentences and executions are carried out in a racially biased manner, the U.S. government should at the very least fulfill its commitment during the UPR process to study racial disparities in the death penalty system.

Issue 8(b). The U.S. government's response that no mentally retarded defendants have been executed since the Supreme Court's ruling in *Atkins v. Virginia* ignores clear evidence to the contrary. The intellectually disabled continue to be sentenced to death and executed in the United States, despite the *Atkins* decision.⁶ Although the Court in *Atkins* required all capital jurisdictions to permanently and completely exempt the intellectually disabled, it left procedures for determining intellectual disability up to the states. But some states, looking often to stereotypes of persons with mental retardation, and disregarding established science, apply exclusion criteria that deviate from and are more restrictive than the accepted scientific and clinical definitions. These state deviations have the effect of excluding from *Atkins*'s reach some individuals who plainly fall within the class it protects.

The State of Texas executed Marvin Wilson on August 7, 2012. Wilson had an I.Q. of 61 and there was abundant evidence that he was mentally retarded.⁷ Nevertheless, Texas justified the execution by finding that Wilson did not meet the judge-made, non-scientific "definition" established by its highest criminal court in *Ex parte Briseno* (2004).⁸

Like Texas, the State of Florida also does not follow the clinical definition of mental retardation, and thwarts *Atkins* in another way – by strictly requiring an IQ score of 70 or below.

This, too, is based on a troubling misapplication of the clinical guidelines. A recent study showed that half of all losing *Atkins* claims in Florida were cases where the claimant did not have a score below 70, but had otherwise been deemed mentally retarded, and in half of those cases, the state's strict cutoff at 70 determined the outcome.⁹ Like Texas's adaptive-strength focus, Florida's unscientific IQ cut-off permits unconstitutional executions.

These troubling practices exist in other death penalty states as well. Alabama executed Holly Wood on September 8, 2010, despite strong evidence that he was mentally retarded,¹⁰ and Georgia death row prisoner Warren Hill has come dangerously close to execution on a number of occasions, though every expert who has evaluated him agrees that he is intellectually disabled and ineligible for the death penalty under *Atkins*.¹¹ Georgia is also the only state in the country in which capital defendants must prove mental retardation beyond a reasonable doubt, the strictest burden of proof in the criminal justice system.

Issue 8(c). The U.S. government has taken no steps to improve access to federal review of state court death penalty convictions. The Antiterrorism and Effective Death Penalty Act of 1996 and the USA Patriot Improvement and Reauthorization Act of 2005, as well as numerous decisions interpreting those acts from the United States Supreme Court, continue to drastically limit the availability of federal habeas corpus relief for condemned prisoners. As a result, defendants who are later able to present evidence establishing their innocence or who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and the suppression of exculpatory evidence by the prosecution have been left without judicial recourse. Nor has Congress acted to implement the *Avena* decision of the ICJ.¹² Moreover, the Supreme Court declined the stay of execution and application for writ of habeas corpus in the absence of implementing legislation.¹³ Restrictions on federal habeas continue to block meaningful remedies for violations of condemned inmates' consular rights under the Vienna Convention on Consular Relations (VCCR).

Issue 8(d). Despite some of the protections cited by the U.S. Government in its response, the safeguards in place are obviously not working. The number of people exonerated from death row across the United States continues to climb. Since 1973, 142 innocent people have now been released from death row.¹⁴ Still many others have been released from death row after their guilt for the capital offense was put in doubt, though they have not been exonerated completely.¹⁵ Tragically, not all innocent people have escaped execution.¹⁶ No federal agency or body has been tasked with identifying the causes of so many wrongful convictions in capital cases.

While the government notes that federal capital defendants have a conditional right to post-conviction DNA testing, this right is not absolute, and many states do not guarantee capital defendants the right to post-conviction DNA testing.¹⁷ For instance, the State of Mississippi

came dangerously close to executing Willie Manning, without giving him the opportunity to conduct DNA testing of critical evidence in his case, even though the Federal Bureau of Investigation supported the testing. Fortunately, at the last minute, his execution was stayed by the Mississippi Supreme Court, though Manning remains on Mississippi's death row.¹⁸

Issue 8(e). While the federal government has provided some resources to improve capital defense programs across the country as noted in its reply, these resources still fall far short of what is necessary for competent and constitutional representation in capital cases. There remains a huge disparity between the modest grants to capital defenders and the amounts provided by the federal government to state law enforcement and prosecutors. The situation is worsened under the current federal sequester, which is disproportionately affecting defense resources for indigent clients, while leaving prosecutors and law enforcement relatively untouched.¹⁹ The federal government should commit to increased funding to indigent defense systems.

IV. Recommended Questions

1. What progress, if any, has the United States made to fulfill its UPR commitment 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?

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.²⁰
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. States must ensure that capital defense lawyers have adequate time, compensation, and resources for their work on each case to ensure the enhanced fair trial rights guaranteed under the ICCPR are protected for each individual threatened with a death sentence.

5. Congress should implement the *Avena* decision by passing appropriate legislation.

¹ *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).

² As of July 26, 2013. *Executions by Year Since 1976*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 9, 2013), <http://www.deathpenaltyinfo.org/executions-year>.

³ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *DEATH ROW U.S.A.* (Winter 2013), available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2013.pdf.

⁴ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), available at <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

⁵ *DEATH ROW U.S.A.*, *supra* note 3.

⁶ See generally John Blume, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation*, 18 CORNELL J. L. & PUB. POL'Y 689 (2009); John Blume, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009).

⁷ Editorial, *Mentally Retarded and on Death Row*, N.Y. TIMES (Aug. 3, 2012), available at http://www.nytimes.com/2012/08/04/opinion/mentally-retarded-and-on-death-row.html?_r=2&.

⁸ *Ex Parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004).

⁹ John Blume, *An Empirical Look at Atkins*, *supra* note 6.

¹⁰ Brendan Kirby, *Alabama's Shameful Execution*, THE DAILY BEAST (Sept. 8, 2010), available at <http://www.thedailybeast.com/articles/2010/09/08/holly-wood-death-rows-mentally-retarded-inmate.html>.

¹¹ Ed Pilkinton, *Georgia court blocks Warren Hill execution as state acquires new drugs*, THE GUARDIAN, July 18, 2013, available at <http://www.theguardian.com/world/2013/jul/18/georgia-blocks-warren-hill-execution-new-drugs>.

¹² *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

¹³ *Leal Garcia v. Texas*, 654 U.S. ___ (2011).

¹⁴ *The Innocence List*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 9, 2013), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

¹⁵ *Partial Innocence – Conviction Reduced*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 9, 2013), <http://www.deathpenaltyinfo.org/additional-innocence-information#Released>.

¹⁶ *Executed but Possibly Innocent*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 9, 2013), <http://www.deathpenaltyinfo.org/executed-possibly-innocent>. See also, e.g., James Liebman et al., *Anatomy of an Execution, Los Tocayos Carlos*, 43 COLUMN. HUM. RTS. L. REV. 711 (2012), available at <http://www3.law.columbia.edu/hrlr/ltr/>.

¹⁷ See *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT (last visited Sept. 9, 2013), http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php.

¹⁸ *Manning v. State*, No. 95-DP-00066-SCT (Miss. 2013).

¹⁹ See, e.g., Michael S. Nachmanoff, *Sequestration Threatens to Eviscerate Federal Public Defenders*, THE HILL, (July 23, 2013, 2:00 PM), available at <http://thehill.com/blogs/congress-blog/judicial/312659-sequestration-threatens-to-eviscerate-federal-public-defenders>; Ryan J. Reilly, *Federal Public Defender Sequester Cuts Slammed As 'Ill-Conceived'*, (July 23, 2013, 2:35 PM), available at http://www.huffingtonpost.com/2013/07/23/federal-public-defender-sequestration-cuts_n_3640783.html.

²⁰ Special Rapporteur on extrajudicial, summary, or arbitrary executions, *Follow-up to country recommendations—United States of America*, U.N. Doc. A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns); Special Rapporteur on extrajudicial, summary, or arbitrary executions, *Addendum – Mission to the United States of America*, U.N. Doc. A/HRC/112/Add.5 (May 28, 2009) (by Philip Alston).

Accountability for Torture and Abuse during the Bush Administration

I. Issue Summary

Definitive evidence has come to light that Bush Administration officials committed serious crimes under U.S. 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 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."¹ 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, by 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. In June 2012, for example, the U.S. Supreme Court refused to review a lower court's dismissal of a civil damages lawsuit against senior Bush Administration officials for their roles in the unlawful detention and torture of U.S. citizen Jose Padilla.² 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.

With domestic avenues for relief closed, a number of victims of U.S. torture and abuse have filed petitions against the United States with the Inter-American Commission on Human Rights.³ The government has yet to respond to any of the petitions, including one filed over five years ago.

Finally, the U.S. government continues to withhold from the public key documents relating to the CIA's rendition, detention, and interrogation program. Chief among them is a 6,000-page report of the Senate Select Committee on Intelligence, which, according to the Chairwoman of the Committee, is "a comprehensive review of the CIA's detention program that includes details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated."⁴ The Chairwoman recently stated her intent to seek the declassification and release of at least the 300-page executive summary of the report; however, neither the report nor the CIA's recently submitted response to it is yet public.⁵ These violations were addressed in detail in the ACLU List of Issues Submission from December 10, 2012.⁶

II. Relevant Questions in the Human Rights Committee's List of Issues

11) Please provide information on:

- a. Whether the State party has instigated independent investigations into cases of torture or cruel, inhuman or degrading treatment or punishment of detainees in United States custody outside its territory. Please clarify whether those responsible have been prosecuted and sanctioned, and whether the State party has prosecuted former senior government and military officials who have authorized such torture and abuse;*
- b. Whether the State party deems so-called "enhanced interrogation techniques", now prohibited by the State party, including "water boarding," to be in violation of article 7 of the Covenant. Please provide information on whether the State party has taken steps to prosecute officers, employees, members of the Armed Forces, or other agents of the Government of the United States, including private contractors, for having employed these techniques, and what is being done to prevent the use of such techniques in the future. Please also clarify whether remedies have been offered to victims of such techniques;*
- c. The reasons for the absence of legislation explicitly prohibiting torture within the territory of the State party.*

III. U.S. Government Response

In the U.S. government replies to the list of issues, the U.S. stated that torture and cruel, inhuman or degrading treatment or punishment is prohibited at all times and that the U.S. armed forces promptly and independently investigate allegations of detainee mistreatment.⁷ As an example, the U.S. cited the prosecution of a Central Intelligence Agency (CIA) contractor accused of assaulting a detainee in Afghanistan in 2003.⁸ However, despite credible evidence of the widespread and systemic use of torture by U.S. officials, no other prosecutions have been initiated. As the U.S. replies note, in 2012, the Attorney General closed any further investigation into detainee abuse. In its replies, the U.S. also fails to acknowledge its use of jurisdictional and immunity doctrines to prevent victims and survivors of U.S. forced disappearance, torture and cruel, inhuman or degrading treatment from accessing civil redress in U.S. courts and its failure to respond to petitions by the ACLU and others seeking redress for these unlawful acts before the

Inter-American Commission on Human Rights. Finally, the U.S replies do not address its failure to publicly disclose the results of the Senate Select Committee on Intelligence investigation—as well as the CIA’s response to that investigation—into the role of the CIA in the use of torture and abuse.

IV. Recommended Questions

1. What measures have been taken to comprehensively and effectively investigate and, when warranted by the evidence, 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. did not 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. government’s obligations under ratified treaties and other international laws to investigate and, when warranted, prosecute civilian and military leaders who ordered and approved the use of torture?
3. Given the 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 remedies for their mistreatment? 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—as well as the CIA’s response to that 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 to protect the rights of those seeking an opportunity to be heard, and potentially seek redress, through the U.S. court system.

3. The U.S. government should release critical documentation of torture and other abusive forms of treatment sought under the Freedom of Information Act (FOIA).
4. The U.S. should establish a fund for reparations to persons who were subjected to torture and other forms of cruel, inhuman or degrading treatment while held under U.S. custody or control.

¹ Scott Shane, *Portrayal of C.I.A. Torture in Bin Laden Film Reopens a Debate*, N.Y. TIMES, Dec. 12, 2012, available at <http://www.nytimes.com/2012/12/13/us/zero-dark-thirty-torture-scenesreopendebate.html?pagewanted=all>.

² Press Release, American Civil Liberties Union, Supreme Court Denies Request to Hear Torture Victim's Lawsuit (June 11, 2012), available at <https://www.aclu.org/national-security/supreme-court-denies-request-hear-american-torture-victims-lawsuit>.

³ See *Jose Padilla and Estella Lebron v. United States*, Inter-Am. Comm'n H.R. (2012); *Thahe Mohammed Sabar and others v. United States*, P-417-12, Inter-Am. Comm'n H.R. (2012); *Binyam Mohamed and others v. United States*, Inter-Am. Comm'n H.R. (2011); *Khaled El Masri v. United States*, P-419-08, Inter-Am. Comm'n H.R. (2008).

⁴ Press Release, Senator Dianne Feinstein, Feinstein Statement on CIA Detention, Interrogation Report (Dec. 13, 2012), available at <http://www.feinstein.senate.gov/public/index.cfm/2012/12/feinstein-statement-on-cia-detention-interrogation-report>.

⁵ See Mark Mazzetti & Scott Shane, *Senate and C.I.A. Spar over Secret Report on Interrogation Program*, N.Y. TIMES, July 19, 2013, available at <http://www.nytimes.com/2013/07/20/us/politics/senate-and-cia-spar-over-secret-report-on-interrogation-program.html?pagewanted=all>.

⁶ ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 10, 2012), available at <https://www.aclu.org/human-rights/aclu-suggested-list-issues-un-country-report-task-force-us-compliance-international>.

⁷ United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR), ¶ 44 (July 3, 2013), available at <http://www.state.gov/j/drl/rls/212393.htm>.

⁸ *Id.*, ¶ 46.

Targeted Killings

I. Issue Summary

Since our submission to the Committee in December 2012,¹ there have been a few positive developments with respect to long-overdue transparency concerning the United States' targeted killing program. As discussed below, however, many of these developments raise more questions than answers about the lawfulness of U.S. lethal force strikes abroad. Moreover, the United States is still keeping entirely secret from the American public and the international community basic information about lethal strikes—including the identity of targets and victims, numbers of casualties (including civilian bystanders), and the basis for strikes—and it is refusing to provide meaningful transparency and accountability in domestic courts.

On February 8, 2013, the United States officially released a white paper summarizing its claimed legal basis for the use of lethal force against a U.S. citizen abroad.² It did so after a leak of the same document days earlier.³ On May 23, 2013, the government released a “Presidential Policy Guidance” outlining the policy standards to which it would internally adhere when using lethal force outside active hostilities.⁴ Under the new policy, the United States has said it will only use lethal force against “continuing, imminent” threats to the American people; previously, according to credible media reports, the United States had on occasion used lethal force against individuals who presented a threat not to the United States, but to the governments of states in which the killings were carried out. Importantly, the government clarified that it will apply its new, apparently more protective, rules regardless of the target's citizenship, eliminating a troubling distinction between citizens and non-citizens. In addition, President Obama announced in a speech at National Defense University that the U.S. government will only use lethal force when there is “near-certainty” that civilian bystanders will not be injured or killed.⁵

While these new policy pronouncements were an encouraging, though belated, move toward openness about U.S. government targeted killing policies, there are disturbing indications that little has changed in practice.

As an initial matter, the new rules remain highly opaque. Most basically, it is unclear how the U.S. government defines the “places of active hostilities” in which the new rules do *not* apply. And the rules do nothing to address the fundamental problem with U.S. targeted killing policy: the standards it is using violate international human rights law, which prohibits use of lethal force outside of armed conflict unless it is a last resort, used against a specific, concrete, and imminent threat. That concern is heightened by the U.S. government's novel interpretations of human rights law. For example, according to the white paper, the U.S. government claims the authority to use lethal force against an individual who constitutes a “continuing, imminent threat”—as the government defines “imminence,” it need not even have clear evidence that the threat involves a concrete and known plot. If true, the government's elastic definition of

“imminence” is a clear departure from international standards, and from plain English.⁶ Additionally, though the Presidential Policy Guidance states that the government will conduct targeted killings only where capture is not feasible and no reasonable alternatives to the use of lethal force exist, the document contains no explanation of what those purported constraints mean in practice. In short, while we appreciate these efforts to explain U.S. government policy standards to the public, those explanations provoke more concerns and questions than provide answers, and do nothing to inspire confidence that the U.S. government is adhering to its international legal obligations.

Concern about the government’s actual implementation of new policies was heightened when, just days after the Presidential Policy Guidance was released, officials confirmed that the government would continue to carry out so-called “signature strikes”—the targeting of unidentified individuals based on apparent behavioral patterns.⁷ On its face, the Presidential Policy Guidance appeared to have constrained the practice of signature strikes. That the U.S. government carved out an exception to an apparent restriction so soon after it was announced calls into question the extent to which the government is relying on other loopholes in its own policy constraints.

II. Relevant Questions in the Human Rights Committee’s List of Issues

The use of so-called targeted killings by the U.S. outside recognized armed conflict remains a significant threat to the right to life and continues to result in violations of the ICCPR. The Committee has asked the U.S. Government to address the following question:

10) Regarding the protection of life in armed conflict:

- a. Please clarify how targeted killings conducted through drone attacks on the territory of other States, as well as collateral civilian casualties are in compliance with Covenant obligations. Please clarify how the State party ensures that such use of force fully complies with its obligation to protect life.*

III. U.S. Government Response

The U.S. government’s response to the Committee emphasized that its targeted killing program is “consistent with all applicable . . . international law.”⁸ But the government’s policy choices on their face deviate from stringent international legal requirements, and the government has thus far refused to make public the legal memoranda containing its analysis and interpretation of the legal constraints on the use of lethal force. Perhaps most problematically, the Presidential Policy Guidance - which is invoked in the U.S. replies to the Committee’s list of

issues - is explicitly a government *policy*; it is not an expression of the government's view of the *law*. In the context of the government's targeted killings practices, that is a key discrepancy.

Furthermore, the government has not disclosed its selection process or evidentiary criteria for targeted killing decisions. Although the government has finally acknowledged responsibility for killing four U.S. citizens, it refuses to disclose the identity or number of non-citizens, including civilian bystanders, who have been killed. In the absence of that information, neither the Committee nor the international community at large can have confidence that the U.S. government's targeted killing actions actually adhere to the legal requirements.

Crucially, while the U.S. government continues to publicly insist that its targeted killing program complies with its international obligations to protect the right to life, it has maintained an unwavering opposition to judicial review and accountability.

For example, in March 2013, a federal appeals court in Washington, D.C., ruled in an ACLU Freedom of Information Act lawsuit that the Central Intelligence Agency could no longer refuse to confirm or deny whether it had information about the government's use of drones to carry out targeted killings.⁹ The ruling affirmed the public's right to understand and evaluate the government's conduct and defense of the program with information beyond what the government has selectively chosen to leak and disclose. Yet, in recent court filings, the CIA insists that it cannot release documents that respond to the ACLU's request and it will not even disclose at the most general level the records in its possession.¹⁰

In a separate case, in July 2013, the U.S. government argued in federal court that the judicial branch has no role in adjudicating the legality of the killings of three American citizens for whose deaths the government has publicly acknowledged responsibility.¹¹ The ICCPR guarantees the right to an effective remedy when life is wrongfully taken, and the U.S. government's legal arguments in domestic wrongful-death actions stands in diametric opposition to that fundamental requirement and treaty obligation.

The U.S. government must do much more with respect both to transparency about the scope of lethal-force authority it claims and to limiting that scope so that its actions comport with its international legal obligations under human rights law.

IV. Recommended Questions

In addition to the questions and recommendations previously submitted:

1. Provide the identities and numbers of non-U.S. citizens killed or injured in the government's targeted killing program, including the number of civilian bystanders who

have been killed or injured. If the government refuses to disclose this information, provide an explanation of why it distinguishes between citizens and non-citizens when it comes to releasing this basic information.

2. Describe with specificity whether and how the U.S. government may depart from the Presidential Policy Guidance and how any such departure complies with international human rights law.
3. Describe with specificity how the U.S. government's claimed "signature strike" authority complies with international human rights law, and the circumstances under which such strikes will be conducted.
4. Describe the measures in place to provide prompt, thorough, effective, and independent public investigations of alleged violations of international humanitarian and human rights law resulting from lethal force operations outside of Afghanistan.
5. Explain how the U.S. government's opposition to judicial review of the lawfulness of targeted killings of its own citizens complies with its obligation under the ICCPR to provide an effective remedy for violations of the right to life.

V. Suggested Recommendations

1. The U.S. Government should disclose the legal and policy standards, including the OLC opinions and the rules implementing the Presidential Policy Guidance, relevant to the targeted killing program.
2. The President should direct an end to any use of force outside of Afghanistan that does not comport with international human rights law.
3. The Executive Branch should refrain from invoking jurisdictional, secrecy, and immunity doctrines to prevent judicial review of the merits of wrongful targeted killing claims in domestic courts.

¹ Columbia Law School Human Rights Institute and ACLU Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the International Covenant on Civil and Political Rights (Dec. 28, 2012), *available at* http://www.ushrnetwork.org/sites/ushrnetwork.org/files/aclu_columbia_law_school_human_rights_committee_submission_-_targeted_killing.pdf.

² DOJ White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

³ Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS (Feb. 4, 2013), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite.

⁴ Presidential Policy Guidance, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, *available at* http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

⁵ President Barack Obama, Remarks at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

⁶ See Jameel Jaffer, *The Justice Department's White Paper on Targeted Killing*, ACLU (Feb. 4, 2013), <https://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing>.

⁷ Peter Baker, *In Terror Shift, Obama Took a Long Path*, N.Y. TIMES, May 27, 2013, <http://nyti.ms/11t06mz>.

⁸ United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR), ¶ 34 (July 3, 2013), *available at* <http://www.state.gov/j/drl/rls/212393.htm>.

⁹ *American Civil Liberties Union v. CIA*, 710 F.3d 422 (D.C. Cir. Mar. 15, 2013).

¹⁰ Memorandum of Points and Authorities in Support of Defendant CIA's Motion for Summary Judgment, *American Civil Liberties Union v. CIA*, No. 1:10-cv-00436-RMC (D.C. Cir. Aug. 9, 2013).

¹¹ Press Release, American Civil Liberties Union, Court Hearing Friday in Lawsuit Challenging U.S. Drone Killings of Three Americans (July 18, 2013), *available at* <https://www.aclu.org/national-security/court-hearing-friday-lawsuit-challenging-us-drone-killings-three-americans>.

NSA Surveillance Programs

I. Issue Summary

Over the last two months, it has become clear that the National Security Agency (NSA) is engaged in far-reaching, intrusive, and unlawful surveillance of telephone calls and electronic communications both within and outside the United States. Through media reports as well as U.S. government declassifications, we have recently learned about two such forms of NSA surveillance.¹ Through one, the NSA is collecting the “telephone metadata” of every single phone call into, out of, and within the United States. Through another, which includes programs called “PRISM” and “UPSTREAM,” the NSA is engaged in the large-scale collection, storage, and monitoring of the content of electronic communications all around the world. These mass surveillance programs violate the U.S. Constitution and are the product of defects both in the laws that authorize them and in the current oversight system. Both of the programs also raise serious concerns about whether they violate the U.S. government’s obligations under international human rights law to protect the right to privacy and the right to free expression.²

The Foreign Intelligence Surveillance Act (FISA) affords the government sweeping power to monitor the communications of innocent people, and the law’s imposition of excessive secrecy over the existence, operation, and oversight of the programs it authorizes has made legislative oversight difficult and public oversight impossible. Intelligence officials have repeatedly misled the public, the U.S. Congress, and domestic courts about the nature and scope of the government’s surveillance activities. Moreover, structural features of the Foreign Intelligence Surveillance Court (FISC) have changed dramatically since the court was first established more than thirty years ago, and it is clear from recent disclosures that those changes prevent that court from serving as an effective guardian of individual rights and overseer of executive power. Finally, challenges to the U.S. government’s surveillance practices in regular U.S. courts have been thwarted by procedural doctrines that foreclose meaningful and substantive judicial review of U.S. government surveillance programs, enabling the executive branch to act, improperly and inadequately, as its own “check.”

The U.S. government’s extensive collection of electronic-communications content under the PRISM and UPSTREAM programs is profoundly disturbing, and it raises serious concerns that the Committee should require the U.S. to address during its upcoming review. The U.S. government has acknowledged that, through PRISM, it may, and does, acquire the contents of the entire digital lives of many people across the globe. In particular, the United States regularly demands emails, audio and video chats, photographs, and other internet traffic from nine major service providers—Microsoft, Yahoo!, Google, Facebook, PalTalk, AOL, Skype, YouTube, and Apple—located within the United States. The companies are not even allowed to publicly discuss that they received these orders, let alone notify affected individuals whose data has been seized by the U.S. government. Additionally, the media has reported that, under UPSTREAM,

the government scans the content of nearly all emails and other text-based communications that enter or leave the United States for particular keywords “about” its foreign-intelligence targets.

The PRISM and UPSTREAM programs are authorized by section 702 of the FISA. That statute authorizes the “targeting” of non-U.S. persons reasonably believed to be located outside the United States for foreign-intelligence purposes.

Even though the law requires judicial approval before the government can engage in this kind of surveillance, in practice, there is little judicial involvement in the program. By making an application to the FISC, the U.S. government may obtain a mass-acquisition order that authorizes, for an entire year, whatever surveillance the government may choose to engage in, within broadly drawn parameters.³ Additionally, the government’s definition of “foreign intelligence” sweeps so broadly that it potentially encompasses almost any foreign person at all—not just individuals who are foreign agents, engaged in criminal activity, or connected even remotely with terrorist activities. Finally, the U.S. government’s targeting procedures allow the NSA to sweep up the communications of not only any foreigner who *is* a target, but any foreigner who may be communicating *about* the target as well.

The effect of this expansive scheme is to bring virtually every international communication within the reach of the NSA’s surveillance. What’s more, the government retains most of the information it collects under section 702 indefinitely, and it may disseminate and analyze collected information with only limited restrictions. Moreover, it may do so without subjecting itself to the scrutinizing glare of the courts.

II. Relevant Question in the Human Rights Committee’s List of Issues

22) *Please provide information on steps taken to ensure judicial oversight over National Security Agency surveillance of phone, email and fax communications both within and outside the State party. Please also specify what circumstances, as mentioned in section 206 of the USA Patriot Act, justify “roving” wiretaps.*

III. U.S. Government Response

The U.S. government’s responses to the Committee state that amendments to the FISA have “enhance[d] judicial and Congressional oversight” by giving the FISC a “continuing and active role in overseeing certain NSA collection activities.”⁴ But those answers belie the weakness of the current surveillance-oversight scheme. Until Congress enacted section 702 as part of the FISA Amendments Act (FAA), in 2008, the FISA generally prohibited the government from conducting electronic surveillance without first obtaining an individualized and particularized order from the FISC.⁵ In order to obtain a court order, the government was required to show that

there was probable cause to believe that its surveillance target was an agent of a foreign power, such as a foreign government or terrorist group. It was also generally required to identify the facilities to be monitored.

Section 702, in contrast, has as its defining feature the *lack* of ongoing judicial oversight. The FISC does not review individualized surveillance applications. Nor does it have the right to ask the government *why* it is initiating any particular surveillance program. Instead, the FISC's role is limited to reviewing the government's targeting and minimization procedures. And even with respect to those procedures, the FISC's role is to review the procedures at the outset of any new surveillance program; it does not have the authority to supervise the implementation of those procedures over time. Section 702 allows the U.S. government to conduct electronic surveillance without indicating to the FISC whom it intends to target or which facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed. Further, the law does not require the government to make any showing to the court—or even make an internal executive determination—that the target is a foreign agent or engaged in terrorism.⁶ The target could be a human rights activist, a media organization, a geographic region, or even an entire country. And because section 702 does not require the government to identify the specific targets and facilities to be surveilled, it permits the acquisition of these communications *en masse*. A single acquisition order may be used to justify the surveillance of communications implicating thousands or even millions of people, for a year at a time.

The U.S. government must clearly explain to the Committee how the wide-ranging, judicially unsupervised surveillance it is conducting across the globe on millions of people comports with its duties to protect the rights to privacy and freedom of expression. Because the Committee's questions to the U.S. government came before the momentous recent disclosures and acknowledgments, the Committee did not have the opportunity to direct its questions about surveillance and privacy to the issues and concerns that are now most pressing. The U.S. government's responses to the Committee are insufficient and incomplete, given the new public record. The Committee should embrace the U.S. government's upcoming review as an occasion to demand an accounting to the world community that has long been missing in its alarming surveillance practices, which implicate not just Americans, but the entire world.

IV. Recommended Questions

1. Does the U.S. government believe that its collection of international communications for foreign intelligence purposes comport with its obligations under Article 17 (right to privacy) and 19 of the ICCPR? In this context, "collection" means the interception, copying, filtering or processing of communication content or metadata.

2. Although this communications surveillance may be prescribed by U.S. law, please explain the justifications for the restrictions on the rights to privacy and free expression imposed by these laws and how they are both (1) necessary to achieve legitimate government objectives; and (2) proportionate to those aims, as required by the ICCPR?
3. Does the government consider that the rights encompassed by Articles 17 and 19 extend to foreign nationals residing outside the United States? If not, why not? If the government considers rights to extend extraterritorially, what measures does the government employ to ensure that its surveillance of such persons does not violate U.S. obligations under these articles, and in particular that they are prescribed and governed by law, and both necessary and proportionate to legitimate government objectives?
4. In conducting communications surveillance, what restrictions—if any—does the government impose on (a) information that can be collected on foreign nationals; and (b) what can be done with such information once collected?
5. Please explain the type and amount of international and foreign communications the U.S. government is collecting. Does the government target specific individuals, organizations, countries, or regions for such collection? Does the government consider that international instruments constrain in any way its authority to collect foreigners' communications metadata or content in bulk?

V. **Suggested Recommendations**

1. The U.S. government should release all FISA Court or FISA Court of Review opinions and orders interpreting the meaning, scope, and constitutionality of its surveillance laws, as well establish a presumption that future rulings of this kind will be publicly available.
2. The U.S. government should refrain from broad invocations of jurisdictional, secrecy, and immunity doctrines that prevent judicial review of the merits of government surveillance programs in domestic courts.
3. The U.S. government should make public its interpretation of its international treaty and other international legal obligations concerning state surveillance of foreign nationals outside the United States, including by clarifying how its current surveillance activities comport with the ICCPR's "proportionality" requirement.

4. The U.S. government should explain the steps it has taken to supervise its surveillance-gathering agencies' collection of international communications to ensure that those agencies comply with the government's international legal obligations.

¹ *NSA slides explain the PRISM data-collection program*, WASHINGTON POST, July 10, 2013, available at <http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/>; Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 5, 2013, available at <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

² See, e.g., UDHR art. 12; ICCPR art. 17; Written Statement, United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression & Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression (June 21, 2013), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1>.

³ 50 U.S.C. § 1881a(a), (c)(2).

⁴ United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International covenant on civil and Political Rights (ICCPR), ¶¶ 115-16 (July 3, 2013), available at <http://www.state.gov/j/drl/rls/212393.htm>.

⁵ When the U.S. government invokes "an ordinary FISA surveillance case," *Id.*, ¶ 118, it is referencing non-FAA surveillance authority under the FISA. But PRISM relies on the FAA, under which judicial involvement is far more removed and far less able to police constitutional and other legal boundaries.

⁶ 50 U.S.C. § 1881a(g)(4).