



From Rhetoric to Action:

A Report on U.S. Engagement with the
Universal Periodic Review Process

The Center for Constitutional Rights
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The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

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Table of Contents

Introduction.....	4
I. U.S. Government Fails to Hold U.S. Officials Accountable for Torture and Other Serious Violations of International Law at Guantánamo and Other U.S. Detention Sites ..	6
1.1 No Pending Independent Criminal Investigation into Torture	7
1.2 No Prosecution for Destroying Evidence of Torture	7
1.3 U.S. Government Opposition to Every Civil Action Brought against U.S. officials for International Law Violations, Including Torture	8
1.4 U.S. Government Opposition to Accountability and Remedy for Violations at Guantánamo	8
1.5 U.S. Interference with the Independent Judiciary in Foreign Jurisdiction	9
II. U.S. Fails to Hold Accountable Private Military Contractors Accountable for Serious Violations of International Law, at the same time as it Increases its Use of Contractors .	10
2.1 The U.S. Government Must Hold Corporations Accountable for Human Rights Abuses.....	11
III. U.S. Government Must Ensure Compliance with the Leahy Laws, and Transparency in the Leahy Process	13
IV. U.S. Silence on Targeted Killing Practices Prevents Meaningful Review of Its International Obligations	14
V. The U.S. Prison System’s Experiment in Social Isolation.....	16
5.1 Access to Educational and Post-Release Preparation Programming	16
5.2 Cruel and Unusual Treatment and Punishment	17
5.3 Religious and Racial Profiling and Discrimination	17
5.4 U.S. Human Rights Violations.....	18
VI. Racial Profiling: A Violation of Human and Civil Rights	19
6.1 The NYPD’s Use of Stop-And-Frisk Violates New Yorkers’ Human Rights.....	19
6.2 Accountability, Transparency and Oversight Needed to Uphold Human Rights.....	19
VII. Discrimination, Xenophobia, Racism and Intolerance.....	21
7.1 Secure Communities: A Violation of Civil and Human Rights.....	21

Introduction

The Universal Periodic Review Process and the United States

The Universal Periodic Review (UPR) process was established by the United Nations Human Rights Council in 2006. Countries are reviewed every four years on their compliance with human rights obligations under the UN Charter, the Universal Declaration of Human Rights, relevant treaties, declarations and international law. The UPR review process was established to evaluate the compliance of all 192 U.N. Member States with their human rights obligations and commitments, and to identify progress, shortcomings and areas for improvement.

On August 23, 2010, the United States submitted its national report to the UN Human Rights Council, outlining its own assessment of its human rights compliance.¹ That November, the U.S. government sent a delegation to Geneva to participate in its first UPR review at the UN Human Rights Council. After this review, the working group of nations tasked with reviewing the United States' human rights record produced "Report of the Working Group on the Universal Periodic Review: United States of America," listing recommendations to the United States on how to improve its record.²

On March 10, 2011, the U.S. State Department responded by submitting a document titled "U.S. Response to UN Human Rights Council Working Group Report"³ which outlines the recommendations it supports, supports in part, or rejects. The following week, the U.S. delegation traveled to Geneva to formally adopt selected recommendations.

Engagement with Civil Society

Prior to issuing its "National Report," the U.S. State Department collected input from and consulted with the American public and civil society. In April 2010, civil society and non-governmental groups, including the Center for Constitutional Rights (CCR), submitted "stakeholder" reports for the Human Rights Council to consider in its evaluation of the United States. CCR prepared or contributed to five stakeholder reports:

- Political Repression: Continuum of Domestic Repression
- Political Repression: Political Prisoners
- Human Rights Abuses Committed by the New York Police Department
- The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin

¹ See "National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: United States of America," U.N. Doc A/HRC/WG.6/9/USA/1 (Aug. 23, 2010), available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf. Hereby referred to as "National Report".

² Country recommendations to the United States appear in "Report of the Working Group on the Universal Periodic Review: United States of America," A/HRC/16/11 (January 4, 2011) available at <http://www.unhcr.org/refworld/docid/4d6b6d3e.html>. Hereby referred to as "Report of the Working Group" or "Recommendations".

³ *U.S. Response to UN Human Rights Council Working Group Report*, March 10, 2011. <http://www.state.gov/g/drl/upr/157986.htm>. Hereby referred to as "Response to the Recommendations".

- Stakeholder Submission on United States Obligations to Respect, Protect and Remedy Human Rights in the Context of Business Activities

During the November 2010 review of the United States by the Human Rights Council, civil society provided supplemental information highlighting shortcomings and areas of concern not covered by the U.S. in its formal presentation before the body. Civil society also organized and presented at informational side panel events which assessed the U.S. human rights record.

Many civil society groups again traveled to Geneva in March 2011 to ensure that a more complete accounting of the U.S. rights record would be presented.

While the U.S. government's formal engagement with the UPR and the international human rights regime is a critical step forward from previous administrations, its March 2011 "Response to Recommendations" presents a distorted and incomplete accounting of its record. Its response omits or glosses over many critical human rights violations and concerns, demonstrating that the Obama administration is unwilling to meaningfully embrace a human rights framework.

CCR urges the Obama administration to move from rhetoric to action, and to take concrete steps towards complying with its full international human rights obligations. In particular, the U.S. is failing to meet its obligations regarding accountability for serious international law violations, the closure of Guantánamo, ending unlawful targeted killings, isolating political activists and Muslims in prisons, and ending the practice of racial profiling by local law enforcement. The following report discusses these issues in further depth.

I. U.S. Government Fails to Hold U.S. Officials Accountable for Torture and Other Serious Violations of International Law at Guantánamo and Other U.S. Detention Sites

In its response to the recommendations presented by the working group of nations tasked with reviewing its human rights record for the UPR process, the United States government has claimed: “We investigate allegations of torture, and prosecute where appropriate.”⁴ The U.S. government has also asserted that the “U.S. supports recommendations calling for prohibition and vigorous investigation and prosecution of any serious violations of international law, as consistent with existing U.S. law, policy and practice.”⁵ Yet, in complete disregard of its domestic legislation and obligations as a signatory to the Geneva Conventions, the Convention Against Torture, and other treaties, the United States government has not sought to hold any high-level U.S. official accountable for serious violations of international law committed against individuals held in U.S. custody, including torture and other cruel, inhuman, and degrading treatment.

It is well-documented that in the years following the September 11, 2001 attacks, U.S. high-level officials committed, ordered, directed, authorized, condoned, planned and otherwise aided and abetted, or failed to prevent or punish the commission by subordinates of serious violations of international law, including torture, cruel, inhuman and degrading treatment or punishment, and enforced disappearances.⁶ Based on interviews with current or former detainees, and the review of governmental reports and memoranda, both the International Committee of the Red Cross and the United Nations Special Procedures have concluded that such violations have been committed.⁷ Indeed, in

⁴ See “U.S. Response to UN Human Rights Council Working Group Report,” ¶ 14 (Mar. 10, 2011) available at: <http://www.state.gov/g/drl/upr/157986.htm> and hereby referred to as “Response to the Recommendations”. Country recommendations to the United States appear in “Report of the Working Group on the Universal Periodic Review, United States of America,” A/HRC/16/11 (Jan. 4, 2011) and hereby referred to as “Report of the Working Group” or “Recommendations.”.

⁵ Id.

⁶ The sources documenting these violations include Bush Administration memoranda, congressional hearings and reports including the Senate Armed Services Committee 2008 report on detention and interrogation policies, Inspector General reports, including the 2004 CIA IG Report declassified documents, court documents, testimonies of victims, innumerable investigative news articles and books as well as direct admissions by intelligence, military and administration officials.

⁷ See, e.g., ICRC, Report to John Rizzo, Acting General Counsel, CIA, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, Feb. 14, 2007, available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; United Nations Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, Feb. 19, 2010, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>; United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to*

November 2010, former U.S. President George W. Bush admitted in his memoirs *Decision Points* that he personally authorized the use of waterboarding on detained individuals. Although the Obama administration recognizes that waterboarding is unequivocally, and as a matter of law, an act of torture, no investigation has been opened following this admission.

No Pending Independent Criminal Investigation into Torture

In August 2009, following the public release of the 2004 CIA Inspector General's Report, U.S. Attorney General Eric Holder opened a narrow and preliminary review of small number of incidents; this review could lead not to prosecutions, but only to the opening of another, more comprehensive investigation.⁸ Holder, made clear that neither the authors of the Bush Administration's "torture memos" nor those who relied on these memos would be subject to investigation.⁹ Significantly, the authors of these memos broke with U.S. and international precedent and radically redefined torture in an effort to authorize acts, including waterboarding, which clearly amount to the crime of torture. The results of this narrow investigation have yet to be released.

No Prosecution for Destroying Evidence of Torture

In January 2008, a special prosecutor, John Durham, was appointed to investigate the destruction of at least 92 interrogation videotapes—including tapes which showed two high-value detainees being subjected to waterboarding and various other torture techniques by CIA interrogators. On November 9, 2010, upon expiration of the statute of limitations, the Department of Justice announced that no criminal charges would be issued against any of the individuals responsible for destroying the tapes and evidence of torture.¹⁰ This result is particularly disturbing as the detainees on the tapes in question remain in custody in Guantánamo Bay and raises serious questions about the U.S. government's purported commitment to "vigorous investigation and prosecution" related to torture allegations, as set forth in the Response to the Recommendations.

the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, E/CN.4/2006/120, Feb. 27, 2006, available at:
<http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120>.

⁸ Attorney General Holder announced the "opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations" and that the preliminary review was used "to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter." Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available online at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html>.

⁹ Attorney General Holder stated that he will not place in "legal jeopardy" or "prosecute" those individuals who acted "in good faith and within the scope of legal guidance." *Id.*

¹⁰ Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, November 9, 2010, available at: <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>.

U.S. Government Opposition to Every Civil Action Brought against U.S. officials for International Law Violations, Including Torture

In the Response to the Recommendations, the U.S. government rejects those recommendations which call for redress for victims of torture.¹¹ The U.S. government states that “[a]lthough mechanisms for remedies are available through U.S. courts, we cannot make commitments regarding their outcome.”¹² This statement by the U.S. government is disingenuous: it wholly ignores the active – and even proactive – role of the U.S. government, through the Department of Justice and other governmental agencies, to shut the courthouse doors to torture victims and other victims of U.S. so-called “national security policies.”

To date, not one victim of the United States’ post-9/11 policies has been allowed to have his or her day in U.S. court and to have an American jury decide who, if anyone, should be held accountable for the wrongs to which these individuals were subjected. The Obama administration has followed the lead of the Bush administration in seeking to block current and former detainees who have been victims of egregious violations from seeking accountability and redress in U.S. courts. Invoking the state secrets doctrine, absolute and qualified immunity, and national security or foreign policy concerns, it has opposed all efforts by victims of U.S. policies, programs and individual government officials’ illegal actions to have their claims heard in U.S. courts. Whether victims of torture at Guantánamo or victims of extraordinary rendition, including Canadian citizen Maher Arar who sought to have his case reviewed by the U.S. Supreme Court,¹³ the U.S. government has sought to block all forms of reparation, redress or remedy.

U.S. Government Opposition to Accountability and Remedy for Violations at Guantánamo

Until now, the Obama administration has not only failed to conduct independent and thorough investigation of abuses at Guantánamo, but has opposed inquiry, review, and remedy for the victims of these abuses by the courts. The U.S. government has consistently blocked accountability and remedy for abuses against detainees by arguing in court that these men have no rights under the law and that national security considerations dictate that their cases must be dismissed.

This reality not only contradicts the U.S. government’s claim in its final UPR report that it investigates allegations of torture and prosecutes where appropriate, but also exposes the hollowness of the government’s claim that “mechanisms for remedies are available through U.S. courts” and that it therefore “cannot accept portions of recommendations concerning reparation, redress, remedies, or compensation.”

For example, in [Al-Zahrani v. Rumsfeld](#), one of several civil lawsuits filed by former Guantanamo detainees, all of which have been vigorously opposed by the Department of

¹¹ Response to the Recommendations at para. 14: “We cannot accept portions of these recommendations concerning reparation, redress, remedies, or compensation.”

¹² Id.

¹³ See <http://www.ccrjustice.org/ourcases/current-cases/arar-v-ashcroft>

Justice under Presidents Bush and Obama alike, the Obama administration has challenged efforts by the families of men who died in Guantánamo in 2006 to seek answers about the circumstances of the deaths.¹⁴ The government maintains that the men committed suicide, but recent evidence from soldiers stationed at the base at the time strongly suggests that officials covered up the true circumstances and that the men may have been killed at a secret site at Guantánamo. In opposing the case in court, the government argued that U.S. officials have immunity for the allegations of torture and possible homicide, even if true, because at the time of the deaths it was not clear whether the U.S. Constitution applied to the actions of U.S. officials at the U.S. military base at Guantánamo (where the United States is the only governing authority), and the officials could therefore not have reasonably known whether torture and murder violated the law. As in every other case seeking accountability for torture, the government also cited vague national security concerns as a reason to dismiss the case. Moreover, the government argued that a provision of the Military Commissions Act enacted in 2006 acts as an absolute bar to any claim of mistreatment by men detained at Guantanamo. The sum total of the government's position was that the United States can arbitrarily label a foreign citizen as an "enemy combatant," transfer him to Guantánamo, torture or kill that individual, and then cover it up, without any legal accountability whatsoever.

U.S. Interference with the Independent Judiciary in Foreign Jurisdiction

U.S. State Department cables released in 2010 have revealed that pressure was exercised by the Obama administration to secretly obstruct efforts within the Spanish judiciary to investigate egregious violations of international law, including the torture of former Guantánamo detainees and other individuals who have been subjected to the U.S. torture program.¹⁵ Such attempts to interfere with the Spanish judicial system demonstrate the U.S. government's claim to support the "vigorous investigation and prosecution of any serious violations of international law" is false.

Despite its promise of a new era of respect for the rule of law, the Obama administration has repeatedly acted to ensure impunity for those under the Bush administration who planned, authorized, and committed torture. The Obama administration must honor its promise and the positions set forth in the Response to the Recommendations by conducting independent and comprehensive investigations into well-documented and grave human rights abuses at Guantánamo and elsewhere, including torture, as far up the chain of command as the evidence might lead, and prosecute those responsible. This is the only way to end a culture of impunity and secure a future in which torture and other grave human rights abuses no longer take place.

¹⁴ See <http://www.ccrjustice.org/ourcases/current-cases/al-zahrani-v.-rumsfeld>

¹⁵ See "Supplemental Filing to 26 April 2010 Joint Expert Opinion," Preliminary Proceedings, 134/09, Audiencia Nacional, Dec. 11, 2010, pp. 9-11, available at: http://www.ccrjustice.org/files/Spain%20Supplemental%20Final_English%20-%20EXHIBITS.pdf

II. U.S. Fails to Hold Accountable Private Military Contractors Accountable for Serious Violations of International Law, at the same time as it Increases its Use of Contractors

The Recommendations to the U.S. include calls to halt human rights violations committed by private military contractors in Afghanistan and other States, to hold all persons who committed violations including in U.S. detention centers, such as Abu Ghraib accountable, and to end the privatization of conflicts by using private military companies. The Center for Constitutional Rights, along with partner organizations, submitted a report on the need to hold corporations, including private military contractors, accountable for serious violations of international law, and highlighted the efforts by victims of torture and other serious abuse at Abu Ghraib to seek accountability through civil actions in U.S. courts.¹⁶ U.S. contractors CACI and Titan (now L-3 Services), which provided interrogation and interpretation services, were implicated in the torture and abuse of detainees at Abu Ghraib in 2003-2004, as documented in U.S. military reports;¹⁷ no contractor has been prosecuted for the serious violations of international law that occurred at Abu Ghraib and other detention facilities in Iraq.

The U.S. Response to the Recommendations failed to address the issue of accountability for U.S. contractors, stating only that the U.S. has “expressed support for the International Code of Conduct for Private Security Service Providers.”¹⁸ As the State Department Legal Advisor Harold Koh stated in Geneva, at the time the International Code of Conduct was launched – which coincided with the U.S. appearance before the Human Rights Council for the UPR – “we fully recognize it [the International Code of Conduct] is not and cannot be a substitute for effective accountability under the law.”¹⁹

The U.S. must ensure that any accountability gaps for contractors are closed, and until it has demonstrated that contractors can be held fully accountable for serious violations under the law, and that victims of such violations can achieve meaningful redress, it must seriously rethink its relationship with private military and security companies, and end its outsourcing of core governmental functions to contractors, particularly in the context of military operations. Those contractors who have been implicated in serious domestic and international law violations such as torture and murder must be investigated, and where appropriate, prosecuted for their conduct – their status as a government contractor must not be used as a shield to bestow immunity or allow for impunity

¹⁶ Stakeholder Submission on United States Obligations to Respect, Protect and Remedy Human Rights in the Context of Business Activities, Apr. 19, 2010, pp. 5-6, 8, *available at* http://www.ccrjustice.org/files/USUPR_CorpAcct_Final_All.pdf (“Corporate Accountability Report”).

¹⁷ A petition for certiorari in the plaintiffs’ case, *Saleh v. Titan*, is currently pending before the U.S. Supreme Court, following dismissal of the case by the U.S. Court of Appeals for the District of Columbia. On October 4, 2010, the Court invited the Acting Solicitor General to express his views on whether the Court should hear this case; the U.S. government has not yet responded to the Court’s invitation.

¹⁸ Response to the Recommendations, p. 15, point 5.

¹⁹ Frank Jordans, “Security companies sign code of conduct; Xe, formerly Blackwater, among those in Agreement,” Nov. 9, 2010, *available at* <http://www.airforcetimes.com/news/2010/11/ap-private-security-companies-sign-code-of-conduct-110910/>.

The U.S. Government Must Hold Corporations Accountable for Human Rights Abuses

The Center for Constitutional Rights, working with partners EarthRights International, the International Network for Economic, Social and Cultural Rights (ESCR-Net) and the Western Shoshone Defense Project, submitted a report concerning the U.S. human rights record in the context of business activities. The report examined the degree to which the U.S. is upholding its duties to respect, protect and remedy human rights abuses involving business actors both domestically and abroad.

The Corporate Accountability Report cited numerous examples where private companies have been alleged to be responsible for serious human rights abuses, such as:

- the use of forced labor and child labor by Bridgestone in Liberia;
- human trafficking of Nepali laborers by Kellogg Brown & Root;
- nonconsensual medical experimentation by Pfizer;
- extrajudicial killings and torture committed by private military contractors in Iraq and Afghanistan; and
- complicity in war crimes by Chiquita

Among the recommendations in the Corporate Accountability Report were for the U.S. to refrain from supporting business activities which fail to respect internationally-recognized human rights standards, including the human rights of indigenous peoples, whether through direct government support, through government contracting (particularly of private security companies), through development or reconstruction projects, or through measures taken in the context of the OPIC, ExIm, the World Bank Group or other inter-governmental institutions; to reverse executive branch positions protecting businesses from legal accountability for human rights abuses, such as positions that defendants should not be liable for aiding and abetting violations of international law, that the political question doctrine can shield businesses from liability for their violations of fundamental international law norms, and that defendants may not be sued in the U.S. for human rights violations that occurred outside of U.S.; to clarify, if and as necessary, that contracting with the U.S. does not provide businesses who abuse human rights with immunity from criminal or civil liability; to take immediate measures to investigate and where appropriate prosecute and punish any business entity and their personnel, such as private military contractors, for involvement and/or complicity in international law violations, including torture and war crimes; and to take appropriate legislative, regulatory and/or policy measures to prevent the acts of transnational businesses under U.S. jurisdiction which negatively impact human rights, including the rights of indigenous peoples and economic, social and cultural rights.

Notably, India raised the issue of accountability for human rights violations by business corporations, and queried what the U.S. position was to corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350.²⁰ The United States did not respond to India's query in the Response to the Recommendations and wholly ignored the issue of corporate accountability for international law violations in its Response.

²⁰ Report of the Working Group, para. 22.

The U.S. must firmly state its commitment to not support business activities which fail to respect internationally-recognized human rights standards, to ensure that transnational businesses are held accountable when violations of international law are committed, including corporations that contract with the U.S. government, and that victims of human rights violations have access to a meaningful and effective remedy.

III. U.S. Government Must Ensure Compliance with the Leahy Laws, and Transparency in the Leahy Process

Recommendation 227, advanced by Norway, called upon the U.S. to apply the “Leahy Laws” with respect to countries receiving U.S. security assistance, and that the human rights records of all units receiving such assistance be documented, evaluated, made available and followed up upon in the case of abuse. This recommendation reflected recommendations made by NGOs in written submissions and at a panel discussion in Geneva during the U.S. UPR process.²¹

The Leahy Laws prohibit the provision of security assistance to countries and military units that engage in a pattern of gross violations of human rights.²² These laws require the U.S. to review all credible evidence of gross human rights violations committed by units of foreign militaries, and if credible evidence of gross human rights violations exists, it further requires the U.S. government to withhold U.S. funding for foreign military units until perpetrators are held accountable. Serious questions exist about the review process of foreign military units alleged to have committed serious human rights violations, including questions about the sources and scope of information relied upon when conducting the review, the equal application of the standard of review for all States receiving security assistance, and the follow-up taken when abuses by military units has been established.

The U.S. Response to the Recommendations failed to adequately respond to the concerns raised by Norway and NGOs about the implementation of the Leahy Laws. While asserting that it applied the Leahy Laws to “all countries receiving U.S. security assistance” and that it responds “appropriately” in cases of abuse, the U.S. government rejected Norway’s calls to bring transparency to the Leahy Law process. The U.S. refused to make its “decision-making process publicly available,” stating that it “cannot make our decision-making public” because it considers information from all sources, including classified sources.²³ The U.S. government’s insistence on cloaking the Leahy review process in secrecy is seriously misguided and conflicts with the very human rights principles the Leahy Laws are intended to promote. Even if the U.S. government might be justified in some cases in protecting confidential sources or information, there is no reason why the U.S. must withhold from the public other information from the decision-making process, such as the units reviewed, the publically available documents or sources relied upon to conduct the review, the outcome of the review and the reasons for that outcome, and the follow-up steps taken in cases where abuse has been established.

²¹ See Submission by The Rachel Corrie Foundation, *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/RCF_RachelCorrieFoundation.pdf. See also “UN Human Rights Council Calls On U.S. to Enforce “Leahy Amendment,” Nov. 10, 2010, *available at* <http://rachelcorriefoundation.org/blog/2010/11/10/un-human-rights-council-calls-on-u-s-to-enforce-leahy-amendment> and video of the session available at: <http://blip.tv/file/4870016>.

²² See 22 U.S.C. § 2304 (1994), protocol on Human Rights and Security Assistance, and the “Leahy Amendments” to the Foreign Operations Appropriations and Defense Appropriations Acts (e.g. P.L. 105-118 § 570).

²³ Response to Recommendations, para. 26.

IV. U.S. Silence on Targeted Killing Practices Prevents Meaningful Review of Its International Obligations

In the United States' national report submitted as part of the Universal Periodic Review (UPR) process, the government made no mention of its practice of targeting terrorism suspects for killing.²⁴ The government's only discussion of the issue was in its cursory response to the questions presented by the working group of nations tasked with reviewing the United States' record in November 2010. The U.S. delegation claimed that "United States targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law," and said "[t]o the extent that human rights law may apply in armed conflict or national actions taken in self-defense, in all cases, the United States works to ensure that its actions are lawful."²⁵

The reality is that the United States is targeting individuals for killing not only within recognized zones of armed conflict, but in countries such as Yemen where the United States is not engaged in hostilities rising to the level of war. It is not only targeting suspects of Al Qaeda, but loosely defined "associated" forces. And it is not only conducting these killings using its regular armed forces, but with unaccountable secret forces and the CIA. In late 2009 and early 2010, aspects of the United States' targeted killing program came to light in connection with the reported authorization for the killing of a U.S. citizen in Yemen. Credible media sources reported "kill lists" of suspects of terrorism maintained by the CIA and a covert unit of the U.S. military called the Joint Special Operations Command (JSOC), to which individuals are added on the basis of secret criteria following a secret executive process. Despite these reports, and human evidence of the United States' targeting practices—for example, when over 40 people including children died as the result of a U.S. strike in Yemen in December 2009—the government continues to refuse to officially acknowledge the full scope of its targeting program, including where it operates, how targets are identified, and how many casualties have resulted.

Outside zones of active hostilities in an armed conflict, international law, including treaties to which the United States is a party, requires that individuals be afforded judicial process before they may be executed by the state. In certain narrow circumstances, such process is not required if an individual poses an imminent threat of grave harm and lethal force is a last resort. There are constraints on the use of lethal force even within armed

²⁴ See *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: United States of America*, U.N. Doc A/HRC/WG.6/9/USA/1 (Aug. 23, 2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf.

²⁵ See *Report of the Working Group on the Universal Periodic Review, United States of America*, ¶53, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.

conflict, including that only individuals directly participating in hostilities may be targeted. The U.S. government's failure to provide information on its targeting practices beyond the broad outlines makes meaningful assessment of its compliance with international law virtually impossible. But what has been reported and documented—for example, predetermined decisions to authorize lethal force against suspected individuals, and U.S. strikes in countries as far away from the armed conflict in Afghanistan such as Yemen—raises serious questions about the lawfulness of its practices.

In its follow-up report to the UPR, the United States said that it supported recommendations “calling for prohibition and vigorous investigation and prosecution of any serious violations of international law.”²⁶ The government should back up its stated support with adequate information to allow for more than a one-sided assessment of its international obligations.

²⁶ *U.S. Response to UN Human Rights Council Working Group Report*, ¶14 (Mar. 10, 2011), available at <http://www.state.gov/g/drl/upr/157986.htm>. The recommendations referenced in text appear in the *Report of the Working Group* (Jan. 4, 2011), 92.60 and 92.137.

V. The U.S. Prison System's Experiment in Social Isolation

CCR engaged in the periodic review process by highlighting the issue of Communications Management Units (CMUs) - prison units designed to isolate and segregate certain prisoners. The CMUs are filled predominately with Muslims or political activists; and bias, political scapegoating, religious profiling and racism keep them locked inside these special units.²⁷

Unlike other prisoners in the federal prison system, individuals detained in the CMUs are completely banned from any physical contact with visiting family members and friends. CMU prisoners receive no meaningful explanation for their transfer to the unit or for the extraordinary communications restrictions to which they are subjected. Furthermore, no meaningful review or appeal process allows CMU prisoners to be transferred back to general population.

In its March 2011 response to the recommendations of the Human Rights Council Working Group, the U.S. government noted that it supported Sweden's recommendation to ensure the "full enjoyment of human rights by persons deprived of their liberty."²⁸ However, the policies, practices and conditions at the CMUs contradict the U.S.' assertion and constitute a significant blemish on the U.S. human rights record.

Access to Educational and Post-Release Preparation Programming

While the U.S. government claims to support improving access to education in its prisons systems,²⁹ the individuals detained in CMUs have had limited access to educational and other opportunities, including programs that facilitate reintegration and employment efforts upon their release. While the BOP requires that all eligible prisoners receive the opportunity to engage in release preparation programming to facilitate their ability to gain employment post-release, some CMU prisoners fear that their post-release prospects have been compromised due to the lack of meaningful release preparation programming.³⁰ This is in violation of the International Covenant on Civil and Political Rights, which holds that the aim of the penitentiary system should be social rehabilitation and reformation of the prisoner.³¹ By limiting access to educational programming that facilitates social reintegration, the CMUs are in violation of human rights norms. The U.S. government must urge the Bureau of Prisons (BOP) to improve access to educational opportunities for the individuals in the CMUs.

²⁷ "CCR CMU Factsheet." Available at: <http://www.ccrjustice.org/cmu-factsheet>

²⁸ See Recommendation 177, "Report of the Working Group on the Universal Periodic Review: United States of America," A/HRC/16/11 (Jan. 4, 2011) available at: <http://www.unhcr.org/refworld/docid/4d6b6d3e2.html>.

²⁹ "U.S. Response to UN Human Rights Council Working Group Report."

³⁰ "Complaint - Aref, et al. v. Holder, et al." March 29, 1010. <http://ccrjustice.org/files/Complaint%20-%20with%20electronic%20signature.pdf>.

³¹ International Covenant on Civil and Political Rights, Article 10 (3).

Cruel and Unusual Treatment and Punishment

The complete ban on physical contact hinders the rehabilitation and maintenance of family integrity for those denied of their liberty, and can be destructive to their mental and emotional health. The BOP has subjected individuals in the CMUs to excessive, cruel, inhuman, and degrading conditions of confinement, including prolonged and complete denial of any opportunity for physical contact with their loved ones, excessive restriction of other means of communication with family members; and extended detention in a unit segregated from the rest of the prison, without any legitimate penological purpose. In doing so, these individuals have been subjected to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution and to standards enshrined in the Universal Declaration of Human Rights (UDHR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR). Further, the ICCPR holds that the prisoner must be “treated with humanity and with respect for the inherent dignity of the human person.”³²

Religious and Racial Profiling and Discrimination

The UN Human Rights Council Working Group urged the United States, in the context of the “War on Terror,” to enact federal legislation that would work to prohibit racial and religious profiling.³³ In July 2010, Congress introduced the End Racial Profiling Act (ERPA),³⁴ a comprehensive prohibition on federal, state and local law enforcement engaging in profiling based on religion, ethnicity, race and/or national origin. The Obama administration should demand Congress to pass ERPA to ensure that none its entities engage in unconstitutional profiling.

Discriminatory profiling is in practice with regards to designation of prisoners to CMUs. Over two-thirds of the CMU population are Muslim even though Muslims represent only six percent of the federal prison population – this represents an overrepresentation of at least 1000 percent. This discrepancy cannot be explained by crime of conviction or incarceration conduct, as many Muslim prisoners in the CMUs are serving time for relatively pedestrian offenses, and had clean disciplinary records prior to transfer. The only explanation is discrimination. While the U.S. government has, in part, supported the recommendations issued by the Working Group regarding profiling, “the invidious use of race, ethnicity, national origin or religion” and identified it as an unconstitutional practice,³⁵ ultimately, designation to these units is largely based on the religion of the prisoners in the federal prison system. As such, these acts are arbitrary, discriminatory in nature and impermissible.

While the U.S. government has claimed that it is “committed to vigilance in the continued protection of fundamental freedoms of expression and religion for all,

³² International Covenant on Civil and Political Rights, Article 10 (1).

³³ UN Human Rights Council, op. cit., 28, *Report of the Working Group on the Universal Periodic Review, United States of America*.

³⁴ Wahab, Nadine. "ERPA Introduced." July 27, 2010. <http://www.rightsworkinggroup.org/content/erpa-introduced> (accessed March 16, 2011).

³⁵ *U.S. Response to UN Human Rights Council Working Group Report*.

including laws and policies to protect Muslim, Arab, and other Americans from discrimination and to secure their freedom to practice their religion,”³⁶ the designation and isolation of Muslim prisoners and political activists to the CMUs unlawfully chills prisoners’ rights to freely practice their religion and to speak out on issues of social and political importance while incarcerated.

The BOP has segregated and isolated Muslim prisoners to CMUs based on a prejudiced belief that Muslim prisoners are more likely than others to pose a threat to prison security. After increased media scrutiny of the targeted designation of Muslims to these units, additional non-Muslim prisoners were moved to the CMU, referred to as “balancers” by guards in these units. Perhaps in an attempt to minimize this blatantly discriminatory policy, the BOP significantly undercounted the disproportionate number of Muslim prisoners in the CMU in response to a Freedom of Information Act request.³⁷ Further, the absence of a meaningful method or means to seek return to the general population is a due process violation that allows for racial and religious profiling.

U.S. Human Rights Violations

As such, the policies, practices and conditions at CMUs are in violation of the First, Fifth, and Eighth Amendments to the U.S. Constitution and rights enshrined in the ICCPR, CAT and UDHR. The BOP must ensure that designation of prisoners to the CMUs does not occur for retaliatory, arbitrary, or discriminatory reasons. The Obama administration must also ensure that everyone, including CMU prisoners, receives their constitutional rights to due process and equal treatment. CMUs must meet Constitutional and regulatory standards, or they should be shut down completely.

³⁶ Koh, Harold H. "U.S. Department of State." November 9, 2010.
<http://www.state.gov/s/l/releases/remarks/150677.htm>

³⁷ “Complaint - Aref, et al. v. Holder, et al.” March 29, 2010. <http://ccrjustice.org/files/Complaint%20-%20with%20electronic%20signature.pdf>

VI. Racial Profiling: A Violation of Human and Civil Rights

Racial profiling violates fundamental rights and protections enshrined in the United States Constitution, the Civil Rights Act of 1964 and the ICERD and ICCPR. In their March 2011 response to the U.N. Working Group report, the U.S. government concurred, stating that profiling, “the invidious use of race, ethnicity, national origin or religion — is prohibited under the U.S. Constitution and numerous pieces of national legislation.”³⁸

The NYPD’s Use of Stop-And-Frisk Violates New Yorkers’ Human Rights

The NYPD continues to engage in a policy and practice of illegal racial profiling through its use of stop-and-frisk, the practice by which a police officer initiates a stop of an individual on the street allegedly based on reasonable suspicion of criminal activity. This matter was highlighted in requests put forth by other countries during the US’ periodic review in 2010³⁹ and also outlined as a concern by the Special Rapporteur on racism during his 2009 visit to the U.S.⁴⁰

Stop-and-frisks do not reduce crime and occur at an alarming rate in communities of color, who often feel under siege and harassed by the police. Black and Latino New Yorkers are also treated more harshly, are more likely to be arrested rather than issued a summons, and more likely to have force used against them than White suspects when stopped by NYPD officers. Moreover, the practice contributes to continued mistrust, doubt and fear of police officers in communities of color that are already scarred by systemic racial profiling and major incidents of police brutality. Stop-and-frisk is also ineffective. While the NYPD purports that their stop-and-frisk policy keeps weapons off the street, stop-and-frisks result in a minimal yield of weapons and contraband. Despite all of these concerns, the NYPD’s use of stop-and-frisk is on the rise every year.⁴¹

Accountability, Transparency and Oversight Needed to Uphold Human Rights

To date, New York State, the New York City government and the New York Police Department NYPD have not created or sustained effective mechanisms or measures to uphold ICERD at the local level, especially with regards to the NYPD’s continued use of stop-and-frisk and racial profiling. The NYPD feels empowered to continue these disturbing practices: the department proudly boycotted recent New York City Council hearings on the stop-and-frisk, despite presentations that questioned the policy’s efficacy. Moreover, New York City Civilian Complaint Review Board, which investigates

³⁸ U.S. Response to UN Human Rights Council Working Group Report, March 10, 2011.

<http://www.state.gov/g/drl/upr/157986.htm>.

³⁹ UN Human Rights Council, op. cit., 18 and 20, *Report of the Working Group on the Universal Periodic Review, United States of America*.

⁴⁰ “The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin.” November 2010, at 3.

http://www.rightsworkinggroup.org/sites/default/files/Racial%20Profiling%20Joint%20Report%20USA_0.pdf.

⁴¹ “Stop-and-Frisks of New Yorkers in 2010 Hit All-Time High at 600,601; 87 Percent of Those Stopped Black and Latino.” February 24, 2011. <http://ccrjustice.org/newsroom/press-releases/stop-and-frisks-of-new-yorkers-2010-hit-all-time-high-600%2C601%3B-87-percent-of>.

complaints from New Yorkers about police misconduct, including improper stop-and-frisk, has limited authority to take action against officers who violate citizens' rights.

There is a clear need for accountability, independent oversight and reform of the NYPD's stop-and-frisk practices. The U.S. government agreed, noting in their response to the U.N. Working Group report that they supported the recommendation to "Strengthen oversight with a view to ending excessive use of force by law enforcement bodies, particularly when it is directed to the racial minorities and bring those responsible for violation of laws to justice."⁴² The United States must ensure that appropriate measures and mechanisms are put in place and work towards eliminating racial discrimination, and work towards meeting its human rights obligations. The NYPD must release additional policing and crime data to the public, enforce existing NYPD reporting requirements, and increase the scope and authority of the CCRB. Further, policy makers should create a position for a public official or body that would review NYPD practices, policies and data in order to issue recommendations for systemic, department-wide changes. An independent auditor would assess the failure or success of the police department in implementing its policing policies that are specifically designed to eliminate racial profiling. The auditor would also have the official capacity to investigate compliance with such policies.

⁴² *U.S. Response to UN Human Rights Council Working Group Report*

VII. Discrimination, Xenophobia, Racism and Intolerance

The rights and protections guaranteed by the U.S. Constitution and international human rights treaties extends to everyone in the U.S., regardless of their race, national origin, or immigration status.

In its response to the UN Working Group, the U.S. government discussed their “continuing efforts to improve [its] immigration policies and to eliminate xenophobia, racism, and intolerance.”⁴³ However, the U.S. government has increasingly encouraged the involvement of state and local law enforcement in the enforcement of federal immigration law leading to a staggering increase in detention and deportations in this country while violating civil and human rights. This problematic relationship was also noted as concerning by the Inter-American Commission in March 2011.⁴⁴

Secure Communities: A Violation of Civil and Human Rights

The Obama administration is increasingly relying on detention and federal immigration-local law enforcement collaboration programs to enforce immigration laws. The U.S. Immigration and Customs Enforcement (ICE) Agency’s “Secure Communities” program (S-Comm) mandates an unprecedented level of involvement between local and state law enforcement agencies and federal immigration officials by requiring state and local agencies to check the fingerprints of all arrested individuals against federal civil immigration databases. CCR believes that S-Comm is a racial-profiling dragnet that unfairly funnels people into the inhumane ICE detention and removal system. Further, S-Comm targets racial minorities, increases the likelihood of racial profiling and pretextual arrests and leaves immigration enforcement to local police untrained on immigration laws.

While ICE officials have declared their intention to expand S-Comm into every jurisdiction in the country by 2013, information about the program has been scarce, and the development of operational details has been shrouded in secrecy. ICE’s own records show that 79 percent of people deported due to S-Comm are not criminals or were arrested for minor offenses and preliminary data confirms that some jurisdictions, such as Maricopa County, Arizona, have abnormally high rates of non-criminal S-Comm deportations.⁴⁵ Documents recently released in response to a Freedom of Information Act request reveal that federal government agencies are consistently and purposefully manipulating answers to questions from Congress, media, and state and local policy makers,⁴⁶ about the ability of states and localities to “opt-out” of the program. Despite concern expressed by a plethora of law enforcement, local and state level legislators,

⁴³ *U.S. Response to UN Human Rights Council Working Group Report.*

⁴⁴ “IACHR Publishes Report on Immigration in the United States.” March 17, 2011. <http://cidh.org/Comunicados/English/2011/21-11eng.htm>

⁴⁵ “Rights Groups Respond to Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) Announcement.” October 6, 2010. <http://www.ccrjustice.org/newsroom/press-releases/rights-groups-respond-department-of-homeland-security-%28dhs%29-and-immigration->

⁴⁶ “Newly Released Secure Communities Documents Signal Opening for Local Opt-Out.” February 17, 2010. <http://uncoverthetruth.org/newly-released-secure-communities-documents-signal-opening-for-local-opt-out>.

advocates and concerned community members about racial profiling, unlawful pretextual arrests and the ramifications on community policing, ICE continues to expand S-Comm into jurisdictions across the U.S.

The ICE and the U.S. Department of Homeland Security should terminate all federal immigration enforcement programs that rely on state and local criminal justice systems and violate people's rights and ultimately undermine public safety and police-community relations.