A coordinated U.S. NGO response to the U.S. Second and Third Periodic Reports and to CCPR/C/USA/Q/3

Introduction

1. Upon review of the Committee's *List of Issues to be taken up in connection with the consideration of the Second and Third periodic reports of the United States of America*, adopted on March 30, 2006, this update was drafted to address the Committee's priority concerns. This document also addresses a number of related matters within the Committee's jurisdiction. It represents a collaborative effort on the part of a cross-section of U.S. NGOs, many of which presented information for the Committee's consideration during its March 2006 session in New York.

2. The institutions and individuals involved in this effort welcome the opportunity to provide the Committee with information to be used in its review of U.S. compliance with the ICCPR.

3. This document is an overview of the shadow reports prepared as part of this U.S. NGO collaboration. It supplements the full shadow reports prepared for the Committee's review, copies of which have been filed with the Secretariat.

4. Copies of the executive summaries of the above-referenced shadow reports are attached to this document.

Right to self-determination and rights persons belonging to minorities (Articles 1 and 27)[1]

5. Due to continuing interference with the self-governance and property rights of Native Americans, the U.S. government is in violation of Article 1 of the ICCPR. The government has engaged in long-term mismanagement of Individual Indian Money (IIM) accounts resulting in major losses from the Indian Trust. *Cobell v. Norton*, 428 F.3d 1070 (U.S. App. D.C. 2005). The Government continues to attack access and ownership of traditional lands using methods ranging from "gradual encroachment" to harassment via fines and property confiscation. These actions constitute breaches of Indian treaties, violations of indigenous rights to property and culture and violations of Article 1(2) of the Covenant.

6. The Federal Government has also failed to recognize specific Native American tribes as self-governing peoples. The established process for federal recognition was established by the United States in 1934 under what is referred to as the "Indian Reorganization Act". This process, imposed upon Native communities, oftentimes directly conflicts with long-standing traditional forms of self-government. It has also created significant obstacles to federal recognition that are not easily overcome. For

[1] ICCPR Article 1, Self-Determination and Native Americans Shadow Report, T. Yvette Soutiere with contributions by Julie Fishel, Western Shoshone Defense Project, and Lucy Simpson, Indian Law Resource Center. *see also* Statement of Judge Claudia Morcom for the Meiklejohn Civil Liberties Institute and the International Association of Democratic Lawyers.

example, certain federally required criteria cannot be met because of actions taken by the Government and majority factions of the population throughout this country's history. Refusal to recognize Native American peoples or Nations which do not fit certain criteria because of historical actions represents a violation of Article 1(3) of the Covenant.

7. Moreover, issues regarding self-determination for Native Americas are also implicated in the case of Leonard Peltier, who was convicted in 1977 for killing two FBI agents (which Peltier consistently denies). Numerous NGOs and the American Indian Movement that support the release of Peltier note that even though two FBI officers were killed, the killings occurred in a "war-like atmosphere" in which FBI agents had been terrorizing residents of the Pine Ridge Indian reservation in the wake of the Pine Ridge protest in the early 1970s. In April 2006, the U.S. 8th Circuit Court of Appeals determined that the U.S. District Court where Leonard Peltier was tried had subject matter jurisdiction even though the killings occurred on Native American land and even though Peltier was convicted under statutes that required the crime to take place in special maritime and territorial jurisdiction of the United States, jurisdictions that do not include Native American land.

Constitutional and legal framework within which the Covenant is implemented [(Article 2) including issues related to effective remedies][2]

8. The constitutional and legal framework in which the ICCPR is implemented is marked by the doctrines of federalism/states rights and separation of powers, as well as the prerogatives of sovereignty that appear to inform the exceptionalism on which the U.S. reservations, understandings, and declarations (RUDs), as well as its proviso, to the Covenant are based. The U.S. constitution is an obstacle neither to recognizing the full range of rights under the Covenant nor to assuming the Covenant's governmental obligations. Rather, these long-standing legal doctrines, and the constitutional amendments on which they are based, are used to avoid imposing on individual states a federal obligation to comply with the ICCPR. In addition, the vast majority of the rights, privileges and immunities of citizenship are, as a matter of tradition, within the purview of the states. This limits the reach of Congress' broad remedial power under §5 of the Fourteenth Amendment, the primary vehicle by which Congress has held states to account for violating individual rights such due process and equal protection of the laws. Moreover, the plenary power of Congress

[2] Professor Penny Venetis, *et al*., In Response to the Second and Third Periodic Reports of the United States of America: Shadow Report on U.S. Exceptionalism and Lack of Implementation. National Campaign to Restore Civil Rights, The Lack of Access to the Courts to Enforce Civil Rights in the United States: *A Violation of the Right to Effective Remedy Under Article 2(3) of the ICCPR*; Report on Women's Rights under the International Covenant on Civil and Political Rights; Women's Institute for Leadership Development for Human Rights, *et al.*, Conditions and Conduct in the California Criminal Justice System: A Report on U.S. Government Compliance with the United Nations International Covenant on Civil and Political Rights; Global Rights and the University of North Carolina Law School Human Rights Policy Clinic, Domestic Workers' Rights in the United States: A report prepared for the U.N. Human Rights Committee in response to the Second and Third Periodic Report of the United States; National Association of Criminal Defense Lawyers, *et al.*, Report on the Death Penalty. *See also* Submission of the Lawyers' Committee for Civil Rights under Law.

to regulate interstate and foreign commerce has been limited where the judiciary has disagreed with Congress' legislative judgment regarding the national impact of matters such as gender-based violence. Rather than grant Congress the high level of deference its commerce-related decisions historically garnered, the Supreme Court has chosen to substitute its judgment to conclude that the factual record on which some laws were based was insufficient. The effect of this federal/state relationship is seen in areas such as criminal and family law, where legal standards and rights vary widely from state to state. It also means that federal jurisdiction is triggered only when federal rights are implicated, and in this case, that federal right is limited to a right to be free from intentional discrimination at the hands of public actors.

9. The recently re-introduced amendment to the Constitution of the United States to ban same-sex marriage is an example of the arbitrariness with which the federal government demonstrates is willingness to override state determinations regarding matters traditionally regulated by individual states. Rather than protect human rights, this proposed constitutional amendment evinces a federal government engaged in creating acrimony and facilitating discrimination in violation of the Covenant.

10. The United States has been intrinsically involved in the development of the United Nations from its first incarnation as the League of Nations, to the aftermath of World War II and the development of peaceful diplomacy. The U.S. has also played the role of watchdog for the implementation of human rights around the world. The U.S., however, has faltered in meeting its own international human rights obligations, including those of the Covenant

11. Nearly 15 years after the signing of the ICCPR, the United States has failed to acknowledge the full extent of the treaty's legal significance and has not taken the active steps necessary to ensure that treaty obligations are enforced as U.S. law.

12. When the U.S. signed the treaty, it simultaneously issued broad RUDs limiting the scope of its obligations and rendering the treaty unenforceable. In essence, the RUDs strip the ICCPR of all its authority and relevance to the U.S. As such, the U.S.'s RUDs have been criticized both by this Committee and fellow signatory parties to the ICCPR.

13. This Committee criticized the U.S.'s widely formulated reservations. It noted that the U.S.'s RUDs were "intended to ensure that the United States has only accepted what is already law in the United States." Additionally, 11 fellow signatories and this Committee found the U.S. reservations to Article 6(5) regarding the juvenile death penalty and Article 7 regarding the use of torture and cruel, inhuman and degrading treatment, as inconsistent with the Covenant's object and purpose, and in direct conflict with the non-derogable provision of the right to life under Article 4(2).

14. The U.S. ratified the ICCPR in a way that precludes the treaty from having any real effect domestically. Under the "federalism understanding," the U.S. government

pledges that it will implement the ICCPR to the extent that it has legislative and judicial jurisdiction, and allow state and local governments to implement the treaty where they have respective jurisdiction. However, the federal government has yet to name the types of matters where state and local governments have unique jurisdiction and therefore specific obligations under the ICCPR treaty. Nor has the federal government taken steps to pass implementing legislation to ensure that all branches of government understand their human rights obligations. Finally, should states and local governments fail to uphold their obligations under the ICCPR, the federal government has not clarified its authority to ensure the treaty is upheld and enforced.

15. The U.S. continues to stand by its RUDs, even in situations when the U.S. Supreme Court has rendered them unnecessary, as in the case of banning the execution of juveniles. *Roper v. Simmons*, 543 U.S. 551 (U.S. 2005).

16. The U.S. also continues to assert that the treaty is non-self executing and that it cannot be invoked in U.S. Courts to remedy a violation of the human rights guaranteed by the ICCPR. This failure to implement the ICCPR and the continued clinging to RUDs violates the ICCPR on its face. Additionally, the U.S.'s failure to implement the treaty and the U.S.'s failure to ratify Optional Protocol I leaves those whose human rights have been violated with no remedy.

17. As a matter of domestic law, millions of individuals in the United States do not have the right to remedy violations of federal civil rights laws as a result of Supreme Court opinions that restrict the private right of action of individuals. The inability to redress these civil rights violations is contrary to Article 2(3).

18. U.S. Supreme Court decisions have prevented individuals from obtaining an injunctions to stop ongoing discriminatory conduct violate Article 2(3) because remedies must be accessible to individuals whose rights are protected.

19. U.S. Supreme Court decisions that have restricted the ability of individuals to obtain compensatory damages against state actors violate Article 2(3) and the failure to compensate an individual for harms caused by civil rights violations means that the remedy is insufficient and thus inappropriate.

20. Under the ICCPR, state sovereign immunity cannot be a defense against the imposition of corrective measures aimed to effectuate the requirements of Article 2(3). This, however, is at odds with the position taken by the U.S. government.

21. The implementation of the effective remedy requirements of Article 2(3) is particularly crucial when the individuals involved are vulnerable persons. Among those groups rendered especially vulnerable are immigrants and those seeking asylum.

22. The United States generally recognizes asylum claims based on past persecution or likely future persecution as a result of an individual's sexual orientation or gender

identity. Nonetheless, U.S. immigration advocates note the difficulty of proving such claims, and the insensitivity of some immigration officials to sexuality-based cases. Asylum applicants must also generally seek protection within one year of arriving in the United States. This short timeline for filing asylum claims can be particularly difficult for LGBTI asylum applicants who may find it difficult to reconcile the extreme persecution they faced in their home communities with the possibility of a more "open" sexual orientation or identity in the United States.

23. Employers of domestic workers who are protected by diplomatic immunity are not subject to the civil, criminal or administrative jurisdiction of the United States, a protection that denies domestic workers the ability to obtain a remedy against them. U.S. courts have aggravated this problem by interpreting the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude domestic workers.

24. The connection between domestic workers' immigration status and her employment is exploited by employers to discourage the reporting of violations. The United States exacerbates this vulnerability by: (1) allowing inquiry into the domestic workers immigration status should she report a violation; and (2) failing to provide a vehicle through which domestic workers fired after reporting abuses can obtain another visa and stay in the United States to pursue a remedy.

25. U.S. asylum law and practice does not adequately consider or recognize the protection needs of women fleeing gender-specific persecution. By failing to specifically accommodate for gender as a contributing persecution ground, the U.S. stands in violation of its obligations under the ICCPR Articles 2(1), 7, 13, and 26, and Refugee Convention Articles 3, 31, and 33 at a minimum. Moreover, the US has increasing limited previously available protections under its asylum law. Where gender-based violence resulting from conflict or personal situations is the cause of women's flight from persecution, the diminishing protections and harshness of the U.S. restrictions on asylum fall disproportionately on women.

26. The Bush Administration enacts or narrowly interprets laws in the name of fighting terrorism that has the effect of disproportionately denying asylum to female victims of sexual violence, the very victims of terrorists. U.S. imposition of a "material support" bar to asylum or refugee status adversely impacts women because of their status as women. "Material support" provided under threat of violence, physical harm and, *inter alia*, coercion denies them asylum protection. In conflicts, women become non-combatant victims. They are raped by invading forces for purposes of humiliating their men and their nation, for "ethnic cleansing," or for "recreation." They are compelled by captors to perform chores by day, suffering sexual indignities by night. Although they work under duress, women are denied asylum because the U.S. will not recognize the gender-specific vulnerability of rape or threat of rape as a duress defense.

27. The U.S. expedited removal procedure does not provide sufficient due process to enable aliens with valid asylum claims to effectively pursue their right against expulsion.

28. Immigration inspectors fail to consistently do the following: (1) refer asylum seekers for a credible fear review; and (2) inform asylum seekers of their right to credible fear review.

29. Asylum seekers are denied the right to challenge parole decisions. Procedural changes at the Board of Immigration Appeals ("BIA streamlining") has undermined asylum seekers' due process rights and may be leading to denials of meritorious asylum claims. Limitations on judicial review deny many aliens the ability to challenge the legality of detention and removal orders. Whole categories of aliens (for example, asylum seekers who apply after one year in the U.S.) are denied any access to federal court review based on an array of procedural bars.

30. The rights of immigrants facing removal proceedings to effective remedy, including access to counsel are inadequately protected. The U.S. denies access to counsel in expedited removal proceedings. The U.S. provides no meaningful access to counsel for individuals in removal proceedings. Faced with prolonged confinement in poor conditions, individuals who have valid asylum claims are effectively forced to stipulate to removal.

31. The expansion of deportable offenses and limitations on discretionary relief violates lawful permanent residents' right to family integrity. Mandatory removal violates legal permanent residents' right to individualized review. The U.S. failure to consider the interests of any minor children violates the right of the child to special protection.

Counter-terrorism measures and respect of Covenant guarantees (including the criminalization of dissent and *non-refoulement*)[3]

32. The government monitoring phone, e-mail, and fax communications within and outside the United States without judicial oversight about which this Committee has

[3] Merrilyn Onisko for the National Lawyers Guild and International Association of Democratic Lawyers, Criminalization of Dissent in the United States: A Shadow Report on the United States' Obligations under Articles 19 and 21 of the ICCPR; Malcolm X Grassroots Movement, Submission to the United Nations Human Rights Committee on the occasion of its review of the U.S. Government's Second & Third Periodic Report concerning its compliance with the ICCPR, Political Prisoners in the United States; The International Women's Human Rights Law Clinic of the City University of New York School of Law, *et al.,* Report on Failure of Compliance with Article 20 Prohibiting Propaganda for War; Submission of Judge Claudia Morcom for the Meiklejohn Civil Liberties Institute and the International Association of Democratic Lawyers; Minnesota Advocates for Human Rights, *et al.*, Problems with United States Compliance with the International Covenant on Civil and Political Rights – *Violations of the Rights of Aliens*: A report to the United Nations Human Rights Committee on the Second and Third Report of the United States of America. *See also,* Submissions of the American Civil Liberties Union and the Center for Constitutional Rights.

expressed its concern are part of a larger scheme that criminalizes dissent. To this end, the government is engaged in intelligence gathering that violates Article 17. In addition to Article 17, the government's actions violate Articles 18, 19 and 21 because the rights of many are degraded because of their opposition to the "war on terror." The United States and local law enforcement agencies have participated in illegal tactics to disrupt lawful protest and assembly and unlawfully use mass arrests as a means to sweep political activists off the streets and as a tool for mass intelligence gathering operations. The Federal Bureau of Investigation (FBI) has been collecting information on the tactics, training and organizing of anti-war demonstrators who have done nothing illegal. This violates both the limited protections provided by the U.S. Constitution and the broader rights recognized in the Covenant. It follows a historical pattern in the U.S. where dissent is criminalized and dissenters persecuted for their beliefs. Prior to this most recent reincarnation, the abuses of the FBI and other law enforcement agencies and officials under the Counter Intelligence Program (COINTELPRO) led not only to federal laws which the Bush Administration has chosen to ignore, but also to the politically-motivated trials and incarceration of scores of political prisoners, many of whom remain imprisoned under terms and conditions that continue to punish them for reasons including their opinions, beliefs and associations. The recent nomination and confirmation of General Michael Hayden to head the Central Intelligence Agency in part because of his role in the National Security Agency's surveillance serves as additional evidence of the Administration's continuing disregard for both domestic and international law.

33. Peaceful political demonstrators in the United States have been profiled by government agencies based on their political or ideological viewpoints; the organizations to which they belong are being infiltrated by local and federal law enforcement; and they are being illegally detained, arrested and sometimes beaten based on their participating in politically expressive activity and/or peaceable assembly.

34. This chilling criminalization of the right to assembly by the United States, and its lack of adherence to its obligations under Articles 19 and 21 can be seen in three instances in the past five years at which peaceful protesters have been illegally arrested and interrogated by local and federal agents based on their political opinions: the January 2001 Inaugural protests in Washington D.C., the April 2002 anti-war protests also in Washington, D.C.; and the anti-Free Trade Association of the Americas (FTAA) protests held in Miami, Florida in November 2003.

35. In 1978, a petition to the United Nations filed by the National Conference of Black Lawyers, the National Alliance Against Racist and Political Repression, and the United Church of Christ Commission for Racial Justice exposed the existence of political prisoners in the United States, their political persecution, and the cruel, inhuman and degrading treatment and punishment they suffer in U.S. prisons. Today, there are more than 100 political prisoners in the U.S. Some of these prisoners have been held for over three, and sometimes as long as four decades. Six political prisoners have died in prison over the last ten years.

36. Article 20 implicitly recognizes that the condition of war jeopardizes the integrity and exercise of all of the political and civil rights elsewhere declared in the Covenant.

37. The Committee has expressed concern and requested clarification of actions and policies of the United States which are in apparent violation of even the core, non-derogable protections States Parties undertake to assure under the treaty. The US government has sought to justify its actions and policies on the basis of the "war on terror" and the exigencies of its illegal war in Iraq. Because of the pervasive impact of war the propaganda campaign prohibited by Article 20, the fear and xenophobia it stoked, and the resulting illegal war have all contributed to violations, both here and abroad, of many other rights protected by this Covenant.

38. While federal regulations implementing Article 3 of the Convention Against Torture allow individuals to raise Article 3 claims for protection from *refoulement*, the United States has failed to create an adequate legal mechanism implementing fully the obligations of Article 3. Among the shortcomings of U.S. law in this area are the heightened standards that limit the ability of torture survivors to access protection from *refoulement*. U.S. law requires a showing that torture "is more likely than not" and defines government acquiescence so as to exclude "private entities a government is unable to control." These standards are contrary to the requirements of treaties such as the ICCPR and the Convention against Torture.

39. The fundamental flaw in the U.S. position may be attributed to the way it chooses to characterize the rights involved. The U.S. analyzes deportation as a matter of Article 13 which not only applies only to those legally within the United States, but also exempts from coverage those not legally within the country. Article 7, however, is non-derogable and applies to aliens regardless of their status. Thus, protections based on the *non-refoulement* rule should be available regardless of an individual's immigration status. Legislation such as the IIRARA and the REAL ID Act strike a balance in favor of the perceived needs of national security at the expense of the non-derogable human rights of aliens, placing them at risk of *refoulement.* This is contrary to the balance struck, for example, in this Committee's General Comment No. 15, where the prerogatives of a sovereign to regulate entry to its territory are limited by the "inherent right to life, protected by law, [which] may not be arbitrarily deprived of life."

40. The traumatic nature of gender-specific persecution of women often makes them unable to confront their memories in a timely fashion in order to meet the one-year filing requirement. Failure to recognize that a disproportionate number of women require additional time to adequately deal with their memories and narrate their case, denies the reality of their unique situation and constitutes *de facto* discrimination. This contravenes ICCPR Articles 7, 13 and 26 and strips women of the *nonrefoulement* protections provided for in the Covenant.

Non-discrimination and right of equality before the law and to the equal protection of the law (Articles 2 and 26)[4]

41. Persistent racial and gender profiling by law enforcement officers leads to disproportionate numbers of people of color, immigrants, women, lesbian, gay, bisexual, transgender, and intersex (LGBTI) people, sex workers, and youth having their civil and political rights and freedoms violated by law enforcement officers in the U.S. This contravenes the Covenant's non-discrimination provisions.

42. Although death and destruction were inevitable given the magnitude of Hurricane Katrina in August 2005, a great many deaths were the direct result of the State Party's failure to provide adequate evacuation plans, evacuation assistance, and humanitarian aid. These omissions violated both the right to life and the principle of non-discrimination. Specifically, the State Party's evacuation plans amounted to discrimination on the basis of property ownership, which had a disparate impact on racial minorities, in general, and on African Americans, in particular.

43. Further, the failure of the State party to provide appropriate remedies to the victims of Hurricane Katrina whose rights were violated constitutes a separate violation under Article 2(3).

44. Like many of the victims of Hurricane Katrina, homeless people are discriminated against on the basis of property and other status. Laws prohibiting sleeping, camping and sitting in public places, as well as the lack of permanent residences make it difficult to obtain identification cards, and therefore, housing, employment, and other services.

45. Domestic violence is a leading cause of homelessness among women. When these women are denied housing or evicted from their residences because of the violent acts of their abusers, it constitutes a form a sex discrimination in housing.

46. Discriminatory animus also permeates nearly all categories of human rights violations directed at LGBTI Americans, whether committed by state or non-state actors. In many cases the discriminatory intent behind other seemingly distinct categories of human rights violations – including deprivations of life, liberty, health and

[4] In the Shadows of the War on Terror: Persistent Police Brutality and Abuse in the United States; U.S. Human Rights Network and Jean Carmalt, Hurricane Katrina and Violations of ICCPR Articles 6 and 26: A Response to the Third Periodic Report of the United States of America; Submission of Rev. Daniel Buford for the Meiklejohn Civil Liberties Institute, International Association of Democratic Lawyers, Peoples Institute, and Allen Temple; LGBTI Shadow Report; Minnesota Advocates for Human Rights, *et al., supra* note 3; National Law Center on Homelessness and Poverty, Homelessness and U.S. Compliance with the International Covenant on Civil and Political Rights. *See also* Submissions of the Center on Housing Rights and Evictions and the Lawyers' Committee for Civil Rights under Law.

opportunity – may not be easily or even logically separated from the animus that encourages the violation.

47. Since the last periodic examination of U.S. compliance with the Covenant, the U.S. Supreme Court has significantly altered the legal framework in the United States through its decisions in *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003). The failure of the U.S. to explain such major legal advances in its most recent periodic report is highly unusual and raises some concern over the government's commitment to enforcing the rights protected in those cases and echoed in the ICCPR.

48. While the U.S. Supreme Court has now invalidated the country's sodomy statutes, police authorities and prosecutors have in many circumstances selectively made use of other criminal provisions involving morals offenses to target LGBTI individuals. Other discriminatory criminal provisions also seem to have survived after the *Lawrence* decision, raising serious ongoing concerns over the protection afforded to consensual adult sexual activity in the United States.

49. In addition, the legal framework for protecting equality in the United States still contains significant gaps that fail to protect the non-discrimination rights found in Articles 2 and 26 of the Covenant. The Fourteenth Amendment's equal protection provision has not been consistently interpreted either to protect against sex, sexual identity and gender discrimination or to require the highest level of judicial scrutiny to assess the constitutionality of sex-, sexual identity-, or gender-based discrimination. The same can be said for those discriminated against on the basis of their status as immigrants.

50. The compounded impact of discrimination against women because of their sexual orientation requires unique attention, as do the various other intersecting forms of discrimination based on race, disability, health status, gender identity, gender expression and sexual orientation. Within the criminal justice system, for example, lesbian and transgender women face significantly heightened risks of sexual violence from male officers immediately upon arrest and in custodial detention.

51. The "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy in the U.S. is part of a 1993 law banning LGBTI Americans from serving openly in the military. This constitutes a discriminatory limitation on freedom of expression that was originally intended to loosen federal restrictions by allowing lesbians, gays and bisexuals to serve in the military so long as they did not publicly disclose their sexual orientation. Hundreds of Americans are still discharged every year under this policy.

52. The uncertainty of the legal status of transgender people under state law also has a significant impact on other rights such as rights in area of family life. For example, in 1999, a Texas court not only invalidated a seven-year marriage between a transgender woman and her deceased husband, but also refused to recognize damage

compensation that was awarded to her for her husband's death in a medical malpractice case.

53. In addition, issues regarding women's rights and equality vis-à-vis men are raised by the United States Government's failure to implement the Covenant with respect to women's human rights and discrimination. These issues constitute violations under several Articles of the Covenant in addition to indicating a lack of implementation of Article 3 and General Comment No. 28.

Right to life (Article 6)[5]

54. In its Concluding Observations regarding the initial report of the U.S. under Article 40 of the ICCPR, this Committee noted specific concerns about the way in which death sentences were imposed. In the eleven years that have passed since then, the U.S. Supreme Court has taken important measures to prohibit the application of the death penalty to juvenile offenders and to the mentally retarded. We applaud those decisions, and welcome the Supreme Court's newfound willingness to consider international law in assessing whether certain aspects of the death penalty violate the Eighth Amendment to the United States Constitution.

55. At the same time, and contrary to the Committee's specific recommendations in 1995, the U.S. has failed to take measures to restrict the death penalty to the most serious crimes. For example, the "felony murder" rule allows for individuals to be sentenced to death, even if they did not kill, intend to kill, or even contemplate that another human being would die as a result of their actions. Moreover, since the U.S. last appeared before this Committee, it has taken no steps to reduce the number of crimes for which individuals are "death-eligible."

56. There is ample evidence that death sentences in the United States are imposed arbitrarily and on the basis of impermissible factors such as race and poverty. These systemic problems are compounded by the poor quality of legal representation routinely provided to indigent defendants facing the death penalty. In addition, there are no uniform standards to guide the discretion of state prosecutors in seeking the death penalty. As a result, there are enormous geographical disparities in the sorts of crimes for which the death penalty is imposed. The administration of the death penalty in the United States therefore violates Articles 6(1) and 26 of the Covenant.

57. Executions of the severely mentally ill are commonplace in the United States, despite a Supreme Court decision prohibiting the execution of the "insane." *Ford v. Wainwright,* 477 U.S. 399 (1986). In the last ten years, the U.S. has put to death

[5] National Association of Criminal Defense Lawyers, *et al. supra* note 2; National Law Center on Homelessness and Poverty, *supra* note 3; Nicole M. Phillips and Connie de la Vega, representing Human Rights Advocates through University of San Francisco Frank C. Newman International Human Rights Clinic, Report on Juvenile Criminal Sentences, the Right to Vote, the Right to Life on the Border and Freedom of Association in the United States: A Shadow Report.

dozens of prisoners suffering from schizophrenia, bipolar disorder, and other incapacitating mental illnesses. Moreover, the United States has allowed at least one mentally ill prisoner to be forcibly medicated with anti-psychotic medication so that he could be rendered "competent" for execution. These practices constitute cruel, inhuman or degrading treatment or punishment in violation of Article 7.

58. There is mounting evidence that current lethal injection protocols violate Article 7. Lethal injection is the most common method of execution in the U.S. While lethal injection was once believed to cause a painless death, experts have testified that death by lethal injection can cause excruciating agony. Prisoners have sought to obtain stays of execution while lethal injection is subjected to further study and analysis, but courts in several states have repeatedly denied them even a temporary reprieve.

59. Death row prisoners in states such as Texas and California are routinely subjected to inhuman and degrading treatment in violation of Articles 7 and 10. Of the thirty-eight states that allow for the application of the death penalty in the U.S., Texas and California have, by far, the largest number of condemned inmates. The prisons housing death row inmates in these two states have been severely criticized by the federal judiciary for imposing inhumane and degrading conditions of detention, and for failing to provide necessary mental health treatment for incarcerated prisoners. These conditions have had grave effects on death row inmates' mental and physical health.

60. The conditions of death row confinement cannot be viewed in isolation from the length of time that prisoners spend on death rows awaiting their executions. As several international tribunals have recognized, prisoners forced to anticipate their own deaths face a unique form of mental torment. This Committee has stressed that the mere length of time that a prisoner spends on death row does not give rise to a violation of Articles 7 and 10, and we do not quarrel with that conclusion in this report. Rather, we contend that the inhumane conditions on death rows nationwide, coupled with the cumulative effects of those conditions on prisoners who typically spend over a decade awaiting execution, amount to cruel, inhuman or degrading treatment or punishment.

61. Homeless people suffer serious health problems that are directly related to their lack of housing. Being subjected to the elements contributes to illness and death among the homeless population.

62. The high number of migrant deaths attributed to both the change in U.S. border policy and the violence of vigilante groups violates Article 6. After the U.S. changed its border policy in 1994, entry points in major cities closed and migrants were forced to cross the U.S.-Mexico border in remote areas such as the Sonoran desert. During the past year alone, the U.S. Customs and Border Protection agency reported that 464 migrants had died as of September 30, 2005, most of who perished from the extreme temperatures of the Arizona desert. Following the September 11, 2001 terrorist attacks on the U.S., there was an increase in the number of militia-like groups formed

along the U.S.-Mexico border, some of which have gained the support of white supremacists. Vigilante groups formed and started hunting, detaining, beating, and sometimes killing immigrants.

Prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 7)[6]

63. Issues relating to domestic policing highlight the widespread violations of human rights guaranteed by the Covenant which take place *outside* of courts and prisons, on the streets, in patrol cars, and in police precincts across the U.S. Additionally, the persistent and pervasive police abuse and misconduct in the U.S. interferes with the enjoyment of other rights guaranteed by the Covenant.

64. Violations of the Covenant continue to take place on U.S. soil, in the shadows of the U.S. government's extraterritorial activities, at the hands of local, state, and federal law enforcement agents. There are significant similarities – in practices, personnel, targets, and rationales – between the U.S. government's human rights abuses overseas and at home.

65. The overall climate of the U.S. government's "war on terror" has led to considerable abridgment of civil liberties in the U.S. It has fostered torture and abuse of individuals detained by local and federal law enforcement agencies in the wake of the events of September 11, 2001, as well as the ongoing targeting of Arab and Muslim populations in the U.S. It has also created a generalized climate of impunity for law enforcement officers, and contributed to the erosion of what few accountability mechanisms exist for civilian control over law enforcement agencies. As a result, police brutality and abuse persist unabated and undeterred across the country.

66. The U.S. government refers this Committee to the two reports it has submitted to the UN Committee Against Torture (CAT) for information concerning its compliance with Article 7 of the Covenant. In its report to the CAT, the U.S. government concedes that complaints of police violence and abuse continue to be made, but states, "In a country of some 280 million people with a prison population of over 2 million people it is perhaps unavoidable, albeit unfortunate, that there are cases of abuse." This is a conclusion with which we disagree.

67. The U.S. has a double standard on the use of mind-altering drugs. On the one hand, the U.S. understands the intentional infliction of mental suffering by administration of mind-altering drugs on a person as torture; yet on the other hand it condones the practice of force drugging when the victim is a person with psychosocial disabilities.

[6] In the Shadows of the War on Terror, *supra* note 4; Tina Minkowitz and Al Gaves, with the assistance of Celia Brown, Myra Kovary and Eve Remba on behalf of New York Organization for Human Rights and Against Psychiatric Assault, Mind Freedom International and Law Project for Psychiatric Rights, Alternative Report on Force Drugging, Forced Electroshock and Mental Health Screening of Children: Violation of Article 7

68. A report by five UN special rapporteurs condemned the force drugging of Guantánamo detainees as a violation of the right to free and informed consent and its "logical corollary, the right to refuse treatment".

69. Force drugging and forced electroshock violate Articles 7 and 18 of the Covenant. Maintaining separate standards in relation to people with psychosocial disabilities violates Article 2. A standard of legal capacity that disqualifies people with psychosocial disabilities from exercising free and informed consent denies equal protection of the law in violation of Article 26.

70. Gender and racial disparities intersect with disability-based discrimination. Electroshock is administered twice as often to women as it is to men, often under circumstances that demonstrate a gender-related motive. Force drugging in the community by court order is used in New York State disproportionately against people of color, mostly African Americans.

71. A new model of legal capacity being developed by people with disabilities would eliminate incapacity determinations and instead provide support to all who need it to facilitate their decision-making. The support model is based on choice in a context of interdependence, rather than self-sufficiency, as a paradigm for legal capacity. Since everyone has a will and is capable of making choices, legal capacity is accessible to all on an equal basis, with the applicable standard for children being articulated in the Convention on the Rights of the Child Article 12, a right to freely express their views, which are to be given due weight in accordance with the child's age and maturity.

72. Adoption of the support model of legal capacity is necessary to eliminate discrimination in the right to free and informed consent, which underlies protection against medical practices amounting to torture or cruel, inhuman or degrading treatment or punishment.

73. Mass screening of children for mental illness with only passive consent by their parents (i.e. parents can opt out but no affirmative consent is required, and there is no requirement of consultation with the children at all), with the result that children are drugged with psychotropics, violates their rights under Article 7.

74. Violence, torture and extrajudicial killings of persons because of their sexual orientation, whether committed by state authorities or non-state actors, including deaths in prison that may be attributed to the failure of prison officials to adequately protect LGBTI inmates, all raise serious concerns under Articles 6, 7 and 10. There is evidence of state acquiescence to private misconduct that results in severe abuse.

Treatment of persons deprived of liberty (Article 10)[7]

75. Nationally, the United States sentences more than 1 million people to state and federal prison every year, and there are currently 7 million people under correctional supervision, including more than 2 million in prison and jail. Six percent of the American adult population has been convicted of a felony. As the American criminal justice system continues to expand, its burden has fallen most heavily on the poor and people of color. Their powerlessness and lack of resources make even more urgent their need for human rights protections at trial, at sentencing and while being held in custody.

76. The rapid growth of the prison population has taken place at the same time as crime and punishment has become deeply politicized, with increasing disrespect for the dignity and humanity of prisoners. As a result, both deliberate policy and inadequate resources have led to increasingly inhuman conditions within the United States prison and jail system that frequently contravene both Articles 7 and 10.

77. The rights enumerated under Article 14 are generally supported by United States constitutional jurisprudence. This includes the right to be represented by counsel at trial and, for indigent defendants facing the possibility of imprisonment, to have counsel provided to them. However, this basic requirement of a fair trial is often not met. With three-quarters of criminal cases requiring the public provision of counsel, a system without a vibrant and well-funded indigent defense system is not sufficiently meeting the requirements of guaranteeing counsel. In practice, the United States does not make adequate resources available for indigent defense, and there are no mechanisms to ensure that states provide competent counsel.

78. Effective counsel is necessary at all stages of a criminal court proceeding. Ninety five percent of all criminal cases are settled not at trial but through plea bargains. Defendants facing long mandatory sentences determined by legislation or strict sentencing guidelines are very vulnerable to pressure from prosecutors and the assistance of a skilled and knowledgeable attorney during the negotiation process is essential. Without adequate resources to meet the growing need for effective assistance of counsel for indigent defendants, the US cannot meet its obligations under the Covenant.

79. Article 26 recognizes that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Despite this internationally accepted norm, a double standard of justice has been evident in criminal sentencing in the United States, particularly for drug offenses. The national prison population has more than tripled since 1980, with nearly half of that population being black, although African Americans constitute only 12 percent of the U.S. population. The increase in the prison population is neither in response to rising crime

[7] Domestic Criminal Justice Issues and the ICCPR; Women's Institute for Leadership Development for Human Rights, *et al., supra* note 2.

nor an indication of more criminal activity by blacks. Instead, it is a reflection of more stringent penalties in the form of mandatory minimum sentences, particularly the penalty disparity between crack and powder cocaine.

80. Endemic overcrowding leads to greater levels of violence, lack of privacy, excessive noise, inadequate programs and lack of essential services, including healthcare. Especially at risk in these conditions are the large number of mentally ill within prisons and jails. The mentally ill are overrepresented among those sent to super maximum security ("Supermax") prisons. In these prisons, people spend a minimum of 23 hours a day in small cells with almost no interaction with other people, limited activities, sensory deprivation, and harsh security restrictions. Confinement in a supermax can be devastating for anyone, but for the mentally ill it surely constitutes torture.

81. In addition to the inhuman treatment suffered by all prisoners, women are especially at risk for sexual abuse and humiliation, and inadequate medical and obstetric care, including shackling during childbirth. Approximately five percent of women reportedly arrive pregnant in jail, and approximately 2,000 babies are born to U.S. prisoners every year. Moreover, female inmates frequently are not provided with the means to exercise their rights to abortion services.

82. Women prisoners, who are more likely than their male counterparts to be the primary caretakers of dependent children, are disparately impacted by the loss of contact with their children. The separation from children and the risk of losing parental rights is gravest for those in private, for-profit prisons who are often held in different states from where their families reside making it almost impossible to maintain contact with their children. Prisons are patriarchal systems which attempt to restrict women's choices not only about their bodies but also their offspring. After incarcerated women bear children, their offspring are placed in either kinship or foster care. If a child is placed in foster care, mothers often irreversibly lose their children without due process. Even worse, reunification is often at the whim of individual case workers.

83. In addition, LGBTI persons in detention are subjected to sexual, physical and verbal abuses. Abuses carried out under these circumstances constitute intersecting violations of ICCPR provisions. In particular, violations of Article 9 are most common when police or custodial officers fail to protect LGBTI persons or deliberately place them in harm's way. Police reliance on an individual's "deviance" from stereotypical gender norms as a ground for suspicion or police targeting individuals adds to this risk for LGBTI persons.

84. California, home to approximately 10 percent of the nation's prison population, is an example of the gravity of human rights concerns facing imprisoned populations. The mistreatment of inmates incarcerated in California prisons has resulted in a spectrum of abuses that particularly impact marginalized populations including transgender persons, women, the elderly, youth, the disabled, and the mentally ill. Prisoners face

multiple forms of discrimination and are subjected to violence based on their gender and racial identities, economic status, age and sexual orientation.

85. In direct opposition to its obligations under the ICCPR, U.S. legislation such as the Prison Litigation Reform Act ("PLRA") effectively prevents many prisoners from seeking redress in federal court. Under the PLRA, federal court supervision over prison systems failing to maintain humane conditions in their facilities automatically terminates unless the court can make detailed factual findings of a current and on-going constitutional violation. This drastically reduces the ability of the courts to remedy human rights violations in prisons. In addition, the PLRA caps the attorney fees that can be recovered in cases filed by prisoners and limits the tasks for which fees can be awarded. In effect, this discourages attorneys from representing even prisoners with strong cases.

86. Congressional legislation like the Prison Rape Elimination Act (PREA) of 2003 exists to address sexual violence. States such as California, however, have not taken action to implement PREA-based recommendations to provide safety in its correctional complex or to hold perpetrators accountable for custodial sexual misconduct.

87. Asylum seekers are detained under unsuitable conditions and personnel at the institutions where they are detained are not given adequate training to understand and work with asylum seekers.

Freedom of association (Article 22)[8]

88. Employed in private homes to perform household tasks that historically have been assigned a diminished value, domestic workers frequently face exploitation and abuse, a problem further exacerbated by their association with particular groups (women, minorities, and migrants) who suffer multiple forms of discrimination. Domestic workers experience abuses ranging from verbal abuse and economic exploitation to physical and sexual assault and forced servitude. Although U.S. laws should protect them, domestic workers find that they are often excluded from legal protections or that the laws are not enforced. This reprehensible abuse of domestic workers violates Articles 2, 3, 7, 8, 9, 12, 17, 19, 21, 22, and 26.

89. The 2002 U.S. Supreme Court case *Hoffman Plastic Compounds, Inc. v. NLRB* violates Article 22's right to freedom of association, including the right to form and join trade unions. *Hoffman* removed the traditional back pay remedy for undocumented workers whose rights have been violated under the National Labor Relations Act (NLRA), effectively eliminating any association rights for these workers. Without these rights, undocumented migrant workers have little incentive to report workplace abuses, which in turn decreases the accountability of employers who exploit the migrant workforce. Many employers in the United States have attempted

[8] Global Rights and the University of North Carolina Law School Human Rights Policy Clinic, *supra* note 2; Phillips and de la Vega *supra* note 5.

to use the *Hoffman* decision as a way to weaken other workplace protections for migrant workers. This decision has both directly and indirectly affected the rights to equal protection and nondiscrimination for this vulnerable group of migrant workers in irregular status. The Supreme Court's decision represents an impermissible favoring of immigration policy and national security over even the limited human rights protections afforded the right to associate under the NLRA. The U.S. has also failed to protect the existing labor rights of migrant workers on the Gulf Coast following Hurricane Katrina.

90. The Inter-American Court of Human Rights and the ILO's Committee on Freedom of Association have issued opinions stating that the *Hoffman* decision violates the country's international and regional treaty obligations.

91. Twenty-two states in the U.S. have further undermined the right to freedom of association by enacting so-called "right to work" laws. These laws prevent unions from collecting fees from nonmember employees, while still guaranteeing those employees the benefits of union membership. The result is weaker unions with inadequate resources to represent their members. Consequently, workers in states with so-called "right-to-work" laws have lower wages, fewer people with health care, higher poverty and infant mortality rates, lower workers' compensation benefits for workers injured on the job, and more workplace deaths and injuries.

92. The U.S. Government offers as examples of its protection of the right to "expressive association" two highly controversial decisions of the U.S. Supreme Court in *Boy Scouts of America v. Dale*, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston.* In both cases the Supreme Court was required to balance freedom of expressive association, which protects the right of individuals to associate freely with those expressing similar political, social or cultural views, with state prohibitions on discrimination based on sexual orientation. The outcome in each of those decisions raises serious non-discrimination concerns, and it is particularly offensive that the U.S. Government's periodic report raises the decisions within such a positive context and without a more complete discussion of their impact on LGBTI Americans.

Protection of children (Article 24)[9]

93. The United States fails to recognize the right of children in conflict with the law to procedures that take account of their age as required by Article 14 or the more general requirements for the special protection of minors required under Article 24 of the ICCPR. State legislation routinely allows children, in some cases as young as ten years old, to be subject to adult criminal proceedings. Once in the jurisdiction of criminal court, child offenders lose the protections that they would have received in

[9] LGBTI Shadow Report *supra* note 4; Women's Institute for Leadership Development for Human Rights *supra* note 2; Phillips and de la Vega *supra* note 5; Domestic Criminal Justice Issues and the ICCPR *supra* note 7.

the juvenile court which takes account of their status as children and are eligible for adult sentences including life in prison without the possibility of release.

94. While the number of new commitments of children to adult prisons has declined from its peak, the Department of Justice's latest figures show more than 9,000 children in adult prisons and jails with more than 4,000 children per year entering the adult system, 70 percent of them youth of color. When the United States ratified the ICCPR, it attached a limiting reservation stipulating that it "reserve[d] the right, in exceptional circumstances, to treat juveniles as adults." Clearly, however, given the numbers involved, the circumstances in which children are treated as adults is far from exceptional. It is a routine and everyday occurrence.

95. Confining children within adult prisons and jails not only contravenes Article 14 but also Articles 7 and 10 as their youth and vulnerability make the conditions they face particularly inhuman and damaging. Children in adult prisons and jails are at increased risk of suicide and sexual and physical abuse by guards and other prisoners. The sentence of life without the possibility of release for children is an extreme form of cruel and inhuman punishment that denies any possibility of rehabilitation.

96. Children's detention facilities fail to meet the requirements of the ICCPR. The manner in which children are detained discourages them from pursuing their right to seek asylum and other forms of relief. Juvenile aliens' access to counsel is insufficient.

97. Discrimination, abuse and misconduct against LGBTI youth remains particularly severe. Verbal, physical and sexual violence directed at LGBTI youth in schools, in juvenile detention facilities and in foster care is prevalent. The government's failure in this context to guarantee adequate protection to LGBTI youth raises serious concerns under Article 24 of the ICCPR. LGBTI associations in schools have also come under attack. And an increasing number of children face economic challenges due to the government's failure to recognize same-sex relationships involving their parents, or their same-sex *de facto* step-parents. If a parental figure is unable to establish a legal relationship, a child is often unable to claim health insurance or social security survivor benefits.

Voting and Political Participation (Article 25)[10]

98. In the United States, felony disfranchisement laws are adopted at the state level and thus have resulted in wide disparities in both the terms and the application of the laws. Serious problems exist in the procedures for removing voters from electoral databases because of a felony conviction, as well as in the education of public

[10] Terry M. Ao, *et al.*, Violations of Article 25: A response to the U.S. Second and Third Periodic Reports and to CCPR/C/USA/Q/3: On issues related to the right to vote and participate in public affairs. *See also* Submissions of the American Civil Liberties Union and the Lawyers' Committee for Civil Rights under Law.

officials charged with upholding the laws. There is also significant variance in state determinations of which crimes will result in disfranchisement.

99. In the April 2006 elections in Orleans Parish, tens of thousands of voters were denied access to voting because the U.S. Government failed to take actions to accommodate those displaced by Hurricane Katrina. Despite precedents set by the responses to other disasters including the September 11, 2001 attacks in New York City, the federal government chose to provide only a fraction of the financial assistance requested by the Louisiana State government to hold these elections. Of particular concern, the impact of the denial of voting rights for the displaced population was racially disparate. A review of the April voter turnout shows a significant drop among African-American voters and an actual increase in the percentage of white voter turnout.

100. The residents of Washington, D.C., pay taxes like any other U.S. resident, but they are denied representation in the federal legislature. In December 2003, the Inter-American Commission on Human Rights ruled that the U.S. Government is in violation of international law because Washington, D.C., residents have no representation.