



U.S. Compliance with the International Covenant on Civil and Political Rights

Suggested List of Issues to Country Report Task Force on the United States

**107th Session of the Human Rights Committee, Geneva
March 11-28, 2013**

Submitted by:
Human Rights Institute, Columbia Law School*
435 West 116th Street
New York, NY 10027
U.S.A.

Phone: 212-854-3138
Email: gmoses@law.columbia.edu

December 28, 2012

**On behalf of:*

Access to Justice: National Coalition for a Civil Right to Counsel; Maryland Legal Aid Bureau; Columbia Law School Human Rights Institute; Northeastern School of Law Program on Human Rights and the Global Economy; and the National Center for Access to Justice

Federal Role in Respecting and Ensuring Covenant Rights: Columbia Law School Human Rights Institute; The International Association of Official Human Rights Agencies

TABLE OF CONTENTS

| | |
|--|----|
| Access to Justice, including Meaningful Legal Representation in Civil Cases | 3 |
| The Federal Role in Respecting and Ensuring Covenant Rights at the State and Local Level | 6 |
| Diplomatic Assurances Against Torture | 10 |

I. Access to Justice, including Meaningful Legal Representation in Civil Cases

II. Reporting Organization(s)

National Coalition for a Civil Right to Counsel; Maryland Legal Aid Bureau; Columbia Law School Human Rights Institute; Northeastern School of Law Program on Human Rights and the Global Economy; and the National Center for Access to Justice

III. Issue Summary

Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system. Millions of Americans lack representation when facing crises such as eviction, foreclosure, workplace discrimination, termination of subsistence income and medical assistance, and loss of child custody. Although the U.S. Supreme Court has recognized the right to counsel in the criminal context, it has failed to establish a similar protection for individuals in the civil context when basic human needs are in jeopardy. The result is a crisis in unmet civil legal needs. Fewer than one in five low-income persons in the United States obtains necessary legal assistance in civil matters. Furthermore, federal law restricts the services that indigents receive through federally-funded legal services organizations. The result is inequality and a denial of fairness in the civil adjudication system, with disproportionate harm to those living in poverty, racial minorities, and women. Attempts at the federal level to address the justice gap have fallen short. Moreover, the United States fails to protect the human rights of migrant agricultural workers throughout the country by allowing and participating in the denial and limitation of access to these workers in their labor camp homes by legal advocates and other community service providers. This denial/limitation makes such workers vulnerable to systemic exploitation, including wage theft, pesticide exposure and, in some cases, human trafficking.

IV. Concluding Observations offered by the Human Rights Committee

None to date.

V. U.S. Government Report

In its 2011 report to the Human Rights Committee, the U.S. government concedes inequalities in its civil justice system, “in part because neither the U.S. Constitution nor federal statutes provide a right to government-appointed counsel in civil cases when individuals are unable to afford it.”¹ The government then identifies several mechanisms it employs to mitigate the justice gap. Chief among those mentioned are the federal *in forma pauperis* statute, the Department of Justice’s Access to Justice Initiative, and the Legal Services Corporation.²

None of these measures, however, are sufficient to address the justice gap in the United States. The *in forma pauperis* statute only authorizes courts to request an attorney represent an indigent litigant while providing no funding. In practice, this discretionary power is rarely exercised. While promising, the Access to Justice Initiative has institutional and resource constraints that prevent it from fulfilling its potential and comprehensively addressing the dire need for civil legal

¹ United States Report to the Human Rights Committee, para 301.

² US Report to HRC, para 302.

services. The Legal Services Corporation, which provides grants for civil legal assistance, has experienced crushing budget cuts and severe restrictions on how NGO's funded by it can conduct their work.

VI. Legal Framework

- ICCPR Articles 2; 14; 26

VII. Human Rights Committee General Comments

General Comment 32 clarifies Article 14's guarantee of equality before the law. The Human Rights Committee explains that this guarantee encompasses access to the legal system, including in civil cases. It emphasizes that the availability of legal counsel "often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way." The Committee recommends that states provide legal assistance to those who cannot afford it, noting that this may be *required* in certain cases.

VIII. Other UN Body Recommendations

The CERD Committee has taken particular notice of the United States' failure to provide counsel in civil cases. During its 2008 review of the United States, the CERD Committee expressed concern that the lack of civil counsel for persons living in poverty disproportionately and negatively affects racial minorities in the U.S.,³ and recommended that the U.S. "allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake."⁴

A number of other UN bodies and independent experts have identified the importance of the civil right to counsel to vindicating other rights, particularly those relating to basic human needs. The Special Rapporteur on Adequate Housing has written, for example, that legal remedies against forced evictions are only effective where civil legal aid is also provided.⁵ Other Special Procedures have made similar comments in regards to protecting the rights of racial minorities,⁶ women,⁷ and migrants.⁸ The Special Rapporteur on Extreme Poverty recently summarized this

³ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. 8/05/2008. A/56/18, CERD/C/USA/CO/6, para. 22.

⁴ *Id.*

⁵ See U.N Human Rights Comm. – General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions: 20/05/97, ¶ 15, 16th Sess. HRC, U.N. Doc. E/1998/22, Annex IV (1997).

⁶ U.N Special Rapporteur on the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Annual Rep. to the Human Rights Council ¶10, ¶35, 18th sess. HRC, U.N Doc. A/HRC/18/44 (July 21, 2011) (by Githu Muigai).

⁷ See U.N Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights: *International, regional and national developments in the area of violence against women (1994-2003)* ¶90, 59th sess. CHR, U.N Doc. E/CN.4/2003/75 (Jan. 6, 2003); U.N Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights: *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* ¶83, 62nd sess. CHR, U.N Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk).

⁸ U.N Special Rapporteur on the human rights of migrants, Annual Rep. to the Human Rights Council, ¶46, 7th sess. HRC, U.N Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante); See also U.N Special Rapporteur on the human

relationship between counsel and the vindication of other rights: “[the] (l)ack of legal aid for civil matters can seriously prejudice the rights and interests of persons..., for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.”⁹

IX. Recommended Questions

- Please provide information on the legislative, policy, and other measures being taken to address the deficiencies in current federal initiatives related to access to justice and to meaningfully expand access to the civil justice system, including the provision of civil legal services in cases where human needs are at stake.
- Please provide information on what measures the United States is taking to ensure the protection and enforcement of the rights of migrant farmworkers to receive visitors in their homes, including educational, religious, health and legal service providers.

X. Suggested Recommendations

The United States should take the following steps to address the civil justice gap:

- support research to assess the immediate and long-term financial and other consequences for courts, court users, and communities when court users have counsel in civil cases, and to explore other ways to improve court access;
- enact federal legislation to guarantee right to counsel in immigration cases and all civil cases in federal court where liberty interests or fundamental human needs are at stake;
- fully fund the Legal Services Corporation at a level sufficient to meet the need for free or low cost legal assistance and lift restrictions that prevent legal services lawyers from providing the full array of necessary services;
- intensify the Access to Justice Initiative's activities with respect to civil legal services providers and provide it with the necessary leadership, funding and other support to reach its full potential;
- support and coordinate efforts on the state level to establish a civil right to counsel by developing, evaluating, and disseminating “best practices” for states; and
- take all reasonable measures to ensure the rights of migrant farmworkers to receive visitors in their homes, including educational, religious, health and legal service providers, including enforcement of the rights of migrant farmworkers by all appropriate federal and state agencies.

rights of migrants, Annual Rep. to the Comm. on Human Rights ¶24, 59th sess. CHR, U.N Doc. E/CN.4/2003/85 (Dec. 30, 2002) (by Gabriela Rodríguez Pizarro).

⁹ See U.N Special Rapporteur on Extreme Poverty and Human Rights, Report on Access to Justice for People Living in Poverty, ¶62, 21st sess. HRC, U.N Doc. A/67/278 (August 9, 2012) (by Maria Magdalena Sepúlveda Carmona).

I. The Federal Role in Respecting and Ensuring Covenant Rights at the State and Local Level

II. Reporting Organization(s)

Columbia Law School Human Rights Institute & the International Association of Official Human Rights Agencies

III. Issue Summary

Full compliance with the ICCPR requires that treaty provisions are respected and protected at the state and local levels. In ratifying the ICCPR, the United States indicated that state and local governments share authority to implement the treaty. Such shared responsibility is consistent with international law and U.S. federalism.¹ Indeed, state and local governments have jurisdiction over a range of issues covered by the Covenant and are essential partners in ensuring compliance with the ICCPR.² Despite their critical role, state and local governments continue to lack the necessary training and resources to implement international human rights treaty standards. The U.S. has yet to establish transparent and effective federal mechanisms to encourage, coordinate and support state and local efforts to monitor and implement human rights. Because there is no national human rights infrastructure, many state and local officials are unaware of the treaties the U.S. has ratified and their obligations with respect to treaty implementation.³ State and local governments also lack the funding and resources necessary to effectively collect and analyze data on human rights compliance and take other steps to implement human rights. Thus, while state and local agencies and officials have the potential to implement the United States human rights commitments, this potential is largely unrealized.⁴

IV. Concluding Observations

In 2006, the Human Rights Committee called for the creation of mechanisms within the United States to facilitate more comprehensive reviews of compliance at all levels of government and foster

¹ See International Covenant on Civil and Political Rights, Declarations and Understandings of the United States of America, Understandings, ¶ 5. According to Article VI of the U.S. Constitution, treaties are “the supreme law of the land.”

² See United States of America, Annex A to the Common Core Document of the United States State, Local, Tribal, and Territorial Human Rights Organizations and Programs, ¶ 3, (Dec. 31, 2011) [hereinafter Annex A], available at <http://www.state.gov/j/drl/rls/179782.htm>

³ To date, several mechanisms have been created to support treaty implementation but these mechanisms have lacked transparency have not coordinated with state and local officials. In 1998, President Bill Clinton issued Executive Order 13107, setting up an Inter-Agency Working group to promote and implement ratified human rights treaties. This body was never fully operationalized and was rendered inactive and ineffective when George W. Bush took office. More recently, the Obama Administration creating an Interagency Equality Working group, which may be responsible for treaty reporting and UPR implementation. However, there is very little publicly available information about this body. To date, it has no institutionalized mandate and has not engaged with state and local agencies and officials.

⁴ A number of state and local agencies and officials in states and localities have begun to promote and protect human rights using innovative strategies. These initiatives are detailed in three reports by the Columbia Law School’s Human Rights Institute, available at <http://web.law.columbia.edu/human-rights-institute/human-rights-us/treaty-implementation/state-and-local-work/state-local-report>.

follow-up with the Concluding Observations.⁵ The Committee emphasized the importance of implementation of the treaty at the state level, calling for the U.S. to take steps that ensure federal and state laws comply with the treaty in a number of areas, including racial profiling, housing discrimination on the basis of race and employment discrimination on the basis of gender and sexual orientation.⁶ The Committee further requested more comprehensive information on compliance at the state level.⁷

V. U.S. Government Report

For this review, the U.S. has submitted Annex A to the Common Core Document of the United States of America, which describes an array of state, local, tribal and territorial human rights organizations and programs and emphasizes that state and local agencies play a “critical role” in human rights implementation. It offers a snapshot of the ways that some of the approximately 150 existing state and local civil and human rights agencies in the United States are addressing issues of discrimination in their local communities.⁸

We commend the inclusion of state and local agency initiatives. However, the U.S. Report and Annex A omit essential information on the domestic human rights context. Most notably, state and local agencies face numerous constraints in their efforts to promote and protect human rights. First, these agencies are primarily mandated to monitor and enforce state and local anti-discrimination laws and they lack training on human rights standards. Second, agencies are over-burdened and under-resourced, often lacking the staff necessary to carry out even their core anti-discrimination work. Over the past several years, many of these agencies have experienced budget cuts, and several have been forced to close. As a result of these constraints, their capacity to monitor and implement human rights is limited.

Furthermore, neither the Fourth Periodic Report nor Annex A describe how the federal government supports and coordinates efforts to comply with human rights treaty standards through education, training, and other means. The only examples of federal support focus on anti-discrimination initiatives related to provisions of domestic law. Finally, Annex A lacks a broader discussion on the ways in which other state and local actors, such as state and local elected officials and law enforcement personnel, promote and protect human rights, despite the important role these actors can also play to ensure human rights treaty compliance at the state and local level.⁹

VI. Legal Framework

⁵ Human Rights Comm., 87th Sess., July 10-28, 2006, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 39, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter *Concluding Observations 2006*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

⁶ *Concluding Observations 2006*, ¶ 22-25; 28.

⁷ *Concluding Observations 2006*, ¶ 39.

⁸ Annex A, ¶ 3.

⁹ In prior reviews on compliance with the CERD, the U.S. has provided more comprehensive data on state civil rights programs foster compliance with provisions of that treaty. See Annex I to the Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, (April 2007), available at http://www.state.gov/j/drl/rls/cerd_report/83405.htm.

Articles 2; 26 and 50.

VII. Human Rights Committee General Comments

General Comment 31 clarifies that all levels of government—federal, state and local—bear a responsibility to implement human rights standards and affirms that the provisions of the ICCPR “extend to all parts of federal states without any limitations or exceptions.”¹⁰

VIII. Other UN Body Recommendations

The CERD Committee has recommended that the U.S. “establish appropriate mechanisms to ensure a coordinated approach” to human rights implementation “at the federal, state and local levels.”¹¹ The Committee on the Rights of the Child has similarly called for greater coordination at the federal and state levels to foster compliance with the Optional Protocols to the CRC.¹² In 2010, the U.N. Working Group of experts on people of African descent recommended that the U.S. create a human rights monitoring body to facilitate greater human rights implementation at the state and federal level.¹³ Most recently, during the UPR review of the United States, twelve countries called for the U.S. to establish a national human rights monitoring body and four of these emphasized that such a body should coordinate with state and local entities.¹⁴

IX. Recommended Questions

- Please describe the education, legislative, policy and other measures taken by the United States to ensure that state and local agencies and officials have the capacity to respect and implement the United States’ commitments under the ICCPR and implement the Committee’s Concluding Observations. Specifically describe how the federal government effectively communicates these standards and recommendations to state and local agencies and officials to foster greater awareness of and compliance with human rights standards.
- What measures has the United States taken to create institutionalized, transparent and coordinated mechanisms to monitor and implement human rights at federal, state and local levels in order to raise awareness of treaty provisions and Committee recommendations,

¹⁰ U.N. Human Rights Comm.—General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 4, U.N. Doc CCPR/C/21/Rev.1/Add. 13 (May 26, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>.

¹¹ Comm. On the Elimination of All Forms of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 13, U.N. Doc. CERD/C/USA/CO/6 (May 16, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>

¹² Comm. on the Rights of the Child, *Concluding Observations: United States of America*, ¶13, U.N. Doc CRC/C/OPSC/USA/CO/1 (June 25, 2008), available at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.USA.CO.1.pdf>; see also ¶ 19 (recommending that the U.S. consider creating human rights institutions equipped with requisite funding and resources).

¹³ Report of the Working Group of experts on people of African descent: Visit to the United States of America, ¶ 88, U.N. Doc. A/HRC/15/18 (Aug. 6, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/152/97/PDF/G1015297.pdf?OpenElement>.

¹⁴ See U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, 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>.

disseminate information about and oversee implementation, and provide financial and other resources and support to foster human rights compliance.

X. Suggested Recommendations

- **Establish transparent and effective federal mechanisms** mandated to coordinate with state and local officials to ensure comprehensive monitoring and implementation of international human rights standards at the federal, state and local levels, such as a reinvigorated Inter-Agency Working Group on Human Rights and a National Human Rights Institution.
- Ensure **Dedicated Staff** responsible for coordinating and liaising with state and local agencies and officials regarding human rights reporting and implementation, including identifying and developing best practices at the state and local level and communicating recommendations from international bodies to state and local governments.
- **Provide education and training** to state and local officials on international human rights treaty standards and Concluding Observations, as well as their obligations to implement human rights and effective practices for fostering compliance with human rights standards.
- **Provide** state and local governments with **funding** to engage in civil and human rights implementation and compliance, including through grants to state and local agencies to ensure they have the resources to undertake human rights education, monitoring, reporting and enforcement.

I. Diplomatic Assurances Against Torture

II. Reporting Organization: Columbia Law School Human Rights Institute

III. Issue Summary

Diplomatic assurances against torture are non-binding guarantees of humane treatment the U.S. government seeks when transferring detainees to foreign governments with records of torture or inhumane detention conditions. The U.S. government has used assurances in a variety of contexts: repatriations from the Guantanamo detention facility; deportations and extraditions; custodial detainee transfers in Afghanistan and elsewhere; and renditions.¹ There are reports of recent U.S. involvement in proxy detention and related practices, facilitating the transfer of individuals to the custody of governments with records of torture or inhumane detention conditions, and sometimes participating in the interrogation of these individuals.² Whether the U.S. uses assurances or other mechanisms to monitor torture in this context is unknown.

The UN Human Rights Committee, UN Committee Against Torture, several UN experts have repeatedly raised concerns about U.S. use of assurances. Categorized broadly, these concerns are: the government's lack of transparency regarding detainee transfer policy and procedures, particularly in the context of renditions; the sufficiency of judicial review of the risk of abuse in individual cases; and the efficacy of post-return monitoring arrangements to ensure the safety of transferred detainees.

In January 2009, President Obama signed an executive order establishing the interagency Special Task Force on Interrogations and Transfer Policies, but the government has not published any version of the task force's report or announced any steps to implement its recommendations.³ In

¹ In 2010, the Human Rights Institute published *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers*, surveying evolving jurisprudence and practice in the U.S., Canada and Europe, and describing the guidance of U.N. human rights bodies and experts and briefing paper "U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada. They are available at <http://web.law.columbia.edu/human-rights-institute/diplomatic-assurances>.

² See, e.g., Terri Judd, "UK accused of role in rendition as missing 'Briton' faces US charges," *The Independent* (December 23, 2012) (reporting the disappearance and detention of then-UK citizen Mahdi Hashi and two Swedish national in Africa by "local authorities" before being flown to the U.S., where they have recently been indicted for terrorism offenses) available at www.independent.co.uk/news/uk/home-news/uk-accused-of-role-in-rendition-as-missing-briton-faces-us-charges-8430600.html; Eli Lake, "Somalia's Prisons: The War on Terror's Latest Front," *The Daily Beast* (June 27, 2012) (reporting that the U.S. military and CIA facilitated the transfer of 16 individuals to Bosaso Central Prison in Somalia, which has inhumane detention conditions, and participated in the questioning of Al-Shabab suspects), available at www.thedailybeast.com/articles/2012/06/26/somalia-s-prisons-the-war-on-terror-s-latest-front.html; Richard Lough, "Analysis: Kenya renditions raise U.S. proxy detention questions," *Reuters* (October 18, 2010) (reporting the transfer of 13 Kenyans to neighboring Uganda, where were denied access to legal representation and questioned by U.S. Federal Bureau of Investigation agents), available at <http://www.reuters.com/article/2010/10/18/us-kenya-renditions-analysis-idUSTRE69H2WM20101018>; Human Rights Watch, *Violence Instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit*, March 23, 2011 (noting evidence that in some cases, U.S. Federal Bureau of Investigation agents interrogated individuals detained by Uganda's Rapid Response Unit, which routinely commits torture), available at <http://www.hrw.org/node/97144>.

³ Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009). It includes officials "from law enforcement, the US Intelligence Community, and the Department of Defense." The Justice Department also issued a press release outlining in basic terms the Task Force's recommendations. Press Release, US Dep't of Justice, Special Task Force

its August 2010 report to the U.N. Human Rights Council for the Universal Periodic Review, the Administration noted that it was “developing practices and procedures that will ensure the implementation of [the] Task Force recommendations.”⁴ However, it remains unclear whether the government is developing standards on key issues such as: the substantive content of assurances; what countries they will be solicited from; for what categories of individuals they will be sought; and the post-return monitoring protocol for U.S. embassy staff or third-party monitors.

IV. Concluding Observations by the Human Rights Committee

In 2006, the U.N. Human Rights Committee called on the U.S. to “adopt clear and transparent procedures with adequate judicial mechanisms for review” regarding transfers based on assurances.⁵ It urged the U.S. to maintain “effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals.”⁶ The Human Rights Committee has likewise urged other States to “exercise the utmost care in relying on diplomatic assurances.”⁷

V. U.S. Government Report

In its 2011 report to the Human Rights Committee, the U.S. government states that “[c]urrent assurances practice in the United States involves greater transparency and improved procedural safeguards.” It confirms that it is implementing recommendations made by the Special Task Force Interrogation and Transfer Policies and describes them generally: the State Department has a role in evaluating assurances; assurances include a monitoring mechanism “in cases in which assurances are *required for the transfer to proceed*” (emphasis added); and some government agencies submit annual reports about transfers with assurances.⁸

While these steps are an improvement on past practice and the government’s disclosure is welcome, there are significant gaps in transparency and substantive policy:

- *Renditions and Proxy Detention* In its 2011 report, the government does not describe its policy regarding assurances in renditions, proxy detention and related practices. The Central Intelligence Agency, which might be involved in renditions or proxy detention, is not one of the agencies that submit an annual report on assurances; and, in any event, none of these reports have been made public.

on Interrogations and Transfers Policies Issues Its Recommendations to the President, (Aug. 26, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>.

⁴ See Human Rights Council, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: United States of America, UN Doc. A/HRC/WG.6/9/USA/1 ¶85 (2010).

⁵ U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States, ¶16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006).

⁶ U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States, ¶16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006).

⁷ Human Rights Committee: Concluding Observations and Recommendations – Denmark, U.N. Doc. CCPR/C/DNK/CO/5 (Dec. 16, 2008) (“The State party should exercise the utmost care in relying on diplomatic assurances when considering the return of foreign nationals to countries where treatment contrary to Article 7 of the Covenant is believed to occur.”); *see also* Conclusions and recommendations of the Human Rights Committee–France, U.N. Doc. CCPR/C/FRA/CO/4 (July 31, 2008), para.20 (expressing concern that individuals have been transferred abroad pursuant to assurances and have been subjected to treatment in violation of ICCPR Article 7); Conclusions and recommendations of the Human Rights Committee–U.K., U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008), para. 12. (calling for for greater procedural guarantees and noting that the risk of failure of assurances increases with the systemic practice of torture in a receiving State);

⁸ U.S. Report to the Human Rights Committee, (December 30, 2011), ¶¶285-286.

- *Judicial Review* The government describes providing an “opportunity to review the assurances” in immigration removals, but this informal process does not provide the same procedural safeguards as judicial review. Moreover, it is unclear whether the government provides this opportunity for other transfers.
- *Post-return monitoring* The government does not specify under what circumstances it will conduct monitoring because it is “required for the transfer to proceed.”⁹ Additionally, basic parameters are unknown—including who conducts monitoring, how frequently it occurs and for how long after the transfer—making it impossible to assess the adequacy of the monitoring mechanism.

VI. Legal Framework

ICCPR Article 7 (prohibition on torture and cruel, inhuman or degrading treatment or punishment).

VII. UN Human Rights Committee General Comments

The Human Rights Committee, in General Comment 20, interpreted Article 7’s prohibition on torture to encompass an obligation not to “expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”¹⁰

VIII. Other UN Body Recommendations

Other UN treaty bodies and experts have regularly expressed concern about the use of assurances. The Committee Against Torture, in evaluating State submissions under the UN Convention Against Torture, often requests that States provide information concerning the frequency of their use, the minimum requirements for assurances, the use of procedural guarantees, existence of monitoring mechanisms, and their legal enforceability.¹¹ Moreover, with regard to U.S. practice, the Committee has specifically objected to the “secrecy of such procedures including the absence of judicial scrutiny.”¹²

Juan Mendez, the current Special Rapporteur on Torture, and his predecessor Manfred Nowak, have characterized diplomatic assurances as “an attempt to circumvent the absolute prohibition of torture and non-*refoulement*.”¹³ Mendez has emphasized that assurances have “been proven to

⁹ U.S. Report to the Human Rights Committee, (December 30, 2011), ¶¶285-286.

¹⁰ Human Rights Committee, General Comment No. 20: *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)* (1992), ¶9 (“In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.”). With regard to the scope of the obligations under Article 7 ICCPR, see Human Rights Committee, General Comment No. 31: *On the nature of the general legal obligation on States Parties to the Covenant*, ¶12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (April 21, 2004).

¹¹ See, e.g., Conclusions and recommendations of the Committee against Torture – Canada, U.N. Doc. No. CAT/C/CR/34/CAN (July 7, 2005), para. 5(e); Conclusions and recommendations of the Committee against Torture – Germany, U.N. Doc. No. CAT/C/CR/32/7 (June 11, 2004), para. 5(e); Conclusions and recommendations of the Committee against Torture – United Kingdom, ¶4(d), U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004).

¹² Conclusions and recommendations of the Committee against Torture – United States, ¶21, U.N. Doc. CAT/C/USA/CO.2 (July 25, 2006).

¹³ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, ¶62-63, U.N. Doc. A/HRC/16/52 (February 3, 2011), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.52.pdf>; Report of the Special Rapporteur

be unreliable” and “cannot be considered an effective safeguard against torture and ill-treatment.”¹⁴

IX. Recommended Questions

1. Please describe the U.S. government position on its *non-refoulement* obligations in the context of rendition, proxy detention, or other cases in which the U.S. extrajudicially facilitates a transfer or is involved in the interrogation of an individual held in the custody of a foreign government.
2. Please describe U.S. minimum standards for the content of assurances and factors in assessing the reliability of assurances, including under what circumstances the U.S. government regards post-return monitoring as “required for the transfer to proceed.”¹⁵
3. Please describe U.S. post-return monitoring practices, including the training of monitoring personnel; the frequency and duration of post-return monitoring; and any cases in which returned detainees have reported the breach of assurances against torture, as well as any remedial steps the government has taken in response.

X. Suggested Recommendations

1. **Establish minimum standards** for the contents of assurances, including access to a lawyer, recording of all interrogations, independent medical examination, prohibition of incommunicado detention, and post-return monitoring.¹⁶ Do not conduct transfers where the receiving government systematically commits torture or cruel, degrading or inhuman treatment or punishment.¹⁷ Do not conduct, facilitate or participate in extrajudicial transfers, which deprive a detainee of the opportunity to provide information about his individual risk factors for torture or challenge the reliability of assurances.
2. **Establish effective post-return monitoring standards and procedures.** Do not conduct transfers where receiving governments are unwilling to permit monitoring compliant with these standards and procedures.
3. **Adopt transparency measures** with regard to transfers with assurances. In particular, make publicly available a version of the Special Task Force on Interrogation and Transfer Policy’s report, as well as the annual reports on transfers with assurances that agencies submit.
4. **Clarify the government’s position on judicial review** and ensure that all detainees are afforded an opportunity for meaningful judicial review of transfer decisions.

on the question of torture, Manfred Nowak, “Civil and Political Rights, Including the Questions of Torture and Detention,” ¶32, U.N. Doc. E/CN.4/2006/6 (December 23, 2005).

¹⁴ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, ¶62, U.N. Doc. A/HRC/16/52.

¹⁵ U.S. Report to the Human Rights Committee, ¶¶285-286 (December 30, 2011).

¹⁶ These basic requirements for assurances were set out by Theo van Boven, Special Rapporteur on Torture from 2001 to 2004. See Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, U.N. Doc. A/59/324 (Sept. 4, 2004).

¹⁷ “The State party should only rely on “diplomatic assurances” in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case.” Conclusions and recommendations of the Committee against Torture - United States, ¶21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

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

**Columbia Law School Human Rights Institute
and**

American Civil Liberties Union

Suggested List of Issues to Country Report Task Force on the United States

**107th Session of the Human Rights Committee, Geneva¹
11-28 March 2013**

28 December 2012

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

P: (212) 519-7884
humanrights@aclu.org

Human Rights Institute, Columbia Law School
435 West 116th Street
New York, NY 10027

P: (212) 854-3138
gmoses@law.columbia.edu

¹ Human Rights Committee, *Consideration of reports and country situations in the absence of a report*, <http://www2.ohchr.org/english/bodies/hrc/hracs107.htm> (last visited Dec. 10, 2012).

Targeted Killings Through Drone Strikes in Pakistan, Yemen and Somalia (Article 6 (arbitrary deprivation of right to life); Article 4 (non-derogation from, *inter alia*, Article 6); Article 2(3) (right to effective remedy))¹

I. Issue Summary

The U.S. government is engaged in targeted killings through drone strikes (and other aircraft) in Pakistan, Yemen, Somalia and elsewhere, which have resulted in the deaths of thousands of people.² U.S. practice is characterized by secrecy and an unwillingness even to engage directly with concerns about civilian harm, let alone to provide accountability for civilian deaths and injury. Despite calls for disclosure from UN experts and non-governmental organizations, the U.S. government uses vague and shifting legal standards, and fails to disclose the basis for strikes or the steps it takes to minimize harm to civilians and investigate reported violations of international humanitarian law and human rights law.³

The government carries out targeted killings outside of recognized armed conflict largely through the Central Intelligence Agency (CIA) and the military's Joint Special Operations Command (JSOC), two highly secretive organizations that often evade public scrutiny. On the one hand, the government stalls transparency and accountability by claiming in litigation that the CIA's involvement in the drone program is a state secret and that disclosure would cause grave harm to national security. On the other hand, government officials tout the effectiveness of the program in anonymous leaks to the press—a forum in which claims of lawfulness and low civilian casualties cannot be tested meaningfully.⁴

U.S. disclosure about measures to protect civilians and ensure legal compliance is especially crucial in light of troubling reports about civilian casualties from strikes in Pakistan and Yemen. Although there has not been a large-scale study based on ground reporting, several organizations have credibly made civilian casualty estimates that are significantly higher than those the U.S. government has suggested in anonymous leaks.⁵

In some areas, the U.S. government reportedly “counts all military-age males in a strike zone as combatants” who may be targeted — a standard reported by the New York Times in May 2012 and which the U.S. government has never disputed.⁶ This standard would lead the government to systematically undercount potential civilian casualties and would violate international law.⁷

Moreover, there are numerous reports of U.S. “double-tap” strikes—those occurring after the initial strike to ensure that all individuals present in a “kill box,” or designated area, are killed.⁸ The practice has reportedly resulted in the deaths of rescuers; in the context of armed conflict, deliberate targeting of rescuers would be a war crime, as UN expert Christof Heyns stated in June 2012.⁹ Both in and outside of armed conflict, killing of rescuers violates human rights law.¹⁰

Despite calls by UN experts we describe below, the U.S. government does not disclose whether it conducts effective investigations after strikes to determine the identity of individuals killed, nor does it disclose the results of any such investigations. Moreover, we know of no U.S.-sponsored system of amends, reparation or compensation for strike victims or their families in Pakistan, Yemen or Somalia.

Top U.S. officials invoke both the doctrine of self-defense and international humanitarian law as legal justification for the targeted killing program. But the U.S. legal framework is ambiguous and appears to conflate self-defense principles related to the permissibility of using force (*jus ad bellum*) with humanitarian law principles regarding how force should be exercised in the targeting of particular individuals (*jus in bello*). It also applies international humanitarian law's more permissive regime for the use of lethal force in situations where there is no recognized armed conflict, while refusing to recognize the international human rights standards that properly apply.

What one official has termed a “flexible understanding of imminence” appears to have replaced the strict limitations on the use of lethal force under both international human rights and humanitarian law (assuming humanitarian law were properly to apply).¹¹ This interpretation appears to have enlarged the scope of who the U.S. views as lawfully subject to direct attack, with officials variously saying that they target individuals who pose a “significant threat” or “an actual ongoing threat,” and incorporate in imminence “the relevant window of opportunity to act.”¹² Thus, even if imminence were the relevant standard, these malleable and shifting partial definitions are so broad as to rob the term of meaning.

II. Concluding Observations by the Human Rights Committee

The Human Rights Committee has not previously addressed U.S. targeted killings through drone strikes (or other aircraft). U.S. drone strikes in Pakistan began in 2004 and in Yemen the first reported strike was in 2002, but the government accelerated these strikes dramatically starting in 2008.¹³ In its first review of Yemen since then, in March 2012, the Human Rights Committee addressed questions to Yemen about targeted killings through drone strikes conducted by the U.S. on its territory. One Committee member asked “how the Government was engaging in that matter, which was clearly a violation of the right to life.”¹⁴ Yemen’s Minister of Human Rights responded, describing the “lack of transparency” and “the current situation, whereby civilians had been killed by unmanned vehicles.”¹⁵

In 2006, the Committee recommended the United States acknowledge the applicability of the Covenant to actions taken with respect to individuals under its jurisdiction but outside U.S. territory, as well as its applicability in times of war.¹⁶

III. U.S. Government Report

The Human Rights Committee has not previously asked the government to address U.S. targeted killings through drone strikes (or other aircraft).

Regarding extraterritorial application of the ICCPR, the government's position is that article 2(1) of the Covenant only applies to individuals both within the territory and jurisdiction of the State Party.¹⁷ The U.S. does not take the position that the Convention is suspended in times of war.¹⁸

IV. Other UN Body Recommendations

In March 2012, UN Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns called on the United States to “clarify the rules that it considers to cover targeted killings”; the “procedural safeguards in place to ensure in advance that targeted killings comply with international law”; and “the measures taken after such killing to ensure that its legal and factual analysis is correct.” Heyns emphasized: “Disclosure of these killings is critical to ensure accountability, justice and reparation for victims or their families.”¹⁹ He called on the U.S. to disclose data on civilian casualties from drone strikes; “the measures or strategies applied to prevent casualties”; “the measures in place to provide prompt, thorough, effective and independent public investigation of alleged violations” of international humanitarian law and human rights.²⁰

These comments echoed recommendations made by Heyns' predecessor Philip Alston, who issued a major study on targeted killings in May 2010 that examined the practice of the United States and other States.²¹ Alston's report specified requirements for targeting operations under human rights law (applicable in and outside armed conflict) and humanitarian law (applicable in armed conflict).²²

Moreover, in June 2012 U.N. High Commissioner for Human Rights Navi Pillay expressed “serious concern” over drone strikes in Pakistan, noting that it is “unclear that all persons targeted are combatants or directly participating in hostilities.”²³ She reminded States of their obligations to “take all necessary precautions to ensure that attacks comply with international law” and to “conduct investigations that are transparent, credible and independent, and provide victims with effective remedies.”²⁴

Ben Emmerson, U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has also expressed strong concern about the legality of the targeted killing program and will examine the legality of drone strikes this year.²⁵

V. Recommended Questions

1. Describe with specificity the legal framework the U.S. government applies to targeting operations occurring outside the context of armed conflict in Afghanistan. Clarify U.S. legal standards for who may be targeted, including whether the U.S. presumes that all military-age males in a strike zone are lawfully subject to direct attack.

2. Provide an accounting of all casualties resulting from targeting operations occurring outside of Afghanistan, including a breakdown of the number of people targeted and injured or killed as well as collateral civilian deaths and injuries.
3. Describe with specificity the measures or strategies the U.S. government applies to mitigate civilian harm in targeting operations.
4. Describe the measures in place to provide prompt, thorough, effective and independent public investigation of alleged violations of international humanitarian law and human rights resulting from targeting operations outside of Afghanistan.
5. Clarify whether a system of compensation, reparation or making amends exists in Pakistan, Yemen, Somalia or other States where targeting operations have taken place, similar to those the U.S. put in place in Iraq and Afghanistan. If no such system exists, describe what measures are being taken to expeditiously establish and implement such a system.

VI. Suggested Recommendations

1. **Identify the rules of international law the government considers to provide a basis for targeting operations outside of the armed conflict in Afghanistan.** Specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that the government's legal justification and factual analysis was accurate.
2. **Officially acknowledge drone strikes and other targeting operations in Pakistan, Yemen, Somalia and other States,** including the role of the CIA and Joint Special Operations Command. Do not invoke state secrets as barriers to judicial review of targeted killings in U.S. courts.
3. **Disclose all casualties** resulting from targeting operations outside of Afghanistan, including a breakdown of the number of people targeted and injured or killed as well as collateral civilian deaths and injuries. Disaggregate data to identify the number of casualties resulting from the use of armed drones as well as other aircraft.
4. **Disclose with specificity measures or strategies** the U.S. government applies to mitigate civilian harm in targeting operations.
5. **Establish a system to ensure prompt, thorough, effective and independent public investigation** of alleged violations of international humanitarian law and human rights law resulting from drone strikes outside of Afghanistan.
6. **Clarify whether a system of compensation, reparation or making amends exists** in Pakistan, Yemen, Somalia or other States where targeting operations have taken

place, similar to those the U.S. put in place in Iraq and Afghanistan. If no such system exists, expeditiously establish and implement such a system.

¹ In General Comment 6 and General Comment 14, the Human Rights Committee described the right to life in ICCPR Article 6 as “the supreme right from which no derogation is permitted even in time of public emergency.” Human Rights Comm., General Comment No. 6, ¶2, (April 30, 1982), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument); Human Rights Comm., General Comment No. 14, ¶2, (November 9, 1984). Moreover, the Human Rights Committee emphasized: “The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”¹ Human Rights Comm., General Comment No. 6., ¶3.

² The Columbia Law School Human Rights Institute has published three studies that examine the impact of drone strikes on civilians, government accountability and legal standards. See Columbia Law School Human Rights Clinic & Center for Civilians in Conflict, *The Civilian Impact of Drones* (Sept. 2012); Columbia Law School Human Rights Clinic, *Counting Drone Strike Deaths* (Oct. 2012); Columbia Law School Human Rights Institute, *Targeting with Drone Technology: Humanitarian Law Implications* (Mar. 2011). These studies are available at <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes>. See also *Covert War on Terror – The Data*, The Bureau of Investigative Journalism, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Dec. 28, 2012).

³ Jamil Dakwar, American Civil Liberties Union, Intervention at the 2nd Plenary Meeting, 20th Session of the United Nations Human Rights Council (June 18, 2012) *available at* <http://www.unmultimedia.org/tv/webcast/2012/06/aclu-gd-item-2-2nd-meeting-20th-session-human-rights-council.html>.

⁴ See *The Civilian Impact of Drones*, *supra* note 2, at 59.

⁵ See *The Civilian Impact of Drones*, *supra* note 2, at 19-21.

⁶ See *The Civilian Impact of Drones*, *supra* note 2, at 32 (discussing Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012).

⁷ See *The Civilian Impact of Drones*, *supra* note 2, at 73.

⁸ See *Civilian Impact of Drones*, *supra* note 2, at 74.

⁹ “Reference should be made to a study earlier this year by the Bureau of Investigative Journalism... If civilian ‘rescuers’ are indeed being intentionally targeted, there is no doubt about the law: those strikes are a war crime.” Christof Heyns, Remarks at “The Human Rights Implications of Targeted Killings,” Geneva, Switzerland (June 21, 2012) *reported in* Jack Searle, *UN expert labels CIA tactic exposed by Bureau ‘a war crime,’* Bureau of Investigative Journalism (June 21, 2012), *available at* <http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/>.

¹⁰ Under human rights law, a State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*). See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, ¶32, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

¹¹ John O. Brennan, *Strengthening our Security by Adhering to our Values and Laws*, Speech at Harvard Law School (Sept. 16, 2011) *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

¹² Eric Holder, U.S. Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; John O. Brennan, *The Efficacy and Ethics of U.S. Counterterrorism Strategy*, Speech at Woodrow Wilson International Center for Scholars (Apr. 30, 2012) *available at* <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>; Jeh Johnson, *National Security Law, Lawyers and Lawyering in the Obama Administration*, Speech at Yale Law School (Feb. 22, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

¹³ *The Civilian Impact of Drones*, *supra* note 2, at 14-16.

¹⁴ Human Rights Comm., 104th Sess., Yemen Ready for Dialogue About Human Rights After 2011 Protests Demand Government That Respects ‘Freedom, Equality and Dignity,’ U.N. Doc. HR/CT/741, *available at* <http://www.un.org/News/Press/docs/2012/hrct741.doc.htm>.

¹⁵ *Id.*

¹⁶ Human Rights Comm., 87th Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶10, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

¹⁷ Human Rights Comm., Fourth Periodic report: United States of America, ¶505, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement> (“Fourth Periodic Report”).

¹⁸ *Id.*, ¶506.

¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Follow-up to country recommendations – United States of America, ¶82, U.N. Doc. A/HRC/20/22/Add.3 (March 30, 2012) (by Christof Heyns), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/125/43/PDF/G1212543.pdf?OpenElement>.

²⁰ *Id.*, ¶81-82.

²¹ *See* Report of the Special Rapporteur on extrajudicial, summary or arbitrary Executions, Interim Report, ¶¶11-16; U.N. Doc. A/65/321 (Aug. 23, 2010) (by Philip Alston); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, *supra* note 10.

²² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, *supra* note 10, ¶93.

²³ 20th session of the U.N. Human Rights Council, Opening Statement by Navi Pillay, United Nations High Commissioner for Human Rights, Geneva, June 18, 2012, *available at* <http://www.unhcr.org/refworld/pdfid/5007f7f62.pdf>.

²⁴ *Id.*

²⁵ Owen Bowcott, *UN to investigate civilian deaths from US drone strikes*, The Guardian (Oct. 25, 2012), *available at* <http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes>.