



# UNITED STATES OF AMERICA

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Submitted by The Advocates for Human Rights, a non-governmental organization in special consultative status pursuant to HRC resolution 5/1 of 18 June 2007

## I. EXECUTIVE SUMMARY

1. The Advocates for Human Rights (“The Advocates”) is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training and publications. Established in 1983, The Advocates has produced more than 75 reports documenting human rights practices in more than 25 countries and holds special consultative status with the Economic and Social Council.
2. In addition to providing services to and advocating on behalf of the rights of migrants, refugees, and asylum seekers in the United States, The Advocates is committed to the elimination of the death penalty worldwide and to ensuring human rights protection for women around the world. In this submission, The Advocates provides information and makes recommendations on these three important issues in the United States under Sections B and C as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.<sup>1</sup>

## II. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

### A. Right to life, liberty, and security of the person, right to due process, right to equal protection before the law, right to freedom from racial discrimination, right to freedom from torture, right not to be arbitrarily deprived of life: DEATH PENALTY

3. The death penalty in the United States violates several human rights standards set forth in treaties. Prime among them are right to freedom from torture, right to equality before the courts, right to freedom from discrimination, right to liberty and security of person, and the right not to be arbitrarily deprived of life. Currently, the United States federal government, as well as thirty-five states retain the death penalty.<sup>2</sup>
4. **Innocence:** The death penalty in the United States violates human rights regarding due process of law, right to liberty and security, and equal protection of law by subjecting innocent people to punishment. Since 1973, 139 innocent people in the United States have been exonerated from death row because they were wrongly convicted, including nine who were released in 2009.<sup>3</sup> Additionally, evidence suggests innocent people, including Cameron

Todd Willingham in Texas, may have been wrongfully convicted and executed in the United States.<sup>4</sup>

5. ***Racial Disparities:*** Studies have shown the application of the death penalty in the United States has a disparate racial impact. The racial disparity violates the United States' obligations under the International Convention on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Studies show defendants convicted of killing white victims are more likely to receive death sentences than defendants convicted of killing African-American victims.<sup>5</sup> A 2007 study showed African-American defendants received the death penalty at three times the rate of white defendants where the victims were white.<sup>6</sup> A report by the American Bar Association in 2007 concluded African-American defendants are sentenced to death more often than similarly situated white defendants.<sup>7</sup>
6. ***Lethal Injection:*** Death by lethal injection can result in severe and excruciating pain violating human rights obligations related to torture and cruel and unusual punishment. Reports show executions by lethal injection can last over twenty minutes and lead to severe suffering, burns, and convulsions.<sup>8</sup> Certain states ban the use of the drugs used in lethal injection executions on animals, but continue to use the drugs for death penalty executions.<sup>9</sup> The problems associated with lethal injection were of such concern that the U.S. Supreme Court granted certiorari to hear a challenge to Kentucky's lethal injection process. In 2008, the United States Supreme Court allowed the continued use of a method of execution by lethal injection challenged by Kentucky death row inmates.<sup>10</sup> Yet, problems persist with states' lethal injection procedures: on September 15, 2009, during the attempted execution of Romell Broom, Ohio officials spent over two hours attempting to locate a suitable vein to use for the lethal injection before finally postponing his execution.<sup>11</sup>
7. ***Recommendation:*** Given the discriminatory and arbitrary application of the death penalty, potential pain and torture inflicted during lethal injection procedures, and the execution of innocent individuals, the U.S. and U.S. states should immediately abolish the death penalty and commute all death sentences to a life imprisonment term.

#### **B. Equality and non-discrimination: HUMAN RIGHTS OF WOMEN**

8. The United States has committed to combating human rights violations against women through a number of international treaties. The United States has ratified the International Covenant on Civil and Political Rights, the International Convention of the Elimination of All Forms of Racial Discrimination, the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the United States has also signed, but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>12</sup>
9. ***Domestic Violence and Child Custody:*** Domestic violence violates numerous human rights obligations including the right to equal protection under the law and the right to due process under the law. Domestic violence victims in the United States face additional harm when confronted with child custody disputes in the court system. State family courts consider statutory best interest factors in reaching child custody decisions.<sup>13</sup> Currently, six states do

not include domestic violence in the best interest factors and twenty-six states do not have a rebuttable presumption against awarding custody to a batterer.<sup>14</sup> The United States has recognized that protections should be implemented to provide for supervised visitation and the safe exchange of children in situations involving domestic violence.<sup>15</sup> As of 2006, thirty-six states did not have statutes regarding supervised visitation programs.<sup>16</sup>

10. In 2007, ten mothers along with national and local organizations brought a suit against the United States before the Inter-American Commission on Human Rights claiming that their human rights were violated because custody was awarded to abusers.<sup>17</sup> Additionally in 2007, another mother brought an action against the United States before the same commission raising claims of human rights violations related to her domestic violence case and the subsequent killing of her three daughters.<sup>18</sup>
11. A 2008 study of the New York City family courts found tremendous shortcomings in protecting the custody rights of battered woman.<sup>19</sup> The study found a system that was biased against the victims of domestic abuse when making custody determinations.<sup>20</sup> Interviews with domestic violence victims regarding custody proceedings revealed violations of judicial procedure, a failure by the courts to recognize domestic violence, and skeptical attitudes toward victims by government officials.<sup>21</sup>
12. States differ greatly in the definition of domestic violence. Only a limited number of states include threats, coercion, and psychological abuse as well as physical violence in statutory definitions of domestic violence.<sup>22</sup> The failure to properly classify abusive behavior as domestic violence prevents the behavior from being properly considered in custody determinations resulting in further human rights violations.

### **13. Recommendations:**

- U.S. states should pass laws where a finding of domestic violence creates a presumption that it is not in the child's best interest to be placed in the sole or joint custody of the perpetrator. U.S. states should pass laws stating the court may award the perpetrator of domestic violence visitation rights only if adequate measures to protect the child's and the mother's safety can be made and allowing the court to impose additional measures necessary to ensure that the visitation does not endanger the child or mother.
- U.S. states should develop guidelines for child custody determinations that incorporate domestic violence concerns. These guidelines require courts to screen for domestic violence, and provide that an abuser will not be awarded custody unless he can prove he is not a danger to the child or the mother. When domestic violence is an issue, custody negotiations should never be the subject of mediation.

14. **Sex Trafficking:** Sex trafficking is a form of slavery resulting in human rights violations. The United States has committed to combating sex trafficking through a number of international treaties. The United States has ratified both the United Nations Optional Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.<sup>23</sup> Additionally, the United States Congress passed the Trafficking Victims Protection Act.<sup>24</sup>

15. The United States government has authorized and funded human trafficking task forces to enhance and coordinate anti-trafficking efforts between federal and local law enforcement agencies and non-profit organizations.<sup>25</sup> The United States State Department conducts a yearly review of anti-trafficking efforts and issues an annual report.<sup>26</sup> The Department of Health and Human Services implemented and continues to fund the Rescue & Restore Victims of Human Trafficking public awareness campaign.<sup>27</sup>
16. Gaps exist in the implementation of United States law enforcement efforts to combat sex trafficking. A fully protective comprehensive legal scheme to fight sex trafficking should include criminal statutes, civil remedies, and the protection of victims. Currently, a number of efforts are under way in states to implement sex trafficking legislation.<sup>28</sup> However, nine states lack statutes that criminalize trafficking in persons.<sup>29</sup> Additionally, studies show first responders and other law enforcement officers are not properly trained to identify and investigate sex trafficking.<sup>30</sup>
17. Sex trafficking frequently crosses jurisdictional boundaries, and therefore, coordinated efforts among neighboring jurisdictions are necessary to combat sex trafficking. Additionally, sex trafficking prevention requires efforts from multi-disciplinary teams including first responders, social workers, and legal officials.<sup>31</sup> Currently, only seventeen states have statewide anti-trafficking task forces.<sup>32</sup>
18. Improvements also need to be made in the treatment and support of victims of sex trafficking. Sex trafficking victims are often called “prostitutes” and treated as criminals rather than victims.<sup>33</sup> As of 2009, only nineteen states have laws providing resources or protection for victims of human trafficking.<sup>34</sup> In addition to providing resources and support for victims, criminal justice efforts need to focus on criminal enforcement against the perpetrators involved in sex trafficking crimes, including the traffickers, pimps, and buyers or “johns.”<sup>35</sup>

**19. Recommendations:**

- Both federal and state government agencies, healthcare providers and service providers receiving federal or state funding should be trained and mandated to use human trafficking screening protocols particularly in cases where they encounter individuals presenting as “prostitutes” or as juveniles who are truant, delinquent or in need of protection.
- Rather than treat trafficked persons as criminals, federal and state prosecutors should provide practical assistance to trafficked women and girls based on their status as crime victims.
- Congress should continue to allocate funds to address the gaps for trafficked U.S. citizens and lawful permanent residents, including funding for long-term housing and supportive services. In particular, funds should be allocated to emergency, transitional and long term permanent housing. States should direct federal funds to address current gaps in housing and supportive services for trafficking victims.

**C. Rights of MIGRANTS, REFUGEES AND ASYLUM SEEKERS<sup>36</sup>**

20. The United States’ immigration system, while generous in many ways, is riddled with systemic failures to protect human rights and meet international human rights obligations, including the rights to due process and fair deportation procedures,<sup>37</sup> freedom from arbitrary

and inhumane detention,<sup>38</sup> protections from *refoulement* for refugees,<sup>39</sup> freedom from discrimination,<sup>40</sup> and family unity<sup>41</sup> Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice.

21. We welcome the recent efforts of the United States to begin to correct some of the most egregious human rights violations in the immigration system. Nonetheless, serious human rights violations continue. In violation of ICCPR article 13, United States immigration laws impose mandatory removal (deportation) without a discretionary hearing in a broad category of cases.<sup>42</sup> The United States also fails to ensure that all non-citizens have access to representation during their expulsion hearings; in 2008, approximately 57% of all removal cases (84% of detained cases) completed were unrepresented.<sup>43</sup>
22. Further, expansion of the U.S. immigration enforcement system, has tremendous, negative implications on the protection of the human rights of non-citizens in the United States.<sup>44</sup> Today Immigration Customs and Enforcement (ICE) operates the largest detention and supervised release program in the United States, with a total of 378,582 non-citizens from 221 countries in custody or supervised by ICE in fiscal year 2008.<sup>45</sup> Highly publicized cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity.<sup>46</sup>
23. Problems with the asylum and refugee protection systems have resulted in denial of protection to *bona fide* refugees. The arbitrary one-year filing deadline for filing asylum claims, denial of protection against *refoulement* for those who have been convicted of minor crimes, and a sweeping definition of “material support” of “terrorist activities” have seriously undermined the United States’ compliance with the obligations under the Refugee Convention and the ICCPR.<sup>47</sup>
24. Finally, the United States regularly fails in its obligation to consider the unity of the family in its immigration laws, policies, and practices. An estimated 1,012,734 family members have been separated by deportation between 1997 and 2007.<sup>48</sup> Mandatory deportation and detention laws without discretionary hearings to consider family ties, measures that bar permanent residence for people who illegally enter or are unlawfully present in the U.S., and extraordinarily long backlogs for immigrants visas based on close family relationships mean that families face years, decades, and even permanent separation. Refugees also face prolonged separation from families. Denial of asylum based on the one-year filing deadline, denial of reunification for families based on alleged “material support” of terrorism, the indefinite closure of refugee resettlement based on family unification, and a legal definition of family relationships that fails to recognize the reality of family disruption in refugee crises all contribute to the United States’ failure to respect the unity of the family.

## **25. Recommendations:**

- U.S. government should reform the U.S. immigration system to ensure that the ICCPR’s obligations to protect due process and family unity are met including: ending of automatic criminal prosecutions for border crossers and other streamlined procedures which fail to protect non-citizens’ rights to due process, access to counsel, presentation of their case before a judge, and other fundamental safeguards of fairness.

- U.S. government should reform the immigrant detention system to end reliance on detention as a cornerstone of immigration enforcement policy, end arbitrary detention by providing individualized custody hearings for all detainees and ensure that all those who must be detained are held in non-penal facilities and afforded humane treatment which recognizes their inherent human dignity and immediate passage of enforceable rights-respecting detention standards. Ensure that all places of immigrant detention, including short-term facilities, adhere to these standards.
- U.S. government should reform of the U.S. refugee and asylum system to ensure that the United States meets obligations under the 1951 Convention and ensure that exclusions from refugee protection complies with the 1951 Convention.

## APPENDIX

**Sex Trafficking Needs Assessment for the State of Minnesota** (full report);(Originally published September 2008; revised edition October 2008) available at [http://www.advrightrights.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT\\_FINAL.10.13.08.pdf](http://www.advrightrights.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT_FINAL.10.13.08.pdf)

## REFERENCES

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- <sup>2</sup> DEATH PENALTY INFORMATION CENTER, DEATH PENALTY FACT SHEET (2010), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>
- <sup>3</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Apr. 1, 2010).
- <sup>4</sup> See David Gram, *Trial by Fire*, THE NEW YORKER, Sept. 7, 2009 [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann) (last visited Apr. 1, 2010); see also Death Penalty Information Center, <http://www.deathpenaltyinfo.org/executed-possibly-innocent> (last visited Apr. 1, 2010).
- <sup>5</sup> See AMNESTY INTERNATIONAL, DEATH PENALTY FACTS SHEET (2010), available at <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>
- <sup>6</sup> See AMNESTY INTERNATIONAL, DEATH PENALTY FACTS SHEET (2010), available at <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>
- <sup>7</sup> See AMNESTY INTERNATIONAL, DEATH PENALTY FACTS SHEET (2010), available at <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>
- <sup>8</sup> See AMNESTY INTERNATIONAL, EXECUTION BY LETHAL INJECTION: A QUARTER CENTURY OF STATE POISONING (2007), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGA500072007>
- <sup>9</sup> See AMNESTY INTERNATIONAL, DEATH PENALTY FACTS SHEET (2010), available at <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>
- <sup>10</sup> Baze v. Rees, 553 U.S. 35 (2008); see also Linda Greenhouse, *Supreme Court Allows Lethal Injection for Execution*, N.Y. TIMES, Apr. 17, 2008 [http://www.nytimes.com/2008/04/17/us/16cnd-scotus.html?\\_r=1](http://www.nytimes.com/2008/04/17/us/16cnd-scotus.html?_r=1) (last visited Apr. 1, 2010).
- <sup>11</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org/information-about-romell-broom-botched-execution> (last visited Apr. 1, 2010).
- <sup>12</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 14.
- <sup>13</sup> AMERICAN BAR ASSOCIATION, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008), available at <http://www.abanet.org/domviol/docs/Custody.pdf>; see also AMERICAN BAR ASSOCIATION, CUSTODY DECISIONS IN CASES WITH DOMESTIC VIOLENCE ALLEGATIONS, available at [http://www.abanet.org/legalservices/probono/childcustody/domestic\\_violence\\_chart1.pdf](http://www.abanet.org/legalservices/probono/childcustody/domestic_violence_chart1.pdf)
- <sup>14</sup> AMERICAN BAR ASSOCIATION, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008), available at <http://www.abanet.org/domviol/docs/Custody.pdf>; see also AMERICAN BAR ASSOCIATION, CUSTODY DECISIONS IN

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<sup>15</sup> See U.S. DEP'T OF JUSTICE, SUPERVISED VISITATION AND SAFE EXCHANGE GRANT PROGRAM, [http://www.ovv.usdoj.gov/safehaven\\_desc.htm](http://www.ovv.usdoj.gov/safehaven_desc.htm) (last visited Apr. 9, 2010).

<sup>16</sup> See FLA. STATE U., INSTITUTE FOR FAMILY VIOLENCE STUDIES, <http://familyvio.csw.fsu.edu/SV.php> (last visited Apr. 9, 2010).

<sup>17</sup> See STOP FAMILY VIOLENCE, PETITION TO INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *available at* [http://www.stopfamilyviolence.org/sites/documents/0000/0096/Web\\_Petition-C.pdf](http://www.stopfamilyviolence.org/sites/documents/0000/0096/Web_Petition-C.pdf)

<sup>18</sup> See Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19 (2008).

<sup>19</sup> VOICES OF WOMEN ORGANIZING PROJECT, JUSTICE DENIED: HOW FAMILY COURTS IN NYC ENDANGER BATTERED WOMEN AND CHILDREN (2008), *available at* <http://www.vowbwrc.org/pdf/justiceDeniedRep.pdf>.

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<sup>22</sup> See Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163 (2009).

<sup>23</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Mar. 9, 1927, 60 L.N.T.S. 253 (ratified by United States Mar. 21, 1929), *amended by* The Protocol of December 7, 1953 (ratified by United States Mar. 7, 1956); The Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (ratified by United States Dec. 6, 1967); U.N. Trafficking Protocol, Annex II (ratified by United States Nov. 3, 2005); United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 10, A/RES/54/263 (May 25, 2000), Vol. 2171, A-27531; *see also* Convention Concerning the Prohibition and Immediate Actions for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207, Art. 3(b), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (ratified by United States Dec. 2, 1999); *see also* CEDAW, Art. 6; *General Recommendation No. 19, Violence against Women*, Committee on the Elimination of Discrimination against Women, 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992).

<sup>24</sup> 22 U.S.C. § 7101(2007).

<sup>25</sup> See U.S. DEP'T OF JUSTICE, <http://www.ojp.usdoj.gov/BJA/grant/httf.html> (last visited Apr. 1, 2010).

<sup>26</sup> See U.S. DEP'T OF STATE, <http://www.state.gov/g/tip/> (last visited Apr. 1, 2010); *see also* ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2008, *available at* <http://www.state.gov/documents/organization/125840.pdf>.

<sup>27</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVS, <http://www.acf.hhs.gov/trafficking/> (last visited Apr. 1 2010).

<sup>28</sup> See POLARIS PROJECT, HUMAN TRAFFICKING REPORT-ALL PENDING LEGISLATION, *available at* <http://www.trendtrack.com/taxis/cq/viewrpt?event=49f99ef0e9>

<sup>29</sup> CENTER FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS (2010), *available at* <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf>

<sup>30</sup> See AMY FARRELL ET AL., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT (2008) *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf>

<sup>31</sup> See AMY FARRELL ET AL., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT (2008) *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf>.

<sup>32</sup> CENTER FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS (2010), *available at* <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf>

<sup>33</sup> See, e.g., Laura Bauer, *Sex Slaves Often Victimized Twice in U.S. Trafficking War*, KAN. CITY STAR, Dec. 14, 2009 <http://www.mcclatchydc.com/2009/12/14/80588/sex-slaves-often-victimized-twice.html> (last visited Apr. 8, 2010); Joseph Berger, *Despite Law, Few Trafficking Arrests*, N.Y. TIMES, Dec. 3, 2009 <http://www.nytimes.com/2009/12/04/nyregion/04trafficking.html> (last visited Apr. 8, 2010)

<sup>34</sup> POLARIS PROJECT, U.S. POLICY ALERT ON HUMAN TRAFFICKING (2009), *available at* <http://www.polarisproject.org/images/8-24-09%20policy%20alert.pdf>

<sup>35</sup> See, e.g., Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28 (2008); SHARED HOPE INTERNATIONAL, THE NATIONAL REPORT OF DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009).

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<sup>36</sup>For a more detailed report, see the coalition stakeholder report on migrants, refugees and asylum seekers submitted by the US Human Rights Network. The Advocates coordinated the drafting of that report.

<sup>37</sup> International Covenant on Civil and Political Rights (ICCPR), art. 13, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). *See also* UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 12, U.N. Doc. A/HRC/7/12/Add.2, (Mar. 5, 2008) (*prepared by* Jorge Bustamante, Mission to the United States of America) (noting that the Human Rights Committee has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. The Committee has clarified: “. . . if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.” and further: “An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one”).

<sup>38</sup> Universal Declaration of Human Rights (UDHR), art. 9; ICCPR, art. 7 (stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); ICCPR, art. 9(1) (stating no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law); *id.* art. 9(2) (guaranteeing that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him); *id.* art. 9(4) (requiring that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful); ICCPR art. 10(1) (requiring that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2) (requiring that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons). *See also* UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (reminding states that the legality of detention must be open for challenge before a court and 2); UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (reminding states of the right of the detained to a prompt review).

<sup>39</sup> UDHR, art. 14; 1951 Convention relating to the Status of Refugees, art. 33(1) July 28, 1951, 189 U.N.T.S. 137 [*hereinafter* Refugee Convention] (stating that no State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). *Id.* art. 31 (recognizing that refugees and asylum seekers may be forced by their circumstances to enter a country illegally in order to escape persecution, and providing that States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [*hereinafter* Convention Against Torture or CAT] (stating that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights).

<sup>40</sup> Convention on Elimination of Racial Discrimination (CERD), art. 1, ¶ 2 (providing for the possibility of differentiating between citizens and non-citizens); *but see* CERD, Gen. Rec. 11 (noting regarding the rights of non-citizens, art. 1, ¶ 2, must not detract from the rights and freedoms recognized and enunciated in other human rights instruments and “must be construed so as to avoid undermining the basic prohibition of discrimination”); Gen. Rec. 30, at ¶ 2 (noting that “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”).

<sup>41</sup> UDHR, art.16 (3); ICCPR, art. 23 (1), (3) (stating that the right of men and women to marry and found a family shall be recognized and that this right includes the right to live together); *id.* art. 17(1) (stating that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence . . .”).

<sup>42</sup> *See* INA § 236(c) (directing that the Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in INA § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i)



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on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense).

<sup>43</sup> ABA, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 39 (2010) [*hereinafter* REFORMING THE IMMIGRATION SYSTEM], *available at* [http://www.abanet.org/media/nosearch/immigration\\_reform\\_executive\\_summary\\_012510.pdf](http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf)

<sup>44</sup> See NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT IMMIGRATION ENFORCEMENT REPORTS (Apr. 2010) (summarizing 20 reports of human rights and other violations issued by both non-governmental organizations and the U.S. government since the end of 2008), *available at* <http://www.immigrationforum.org/images/uploads/2010/EnforcementReportSummaries.pdf>.

<sup>45</sup> DR. DORA SHRIRO, U.S. DEPT. OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009) at 2.

<sup>46</sup> The New York Times alone contained at least 25 reports of problems with conditions in detention, including deaths in detention, between 2005 and March 2010.

<sup>47</sup> The Human Rights Committee in its Concluding Observations noted at ¶ 17 that the Committee is concerned the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided “material support” to a “terrorist organization”, whether voluntarily or under duress. The Committee noted regret at having received no response on this matter from the State party. The Committee observed that the State party should ensure that the “material support to terrorist organizations” bar is not applied to those who acted under duress. UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006). See also HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES (2009).

<sup>48</sup> HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 5 (Apr. 2009).