

CENTER FOR CONSTITUTIONAL



The Center for Constitutional Rights' Report to the United Nations Human Rights Council's Universal Periodic Review of the United States

Submitted 3 October 2019

The Center for Constitutional Rights works with communities under threat to fight for justice and liberation through litigation, advocacy, and strategic communications. Since 1966, the Center for Constitutional Rights has taken on oppressive systems of power, including structural racism, gender oppression, economic inequity, and governmental overreach. The Center for Constitutional Rights has special consultative status with ECOSOC and welcomes the opportunity to contribute to the Universal Periodic Review of the United States' compliance with international human rights law.

CENTER FOR CONSTITUTIONAL RIGHTS
Report to the UN Universal Periodic Review of the United States
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The Center for Constitutional Rights (CCR) is pleased to submit its report to the Universal Periodic Review regarding the United States' compliance with international human rights law. CCR condemns the U.S.' continued disregard for international human rights, which, coupled with rising xenophobia and white nationalism, threatens the protection of human rights worldwide. This report considers developments since the U.S.' Second Review in 2015¹, and provides brief updates and analysis on four areas of deep concern: 1) the continued, arbitrary, and indefinite detention of Muslim men at the Guantánamo Bay prison; 2) the suspension of human rights for non-white refugees and asylum seekers; 3) the legalized repression of human rights defenders, including advocates for Palestinian rights, Indigenous water protectors, and Black activists organizing for racial justice; and 4) the legalized discrimination and heightened criminalization of queer and transgender people.

THE UNITED STATES' DISENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS

The U.S.' disengagement with the Universal Periodic Review process and the Human Rights Council represents a dangerous and deeply concerning extension of the U.S.' long-standing posture of exceptionalism and half-measures in meeting its human rights obligations. Since its last review in 2015, rather than ratifying important human rights instruments such as the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities or the Convention on the Elimination of All Forms of Discrimination Against Women, and improving cooperation with international human rights mechanisms (including UN special procedures), the U.S. has only further entrenched its position as a global legal outlier, particularly with regard to accountability for human rights violations. For example, not only has the United States not ratified the Rome Statute of the International Criminal Court, it has gone on the attack against the ICC in an effort to forestall an investigation into U.S. torture.² Such systemic disregard for human rights enables and fosters the U.S. policies and practices highlighted in this brief report. The absence of state accountability not only devastates individuals and communities both in the U.S. and around the world but creates a dangerous incentive for state and corporate actors to pursue and preserve the status quo: impunity. CCR calls on the U.S. to meaningfully address the issues below that are emblematic of broader human rights violations and fundamentally transform its relationship to the international human rights system.

¹ See, Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, A/HRC/30/12/Add.1, (September 14, 2015), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/207/66/PDF/G1520766.pdf?OpenElement>; see also, Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12, (July 20, 2015), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?OpenElement>

² See, CCR Complaint to the UN Special Rapporteur on the Independence of Judges and Lawyers: Interference with Judicial Proceedings at the International Criminal Court, 5 June 2019, at https://ccrjustice.org/sites/default/files/attach/2019/07/5%20June%202019_Special%20Rapp%20letter%20ICC_final%207-26-19%20web.pdf; See generally CCR, "Accountability for International Crimes in Afghanistan," Last updated September 30, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/accountability-international-crimes-afghanistan>

Indefinite Detention of Muslim Men at Guantanamo Bay Prison

Despite accepting several 2015 recommendations regarding the immediate closure of Guantánamo Bay (176.242, 176.244, 176.246, 176.249), the U.S. continues to operate the prison. Of the nearly 800 men detained since January 2002, forty remain imprisoned. The majority have never been charged with a crime. It is the de facto position of the current administration that no prisoner will leave Guantánamo regardless of his individual circumstances.³ This includes five men cleared for release, including CCR client Sufyian Barhoumi, an Algerian citizen who was cleared in 2016.⁴ The continued arbitrary and indefinite detention of Muslim prisoners without charge or fair trial in federal court is a violation of international law, and human rights bodies have long confirmed that the prisoners have been subjected to torture and ill-treatment while held in detention.⁵

These prisoners comprise an aging, increasingly sick population nearing a breaking point. CCR client Sharqawi Al-Hajj, who endured torture and abuse during two years in secret CIA detention prior to his now 15 years of captivity at Guantánamo, attempted suicide in August 2019 and remains in an extremely precarious state.⁶ The U.S. government nonetheless refuses to allow independent medical examination or to consider his transfer out of the prison. Mr. Al-Hajj embodies the deadly impact of the U.S. detention policies, and reflects the larger cruelty of the U.S.' racist and discriminatory prison industrial complex, as well as a second-class justice system for Muslim terror suspects. The continued operation of Guantánamo both emanates from and reinforces the extreme practices and conditions of confinement found within U.S. domestic prisons, particularly solitary confinement.⁷ It is also important to note that there has been no accountability or remedy for the torture of prisoners made public in the study of the CIA's detention and interrogation program⁸, 23 of whom still remain at Guantánamo. Failure to close Guantánamo

³ See Executive Order 13,823 of January 30, 2018 (paving the way for the possibility of new transfers to Guantánamo), available at: <https://www.federalregister.gov/documents/2018/02/02/2018-02261/protecting-america-through-lawful-detention-of-terrorists>; See also, State of the Union Address (30 Jan 2018), (announcing the EO and criticizing the previous two administrations for releasing Guantánamo prisoners ("[i]n the past, we have foolishly released hundreds of dangerous terrorists, only to meet them again on the battlefield ... So today, I am keeping another promise. I just signed an order ... to keep open the detention facilities at Guantánamo Bay."), available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>; See more, CCR. "Challenging Trump's Guantánamo", available at: <https://ccrjustice.org/GuantanamoUnderTrump>

⁴ See CCR. "Sufyian Barhoumi", May 23, 2016, available at: <https://ccrjustice.org/sufyian-barhoumi>

⁵ See OHCHR, "'It's not just about closing Guantánamo, but also ensuring accountability,' UN rights experts say." 26 February 2016, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17097&LangID=E>; see also, OHCHR, "US must stop policy of impunity for the crime of torture"- UN rights expert", December 13, 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>

⁶ See CCR. "Al-Hajj v. Trump," available at: <https://ccrjustice.org/home/what-we-do/our-cases/al-hajj-v-trump-0>

⁷ See CCR, "Solitary Confinement: Torture in U.S. Prisons," last updated March 2017, available at: <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/torture-use-solitary-confinement-us-prisons>; See also, CCR, "Ashker v. Governor of California," last updated May 31, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown>

⁸ See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, available at: <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>

erodes global human rights protections and its mere existence creates the conditions for abuse and ill-treatment of criminalized communities worldwide.

Separation of Families and Suspension of International Law

The current U.S. administration's abusive immigration policies represent an unprecedented rejection of the post-World War II human rights consensus to protect refugees and asylum seekers.⁹ Far from upholding its 2015 UPR commitments to improving the rights of immigrants (176.330), the U.S. government has systematically undone its fundamental obligations to refugees, violated international law principles such as *non-refoulement*, and enforced inhumane, retaliatory practices against already vulnerable asylum seekers and immigrants.¹⁰

Among other human rights protections, asylum law recognizes that those fleeing persecution cannot be penalized for the way in which they enter a safe haven. However, in November 2018, the administration codified an unlawful, existing practice of turning asylum seekers away from even official ports of entry by issuing a rule, followed by an executive proclamation¹¹ to bar those who enter the U.S. "without inspection" – that is, without going through the formal process at ports of entry – from seeking asylum.¹² In July 2019, the government issued an interim final rule regarding transit through a third country that effectively bars the vast majority of refugees from seeking asylum at the U.S. Southern border.¹³ The U.S. Supreme Court upheld this rule in September 2019.¹⁴

Both the unlawful executive action against non-white immigrants as well as the judicial green light are mirrored in the context of the discriminatory "Muslim ban,"¹⁵ which has been in place since 2016, and which was upheld by the Supreme Court in 2017. These policies that result in the separation of families are rooted in a white nationalist ideology and bolster racist and xenophobic responses to the global migration crisis. Failures of the U.S. to uphold international law protections for certain refugees and asylum seekers threaten the rights of all individuals and families worldwide to stay, to leave, and to return to their homes with dignity.¹⁶

⁹ *E.g.*, 1951 Refugee Convention, Art. 33

¹⁰ See CCR, "D.J.C.V. v. U.S. Immigration and Customs Enforcement (ICE), 18-cv-09115-AKH (S.D.N.Y. Oct. 15, 2018)," (In a case where ICE had unlawfully detained and separated a father and his two-year old son for nearly six months without any contact, the court found that "Except in the most dreadful circumstances, a court should not countenance the cruelty of the separation of a parent and child by the government."), available at: <https://ccrjustice.org/home/what-we-do/our-cases/djcv-v-us-immigration-and-customs-enforcement>

¹¹ See CCR, "Al Otro Lado v. Nielsen," available at: <https://ccrjustice.org/home/what-we-do/our-cases/al-otro-lado>; and *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018)

¹² *Id.*

¹³ *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019)

¹⁴ *Barr v. E. Bay Sanctuary Covenant*, Case No. 19A230, 588 U.S. ____, 2019 WL 4292781 (2019)

¹⁵ See CCR, "The Yemeni American Justice Initiative," March 2, 2018, available at: <https://ccrjustice.org/YAJI>; see CCR, "Muslim Ban Waiver FOIA," June 28, 2018, available at: <https://ccrjustice.org/home/what-we-do/our-cases/muslim-ban-waiver-foia>; see CCR and Rule of Law Clinic at Yale Law School, "Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials from Yemeni-American Families Stuck in Limbo." June 2018, available at: <https://ccrjustice.org/window-dressing-Muslim-ban-waivers-yemen-american-report>

¹⁶ Universal Declaration of Human Rights. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), Arts 13, 14, 15, 16. [UDHR].

Legalizing the Repression and Silencing of Human Rights Defenders

From the growing movement in support of Palestinian rights, to Indigenous resistance at Standing Rock and the Movement for Black Lives, the last decade in the U.S. has been marked by tremendous grassroots organizing to challenge oppression and advance human rights. U.S. officials have responded by passing federal and state legislation to criminalize protest and dissent, as well as by surveilling social justice movements and communities. These measures seeking to chill, punish, or attempt to punish human rights defenders contravene international human rights obligations¹⁷ and declarations that recognize the duty of states to safeguard those who strive for the protection and realization of human rights and fundamental freedoms.¹⁸

Since 2014, over 100 measures targeting boycotts and other advocacy for Palestinian rights have been introduced in state and local legislatures and the U.S. Congress. According to the independent legal and advocacy organization Palestine Legal, 27 states have now adopted anti-boycott laws, including five executive orders issued by governors, with legislation pending in another 14 states.¹⁹ The measures, which are a direct attack on constitutionally-protected free speech²⁰, as well as on international principles of freedom of expression and of association, are designed to silence expressive advocacy for Palestinian rights through the use of blacklists, forced pension fund divestments, and/or prohibitions on government contracts, and in certain cases, even criminal and civil penalties. For example, in 2016, Arizona passed a law forbidding the state from contracting with companies that boycott Israel, including a legal office contracted by the state to represent people in prison.²¹

The U.S. tactic of criminalizing protest and dissent has extended to those advocating for environmental justice, despite growing international recognition of the unique risks faced by environmental human rights defenders.²² Following mass popular protests at Standing Rock opposing the Dakota Access Pipeline in North Dakota, a wave of legislation was introduced across the country pursued by oil and gas interests, and supported by groups like the American Legislative Exchange Council (ALEC), aimed at cracking down on and chilling protests against

¹⁷ *E.g.*, UDHR, Art. 19; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR], Art. 19.

¹⁸ UN General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms." A/RES/53/144. 8 March 1999, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>

¹⁹ See CCR and Palestine Legal, "The Palestine Exception to Free Speech: A Movement Under Attack in the US." September 2015, available at: <https://palestinelegal.org/the-palestine-exception>; see also Palestine Legal 'Legislation' webpage, available at: <https://palestinelegal.org/righttoboycott>

²⁰ United States Supreme Court (1982) NAACP v Claiborne Hardware: "The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott..." and United States Supreme Court (1966): "[c]riticism of government is at the very center of the constitutionally protected area of free discussion".

²¹ See CCR, "Jordahl v. Brnovich (Amicus)," January 24, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/jordahl-v-brnovich-amicus>

²² UN HRC. "Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development." A/HRC/40/L.22/Rev.1, 20 March 2019, available at: <https://undocs.org/A/HRC/40/L.22/Rev.1>

fossil fuel infrastructure projects.²³ On August 1, 2018, a new bill passed by the Louisiana legislature went into effect, adding pipelines to the definition of “critical infrastructure” and dramatically increasing the penalties faced by protestors engaging in civil disobedience activities in and around pipelines and pipeline construction sites.²⁴

In addition to the legislative measures used to silence activism, the U.S. government, through the U.S. Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI) has been systematically surveilling and monitoring the activity of the Movement for Black Lives (M4BL).²⁵ In response to public activism advancing racial justice, the U.S. government cast Black human rights defenders as extremists and potentially violent threats, and engaged in sweeping surveillance of constitutionally protected activities.²⁶ The effect of such legislative and executive measures against activists on the basis of their race and/or political viewpoints is to chill activity or otherwise divert resources from the essential work of protecting human rights and the environment.

Codifying the Discrimination to Incarceration Pipeline for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) People

Among the most vulnerable to the U.S. administration’s ideology and tactics of criminalizing communities for asserting their human rights are transgender people. Despite accepting UPR recommendations to “heighten efforts to promote non-discrimination of any kind, including discrimination on the basis of sexual orientation and gender identity” (176.162, 176.163), the government has refused to recognize the rights of the transgender people, and LGBTQ+ people more generally, particularly with regard to the human right to work.²⁷

Over the last several years, the U.S. government has targeted transgender people in an attempt to exclude them from military service, and presently is enforcing a near-blanket ban.²⁸ It has also

²³ See International Center for Not-for-Profit Law, “US Protest Law Tracker.” available at: <http://www.icnl.org/usprotestlawtracker/>; see also, American Legislative Exchange Council (ALEC), “Critical Infrastructure Protection Act,” available at: <https://www.alec.org/model-policy/critical-infrastructure-protection-act/>

²⁴ See, CCR. “White Hat v. Landry,” May 22, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry>; see also CCR, “Energy Transfer Equity, et al, v. Greenpeace, Earth First! et al,” (regarding the failed efforts of US corporations to sue environmental activists under the Racketeer Influenced and Corrupt Organizations Act or “RICO,” a federal law that allows for criminal penalties or a civil cause of action against ongoing criminal enterprises, by claiming Earth First! funded a violent terrorist presence at the Standing Rock protests, and was part of a sprawling conspiracy to deceive the public about the environmental risks of pipelines.) February 14, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/energy-transfer-equity-et-al-v-greenpeace-earth-first-et-al>

²⁵ See CCR. “Color of Change v. Department of Homeland Security and Federal Bureau of Investigation,” March 19, 2018, available at: <https://ccrjustice.org/COC-FOIA>; see also CCR. “Briefing Guide: Color of Change v. FBI & DHS,” May 16, 2018, available: <https://ccrjustice.org/briefing-guide-color-change-v-fbi-dhs>

²⁶ See CCR and Color of Change. “Briefing Guide: The DHS “Race Paper”,” March 19, 2018, available at: <https://ccrjustice.org/sites/default/files/attach/2018/03/COC%20FOIA%20-%20Full%20Briefing%20Guide%20Final.pdf>

²⁷ UDHR, Article 23.1; see also CCR, “Submission to UN Working Group on Discrimination Against Women and Girls,” September 12, 2019, available at: https://ccrjustice.org/submission-un-working-group-discrimination-against-women-and-girls#_ftnref115

²⁸ Multiple groups have challenged the U.S. government’s exclusion of transgender people from serving in the military, though legal action is still pending. See *Karnoski v. Trump* 926 F.3d 1180 (9th Cir. 2019); *Stockman v.*

rescinded guidance or changed agency rules that protect LGBTQ+ people's access to healthcare²⁹ and their rights in school³⁰ and has proposed to allow shelters to discriminate against transgender residents.³¹ Most recently, government agencies have issued proposed rules that would remove protections against discrimination in healthcare by providers against transgender people, pregnant people, and people who have had abortions, and that would broadly expand religious exemptions to anti-discrimination policies for federal contractors.³²

The U.S. Supreme Court is currently hearing a case on the question of whether the landmark Civil Rights Act of 1964, which prohibits discrimination “because...of sex” thus prohibits discrimination against LGBTQ+ people.³³ The U.S. government argued in a series of briefs that it does not—in direct contradiction with the position taken previously by the federal agency that protects against employment discrimination. The U.S. government's attempt to gut the anti-discrimination protections applicable to LGBTQ+ persons will undoubtedly have an even more drastic effect on members of the LGBTQ+ community who are already marginalized and underemployed due to existing limitations on access, bias, and criminalization, including racial and religious minorities, women, disabled people, people with HIV, and people in rural environments. The effect of this state-sanctioned discrimination could be to exacerbate the “discrimination-to-incarceration pipeline,” whereby marginalized people such as transgender individuals are deprived of economic opportunity, pushed into underground and criminalized economies in order to survive, and consequently become overrepresented in prisons and jails, where they are subjected to further discrimination, denial of care, and violence. Discrimination against the LGBTQ+ community violates international principles of equality and non-discrimination, and the actions of the U.S.

Trump, 331 F.Supp.3d 990 (C.D. CA 2018); Doe 2 v. Shanahan, 755 Fed. App'x. 19 (D.C. Cir. 2019); Stone v. Trump, 280 F.Supp. 3d 747 (2017).

²⁹ The U.S. Department of Health and Human Services (HHS) has proposed to rescind a rule interpreting the definition of sex as inclusive of sexual orientation and gender identity in the nondiscrimination provision of the Affordable Care Act. See Section 1557 NPRM, HHS-OCR-2019-0007, RIN 0945-AA11; 45 C.F.R. Part 92, 81 Fed. Reg. 31376. HHS has also published a rule allowing employees of health care facilities to discriminate against LGBTQ+ people, and deny them services, if they have a religious or moral objection to their identity or procedure requested. 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. Pt. 88).

³⁰ The U.S. Department of Education and U.S. Department of Justice rescinded guidance issued in May 2016 directing that schools treat a student's gender identity as the student's sex, as a protected characteristic under federal civil rights law. See <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

³¹ The U.S. Department of Housing and Urban Development is proposing changes to a rule preventing discrimination against transgender people's access to homeless shelters, to provide shelters with pretexts for discrimination against transgender people, including such broad categories as “practical concerns, [and] religious beliefs.” See <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=201904&RIN=2506-AC53>.

³² See CCR, “Advocacy with U.S. Government in Support of LGBTQIA+ Rights and Gender Justice.” September 2019, available at: <https://ccrjustice.org/advocacy-us-government-support-lgbtqia-rights-and-gender-justice>

³³ See CCR, “R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission and Aimee Stephens (Amicus),” July 3, 2019, available at: <https://ccrjustice.org/home/what-we-do/our-cases/rq-gr-harris-funeral-homes-v-equal-employment-opportunity-commission-and>; see also, CCR, “Stories of Transgender Americans Amplified in Remarkable Supreme Court Filing,” July 3, 2019, available at: <https://ccrjustice.org/home/press-center/press-releases/stories-transgender-amplified-remarkable-supreme-court>

government even rise to the level of persecution, a crime against humanity, as they result in the denial or infringement of fundamental rights.³⁴

Recommendations

The U.S. must fundamentally re-examine its relationship with the international human rights system and take the necessary steps to fully comply with its obligations, including to:

1. Center the demands of those most impacted by the U.S.' failure to uphold its human rights obligations;
2. Immediately ratify all remaining human rights conventions and optional protocols and ensure domestic implementation;
3. Ratify the Rome Statute of the International Criminal Court (ICC), cease interference and participate fully in the ICC and other mechanisms of international accountability;
4. Immediately close Guantánamo Bay prison and end the practice of arbitrary and indefinite detention without trial;
5. Fully abide by fundamental international law obligations to refugees, asylum seekers, and immigrants, particularly *non-refoulement*;
6. Ensure that refugees, asylum seekers and immigrants maintain family unity;
7. Cease the legislative attacks against the rights to protest, dissent, and boycott;
8. Cease the discriminatory targeting and surveillance of human rights defenders and activists on the basis of race and/or political viewpoints;
9. Uphold protections for LGBTQ+ individuals and other marginalized communities in employment, healthcare, education, housing, and other areas necessary to guaranteeing their rights and dignity.

³⁴For a detailed analysis on how bias and discrimination against LGBTQ+ persons implicates international human rights law, see CCR, Reporting on the Human Rights of Lesbian, Gay, Bisexual, Transgender, and Queer Individuals in the Changing World of Work, Submitted to OHCHR Working Group on Discrimination Against Women and Girls. September 2019, available at: <https://ccrjustice.org/submission-un-working-group-discrimination-against-women-and-girls>