

# CENTER FOR CONSTITUTIONAL



## **The Center for Constitutional Rights' List of Themes Submission to assist the UN Committee on the Elimination of Racial Discrimination Review of the United States**

**Submitted May 16, 2022**

*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 UN Committee on the Elimination of Racial Discrimination's review of the United States' compliance with the International Convention on the Elimination of Racial Discrimination.*

**CENTER FOR CONSTITUTIONAL RIGHTS**  
**List of Themes Submission to the UN Committee on the Elimination of Racial  
Discrimination**

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This List of Themes submission is presented to the UN Committee on the Elimination of Racial Discrimination to assist in the Committee's upcoming review of the United States. It outlines the Center for Constitutional Rights' key concerns with regard to the laws, policies, and practices that impact racialized communities, including Indigenous, Black, brown, Muslim and immigrant communities.<sup>1</sup> The following List of Themes places an emphasis on the underlying policies, practices, and ideologies that allow the U.S. to perpetuate systematic inequality, exclusion, and discrimination against racialized communities. In examining the political decisions emanating from the logics of organized abandonment and mass punishment, the systemic disenfranchisement of racialized communities, and the U.S.' refusal to repair historic injustice, our expectation is that the Committee will interrogate and require the U.S. to explicitly address the root causes of racial discrimination: white supremacy, colonialism, and racial capitalism. As the U.S. continues to fail to abide by its obligations under the International Convention on the Elimination of Racial Discrimination, we call on this Committee to support the demands of those most impacted by structures of oppression for rights-based laws and policies that dismantle oppressive systems of power—including structural racism, gender oppression, and settler colonialism—and for the accountability necessary to begin to build a just society.

## Failure to Comply & Refusal to Repair | Arts. 1, 2, 6, & 7

The fulfillment of CERD obligations requires the meaningful redress and repair of historical injustice. The U.S.' refusal to address and account for historic harms—including genocide, colonialism, forcible transfer, land theft, slavery, Jim Crow, and racial segregation and inequality—perpetuates and reinforces current systemic racial discrimination and oppression of Black people, Indigenous peoples, and other racialized people in the U.S. and throughout the world.

Our analysis that the U.S. cannot fulfill its CERD obligations is informed by critical race theory, which elucidates why the U.S. has been and continues to be incapable of or unwilling to eliminate all forms of racial discrimination. Tracing the development of the U.S. legal regime, critical race theorists demonstrate how it has been constructed to preserve and protect white power, property, and wealth.<sup>2</sup> White supremacy, settler colonialism, and racial capitalism are embedded within U.S. laws, institutions, and procedures *by design*. Because the U.S. is invested in and benefits from racial oppression, its shallow responses to prevent state actors from engaging in racially discriminatory conduct falls short of what is required for the U.S. to eliminate *all* forms of racial discrimination.

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<sup>1</sup> See Center for Constitutional Rights (CCR), *Submission to UN Special Rapporteur on Minority Issues*, CCR (Nov. 16, 2021), <https://ccrjustice.org/submission-un-special-rapporteur-minority-issues>; see also CCR, *Shifting Power to the People: A Rights-Based Vision for Biden & the 117th Congress* (2021), <https://docs.google.com/document/d/1xganLBEgaG4hA7IK2BZSDFCGbmgs2T5EqXXvkaKtL4k>.

<sup>2</sup> See, e.g., Cheryl Harris, *Whiteness as Property*, 106 *Harvard L. Review* 1710 (1993); Ian Haney Lopez, *White By Law: The Legal Construction of Race* (2006).

Article 6 of CERD requires States to assure effective remedy and adequate reparations for acts of racial discrimination and violation of the Convention.<sup>3</sup> As we mentioned in our submission to the UN Special Rapporteur on Minority Issues, “any assessment of compliance with international human rights standards must be measured against the U.S.’ reparation of historical injustice.”<sup>4</sup> By failing to address the historic harms caused by the U.S. government and its people against racialized communities here and abroad, the U.S. maintains the status quo of a white supremacist, settler colonial project that depends on stolen Indigenous land and the exploited labor of Black, brown, and other racialized people. The institutions and mechanisms of racial oppression have never ended—they merely evolved.<sup>5</sup>

The U.S. legal framework of civil rights and non-discrimination, which promotes legal equality as opposed to social equality, is insufficient to address historical harms and to otherwise guarantee the social, cultural and economic rights of racialized communities.<sup>6</sup> Additionally, in crafting legislation and policy without reference to race or class (creating a facade of neutrality), the U.S. further facilitates racial discrimination.<sup>7</sup> Since 2001, the Committee on the Elimination of Racial Discrimination has repeatedly expressed concern that the U.S.’ definition of racial discrimination “is not in line with article 1, paragraph 1 of the Convention, which requires States parties to prohibit and eliminate racial discrimination *in all its forms*, including practices and legislation that may not be discriminatory in purpose, but are *discriminatory in effect*.”<sup>8</sup> Instead of acknowledging racism as a system of oppression, the U.S.’ definition of racial discrimination as articulated in legislation and jurisprudence is concerned only with interpersonal, racially discriminatory conduct motivated by a prejudice towards people belonging to a particular racial category. In requiring individuals to prove racially discriminatory intent, rather than centering discriminatory impact, the U.S. legal system has exempted itself both from preventing or rectifying racism as well as from its obligation to address its root causes.<sup>9</sup>

In response to the momentous popular uprisings and outcry following the May 2020 murder of George Floyd, the international community made clear that confronting past legacies of enslavement and colonialism was key to dismantling systemic racism and advancing reparatory justice.<sup>10</sup> In her seminal report on racial justice, the High Commissioner of Human Rights emphasized that the attainment of racial equity would require the transformation of “systems and structures that were designed and shaped by enslavement, colonialism and successive

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<sup>3</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965), part 1, art. 6.

<sup>4</sup> See CCR, *Submission to UN Special Rapporteur on Minority Issues*, *supra* note 1.

<sup>5</sup> E.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

<sup>6</sup> See Center for Human Rights & Global Justice and Robert L. Bernstein Institute for Human Rights, *The Black Lives Matter Movement, Racial Inequality, and Human Rights in the United States*, YouTube (Sept. 22, 2015), <https://www.youtube.com/watch?v=hgL4lyulMkI>; see also Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (2003).

<sup>7</sup> Theresa Rocha Beardall, *Sovereignty Threat: Loreal Tsingine, Policing, and the Intersectionality of Indigenous Death*, 21 Nev. L.J. 1025, 1037 (2021) (“the state implicitly normalizes and justifies settler violence by creating laws that appear race neutral but in effect disproportionately impact the health and safety of minoritized populations”).

<sup>8</sup> Comm. on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, ¶ 5, CERD/C/USA/CO/7-9 (Aug. 29, 2014) (emphasis added) [hereinafter 2014 Concluding Observations]. See also CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 10, CERD/C/USA/CO/6 (May 8, 2008) [hereinafter 2008 Concluding Observations]; CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 380–407, A/56/18 (2001).

<sup>9</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>10</sup> Report of the United Nations High Commissioner for Human Rights, *Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers*, A/HRC/47/53 (June 1, 2021).

racially discriminatory policies and systems.”<sup>11</sup> Significantly, while the Biden administration claims to be committed to racial equity,<sup>12</sup> we are concerned that the inaccurate definition of equity in Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) will prevent the U.S. government from eliminating racism as required by CERD and as affirmed by OHCHR. EO 13985 defines equity in terms of equal and impartial treatment, which offers a definition of *equality* where people are treated the same, rather than of *equity* which is responsive to historic and current power imbalances.<sup>13</sup> A commitment to racial equity in law and policy-making would challenge existing state infrastructure and institutions, and crucially necessitate a recalibration of national priorities, where public resources are reallocated away from discriminatory systems of incarceration, policing, and militarism, and into programs, solutions, and institutions that center and bolster the rights of racialized and other oppressed communities.<sup>14</sup>

We are thus deeply concerned by the active attempts by U.S. lawmakers to prevent public education regarding the systemic nature of racism and legislative efforts to stifle fact-based analysis and coherent critiques of ideologies and institutions of oppression. In suppressing the history of racial discrimination in this country, legislation banning or restricting critical race theory violates article 7 of CERD, which requires States parties to “adopt immediate and effective measures, particularly in the fields of *teaching, education, culture and information*, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among . . . racial or ethnical groups . . . .”<sup>15</sup>

Finally, since 2008, the Committee has repeatedly expressed concern “at the lack of progress achieved in withdrawing or narrowing the scope of the reservation to article 2 of the Convention and in prohibiting all forms of discriminatory acts perpetrated by private individuals, groups or organizations.”<sup>16</sup> By focusing solely on prohibiting racially discriminatory acts by state actors, the U.S. ignores the role of private actors in maintaining and perpetuating racism. Racism unfolds not only through affirmative state action but also state inaction by refusing to prevent racial discrimination by private individuals or hold such perpetrators accountable. For example, the government refuses to prevent or hold accountable—and often contracts with—corporations that violate the human rights of racialized peoples across the globe, including torture.<sup>17</sup>

In order to fulfill its CERD obligations, the U.S. must develop a legal framework that recognizes the systemic nature of racism and prohibits all forms of racial discrimination by both public and private actors, place structural inequalities facing racialized communities within their historical contexts, and repair historic and current harms.

## Questions

1. What obstacles prevent the U.S. from taking action to address the Committee’s concerns and recommendations articulated in its Concluding Observations, specifically the failures

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<sup>11</sup> *Id.*

<sup>12</sup> Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>13</sup> *Id.* at § 2(a) (“The term ‘equity’ means the consistent and systematic fair, just, and impartial treatment of all individuals”).

<sup>14</sup> See CCR, *Shifting Power to the People: A Rights-Based Vision for Biden & the 117th Congress*, *supra* note 1.

<sup>15</sup> Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 3, part 1, art. 7 (emphasis added).

<sup>16</sup> 2014 Concluding Observations, *supra* note 8, ¶ 5; 2008 Concluding Observations, *supra* note 8, ¶ 11.

<sup>17</sup> See, e.g., *Al Shimari, et al. v. CACI*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al> (providing overview of case seeking to hold private contractor who conspired to, and aided and abetted torture at Abu Ghraib accountable).

of the legal framework to address historical harms and to otherwise guarantee the social and economic rights of racialized communities?

2. Can the Biden administration provide clarity on its definition of equity as referenced in Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), and the intended material transformations of state infrastructure and institutions necessary to attain racial equity?
3. Given that the U.S. can leverage vast amounts of public wealth to address social, economic, and public crises, what concrete steps will the U.S. commit to repairing historic injustice and upholding its obligations to eliminate racial discrimination, including:
  - a. When will the U.S. return the land and resources to Indigenous nations in compliance with CERD's General Recommendation No. 23? And will the U.S. adopt and implement the UN Declaration on the Rights of Indigenous Peoples?
  - b. Will the U.S. create a commission to examine, assess, and propose land back for Native people and nations for historical and ongoing injustices, including genocide, forcible transfer, land dispossession, dehumanization, racial inequity, the murder and disappearance of Indigenous women and girls, and all forms of violence against Native people?
  - c. Will the U.S. government commit to creating and implement a comprehensive plan to address historic and ongoing racial discrimination and make racial justice, rather than racial equality, a pillar of future policy-making?
  - d. If the U.S. Congress fails to enact S. 40 (2021), the Commission to Study and Develop Reparation Proposals for African-Americans Act, will the Biden administration establish a similar commission by executive order, and ensure the scope of the duties includes an express mandate to analyze such structural inequality as mass incarceration and COVID-19 health disparities within the context of lingering negative effects of the institution of slavery?<sup>18</sup>
  - e. Will the U.S. provide reparations to survivors of the post-9/11 U.S. torture program and individuals held in indefinite detention, commit to no longer appointing any officials who oversaw these programs to new agency positions, and end any remaining elements of these programs?
4. Will the U.S. ensure that its foreign policy includes generally applicable human rights conditions, including by upholding the absolute prohibition on torture and other cruel, inhuman, or degrading treatment or punishment, and amending the Torture Victim Protection Act (28 U.S.C. §1350, note) and the Torture Statute (18 U.S.C. §2340) to ensure accountability against U.S. actors, including former government officials and federal contractors, for torture, at home and abroad?

## Organized Abandonment & Environmental Racism | Arts. 2, 5, & 6

Drawing from the scholarship of geographer and prison abolitionist, Ruth Wilson Gilmore, we invite the Committee to further contextualize the U.S.' long history of racial discrimination within the framework of "organized abandonment." Organized abandonment refers to the state's systemic disinvestment in racialized communities, the failure to ensure the equitable distribution of public wealth, and the wilful neglect of society's most oppressed members.<sup>19</sup> Organized

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<sup>18</sup> CCR, *Submission to UN Special Rapporteur on Minority Issues*, *supra* note 1.

<sup>19</sup> See The Humanities Institute at UCSC, *Ruth Wilson Gilmore: "Organized Abandonment and Organized Violence: Devolution and the Police" 11.9.15*, Vimeo (Nov. 20, 2015), <https://vimeo.com/146450686>.



abandonment is the result of political decisions that prioritize corporate profit, and not only threatens the fundamental human rights of those most vulnerable—including the rights to life, health, housing, education, a decent wage, and a clean environment—but also reflects a profound disregard for collective safety and well-being.

The disproportionate impact of the COVID-19 pandemic on Black, brown, Indigenous, immigrant, and poor communities, as well as on unhoused people, and people who are incarcerated and detained, is the foreseeable result of the organized abandonment of vulnerable communities.<sup>20</sup> Significantly, the political decisions to simultaneously deny universal health care while leveraging public wealth to protect corporate interests must not only be understood as a suspension of the human rights guaranteed under CERD, but also viewed through the lens of international criminal law. “Given the . . . scale of easily predictable and unnecessary human suffering resulting from governmental responses, these non-rights respecting policies may amount to crimes against humanity.”<sup>21</sup> The pandemic magnified the U.S. policies and practices of organized abandonment and exacerbated systemic racial discrimination. To appropriately address such predictable human suffering and create a framework for justice, the U.S. government must not only guarantee universal healthcare but also employ a rights-based approach to policy-making that guarantees economic, social, civil and political rights to all, including the right to a remedy.

Central to the U.S. government’s failure to guarantee the health and well-being of racialized communities is the persistence of environmental racism and the prioritization of profit for toxic, extractive industry. Of particular concern are discriminatory land use policies in the U.S. which have led to the approval and construction of more than 200 toxic industrial and petrochemical plants along an 80 mile stretch of the Mississippi River in the southern state of Louisiana between Baton Rouge and New Orleans, resulting in lethal pollution and the poisoning of air, land and water. So notorious are the health impacts arising from industry pollution that the area has long been known as “Cancer Alley”, and was recently renamed “Death Alley” by local residents. According to U.S. government data, the cancer rate for parts of the area is 47 times higher than the national average.<sup>22</sup> Last year, a group of United Nations experts published a report discussing Cancer Alley stating, “this form of environmental racism poses serious and disproportionate threats to the enjoyment of several human rights of its largely African American residents, including the right to equality and non-discrimination, the right to life, the right to health, right to an adequate standard of living and cultural rights.”<sup>23</sup> This deliberate targeting of historic Black communities for the siting of toxic industry facilities is a direct legacy of slavery, and the continued, systemic dehumanization of people of African descent. Many of the sites of toxic industry are located on former plantations, where the ancestors of local people were enslaved for centuries.<sup>24</sup> Together with local communities, forensic architects have discovered

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<sup>20</sup> See *East Baton Rouge Prison Still Failing Medically Vulnerable People at Risk of Life-Threatening COVID*, Center for Constitutional Rights (Mar. 5, 2021),

<https://ccrjustice.org/home/press-center/press-releases/east-baton-rouge-prison-still-failing-medically-vulnerable-people-0>; see also *Health Equity Considerations and Racial and Ethnic Minority Groups*, Center for Disease Control and Prevention (CDC) (Jan. 25, 2022),

<https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html#fn1>.

<sup>21</sup> See *Center for Constitutional Rights Priorities for CARES-2*, Center for Constitutional Rights (May 12, 2020),

<https://ccrjustice.org/center-constitutional-rights-priorities-cares-2>.

<sup>22</sup> *National Air Toxics Assessment - 2014 NATA: Assessment Results*, United States Environmental Protection Agency, <https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results>.

<sup>23</sup> *Environmental Racism in Louisiana’s ‘Cancer Alley’, Must End, Say UN Human Rights Experts*, UN News (Mar. 2, 2021), <https://news.un.org/en/story/2021/03/1086172>.

<sup>24</sup> See *The Descendants Project v. St. John the Baptist Parish*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/descendants-project-v-st-john-baptist-parish-1>.

burial grounds of these formerly enslaved people and require urgent government intervention to halt the continued construction and operation of industry facilities on sacred sites.<sup>25</sup>

We also note that another feature of the Government's organized abandonment of Black communities in Cancer Alley and elsewhere is the denial of adequate consultation for people living in or near areas where infrastructure and heavy industry projects are sited for construction. In Wallace, Louisiana, for example, the majority Black community has been denied an opportunity to engage in consultation with the U.S. Army Corps of Engineers in relation to a grain terminal project that stands to further contaminate the air quality of an already heavily polluted area in Cancer Alley. This unwillingness to guarantee that the most marginalized communities are protected from environmental pollution and have access to adequate health care and remedies for current and historic harm only compounds the deprivation of rights already experienced by Black communities. We affirm the Committee's concern in its 2014 Concluding Observations that "individuals belonging to racial and ethnic minorities as well as Indigenous peoples continue to be disproportionately affected by the negative health impact of pollution"<sup>26</sup> and regret that the U.S. government has continued to approve and construct new heavy industry projects that are disproportionately impacting racialized communities.<sup>27</sup>

Article 2.1(a) and (b) are particularly relevant to the issue of environmental racism in Louisiana and across the United States. These provisions state that "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation" and "Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations."<sup>28</sup> We also note that General Comment No. 36 of the UN Human Rights Committee elaborates additional considerations on this issue. They state that, in the context of implementing the state's obligation to respect and ensure the right to life, the State must take measures to "preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."<sup>29</sup>

The enumeration of social, economic and cultural rights in Article 5(e) offers a clear roadmap for the U.S. government away from the laws, policies and practices of organized abandonment toward a future of accountability and collective flourishing. The elimination of racial discrimination requires investment in public health, housing, education, and social services, and the U.S. must be held accountable for its persistent failure to guarantee the human rights of racialized communities in accordance to Article 6.

### Questions:

1. What steps is the Biden administration taking to enact universal healthcare coverage, and will the U.S. government ensure a right to remedy for all people denied access to healthcare and coverage in accordance with international human rights standards and obligations?

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<sup>25</sup> See *RISE St. James - The Fight to Protect Burial Sites of Enslaved People*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/riase-st-james-fight-protect-burial-sites-enslaved-people>.

<sup>26</sup> 2014 Concluding Observations, *supra* note 8, ¶ 10.

<sup>27</sup> See *Indigenous and Arab Organizers Stand in Solidarity with Water Protectors Resisting Line 3 Pipeline*, Center for Constitutional Rights (Sept. 16, 2021),

<https://ccrjustice.org/indigenous-and-arab-organizers-stand-solidarity-water-protectors-resisting-line-3-pipeline>.

<sup>28</sup> Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 3, art. 2.1(a) & (b).

<sup>29</sup> Hum. Rts. Comm., General Comment No. 36, ¶ 62, CCPR/C/GC/36 (Sept. 3, 2019) (on article 6 of the International Covenant on Civil and Political Rights, on the right to life).

2. What material investments are the U.S. government making in historically abandoned racialized communities, and what steps are the Biden administration taking to expand the social safety net by *inter alia* broadening unemployment insurance, vastly increasing food aid programs, extending housing assistance, expanding childcare for working families, canceling debt, and implementing a moratorium on evictions, foreclosures, and shut-offs of water and electricity?
3. Will the Biden administration establish a commission to examine the impacts of environmental racism on Black and Indigenous people; subpoena information detailing discussions and decisions made between fossil fuel businesses and local, state and federal government authorities; assess and propose reparations to remedy current and historic injustices; and stop current and prevent future oppression of Black and Indigenous people and exploitation of the land?
4. What is preventing the U.S. government from instituting a moratorium on all new heavy industry facilities, including petrochemical plants, and expansions of existing facilities, located in or near predominantly Black, Indigenous, and economically deprived communities?

## Racist Carceral Logics: Guantánamo, Immigration Detention, and Family Regulation | Arts. 2, 5, & 6

The criminal legal system in the United States requires the mass criminalization, incarceration, and surveillance of racialized people domestically and around the world, particularly Black and brown, Indigenous, Muslim, immigrant, poor and LGBTQIA+ communities. Rooted in an ideology of white supremacy, the carceral logic of the U.S. government threatens the human rights of racialized communities, and undermines collective safety and human flourishing.

The U.S. remains the world leader in incarceration, with nearly 2 million people held in jails and prisons across the country, with disproportionate impact on Indigenous and Black communities.<sup>30</sup> Trans and gender non-conforming people are also disproportionately threatened by incarceration and precarious conditions of confinement,<sup>31</sup> and the U.S. government continues its repressive practice of solitary confinement, which amounts to torture.<sup>32</sup> The same ideological, political, and economic forces behind mass incarceration have also lead to the creation of the

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<sup>30</sup> See Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, Prison Policy Initiative (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/#:~:text=Native%20people%20made%20up%202.1%20community%20supervision%20in%20mid%2D2018>; see also The Sentencing Project, *Trends in U.S. Corrections* 5, <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> (finding Black men six times as likely to be incarcerated as white men).

<sup>31</sup> See Jaime M. Grant, et al., National Center for Transgender Equality and National Gay and Lesbian Taskforce, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 163 (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) (finding more than one out of five (21%) trans women of all ethnicities are incarcerated during their lifetimes—a rate that skyrockets to nearly one out of two (47%) among Black trans people).

<sup>32</sup> See *Solitary Confinement: Torture in U.S. Prisons*, Center for Constitutional Rights (last updated March 2017), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/torture-use-solitary-confinement-us-prisons>.



largest immigration detention system in the world,<sup>33</sup> in which Black migrants are over-represented and subject to discriminatory deportations.<sup>34</sup> And in the aftermath of 9/11, the U.S. government launched a platform of human rights abuses, including the ongoing injustice of indefinite detention of Muslim men and boys without charge or fair trial at the Guantánamo Bay prison.<sup>35</sup> The U.S. government's punitive reflex and carceral policies are "grounded in the debasement of the status of individuals in society" and are symptoms of a society committed to preserving a deadly hierarchy of human life.<sup>36</sup>

U.S. public policy reflects this systemic debasement of racialized communities, and the carceral logic of social control, punishment, isolation, and confinement permeates state institutions. In the context of the family regulation system (or child welfare system), the U.S. government disproportionately targets Black, Indigenous, and poor families for disruption, and the impact of such state intrusion, surveillance, and forced separation of families only further entrenches unjust social and economic conditions.<sup>37</sup> Led by Black and Indigenous mothers, there exists in the U.S. a growing movement to radically transform or abolish the family regulation system, including by repealing the Adoption and Safe Families Act (ASFA).<sup>38</sup> Indeed, the complete divestment from the U.S. system of discriminatory policing, incarceration and surveillance and the commensurate public investment in the safety and well-being of racialized communities is necessary for the U.S. to be able to abide by its obligations under the UN CERD.

We reiterate concluding observations 18, 20, and 22 identifying violations of CERD Articles 2, 5 and 6, and do not accept the U.S. government's proposed half-measures or piecemeal reforms in the face of persistent, systemic racism in the criminal legal, "national security" and immigration regimes. In order to eliminate structural discrimination, as recommended in Concluding Observation 20(a), such systems must be fundamentally reimagined away from their colonial, anti-Black, and xenophobic origins.

### Questions:

1. Will the Biden administration commit and create a plan to divest public resources from mass incarceration and state control and invest in non-punitive, non-carceral approaches to community safety by supporting community-based services, infrastructure, and efforts,

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<sup>33</sup> Mizue Aizeki, Ghita Schwarz, Jane Shim, & Samah Sisay, *Cruel by Design: Voices of Resistance from Immigration Detention*, Immigrant Defense Project and the Center for Constitutional Rights (February 2022), <https://www.immigrantdefenseproject.org/wp-content/uploads/Cruel-By-Design-IDP-CCR-Feb-2022.pdf>.

<sup>34</sup> See *Cameroonian Immigration Detention in Crisis*, Center for Constitutional Rights (Oct. 12, 2021), <https://ccrjustice.org/home/get-involved/tools-resources/publications/cameroonian-immigration-detention-crisis>.

<sup>35</sup> See *Unconstitutional and Unjust: Dismantling 20 Years of Discriminatory 'National Security' Policy*, Center for Constitutional Rights (Sept. 20, 2021), <https://ccrjustice.org/unconstitutional-and-unjust-dismantling-20-years-discriminatory-national-security-policy>; *Faces of Guantánamo* (2022), Center for Constitutional Rights (Jan. 15, 2022), <https://ccrjustice.org/faces-guantanamo-2022>.

<sup>36</sup> Report of the United Nations High Commissioner for Human Rights, *Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers*, *supra* note 10.

<sup>37</sup> See Movement for Family Power and National Advocates for Pregnant Women, *Violence Against Women in the Medical Setting: An Examination of The U.S. Foster System* (May 31, 2019), [https://ccrjustice.org/sites/default/files/attach/2019/06/MFP\\_NAPW\\_UN\\_VAW\\_Submission-20190531-Final.pdf](https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf) (submission to UN Special Rapporteur on Violence Against Women).

<sup>38</sup> See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>; see also *Solutions and Strategies*, Movement for Family Power, <https://www.movementforfamilypower.org/solution-and-strategies>.

such as community programs to address food insecurity, homelessness, education, and access to healthcare?

- a. Specifically, what steps is the U.S. government taking to decarcerate prisons, detention centers, and jails, and to invest in community-determined alternatives for safety and justice that center those most vulnerable to abuse, including trans and gender non-conforming people?
2. When will the U.S. government end the torture of solitary confinement and end all forms of solitary confinement in all federal custody as outlined by the “Blueprint for Ending Solitary Confinement by the Federal Government”?<sup>39</sup>
3. When will the Biden administration end indefinite detention by releasing all people held in immigrant detention centers and at Guantánamo, and close Guantánamo Bay Detention Camp?<sup>40</sup>
4. What is preventing the U.S. government from implementing a moratorium on deportations that disproportionately target Black migrants, and how does the Biden administration intend to ensure non-discrimination in accordance with CERD in all future executive action related to immigrant entry?
5. Will the Biden administration take executive action to ensure that the Adoption and Safe Families Act (ASFA) is implemented in accordance with CERD obligations?<sup>41</sup>

## Systematic Disenfranchisement: Voting Apartheid | Arts. 2, 3, & 5(c)

Racialized communities are currently experiencing the roll-out of a new phase in the generations-long efforts to disenfranchise Black voters and other marginalized communities.<sup>42</sup> Below we consider the systematic denial of Black people of the right to vote, and similarly condemn the U.S. laws and policies that disenfranchise 3.5 million people living in U.S. territories/colonies, as well as the disenfranchisement of formerly and currently incarcerated people, which is a particular threat to the civic participation of racialized populations. We also contextualize the right to voice dissent as central to full political participation, which together

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<sup>39</sup> See Federal Anti-Solitary Taskforce (FAST), *A Blueprint for Ending Solitary Confinement by the Federal government* (June 2021), <https://www.aclu.org/report/blueprint-ending-solitary-confinement-federal-government>.

<sup>40</sup> See *4 Steps President Biden Must Take to Close Guantánamo*, Center for Constitutional Rights (Dec. 17, 2020), <https://ccrjustice.org/four-steps-president-biden-must-take-close-guantanamo>.

<sup>41</sup> See *What is the Adoption and Safe Families Act?*, Repeal ASFA, <https://www.repealasca.org/what-is-asfa> (finding that since being signed into law in 1997, ASFA has resulted in the permanent separation of more than one million children from their parents with a disproportionate impact on Black and Indigenous families).

<sup>42</sup> See Carol Anderson, *The Five Ways Republicans Will Crack Down on Voting Rights in 2020*, *The Guardian* (Nov. 13, 2019), <https://www.theguardian.com/us-news/2019/nov/13/voter-suppression-2020-democracy-america>; see also David A. Graham, *North Carolina's Deliberate Disenfranchisement of Black Voters*, *The Atlantic* (July 29, 2016), <https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/>.

with the right to vote has overwhelmingly been defined by exclusion, suppression, intimidation, and disenfranchisement.<sup>43</sup>

The coordinated gerrymandering strategy after the 2010 midterm elections and census meant that Republicans gained a vast majority of seats in the U.S. House of Representatives in 2012, despite the fact that Democratic candidates won a majority of votes.<sup>44</sup> Significantly, no Republican president has been elected by popular vote in the 21<sup>st</sup> century.<sup>45</sup> Since the U.S. Supreme Court gutted the Voting Rights Act in the 2013 *Shelby County v. Holder* decision, the GOP has only increased their assault on voting rights – deploying tactics aimed at inhibiting voter registration and turnout, voter roll purges, passing restrictive I.D. laws, even shuttering polling places, and dramatically and illegally redrawing electoral districts.<sup>46</sup> The active disenfranchisement of Black voters is grounded in white supremacy and fueled by corporate and private actors such as the American Legislative Exchange Council (ALEC)<sup>47</sup>, Council for National Policy (CNP), Redistricting Majority Project (REDMAP), and other GOP-aligned entities.

Contrary to 2014 concluding observation 11(a) recommending that the U.S. encourage voter participation, in the lead up to the 2020 election, as the COVID-19 pandemic swept through the U.S., the Republican Party targeted mail-in voting and online and same-day voter registration. Their strategy has evolved again in the wake of the Republican party losing the 2020 Presidential election. At the local level, in some states Republicans have removed people of color from local boards and have stripped county authorities of election oversight.<sup>48</sup> At its essence, the objective of the Republican party and their right-wing corporate sponsors is to deny the right to vote from as many non-Republicans as they can—and Black voters have long been at the center of this strategy.

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<sup>43</sup> See Luna Martinez, *A Colony Is a Colony Is a Colony: Puerto Rico and the Courts*, Center for Constitutional Rights: The Daily Outrage (Oct. 20, 2021), <https://ccrjustice.org/home/blog/2021/10/20/colony-colony-colony-puerto-rico-and-courts>.

<sup>44</sup> See David Daley, *How the Republicans Rigged Congress — New Documents Reveal an Untold Story*, Salon (Feb. 8, 2018), <https://www.salon.com/2018/02/06/how-the-republicans-rigged-congress-and-poisoned-our-politics/>; see also David Daley, *How the GOP Made Your Vote Useless*, The Daily Beast (Oct. 7, 2017), <https://www.thedailybeast.com/how-gop-gerrymandering-made-your-democratic-vote-useless>.

<sup>45</sup> This is not to suggest that Democrat-affiliated interests have not also sought at times to suppress Black voting. What is true now is that there has been a clear, focused, sustained, across-the-board, nation-wide strategy to suppress and dilute Black voting and that of other minority communities in very pronounced ways for over 20 years, with particular renewed efforts and success in 2010, which lead to the redistricting efforts and new tactics after the election of Barack Obama and then the 2010 census.

<sup>46</sup> See Jelani Cobb, *Voter-Suppression Tactics in the Age of Trump*, The New Yorker (Oct. 21, 2018), <https://www.newyorker.com/magazine/2018/10/29/voter-suppression-tactics-in-the-age-of-trump>; see also Ari Berman, *Republicans Are Trying to Kick Thousands of Voters Off the Rolls During a Pandemic*, Mother Jones (Apr. 14, 2020), <https://www.motherjones.com/politics/2020/04/voter-purges-wisconsin-republican-election>; see also Suevon Lee and Sarah Smith, *Everything You've Ever Wanted to Know About Voter ID Laws*, ProPublica (Mar. 9, 2016), <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>; see also Bob Moser, *The GOP's Sneakiest Voter Suppression Tactic*, The New Republic (Oct. 31, 2018), <https://newrepublic.com/article/151966/gops-sneakiest-voter-suppression-tactic>; see also Robert Barnes, *North Carolina's Gerrymandered Map Is Unconstitutional, Judges Rule, and May Have to Be Redrawn Before Midterms*, The Washington Post (Aug. 27, 2018), [https://www.washingtonpost.com/politics/courts\\_law/2018/08/27/fc04e066-aa46-11e8-b1da-ff7faa680710\\_story.html](https://www.washingtonpost.com/politics/courts_law/2018/08/27/fc04e066-aa46-11e8-b1da-ff7faa680710_story.html)

<sup>47</sup> See *How Evangelicals and Corporations Captured State Lawmaking to Safeguard White Supremacy and Corporate Power: A Report From the Center for Constitutional Rights, Dream Defenders, Palestine Legal, The Red Nation, and the US Campaign for Palestinian Rights*, ALEC Attacks, [www.alecattacks.org](http://www.alecattacks.org).

<sup>48</sup> See Nick Corasaniti and Reid J. Epstein, *How Republican States Are Expanding Their Power Over Elections*, The N.Y. Times (June 19, 2021), <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html>.

We uplift CERD's General Recommendation No. 34 and the explicit, "special and concrete measures" that states must take to "guarantee people of African descent the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage and to have due representation in all branches of government."<sup>49</sup> We further encourage the Committee to recognize the far reaching implications of the historical deprivation of Black people of the right to vote in the U.S, and to consider that such systemic disenfranchisement may meet the threshold for international crimes, such as apartheid, as prohibited in Art. 3 of CERD.

### Questions:

1. What steps is the U.S. government taking to protect and promote the right to self-determination of all people under U.S. control, including people living in U.S. territories, and formerly and currently incarcerated people?<sup>50</sup>
2. Does the Biden administration support the establishment of independent, non-partisan electoral commissions to oversee redistricting to help ensure free and fair elections and prevent gerrymandering?
3. What measures are the U.S. government taking to prohibit any current or pending disenfranchisement laws or voter suppression bills,<sup>51</sup> including by establishing remedies and penalties for voter disenfranchisement and voter suppression violations?
4. What steps is the U.S. government taking to hold private actors accountable for systematically depriving Black people of the right to vote, particularly entities registered as non-profit organizations that operate in violation of the U.S. Tax Code?

## Systematic Disenfranchisement: Suppression of Dissent by Indigenous, Black & Palestinian human rights defenders | Arts. 2, 3, & 5(d)

In response to the systematic exclusion from the political process, racialized and marginalized populations have long sought alternative venues to demand their rights and voice their dissent against an unjust status quo. The treatment of protesters has been starkly delineated along racial lines, with Indigenous and racial justice activists under particular threat of both discriminatory treatment and violence by U.S. law enforcement, as well as discriminatory legislation and frivolous lawsuits designed to stifle dissent.

As Indigenous Water Protectors and Land Defenders lead the front-line defense against the oil and gas industry across the country, they are experiencing serious attacks on their rights to free speech, expression and association. In 2017, the partial owner of the Dakota Access Pipeline, Energy Transfer Equity, filed a bizarre and far-fetched lawsuit naming various environmental organizations and "Earth First!" as defendants, and later individual activists including Krystal Two Bulls, an Oglala Lakota and Northern Cheyenne organizer.<sup>52</sup> The baseless lawsuit, which

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<sup>49</sup> CERD, *General Recommendation No. 34 adopted by the Committee: Racial Discrimination Against People of African Descent*, ¶ 43, CERD/C/GC/34 (Sept. 30, 2011).

<sup>50</sup> See CCR, *Shifting Power to the People: A Rights-Based Vision for Biden & the 117th Congress*, *supra* note 1, at 20 ("Guarantee Self-Determination and Genuine Access to the Democratic Process").

<sup>51</sup> See *Comprehensive Bill Search*, Voting Rights Lab, <https://tracker.votingrightslab.org/pending/search>.

<sup>52</sup> See *Energy Transfer Equity, et al. v. Greenpeace, Earth First! et al.*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/energy-transfer-equity-et-al-v-greenpeace-earth-first-et-al>.

was a textbook example of a “strategic lawsuit against public participation,” or SLAPP, was dismissed in 2019.

Since the protests at Standing Rock opposing the Dakota Access Pipeline in North Dakota in February 2017, more than 60 bills that heighten the risk and criminal penalties of dissent have been introduced across 30 states.<sup>53</sup> In 2018, the Louisiana Mid-Continent Oil and Gas Association (LMOGA) drafted and proposed an amendment to Louisiana’s Critical Infrastructure law in an attempt to chill, and harshly punish opposition to LMOGA’s pipeline projects. The law was passed in August 2018 and swiftly used to charge Indigenous Water Protectors with felonies for their non-violent protest.<sup>54</sup> On July 13, 2021, a local district attorney in Louisiana rejected all charges against the 17 individuals who were charged with felonies under the 2018 law and declined to prosecute them.

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), in what is the latest iteration of criminalizing the Black freedom struggle.<sup>55</sup> The U.S. government cast Black human rights defenders as extremists and potentially violent threats, and engaged in sweeping surveillance of constitutionally protected activities.<sup>56</sup> During the 2020 protests following the police murder of George Floyd, law enforcement met protestors with tear gas and physical violence, and issued over 10,000 arrests, with over 90 people facing federal charges.<sup>57</sup> These tactics are designed to chill the activities of racialized communities and deny their full participation in political, civil and social life.

For decades, the state and private actors have worked to suppress advocacy for Palestinian human rights utilizing many of the strategies outlined above, working in concert to chill and silence dissent and criticism of Israeli policies of settler-colonialism and apartheid. Through allegations of anti-semitism and “terrorism”, the coordinated and well-funded repression seeks to undermine, delegitimize, and dehumanize the Palestinian cause and human rights defenders working to realize Palestinian liberation.<sup>58</sup> A particular tactic is the criminalization of the Constitutionally-protected right to boycott, and today, 32 states have anti-boycott laws (including executive orders) in effect that target advocacy for Palestinian rights by criminalizing the tactics of boycott, divestment and sanctions, which aim to achieve freedom, justice, and equality for

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<sup>53</sup> See Zoë Carpenter and Tracie Williams, *Photos: Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests*, The Nation (Feb. 16, 2018), <https://www.thenation.com/article/archive/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests/>.

<sup>54</sup> See *White Hat v. Landry*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry>.

<sup>55</sup> See *Color of Change v. Department of Homeland Security and Federal Bureau of Investigation*, Center for Constitutional Rights, <https://ccrjustice.org/COC-FOIA>; see also *Briefing Guide: Color of Change v. FBI & DHS*, Center for Constitutional Rights (May 16, 2018), <https://ccrjustice.org/briefing-guide-color-change-v-fbi-dhs>.

<sup>56</sup> See CCR and Color of Change, *Briefing Guide: The DHS “Race Paper”*, Center for Constitutional Rights, <https://ccrjustice.org/sites/default/files/attach/2018/03/COC%20FOIA%20-%20Race%20Paper%20Briefing%20Guide%20031918.pdf>.

<sup>57</sup> See *Amnesty for Protestors - Free ‘Em All: Protect Front Line Freedom Fighters*, Movement for Black Lives, <https://m4bl.org/amnesty-for-protestors/>.

<sup>58</sup> See *The Issue: Suppression of Palestine Activism*, Palestine Legal, <https://palestinelegal.org/about-the-issue>; see also *Letter to Secretary Blinken from U.S. Orgs & Leaders in Solidarity with Palestinian Civil Society: 304 Organizations Demand Biden Administration Condemn Israel’s Crackdown on Human Rights Groups*, Center for Constitutional Rights (Oct. 29, 2021), <https://ccrjustice.org/letter-secretary-blinken-us-orgs-leaders-solidarity-palestinian-civil-society>.



Palestinians.<sup>59</sup> CERD protects the full political participation of racialized communities, and as a party to the convention, the U.S. must guarantee these rights, including the right to remedy.<sup>60</sup>

**Questions:**

1. What measures is the State party taking to ensure corporations, acting privately, collectively and/or through non-profit organizations, do not pursue their political and economic interests at the expense of human rights by exerting undue political influence over the regulatory and law/policy making decision-making of local, state and federal government bodies?
2. What measures is the State party taking to ensure that Indigenous people are protected from all forms of attack when they exercise their right to defend the integrity of their land, air, and water?
3. What steps is the U.S. government taking to end repressive police and federal control and restriction of protests, and to repeal laws that criminalize protest-related activities?
4. How does the U.S. government intend to prevent corporations and powerful actors from abusing the court system to intimidate and silence their critics, including the use of SLAPPs?
5. Will federal and state-level officials drop the charges against protestors demanding environmental and racial justice, including during the protests against Line 3, and the 2020 uprisings for Black Lives?<sup>61</sup>
6. What measures is the State party taking to repeal, revoke, and rescind laws, rules, and policies that criminalize and chill protected First Amendment activity of those advocating for Palestinian rights, such the right to call for boycotts, divestment and sanctions?

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<sup>59</sup> See *State Legislation: Legislation Targeting Advocacy for Palestinian Rights*, Palestine Legal, <https://legislation.palestinelegal.org/state-legislation/>.

<sup>60</sup> See *80 Non-Governmental Organizations, Faith-Based Groups, and Academic Institutions Call for the Biden Administration to Repeal ICC Sanctions*, Center for Constitutional Rights (Feb. 17, 2021), [https://ccrjustice.org/sites/default/files/attach/2021/02/Call\\_Biden\\_Repeal\\_ICC\\_Sanctions\\_February2021\\_Updated.pdf](https://ccrjustice.org/sites/default/files/attach/2021/02/Call_Biden_Repeal_ICC_Sanctions_February2021_Updated.pdf).

<sup>61</sup> See *Indigenous and Arab Organizers Stand in Solidarity with Water Protectors Resisting Line 3 Pipeline*, Center for Constitutional Rights (September 16, 2021), <https://ccrjustice.org/indigenous-and-arab-organizers-stand-solidarity-water-protectors-resisting-line-3-pipeline>