

AMERICA'S HUMAN RIGHTS CHALLENGE

International Human Rights Implications
of US Immigration Enforcement Actions
Post-September 11



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of US Immigration Enforcement Actions
Post-September 11**

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INTRODUCTION

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

—Article 2, Universal Declaration of Human Rights, 1948

More than 500 million people annually cross US borders at legal entry points, about 330 million of them non-citizens. Another 500,000 or more enter illegally without inspection across America's thousands of miles of land borders or remain in the country past the expiration of their permitted stay. The challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.

—*The 9/11 Commission Report*, 2004

In 2003 the Migration Policy Institute issued *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11*. The authors criticized the government's excessive reliance on immigration controls in its post-9/11 anti-terrorism efforts.¹ Such policies included selective enforcement against Arabs and Muslims and a serious compromise of established due process protections that "failed to make us safer ... violated our fundamental civil liberties, and ... undermined national unity."² Some policies were characterized by the authors as "immigration measures more commonly associated with totalitarian regimes,"³ including detention without charge, denial of access to counsel, and closed hearings. The impact was felt most strongly in the Arab American and Muslim communities who were the targets of a strategy that "[r]ather than relying on individualized suspicion or intelligence-driven criteria ... has used national origin as a proxy for evidence of dangerousness."⁴ Such policies "deepened the perception abroad that America is anti-Muslim and that its [political] principles are hypocritical."⁵

In the past three years, reliance on immigration restriction as a "magic bullet" for security has only intensified. New procedures have included additional screening of visa applicants, mandatory call-in programs, non-reviewable admissions decisions, arrests and prolonged detention of long-term residents, closed immigration hearings, and mandatory detention of asylum seekers. While some post-9/11 immigration enforcement programs have been abandoned as ineffective or too controversial, a national security rhetoric now frames all discussions of every aspect of immigration policy.

¹ Authors of *America's Challenge* are Muzaffar Chishti, Doris Meissner, Demetrios Papademetriou, Jay Peterzell, Michael Wishnie, and Stephen Yale-Loehr.

² Migration Policy Institute, *America's Challenge: Domestic Security Civil Liberties, and National Unity after September 11*, Executive Summary, 7 (2003).

³ *Ibid.*, p. 8.

⁴ *Ibid.*

⁵ *Ibid.*, p. 11.

The 9/11 Commission urged a reform of immigration enforcement, because “constraining terrorist travel should become a vital part of the counterterrorism strategy.”⁶ However, in the commissioners’ “Report Card” issued in December 2005, the government received mediocre grades, ranging from C for “Comprehensive Screening System,” to D for “International Collaboration on Borders and Document Security,” to I (“incomplete”) for “Terrorist Travel Strategy.”⁷

In *America’s Human Rights Challenge*, the Migration Policy Institute examines these practices through the lens of international human rights. *America’s Human Rights Challenge* addresses how international human rights law can serve as a tool for the assessment of US immigration security measures post-9/11.

This report is not intended as a litigation manual for practitioners, but rather as an introductory human rights text for US policymakers and immigrants’ rights advocates interested in how US practices can be evaluated under the rights standards used around the world.

A NOTE ABOUT “RENDITION”

Since *America’s Challenge* was published, it has been revealed that the US government has engaged in secret and/or clandestine seizure of “suspected terrorists” and their transport to foreign countries where they are subjected to imprisonment and interrogation, including torture. These extralegal procedures, carried out on US soil or by US agents operating in foreign territory, violate international human rights law. They constitute arbitrary arrests, violations of due process guarantees, illegal detentions, and ignore essential provisions of the Convention Against Torture and the Refugee Convention. When a person is removed from the United States or an airport on US territory and sent to another country, such actions should be governed by federal statute, extradition treaties, or immigration law. To seize and transport persons against their will, without any administrative or judicial procedures, is tantamount to kidnapping.

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Susan Gzesh
June 2006

⁶ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 385 (2004).

⁷ Public Discourse Project [members of the 9/11 Commission], *Final Report on 9/11 Commission Recommendations*, at www.9-11pdp.org (December 5, 2005).

GENERAL PRINCIPLES: HUMAN RIGHTS AND IMMIGRATION LAW ENFORCEMENT

Protection of Aliens: A Core Human Rights Principle

[T]he incredible plight of an ever-growing group of innocent people [Jews expelled from their countries by Nazi decrees] was like a practical demonstration of the totalitarian movements' cynical claims that no such thing as inalienable human rights existed ... the very phrase "human rights" became for all concerned — victims, persecutors, and onlookers alike — the evidence of hopeless idealism or fumbling feeble-minded hypocrisy.

—Hannah Arendt, *The Origins of Totalitarianism*, 1951

Migrants and refugees are among the world's most vulnerable people, having left behind their rights as citizens of their home countries.⁸ As human beings, however, they carry the protections of international human rights law with them as they cross national borders. Rights that transcend national boundaries are an excellent framework for understanding the limits of the powers of a nation-state against its non-members.

What limitations can international human rights principles place on immigration law enforcement? International human rights are founded on the concept of the universal dignity of all human beings, irrespective of their membership in a particular nation-state.

Protection of the human rights of noncitizens was central to the 1948 Universal Declaration of Human Rights (UDHR), the fledgling United Nations' response to the manipulation of citizenship, nationality, and deportation that figured in both the Nazi genocide and the massive displacements following World War II.

Since 1948 a series of international conventions have come into force, enumerating the rights of the "Everyone" who is the subject of the UDHR. The International Covenant on Civil and Political Rights (ICCPR)⁹ affirms that each State Party is responsible for ensuring the rights contained in the covenant to "all individuals within its territory and subject to its jurisdiction."¹⁰ In addition, the Convention and Protocol Relating to the Status of Refugees,¹¹ the International Convention on the Elimination of All Forms of

⁸ Some migrant-sending states defend the human rights of their nationals abroad. Mexico has made extensive use in the United States of the advocacy role guaranteed to its consular staff under the Vienna Convention on Consular Relations, April 24, 1963; 596 U.N.T.S. 261.

⁹ The ICCPR was ratified by the United States in 1992.

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966; 999 U.N.T.S. 171, Art. 2.

¹¹ Convention relating to the Status of Refugees, July 28, 1951; 189 U.N.T.S. 137; and Protocol relating to the Status of Refugees, Jan. 31, 1967; 606 U.N.T.S. 267. The United States has not ratified the Convention, but did ratify the Protocol in 1968.

Racial Discrimination (ICERD),¹² and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC)¹³ deal explicitly with national origin and citizenship status. The Convention on the Rights of the Child (CRC) has been invoked as a protection of the unity of families against deportation and detention.¹⁴

International human rights law is a new framework for many US lawyers and policy analysts. As internationally accepted norms with universal coverage of all persons, human rights can shed new light on the current discussion of the balance between immigration enforcement and individual rights. International human rights law supports two of the most basic principles of US constitutional law — the rights to due process and to freedom from racial discrimination.

US Law and International Human Rights

US policymakers and advocates are familiar with US constitutional principles that, for example, restrain searches and seizures by police, and guarantee equal protection of the laws. Since the Supreme Court ruled on the rights of Chinese immigrants in the 1880s, American jurisprudence has diverged regarding whether citizens and aliens enjoy the same constitutional rights. One trend has established equality between citizens and aliens with respect to many constitutional principles such as criminal trial rights under the Fourth, Sixth, and Eighth Amendments. However, in a separate line of cases, aliens' rights to defend against immigration enforcement are dependent on the more elastic concept of due process under the Fifth Amendment — under which courts strike variable balances between individual and government interests.¹⁵ International human rights law can supply a new way of thinking about the gaps in protection under US constitutional law.

The United States, as a founding member state of the United Nations, promoted the Universal Declaration of Human Rights, drafted under Eleanor Roosevelt's leadership and adopted by the General Assembly December 10, 1948.¹⁶ The United States has subscribed, with certain limitations as noted, to the following instruments:

¹² International Covenant on the Elimination of All Forms of Racial Discrimination, March 7, 1966; 660 U.N.T.S. 195. ICERD was ratified by the United States in 1994.

¹³ International Covenant on the Protection of the Rights of All Migrant Workers and Members of Their Families, opened for signature Dec. 18, 1990; 2220 U.N.T.S. 93. The United States has not ratified the MWC.

¹⁴ Convention on the Rights of the Child, Nov. 20, 1989; 1577 U.N.T.S. 3. The United States has not ratified the CRC.

¹⁵ See, for example, Hiroshi Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation" 100 *Yale L.J.* 545 (1990); and Hiroshi Motomura, "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights," 92 *Columbia L. Rev.* 7 (1992).

¹⁶ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

- International Covenant on Civil and Political Rights (ICCPR) was ratified by the United States in June 8, 1992, with a reservation that the treaty is not “self-executing” — in other words, its provisions apply only insofar as Congress has passed implementing legislation;
- the International Covenant on Economic, Social, and Cultural Rights was signed by the United States but not ratified (ICESCR — entered into force January 3, 1976);
- the Convention and Protocol Relating to the Status of Refugees (Refugee Convention and Protocol); US law on political asylum and refugees is explicitly modeled on the Convention and Protocol;¹⁷
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); ratified by the United States in October 21, 1944;
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ratified by the United States in October 21, 1994 (CAT or Torture Convention — entered into force June 26, 1987);
- Vienna Convention on Consular Relations ratified in November 24, 1969; guarantees, among other provisions, that detained foreigners have access to consular authorities of their home government; and the
- American Declaration on the Rights and Duties of Man (“American Declaration”), a declaration of the Organization of American States that placed jurisdiction in the Inter-American Commission on Human Rights (IACHR) over violations of the declaration. The United States is subject to the IACHR, but not the jurisdiction of the Inter-American Court.¹⁸

The United States has signed the Convention on the Rights of the Child (CRC), but is one of only two states (along with Somalia) that have not ratified the CRC.¹⁹ The United States has neither signed nor ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC). The MWC entered into force in 2004, but has been ratified almost exclusively by migrant-sending countries. While the United States has filed “reservations” with respect to some of the treaties it has ratified, none of the reservations (either implicitly or explicitly) were intended to limit the government’s obligations to protect noncitizens’ rights.²⁰

¹⁷ The United States ratified the Protocol that incorporated the Convention by reference, November 1, 1968, but not the Convention as a separate document.

¹⁸ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, at 7, O.A.S. Doc. OEA/ser.L/V./I.4, rev. XX (1948).

¹⁹ One US court found that the United States was bound by the CRC as “customary international law,” due to the treaty’s almost universal acceptance. The decision, to nullify the deportation of the father of a US citizen, was overturned on appeal on procedural grounds. See *Beharry v. Reno [Ashcroft]* 183 F. Supp. 2d (584 (E.D. N.Y. 2002), *Beharry v. Ashcroft* 329 F.3d 51 (2d Cir., 2003). The United States has ratified the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts, entered into force February 12, 2002, which prohibits sending juveniles under age 18 into conflict situations.

²⁰ For a general overview, see Alison Parker, “Inalienable Rights,” *American Prospect* (October 2004); and Earthrights International, *Shock and Law: George W. Bush’s Attack on Law and Universal Human Rights* (2005).

The US Constitution provides that treaties are part of the “supreme law of the land.”²¹ Since the 1980s, a growing number of US court decisions have relied on international human rights instruments or used them as a guide to interpreting US law. The list of Supreme Court cases citing international human rights law begins with cases interpreting US obligations under the Refugee Convention in the 1980s and includes recent decisions on affirmative action, the criminalization of sodomy, and the death penalty for juveniles.²² A group of leading judges and scholars, including Supreme Court Justices Ruth Bader Ginsburg and Anthony Kennedy and Yale Law School Dean Harold Hongju Koh, argue that international human rights law is increasingly important in US jurisprudence and public discourse.²³ Public interest law groups such as the American Civil Liberties Union, the Center for Constitutional Rights, and Global Rights all present international human rights arguments in cases before US courts. However, there is also a group of prominent conservative scholars, backed by legal organizations including the Pacific and Atlantic Legal Foundations, who maintain that US courts should not be enforcing or relying on international human rights law. Supreme Court Justice Antonin Scalia and law professor Jack Goldsmith are among the leaders of the latter school of thought.²⁴ The position of the Executive Branch has been clearly on the side of “American exceptionalism” as the Bush administration has violated and withdrawn from a number of human rights treaties and other international agreements.²⁵

In the midst of this debate, familiarity with and acceptance of international human rights norms is growing within US civil society, particularly among organizations that find international human rights an inspiring complement to their traditional civil rights focus.²⁶ In the 1980s, religious activists and lawyers based their opposition to

²¹ US Constitution, Article VI. Note that “states” refers to national governments. Treaties are ratified by national governments, with the obligation that local governments (states, provinces, or municipalities) be held accountable by their own national government.

²² *INS v. Cardoza-Fonseca* 480 US 427 (1987) “In 1968 ... the United States agreed to comply with the substantive provisions of ... the 1951 United Nations Convention Relating to the Status of Refugees”; *Grutter v. Bollinger* 539 US 306 (2003) affirmative action; *Lawrence v. Texas* 539 U.S 558 (2003) sodomy; *Roper v. Simmons* 543 US 551 (2005) juvenile death penalty.

²³ See Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication,” a speech before the American Society for International Law, April 1, 2005, <http://www.asil.org/events/AM05/ginsburg050401.html>, and Harold Hongju Koh, “International: Law as Part of Our Law,” 98 *AM. J. INT’L L.* 43 (2004).

²⁴ See, for example, Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2005.

²⁵ See, for example the Bush administration’s refusal to submit the Kyoto Accords for Senate ratification <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>, and the withdrawal from jurisdiction of the International Court of Justice for disputes arising under the Vienna Convention on Consular Relations., Adam Liptak, “U.S. Says It Has Withdrawn from World Judicial Body,” *New York Times*, March 10, 2005.

²⁶ “Bringing Human Rights Home,” *American Prospect* vol. 15, no. 10 (October 2004), <http://www.prospect.org/web/page.wv?name=View+Subject§ion=root&id=89>; also the US Human

government policy toward Central American refugees on Nuremberg principles and the Refugee Convention.²⁷ Now many Americans, who condemn torture of detainees in Guantanamo and US-run prisons abroad, are concerned that the United States has lost legitimacy as a world leader in human rights. With respect to domestic justice issues, US citizens are becoming more receptive to arguments based on international human rights. US citizens embracing international human rights are joined by immigrants from countries where the rights language is framed as “human rights,” as proclaimed in signs at the spring 2006 mass immigrant-led demonstrations. The constituency to promote and use international human rights within the United States is growing.

National Sovereignty versus Universal Rights

How do human rights and immigration enforcement relate? Immigration law regulates the entry and activities of foreigners in the national territory; in some countries, it also provides a path to citizenship. As such, it defines both territorial access and political membership — two ultimate expressions of national sovereignty. The sovereign power of a state to establish its immigration policy encounters its limits in international human rights law. As states enforce their immigration laws, they ought not to do so at the expense of the human rights of aliens, although in practice, many states regularly do. The most important human rights guarantees that are relevant to immigration law are:

- due process, particularly as protection against the violation of other fundamental rights such as personal freedom and the prohibition on torture and
- the prohibition against racial and national origin discrimination.

The commitment of the human rights regime to the primacy of international human rights over national law is growing. The United Nations Human Rights Commission and the Inter-American Commission on Human Rights have appointed Special Rapporteurs to deal with the rights of migrants; the UN Commission also had a Special Rapporteur on Discrimination Against Non-citizens.²⁸ The universal and regional human rights organs entertain numerous complaints regarding the rights of asylum-seekers and other migrants. For example, in January 2004, the Committee on the Elimination of Racial Discrimination issued a General Recommendation on

Rights Network <http://www.ushrnetwork.org/>, the Midwest Coalition for Human Rights <http://www.midwesthumanrights.org>, the Center for Constitutional Rights (www.ccr-ny.org) and the American Civil Liberties Union (www.aclu.org).

²⁷ See Susan Gzesh, “Central Americans and Asylum Policy in the Reagan Era” (and sources cited therein), *Migration Information Source*, April 2006, Migration Policy Institute.

²⁸ The mandate of the U.N. Special Rapporteur on the Human Rights of Migrants was created in 1999 by the U.N. Commission on Human Rights (Res. 1999/44) and extended until 2008 (Res. 2005/47). The mandate of the Special Rapporteur on the Rights of Non-Citizens was created by the Sub-Commission on the Promotion and Protection of the Rights of Non-Citizens, E/CN.4/Sub.2/Res.21 (2003). The mandate of the Special Rapporteur on the Rights of Migrant Workers and the Members of their Families was created by the Inter-American Commission on Human Rights in 1997, ([AG/RES. 1404 XXVI-O/96](#) and [AG/RES 1480 XXVII-O/97](#)).

Discrimination Against Non-citizens that affirmed the UN commitment to principles of anti-racism with respect to state policies that distinguish between citizens and noncitizens or that govern citizenship or naturalization.²⁹ Using international human rights law as our framework, the questions asked in this report are whether the United States — in its post-9/11 migration security efforts — has complied with its obligations under international human rights law with respect to:

- Due process protections;
- The prohibitions on national origin or race discrimination; and
- The absolute prohibition on torture, and cruel, inhuman or degrading treatment.

What Can US Advocates Learn from Human Rights?

The central goal of this report is to assist analysts and advocates in determining whether international human rights can help make the case for fair treatment of immigrants and refugees in the United States and fill gaps in US law and principles. A familiarity with international human rights law will help readers better communicate with colleagues abroad, and perhaps, in the long run, mitigate the US loss of world leadership on human rights.

²⁹ *General Recommendation No. 30: Discrimination Against Non Citizens*, U.N. Committee on the Elimination of Racial Discrimination, 01/10/2004. CERD/C/64/Misc.11/rev.3 (2004).

QUESTION 1: HAS THE UNITED STATES RESPECTED THE DUE PROCESS PROTECTIONS GUARANTEED TO NONCITIZENS, MIGRANTS, AND REFUGEES UNDER INTERNATIONAL HUMAN RIGHTS LAW?

Due Process and Security of the Person

Since September 2001, the US government has instituted new immigration controls that violate the due process protections of human rights law. Procedures include prolonged detention and a lack of opportunity to be heard that can result in deportation to be subjected to torture. Some procedures were trial measures while others have become permanent. Any seizure of the person or limitation on freedom of movement triggers due process protections. What are the standards to be applied?

US Domestic Law

The US Constitution provides in Amendments Five and Fourteen that no person shall be deprived of life, liberty, or property without due process of law. This principle applies to all deprivations of liberty, whether by civil or penal authorities. Immigration enforcement actions are considered civil, rather than penal. Therefore, aliens subject to such procedures are protected by the general terms of the Due Process clause of the Fifth Amendment, rather than the more specific Bill of Rights guarantees that apply in criminal proceedings.

What the Due Process clause requires can vary under a “balancing test” between government and individual interests.³⁰ However, it is important to note aliens seeking entry to the United States (for example, at an immigration inspection counter in an airport) have almost no recognized rights under the Constitution.³¹ US due process jurisprudence allows flexibility to the government to design immigration procedures based on reasons such as expediency and efficiency. US courts have found that the use of hearsay evidence in deportation hearings violates due process but that complete, simultaneous translation is not required.³²

A compelling example of the injustices that can result from these gaps in rights protection under US law can be seen in the 2006 decision of a federal court dismissing the complaint brought by Maher Arar, a Canadian citizen deported to Syria where he was subjected to torture, discussed at the end of this report.

³⁰ The standards for the due process balancing test are set out in the landmark decision of *Mathews v. Eldridge* 424 US 319 (1976).

³¹ Limited procedural rights have been recognized for long-time permanent resident aliens who are re-entering the United States *Landon v. Plasencia* 459 US 21 (1982). Advocates have argued, without success, for recognition of a constitutional right to association for US citizens with respect to their relationships with barred or deportable aliens (*Kleindienst v. Mandel*, 408 US 753 [1972], *Fiallo v. Bell* 430 US 787 [1977]).

³² *Bridges v. Wixon* 326 US 135 (1945) barring hearsay; *El Rescate Legal Services v. Exec. Office of Immigration Review* 959 F2d 742 (9 Cir, 1992) partial translation.

International Human Rights Law

Universal Coverage

The Universal Declaration of Human Rights and the guarantees of the International Covenant on Civil and Political Rights (ICCPR) are universally applicable to any person deprived of his or her liberty by official action, whether with respect to criminal charges, immigration enforcement, or for any other reason — regardless of alienage. The universality of coverage is underscored by the consistent use of inclusive pronouns (“Everyone,” “no one,” “every person,” and “anyone”) in articles describing particular procedural rights. Nowhere are the provisions restricted to “citizens.”

The ICCPR states the commitment to universality in unambiguous terms:

Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (Art. 2).

The Torture Convention promises its guarantees to “all members of the human family” and consistently uses the term “person,” guaranteeing that a State Party will abide by the protection against torture and cruel, inhuman, and degrading treatment in the “custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction” (Preamble and Art. 11).

The American Declaration of the Rights and Duties of Man explicitly deals with the issue of the rights of foreigners in its opening paragraphs: “[T]he essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality” and at Article 17, “Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.”³³

Due Process Guarantees

The list of due process rights in the ICCPR, applicable to all detentions, includes the rights to:

- * be free from arbitrary arrest or detention (Art. 9[1]);
- * be informed, at the time of arrest, of charges lodged (Art. 9 [2]);

³³ The few clauses in the American Declaration that distinguish between citizen and noncitizen are those that: grant the free movement and choice of residence within a state (limited to “nationals”) (Art. 8); grant the right to “every person” to “seek and receive asylum in foreign territory” (Art. 27); and bar noncitizens from participating in “political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien” (Article 38).

- * have the detention reviewed by a court “without delay” (Art. 9 [4]);
- * compensation for unlawful detention (Art. 9 [5]); and
- * be treated with humanity and with respect for the inherent dignity of the person (Art. 10 [1]).

The ICCPR also offers specific due process guarantees regarding the expulsion of lawfully resident aliens, as follows:

An alien lawfully in the territory of a State Party ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority (Art. 13).

The American Declaration also provides that, “No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law” with the right to have the legality of the detention determined “without delay by a court” or be released, as well as the right to “humane treatment” in custody (Art. 25).

The Refugee Convention guarantees due process to asylum seekers in the prohibition on return or expulsion to “the frontiers of territory where his life or freedom would be threatened” (Art. 33). The Torture Convention prohibits states from expelling, returning, or extraditing anyone (alien or citizen) to a state where “there are substantial grounds for believing he would be in danger of being subjected to torture” (Art. 3). Both of these treaties imply due process protections because an inquiry must be made regarding whether someone to be expelled might be tortured or otherwise harmed.

In general, human rights norms provide that expulsion procedures must follow the rule of law and allow all persons to give reasons against their threatened expulsion, as recognized in a number of cases by the United Nations Human Rights Committee.³⁴

Derogation of Due Process Rights

International human rights law has “bright line” rules regarding when states are permitted to suspend or modify certain rights (“derogate” from obligations). The ICCPR permits states to take such measures under the ICCPR only “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”³⁵ The public emergency must be clearly defined, of limited duration, and

³⁴ Guy Goodwin-Gill and Kathleen Newland, “Forced Migration and International Law,” in Aleinikoff & Chetail, eds., *Migration and International Legal Norms* (The Hague: TMC Asser Press, 2003), pp. 123-136; See for example, *Ahani v. Canada*, Communication No. 1051/2002, UN Doc.CCPR/C/80/D/1051/2002 (2004); and *Eric Hammel v. Madagascar*, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40), p. 130 (1987).

³⁵ ICCPR, Art. 4(1).

measures taken must be in proportion and strictly tailored to the exceptional situation of the particular emergency.

It is not clear whether international human rights law supports the state of emergency the Bush administration claims is authorized through Congressional resolution to use force to combat terrorism.³⁶

The UN Human Rights Commission has repeatedly declared “national security” laws that provided for detention without charge to be illegal.³⁷ A group of international human rights law experts have declared, in an affidavit filed in litigation contesting the post-9/11 PENTTBOMM (Pentagon/Twin Towers Bombing Investigation) arrests, that the mass detentions violated established due process norms that prohibit arbitrary detention.³⁸

Commentators in both Europe and the United States are concerned that the “war on terror” will be used as the reason for the institution of extreme state security measures, justified as a sort of permanent “state of emergency.”³⁹ The British House of Lords has ruled that the indefinite detention of foreigners under anti-terrorism statutes contravened the European Human Rights Convention and British law. The Lords found that the UK derogation from the European Convention (as a justification for the suspension of certain rights) was improper.⁴⁰ The United Nations High Commissioner for Human Rights issues periodic reports concerning the delicate balance between combating terrorism and respecting human rights.⁴¹

How Do Due Process Guarantees Protect Other Fundamental Human Rights such as the Prohibition on Torture?

Human rights treaties that contain derogation clauses (permitting suspension of certain rights) provide clear guidelines regarding circumstances under which derogation is permissible, as well as explicit provisions that may not be suspended under any circumstances.⁴² In general, the rule is that procedural protections cannot be suspended — under any circumstances — where they protect persons from the possible violation of

³⁶ General Comment, No. 29, States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

³⁷ See *Acosta v. Uruguay*, Comm. No. 110/1981 (1983), U.N. Doc. Supp. No. 40 (A/44/40) (1984), and other cases cited in Derek Jinks, “International Human Rights Law and the War on Terrorism,” 31 *Denv. J. of Int’l L. & Pol’y* 58 (Fall 2002).

³⁸ See Declaration of International Law Scholar William Aceves et al. in *Turkmen v. Ashcroft*, US Dist. Ct. S.D. N.Y. at http://www.ccr-ny.org/v2/legal/september_11th/docs/Scholars_Declaration.pdf.

³⁹ See for example, essays by US, European, and African human rights experts collected in *Human Rights in the ‘War on Terror,’* ed. Richard Ashby Wilson, Cambridge University Press, 2005; and Giorgio Agamben, *State of Exception*, University of Chicago Press, 2005.

⁴⁰ *A. and others v. Secretary of State for the Home Dept*, House of Lords, Dec. 16, 2004, [2004] UKHL 56.

⁴¹ See Office of the High Commissioner for Human Rights, “Terrorism and Human Rights,” at www.unhchr.ch/terrorism/index.html.

⁴² See Jinks (2002), for a very helpful discussion of human rights law and the criminal prosecution of terrorists.

the most fundamental human rights: the right to life, the prohibition on torture, cruel, inhuman, and degrading treatment, and the prohibition on slavery.⁴³

The Refugee Convention and Protocol bar states from expelling or returning (“in any manner”) a refugee 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.”⁴⁴ The Torture Convention obligates State Parties to refrain from expelling, returning, or extraditing a person to any state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁵ No derogation of this obligation is permitted under any circumstances. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public emergency, may be invoked as a justification of torture.”⁴⁶

Where expulsion may subject an alien to persecution or torture in another country, human rights treaties explicitly require states to allow an alien an adequate opportunity to argue against his or her return to such country.⁴⁷ The Torture Convention absolutely prohibits return of *anyone* to a place where he or she would be in danger of torture, although the Refugee Convention permits states to bar the entry (and asylum petitions) of certain dangerous persons. New US legislation limits judicial review of claims for protection under the CAT and thereby appears to violate fundamental due process rights of aliens.⁴⁸

⁴³ David Weissbrodt and Isabel Hörtreiter, “The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other International Human Rights Treaties,” 5 *Buff. Hum. Rts. L. Rev.* (1999).

⁴⁴ The Refugee Convention permits states to return certain felons who constitute a danger to the community as well as persons for whom there are “reasonable grounds for regarding as a danger to the security of the country.” Art. 34.

⁴⁵ Convention Against Torture and other Cruel, Inhuman and Degrading Treatment (“Torture Convention”) Art. 3.

⁴⁶ Torture Convention, Art. 2.

⁴⁷ Refugee Convention, Art. 33, Torture Convention, Art. 3, ICCPR Art. 7, and the Convention on the Rights of the Child, Art. 22 (not ratified by the United States). See Joan Fitzpatrick, “The Human Rights of Migrants,” in Aleinikoff & Chetail, *Migration and International Legal Norms*, 2003, pp. 169-184.

⁴⁸ See “Real ID Act of 2005,” Title I “Amendments to Federal Laws to Protect Against Terrorist Entry,” Sec. 106 (a) (4), removing review of claims under the CAT from the habeas corpus jurisdiction of the federal courts.

A NOTE: DUE PROCESS AND DENIAL OF GOVERNMENT “BENEFITS”

US jurisprudence recognizes due process protections limiting government action against individuals' property interests as well as their personal liberty. As part of that tradition, US courts protect individuals against the arbitrary or discriminatory denial by the state of certain government-supplied “benefits,” such as food assistance.⁴⁹ Advocates have yet to test the possibility of using human rights principles of due process with regard to the denial of a visa or residency permit.

Due Process Case Study I: Arrests and Detentions

A. US Government Actions

1. The Post-9/11 Sweeps

The US government responded to the September 11 terrorist attacks almost immediately with a wave of arrests of persons with possible ties to terrorism, the PENTTBOM program. The secrecy that accompanied the initial arrests and the lack of transparency over procedures for many months; the abusive treatment in detention facilities; the lack of consular, family, or attorney access; the lack of hearings; and prolonged detentions without a legal basis constituted serious violations of the human rights provisions that guarantee due process. Authorities did not employ the procedures enacted by Congress under the USA PATRIOT Act that grant the Attorney General the authority to detain suspected terrorists, however with substantial procedural protections.⁵⁰ To avoid these provisions, the government used the general authority granted in ordinary immigration legislation.

Arrests were made by the FBI, immigration authorities, and other federal agencies; in the first months after 9/11, over 1,200 arrests were almost exclusively of Muslim men from Middle Eastern and South Asian countries. Law enforcement authorities detained hundreds of noncitizens on the basis of often tenuous suspicions, unfounded reports by informants, and/or imagined ties to terrorism, as confirmed by MPI's investigation: “... many of the detainees were incarcerated because of [racial] profiling by ordinary citizens who called government agencies about neighbors, coworkers and strangers based on their ethnicity or appearance.”⁵¹

⁴⁹ This line of reasoning has been developed by US courts over the past 36 years, starting in 1970 with the Supreme Court decision of *Goldberg v. Kelly* 397 US 254.

⁵⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Sec. 412. The detainee must be “engaged in terrorist activity or in any other activity endangering the national security of the United States,” and after seven days must be charged with a criminal offense or with an immigration violation or be released. There is a right to judicial review and the Attorney General must report to Congress the number of individuals who were detained, their nationality, grounds for detention, and the duration.

⁵¹ MPI, *America's Challenge*, “Findings,” p. 12; The Department of Justice's Office of Public Affairs reported that by November 11, 2001, more than 1,200 individuals (citizens and noncitizens) were detained for questioning. While some were released shortly after, others were detained for violations of immigration law.

The Migration Policy Institute's 2003 report *America's Challenge* determined that among individuals detained for immigration violations, around 100 were charged with federal crimes; more than 700 continued to be detained on immigration violations, and about 50 as material witnesses.⁵² It appears that out of 406 criminal cases, only one individual was charged with a terrorism-related crime; most detainees were charged with the possession and use of fraudulent documents.⁵³ A June 2003 report on the detentions by the Office of the Inspector General (OIG) of the Department of Justice substantiated all the early reports of abuse and became the basis for a petition to the United Nations Commission on Arbitrary Detentions brought by Human Rights Watch and the American Civil Liberties Union (ACLU).⁵⁴

Estimates of the total number detained range from 762 in the New York area (whose situation was reviewed in the OIG Report below) to an estimate of 3,000 according to community-based and legal services organizations. The arrests and lack of information caused tremendous anxiety for families and those who sought to help them. As found by MPI, "Many of these detainees had severe problems notifying or communicating with family members and lawyers or arranging for representation at all."⁵⁵ The arrests were called "disappearances" by at least one US civil liberties organization, intentionally invoking the practices of authoritarian regimes in the "dirty wars" of Latin America in the 1970s.⁵⁶

2. Conditions of Detention

As detailed in the report of the Office of Inspector General, the PENTTBOM detainees typically suffered from abuse by guards and terrible conditions of detention. Detainees in the Metropolitan Detention Center in New York and the Passaic County Jail in New Jersey were insulted, threatened, and beaten by guards on a routine basis. Detainees were deprived of natural light, exercise, medical care, and were housed with ordinary criminal detainees.⁵⁷

In litigation brought regarding the sweeps, plaintiffs have made serious charges, substantiated in the OIG report, of serious beatings, racist language, threats, and a

See "Assessing the New Normal," Lawyers Committee for Human Rights/now Human Rights First, 2003: www.humanrightsfirst.org.

⁵² *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* (Migration Policy Institute [MPI]) 2003, pp. 27, footnote 112 and Appendix, Section E, p. 5.

⁵³ Human Rights Watch, "A Year of Loss," http://www.humanrightsfirst.org/us_law/loss/loss_ch3a.htm.

⁵⁴ Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, June 2003, ("OIG Report") and see the ACLU petition at <http://www.aclu.org/safefree/general/16912lg120040126.html>.

⁵⁵ MPI, *America's Challenge*, "Findings," at p. 13.

⁵⁶ "America's Disappeared: Seeking International Justice for those Detained after September 11, an ACLU Report," January 2004, available at www.aclu.org.

⁵⁷ OIG Report, Chapters 8 & 9.

general air of impunity among the guards, particularly in the immediate post-9/11 period. Several detainees reported that one particularly sadistic supervisor in the Metropolitan Detention Center would grab a new arrestee and slam his face into the wall; at least one victim lost his front teeth. Detainees interviewed by the ACLU reported similar abusive treatment.⁵⁸

3. *Secrecy and Arrest — “Disappearances”*

Legal assistance projects, consular officials, and individual attorneys retained by family members faced great difficulty locating and communicating with detainees.⁵⁹ There was a determined governmental effort to hide the identity, number, and whereabouts of individuals detained for immigration violations and regarded as of “high interest” or “special interest” on the basis of their citizenship, place of birth, religion or other factor. On April 17, 2002, an Interim Rule on “Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities” went into effect, prohibiting any state or local detention facility housing immigration detainees from releasing information on individuals.

4. *Mandatory Detention/“No Bond” Policies*

A “no bond” policy was ordered for immigration detainees suspected of having any possible links to the events of September 11. Many others had exceptionally high bonds.⁶⁰ Detainees challenged this policy before immigration judges who often ordered their release after determining that there was no evidence of danger or involvement in 9/11 to support the government’s “no bond” position.⁶¹ However, the INS issued an “automatic stay” rule in October 2001, permitting the INS/CIS to detain a noncitizen whose release was ordered by an immigration judge pending the government’s appeal, if the initial bond the government had requested was “no bond” or more than \$10,000.⁶² The OIG Report found that the government kept individuals in detention even after their bond had been paid or after an immigration judge had ordered their release.⁶³

Some of these policies regarding bond and release were institutionalized and have become standard CIS procedures. Detention is now mandatory for several categories of aliens, with no possibility of release on bond. All immigration detainees face a substantial increase in bond amounts, as well as more onerous conditions on their liberty post-release.

⁵⁸ See, ACLU, “America’s Disappeared,” *infra* at fn. 49; and Center for Constitutional Rights, Docket: *Turkmen v. Ashcroft* for details and updates: http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=35KQUuFROg&Content=96.

⁵⁹ See CCR Turkmen Docket, *above*.

⁶⁰ MPI, *America’s Challenge*, “Findings,” p. 13.

⁶¹ OIG Report, *supra*, Chapter 5.

⁶² 8 CFR Part 3, INS No. 2172-01; AG Order No. 2528-2001. The stay of the release order may be appealed to the Board of Immigration Appeals (BIA), and may be further appealed to the Attorney General; those decisions are subject to review in federal court, but such appeals may take a year or more.

⁶³ OIG Report, *supra*, Chapter 6.

5. *Detention without Charge*

As confirmed by the Office of Inspector General's report, hundreds of individuals arrested in the PENTTBOM sweeps were not charged with an immigration violation within the 48 hours required by regulation; they remained detained without charge for months.⁶⁴ Many were detained for prolonged periods following the entry of a final deportation order, despite the detainee's willingness to be deported. While a regulation permits detention without charge beyond 48 hours in certain exceptional circumstances, the terms are vague and contain a time limit. Nor does the INS/CIS keep records regarding the use of the exception.⁶⁵ These immediate post-9/11 practices have been continued. At the present time, many individuals ordered deported or granted bond by an immigration judge have continued to be detained for lengthy periods.

Release on bond or departure after a deportation order has become dependent on a "clearance" from the Federal Bureau of Investigations (FBI) that assures that the detainee had no knowledge of or links to terrorist activity. There is no immigration statute or regulation establishing this practice. It is estimated that for the PENTTBOM detainees, the average clearance process took 80 days.⁶⁶ The legality of this practice is currently one of the issues in the *Turkmen* litigation pending in federal court in New York.⁶⁷

6. *"Special Interest" Hearings Closed to the Press and Public*

On September 21, 2001, Chief United States Immigration Judge Michael Creppy, head of the Executive Office for Immigration Review, issued a directive to close hearings and files of cases classified as "special interest" to all members of the press and public. The order directed that these cases were not to be listed on the public calendar in immigration courts, and personnel were prohibited from confirming or denying their existence. As the right of the press to attend court hearings is essential to assure fairness in procedures, the directive was challenged as a basic denial of due process. It is estimated that between 2001 and 2003, over 600 immigration hearings were closed to the public under this order.⁶⁸ The ACLU, Center for Constitutional Rights, and cooperating attorneys brought two federal cases to contest these practices. The cases resulted in two decisions — one ordering access and the other upholding secrecy; the issue has remained unresolved in the US courts.⁶⁹

⁶⁴ Once an individual is apprehended by immigration authorities, the person can remain in detention, be released on bond or recognizance, may have deportation proceedings instituted, or be served with a warrant for arrest on a criminal charge. 8 CFR.

⁶⁵ OIG Report (cited above), Chapter 3.

⁶⁶ OIG Report, Chapter 4.

⁶⁷ For updates on the *Turkmen* litigation, see www.ccr-ny.org ("Docket").

⁶⁸ MPI, *America's Challenge*, "Findings," p. 13.

⁶⁹ *Detroit Free Press v. Ashcroft* 303 F 3d 681 (6 Cir 2002) in favor of open hearings; *North Jersey Media Group et al. v. Ashcroft* 308 F 3d 198 (3 Cir 2002); *cert. den.* 538 US 1056 (2003) upholding the closure of hearings to the press and public.

7. Access to Consular Officials

The Vienna Convention provides that consular authorities may have access to their detained compatriots. This guarantees that noncitizens have an impartial monitor of conditions of detention and a guarantee of assistance in asserting their rights.⁷⁰

In the PENTTBOM sweeps, detainees were not informed of their right to contact their consulates or provided with telephone access even if they made an affirmative request. However, when their relatives managed to contact their consular officials or those officials were informed of their detention through a third party, detainees able to communicate and receive consular assistance.

RESPONSE BY US LAWYERS

While legal defense organizations began working on behalf of the PENTTBOMM detainees almost immediately, efforts to locate and communicate with clients were hampered by government secrecy and refusal to release information. Groups including the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First (formerly the Lawyers Committee for Human Rights), and various local and national bar organizations, defended individual immigrants and brought class-action lawsuits to challenge various aspects of the detention program, some cases citing international human rights conventions. Some of the legal challenges obtained moderate or temporary reforms to some of the most draconian tactics and practices.⁷¹

The Center for Constitutional Rights filed a class-action lawsuit in 2002 contesting the detentions that are still pending four years later. In early 2006, four deported plaintiffs were brought back to the United States to testify in depositions.⁷² A group of international human rights experts have filed an affidavit with the court in the CCR case (*Turkmen v. Ashcroft*) stating that the detentions violated international human rights guarantees against arbitrary

⁷⁰ Vienna Convention on Consular Relations, 596 U.N.T.S. 261, entered into force March 19, 1967, Art. 36, "Communication and Contact with Nationals of the Sending State."

⁷¹ The Migration Policy Institute, the ACLU, the Center for Constitutional Rights, and Human Rights Watch have all published accounts by detainees and witnesses that detail the methods of arrest, interrogation, conditions of imprisonment, and physical, emotional, and social consequences of detention to the detainees and their families. See reports by: Migration Policy Institute, *America's Challenge*; the Center for Constitutional Rights, www.ccr-ny.org; the ACLU, "Presumption of Guilt," www.aclu.org; and Human Rights Watch, "Witness to Abuse" www.hrw.org.

⁷² Nina Bernstein, "Held in 9/11 Net, Muslims Return to Accuse U.S." *New York Times*, 1/23/2006, <http://www.nytimes.com/2006/01/23/nyregion/23detain.html?ex=1148270400&en=504bfb67b06fd6c&ei=5070>.

⁷³ See Declaration of International Law Scholars http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=35KQUuFROg&Content=96.

⁷⁴ As reported by Human Rights First, see: http://www.humanrightsfirst.org/us_law/loss/loss_ch3a.htm.

⁷⁵ OIG Report, *supra*, Chapter 2; Among those detained, 254 were Pakistani and 111 Egyptian. Other reported countries of origin of the detainees include: Turkey, Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, Syria, Lebanon, Israel, Iran, Guyana, Algeria, Bangladesh, Afghanistan, United Kingdom, and France.

detention; against cruel, inhuman, and degrading treatment; and the protection of access to consular authorities.⁷³ Additionally, the Columbia University Human Rights Clinic brought a complaint regarding the post-9/11 detentions before the United Nations Working Group on Arbitrary Detention.⁷⁴

In addition to efforts by lawyers, members of Congress and other government agencies became involved in these matters. Two years after the initial detentions, the Justice Department's Office of the Inspector General issued a report on the detentions that confirmed many of the early reports of conditions complained about by detainees, their families, and lawyers. OIG determined that the INS detained at least 762 noncitizens of Arab or South Asian nationalities between September 11, 2001, and August 6, 2002, as a result of PENTTBOM, for investigation purposes.⁷⁵

B. Human Rights Violated

The Universal Declaration of Human Rights states at Articles 9 and 10 that, "No one shall be subjected to arbitrary arrest, detention, or exile," and "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The US government violated the human rights of the detainees, as follows:

- arrests were made without any reasonable grounds of suspicion of involvement in, knowledge of, or connection to terrorist activity; religion and national origin were the sole basis for many of the arrests;
- detainees were kept incommunicado, unable to contact family, lawyers, or the consular officials of their home countries;
- detainees were not allowed release on bond;
- detainees were not informed of the reasons for their detention, nor were they charged with being deportable within a reasonable length of time; nor were they charged with a crime within a reasonable length of time;
- deportation hearings were held in secret, without the presence of counsel, press, or the aliens' families;
- once aliens were found deportable, they were detained for months on a "hold until clear" request from the FBI; and
- detainees were kept in appalling conditions of confinement and subjected to anti-Muslim abuse by guards.

Persons picked up in the immediate post-9/11 "dragnet" were subjected to numerous violations of their right to due process under international human rights law. The practices impacted the detainees' right to effective assistance of counsel by blocking initial contact with families and attorneys and interfering with communication with attorneys once detainees had secured representation. The entire operation constituted an arbitrary detention, as follows:

- unfounded deprivation of personal liberty constitutes a violation of the right to personal freedom under the UDHR, the ICCPR, and the American Declaration;
- the refusal to allow detainees to contact their families, legal counsel, or consular officials is a denial of their rights under the UDHR, the ICCPR, and the American Declaration
- Individuals detained should be brought promptly before an impartial adjudicator and should be informed of the reasons for their detention.
- Detention beyond the time of judicially ordered release constitutes a violation of the right to personal freedom and amounts to arbitrary detention.

The policies of secret detentions, refusal to release information about detainees, and the prolonged detention without charge all violate established human rights principles, primarily guarantees of due process. The Universal Declaration of Human Rights provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (Art. 10).

All aspects of these arrests violate the fundamental tenet of due process, as set forth in the ICCPR: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁷⁶ The ICCPR details specific rights of detained persons, “Everyone has the right to liberty and security of the person. 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.” Additionally, the detainee “shall be informed, *at the time of arrest*, of the reasons for his arrest and shall be *promptly* informed of any charges against him” (Art. 9 [emphasis added]). This Article also provides for judicial review of the lawfulness of *any* detention and certain additional rights for persons charged with crimes.⁷⁷

The wholesale denial of bond is an arbitrary deprivation of the right to personal freedom recognized under the ICCPR: “No one shall be subject to arbitrary arrest or detention” (Art. 9). The American Declaration also requires that, “No person may be deprived of his liberty except ... according to the procedures established by pre-existing law” (Art. 25), and that persons charged with crimes have the right to a fair and impartial hearing and not to be subjected to cruel and inhuman punishment (Art. 26).

Where hearings involving the deportation of lawful residents were conducted in haste or in secret, such procedures violated the particular guarantees of the ICCPR, “An alien

⁷⁶ ICCPR, Article 10.

⁷⁷ The late human rights scholar Joan Fitzpatrick stated, “The right to judicial proceedings to challenge the lawfulness of detention applies in all contexts and is non-derogable.” Fitzpatrick, *supra.*, p. 174, citing U.N. Human Rights Committee, General Comment No. 29 (States of Emergency) (2001), para. 16.

lawfully in the territory of a State Party ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by ... the competent authority" (Art. 13). The right of the press and public to attend trials is also guaranteed in the ICCPR, but in a more qualified way. The press and public may be excluded from "all or part of a trial" for reasons of "national security" but — even in such cases — the decision of the court must be made public, unless to protect the interests of a child. The EOIR order closing deportation hearings and refusing to confirm the existence of such hearings or their results — for an entire class of persons — may have violated this guarantee.⁷⁸

The arrests of detainees from their family homes and the inability of family members to locate them for extended periods recalls the "disappearances" perpetrated by dictatorships in the past⁷⁹ and violated the fundamental right to the security of home and family as set forth in the UDHR, "No one shall be subjected to arbitrary interference with his privacy, family, home ..." (Art. 12).⁸⁰

Furthermore, the conditions of detention (anti-Muslim abuse by guards, 24-hour lighting, beatings, lack of medical attention, etc.) as well as prolonged detention without charge violated international human rights prohibitions on arbitrary detention.⁸¹ Such practices also violated the basic guarantee of decent treatment of the ICCPR, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (Art. 10). Such conditions also constitute cruel, inhuman, and degrading treatment under the Torture Convention.⁸² In addition, foreigners are entitled to contact with consular authorities under the Vienna Convention on Consular Relations. The failure to ensure and protect the rights related to consular protection constitutes a violation of the right to due process and of rights guaranteed under the Vienna Convention.⁸³

⁷⁸ See ICCPR, art. 14.1; for more information on these cases, www.ccr-ny.org ("Docket: Detroit Free Press").

⁷⁹ See, for example, *Nunca Más: The Report of the Argentine National Commission on the Disappeared* (New York: Farrar, Straus and Giroux), 1986.

⁸⁰ See also the protection of family integrity in the American Declaration, Articles 5 & 6; and in the ICCPR, Article 17.

⁸¹ See, "Declaration of International Law Scholars," at docket, *Turkmen v. Ashcroft*, www.ccr-ny.org.

⁸² Torture Convention, Article 16.

⁸³ Art. 36 Vienna Convention on Consular Relations; Case Concerning Avena and Other Mexican Nationals (*Mex. v. US*), 2004 I.C.J. 128 (Mar. 31), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

Due Process Case Study 2: Procedures at Ports of Entry

A. US Government Actions

1. Visitor Registration Programs and “Watch Lists”

Since 9/11, several new government programs have been established to monitor the entry and exit of noncitizens. Those programs have the potential to violate established due process norms as they place the burden of proof on the person affected and do not provide adequate procedures to contest mistakes. The consequences of such mistakes can be quite serious.

TIPOFF and “Visas Viper” are watch-list systems that feed into the databases used by border inspections personnel. They contain data about possible terrorism suspects from both open and classified sources, including information gathered by consular officials.⁸⁴ Persons subjected to exclusion from the country have little opportunity to contest misinformation in these databases.

The National Security Entry-Exit Registration System (NSEERS), was first announced in June 2002, as a program to require nonimmigrant males over the age of 16 from selected countries to register and report any changes of address. The program was implemented first at ports of entry in September 2002. In November 2002, the government announced the “call-in” program (referred to as Special Registration), requiring male citizens of the designated countries already in the United States to report to Immigration and Naturalization Service, provide evidence of their status and identity, and answer questions under oath. By January 2003, citizens of 26 countries were subject to registration requirements. According to MPI, the system was “poorly planned and [did] not achieve its objectives.”⁸⁵ In December 2003, the new Department of Homeland Security temporarily suspended the program. However, registered aliens are still required to register each entry and exit, any changes of address, employment or school, and are subject to re-interviews at the discretion of CIS. Aliens who fail to comply are subject to removal from the United States. In 2003, the NSEERS program was supplemented by the broader program of entry-exit controls known as US-VISIT.

The US-VISIT program (US Visitor and Immigration Status Indicator Technology Program) monitors entry and exit of foreign nationals registered in its database.⁸⁶ Established by the Department of Homeland Security (DHS), US-VISIT has been implemented at all ports of entry and applies to all noncitizens holding non-immigrant visas.⁸⁷ The program requires all visa-holders to be photographed and fingerprinted. The purposes of the program are:

⁸⁴ Stephen Yale-Loehr and Matthew Vernon, “An Overview of U.S. Immigration Watchlists and Inspection Procedures,” in 10 *Bender’s Immigration Bulletin* 1251 (August 1, 2005).

⁸⁵ In a series of regulations issued in November 2002, December 2002, and January 2003, the designated countries ultimately included Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Syria, Sudan, Tunisia, the UAE, and Yemen. 67 Fed. Reg. 67766 (11/6/02); 67 Fed. Reg. 70526 (11/22/06), 67 Fed. Reg. 77642 (12/18/02), 68 Fed. Reg. 2363 (1/16/2003). For a critique of NSEERS, see MPI’s *America’s Challenge*, “Findings,” p. 14.

⁸⁶ American Immigration Lawyers Association, “America’s Borders: From Our Consulates to Our Ports of Entry,” Issue Paper, June 20, 2005, www.aila.org/content/default.aspx?docid=8987.

⁸⁷ Exceptions include Europeans under the Visa Waiver Program, certain diplomatic visa categories; children under 14; adults over 79; visitors the Secretary of State and DHS determine to be exempt, and certain Taiwanese.

- to ensure that the person entering the United States is the same person to whom a visa was granted at a US consulate; and
- to establish a means of monitoring the timely departure from the United States of non-immigrant visa holders.

As stated on the CIS website, “US-VISIT is part of a continuum of security measures that begins overseas and continues through a visitor’s arrival in and departure from the United States.”⁸⁸ While the practice may be inconvenient and offensive to many foreign visitors, it is doubtful that such a law of general and universal application violates international human rights.

CIS has been criticized for its failure to manage its new, enlarged databases. In a 2005 report, the Government Accountability Office criticized the slow pace of implementation of US-VISIT, as well as the failure to include evaluation mechanisms within the program.⁸⁹ Mistakes by CIS threaten law-abiding aliens with the risk of deportation due to CIS error in recording data. While the US-VISIT program does not have the nationality-specific focus of NSEERS, the databases used as its source of information about entrants continue to have problems. Aliens who have acquired a second citizenship by naturalization may find themselves mistakenly subjected to these requirements and at risk of deportation as well.⁹⁰

The Federal Aviation Administration maintains a “No Fly” list of individuals barred from flights because of suspected links to terrorist activities; the list applies within the United States and to international flights headed to the United States. The list is apparently put together from information from the Federal Bureau of Investigations (FBI), the Central Intelligence Agency (CIA), and other intelligence and law enforcement agencies. The screening responsibility is left to the airlines. The government has been strongly criticized for mistaken inclusions on the “no fly” list, including repeated bars of Senator Edward Kennedy from domestic flights. In 2004, the Transportation Safety Administration (TSA) assumed responsibility for screening with a new program called “Secure Flight” based on lists created by US intelligence agencies. The ACLU is attempting to clarify the basis for individual inclusion on the list and whether there are means for contesting classification, through a lawsuit and negotiations with the TSA.⁹¹

2. Expedited Removal

An alien who arrives at a port of entry without a visa or with a visa suspected to be invalid is subject to immediate deportation (“expedited removal”) without a hearing.⁹²

⁸⁸ See http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml.

⁸⁹ US Government Accountability Office (GAO), *Homeland Security: Some Progress Made, but many challenges remain on US-VISIT* (Feb. 2005), GAO-05-202.

⁹⁰ See “Special Registration for Dual Nationals,” *10 Bender’s Immigration Bulletin*.

⁹¹ See <http://www.aclu.org/safefree/general/21164res20051026.html>; “FAQs about the No Fly List,” October 2005.

⁹² 8 USC Sec. 1225(b), INA Sec. 235 (b).

This procedure presents particular risks for asylum seekers. The determination of whether an applicant for entry is subject to expedited removal is made by an immigration officer who determines if the individual is admissible or if the individual has a “credible fear” of return to his or her home country. If the alien does not make a successful “credible fear” claim to the officer, he or she is immediately deported. Only if the alien is successful in establishing “credible fear” to the officer’s satisfaction will he or she have a hearing before an immigration judge.

While the law has also allowed the Attorney General to apply expedited removal procedures to certain persons encountered within the territory of the United States since it was enacted in 1996, this section was implemented only recently.⁹³ On August 10, 2004, CIS announced the expansion of expedited removal to aliens encountered within 100 miles of the US and Canadian borders.⁹⁴ Expedited removal can be applied to individuals without visas apprehended in the first 14 days of their entry to the United States, giving a low-level officer the authority to determine whether an individual has been in the United States more or less than 14 days. There is no meaningful review, either administrative or judicial.

Shortly after expedited removal was initiated in 1996, US advocates sued to have the procedure ruled illegal and unconstitutional under US law; the case was dismissed on jurisdictional grounds.⁹⁵ Other advocates have made sustained, but unsuccessful, efforts to trace persons subjected to expedited removal to their countries of origin.⁹⁶ Given the failure of US courts to address this issue, international human rights claims based on US treaty obligations can have particular importance in framing the objections to these truncated procedures.

MAHER ARAR

Human rights advocates have been able to learn the consequences of denial of due process at a US port of entry through the case of Maher Arar. The Arar case is one of the few instances in which the details of practices loosely grouped under the label of “extraordinary rendition” have come to light. Arar is a naturalized Canadian citizen, born in Syria, who moved to Canada with his parents when he was a teenager. He is married to a Canadian citizen and has two young children, born in Canada.

On September 26, 2002, Maher Arar landed at JFK airport in New York City while in transit on his return to Canada from a family vacation in Tunisia. Upon presentation of his Canadian passport to US immigration officers, he was detained, interrogated for approximately eight hours by FBI and INS agents, and then chained, shackled, and transferred to a “holding” room at the airport. Arar was subjected to another day of interrogation, during which he requested to be allowed to use a

⁹³ The law allows the Attorney General to apply expedited removal to any alien within US territory who is found not to have been lawfully admitted and cannot prove “to the satisfaction of the immigration officer” that he or she has been in the United States for at least two years. 8 USC 1225 (b).

⁹⁴ Department of Homeland Security, Media Roundtable with Under Secretary Asa Hutchinson on Immigration Policy Changes, August 10, 2004.

⁹⁵ *AILA v. Reno* 2000 US App LEXIS 254 (D.C. Cir 2000).

⁹⁶ See results of studies of expedited removal carried out by Karen Musalo and a team of investigators, <http://www.uchastings.edu/ers/>.

telephone, insisted that he had nothing to do with terrorist activities, refused to agree to be “voluntarily” sent to Syria, and requested that he be allowed to return to Canada. He was then transferred to the Metropolitan Detention Center in Brooklyn (MDC), a federal detention facility.

It was not until October 1, that Arar was permitted to use a telephone. That same day, he had been given a document by an MDC officer notifying him that he was inadmissible to the United States as an al Qaeda member. Arar called his family in Ottawa, Canada. On October 3, he was visited by a Canadian consular official who assured him that he could not be sent to Syria, since he was a Canadian citizen. On October 5, an attorney retained by his family visited him in the MDC. On Sunday evening, October 6, and continuing until Monday morning, October 7, Arar was again subjected to a prolonged interrogation without the presence of his lawyer. On Monday, October 7, Arar’s lawyer was given false information by INS notifying her that Arar had been transferred to a New Jersey detention facility. On October 8, Arar was told that the INS had determined to remove him to Syria. Arar voiced concerns about potential torture in Syria, which the INS dismissed. On October 9, he was flown from the United States to Jordan, from where the Jordanians turned him over to Syrian authorities.

Until October 2003, Maher Arar was detained by Syrian Military Intelligence. He was interrogated in lengthy session that included beatings and psychological torture. When not being interrogated, Arar was kept in solitary confinement in an underground cell that was approximately two meters long, two and a half meters high, and one meter wide; the cell was cold, dark, damp, and infested with rats. Sanitary facilities were non-existent and he was not given sufficient food; he lost 40 pounds during his incarceration. Arar was visited in October 2002 and August 2003 by Canadian officials. Threatened by his Syrian captors, Arar did not tell the Canadians about the conditions of his detention until August 2003. Two months later, he was finally released with no charges filed and returned to live with his family in Ottawa, Canada. He continues to suffer the effects of his confinement.

Arar’s detention and deportation to Syria violated fundamental principles of due process as well as the provisions of the Convention Against Torture. The Canadian government has established an official commission to inquire into the case. The European Parliament Temporary Committee on the Transfer and Illegal Detention of Prisoners heard testimony from Arar in March 2006. The Center for Constitutional Rights filed a lawsuit on his behalf, based on US and international law (*Arar v. Ashcroft, et al.* CV-04-0249 US D.C. E.D. N.Y.) On February 16, 2006, the court dismissed most of Arar’s claims. For updates on the federal court case and other developments, see the website of the Center for Constitutional Rights at <http://www.ccr-ny.org>.

B. Human Rights Violations

International human rights law provides clear guidelines for due process. Violations stem from situations in which government mistakes harm persons who have no means to contest or correct them. Law-abiding noncitizens may be barred from travel, thus violating their rights to liberty and security of the person as well as freedom of movement. The system shifts the burden of proof from the state restricting the exercise of a right to the person who is suffering the violation.

Noncitizens “lawfully within the territory” of a state have the right to “liberty of movement” within that state, under Article 12 of the ICCPR. The lack of procedures to contest watch-list errors violates due process principles, such as those set forth in the UDHR: “Everyone is entitled in full equality to a fair and public hearing by an

independent and impartial tribunal, in the determination of his rights and obligations ...” (Art. 10). According to the American Declaration of the Rights and Duties of Man, “Every person may resort to the courts to ensure respect of his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights” (Art. 18).

Expedited removal procedures create particular risks for asylum seekers as they fail to provide an adequate opportunity to be heard. The deportation of persons to places where they may be harmed or tortured would violate the Refugee Convention principles of *non-refoulement* and/or the prohibition on return under the Convention Against Torture. As set forth in Article 33 of the Refugee Convention, “No Contracting 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.”⁹⁷ The Torture Convention contains a similar bar on return to a country where an individual might be subjected to torture.⁹⁸ The lack of adequate procedures for a foreigner subjected to expedited removal to make a claim of potential persecution or torture is a clear violation of general guarantees of due process.

If an alien lawfully entitled to be in the United States is mistakenly expelled under expedited removal, officials will have violated Article 13 of the ICCPR which holds that:

An alien lawfully present in the territory ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by ... the competent authority.

Due Process Case Study 3: Hearings

A. US Government Actions

Since September 11, immigration authorities have erected a cloak of secrecy around formerly public immigration hearings, restricting access by the press, by relatives of immigrant subjects, and requesting that decisions be based on secret evidence. Administrative and legislative reforms have imposed additional restrictions on appeal rights in the name of efficiency. Such measures imperil human rights, particularly rights

⁹⁷ The United States assumed the obligations of the Refugee Convention when it signed the Protocol and amended US immigration law in the Refugee Act of 1980, as found by the Supreme Court majority in *INS v. Cardoza-Fonseca* 480 US 427 (1987).

⁹⁸ Torture Convention, Article 3. “No State party shall expel or return (*refouler*) a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

to due process. Closed hearings do not allow for public scrutiny and constitute a violation of the right to due process.

1. Closed Hearings

The closure of “special interest” hearings mandated immediately following the September 11 attacks has continued. The practice and resulting violations of human rights were discussed above in Case Study 1: Arrests and Detention.

2. Use of Secret Evidence

Since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the 1996 Antiterrorism and Effective Death Penalty Act, immigration judges have been authorized to consider evidence in removal (formerly “deportation” or “exclusion”) proceedings that is not available to the alien for examination. The government can also present secret evidence to oppose release on bond for detained aliens and to oppose grants of political asylum.⁹⁹

In practice, when immigration officials claim that a case involves classified evidence, an immigration judge holds a “secret evidence clearance.” Secret evidence cases are conducted separately from the rest of the court docket, heard in closed sessions, and will not appear on the court’s calendar.¹⁰⁰ While the use of secret evidence was rare before September 11, it became a much more common recourse in its aftermath.

3. Denial of the Right to Counsel

The right to counsel for an alien subject to deportation (“removal”) is provided for under US law, but “at no expense to the government.”¹⁰¹ While the right to appointed counsel for defendants in criminal cases is required under the US Constitution, US courts have never held that the Constitution requires appointment of counsel for indigents arrested by immigration authorities. Given the secrecy and lack of communication during the post-9/11 arrests described previously, many were compelled to proceed with hearings without counsel:

Although detainees in theory had the right to secure counsel at their own expense, and to contact family members and consular representatives, the government frequently denied them these rights, particularly in the first weeks after September 11.¹⁰²

⁹⁹ See Immigration and Nationality Act, Sec. 240(b)(4)(B): an alien is not entitled to examine “national security information” presented by the government; INA Sec. 240(c)(2)(B) aliens shall not have access to government records and documents in his or her case that are “considered by the Attorney General to be confidential.”

¹⁰⁰ These instructions were also part of the Memorandum by Chief Immigration Judge Michael Creepy issued on September 21, 2001, mentioned above.

¹⁰¹ INA Sec. 292.

¹⁰² MPI, *America’s Challenge*, 2003, p. 9.

4. Security Clearance Delays in Grants of Political Asylum and Other Forms of Relief

Under prior practice, immigration judges had the power to grant political asylum or other types of relief from deportation (removal). Beginning in April 2005, the Executive Office for Immigration Review and Department of Homeland Security implemented new procedures that force immigration judges to delay grants of political asylum, Torture Convention relief, or other discretionary measures pending the receipt of FBI security clearance for applicants, in the name of national security. Unwarranted delays in grants can cause undue hardship to refugees, such as delaying family reunification.

B. Human Rights Violations

The right to a public hearing is one of the most basic human rights, as the presence of the press, public, and relatives and friends of the accused assures monitoring of official actions. This right was explicitly included in the Universal Declaration of Human Rights, the foundational document of the modern human rights regime: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him” (Art. 10). The American Declaration of the Rights and Duties of Man, which in 1948 set the framework for the regional human rights regime in the Americas, similarly requires an “impartial and public hearing” (Art. 26).

Furthermore, if evidence is considered by the judge or decision maker that is not revealed to the accused, the individual’s right to defend him- or herself is seriously compromised, as findings may be based on hearsay or unsubstantiated rumors. Basic due process principles require that the accused be able to confront and examine the evidence submitted.¹⁰³ While the ICCPR frames such rights as belonging to the accused in a criminal action, the same standards should apply to the expulsion of aliens.

The ICCPR requires that a decision regarding the expulsion of a lawfully present alien only be made after the alien has been “allowed to submit the reasons against his expulsion,” although with an exception allowed “where compelling reasons of national security otherwise require” (Art. 13). That same Article of the ICCPR goes on to require review of a decision by a “competent authority.” Practices in the immediate post-9/11 period were based on a national security emergency, but nearly four years after those events, vague assertions of emergency are not sufficient to justify blanket claims of national security that limit such basic due process rights.

Similarly, the right to counsel is a right that protects other human rights. The denial of access to counsel amounts to a denial of the right to counsel, which constitutes a violation of the right to due process. While the specific right to counsel in the ICCPR is found in the article dealing with criminal trial rights, the gravity of the potential

¹⁰³ ICCPR, Article 14.

consequences of a deportation ought to be found to merit similar protections of the individual.

The ICCPR upholds, as part of a list of “minimum guarantees” of due process, a person’s right to “have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing” (Art. 14.2.b) and, furthermore, “to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it ...” (Art. 14.2.d). The consequences of deportation are such that the highest standards of due process under international human rights ought to apply.

QUESTION 2: HAS THE UNITED STATES VIOLATED INTERNATIONAL HUMAN RIGHTS LAWS THAT PROHIBIT DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN OR RACE?

Race and National Origin Discrimination and Immigration Procedures

Since September 2001, the US government has instituted new immigration controls and engaged in practices that have created substantial barriers for Arab, South Asian, and Muslim immigrants and visitors. As MPI's 2003 study *America's Challenge* found,

Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measure, the government has violated another core principle of American justice: the Fifth Amendment guarantee of equal protection.¹⁰⁴

International human rights treaties and US law bar discrimination based on race or national origin. However, states are allowed some leeway in the adoption of measures that make distinctions between citizens and aliens. How does the application of international human rights standards regarding race or national origin discrimination reframe our understanding of this issue?

A. US Immigration Law and Racial and National Origin Discrimination

Since at least the late 19th century, American immigration law and practice has never been free of racial discrimination. Exclusion of Asian immigrants began in the 1880s, and Southern and Eastern European immigrants were virtually barred from the 1920s until 1965. Mexican and other Latin American migrants were subjected to mass deportations in periods of economic downturns, although there were no specific quotas barring their entry. From the late 19th century until 1952, naturalization laws barred citizenship to anyone who could not be characterized as "white" or of African descent, resulting in immigrants of various nationalities (Middle Eastern, for example) attempting to have themselves declared "white" by judicial decree.¹⁰⁵ Finally, in 1965, the US Congress abolished the quotas and adopted a racially neutral visa system as one of a series of landmark civil rights statutes.

Since the 1960s, US courts have barred racially discriminatory practices by government at all levels. However, contrary to this trend, the US Supreme Court has upheld the plenary power of Congress and the Executive to expel aliens or bar entry even where

¹⁰⁴ MPI, *America's Challenge*, *infra*, p. 8.

¹⁰⁵ See Ian F. Haney Lopez, "Racial Restrictions in the Law of Citizenship" (1996), cited in Aleinikoff, Martin, and Motomura, *Immigration & Citizenship: Process and Policy*, Thomsen West, 2003, p. 56.

criteria used would be found otherwise to violate US anti-discrimination laws.¹⁰⁶ Furthermore, Congress in 1996 eliminated the jurisdiction of the federal courts over many challenges to discretionary enforcement decisions.¹⁰⁷

If anything, the post-9/11 period has marked a step backward in racially neutral immigration enforcement. MPI documented in *America's Challenge* how many post-9/11 immigration security laws and practices distinguished among foreigners based on race and national origin. "The government has selectively enforced immigration laws based on nationality since September 11. Though claiming to include other factors, the record is one of de facto national origin-based enforcement."¹⁰⁸ In many instances the government has been clear about its intent to focus on particular groups without the necessity for individualized suspicion of involvement in terrorism. "Arabs and Muslims in America feel under siege, isolated, and stigmatized. They believe they have been victimized twice: once by the terrorists and a second time by the reaction to that terrorism."¹⁰⁹

B. Human Rights Law and Discrimination

International human rights law has contained prohibitions against racial discrimination since its beginnings. The Universal Declaration of Human Rights states at Article 1 that: all human beings are "born free and equal in dignity and rights," and at Article 2 that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without any distinction of any kind such as race, colour, national or social origin ... or other status." At Article 7, the UDHR holds that: "All are equal before the law and are entitled without any discrimination to equal protection of the law [and] ... against any discrimination in violation of this Declaration ..."

Using almost identical language, the International Convention on Civil and Political Rights (ICCPR) requires that a State Party guarantee the protection of the rights delineated in that treaty to:

all individuals within its territory and subject to its jurisdiction ... without distinction of any kind, such as race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth or other status" (Art. 2);

and

¹⁰⁶ See, e.g. *Fiallo v. Bell* (430 US 787 [1977]) and *Kleindienst v. Mandel* (408 US 753 [1972]). For example, in *Fiallo*, the Court allowed the denial of visas to the illegitimate children of US-citizen fathers, although there was no such bar for children of US citizen mothers.

¹⁰⁷ INA Sec. 242(a); See Hiroshi Motomura, "Judicial Review in Immigration Cases After AADC," 14 *Geo. Imm. L.J.* 385 (2000).

¹⁰⁸ MPI, *America's Challenge*, "Findings," p. 13.

¹⁰⁹ MPI, *America's Challenge*, p. 40; "Findings," p. 14.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth or other status (Art. 26).¹¹⁰

Similarly, Article 2 of the American Declaration, which is binding on the United States as a member of the Organization of American States, guarantees equality before the law.¹ "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor."

The principal treaty that explicitly treats racial discrimination is the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), with oversight by the Committee on the Elimination of Racial Discrimination (CERD).¹¹¹ At Article 1, ICERD states: "'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The ICERD does allow states to make limited distinctions between citizens and noncitizens, stating at Article 2, "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens;" and at Article 3, "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

The dilemma stems from this inherent contradiction as stated by the late scholar Joan Fitzpatrick, "The strong link between racism, xenophobia, and human rights violations poses a significant challenge for states in devising migration policies that meet basic human rights standards."¹¹² In 1998 the United Nations Human Rights Commission began a study regarding discrimination against noncitizens, appointing a Special Rapporteur in 2000¹¹³ and organizing the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa, in 2001.

¹¹⁰ The Human Rights Committee, established under the ICCPR to monitor state compliance, has declared that the general non-discrimination declaration of Article 26 can be read to require equality of treatment for individuals in situations not explicitly covered by the ICCPR. Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 26 (1994).

¹¹¹ 660 UNTS 195, entered into force January 4, 1969.

¹¹² Joan Fitzpatrick, *supra*, in Aleinikoff & Chetail, 2003.

¹¹³ For more information on the work of the Special Rapporteur on the Rights of Noncitizens (Professor David Weissbrodt of the University of Minnesota), see <http://www.unhchr.ch/>.

Following the Durban conference, the CERD directly addressed the relationship between immigration enforcement and the prohibition on racial discrimination in its General Recommendation No. 30: Discrimination Against Non Citizens. The Commission recommended (among other measures) that states:

ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin; [and] ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that noncitizens are not subjected to racial or ethnic profiling or stereotyping (para. 2.9 and 2.10).¹¹⁴

In the General Recommendation 30, CERD affirmed that while the ICERD provides for differentiation between citizens and noncitizens, it “must be construed so as to avoid undermining the basic prohibition of discrimination.”¹¹⁵ When race, ethnicity, and national origin are used as proxies for dangerousness in the determination of priorities for arrest, in place of assessment of the crime or any other individual criteria, this practice constitutes prohibited discrimination. Furthermore, CERD has clarified that illegal discrimination can be found when a state policy has a “disparate impact” on a particular racial group regardless of whether the policy was intended to discriminate.¹¹⁶

The International Covenant on Civil and Political Rights (ICCPR) further obligates the United States to guarantee equality before the law and prohibits discrimination.¹¹⁷ As a signatory of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the United States is obligated to eliminate “any distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin” (Art. 1, cl.1) and further must act against discrimination by public officials (Art. 2) and guarantee equal treatment before the law (Art. 5).

Particularly with respect to visa applicants (at consulates abroad) and aliens at ports of entry, US law gives applicants no constitutional rights. Furthermore, for most visa denials, US courts lack jurisdiction. In these instances, the principles of international human rights law can have a particular importance in the support of principles of non-discrimination.

¹¹⁴ General Recommendation 30: Discrimination against Non-citizens, Committee on the Elimination of Racial Discrimination, 64th session, 23 February – 12 March 2004, CERD/C/64/misc.11/rev.3.

¹¹⁵ *Ibid.*

¹¹⁶ General Recommendation XI on Non-Citizens, CERD, 48th session, Suoo, No. 18, at 114, U.N.Doc. A/48/18 (1993).

¹¹⁷ “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth or other status” (Art. 26).

Discrimination Case Study I: Post-9/11 Arrests

A. US Government Actions

1. “Voluntary” Interviews — Immediate Post 9/11

In November 2001, Attorney General Ashcroft announced a so-called Voluntary Interview Project with the participation of officials from various agencies.¹¹⁸ The pool of interviews was made up of aliens who shared certain characteristics with the September 11 hijackers: type of visa, gender, age, date of entry into the United States, and country of origin.¹¹⁹ Some 7,602 names were identified for interviews and notices sent. Interviews were supposed to be voluntary, but many feared that refusing to collaborate could have repercussions. Over 3,000 interviews have been conducted.¹²⁰

MPI’s *America’s Challenge* criticized the program because it “greatly alarmed Arab and Muslim-American communities” and had contradictory goals including: “investigating the September 11 terrorist attacks, intimidating potential terrorists, recruiting informants, and enforcing immigration violations.”¹²¹ As far as advocates have been able to determine, no arrests for any terrorism-related activities resulted from the project. The rationale claimed for using the aforementioned criteria to select individuals was that their demographic similarity to the 9/11 hijackers made them more likely to reside in the same communities or be members of the same social groups as the 9/11 hijackers and, therefore, more likely to be aware of suspicious activity.

2. Post-9/11 “Round-Ups”

The targeting of individuals based on race and national origin, using such criteria as a proxy for dangerousness and instead of evidence of suspected criminal activity constitutes prohibited discrimination under international human rights norms. The OIG account reported that authorities failed to establish clear, objective criteria for arrests in PENTTBOM.

As set out above, MPI’s *America’s Challenge* cited the failure of law enforcement to sift out frivolous from serious charges, which meant that state mechanisms were vulnerable to the racial prejudices of individuals. This was confirmed by the OIG Report: “Many leads that resulted in an alien’s arrest on immigration charges were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant ...”¹²²

¹¹⁸ US GAO, *Homeland Security: Justice Department’s Project to Interview Aliens after September 11, 2001*, GAO-03-459, April 11, 2003, p. 7, available at <http://www.gao.gov/new.items/d03459.pdf>.

¹¹⁹ Individuals were from 26 countries in which there was supposedly al Qaeda presence or activity. In the second phase of the program, the age range and the list of countries were broadened.

¹²⁰ United States General Accounting Office, *Homeland Security, Justice Department’s Project to Interview Aliens after September 11, 2001*, April 2003, GAO-03-459.

¹²¹ MPI, *America’s Challenge*, “Findings,” p. 13.

¹²² OIG Report 1, *supra*, Chap. 9, “Our Recommendations,” *infra*, p. 186.

3. Special Call-In Registration

Beginning in December 2002, the Department of Homeland Security instituted the Special Call-In Registration Program,¹²³ a one-time program under NSEERS, mandating registration, within a given time period, of male foreigners who were over age 16, citizens or nationals of 25 countries,¹²⁴ and in the United States without an immigrant visa (i.e., all non-immigrants and others awaiting status changes).¹²⁵ Registration included fingerprinting, photographing, and submission of evidence of residence and work or student status.

Individuals who registered and were found to be in violation of their visa status could be arrested and deported; many were. Individuals subject to Special Call-In Registration were given new reporting obligations. Failing to register is a crime and an immigration violation, leaving the non-compliant foreigner out of status, and thus subject to arrest, detention, and deportation. This program was based exclusively on nationality and gender criteria, resting on the presumption that male citizens from the designated countries should be suspected of connections to terrorism

B. Human Rights Violations

In principle, the Voluntary Interview Project did not entail violations of human rights as long as the individuals subjected to it were properly informed of its voluntary nature and the fact that there were no reprisals for failing to cooperate or refusing to be interviewed. However, the apparent lack of any criteria other than gender and nationality further added to the “presumption of guilt” anti-Muslim atmosphere that pervaded the immediate post-9/11 period. Other aspects of the treatment of post-9/11 detainees, including violations of due process rights and detention conditions that amounted to cruel, inhuman, and degrading treatment were discussed in the Due Process section of this report.

The Center for Constitutional Rights filed a lawsuit, including claims under international human rights law, on behalf of post-9/11 PENTTBOM detainees, contesting their arrest and conditions of detention. Among other charges, the plaintiffs allege that the arrests were based exclusively on their race, religion, or ethnic identity, citing the OIG report that most PENTTBOM detainees were from Pakistan, Egypt, Turkey, and Jordan.¹²⁶ Other discriminatory treatment of these detainees was based on the attitudes and practices of prison guards toward detainees’ religion and national origin. Among

¹²³ See <http://www.ice.gov/graphics/specialregistration/archive.htm>.

¹²⁴ The countries are: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

¹²⁵ Under US immigration law, non-immigrant visas are granted to individuals who are in the United States temporarily, including tourists, students, and temporary workers. INA Sec. 101(a)(15).

¹²⁶ However, the race and religious discrimination claims are framed exclusively under US domestic law. See *Turkmen v. Ashcroft*, Plaintiffs’ Memorandum in Opposition to Motion to Dismiss, http://www.ccr-ny.org/v2/legal/september_11th/docs/.

the findings of the OIG reports and plaintiffs' investigations are instances of refusal to allow Muslim inmates to exercise their religious beliefs and physical abuse based on explicitly racist statements.¹²⁷

Discrimination Case Study 2: Procedures on Entry

A. US Government Actions

Control over the issuance of visas in consulates is appropriately “front and center” among responses by the US government to the September 11 attacks.¹²⁸ US law allows consular officials to put the burden of proof on the visa applicant to establish his or her qualifications, including that he or she is not barred under a long list of disqualifying factors, many of which are framed in vague, general terms. Consular officials have almost unreviewable discretion concerning their determinations with respect to visa applicants. The US Department of State reviews such decisions only with respect to the interpretation of the law, not the officers' determination of facts. US courts have no jurisdiction over these “extra-territorial” decisions, and the visa applicant has no standing to challenge denial of entry, despite the fact that the rights of US citizens or residents might be impacted.¹²⁹

All visa applicants must now have personal interviews with a consular official concerning their eligibility with an increased emphasis on “security concerns,” broadly framed under US law.¹³⁰ A major obstacle for many applicants for non-immigrant visas (most commonly, visitors or students) is the rule that the applicant must establish that she intends to return to her home country following the permitted period of stay in the United States.¹³¹ The Department of Homeland Security has established a Visa Security Unit that has sent supplemental staff to US consulates in Saudi Arabia as of mid-2005.¹³²

1. Racial, National Origin, or Ethnic Background as Criteria

A high proportion of visa applicants from Muslim and Arab countries fail to convince consular officers that they are qualified for visas and pose no threat to the United States. American diplomats report numerous official complaints made by Arab governments

¹²⁷ OIG Report, *supra*, and *Turkmen Plaintiff's Third Amended Complaint* at http://www.ccr-ny.org/v2/legal/september_11th/docs/Turkmen_3rd_Amended_Complaint_9-13-04.pdf.

¹²⁸ Stephen Yale-Loehr, Demetrios Papademetriou, Betsy Cooper, “Secure Borders, Open Doors: Visa Procedures in the post-September 11 Era,” *Bender's Immigration Bulletin*, Vol. 10, No. 18, September 15, 2005, p. 1412.

¹²⁹ The US Supreme Court has consistently upheld the plenary power of Congress and the Executive to bar aliens from entry, even where criteria established by statute or as interpreted by the Executive authority would be found to violate US constitutional guarantees of equal protection. See, e.g., *Fiallo v. Bell*, *Kleindienst v. Mandel*, etc. See *United States v. Verdugo-Urquidez*, 494 US 259 (1990).

¹³⁰ There are certain very narrow exceptions for children, elderly persons over 80, diplomats and certain employees of international organizations. The Intelligence Reform and Terrorism Prevention Act of 2004, cited in Yale-Loehr, *infra*.

¹³¹ Immigration and Nationality Act (INA) Sec. 201.

¹³² In Yale-Loehr, p. 1413, *op cit*.

that claim that their nationals are subjected to unnecessarily intrusive and insulting interviews.¹³³ Statistics released by the Department of Homeland Security show a marked decrease in admissions of non-immigrants from Arab and Muslim countries.¹³⁴ While the issuance of non-immigrant visas by US consulates has dropped dramatically worldwide (by approximately one-third between FY 2001 and FY 2004), the numbers of visas issued to citizens of Arabs and Muslim countries has dropped even more: from a 50 percent drop for Syria and Pakistan to a drop of almost 83 percent for the United Arab Emirates.¹³⁵

US universities have noted a marked decline in applications for graduate study from Muslim and Arab countries, while institutions in states with less discriminatory admissions practices are noting an increase from those regions.¹³⁶ Discrimination on the basis of national origin, ethnicity, and religion results in the decrease of admissions as a result of denial of visa applications and rejections at the ports of entry.

2. Security Clearance Delays

Delays and refusals in the issuance of visas have harmed the interests of innocent foreigners as well as US individuals, research and other academic institutions, and the national interest. New security clearance procedures delay visa processing at US consulates and, in some cases, improperly deny admission to innocent applicants with no possibility of appeal.

The State Department has a terrorist watch list known as TIPOFF used to screen all visa applicants.¹³⁷ The State Department also conducts an additional security review of any

¹³³ Council of American Ambassadors and Institute for the Study of Diplomacy, *How Terrorism Affects American Diplomacy* 18-19 (2004) http://www.guisd.org/terrorism_diplomacy.pdf.

¹³⁴ Admissions for all classes of non-immigrants in 1985, 1990, 1995, 2000, and 2003 show a pattern of discrimination. The number overall has declined since 2000. While 33,690,000 non-immigrant admissions took place in 2000, in 2003 there were only 27,849,000. For Middle Eastern and other Muslim countries, in some cases, the number of admissions returned to the numbers prior to 1985, in others it was even lower. The number of Iranians admitted has decreased: 40,000 in 1985; 18,000 in 1990; 11,000 in 1995 and 2000; and only 4,000 in 2003. The figures for Saudi Arabia are 60,000 in 1985; 53,000 in 1990; 68,000 in 1995; 84,000 in 2000; and 23,000 in 2003. For other Arab & Muslim countries: Pakistan: 28,000 in 1985; 41,000 in 1990; 40,000 in 1995; 58,000 in 2000; and 39,000 in 2003; and United Arab Emirates: 11,000 in 1985; 12,000 in 1990; 23,000 in 1995; 44,000 in 2000; and 20,000 in 2003. US Department of Homeland Security, *Yearbook of Immigration Statistics 2003*, Table 22, 2004.

¹³⁵ Yale-Loehr, pp. 1414 and 1415.

¹³⁶ Eugene McCormack, "Enrollment of Foreign Students Falls for a 2d Year," *Chronicle of Higher Education*, November 18, 2005, citing State Department figures; Yale-Loehr, et al., p. 1415, Appendix E.

¹³⁷ As of November 2003, TIPOFF had about 120,000 names of individuals regarded or suspected of being terrorists whose inclusion is based on a "reasonable suspicion." Inclusion does not entail an automatic visa denial. The database was made available in August 2002 to five Intelligence Community and law enforcement agencies. See Amb. Francis X. Taylor, Coordinator for Counterterrorism, Testimony before Joint Congressional Intelligence Committee, October 1, 2002, <http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0210a&L=dosdo&D=1&T=0&O=A&F=&S=&P=151>.

citizen from any of seven countries listed as terrorism sponsors.¹³⁸ Moreover, visa applicants who are males between the ages of 16 and 45 and nationals of any of the 26 countries “with an al Qaeda presence,” as well as any other individual who fits “certain criteria,” are subject to the “Condor” visa clearance system, an additional mandatory screening.¹³⁹ Also mandated by Section 306 of the Enhanced Border Security and Visa Reform Act of 2002, these reviews, known as “security advisory opinions,” are carried out in order to determine that the visa applicant “does not pose a threat.” The accuracy of the databases used for these security checks have been criticized by the General Accounting Office.¹⁴⁰

Visas are not granted until the required security advisory opinion is issued. There are no time limits and those reviews may take a very long time. Individuals subject to these screenings suffer discrimination on the basis of their country of birth, even though they may have acquired another nationality.

B. Human Rights Violations

These procedures violate general nondiscrimination guarantees of international human rights; persons of certain nationalities and races are subjected to extra procedures and prejudiced presumptions that make it significantly more difficult for them to visit or reside in the United States. Practices that create presumptions about or obstacles to visa applicants from certain countries are in violation of international human rights law, including the guarantees of non-discrimination of Article 7 of the Universal Declaration of Human Rights, cited above.

These practices also violate the CERD General Recommendation No. 30: Discrimination Against Non Citizens. The United States has failed to: “Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin; [and] ... that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping” (para. 2.9 and 2.10).¹⁴¹

¹³⁸ Section 306, Enhanced Border Security and Visa Reform Act of 2002. States listed as sponsors of terrorism are: North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya.

¹³⁹ The 26 countries that trigger the “Condor” visa clearance are Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

¹⁴⁰ US Government Accountability Office (GAO), *supra*.

¹⁴¹ General Recommendation 30: Discrimination against Non-citizens, Committee on the Elimination of Racial Discrimination, 64th session, February 23–March 12, 2004, CERD/C/64/misc.11/rev.3.

Discrimination Case Study 3: Visa Applications

A. US Government Actions

NSEERS

The Department of Homeland Security established the National Security Entry-Exit Registration System (NSEERS),¹⁴² described above in Due Process Case Study 2: Procedures at Ports of Entry. Briefly, NSEERS was targeted at male non-immigrants who are over the age of 16 and are nationals of a list of designated countries,¹⁴³ persons whom the State Department and the immigration authorities determine to be an “elevated national security risk”; and individuals identified at the ports of entry by US Immigration and Customs Enforcement (ICE) inspectors.¹⁴⁴ NSEERS targeted male nationals from almost all Arab or Muslim countries without adequate justification for such treatment. NSEERS included fingerprinting, photographing, and interviewing of individuals when entering the United States as well as post-entry reporting requirements and exit notification.¹⁴⁵ Individuals who failed to comply are listed in the National Crime Information Center (NCIC). Over 177,000 persons were registered in NSEERS as of the end of FY 2003, of whom 2,000 were detained on registration. Many Arab and Muslim visitors report lengthy, intrusive interrogations on entry.

This program has been cited as one of the chief reasons why the number of academics, business people, and university students from the Middle East visiting the United States has dropped dramatically in the past three years, thus harming US interests in the region. Arab American groups and US diplomats in the Middle East continue to note that Arab and Muslim entrants to the US report rude and discriminatory treatment by US border inspection personnel.

B. Human Rights Violations

NSEERS and subsequent screening systems violate international human rights norms, as persons of certain nationalities and races are subjected to prejudicial classifications.

¹⁴² Other components of NSEERS are discussed below, as they target non-immigrants already present in the United States.

¹⁴³ See, *infra*, p. 26, for the list of countries. The nationality designation is regardless of whether the individual has dual nationality or enters the United States with travel documents from another country. See Department of Justice, “Attorney General Ashcroft announces implementation of the first phase of the National Security Entry-Exit Registration System, Press Release,” August 12, 2002 at http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm.

¹⁴⁴ The criteria for ordering an individual to be subject to NSEERS include national origin and factors related to potential suspicion of terrorism. The definition of nationals includes individuals born in certain countries who never held, or no longer hold, citizenship of those countries, including refugees. See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, “Identification of Nonimmigrant Aliens Subject to Special Registration, or the National Security Entry Exit Registration System,” September 5, 2002.

¹⁴⁵ Fingerprints taken at ports of entry are checked against an FBI database that includes fingerprints, which are supposed to be those of terrorists obtained from al Qaeda sites in different parts of the world.

These practices place burdens on immigrants and non-immigrants from certain countries, but not others, violating the guarantee defined in the ICERD against national origin or racial discrimination that “has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Furthermore, the reporting requirements placed on certain individuals subject to NSEERS violated the guarantee of free movement in Article 12 of the ICCPR, “Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement” (Art. 12 ICCPR).

Discrimination Case Study 4: Ongoing Post-9/11 Programs

A. US Government Actions

1. Expedited Removal in Border Areas

In August 2004, CIS expanded the use of expedited removal procedures to persons encountered in US territory within 100 miles of the US-Canadian or US-Mexican borders. Advocates have expressed concern that the capacity to immediately deport persons suspected of being in the US less than 14 days, without any prior hearing, would result in harassment of certain racial groups in border areas.

2. Workplace Raids

In 2002, the Department of Justice initiated “Operation Flytrap,” workplace raids in airports directed at possible terrorists. The raids resulted in the arrest of restaurant workers, janitors, and other employees. Some were unauthorized; others were US citizens with minor criminal records.¹⁴⁶ No one arrested in Operation Flytrap was charged with any crimes related to terrorism or support of terrorist activities. Also in 2002, “Operation Tarmac” resulted in the arrest of persons suspected of having obtained a security badge fraudulently in airports. Among the individuals arrested and charged, not one was connected to terrorist activities.¹⁴⁷

3. Absconder Programs

When non-immigrants overstay their visas, they become subject to arrest and are classified according to the threat they pose. Those classified as “more dangerous” are sought for arrest by immigration authorities with the assistance of US marshals. The criteria under which individuals are classified as “more dangerous” have not been made public. Apparently, classification is by national origin and, as such, constitutes illegal discrimination.

¹⁴⁶ “Airport Net Caught Small Fry,” *Chicago Tribune*, October 6, 2002.

¹⁴⁷ Amy Smith, “Operation Tarmac: Overkill?” *Austin Chronicle*, March 14, 2003.

The Absconder Apprehension Initiative aims at apprehending and deporting noncitizens who were issued deportation or removal orders based on a prior criminal conviction. Priority is given to nationals of countries where there has been “Al Qaeda activity or presence.”¹⁴⁸ Instructions are given to treat these individuals as criminal suspects and to grant them standard procedural rights. They are detained under ICE custody. Depending on the assessment by the interviewer, the Anti-Terrorism Coordinator determines whether to file criminal charges for failure to depart following a deportation order, or to forgo prosecution and allow deportation to proceed.

As found by MPI in *America’s Challenge*, “As a general immigration enforcement measure, the absconder apprehension initiative is legitimate and important. However, after September 11, the government changed the character of the program to make it nationality-specific ... [with] marginal security benefits, while further equating national origin with dangerousness.”¹⁴⁹

4. Devolution of Immigration Enforcement from Federal to Local Officials

State and local police officials have very limited authority to enforce immigration law. They are only responsible for arresting persons who have committed criminal immigration offenses¹⁵⁰ and can be asked to cooperate with immigration authorities in cases of mass or imminent influx of noncitizens.¹⁵¹ Since 1996, federal law has allowed the Attorney General to enter into agreements with state and local police agencies to enforce immigration law — i.e., investigate and arrest for immigration status violations. Prior to this legislation, immigration authority was uniformly considered to be an exclusively federal matter. After September 11, the federal government initiated several such cooperative agreements. Many local law enforcement officials consider such cooperation agreements a hindrance to enforcement of criminal laws within immigrant communities, as immigrant witnesses or crime victims may be afraid to cooperate with police who, they fear may arrest them due to their immigration status.

In principle, local devolution of immigration enforcement authority does not constitute a violation of human rights, as long as the law grants state and local police authorities the authorization to do so and the police have accurate databases on which to rely. However, in their immigration enforcement actions local authorities must refrain from racial and ethnic profiling that may result in discrimination. This is precisely the danger involved in the devolution of enforcement. As characterized by MPI in *America’s Challenge*, “Such measures undercut the trust that local law enforcement agencies have built and need with immigrant communities to fight terrorism and other crimes.”¹⁵²

¹⁴⁸ The Memorandum from the Deputy Attorney General to the INS Commissioner, the FBI Director, the Director of the Marshall Service and US Attorneys on this matter does not list the countries where there has been Al Qaeda activity or presence.

¹⁴⁹ MPI, *America’s Challenge*, “Findings,” p. 13.

¹⁵⁰ Section 274, Immigration and Nationality Act.

¹⁵¹ Section 103 (a)(8), Immigration and Nationality Act.

¹⁵² MPI, *America’s Challenge*, “Findings,” p. 14.

B. Human Rights Violations

Human rights law is very clear regarding race or national origin discrimination, including the basic non-discrimination guarantees of the UDHR (proclaiming equality before the law and equal protection against discrimination at Article 7). The American Declaration requires states to guarantee that “all persons are equal before the law” (Art. 2). The ICCPR guarantees equality before the law and the right to be free from discrimination (Art. 26). The ICERD is particularly clear about the obligation of states to rid public institutions and authorities of practices that discriminate on the basis of race (Art. 2.1.a).

Many of the post-9/11 migration security measures violate international human rights guarantees against race and national origin discrimination. At US consulates, certain nationalities face burdensome new requirements and unfounded presumptions. Within the United States, the Special Registration program was discriminatory *ab initio*, due to its linking race and national origin with suspicion of terrorist activity. The due process problems in the Special Registration program (discussed above) had a particular impact on Arabs and other Muslims. Reporting obligations imposed on certain persons limited protections of freedom of movement. The impact of post-9/11 workplace investigation efforts known as “Operation Flytrap” and “Operation Tarmac” resulted in discrimination against immigrant workers.

Similarly, race, ethnicity, and national origin have been used as the basis for selecting persons for absconder enforcement initiatives. No priority is made based on the crime committed. This practice constitutes illegal discrimination based on race and national origin. Individuals who appear to be foreigners because of their physical appearances are subject to stops and questioning by immigration authorities. Such discriminatory treatment would violate the non-discrimination provisions of the UDHR, the American Declaration, the ICCPR, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹⁵³

¹⁵³ Arts. 2 and 7 Universal Declaration, art. 2 American Declaration, art. 26 ICCPR, and arts 1, 2, 5 CERD.

CONCLUSIONS

[W]e found an important international echo effect from domestic immigration policy. By targeting Muslim and Arab immigrants the US government has deepened the perception abroad that the United States is anti-Muslim and that its democratic values and principles are hypocritical. This echo effect is undermining US relationships with exactly the moderate, pro-Western nations and social groups whom we need in our fight against terrorism.
— MPI, *America's Challenge*, 2003

If the United States seeks to restore its position as a world leader in human rights, it should conform its immigration control practices to its human rights treaty obligations.¹⁵⁴ All states must respect the human rights of all — regardless of race, nationality, or immigration status. Additionally, principles of refugee protection and fundamental rights, such as the right to life and the absolute prohibition on torture and other cruel, inhuman, and degrading treatment are important tools for analyzing US immigration enforcement. Restoring respect for the human rights of all immigrants would be an important step toward true national security.

Legal organizations will continue to try new approaches to bring international human rights law into US courts. Advocacy organizations are encouraged to explore the United Nations and Inter-American bodies set up to monitor US compliance with treaty obligations. This report is not intended as a “how-to” manual, but rather as a preliminary study to spur interest in the use of international human rights law as a tool for analysis and advocacy.

¹⁵⁴ See, for example, Art. 9 of the International Covenant on Civil and Political Rights, “Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention ...” This provision and others in the ICCPR have been found to apply to detention of migrants and asylum seekers by various U.N. bodies including the Working Group on Arbitrary Detention of the UN.

SOURCES FOR INFORMATION

Readers interested in learning how to use the UN and Organization of American States human rights mechanisms are encouraged to consult the following organizations, some of which have developed training materials on human rights law. They include:

- American Civil Liberties Union (www.aclu.org);
- Center for Constitutional Rights (www.ccr-ny.org);
- Center for Justice and International Law (www.cejil.org);
- Global Rights (www.globalrights.org);
- Human Rights First (www.humanrightsfirst.org);
- Human Rights Watch (www.hrw.org);
- Midwest Coalition for Human Rights (www.midwesthumanrights.org);
- National Network for Immigrants and Refugees (www.nnirr.org); and
- US Human Rights Network (www.ushrnetwork.org).

Updates on immigration policy can be obtained from many sources. A few of the organizations consulted for this report include:

- American Immigration Lawyers Association (www.aila.org);
- Migration Policy Institute (www.migrationpolicy.org); and
- National Immigration Forum (www.immigrationforum.org).

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