



Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil and Political Rights

A shadow report by the American Civil Liberties Union
prepared for the United Nations Human Rights Committee
on the occasion of its review of

The United States of America's Second and Third Periodic Report
to the UN Committee on Human Rights Concerning the
International Covenant on Civil and Political Rights

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COVER PHOTOS FROM LEFT TO RIGHT:

- Jessica Gonzales with a picture of her three slain daughters, ages seven, nine, and 10.

- Prisoners were forced to break through windows to escape Hurricane Katrina.

- Father Roy Bourgeois, a religious leader and activist, has been spied on by the U.S. government.

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The U.S. government has seriously eroded the right to privacy by expanding its surveillance of ordinary Americans in name of protecting national security. The National Security Agency is conducting massive wiretapping and data-mining of phone calls and emails, and the FBI is spying on peaceful political and religious groups and demanding personal records without court approval or probable cause. Dissent is now treated as unpatriotic.

Even children's rights are not sacrosanct. The government continues to detain disproportionate numbers of minorities in juvenile detention, and fails to meet the unique needs of girls in detention, whose ranks grow steadily. Over 2,500 juvenile offenders sentenced as adults for crimes committed under the age of 18 are serving a life sentence without the possibility of parole. And the disturbing national trend of the "school to prison pipeline" is causing many of the most vulnerable students to be funneled out of public schools directly into the juvenile and criminal justice systems.

Regarding the cherished right to vote, America is far out of step with the world on felony disfranchisement, shutting 5.3 million American citizens out of the process. Congress is debating reauthorization of the expiring provisions of the federal Voting Rights Act, which is the major safeguard against the constant assaults on the voting rights of minorities.

Since September 11, Arabs, Muslims and South Asians have become targets of overt and covert government activity. They have been arbitrarily detained and abused, misused as material witnesses, denied visas to enter the U.S. if the government finds the content of their speech objectionable, racially profiled, discriminated against for the peaceful practice of their religion, and subjected to unlawful monitoring and surveillance without any suspicion of criminal activity.

To avoid blatant violations of the Covenant by the U.S. in Iraq, Afghanistan, Guantánamo Bay and secret detention facilities outside the U.S., the government continues to maintain that the ICCPR does not apply to its actions outside the United States. The position is consistent with a disturbing trend that threatens to undermine the rule of law in America – the assumption that the Executive has unchecked authority to ignore the law. To regain its position as a beacon of freedom throughout the world, the United States must honor and protect the fundamental freedoms and rights enshrined in the U.S. Constitution and the ICCPR.

Although the ICCPR covers a broad spectrum of civil and political rights, this shadow report does not address all of them, but rather focuses on five substantive areas: national security, immigrant's rights, racial justice, women's rights and religious freedom. There are many areas of ACLU work not covered by this report, and issues within the areas addressed that are only partially covered. The full breadth of the ACLU's relevant work encompasses broader sets of rights covered by the ICCPR and can be seen on our web site, at www.aclu.org.

A. Equal Application Of Rights/Effective Remedies For Violations (Article 2)

Over the last decade, there has been a serious erosion in the ability of immigrants, prisoners and detainees in the "war on terror" to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a vital

remedy.¹ Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to sue for civil rights violations. Rights available to women have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order. Accordingly, the government is failing to ensure the enjoyment of rights to all individuals under its jurisdiction, in contravention of Article 2.

B. Equal Rights For Men and Women (Article 3)

While the U.S. government has made some efforts toward eliminating practices that “impair the equal enjoyment of rights”² women in the criminal justice system, female victims of domestic violence, and low-wage migrant women workers still suffer from unequal and discriminatory treatment.

C. Freedom From Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Article 7)

Evidence from a range of sources, including over 100,000 government documents produced to the ACLU through Freedom of Information Act (“FOIA”) litigation, show a systemic pattern of torture and abuse of detainees in U.S. custody in Iraq, Afghanistan and Guantánamo Bay, Cuba. This abuse was the direct result of policies promulgated from high-level civilian and military leaders and the failure of these leaders to prevent torture and other cruel, inhuman or degrading treatment by subordinates.

Despite the widespread and systemic nature of the torture and abuse, including over 120 reported deaths in custody, the United States has refused to authorize any independent investigation into the abuses and the government continues to assert that the abuse was simply the actions of a few rogue soldiers. The U.S. government has taken very limited measures to hold perpetrators accountable and to provide redress to victims of torture and abuse. Also in violation of the Covenant, the U.S. continues to engage in unlawful renditions in which the CIA kidnaps individuals and transfers them to countries known for their routine use of torture. Other detainees have been “disappeared” to secret detention facilities overseas.

U.S. violations of the prohibition against torture and other forms of abuse are not limited to actions by military personnel overseas in the “war on terror,” but in fact are far too ubiquitous at home. Prisoners and detainees inside the U.S. are subjected to conditions and brutal practices chillingly similar to those experienced by detainees abroad — prolonged solitary confinement, extreme temperatures, intimidation by dogs, painful restraints and electro-stun devices.

¹ Even before the government’s “war on terror”, this Committee expressed concern about the lower standards of due process afforded excludable aliens than other aliens. Using the “war on terror” as justification, the protections for undocumented workers have further significantly weakened.

² U.N. Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)* CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

D. Prohibition Of Slavery & Forced Labor (Article 8)

Migrant women workers in the U.S., particularly domestic workers, are held in conditions of servitude or forced labor in the U.S. The U.S. Report emphasizes abuse of those trafficked for sex work, and fails to recognize and address the serious abuses suffered by domestic workers. These workers remain highly vulnerable because they lack legal protections and because of the exploitative labor conditions to which they are subjected.

E. Right To Liberty and Security Of Person, Rights Of the Accused To Humane Treatment, and Expulsion Of Aliens Without Due Process (Articles 9, 10 & 13)

Since 1996, the U.S. government has dramatically scaled back the rights and remedies of aliens in removal proceedings, increasingly relying on harsh detention policies and creating new “expedited removal” proceedings that lack the most basic due process protections. In addition, in the aftermath of the September 11 terrorist attacks, the government embarked on a number of policies that systematically deprived aliens, particularly those from Muslim-identified countries, of their due process rights, and encouraged increased local enforcement of immigration law, thereby fueling anti-immigrant sentiment. These policies are particularly disturbing in light of the growing number of immigrants being detained – currently nearly 23,000 – a number that has doubled over the last ten years.³ Recent legislation would create a total of 60,000 detention beds for immigrants by 2010.⁴ Indeed, immigration detention now represents the fastest growing federal detention population in the country. National detention standards are routinely ignored and other abuses are widespread.⁵

F. Rights Of the Criminally Accused/Fair Trial (Article 14)⁶

Fundamental to a criminal justice system that is fair to all is the right of a person accused of a crime to be assisted by competent counsel. Yet, this right to counsel for the indigent accused, for both juveniles and adults, is fast becoming illusory in many U.S. states, in both nature and extent, and the brunt is often borne by the racial minorities who are confined at disproportionate rates. The U.S. Report refers to these indigent defense protections but fails to mention that today, many states are failing to adequately fund and supervise their indigent defense systems.

G. Right To Privacy (Article 17)

The U.S. government has seriously eroded the right to privacy by expanding its surveillance of ordinary Americans in the name of protecting national security. The USA Patriot Act authorizes the FBI to demand the personal records of people without probable cause or prior judicial approval. Documents show that the FBI has been monitoring and infiltrating peaceful political and religious groups. And most recently, the public learned that President Bush has authorized

³ See Forrest Wilder, “South Texas Hold’Em,” Texas Observer online (May 5, 2006), available at http://www.texasobserver.org/showArticle.asp?ArticleFileName=060505_holdem.html

⁴ The Intelligence Reform and Terrorism Prevention Act of 2004 approved a 40,000 bed increase in detention over the next five years. Pub. L. No. 108 – 408 §§ 7211 – 7214, § 5204, 118 Stat. 3638, 3825 – 3832 (2004).

⁵ See, e.g., January 11, 2006 letter to DHS Inspector General Richard Skinner from National Immigration Forum and other advocacy organization, documenting noncompliance with the standards and asking for audit; see also Nina Bernstein, “9/11 Detainees in New Jersey Say They Were Abused With Dogs,” New York Times (April 3, 2006).

the National Security Agency to conduct intrusive electronic surveillance of Americans with no check whatsoever against abuse.

H. Freedom Of Thought, Conscience & Religion (Article 18)

Although the U.S. has become increasingly pluralistic with regard to religion, and its laws do not on their face discriminate against others, Muslims have become targets of discrimination based on religion. Charitable funds are sequestered without publicly verifiable evidence of suspicious activity, and the government is not adequately promoting tolerance or enforcing anti-hate crimes laws to protect Muslims and also Jews.

I. Freedom Of Expression & Right Of Peaceful Assembly (Articles 19 & 21)

Historically the U.S. has been a staunch defender of freedom of expression. Since 9/11, however, the U.S. has engaged in policies that seriously threaten free expression rights and have a concrete chilling effect on the right of association. The U.S. government is denying visas to foreign scholars whose political views it disfavors pursuant to an “ideological exclusion” provision of the Patriot Act.⁷ The U.S. government has also been gathering intelligence information that is not connected to specific criminal activity, which has chilled lawful dissent. In another manifestation of this trend, the U.S. government has begun to take a highly restrictive interpretation of the federal open records request law, the Freedom of Information Act, and has refused to disclose a range of documents about its national security policies and practices.⁸

J. Freedom Of Association (Article 22, & Articles 17, 18 and 19)

Because of the U.S. government’s overbroad and unlawful monitoring and surveillance policies, and infiltration of groups without any suspicion of criminal activity, particularly of Arabs, Muslims and South Asians, these groups are now fearful of congregating as they used to do. This is in direct violation of the Article 22 mandate that “Everyone shall have the right to freedom of association with others ... ”

K. Rights Of the Child (Article 24 (& Articles 2 & 26: Non-Discrimination In the Enjoyment Of Rights))

The most vulnerable children are provided unequal education based on race; juvenile detention centers are warehouses of problem children rather than centers of rehabilitation, and poor children are barred – through no fault of their own – from certain state and federal welfare benefits. If children, whatever their beginnings, are to become good, productive citizens, these problems must be remedied, in accord with the Covenant rule that “Every child shall have without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a

⁷ 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

⁸ See, e.g., <http://www.aclu.org/tortureFOIA>; <http://www.aclu.org/spyfiles>; Complaint, *ACLU of Northern California v. DOJ and FBI*, No. 3:04cv04447(N.D. Cal. filed Oct. 21, 2004), available at <http://www.aclunc.org/911/041021-foia.pdf>

minor,”⁹ an individual right that exists *in addition* to a child’s rights to all the civil rights enunciated in the Covenant.

L. Right To Vote & Political Participation (Article 25)

The U.S. maintains in its Report that “[t]he U.S. political system is open to all adult citizens without distinction as to gender, race, color, ethnicity, wealth or property.”¹⁰ While the government professes to equally enforce all laws, the hollowness of this claim becomes readily apparent when the U.S. has repeatedly failed to protect the voting rights of people with felony convictions, of marginalized communities and the millions of voters who continue to be disfranchised in large part because of their race, ethnicity or economic conditions making it more difficult for people to participate in the political process.

M. Equality Before the Law (Article 26)

As evidenced by the images that flashed across the world in the wake of Hurricane Katrina, many parts of the U.S. remain severely segregated by race. Communities of color receive grossly unequal attention by federal, state and private entities compared to their white counterparts. The disparate treatment of minorities is also evidenced by the persistence of racial profiling, a practice law enforcement officials use to target individuals for suspicion of crime based on race, ethnicity, religion or national origin. While profiling practices were traditionally aimed primarily at African-Americans and Latinos, after the tragic events of September 11, their targets now also include Arabs, Muslims and South Asians. Selective prosecution of the drug laws and the use of mandatory minimum sentences in sentencing also persist in many parts of the U.S., and their brunt disproportionately continues to be borne by minorities.

N. Protection Of Minority Rights (Article 27)

The Human Rights Committee has indicated that affirmative action may be “require[d]” when States Parties’ failure to take such affirmative steps would perpetuate discrimination.¹¹ Thus, carefully crafted race-based affirmative action programs to ensure equal enjoyment of rights by all racial groups are plainly permissible, and in some circumstances may be required, under the ICCPR. Just such programs are under legislative assault in the U.S. and the U.S. Supreme Court has taken a narrow view of what is permissible affirmative action.

O. Reservations, Declarations and Understandings Of the United States To the ICCPR

Contrary to this Committee’s mandates, the U.S. government, in its latest report, refuses to reconsider in whole or in part any of its reservations, understandings and declarations to the

⁹ ICCPR art. 24, ¶ 1.

¹⁰ U.S. Report, ¶ 397.

¹¹ *United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights*, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 ¶ 10 (1994); U.N. Human Rights Committee, *General Comment No. 18: Non – Discrimination* ¶ 10 (Oct. 11, 1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

Covenant.¹² The U.S. government's failure to reconsider its positions together with the grossly inadequate domestic implementation of the ICCPR renders significant protections therein meaningless. Also significant, the U.S. continues to hew to its firmly held view that the Covenant does not apply to its actions outside the territory of the United States,¹³ thus claiming immunity for treaty violations by the U.S. military and the CIA in territories under U.S. control such as Iraq, Afghanistan and Guantánamo Bay. This position is inconsistent with the terms and purpose of the ICCPR and violates core principles such as the absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment.¹⁴

RECOMMENDATIONS TO THE UNITED STATES

Respect and Ensure Covenant Rights To All

- Ensure that federal judicial remedies, supplementing state jurisdiction, be available to redress discrimination and denial of constitutional and related statutory rights of persons detained in the “war on terror”, immigrants, minorities, women and undocumented persons.
- Undertake meaningful outreach to educate the federal, state and local judiciaries, as well as all levels of the American public, about U.S. government obligations under the Covenant.
- Take all necessary and reasonable measures to ensure the obligations of the Covenant apply throughout the territory subject to its jurisdiction and effective control.

Afford Equal Rights To Men and Women

- Revise federal sentencing guidelines and policies to reflect women's actual culpability with respect to drug crimes.
- Ensure that female prisoners are given training and educational opportunities equal to those given to male prisoners.
- Amend Violence Against Women Act to allow an individual to be able to seek redress, include economic security protections, and rescind the exception to the one-strike policy.
- Encourage the expansion of federal and state laws that protect domestic violence victims from housing and employment discrimination.

¹² U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, 292, U.N. Doc. No. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995) [hereinafter *Concluding Observations concerning the United States*], available at <http://www.unhcr.ch/tbs/doc.nsf/0/b7d33f6b0f726283c12563f000512bd1?Opendocument>.

¹³ U.S. Dep't of State, Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil & Political Rights § I, ¶ 3 (Oct. 2005) [hereinafter *U.S. Report*], available at <http://www.state.gov/g/drl/rls/55504.htm>.

¹⁴ See Article 7; World Organization for Human Rights USA, *Torture, Arbitrary Detention, And Other Major Human Rights Abuses By the United States; U.S. Non –Compliance with the International Covenant on Civil and Political Rights in the Context of the “War on Terror”* 9 – 11 (Feb. 2006), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/wofhr.pdf>.

Conduct Independent and Prompt Investigations Of Allegations Of Torture and Abuse

- Thoroughly and promptly investigate all allegations of torture and abuse in United States' prisons, jails and other detention facilities, including all facilities under the effective control of the United States.
- Establish independent oversight bodies to investigate complaints of torture and abuse by law enforcement and correctional officers and to monitor conditions in all prisons, jails, and detention centers in the United States.
- Hold accountable all individuals, including government officials, members of the armed forces, intelligence personnel, correctional officers, police, prison guards, medical personnel, and private government contractors and interpreters who have authorized, condoned or committed torture or cruel, inhuman or degrading treatment or punishment.

End Practice Of Unlawful Renditions and Secret Detentions

- Immediately end practice of rendering individuals to secret detention facilities or to countries where torture is a serious human rights problem.
- Ensure effective judicial review of all transfers of persons between the U.S. and other countries, and end reliance on diplomatic assurance to facilitate the transfer of detainees to countries if there are substantial grounds for believing that such persons might be subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Cease all secret detentions, including in all detention facilities under the effective control of the United States. Hold all detainees only in officially recognized detention facilities and grant all detainees and prisoners the right to promptly challenge their detention and access to legal counsel and independent doctors.

Prohibit Slavery & Forced Labor

- Urge the UN to adopt codes of conduct regulating the treatment and protection of migrant domestic workers and require their staff to abide by that code, taking disciplinary action in the event of violations.

Restore Due Process Rights Of All Aliens and Rights and Remedies Of Aliens In Removal Proceedings

- Discontinue use of arbitrary and pretextual detentions.
- Reform immigration policy immediately and ensure its compliance with human rights standards.
- Ensure that any border protection activities are conducted in a manner consistent with the Covenant and other human rights standards.
- Decriminalize violations of immigration laws.
- Order states to refrain from enforcing immigration laws.

- Prohibit “indefinite” and “mandatory” detention of individuals who pose no security or safety risks.
- Ensure meaningful judicial review of removal orders and detention.
- Discontinue the use of “expedited removal” proceedings.
- Reduce the *de jure* and *de facto* discrimination faced by non – citizens in federal prisons.

Respect the Rights Of the Criminally Accused

- Require states to properly fund and supervise their indigent defense systems.
- Curtail the excessive secrecy in the administration of justice.
- End the disproportionate confinement of people of color in prisons, jails and juvenile detention facilities.

Restore the Right To Privacy

- Cease and desist domestic surveillance of Americans without probable cause and prior judicial approval.
- Turn over documents related to unlawful spying on peaceful political and religious groups and individuals.
- Repeal or seriously modify the REAL ID Act, so that sensitive personal information will not find itself in the hands of data brokers and identity thieves.
- Base air traffic-related searches of individuals on suspicion, and conduct them within appropriate parameters.

Ensure Freedom Of Thought, Conscience & Religion

- Cease sequestering Muslim charities’ funds unless there is publicly verifiable evidence of suspicious activity.
- Public officials should engage in increased efforts to promote tolerance and enforce the law with regard to hate crimes that disproportionately target Muslims and Jews.

Honor the Obligation To Allow Free Expression & Peaceful Assembly

- Cease using the Patriot Act’s Ideological Exclusion provision to exclude those whose views the government disfavors.
- Cease unlawful monitoring of political and religious groups.
- Revert to original standards concerning requests for information under the FOIA.

Guarantee Children’s Rights

- Reduce minority over-representation in juvenile detention systems.

- Develop policies and practices for girls in juvenile detention that acknowledge their unique needs.
- Require schools to develop adequate disciplinary criteria and referral procedures, explain racial disparities in disciplinary referrals, maintain accurate discipline records, and report all incidents of racial harassment.

Expand the Right To Vote, Renew the Voting Rights Act, and Improve Implementation Of Voter Access Laws

- Allow all citizens, regardless of their criminal history, to vote. In the alternative, require all states to restore voting rights upon completion of a criminal sentence.
- Urge the U.S. Congress to renew the expiring provisions of the Voting Rights Act in order to protect the voting rights of all Americans.
- Improve voter access by enforcing the Help America Vote Act and National Voter Registration Act.

Guarantee Equality Before the Law

- Effectively plan for crises such as Hurricane Katrina, including by seeking meaningful participation from the community at all stages.
- Eradicate the racial disparities and persistent poverty in the Katrina region.
- Ban all continuing racial profiling practices by state law enforcement officers and ensure that states comply with bans already in place.
- Urge U.S. Congress to pass the End Racial Profiling Act of 2005.
- Urge repeal of state “three strikes” law.

Protect Minority Rights

- Promote affirmative policies that seek to remedy past discrimination for minorities and women.

THE FAILURE OF THE UNITED STATES TO COMPLY WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Equal Application Of Rights/Effective Remedies For Violations (Article 2)

Actions of the federal legislative and judicial branches of the U.S have seriously imperiled both the equal application of rights and availability of effective (or, in some cases, any) remedies. Over the last decade, there has been a serious erosion in the ability of, among others, immigrants, prisoners and detainees in the “war on terror,” to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a most potentially significant remedy.¹⁵ Recent U.S. Supreme Court cases have also sharply limited the ability of individuals to sue for civil rights violations. The Court has ruled that claims of racial or national origin discrimination must be accompanied by proof of intentional discrimination; showing disparate impact, however egregious, is insufficient. Concerning undocumented migrant worker’s rights, courts have severely circumscribed available remedies including back pay, state tort remedies and workers’ compensation, and have also made immigration status relevant in such litigation. Rights available to women have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order.

The U.S. Report fails to address this “roll back” of judicial remedies, saying simply that “U.S. law provides extensive remedies and avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights” citing those “previously reported” and additionally, the Violent Crime Control and Law Enforcement Act of 1994, for “violations committed by law enforcement officers.”¹⁶

The government’s obligations under Article 2 are of both a negative and positive nature: “...the obligation under the Covenant is not confined to the respect of human rights, but ...States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities to enable individuals to enjoy their rights” (emphasis added).¹⁷

1. *Legislative Stripping Of Federal Courts’ Habeas Powers*

a. *Anti-Terrorism and Effective Death Penalty Act Of 1996*

Congress began scaling back federal court power to grant habeas review with the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The AEDPA limits the ability of state detainees to bring habeas corpus claims in federal court and curtails the ability of federal courts to review

¹⁵ Even before the government’s “war on terror”, this Committee expressed concern about the lower standards of due process afforded excludable aliens than other aliens. Using the “war on terror” as justification, the protections for undocumented workers have weakened significantly further.

¹⁶ U.S. Report, ¶ 59.

¹⁷ U.N. Human Rights Committee, *General comment No.03: Implementation at the national level (Art. 2)* (1981), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/c95ed1e8ef114cbec12563ed00467eb5?OpenDocument&Click=](http://193.194.138.190/tbs/doc.nsf/(Symbol)/c95ed1e8ef114cbec12563ed00467eb5?OpenDocument&Click=)

state court decisions for constitutional error.¹⁸ Although the U.S. Justice Department also took the extreme position that the AEDPA, along with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), had eliminated habeas corpus review of deportation orders, the ACLU obtained an important Supreme Court victory limiting this view in *INS v. St. Cyr*, which preserved habeas corpus review for immigrants facing deportation.¹⁹

Pending legislation would even further restrict habeas review by federal courts in criminal cases.²⁰ That legislation, the Streamlined Procedures Act, would amend the AEDPA to further reduce federal courts' habeas powers by revoking federal court jurisdiction to review constitutional errors in sentencing deemed 'harmless' by the state courts. It would apply to all cases, including capital cases.

Before the AEDPA's passage, between 1976 and 1991, death row inmates were granted relief in 47 % of all habeas cases, underscoring the need for appellate review beyond the direct appellate process.²¹ Additionally, "there have been no systematic trial-level improvements that have coincided with the AEDPA's adoption and implementation."²² The new legislation will only perpetuate the flaws of the AEDPA creating a legal environment that will drastically curtail the ability of federal courts to adjudicate meritorious claims. Given the U.S. government's capital punishment reservation to Article 6, those safeguards are even more critical and warrant repeal of the AEDPA.

b. *The Detainee Treatment Act Of 2005 (DTA)*

Despite the Supreme Court's June 2004 decision in *Rasul v. Bush* confirming that Guantánamo detainees can bring habeas corpus petitions to challenge the legal and factual bases for their detentions in U.S. courts, recent legislation has stripped federal courts of their jurisdiction to hear habeas petitions brought by Guantánamo Bay detainees, in yet another escalation in the government's practice of claiming immunity for human rights abuses carried out in connection with its efforts to combat terrorism.

The DTA prohibits cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the U.S. government, and does so regardless of nationality or physical location.²³ However, it goes on to strip Guantánamo Bay detainees of their habeas rights, both in

¹⁸ Anti – Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104 – 132, § 101 – 08, 110 Stat 1214 (1996).

¹⁹ IIRIRA, Pub. L. No. 104 – 208, 110 Stat. 3009 – 546; *INS v. St Cyr*, 553 U.S. 289 (2001).

²⁰ *See, e.g.*, Streamlined Procedures Act of 2005, S. 1088 and H.R. 3035, 109th Cong. (2005).

²¹ Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?* 27 LOY. U. CHI. L.J. 523, 526 (1996).

²² James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411, 425 (2001).

²³ Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub.L. No. 109 – 148 § 1003, 119 Stat. 2680, 2793 (2005)

future *and* in pending cases, eliminating the only legal remedy previously available to them to challenge the legality of their prolonged and arbitrary detention.²⁴

In ensuing litigation, the government asserted that the *Rasul* holding is now limited by the DTA in that detainees are allowed to file court challenges but the courts – under the DTA – are prevented from ruling on those motions.²⁵ The DTA also purports to prohibit Guantánamo detainees from challenging the facts behind their designation as “enemy combatants,” even if new evidence comes to light; any mistreatment in detention or during interrogation; or rendition to a third country where they might be subjected to torture or other forms of cruel, inhuman, and degrading treatment. In addition, the DTA fails to clearly prohibit the Department of Defense from considering evidence obtained through torture or other coercive measures in assessing the status of detainees held in Guantánamo Bay. Somewhat ironically, the U.S. government, which immediately moved to dismiss all 186 pending Guantánamo Bay detainee habeas petitions, is now expressing concern about repatriating these detainees to their home countries for fear of torture and other ill treatment.²⁶ Both the U.N. Commission on Human Rights and the U.N. Committee Against Torture have expressed grave concern about the now even more limited procedures available to detainees.²⁷

c. *REAL ID Act*

In the past decade, the U.S. government has similarly restricted judicial review of immigration decisions, beginning in 1996 with the AEDPA and the IIRIRA. In 2002, the U.S. severely streamlined the administrative appeals allowed for individual non-citizens (including those

²⁴ *Id.* at § 1005. Under this legislation, detainees could only access a court for a very narrow set of claims after the initial designation as an “enemy combatant” by a Combatant Status Review Tribunal or after conviction by a military commission. Despite the fact that the statute did not take effect until December 30, 2005, and a presumption in U.S. law against retroactivity in statutes divesting petitioners from substantive rights, the Bush Administration has filed notice that it will seek have over 180 pending cases dismissed. Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, WASH. POST, Jan. 5, 2006.

²⁵ On January 12, 2006, the Department of Justice filed a motion with the Supreme Court to dismiss *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05 – 184), a case which challenges the constitutionality of military commissions. The government, citing the DTA, which states that the law “shall take effect on the date of the enactment of the Act,” argues that only the U.S. Court of Appeals for the District of Columbia has jurisdiction to hear cases by Guantánamo detainees. Brief for Respondent’s Motion to Dismiss for Lack of Jurisdiction, at 1 – 2, *Hamdan v. Rumsfeld*, No. 05 – 185 (S.Ct. filed Aug. 8, 2005). Thus, the government contended that all pending cases before any U.S. court should be dismissed for lack of jurisdiction. The Supreme Court heard oral argument in this case on March 28, 2006.

²⁶ Tim Golden, *U.S. Says It Fears Detainee Abuse in Repatriation*, NEW YORK TIMES (Apr. 30, 2006). “Since 2002, the Defense Department has sent 187 Guantánamo detainees to their home countries to be released and 80 more for continued incarceration. Panels of military officers at Guantánamo who reviewed the status of 463 prisoners last year recommended 120 transferred to foreign custody and 14 released outright. But only 15 of those 134 prisoners have thus far been sent home, a military spokesman said. The rest — along with 22 others whose transfer or release was approved earlier and 9 more who have been deemed ‘no longer enemy combatants’ — remain at Guantánamo.” *Id.*

²⁷ The U.N. Working Group on Arbitrary Detention recently noted that especially Section 1005 of the DTA – depriving courts of jurisdiction to hear habeas applications by Guantánamo Bay detainees – aggravated concerns raised by the shortcomings of the combatant status review tribunals and administrative review board procedures in place to try detainees. U.N. Commission on Human Rights, *Situation of Detainees at Guantánamo Bay* ¶ 29, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006). Conclusions and Recommendations of the Committee Against Torture, United States of America (Advance Unedited Version (May 18, 2006)) (CAT/C/USA/CO/2), paras. 28 – 30, available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>.

lawfully present). As a result, a body known as the Board of Immigration Appeals (BIA) began summarily affirming deportation orders without written legal opinions at an unprecedented rate.

The U.S. government also recently imposed severe restrictions on the availability of habeas corpus remedies in cases involving refugees and immigrants under the REAL ID Act, passed in 2005.²⁸ In particular, the statute seeks to eliminate habeas corpus review for immigrants challenging deportation for the first time. The government's purported justification is that it will provide an adequate substitute: appeal to the court of appeals. However, the REAL ID Act contains significant so-called streamlining provisions that could have the effect of restricting or eliminating federal court review over immigration deportation decisions in a wide range of cases, including where refugees seek asylum or are fleeing torture and where immigrants have lived in the U.S. for decades and have U.S. citizen family. The U.S. Attorney General has already taken a very narrow view of the kinds of challenges to deportation orders that are reviewable in the courts of appeals.

The REAL ID Act also effectively raises the bar for asylum applicants and individuals seeking relief from removal by manipulating evidentiary burdens and standards, and restricts the authority of the courts to overturn adverse rulings. Specifically, the bill would make it easier for the government to send asylum-seekers back to the countries they are fleeing by increasing their burden of proof and requiring written "corroboration" of their claims, contrary to international law. These heightened requirements apply not only to asylum applications but also to those brought pursuant to the Convention Against Torture and the federal Violence Against Women's Act, among others. Additionally, the REAL ID Act seeks to prohibit courts from reviewing an immigration judge's determination on the availability of corroborating evidence. The REAL ID Act would also make it possible to deport long-term, lawful, permanent residents for providing non-violent, humanitarian support to organizations labeled "terrorist" by the government. In violation of Article 15(1), this provision would apply even when such support was completely legal at the time it was provided.

As a result of these changes, most non-US citizens and foreign nationals challenging deportation, including those with legitimate fears of persecution and torture, now find appeal to a higher authority impossible to obtain, and those whose cases are reviewed are not sufficiently protected against illegal deportation in violation of both Articles 2(3) and 14 of the ICCPR.²⁹

2. *Constitutional Jurisprudence "Rolling Back" Civil Rights Remedies For Minorities*

Racial discrimination and racial injustice remain significant problems in American society. Despite the substantial progress of the last 40 years, people of color are substantially more likely to be poor, have less access to quality education, and in part because of these factors, more likely

²⁸ REAL ID Act of 2005, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109 – 13, Div. B, 119 Stat 231, 302 – 23 (2005).

²⁹ Article 14 provides that persons convicted under the law shall have the right to review by a higher court. But REAL ID purports to eliminate habeas review for immigrants who claim to have been unlawfully treated by the Department of Homeland Security. There is also a likely violation of Article 14 of the Universal Declaration of Human Rights, which provides for the right to seek asylum when an individual fears persecution for a fundamental aspect of their identity including race, religion, nationality, membership in a social group and political opinion.

to become court-involved. The legal and political successes of the civil rights movements of the 1950s and 1960s involved, mainly, the removal of formal, explicit barriers to equality and racial desegregation. An important first step, this was followed by gains in educational attainment, income, and political and civic participation. Since then, the challenge has been to address less explicit forms of discrimination and injustice. However, the tools with which these injustices may be tackled are being severely curtailed by court decisions. For example, in 2001, the Supreme Court held that individuals have no right of action for violation of disparate impact regulations prohibiting federally funded entities from discriminating based on race, color or national origin.³⁰ And in 2000, the Court held that the U.S. Constitution's Eleventh Amendment immunity for states prohibits state employees from suing for age and disability discrimination.³¹

The most damaging of these cases in the assault on private enforcement of civil rights laws is the Supreme Court's 2001 ruling in *Alexander v. Sandoval*, that the disparate impact regulations of Title VI of the 1964 Civil Rights Act, which covers a broad range of federally funded programs, are not privately enforceable.³² Private individuals can no longer sue for discrimination under civil rights statutes unless they can prove the discrimination was intentional. Similarly, the Supreme Court ruled in 2001 in *Garrett v. Board of Trustees of the Univ. of Alabama* and in 2000 in *Kimel v. Florida Bd. of Regents* that the Eleventh Amendment to the U.S. Constitution bars individuals from bringing damages actions against states under the federal Age Discrimination Act and the Americans with Disabilities Act. Finally, in *Gonzaga v. Doe*, the Supreme Court limited the ability of individuals to use the federal civil rights law known as Section 1983 when states or entities violate certain statutes. The Human Rights Committee has stated that "discrimination" prohibited by the ICCPR includes conduct that has a discriminatory purpose or effect.³³ It is vital to restore these legal remedies in order to continue to combat the ongoing racial discrimination and to comply with the Covenant.³⁴

3. Courts are Undermining Equal Protection Of Undocumented Migrant Workers

There are an estimated 9.3 million undocumented workers in the U.S.³⁵ In 2002, in *Hoffman Plastic Compounds, Inc. v. NLRB*, the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to order an award of back pay – compensation for wages an individual would have received had he not been unlawfully terminated before finding new employment – to an undocumented worker who had been the victim of an unfair labor

³⁰ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³¹ *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

³² *Alexander*, 532 U.S. 275 – 277.

³³ General Comment 18: Non – Discrimination: 10/11/89. CCPR General Comment No. 18 (General Comments), para. 7.

³⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

³⁵ Jeffrey S. Passel, Randy Capps, and Michael Fix, *Undocumented Immigrants: Facts and Figures*, Urban Institute Immigration Studies Program (Jan. 2004), available at http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

practice by his employer.³⁶ Since then, employer defendants have invoked *Hoffman* to argue that undocumented workers are not entitled to backpay or other remedies under labor or employment-related statutes, including Title VII (employment discrimination), the Americans with Disabilities Act (disability discrimination), the Age Discrimination in Employment Act, the Fair Labor Standards Act (setting forth right to federal minimum wage and overtime), state workers' compensations schemes, and state law counterparts to the federal anti-discrimination and wage and hour laws.

a. *Courts Extend Hoffman Case*

Some courts have exported the *Hoffman* rationale into other contexts, curtailing both undocumented workers' access to courts and entitlement to various rights and remedies. For example, a New Jersey state court in *Crespo v. Evergo* effectively eliminated certain undocumented workers' right to be free from discrimination in the workplace by interpreting *Hoffman* to preclude the ability of undocumented migrants terminated for discriminatory reasons to avail themselves of the protection afforded by New Jersey's anti-discrimination law.³⁷ Because federal discrimination statutes only apply to private employers with a minimum of 15 employees, the practical effect of such a ruling is that any undocumented migrant who works for an employer with less than 15 employees in New Jersey has no enforceable right to be free from discriminatory termination in the work place.

In addition to excluding undocumented migrants from protection of state anti-discrimination laws, tort remedies or workers' compensation protection in some states, one collateral effect of all the post-*Hoffman* litigation has been to make immigration status a focal point in all employment-related litigation, such that employers vigorously seek documents during litigation concerning employee immigration status. Some courts have justified ordering such information to be turned over on the grounds that it is relevant to the employers' ability to defend against the workers' claims, such as by using their status to attack their credibility or limit their emotional distress damages. Immigrant workers are thus understandably afraid to come forward to enforce their rights, and are forced, when seeking compensation for workplace discrimination, to subject themselves to intrusive inquiries that could have very serious consequences, such as criminal prosecution or deportation. Even legally authorized workers are reluctant to come forward for a number of reasons, including fear that participation in an enforcement action might somehow expose the immigration status of loved ones.

For example, in *Campbell v. Bolourian*, a legally authorized live-in domestic employee denied federal or state minimum wage and overtime pay by defendants filed suit for back pay after leaving her employer.³⁸ During discovery, the Bolourians demanded information concerning her immigration status *after* she ceased working for them arguing that it was relevant because even though it was undisputed that she was legally authorized to work throughout the term of her

³⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The ACLU filed a friend – of – the – court brief supporting the respondent, NLRB, in 2001, arguing that back pay awards were proper under the circumstances. Brief of Amici Curiae of American Civil Liberties Union Foundation and Make the Road by Walking, Inc. in Support of Respondent, *Hoffman Plastic Compounds, Inc. v. NLRB*, available at http://www.aclu.org/images/asset_upload_file821_21993.pdf.

³⁷ *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).

³⁸ *Campbell v. Bolourian*, No. 250979 – V (Cir. Ct. Montg. Cty. May 6, 2005).

employment with them, it shed light on her motives for bringing the suit.³⁹ The trial judge ordered the discovery, which Campbell appealed.⁴⁰ The ACLU of Maryland, along with the Public Justice Center and other organizations, submitted a friend-of-the-court brief for Mrs. Campbell.⁴¹ It was argued, *inter alia*, that relevant federal and state wage laws applied regardless of an employee's immigration status, and that allowing such intrusive discovery demands would intimidate undocumented and other immigrant workers and dissuade them from pursuing legal recourse from abusive and unscrupulous employers. In addition, it was argued that even if immigration status were somehow relevant, Campbell was nonetheless entitled to a protective order against discovery of her current immigration status because the harms – the chilling effect on the enforcement of worker rights – greatly outweighed the employers' need for information.⁴²

In *Sierra v. Broadway Plaza Hotel*,⁴³ the ACLU represented 4 housekeepers from Mexico who worked in a large hotel in Manhattan where they were subjected to severe sexual harassment by the housekeeping supervisor and not paid for working overtime as required by federal and state law. Although this case ultimately settled, as a result of *Hoffman*, plaintiffs did not seek back pay remedies in order to avoid any inquiry into their immigration status in the course of the litigation.

By making immigration status potentially relevant in employment-related litigation, *Hoffman* has undermined the ability of all migrant workers, documented or not, to enforce their right to be free from discrimination, their right to a fair wage and overtime, their right to be compensated for work-related injuries, and other workplace rights. *Hoffman* has thus effectively undermined the equal protection and access to remedies of undocumented and other migrants under U.S. labor and employment laws.

The U.S. government emphasizes that *legal aliens* enjoy equal protection of the laws, but fails to discuss the legal standing of *undocumented* persons at all.⁴⁴ Although the government mentions *Hoffman* briefly in connection with labor association rights, it fails to acknowledge in its Article 2 discussion that *Hoffman* denied equal legal remedies to an undocumented worker, and that post-*Hoffman* litigation tactics by private employers have seriously weakened the enforcement of workplace rights for undocumented persons.⁴⁵ The government also fails to explain that while legal aliens nominally enjoy some rights, effective enforcement of those rights is a separate matter. In addition, the government fails to acknowledge that many immigrants are unfamiliar

³⁹ Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006), available at <http://www.publicjustice.org/news/index.cfm?newsid=93>.

⁴⁰ *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).

⁴¹ Brief of Amici Curiae of Public Justice Center, *et al.*, *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).

⁴² *Id.*; Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006). The Court of Appeals of Maryland (the state's highest court) decided to consider the case itself, but the parties reached a settlement agreement before oral argument. Press Release, Public Justice Center, PJC Brief Leads to Settlement for Immigrant (May 8, 2006), available at <http://www.publicjustice.org/news/index.cfm?newsid=111>.

⁴³ *Sierra v. Broadway Plaza Hotel* Equal Employment Opportunity Commission charges available at, <http://www.aclu.org/FilesPDFs/wrp%20complaint%20to%20eoc.pdf>.

⁴⁴ U.S. Report ¶¶ 42 – 45.

⁴⁵ U.S. Report ¶ 343.

with the complicated legal distinctions of immigration law, and that even some legal immigrants may be confused about their status and thus be afraid to come forward to enforce their rights out of fear of revealing their immigration status. Furthermore, many families are mixed-status families, and thus even legal immigrants may be reluctant to enforce their rights out of concern that such action may draw attention to the undocumented status of family members. Finally, immigration status is not static. Immigrants who have legal status for some time may eventually fall out of status. All of these factors bear on the weakened ability of immigrants, undocumented or not, to effectively enforce their rights under the law.

4. *Rollback Of Civil Rights Remedies For Women*

The rollback in civil rights protections has specific ramifications for women. Two Supreme Court cases in particular, *United States v. Morrison* and *Castle Rock v. Gonzales*, erode federal civil remedies for female victims of domestic violence.⁴⁶ In *Morrison*, the Court held that Congress did not have the power to create a private cause of action, and in *Gonzales*, the Court refused to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order.⁴⁷

Morrison arose out of an alleged sexual assault perpetrated against a college student. After the school's disciplinary procedures failed to punish the alleged perpetrators, the student filed suit under a provision that provides a federal civil remedy for victims of gender-motivated violence. In 2000, the U.S. Supreme Court held that this provision exceeded Congress's powers despite voluminous congressional findings justifying congressional power based on both Congress's reasoning that gender-motivated violence in the aggregate negatively impacts interstate commerce and the need to avoid gender bias in the state systems.⁴⁸ Apparently entirely unaware of the principle that ratified treaties federalize issues otherwise delegated to the states, the Court noted that the fact that the law applied uniformly nationwide bound even those municipalities without any history of discrimination or bias against victims of gender-motivated violence, and that violence against women is a local not national issue and a matter therefore for state law. Accordingly, there is now no federal judicial remedy to compensate women for violence by private actors.

The possibility of a federal remedy under a civil rights provision against local officials who fail to protect persons from privately inflicted violence when they know of it was also recently shut out in the *Gonzales* case. Mr. Gonzales violated a restraining order against him and abducted his daughters from his ex-wife's home. Ms. Gonzales reported the abduction to the police and informed them that her husband had a history of mental instability and erratic behavior. She phoned repeatedly and pleaded with the police to help her retrieve her children. The police repeatedly refused to enforce the restraining order. Ten hours after the abduction, Mr. Gonzales opened fire outside of the police station and was immediately shot and killed. The police discovered the bodies of the three murdered Gonzales children in his truck. Ms. Gonzales filed suit alleging violation of 42 U.S.C. Section 1983, a federal civil rights provision for denial of due process and equal protection of the laws. The U.S. Supreme Court refused to recognize her right

⁴⁶ *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Castle Rock*, 125 S. Ct. 2796 (2005).

⁴⁷ *Id.*

⁴⁸ *Morrison*, 529 U.S. at 618 – 20.

to relief, holding that the government had no affirmative duty to protect its citizens from privately inflicted violence despite the existence of a valid protective order, a state law requiring arrest for any violations of a protective order, knowledge of imminent harm and opportunity to act to prevent the harm. As a result, the only recourse for such violations is in state courts, which tend to discriminate against victims of gender violence, and also generally provide state officials immunity for such conduct. Accordingly, there is also now no federal remedy to compensate for the failure of state actors to protect women from and/or prevent domestic violence.⁴⁹

In an effort to seek redress for this systemic failure of the police and other governmental actors to respond to domestic violence victims, and to raise awareness of this problem, the ACLU filed a petition with the Inter-American Commission on Human Rights in December 2005. The Commission has notified us that it has passed the petition to the U.S. government for its response, due June 2006.

a. *Many States Do Not Provide Remedies For Domestic Violence Victims*

In some states, there are avenues for holding law enforcement officials accountable when police officers fail to provide the protection mandated by state law. But in others, including Colorado where the *Gonzales* suit arose, there are no such remedies. There, the doctrine of sovereign immunity sharply limits the utility of any such tort remedy shielding government officials from liability with certain stated exceptions. The sovereign immunity obstacles vary from state to state.

Few states have general, explicit anti-discrimination provisions protecting domestic violence victims that are enforceable through a private right of action. Instead, there are piecemeal protections in a handful of states for individuals in certain situations, often without a private enforcement option. Thus, without uniform federal legislation, many victims remain unprotected.

In the housing arena, no court, in litigation arising under the federal Fair Housing Act, has ruled definitively that the Act prohibits discrimination against women who have experienced domestic violence.⁵⁰ One court, however, has recognized that discrimination against victims of domestic violence is illegal sex discrimination when based on gender stereotypes and would therefore violate the Fair Housing Act's prohibitions against sex discrimination.⁵¹ Further, some states

⁴⁹ In this case, the Court's decision also distorts state legislatures' intent in requiring enforcement of protective orders and ignores the dynamics of police non – responsiveness to domestic violence that led to these laws. It displays blindness to the realities of domestic violence and the legal structures created to respond to it.

⁵⁰ Fair Housing Act, Pub. L. No. 90 – 284, 82 Stat. 73 (1968).

⁵¹ See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (finding police officer's statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on likely sufficient to support a claim of sex discrimination); *Bouley v. Young-Sabourin*, 394 F. Supp.2d 675 (D. Vt. 2005) (finding plaintiff stated a case of sex discrimination under the Fair Housing Act when she showed that less than 72 hours after her husband assaulted her, her landlord issued a notice to quit); *Smith v. Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994) (finding plaintiff stated a claim for sex discrimination in challenging a police policy for responding to domestic violence complaints that assumed the complainant was an upset and irrational woman unlikely to press charges and that the alleged abuser had the right to exercise dominion and control over the victim's home); see also *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528 – 29 (D. Conn. 1984) (denying motion to dismiss claim of sex discrimination based on City's failure to provide police assistance to battered women).

have enacted legislation that offers greater protection for victims of domestic violence including Rhode Island, Washington, and North Carolina, which prohibit landlords from evicting or otherwise discriminating against tenants because they have experienced domestic violence.⁵² A tenant may also break her lease if she needs to move to protect herself.⁵³

In terms of economic security, while no federal law protects domestic violence victims, some recently enacted state laws do provide limited assistance to victims of domestic or sexual violence so that they can maintain the economic security they need to address the violence in their lives. About half of the states now explicitly provide unemployment insurance benefits to victims of domestic violence who have left a job because of the violence; several states require employers to provide victims time off from work to address the violence; and others provide defenses to individuals who are subject to eviction proceedings based on violence against them or their having sought emergency services.⁵⁴

B. Equal Rights For Men and Women (Article 3)⁵⁵

There is an affirmative obligation on state parties to the Covenant to “take all steps necessary” in the “public and private” sectors to eliminate practices that “impair the equal enjoyment of rights.”⁵⁶ While the U.S. government has made some efforts toward these ends, it has not affirmatively provided certain requisite protections. These include protections for women in the criminal justice system; housing and economic security protections for female victims of domestic violence; and, protections against the economic and sexual exploitation of low-wage migrant women workers. In its report, the U.S. government does discuss the recently reauthorized federal Violence Against Women Act (VAWA), commendable legislation that goes some way toward alleviating some of the housing problems female domestic violence victims suffer, but not without serious deficiencies including – but not only – because it allows public housing authorities to evict domestic violence victims if the landlord can prove that there is an

⁵² R.I. GEN. LAWS § 34 – 37 – 1 to 3 (1956); WASH REV. CODE ANN. §§ 59.18.570, .580, .585 (2006); N.C. GEN. STAT. ANN. § 42-40, - 42.2 (2005).

⁵³ See, e.g., WASH REV. CODE ANN. §§ 59.18.570-575 (2006); OR. REV. STAT. §§ 90.453-459.

⁵⁴ Legal Momentum, *State Law Guide: Housing Laws Protecting Victims of Domestic Violence* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/housing.pdf>; Legal Momentum, *State Law Guide: Unemployment Insurance Benefits* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/ui.pdf>; Legal Momentum, *State Law Guide: Time Off From Work For Victims Of Domestic Or Sexual Violence* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/timeoff.pdf>; Legal Momentum, *State Law Guide: Employment Discrimination Against Domestic or Sexual Violence Victims* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/discrim.pdf>; Legal Momentum, *Domestic Violence Workplace Policies* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/policies.pdf>; Legal Momentum, *State Law Guide: Workplace Restraining Orders* (Jan. 2006), available at <http://www.legalmomentum.org/issues/vio/policies.pdf>.

⁵⁵ The ACLU's Reproductive Freedom Project works to protect everyone's reproductive rights and access to the full spectrum of reproductive health care, including sexuality education, family planning services, prenatal care, childbearing assistance, and abortion care. Although their work is not included in this report, please see <<http://www.aclu.org/reproductiverights/index.html>> <http://www.aclu.org/reproductiverights/index.html> for the full range of their activities. We note that another U.S. NGO working on similar issues, the Center for Reproductive Rights, has submitted a shadow report on reproductive rights. That report is on the Human Rights Committee's website at: http://www.ohchr.org/english/bodies/hrc/87ngo_info.htm.

⁵⁶ U.N. Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)* CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

“actual and imminent threat” to other tenants or staff if the victim is not evicted.⁵⁷ The U.S. report does not address VAWA’s limitations, measures to redress the inequities attendant on court and prison-involved women or the economic discrimination that plagues low-wage women migrant workers.

I. *Criminal Justice Discrimination*

a. *Drug Sentencing Policies Harm Women and Their Families*

The American drug war, premised on the reduction of the use, abuse, and sale of illegal drugs, has been largely ineffective in quashing the supply and demand of drugs in the U.S.⁵⁸ Instead, the policies have resulted, *inter alia*, in a dramatic increase in the number of women convicted for low-level drug offenses, disproportionately minorities. Nationally, there are over 1 million women under some form of criminal supervision.⁵⁹ In 2005, there were eight times as many women incarcerated in state and federal prisons and local jails as in 1980. The number increased from 12,300 in 1980 to 182,271 by 2002.⁶⁰ Women of color are significantly overrepresented in the criminal justice system. In 2004, black women were 4.5 times more likely than white women to be incarcerated.⁶¹ Women account for only 8% of convicted violent felons.⁶² In 1997, 44% of Hispanic women and 39% of African-American women incarcerated in state prison were convicted of drug offenses, compared to 23% of white women, and 26% and 24% of Hispanic and African-American men, respectively.⁶³ Between 1986 and 1999, the number of women incarcerated in state facilities for drug related offenses increased by 888%, surpassing the rate of growth in the number of men imprisoned for similar crimes.⁶⁴

To sharpen the teeth of anti-drug legislation, Congress extended the reach of the anti-drug laws to minor players and in some cases non-participants in drug trafficking by adding in 1988 the crime of “conspiracy to commit a drug offense” to the list of crimes that warrant the imposition of a federal “mandatory minimum” sentence, inflexible sentences that can be very long and give judges no discretion to depart therefrom.⁶⁵ Women, often the girlfriends and wives of the drug

⁵⁷ U.S. Report ¶¶ 81-86; Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

⁵⁸ See generally, ACLU; Break the Chains: Communities of Color and the War on Drugs; The Brennan Center at NYU School of Law, *Caught in the Net: The Impact of Drug Policies on Women and Families* 3 (Mar. 2005) (prepared by Lenora Lapidus, Namita Luthra, Anjali Verma, Deborah Small, Patricia Allard, Kirsten Levinston) [hereinafter *Caught in the Net*], available at http://www.aclu.org/images/asset_upload_file743_23513.pdf.

⁵⁹ Women in Prison Project, *Women in Prison Fact Sheet* 1, Correctional Association of New York (Mar. 2002) [hereinafter *Women in Prison Fact Sheet*], available at http://www.correctionalassociation.org/WIPP/publications/Women_in_Prison_Fact_Sheet_2006.pdf.

⁶⁰ *Caught in the Net*, at 3; Fox Butterfield, *Women Find a New Arena for Equality: Prisons*, New York Times, Dec. 29, 2003.

⁶¹ Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prison & Jail Inmates at Midyear 2004* 11 (Apr. 2005) (prepared by Paige M. Harrison and Allen J. Beck, Ph.D), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>.

⁶² Bureau of Justice Statistics, U.S. Dep’t of Justice, *Criminal Offender Statistics*, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#women>.

⁶³ *Caught in the Net*, Executive Summary.

⁶⁴ *Caught in the Net*, Executive Summary.

⁶⁵ *Caught in the Net* at 35.

traffickers, are now vulnerable to prosecution and incarceration based on their associations rather than their conduct, and some serve longer prison sentences than the traffickers themselves.⁶⁶ Prosecutors offer pleas and reduced sentences to those who can supply “substantial assistance” to the drug investigators, which these low-level participants can rarely if ever, provide, and thus they cannot avail themselves of these reduced sentences. Fearing draconian mandatory minimum sentences, women will often plead guilty to any lesser charge even where totally uninvolved in the offense, giving prosecutors involved excessive and unfair bargaining power.⁶⁷

For example, Brenda Prather was sentenced to forty years to life in prison after being convicted of the crime of selling a controlled substance. Brenda was charged after her husband twice sold drugs to an undercover New York State police officer. The act triggering liability was Brenda’s handing her husband a roll of aluminum foil from their kitchen. Her husband used the foil in a subsequent drug transaction. Despite her husband’s testimony that Brenda had no knowledge of the drug transaction for which the state charged her, the state imputed knowledge of the drug transactions to her.⁶⁸

b. Prisons Provide Fewer Vocational and Education Programs To Women Than Men

The opportunity to gain skills in vocational and educational programs is obviously important in assisting formerly incarcerated women as they rebuild their lives and seek gainful employment. Yet, some state prison systems offer far fewer vocational and educational programs in women’s correctional facilities than in those of men. Until June 2005, the New York State Department of Corrections offered 30 different programs in male prisons and only 11 programs in female prisons.

c. Women On Death Row

1. Prosecution Of Women In Capital Cases Should Include Investigations Of Abuse

Women charged with capital crimes face nearly insurmountable obstacles, one of the most pressing being the difficulty in getting qualified counsel. Where counsel are obtained, they generally lack resources and bear heavy caseloads.⁶⁹ Studies have shown a high incidence of unqualified attorneys being assigned capital punishment cases, with disturbing results.⁷⁰

⁶⁶ *Caught in the Net* at 35, 47.

⁶⁷ *Caught in the Net* at 41-42.

⁶⁸ *Caught in the Net* at 36; see *New York v. Prather*, 249 A.D. 2d 954 (N.Y. App. Div. 1998).

⁶⁹ Phyllis Chesler, “A Double Standard for Murder,” *New York Times* (Jan. 8, 1992), and as reprinted in ACLU, et al., *The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women* 6-7 (Dec. 2004) [hereinafter *Forgotten Population*], available at <http://www.aclu.org/womensrights/crimjustice/13270pub20050120.html>

⁷⁰ *Id.* In states that do not offer public defender services, courts frequently appoint unqualified (no capital case experience) or ineffective counsel. Studies have also shown that a high number of capital defense attorneys have been subject to disciplinary actions. In Washington State, 20% of the 84 prisoners who faced execution from 1981 to 2001 had lawyers who were later disbarred, suspended, or arrested. *Id.*

An important mitigating factor in capital crimes is a history of abuse prior to the crime. Surveys of women prisoners and women Death Row inmates report a high incidence of previous abuse either in childhood or at the hands of intimate partners during adulthood. Of all the women in prisons and jails, almost half reported having been abused before their incarceration.⁷¹ Out of a sample of 66 women who were on Death Row – twenty (30%) reported that spouses or partners had regularly battered them, seven (11%) stated they had been severely beaten as children, and nine (14%) stated they had been abused as both children and adults.⁷²

2. *Conditions Of Confinement Include Extreme Isolation*

Women serving death sentences are often subject to extreme isolation. Of the states sentencing prisoners to death, seven states have a lone woman on Death Row. Many prison facilities housing women on death row limit their interaction with other prisoners and staff members.⁷³ This isolation has led to maltreatment at the hands of virtually unaccountable prison guards. For example, Aileen Wuornos, executed by the State of Florida in 2002, was, according to author Phyllis Chesler who developed a relationship with Wuornos before her death, physically and psychologically abused while isolated on Death Row in a Florida prison:

[S]he spent long periods of time in solitary confinement, freezing and naked. She had been deprived of daylight and exercise and is often forbidden to phone her lawyer. Ms. Wuornos cannot hear or see very well, but her frequent requests for a hearing aid and glasses have all been denied, as has her permission for her to see a gynecologist for her almost continual heavy bleeding. She has lost 40 pounds.⁷⁴

...guards spitting in food trays, brought hours late, tampering with air conditioning and water pressure, unnecessarily peering into the cells and talking about sexually assaulting her on the way to her execution.⁷⁵

Or, in the case of another Death Row inmate, when the prison chaplain came to tell her that her son had been murdered,

She was put in chains and then the chaplain told her. ... The body language of the officers made her afraid to show any emotions or react in a way that would make them strip her down or put her in confinement. She asked to see the psychiatrist; she was told that the psychiatrist had no time in her schedule for her.⁷⁶

Despite their isolation, women on death row still suffer sexual harassment and assault, usually committed by prison staff. One in five of those who replied to a survey reported having been

⁷¹ *Forgotten Population* at 10-11; Bureau of Justice Statistics, U.S. Dep't of Justice, *Prior Abuse Reported by Inmates and Probationers* (Apr. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf>

⁷² *Forgotten Population* at 1, 10.

⁷³ *Forgotten Population* at 12.

⁷⁴ *Forgotten Population* at 13 (citing Phyllis Chesler, *A Double Standard for Murder*, N.Y. TIMES (January 8, 1992), at A19).

⁷⁵ *Forgotten Population* at 13 (citing Caroline J. Keough, *Death Row Complaints Cite Four Guards*, Miami Herald (July 13, 2002), at 1B).

⁷⁶ *Forgotten Population*, at 14 (citing comment by inmate's attorney).

assaulted or sexually harassed while in prison.⁷⁷ This Committee has expressed concerns about male staff in contact positions with women prisoners, and the Standard Minimum Rules for the Treatment of Prisoners require that only women guard women prisoners.⁷⁸

2. *Discrimination Against Victims Of Domestic Violence*

Domestic violence is a widespread problem that predominantly affects women in the U.S. One in 4 women have been physically or sexually abused by a husband or boyfriend at some point in their lives.⁷⁹ Domestic violence is also a key cause of homelessness among women and children. A 1997 survey of homeless parents in ten cities around the country found that 22% had left their last residence because of domestic violence. Among parents who had lived with a spouse or partner, 57% of homeless parents had left their last residence because of domestic violence.⁸⁰ In New York City, almost half of all homeless parents had been abused and one quarter of all homeless parents were homeless as a direct result of domestic violence in 2002.⁸¹ In addition, 47% of homeless school-aged children and 29% of homeless children under five have witnessed domestic violence in their families.⁸²

a. *The Federal Violence Against Women Act Protects Only Those Living In Public or Subsidized Housing*

Recognizing this correlation between domestic violence and homelessness, VAWA protects domestic violence survivors living in public or subsidized housing from discrimination by their landlords by prohibiting public housing authorities from denying leases to victims of domestic violence, dating violence, or stalking, and by disallowing landlords from evicting domestic violence victims under “zero tolerance for crime” or “one strike” policies that allow landlords to

⁷⁷ *Forgotten Population* at 14.

⁷⁸ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, ¶ 18, U.N. Doc. CCPR/C/CAN/CO/5 (Nov. 11, 2005), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf); Friends World Committee for Consultation (Quakers), *Integration of the Human Rights of Women and the Gender Perspective* (Feb. 2006), available at <http://www.quano.org/geneva/pdf/humanrights/CHR62WomeninPrison12.pdf>. The Friends World Committee defines contact positions as “posts that permit or require prison guards to be in physical proximity to the prisoners often unsupervised by other staff.” *Id.* at 3; Standard Minimum Rules for the Treatment of Prisoners, ¶ 53, Adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1955), approved by the Econ. & Soc. Council by its resolutions 663 C (XXIV) (July 31, 1957) and 2076 (LXII) (May 13, 1977), available at <http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf>.

⁷⁹ Nat’l Task force to End Sexual Violence against Women, *Violence Against Women Act 2005: Title IV Prevention* (2005), available at <http://www.vawa2005.org/title4.pdf> (citing, Nat’l Institute of Justice and the Centers for Disease Control and Prevention, *Extent, Nature and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*(2000) (prepared by Patricia Tjaden and Nancy Thoennes); The Commonwealth Fund, *Health Concerns Across a Woman’s Lifespan: 1998 Survey of Women’s Health* (May 1999)).

⁸⁰ ACLU Women’s Rights Project, *Domestic Violence and Homelessness 2* (2006) [hereinafter *Domestic Violence and Homelessness*], available at <http://www.aclu.org/pdfs/dvhomelessness032106.pdf> (citing Homes for the Homeless & Institute for Children and Poverty, *Ten Cities 1997-1998: A Snapshot of Family Homelessness Across America 3* (1998)).

⁸¹ *Domestic Violence and Homelessness* at 3 (citing Institute for Children and Poverty, *The Hidden Migration: Why New York City Shelters Are Overflowing with Families* (April 2002)).

⁸² *Domestic Violence and Homelessness* at 2 (citing Homes for the Homeless & Institute for Children and Poverty, *Homeless in America: A Children’s Story, Part One 23* (1999)).

evict entire families for the violent act of one household member.⁸³ No federal law explicitly protects domestic violence victims and survivors living in other kinds of housing. Relatedly, some cities have passed ordinances allowing for an imposition of fines on property owners if a resident calls for police assistance “too many times” in a particular period, creating an incentive for landlords to evict domestic violence victims in order to avoid such a fine. Milwaukee, Wisconsin is one such city.

b. Other Limitations Of the Violence Against Women Act

VAWA has key and troubling limitations, the first being an exception to the “one-strike” rule, pursuant to which public housing authorities can evict victims of domestic violence if the landlord shows an “actual and imminent threat to other tenants or those employed at or providing service to the property” if the tenancy or subsidized housing is not terminated.⁸⁴ These policies improperly hold the female tenants responsible for the abuser’s actions, and dangerously instill in them a fear of eviction, which prevents them from alerting the police or seeking outside assistance, and encourages the code of silence that women follow to guard against homelessness.⁸⁵

Second, VAWA does not allow an individual to bring a case to court. Instead, an aggrieved tenant must ask the government to bring the case on her behalf (a rare event in civil rights cases). The inability of victims to sue public housing agencies for civil damages leads to questions about the enforcement and ultimate effectiveness of the law. And finally, VAWA does not give domestic violence survivors economic security protection, by, among other things, failing to require employers to give their employees who are victims of domestic violence leave to tend to legal, medical, or other safety-related matters. As one court astutely observed, “the ability to hold on to a job is one of a victim’s most valuable weapons in the war for survival, since gainful employment is the key to independence from the batterer.”⁸⁶

c. Positive Federal Agency, Federal Court, and State Court Decisions Under the Fair Housing Act

The federal Fair Housing Act (FHA), which, unlike VAWA, allows plaintiffs to bring suit to enforce its provisions, has proved quite an effective remedy against discrimination by housing officials. Recently, a federal trial court in Vermont sustained a lawsuit against a landlord who had served a notice of eviction to a tenant 3 days after her husband physically attacked her, claiming that the incident caused the other tenants to fear future violent episodes.⁸⁷ The plaintiff alleged that her eviction was a result of sex discrimination and violated the FHA provision making it illegal to “refuse to sell or rent after the making of a bona fide offer, or to otherwise

⁸³ ACLU Women’s Rights Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing 1*, available at <http://www.aclu.org/pdfs/subsidizedhousingdv.pdf>; Violence Against Women and Department of Justice Authorization Act of 2005, Title IV.

⁸⁴ *Id.*

⁸⁵ *Domestic Violence and Homelessness* at 1.

⁸⁶ *Reynolds v. Fraser*, 781 N.Y.S. 2d 885, 889 (N.Y. Sup. Ct. 2004).

⁸⁷ *Bouley v. Young-Sabourin*, 394 F.Supp.2d 675 (D. Vt. 2005).

refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁸⁸

The federal Department of Housing and Urban Development (HUD) has also brought suits under the FHA on behalf of domestic violence survivors. In October 1999, HUD filed charges against a property management company after the company attempted to evict a tenant 24 hours after her husband was arrested for physically assaulting her.⁸⁹ Noting that nationally women comprise 90-95 % of domestic violence victims, HUD asserted that the property management company discriminated against the tenant based on her sex in violation of the FHA.⁹⁰ Based on the HUD finding, the U.S. Department of Justice sued the apartment complex. Tiffany Alvera, represented by the ACLU Women’s Rights Program, intervened as a plaintiff. The case settled in 2001 with the company agreeing to end its zero tolerance policy as it applied to domestic violence victims, and to change its training manual to reflect these new policies.⁹¹

d. State Legislation Protecting Housing Rights Of Domestic Violence Victims

In addition to the federal housing discrimination remedies, some states have enacted legislation that prohibits sex discrimination and discrimination against victims of domestic violence. Laura K., a Michigan resident, detailed her housing discrimination trials and eventual triumphs to the U.N. Special Rapporteur on Housing. Laura K. was unable to sign a new apartment lease with her husband because she was unemployed at the time. When her husband began physically abusing her, she received a court order of protection prohibiting him from entering their home.⁹² The apartment complex ignored the order, evicted her, and changed the locks – at her husband’s request. She was left homeless with a 6-week old baby. Represented by the ACLU Women’s Rights Program, she sued the apartment complex alleging sex discrimination under Michigan’s landlord tenant law.⁹³ The management company settled out of court, in a confidential cash agreement, but also changed some policies to explicitly protect the housing rights of domestic violence victims and began requiring its managers to receive training in fair housing law and domestic violence.⁹⁴

⁸⁸ 42 U.S.C. § 3604 (a) (West 2006).

⁸⁹ U.S. Dep’t of House & Urban Dev., Charge of Discrimination ¶17, No. HUDALJ 10-99-0538-8 (HUD Ore. Apr. 16, 2001), available at <http://www.legalmomentum.org/issues/vio/Alvera%20Charge%20of%20Discrim.pdf>.

⁹⁰ *Id.* ¶ 28.

⁹¹ Press Release, ACLU Women’s Rights Project, Settlement Reached in Case of Oregon Domestic Abuse Victim Who Faced Eviction; Important Precedent Set for Battered Women Nationwide (Nov. 5, 2001), available at <http://www.aclu.org/womensrights/violence/13146prs20011105.html>.

⁹² *Testimony before U.N. Rapporteur on Adequate Housing by Laura K 2* (Oct. 16, 2005).

⁹³ *Id.* at 8. See also, Michigan Tenant Counseling Program, *The Basics of Discrimination*, http://www.michigantenants.org/resource.2005-06-20.8477853553/html_view.

⁹⁴ *Testimony before U.N. Rapporteur on Adequate Housing by Laura K 8* (Oct. 16, 2005).

3. *Employment Discrimination Against Low Wage Migrant Women Workers*

The U.S. has a population of between 28 and 30 million migrants.⁹⁵ These men and women make up 14 % of the total labor force and fill 20 % of the low-wage work positions.⁹⁶ Of the total migrant population, 9.3 million are undocumented, approximately 6 million of them undocumented migrant workers.⁹⁷ The manufacturing sector employs nearly 1.2 million undocumented migrant workers; the services sector employs almost 1.3 million, and 1 million to 1.4 million undocumented migrant workers labor in other fields.⁹⁸ In 2003, the average undocumented migrant worker earned \$12,000 annually – less than half of the \$24,300 earned by their native-born counterparts. Legal migrants earned \$20,400.⁹⁹

Federal law fails to protect the exploitation of low-wage migrant women workers. As discussed in Article 2, *Hoffman Plastics* and ensuing cases limited remedies for – and thus made – all migrant workers extremely vulnerable to exploitation. This vulnerability is even more marked with regard to women workers, who are regularly subjected to sexual harassment and other forms of gender discrimination in the work place. These women, who often work in undesirable occupations such as housekeeping, retail and factory work, are also extremely vulnerable to economic exploitation, frequently working for little or no compensation falling far below the legally required minimum wage and overtime. The right of undocumented workers to be free from workplace discrimination is particularly disturbing because it has created a subclass of women who have no enforceable right against workplace discrimination, as the *Crespo* decision discussed in Article 2 indicates.¹⁰⁰ Moreover, as also discussed earlier, efforts to reveal the immigration status of employees seeking compensation for discrimination have drastically discouraged women from holding accountable employers who discriminate against them.

The ACLU recently settled a lawsuit on behalf of two Fujianese women who worked at Rainbow Buffet, a New Jersey restaurant, and were economically and sexually exploited during their employment between November 2003 and August 2004.¹⁰¹ The waitresses said they worked for more than 60 hours per week for far below minimum wage. Each woman was paid only \$120

⁹⁵ Rebecca Smith & Sarah Paoletti, *Protecting the Rights of All Migrant Workers as a Tool to Enhance Development* 1 (Oct. 30, 2005) (submitted to the U.N. Committee on Migrant Workers) (hereinafter “*Protecting the Rights of All Migrant Workers*”), available at <http://www.ohchr.org/english/bodies/cmwr/docs/day.pdf> (citing U.S. Census Bureau, U.S. Dep’t of Commerce, *The Foreign-Born Population of the United States* 1 (2000)).

⁹⁶ *Protecting the Rights of All Migrant Workers*, at 1 (citing Urban Institute, *A Profile of the Low Wage Immigrant Workforce* 1 (Nov. 2003)).

⁹⁷ *Protecting the Rights of All Migrant Workers* at 1 (citing Jeffrey S. Passel, Randy Capps & Michael Fix, *Undocumented Immigrants: Facts and Figures* 1 (Jan. 12, 2004) [hereinafter *Undocumented Immigrants: Facts and Figures*]; B. Lindsay Lowell & Robert Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* 7 (2002) [hereinafter “*How Many Undocumented*].

⁹⁸ *Protecting the Rights of All Migrant Workers* at 2 (citing *How Many Undocumented*, at 7-8).

⁹⁹ *Protecting the Rights of All Migrant Workers* at 2 (citing *Undocumented Immigrants: Facts and Figures*, at 30)

¹⁰⁰ See discussion of case in Article 2.

¹⁰¹ Press Release, ACLU, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit Brought by ACLU (May 2, 2006), available at <http://www.aclu.org/womensrights/employ/25392prs20060502.html>. We had alleged that the restaurant’s practices violated federal and state labor laws as well as state tort law and also filed sexual harassment and wrongful discharge charges on the women’s behalf with the Newark Area Office of the U.S. Equal Employment Opportunity Commission. *Id.*; see also Complaint ¶¶4-5, *Li v. Rainbow Group Inc.* No. 2:05-cv-05202-HAA-MF (D.N.J. filed Oct. 31, 2005), available at <http://www.aclu.org/FilesPDFs/rainbow%20buffet%20complaint%20&%20jury%20demand.pdf>.

per month in wages for nearly 300 monthly work hours. Buffet management also systematically confiscated portions of the tips the waitresses received from customers. Busboys and other employees at Rainbow Buffet intentionally hit them, touched them against their will, made humiliating and menacing sexual comments and threatened them, all with the full knowledge of management, who did nothing to stop the acts. In a similar, pending case, *Espinal v. Ramco*, the ACLU represents three female former employees of Ramco General Stores, Inc.¹⁰² We sued Ramco for violation of the Fair Labor Standards Act, the New York Labor Law, the New York State Human Rights Law, and the New York City Victims of Gender Motivated Violence Act. Plaintiffs allege that Ramco paid them below the minimum wage, refused to pay them any overtime, discriminated against them on the basis of gender, reduced their working schedules in retaliation for the women's refusal to have sexual relations with Ramco's president, and created a hostile work environment for female employees.

In addition to the lack of protection from gender discrimination, migrant women are also extremely vulnerable to economic exploitation because of the lack of enforcement against, and regulation of, the industries in which they work. Migrant women domestic workers have reported extreme abuse and exploitation by their employers.¹⁰³ Reportedly 92% of domestic workers are women, and most are also minorities and migrants.¹⁰⁴ These workers, often verbally and sexually abused, and economically exploited by their employers, are, despite the existence of extensive federal and state workplace anti-discrimination laws in the U.S., not covered by most of them.¹⁰⁵ Additionally, these laws are not adequately enforced, and, as discussed in Article 2, courts are curtailing remedies for undocumented workers rendering all migrant workers even more vulnerable to exploitation. As a result, employers act with near impunity, creating extremely difficult and hostile work environments for a very vulnerable population.

Many provisions of U.S. law that protect other workers exclude domestic workers from their protective provisions. Title VII, for example, which prohibits workplace discrimination and sexual harassment, extends only to employers with 15 or more employees, unlikely in the domestic context.¹⁰⁶ Furthermore, domestic workers are expressly carved out of certain laws, such as the Fair Labor Standards Act, and thus live-in domestic workers are not entitled to overtime pay for hours worked over 40 per week, as are other workers.¹⁰⁷ Also, employers of

¹⁰² *Espinal v. Ramco*, No. 1:04-cv-03594-TPG (S.D.N.Y. filed May 12, 2004)

¹⁰³ Human Rights Watch Report, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, (June 2001) Vol. 13, No. 2, at 8, 10, 12.

¹⁰⁴ Bureau of Labor Statistics, U.S. Dep't of Labor, *Table 14: Employed persons by detailed industry and sex, 2004 annual averages* 6 (2005), available at <http://www.bls.gov/cps/wlf-table14-2005.pdf>; Testimony before the Inter-American Commission on Human Rights by Margaret L. Satterthwaite (October 14, 2005); Kristi L. Graunke, *Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 151 (2002).

¹⁰⁵ This problem has long been recognized by the U.N. In 1996, an expert group brought together by the Secretary General to study violence against women migrant workers, recognized that “[v]iolence against women migrant workers is a serious, complex and sensitive issue. The plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse at the hands of their employers, their intermediaries, or the police – a situation exacerbated by economic exploitation – is one that calls for concerted action at the international, national and regional levels.” The Secretary-General, *Report on Violence Against Women Migrant Workers* ¶ 1, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. E/1996/71 (June 20, 1996), available at <http://www.un.org/documents/ecosoc/docs/1996/e1996-71.htm>.

¹⁰⁶ 42 U.S.C. § 2000e(b) (West 2006).

¹⁰⁷ 29 U.S.C.A. § 213(b)(21) (West 2004)

domestic workers are exempt from keeping accurate contemporaneous records of time worked by the domestic worker making it extremely difficult for the worker to prove that she was not paid for all hours worked.¹⁰⁸ Domestic workers are also excluded from protections of the National Labor Relations Act, which protect workers from retaliation by their employers if they participate in labor organizing activities.¹⁰⁹ These various exclusions, in combination with those generally affecting immigrant workers, render migrant domestic workers extremely vulnerable to abuse.

Among domestic workers, perhaps the most vulnerable sub – group are those employed by diplomats, who are excluded from civil and criminal jurisdiction by diplomatic immunity. Each year the U.S. grants 4,000 two-year temporary work G-5 and A-3 visas, to domestic employees of diplomats and staff of international organizations.¹¹⁰ Many of these employers are immune from civil and criminal jurisdiction.¹¹¹ Consequently, workers employed by these individuals have no enforceable rights or remedies. Although numerous cases of abuse ranging from forced labor to wage violations have been reported, these workers have been unable to effectively assert their rights, relying only on occasional intervention by the U.S. State Department.

C. Torture and Cruel, Inhuman, or Degrading Treatment or Punishment (Article 7)

In April 2006, the ACLU submitted a separate and comprehensive shadow report to the Committee Against Torture documenting various violations of the non-derogable rights to freedom from torture and from cruel, inhuman, or degrading treatment or punishment both within the United States and abroad.¹¹² It is critical that the Human Rights Committee examine the U.S. government’s failure to uphold the absolute prohibition on the use of torture and cruel, inhuman, or degrading treatment or punishment, and its concomitant failure to take legislative, administrative, judicial and other measures to prevent and punish acts of torture and abuse.

1. Torture and Abuse In the “Global War On Terrorism”

Evidence from a range of sources, including government investigations, as well as over 100,000 government documents produced to the ACLU through the Freedom of Information Act (“FOIA”) litigation, show a systemic pattern of torture and abuse of detainees in U.S. custody in Afghanistan, the U.S. Naval Base Station at Guantánamo Bay, Cuba, Iraq, and other locations

¹⁰⁸ 29 C.F.R. 552.110(b) (1995)

¹⁰⁹ 29 U.S.C. § 152(3) (West 2006)

¹¹⁰ Lora Jo Foo, *Asian American Women: Issues, Concerns, and Responsive Human and Civil Rights Advocacy* (iUniverse 2003), relevant excerpt available at <http://www.modelminority.com/printout439.html>.

¹¹¹ U.S. Dep’t of State, *Diplomatic and Consular Privileges and Immunities From Criminal Jurisdiction*, available at <http://www.state.gov/documents/organization/20047.pdf>.

¹¹² ACLU, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (Apr. 2006) [hereinafter *Enduring Abuse*] available at http://www.aclu.org/safefree/torture/torture_report.pdf.

outside the United States.¹¹³ In many instances the harsh treatment was ordered as part of an approved list of interrogation methods to “soften up” detainees.¹¹⁴

Reported methods of torture and abuse used against detainees include prolonged incommunicado detention; disappearances; beatings; death threats; painful stress positions; sexual humiliation; forced nudity; exposure to extreme heat and cold; denial of food and water; sensory deprivation such as hooding and blindfolding; sleep deprivation; water-boarding; use of dogs to inspire fear; and racial and religious insults. While some of these techniques may not amount to physical or mental torture they constitute cruel, inhuman or degrading treatment and when used in combination or for prolonged periods of time may amount to torture. These techniques also violate the obligation to treat all persons deprived of their liberty with humanity and with respect to their human dignity as stipulated in article 10 of the Covenant.

In addition, over one hundred detainees in U.S. custody in Afghanistan and Iraq have died. The government has acknowledged that 29 detainee deaths in the custody of the Department of Defense involved suspected “abuse or other violations of law or policy,”¹¹⁵ and documents obtained under the ACLU FOIA litigation reveal that 21 deaths in U.S. custody were homicide, some caused due to “strangulation,” “hypothermia,” “asphyxiation,” and “blunt force injuries.”¹¹⁶ Death and autopsy reports obtained from the government confirm eight homicides that appear to have resulted from abusive techniques used on detainees, in some instances, by the CIA, Navy Seals and Military Intelligence personnel in Iraq and Afghanistan.¹¹⁷ Two documents show that in December 2002, U.S. forces beat two young Afghan detainees to death in Bagram, Afghanistan.¹¹⁸ On June 10, 2006, three detainees in Guantánamo were found dead in what were reported to be suicide deaths.¹¹⁹

¹¹³ In 2003, the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace filed a FOIA request seeking documents from the Central Intelligence Agency, Department of Justice, the Department of State, the Department of Defense and the Federal Bureau of Investigation, concerning treatment of detainees in U.S. custody in Afghanistan, Guantánamo Bay, Cuba, and Iraq. The vast majority of documents were released only following protracted and ongoing litigation and court orders directing government agencies to produce documents. Stipulation and Order, *American Civil Liberties Union Foundation v. Dep’t of Defense*, No. 04-cv-4151 (S.D.N.Y. Aug. 17, 2004), available at <http://www.aclu.org/torturefoia/legaldocuments/eeOrderforResponsivedocs.pdf>. The CIA has yet to release any documents to the ACLU and this issue is currently before the courts. See generally <http://www.aclu.org/torturefoia/legaldocuments/index.html> for the Torture FOIA legal documents.

¹¹⁴ *Treatment of Iraqi Prisoners: Hearing Before the S. Armed Services Comm.* 108th Cong. (2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DODDOA010269.pdf>.

¹¹⁵ U.S. Diplomatic Mission to the United Nations in Geneva, *U.S. Delegation Oral Responses to CAT Committee Questions 12* (May 5, 2006)[hereinafter *U.S. Oral Responses to CAT of May 5*], available at <http://geneva.usmission.gov/Press2006/CAT-MAY5-SPOKEN.pdf>; *U.S. Oral Statements of May 8* at 6 (May 8, 2006).

¹¹⁶ Press Release, ACLU, *U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq* (May 24, 2005), available at <http://www.aclu.org/intlhumanrights/gen/21236prs20051024.html>.

¹¹⁷ *Id.*; Autopsy Reports, available at <http://action.aclu.org/torturefoia/released/102405/>.

¹¹⁸ Armed Forces Regional Medical Examiner, *Final Report of Postmortem Examination*, Jan. 13, 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOD003146.pdf>; Armed Forces Institute of Pathology, *Autopsy Examination Report*, Feb. 25, 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOD003156.pdf>.

¹¹⁹ James Risen and Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. TIMES, June 11, 2006. While the official number of suicide attempts in Guantánamo since it opened in January 2002 has been less than 50, the real number of suicide attempts is far higher. *Id.*; Paisley Dodds, *23 at Guantanamo Tried Mass Suicide in '03*, ASSOCIATED PRESS, Jan. 24, 2005. The US department of defense rarely reports on suicide attempts and often calls

The well-documented, systemic and widespread abuse against detainees was the direct result of policies promulgated by high-level civilian and military leaders and the failure of these leaders to uphold their legal duty to prevent and prohibit torture and other cruel, inhuman or degrading treatment by subordinates. Thousands of detainees remain in U.S. military custody or control in Iraq, Afghanistan, Guantánamo and other locations, and remain subject to unlawful policies and practices in violation of the Covenant and other international human rights treaties.¹²⁰

Moreover, countless government documents reflect the accounts of government employees who themselves witnessed torture and abuse. For example, a memorandum from Navy Vice Admiral Jacoby states that Defense Intelligence Agency personnel in Iraq had witnessed members of Special Operations Task Force 6–26 abusing detainees and then attempting to cover up such abuse.¹²¹ FBI documents similarly record government agents witnessing abuse at Guantánamo Bay. A letter from T. J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division, to Major General Donald J. Ryder, describes “highly aggressive interrogation techniques” witnessed by FBI agents at Guantánamo Bay in late 2002 — the techniques included sexual humiliation, sexual assault, “intense isolation” and using a canine “in an aggressive manner.”¹²²

One FBI employee specifically states in a government document that:

[H]ere is a brief summary of what I observed at GTMO. On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. . . . On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had

them incidents of “self harm” or “hanging gestures.” For example, in January 2005, army spokesman Lt Col Sumpter told the Associated Press that in 2003, there were 350 incidents of self-harm, including 120 “hanging gestures”, and in 2004 there were 110 incidents of self harm. *Id.*; Carol J. Williams, *4 Guantánamo Prisoners Attempt Suicide in One Day*, L.A. TIMES, May 19, 2006, at 10.

¹²⁰ There are roughly 465 detainees at Guantánamo (as of June 2006), 500 detainees at Bagram airbase in Afghanistan (as of June 2006), and roughly 15,387 detainees (as of April 2006). James Risen and Tim Golden, *Three Prisoners Commit Suicide at Guantánamo*, N.Y. TIMES, June 11, 2006; Carlotta Gall and Ruhullah Khapalwak, *33 Afghans U.S. Had Held Are Released*, N.Y. TIMES, June 9, 2006; United Nations Assistance Mission for Iraq, *Human Rights Report 6* (Apr. 2006), available at <http://www.uniraq.org/documents/HR%20Report%20Mar%20Apr%2006%20EN.PDF>.

¹²¹ Memorandum from L.E. Jacoby, Vice Admiral, U.S. Navy to Under Sec’y of Defense for Intelligence (June 25, 2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DODDIA000154.pdf>.

¹²² Letter from T. J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division, to Major General Donald J. Ryder (July 14, 2004), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI001914.pdf>.

apparently been literally pulling his own hair out throughout the night.¹²³

On December 2, 2002, Secretary Rumsfeld authorized interrogation techniques such as “stress positions,” “removal of clothing,” “hooding,” “isolation,” and using a “fear of dogs” in order “to induce stress,” for use at Guantánamo Bay.¹²⁴ Some of these techniques were withdrawn in January 2003 and Secretary Rumsfeld authorized new techniques in April 2003.¹²⁵ However, the report of Major General Fay demonstrates that Secretary Rumsfeld’s December 2, 2002 order resulted in the use of these abusive techniques in Iraq and Afghanistan.¹²⁶

Indeed, many of the December 2002 techniques (such as “stress positions” and the use of dogs) authorized by Secretary Rumsfeld were subsequently also authorized for use in Iraq by Lieutenant General Sanchez in a signed order dated September 14, 2003.¹²⁷ In November 2003, Iraqi General Mowhoush was suffocated to death in U.S. custody after being closely confined in a sleeping bag to bring on “claustrophobic conditions.”¹²⁸ The officer who applied this technique to Mowhoush described it as an example of a “stress position” which he believed was specifically authorized for use in Iraq.¹²⁹ The Taguba Report specifically found that the abuse of detainees in Abu Ghraib was “systemic.”¹³⁰

¹²³ E-mail from [name redacted], FBI to [name redacted], Inspection Division, FBI (Aug. 2, 2004), *available at* <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI002345.pdf>.

¹²⁴ The text of Secretary Rumsfeld’s order was leaked to the press prior to release of the Fay Report. *See* Memorandum from William J. Haynes, General Counsel to Donald Rumsfeld, Sec’y of Defense (Nov. 27, 2002) [hereinafter “Rumsfeld Order”], *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>.

¹²⁵ Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander USSOUTHCOM (Jan. 15, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf>; Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander USSOUTHCOM (Apr. 16, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf> (authorizing, inter alia, “isolation”, “pride and ego down,” “environmental manipulation,” and “futility”).

¹²⁶ Major General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 29* (2004) [hereinafter Fay-Jones Report], *available at* <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

¹²⁷ Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command (Sept. 14, 2003), [hereinafter Sanchez Sept. Order], *available at* <http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf>. This order was replaced by another order from LTG Sanchez dated October 12, 2003, which was largely based on the April 2003 techniques authorized by Secretary Rumsfeld for use in Guantánamo Bay, and authorized the use of “pride and ego down,” “fear up harsh” in interrogating detainees. Memorandum from Lieutenant General Sanchez to Commander, Combined Joint Task Force Seven, *Re: CJTF-7 Interrogation and Counter-Resistance Policy* (Oct. 12, 2003), *available at* <http://www.aclu.org/FilesPDFs/october%20sanchez%20memo.pdf>. The replacement of the order did not, however, bring an end to detainee abuse in Iraq. It was intentionally vague and drafted with the attitude that “MI doctrine suggests that use of approved approaches should be left to the imagination of the interrogator,” according to Sanchez’s chief legal advisor. Sworn statement of [name redacted], Senior Legal Advisor to Lieutenant General Sanchez (June 20, 2004), *available at* <http://www.aclu.org/projects/foiasearch/pdf/DOD000642.pdf>.

¹²⁸ Memorandum from Lewis E. Welshofer Jr., Chief Warrant Officer Third Class, U.S. Army to Commander 82d ABN DIV, Champion Base, Iraq (Feb. 11, 2004), *available at* <http://www.lchr.org/pdf/mem-dic021104.pdf>.

¹²⁹ *See id.*

¹³⁰ Dep’t of Defense, Article 15-6 Investigation of the 800th Military Police Brigade, “Regarding Part One of the Investigation” ¶ 5 (March 2004) [hereinafter Taguba Report], *available at* <http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm>.

As noted in the Fay Report, military staff in Iraq relied heavily on the advice of Major General Geoffrey Miller, a Guantánamo commander who was dispatched by senior Defense Department officials to Iraq to assist with interrogation there.¹³¹ That report also notes that “[d]og teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller’s assessment team from GTMO.”¹³² Government documents received from the U.S. government under the FOIA record Major General Miller’s bias in favor of aggressive interrogation techniques, and objections by the Federal Bureau of Investigation (“FBI”) to the Defense Department’s use of “torture techniques” in Guantánamo Bay.¹³³

It is therefore not surprising that much of the conduct depicted in the horrific photographs of detainee abuse at Abu Ghraib prison bears some relation to techniques authorized for use in Guantánamo Bay. Another government report (purporting to investigate FBI allegations of abuse at Guantánamo), describes how Guantánamo detainees were made to stand naked before female soldiers, wear women’s underwear on their heads, and led around the room on a leash pursuant to specifically authorized interrogation techniques known as “Ego down” and “Futility.”¹³⁴ (Secretary Rumsfeld’s April 2003 order for Guantánamo also authorized these techniques.) Photographs of detainee abuse at Abu Ghraib leaked to the public show some of these techniques were applied to Abu Ghraib detainees — indeed, in perhaps the most well-known photograph, Pfc. Lynddie England appears holding a leash attached to a detainee’s neck.¹³⁵

a. *Lack Of Independent Investigations and Accountability For Abuse*

The U.S. government cited to 12 separate investigations into detainee abuse.¹³⁶ Many of the reports cited by the government in its written submission, however, remain unavailable to the public.¹³⁷ Each of these investigations, moreover, suffered from structural defects, limited

¹³¹ Fay Report at 24-25.

¹³² Fay Report at 10; *see also* R. Jeffrey Smith, *General is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A1.

¹³³ Electronic Communication from FBI General Counsel to FBI Counterterrorism Unit 2-4 (May 30, 2003), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003524.pdf>; E-mail from [name redacted] to Gary Bald, FBI; Frankie Battle, FBI; and Arthur Cummings, FBI (Dec. 5, 2003), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003160.pdf>.

¹³⁴ *See* Lieutenant General Randall M. Schmidt & Brigadier General John T. Furlow, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility 19-20 (June 9, 2005) [hereinafter Schmidt-Furlow Report], available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>. Notably, “Pride and Ego Down” and “Futility” are techniques authorized by Army Field Manual 34-52, *see* U.S. DEPT. OF ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION § 3-18 (Sept. 28, 1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

¹³⁵ Josh White, *Abu Ghraib Tactics Were First Used at Guantánamo*, WASH. POST, Jul. 14, 2005, at A1.

¹³⁶ U.S. Diplomatic Mission to the United Nations in Geneva, *Oral Statements by the United States Delegation to the Committee Against Torture* 7-8 (May 8, 2006) [hereinafter *U.S. Oral Statements of May 8*], available at <http://geneva.usmission.gov/Press2006/CAT-May8.pdf>.

¹³⁷ *See* U.S. Dep’t of State, Second Periodic Report to the Committee against Torture 75-76, U.N. Doc. CAT/C/48/Add.4 (June 2005). For example, the Formica and Route reports are completely unavailable. The only portion of the Church report that is publicly available is its Executive Summary. *Id.* Critical portions of the Fay Report remain classified. In addition, the Washington Post reported on an investigation by retired Colonel Stuart A. Herrington that concluded CIA agents had abused Iraqi detainees, but Herrington’s report remains classified. Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A01.

authority, failing to investigate command officials, or due to a narrowly circumscribed mandate.¹³⁸ Not a single one was truly independent.¹³⁹ The Schlesinger report, which, by its title, purports to be an “independent” report, was the product of a panel all of whose members had been handpicked and appointed as full-time employees without pay by Defense Secretary Rumsfeld himself.¹⁴⁰ The Schlesinger panel had no subpoena power, and issues of personal accountability for detainee torture and abuse were expressly set so as to be beyond the terms of reference of this panel.¹⁴¹

No high-level officials involved in developing or implementing policies on the treatment of detainees in the “global war on terrorism” have been charged with any criminal activity related to the abuses. The U.S. government continues to assert that the abuse was simply the actions of a few rogue soldiers. There has been no investigation into the government’s secret transfer of detainees and the Office of Inspector General’s examination of the role of the CIA has not yet been made public.

There have been few prosecutions for homicide compared to the number of deaths of Afghans and Iraqis in U.S. custody, and the sentences awarded have been disproportionately light. Although the U.S. government acknowledged that 29 detainee deaths involved suspected “abuse or other violations of law or policy,” only 19 individuals received sentences of more than one year.¹⁴² In most of the official, publicly-known actions taken in response to allegations of abuse, the punishment has been non-judicial or administrative. In those cases in which an officer was convicted, the punishment generally was not commensurate with the gravity of the crime. For example, despite finding an army interrogator (the highest-ranking officer prosecuted to date) guilty of homicide, the tribunal only reprimanded the officer and levied a \$6,000 fine.¹⁴³ In another instance, a soldier who admitted to killing an unarmed, handcuffed Iraqi at point-blank range received a three-year sentence.¹⁴⁴ Such punishments send a message that torture and abuse committed by U.S. soldiers will only be lightly punished.

2. *Unlawful Renditions*

Renditions involve the clandestine abduction and detention, without legal process, of persons suspected of terrorist activities. The U.S. transfers these suspects to foreign intelligence services for interrogation, in countries where torture and abuse are routine. Rendition also includes the transfer of terror suspects into CIA custody in unknown secret detention centers overseas.¹⁴⁵ The U.S. openly defends the practice of rendition and considers it a “vital tool in combating

¹³⁸ See Human Rights First, *Getting to Ground Truth* 2, 16 (Sept. 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf

¹³⁹ See *id.* at 2-3, 20.

¹⁴⁰ See *id.* at 2; Memorandum from Donald Rumsfeld, Sec’y of Defense to Hon. James R. Schlesinger, *et al.* (May 12, 2004), available at <http://f1.findlaw.com/news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>, at 106-107.

¹⁴¹ *Id.*

¹⁴² *U.S. Oral Responses to CAT of May 5*, at 6.

¹⁴³ *Iraq General’s Killer Reprimanded*, BBC WORLD SERVICE, Jan. 24, 2006.

¹⁴⁴ Gregg K. Kakesako, *Schofield Soldier gets 3-year term in Shooting*, HONOLULU STAR BULLETIN, Aug. 6, 2004.

¹⁴⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005; Brian Ross and Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005; Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01.

transnational terrorism.”¹⁴⁶ While it denies transporting individuals “to countries where we believe or we know that they’re going to be tortured,” well-documented cases of renditions suggest otherwise.¹⁴⁷ Moreover, the U.S. does not deny the practice of rendition suspected terrorists to countries that the U.S. itself considers as violators of human rights and where individuals might be subjected to cruel, inhuman, or degrading treatment.¹⁴⁸ The U.S. government has therefore failed to meet its obligations under article 7 of the Covenant, which, *inter alia*, prohibits exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”¹⁴⁹

The former Director of the Central Intelligence Agency, George J. Tenet, publicly stated that in an unspecified period before September 11, the U.S. undertook over 70 such renditions, adding that the CIA had “racked up many successes, including the rendition of many dozens of terrorists prior to September 11, 2001.”¹⁵⁰ The media reported that the practice of “rendering” individuals was developed by military or CIA lawyers and “vetted by Justice Department’s office of legal counsel” and has been applied to hundreds of individuals in post-9/11 terrorism interrogations.¹⁵¹ Using civilian aircrafts, which have permission to land on U.S. military airfields worldwide, the CIA flies captured terrorist suspects from one country to another for detention and interrogation.¹⁵²

The exact number of persons rendered post September 11 is unknown. The news media has reported that over 100 suspected terrorists were sent by the CIA to foreign intelligence services and to CIA-run secret detention centers overseas.¹⁵³ About two dozen high-level terror suspects are in CIA custody in secret detention centers.¹⁵⁴ The remaining suspects – a group considered

¹⁴⁶ Sec’y of State Condoleezza Rice, Remarks Upon Her Departure for Europe at the Andrews Air Force Base (Dec. 5, 2005), available at <http://usinfo.state.gov/eur/Archive/2005/Dec/05-471726.html> (Rice also said, “Renditions take terrorists out of action, and save lives . . . Such renditions are permissible under international law”).

¹⁴⁷ R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005), available at <http://hrw.org/reports/2005/eca0405/>; *Enduring Abuse* at 68-72.

¹⁴⁸ U.S. Diplomatic Mission to the United Nations in Geneva, *Written Presentation by the United States to the Committee (Responses to questions)* (May 5, 2006), available at: <http://geneva.usmission.gov/Press2006/CAT-May5.pdf>

¹⁴⁹ U.N. Human Rights Committee, *General Comment 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment*, Art. 7 ¶ 9 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

¹⁵⁰ National Comm’n on Terrorist Attack Upon the United States, *Intelligence Policy, Staff Statement No. 7 2*, available at http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf. *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* 19 (Mar. 24, 2004) (statement of George Tenet, former Director of CIA), available at http://www.9-11commission.gov/hearings/hearing8/tenet_statement.pdf.

¹⁵¹ Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light*, WASH. POST, May 11, 2004 (detailing the existence of “interrogation rooms of foreign intelligence services—some with documented records of torture—to which the U.S. government delivers or ‘renders’ mid or low-level terrorism suspects for questioning”).

¹⁵² Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004.

¹⁵³ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005; Douglas Jehl and David Johnson, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005.

¹⁵⁴ *Id.*

less important, with less direct involvement in terrorism and limited intelligence value — have been transferred to countries including Egypt, Jordan, Saudi Arabia, and Syria for interrogation.¹⁵⁵ The U.S. Department of State’s Human Rights Reports for these countries consistently state that the use of torture during interrogations in these countries is “routine.”

When rendering suspects to foreign intelligence services, U.S. officials claim that they obtain “diplomatic assurances” from the governments concerned that detainees will not be tortured. U.S. Attorney General Alberto Gonzales, in defending the practice, stated that the purpose of U.S. policy is not to send detainees “to countries where we believe or we know that they’re going to be tortured.” He added that if a country has a long history of torture, the United States seeks diplomatic assurances that torture will not be used. However, he acknowledged that it was not possible to “fully control” what other nations do.¹⁵⁶

In practice, officials do nothing to monitor whether those assurances will be honored. They reportedly suggest questions to foreign intelligence interrogators and then turn a blind eye to the methods employed to extract the information.¹⁵⁷ The ACLU considers diplomatic assurances are unreliable and ineffective in protecting against torture and abuse even with so-called post-return monitoring mechanisms. Such “assurances” are inherently unreliable, not legally binding, and provide no recourse for the transferred individual.

The case of Khaled El-Masri strikingly illustrates the dangers of the U.S. rendition program. El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia, held in incommunicado detention, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan. There he was beaten, kicked, confined in squalid conditions, and detained without charge or public disclosure for several months.¹⁵⁸ Five months after his abduction, El-Masri was deposited at night, without explanation, on a hill in Albania.¹⁵⁹ Not long after El-Masri was flown to Afghanistan, Central

¹⁵⁵ *Id.*

¹⁵⁶ R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005), available at <http://hrw.org/reports/2005/eca0405/>. See also Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (Oct. 14, 2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

¹⁵⁷ Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01 (quoting senior United States official as stating that after an individual is rendered, the CIA are “still very much in control” and that they will often “feed questions to their investigators”). See also Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002; David E. Kaplan, *et al.*, *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, U.S. NEWS & WORLD REPORT, June 2, 2003 (describing rendition of individuals to Jordan, Egypt, Morocco and Syria). For a comprehensive news report on the practice of rendition see Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005.

¹⁵⁸ Complaint ¶¶ 1, 23-48, *El-Masri v. George Tenet*, No. 1:05cv1417 (D.D.C. filed Dec. 6, 2005), [hereinafter El-Masri Complaint] available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.

¹⁵⁹ *Id.* at ¶ 54.

Intelligence Agency officials realized that they had abducted and detained an innocent man, yet El-Masri's unlawful detention continued for two additional months.¹⁶⁰

On December 13, 2005, the ACLU filed suit on behalf of El-Masri against George Tenet, former director of the CIA, and the airline companies that facilitated his rendition for the injuries El-Masri suffered as a consequence of the rendition process, including prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment.¹⁶¹ In response to the lawsuit, the CIA made a successful motion to dismiss the suit on the ground that further legal proceedings may expose state secrets and jeopardize national security.¹⁶² The ACLU is planning to appeal the case in the Fourth Circuit.

3. *Torture and Abuse In the United States*

On the domestic front, the United States has failed to correct laws and practices regarding the use of torture and cruel, inhuman or degrading treatment or punishment. The ACLU shadow report to the U.N. Committee against Torture has documented several violations of the article 7 of the ICCPR, particularly in the context of supermax prisons, juvenile detention, and the use electroshock and restraint devices.¹⁶³ The ACLU continues to be particularly concerned about the following issues:

- Inhuman conditions of confinement, including inadequate medical and mental care: Cruel and inhuman conditions of confinement continue to exist in various jails and prisons, including supermax prisons, where prisoners, many of whom are mentally ill, are confined in solitary confinement for up to twenty-four hours a day. Medical and mental health care in prisons throughout the U.S. remains inadequate and has at times resulted in the deaths of prisoners.¹⁶⁴
- Sexual abuse in prisons: Prisoner rape by other prisoners and sexual abuse by correctional officers continues to occur with impunity in U.S. prisons and jails.¹⁶⁵

¹⁶⁰ *Id.* at ¶ 2. German Chancellor Angela Merkel told a joint news conference in Berlin with Secretary of State Condoleezza Rice that the United States had acknowledged it made a mistake in the case of Khaled el-Masri. U.S. administration officials later said the U.S. government did not admit to a "mistake" regarding El-Masri and that the U.S. had informed Germany about El-Masri's detention and release. Saul Hudson and Mark Trevelyan, *U.S. Germany Differ on CIA Abduction Case*, REUTERS, Dec. 6, 2005.

¹⁶¹ El-Masri Complaint ¶¶ 1, 23-48.

¹⁶² Opinion, *El-Masri v. George Tenet*, No. 1:05cv1417 (D.D.C. May 12, 2006), available at <http://jurist.law.pitt.edu/elmasriorder.pdf>.

¹⁶³ *Enduring Abuse* report, at 49-64.

¹⁶⁴ Julian Borger, *America's most unwanted turn to the law*, GUARDIAN, Jan. 12, 2002; Rachael Kamel and Bonnie Kerness, American Friends Service Committee, *The Prison Inside the Prison: Control Units, Supermax Prisons, and Devices of Torture 2-5* (2003), available at <http://www.afsc.org/community/prison-inside-prison.pdf>; Lorna A. Rhodes, *Pathological Effects of the Supermaximum Prison*, AMERICAN JOURNAL OF PUBLIC HEALTH (Oct. 1, 2005); *Enduring Abuse* at 51-58.

¹⁶⁵ See Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), available at <http://www.hrw.org/reports/2001/prison/report.html>; U.S. Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004* (July 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf>; Eli Lehrer, *A Blind Eye, Still Turned: Getting Serious About Prison Rape*, NATIONAL REVIEW, June 2, 2003; *Enduring Abuse* at 56-58.

- Restraint devices and electro-shock weapons: U.S. law enforcement officials and correctional authorities continue to use restraint chairs and electro-shock weapons in ways that amount to cruel, inhuman or degrading treatment.¹⁶⁶
- The use of TASERs: Under certain circumstances, their use meets the Covenant definition of torture or cruel, inhuman or degrading treatment, but it is permitted under the U.S. Constitution's 8th Amendment. The Amendment protects only those convicted of crimes, and does not apply in the contexts in which TASERs are most often used – police encounters (although also used extensively in prisons and jails). TASERs are frequently used against non – aggressive, unarmed people for failure to comply with an official command. The deaths of 148 persons, from 1999 to September 2005, were attributed to Taser weapons.¹⁶⁷
- Children in prisons: Children under the age of eighteen continue to be housed with adults in some facilities. More than 2,200 juvenile offenders sentenced as adults for crimes committed under the age of eighteen are serving a life sentence without the possibility of parole.¹⁶⁸
- Mistreatment of non-citizens: In 2004, the Department of Homeland Security detained more than 200,000 non-citizens in jails and prisons for violating civil immigration laws. Reports of detainee mistreatment include unsanitary conditions of confinement, deaths due to inadequate medical treatment, and abuse by guards.¹⁶⁹

4. *Crime Of Torture Under U.S. Law*

The U.S. government has not made torture a distinct federal crime, except for acts committed outside U.S. territory (18 U.S.C. § 2340A). Notably, despite evidence of torture committed by some U.S. forces, no U.S. official has been charged under this law. Following reports of torture and abuse, a few low- ranking soldiers have been court-martialed for offenses committed

¹⁶⁶ *Enduring Abuse* at 58-61.

¹⁶⁷ ACLU of Northern California, *Stun Gun Fallacy: How the Lack of Taser Regulations Endangers Lives* 1 (Sept. 2005), available at <http://www.aclu.org/police/abuse/19977prs20051006.html>; *Enduring Abuse* at 58-61.

¹⁶⁸ Human Rights Watch and Amnesty International, *The Rest of their Lives: Life Without Parole for Child Offenders* 25 (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>; ACLU, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* 7 (2004).

¹⁶⁹ Daniel Zwerdling, *The Death of Richard Rust*, NATIONAL PUBLIC RADIO, Dec. 5, 2005; Asjylyn Loder, *Speziale Boots Feds Probing Alleged Abuse of Detainees*, HERALD NEWS, Aug. 17, 2005; Daniel Zwerdling, *Immigrant Detainees Tell of Attack Dogs and Abuse*, NATIONAL PUBLIC RADIO, Nov. 17, 2004; Daniel Zwerdling, *U.S. Detainee Abuse Cases Fall Through the Cracks*, NATIONAL PUBLIC RADIO, Nov. 18, 2004; U.S. Dep't of Justice, 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), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>. U.S. Dep't of Justice, Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003), available at <http://www.usdoj.gov/oig/special/0312/final.pdf>. See also ACLU, *America's Disappeared: Seeking International Justice for Immigrants Detained After September 11* (Jan. 2004), available at <http://www.aclu.org/FilesPDFs/un%20report.pdf>; *Enduring Abuse* at 63-64.

overseas under the Uniform Code of Military Justice (“UCMJ”).¹⁷⁰ The UCMJ prohibits many acts such as assault, cruelty, and murder, but fails to prohibit “torture” as a distinct crime. Moreover, the maximum punishment associated with simple assault is set at six months of confinement. For example, the maximum punishment for aggravated assault is only three to five years, and the maximum punishment for a charge of “cruelty and maltreatment” is only one year.

Although the newly enacted Detainee Treatment Act (“DTA”), attempts to close ambiguities in the extraterritorial application of the prohibition to subject persons in U.S. custody to cruel, inhuman or degrading treatment, it has three main shortfalls: First, the definition of cruel, inhuman or degrading treatment in the DTA remains vague and is not as broad as the Covenant and human rights law require and is limited to prohibited acts under the Fifth, Eighth and Fourteenth Amendments. Second, the DTA limits interrogations to standards codified in the updated but as yet unpublished Army Field Manual 34–52 — that Field Manual will not be applicable to the CIA, and is expected to be partially classified.¹⁷¹ Third, President Bush, who first threatened to veto the DTA, wrote at the time of signing the bill that he would construe the DTA “in a manner consistent with the constitutional authority of the President” and his powers as commander-in-chief, implying that he may continue to authorize acts prohibited by the DTA and other international human rights treaties at least with respect to intelligence agencies.¹⁷²

5. *US Constitutional Protections Against Cruel, Inhuman, or Degrading Treatment or Punishment*

The U.S. Constitution’s Fifth Amendment’s due process clause, applicable to interrogation procedures, prohibits actions taken under color of law (acting with government authority) that are “so brutal and offensive to human dignity” that they shock the conscience.¹⁷³ The Eighth Amendment’s prohibition on cruel and unusual punishment is applicable only to convicted persons and to pretrial detainees.¹⁷⁴ The U.S. Supreme Court has held that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁷⁵ Its prohibitions include disproportionate punishments, non-physical forms of cruel and unusual punishment, and wanton or unnecessary infliction of pain.¹⁷⁶

¹⁷⁰ See, e.g., Carlotta Gall, *2 U.S. Soldiers Are Charged With Assaulting Afghan Prisoners*, N.Y. TIMES, Oct. 31, 2005; Josh White, *Workers Surveyed On Detainee Abuse*, WASH. POST, Mar. 28, 2006, at A19; Matthew B. Stannard, *Court-martial’s quirks designed especially for armed forces’ needs*, S.F. CHRON., June 20, 2004.

¹⁷¹ Julian E. Barnes, *Congress Forces Delay of Interrogation Manual Release*, L.A. TIMES, May 11, 2006.

¹⁷² Edward Alden, *Bush statement appears to contradict anti-torture pledge*, FINANCIAL TIMES, Jan. 6, 2006, at 6.

¹⁷³ *Rochin v. California*, 342 U.S. 165, 172-173 (1952) (finding the illegal break-in of the petitioner’s home by government agents, the struggle to force open petitioner’s mouth, and the forcible extraction of his stomach’s contents to retrieve pills “shocks the conscience” and violated Rochin’s due process rights).

¹⁷⁴ See, e.g., *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (affirming that due process rights of pretrial detainees are “at least as great as the Eighth Amendment protections available to a convicted prisoner”).

¹⁷⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁷⁶ The following cases, although not exhaustive, illustrate what conditions U.S. courts have found to constitute torture or cruel and unusual treatment. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding “gratuitous infliction of ‘wanton and unnecessary’” pain when officers made inmate take his shirt off, attached him to a hitching post in the sun for seven hours, given no bathroom break, given water only once or twice and at least one guard taunted Hope for being thirsty); *Estelle v. Gamble*, 429 U.S. 97 (1976) (failure to provide essential medical treatment constitutes cruel and unusual punishment); *Simpson v. Socialist People’s Libyan Arab Jamahriya*, 326

D. Prohibition Of Slavery & Forced Labor (Article 8)

1. Abuse Of Migrant Domestic Workers

Article 8 prohibits slavery, servitude or forced labor, whatever form they take in modern society, and covers situations involving public authorities as well as those involving relationships only between private individuals. Yet, migrant women workers in the U.S., particularly domestic workers, including those employed by diplomats, are held in conditions of servitude or forced labor in the U.S. Nearly 93% of domestic workers are women, and most are also minorities and migrants.¹⁷⁷ These workers, often verbally and sexually abused, and economically exploited by their employers, are not covered by most U.S. laws.¹⁷⁸ (See Article 3.) As the examples offered below demonstrate, these violations often entail violations of additional ICCPR rights including freedom from cruel, inhuman or degrading treatment under Article 7, right to privacy under Article 17 and rights of assembly and association under Articles 21 and 22.

Acknowledging the existence of “modern analogs” to traditional slavery, the government, in its report, discusses the Trafficking Victims Protection Act of 2000 as a tool to enhance its “ability to prosecute slaveholders and assist victims of human trafficking.”¹⁷⁹ The government emphasizes abuse of those trafficked for sex work, however, and not those trafficked for domestic work, also a largely female population. More importantly, the government focuses its prosecutorial energies on sex victims, too. A recent government report notes that

F.3d 230, 234 (D.C. Cir. 2003) (to assess whether an act is cruel or degrading treatment a court must look at the victims’ suffering which depends upon the totality of circumstances. “[T]orture is a label ‘usually reserved for extreme, deliberate and unusually cruel practices, for example . . . tying up or hanging in positions that cause extreme pain’”); *Abebe-Jiri v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (finding that the victim suffered severe pain constituting torture when she was hung from a pole, naked and with her arms and legs bound, and was severely beaten); *Doe v. Qi*, 349 F.Supp.2d 1258, 1318 (N.D. Cal. 2004) (finding that a victim who had been beaten and “hung from pipes for three days, handcuffed to other prisoners and not allowed to sleep” had been tortured); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1346 (N.D. Ga. 2002) (finding torture where a victim who was beaten, kicked in the face and torso, and subjected to a “long and nightmarish beating that included being hit while hanging upside down from a rope until he almost lost consciousness;” finding that the “threat of imminent death; or the threat that another person will imminently be subjected to death, [or] severe physical pain and suffering” can constitute mental torture).

¹⁷⁷ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Table 14: Employed persons by detailed industry and sex, 2004 annual averages* 6 (2005), available at <http://www.bls.gov/cps/wlf-table14-2005.pdf>; Testimony before the Inter-American Commission on Human Rights by Margaret L. Satterthwaite (October 14, 2005); Kristi L. Graunke, *Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 151 (2002).

¹⁷⁸ This problem has long been recognized by the U.N. In 1996, an expert group brought together by the Secretary General to study violence against women migrant workers, recognized that “[v]iolence against women migrant workers is a serious, complex and sensitive issue. The plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse at the hands of their employers, their intermediaries, or the police – a situation exacerbated by economic exploitation – is one that calls for concerted action at the international, national and regional levels.” The Secretary-General, *Report on Violence Against Women Migrant Workers* ¶ 1, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. E/1996/71 (June 20, 1996), available at <http://www.un.org/documents/ecosoc/docs/1996/e1996-71.htm>.

¹⁷⁹ U.S. Report ¶¶ 151, 153.

Between fiscal years 2001 and 2005, federal prosecutors filed 68 cases of sex trafficking...charged 189 defendants with sex trafficking... [while the same government offices] filed 23 labor trafficking cases” and charged “59 defendants.”¹⁸⁰

2. Abuse Of Domestic Workers By Diplomats

In 2005, together with ANDOLAN, a South Asian domestic workers’ organization and Global Rights, the ACLU launched a broad campaign opposing the exploitation of domestic workers employed by diplomats. Unlike other employers, diplomats are generally immune from civil, criminal and administrative processes in the U.S. unless the sending countries waive their immunity. Aggravating the problem, U.S. courts have interpreted the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude the hiring and employment of domestic workers.¹⁸¹

Reiterating this position, the U.S. government has submitted “Statements of Interest” in lawsuits brought by abused workers, on diplomats’ behalf, arguing that the U.S. has entered into a number of treaties that establish its obligation to accord diplomatic immunity from prosecution.¹⁸² Pursuant to these treaties, diplomats are entitled to the same privileges and immunities in the U.S. as the U.S. accords to diplomatic envoys, immunities defined by the Vienna Convention, including immunity from the civil jurisdiction of the courts in this country.¹⁸³ And in *Tabion v. Mufti*, the federal court of appeals relied on what it called the State Department’s “narrow interpretation” of commercial activity and held that employment of a domestic servant did not constitute commercial activity.¹⁸⁴ As a result, certain diplomats are sheltered from the legal repercussions of exploiting employees including domestic workers. Yet domestic workers, including workers employed by diplomats, too often face a range of civil and human rights violations including forced labor and trafficking rising to the level of slavery.

For example, in *Chere v. Taye*, the ACLU represents Beletaschew Chere, an Ethiopian domestic worker trafficked by UNDP staff Alemtashai Girma and her husband Fesseha Taye to New Jersey and held in conditions of forced labor by them.¹⁸⁵ She was forced to work 75-80 hours per week, without payment or time off, verbally and sexually abused, denied needed medical care, prohibited from contacting her family or seeking help, made to sleep on the toddler’s

¹⁸⁰ U.S. Dep’t of Justice, Civil Rights Division, *Report on Activities to Combat Human Trafficking* (FY 2001-2005) 25, 27 (Feb. 2006), available at http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

¹⁸¹ Vienna Convention on Diplomatic Relations, done Apr. 18, 1961, *United States accession*, April 29, 1970, 23 U.S.T. 3227, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

¹⁸² “Statements of Interest” cite Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26-Nov. 21, 1947, 61 Stat. 3416; Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, *United States accession*, April 29, 1970, 21 U.S.T. 1418. See, e.g., Statement of Interest of the United States, *Begum v. Saleh*, No. 1:99-cv-11834-RMB (S.D.N.Y. filed Dec. 7, 1999), available at www.state.gov/documents/organization/6655.doc.

¹⁸³ See, e.g., *Begum v. Saleh*, where the complaint sought damages for defendants’ allegedly holding plaintiff in involuntary servitude prohibited by the Thirteenth Amendment, failure to pay minimum wage under federal and state laws, assault and battery, false imprisonment, conversion, and trespass to chattels.

¹⁸⁴ *Tabion v. Mufti*, 73 F.3d 535, 537-540 (4th Cir. 1996).

¹⁸⁵ Complaint ¶¶ 2, 5, *Chere v. Taye*, No. 2:04-cv-06264-FSH-PS (D.N.J. filed Dec. 21, 2004), available at <http://www.aclu.org/FilesPDFs/wrp%20chere%20complaint%20final%20filed.pdf>. The case is currently in the discovery phase.

