

A classified report prepared in 2004 by CIA Inspector General John L. Helgerson found these techniques appeared to constitute cruel, inhuman or degrading treatment under the Convention Against Torture.²⁰⁸ CIA Director Porter Goss, however, countered that CIA interrogators use “‘unique’ methods to obtain ‘vital’ information from prisoners, but strictly obey laws against torture.”²⁰⁹ The ACLU has sought CIA documents through FOIA and is currently litigating the issue, but the CIA has insisted that releasing evidence of alleged criminal acts by CIA agents would jeopardize national security.

The United States government has failed to revoke measures or directives authorizing “disappearances” and to end the use of secret detention facilities in violation of the Convention.

E. Torture and Abuse in the United States (Articles 1, 16)

Since the United States’ last report to this committee, the ACLU and other organizations have continued to document instances of torture and abuse of prisoners and detainees in prisons and jails. Prisoners and detainees have been beaten, shot at, kicked, shocked with electrical stun guns, repeatedly pepper-sprayed, held in solitary confinement for up to twenty-four hours a day under 24-hour surveillance, and restrained in chairs for hours during which time prisoners have defecated on themselves. Prisoners have also been raped and sexually assaulted by correctional officers and other inmates, and denied immediate medical assistance, resulting in the death of some prisoners.

More than 2.1 million persons are incarcerated in prisons and jails in the United States. The number of prisoners has increased six-fold since 1970. According to the U.S. Bureau of Justice Statistics, the U.S. rate of incarceration in 2004, 724 prisoners per 100,000 persons, is the highest reported in the world. As of 2004, 41% of these prisoners were African-American and 19% were Hispanic.²¹⁰ Overcrowding, budget cuts affecting services and rehabilitation programs for prisoners, and inadequate correctional staff to maintain safety and security leave prisoners vulnerable to abuse by each other as well as by staff.

Below is a sample of cases in which the ACLU has been involved since 1999. These cases demonstrate that persons in confinement have been subjected to abuse and torture in violation of U.S. obligations under the Convention.

²⁰⁸ Douglas Jehl, *Report Warned on CIA’s Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005.

²⁰⁹ *CIA Methods Not Torture*, REUTERS, Nov. 1, 2005.

²¹⁰ The Sentencing Project, *Facts About Prisons and Prisoners* (Oct. 2005), available at <http://www.sentencingproject.org/pdfs/1035.pdf>.

Correctional Officers Relied Upon for Guidance on Treatment of Detainees in Iraq

At least three U.S. correctional officials hired by the Department of Justice to set up Iraq's prison system had previously led prison systems charged with abuse of American prisoners. These officials included Terry Stewart, a previous head of the Arizona prison system, who was sued by the Department of Justice for the rape and sexual assault on female prisoners by correctional staff. Another official was Lane McCotter, who resigned as head of the Utah prison system while under fire because of the death of a mentally ill prisoner who had been held for sixteen hours in a restraint chair. Gary DeLand, who had also headed the Utah system, faced litigation for denying adequate medical care to prisoners.²¹¹

Further, the Taguba Report on the Abu Ghraib prison abuses found that military police guards lacked training on detention procedures and relied on personnel with civilian corrections experience to guide them. The report stated: "I find that without adequate training for a civilian internee detention mission, brigade personnel relied heavily on individuals within the brigade who had civilian corrections experience, including many who worked as *prison guards or corrections officials in their civilian jobs*" (emphasis supplied).²¹²

Some of the soldiers charged in the Abu Ghraib abuse had been prison guards in civilian life. For instance, Charles Graner had previously worked as a guard at a maximum security prison in Pennsylvania, which was the center of an abuse scandal in which guards routinely beat and humiliated detainees.²¹³ Two soldiers allegedly involved in abuses in Camp Whitehorse, a detention facility in Iraq, had been correctional officers in civilian life. At a subsequent court-martial, one of them allegedly told other soldiers that abusive treatment maintains prisoner discipline.²¹⁴

²¹¹ Associated Press, *Why Did U.S. Hire These 4 Guys?*, CBS NEWS, available at <http://www.cbsnews.com/stories/2004/06/03/iraq/main620823.shtml>.

²¹² Taguba Report, *supra* note 185, at "Regarding Part 3 of the Investigation" ¶5. *See also id.* at "Regarding Part 2 of the Investigation" ¶ 20 ("Basic Army Doctrine was not widely referenced or utilized to develop the accountability practices throughout the 800th MP Brigade's subordinate units. Daily processing, accountability, and detainee care appears to have been made up as the operations developed with reliance on, and guidance from, junior members of the unit who had civilian corrections experience.").

²¹³ Paul Liberman and Dan Morain, *Unveiling the Face of the Prison Scandal*; Chuck Graner, L.A. TIMES, June 19, 2004.

²¹⁴ Gillian Flaccus, *Marine goes to trial in death of Iraqi linked to Lynch ambush*, CHICAGO SUN TIMES, Aug. 23, 2004; Charlie LeDuff, *New York Marine Convicted of Assaulting Iraqi Prisoners*, N.Y. TIMES, Sep. 3, 2004, at A8.

1. Conditions of Confinement in Prisons and Jails in the United States

a. Prisoners “Left to Die” During Hurricane Katrina

Before Hurricane Katrina, Orleans Parish Prison (“OPP”) was the largest prison facility in the State of Louisiana. On an average day, OPP held over 6,500 prisoners, 60% of whom were held on attachments, traffic, or municipal charges.²¹⁵ After Hurricane Katrina hit New Orleans in August 2005, the ACLU received reports from over 1,000 prisoners who claimed that they were left for days without food, water, or ventilation. Many of the prisoners reported that as the water rose, deputies forced them into their cells using bean bag guns, mace, and Taser guns. Once they were returned to their cells, many prisoners were locked in to prevent them from escaping. Prisoners reported that deputies abandoned their posts, leaving them to fend for themselves. In order to deal with the heat and the unbearable stench that resulted from overcrowding and the lack of operable toilets and showers, prisoners broke windows for air; some also hung signs out of the windows pleading for help. According to hundreds of prisoner testimonials, OPP deputies and members of the Special Investigation Division shot at some of the prisoners who were attempting to escape the rising water inside the prison, and several individuals reported that they witnessed fellow prisoners getting shot in the back.

When the prisoners were finally evacuated from OPP, up to four or five days after floodwaters reached chest-level in some parts of the prison, they were brought to an overpass where they were confronted by armed guards with K-9 dogs used to threaten them. Several prisoners said that the dogs bit other prisoners. Many of the prisoners said that they were maced and beaten during the evacuation and while on the overpass, generally for nothing more than sitting next to a fellow prisoner who attempted to stand and stretch after being forced to sit on the pavement for hours or even days. Other prisoners recounted being maced and beaten for requesting food and water. Female prisoners also reported that deputies directed degrading and sexually offensive comments at them.

- “It was like we were left to die. No water, no air, no food. We were left with deputies that were out of control,” said one woman.
- One man, who was housed in Templeman II (Unit F-2), said he and other prisoners saw “a few dead bodies and we were told not to say anything or we were going to be like them.”

Hundreds of prisoners said conditions worsened when they were moved to other facilities, such as Elayn Hunt Correctional Center (“Hunt”). At Hunt, thousands of former OPP prisoners were left outside in a large field for up to one week; they remained in the field, most without shelter, even while it rained.

²¹⁵ ACLU, *Orleans Parish Prison: A Big Jail with Big Problems*, available at <http://www.aclu.org/prison/conditions/23419res20060111.html>.

- One person described Hunt as “pure hell.” “The guards treated us like old nasty dogs. We couldn’t ask them nothing... [or] you might get shot at,” he said.
- Another man described lawlessness at Hunt: “Everywhere you looked there were fights, people getting stabbed, people getting raped... When [deputies] did come with food, they threw it to us from scaffolds like they were at Mardi Gras.”²¹⁶

The ACLU represents the Orleans Parish prisoners in an ongoing class action lawsuit.

b. Other Cruel and Inhuman Conditions of Confinement

The ACLU is suing Saginaw county officials for the inhuman conditions of confinement in the Saginaw County jail in Michigan. The ACLU found that prisoners are routinely stripped of their clothing by force and placed naked in an isolation cell where they can be observed by members of the opposite sex. Although a jail directive in December 2001 curtailed this practice, the ACLU found that the practice continues to exist. Some prisoners are provided paper gowns, which are inadequate to cover their bodies, are of poor quality, and easily tear. The prisoners are forced to use the paper gowns either as toilet paper, or to remove the mace that is sprayed on them when the guards strip them of their clothes; as a result, they are often left naked.²¹⁷

Prisoners report that they are subjected to extremely cold temperatures in the isolation cells and are not provided with toilet paper. In one cell, where a commode is available, it is plugged with human feces and waste. Fecal matter, urine, blood and other bodily fluids cover the walls and floors in one of the cells. Two other cells have neither a commode nor a sink; prisoners relieve themselves in a hole.²¹⁸

In January 2002, Mississippi death row prisoners—many of whom had been on death row for decades—began a hunger strike to protest brutally harsh conditions of confinement. Six months later, after efforts to resolve the problems administratively had failed, the ACLU filed a class action on behalf of all the death row prisoners, challenging such inhuman conditions of confinement as exposure to lethal extremes of heat and humidity, pervasive filth, uncontrolled pest infestation, non-functional plumbing and constant exposure to human waste, lack of water, extreme isolation, and the warehousing of

²¹⁶ News Release, ACLU, Men and Women at Orleans Parish Prison Detail Chaos Following Katrina (Nov. 17, 2005), available at <http://www.aclu.org/prison/conditions/21620prs20051117.html>; see also, ACLU, *Testimonials from Inmates Incarcerated at Orleans Parish Prison during Hurricane Katrina* (Jan. 11, 2006), available at http://www.aclu.org/images/asset_upload_file182_23418.pdf.

ACLU, *Summaries of 400 Testimonials From Inmates Incarcerated at Orleans Parish Prison During Hurricane Katrina* (Jan. 11, 2006), available at <http://www.aclu.org/prison/conditions/23418res20060111.html>.

²¹⁷ Brief for Plaintiff at 4-6, *Rose v. Saginaw County*, 232 F.R.D. 267 (E.D. Mich. 2005) (No. 01-10337), available at <http://www.aclumich.org/pdf/briefs/saginawjailbrief.pdf>.

²¹⁸ *Id.* at 5. See also Affidavit of Peggy Goldberg Pitt, *Rose v. Saginaw County*, 232 F.R.D. 267 (attaching Summary of Evidence Supporting Pervasive Pattern of Constitutional Violations-April 27, 2005), available at <http://www.aclumich.org/pdf/briefs/saginawpgpaff.pdf>.

severely mentally ill prisoners in adjoining cells.²¹⁹ At trial, the plaintiffs proved that these conditions were so extreme that they caused most prisoners to develop serious mental illness, and caused already mentally ill prisoners to become profoundly psychotic. The ACLU won a comprehensive injunction in the trial court, which was affirmed by the U.S. Court of Appeals for the Fifth Circuit.²²⁰

c. Supermaximum Security Prisons

The U.S. government defends the use of supermaximum facilities “[f]or certain violent inmates . . . to protect the safety of the community at large and of other members of the prison population.”²²¹ But many of the more than 20,000 people held in supermax prisons are mentally ill, and many are held in long-term isolation for years. Supermax prisons are deliberately designed to subject prisoners to extremes of social isolation and sensory deprivation. Prisoners are typically confined in windowless cells for twenty-three to twenty-four hours a day. They are let out of their cell a few times a week for a shower and limited physical movement in a small, enclosed space, typically without exercise equipment. They have almost no access to education or vocational activities, and very limited opportunity for human interaction. Such conditions would be difficult even for the emotionally robust to tolerate but, for the mentally ill, they often lead to catastrophic deterioration, self-mutilation, and sometimes suicide.²²²

The U.S. Report refers to an ACLU suit brought against Wisconsin’s Department of Corrections regarding conditions in a supermax prison in Boscobel, Wisconsin, which was settled with an agreement that includes a ban on housing seriously mentally ill prisoners in supermax.²²³ Many such facilities continue to operate in the U.S., inflicting extreme suffering and sometimes irreparable harm on mentally ill prisoners in violation of U.S. obligations under the Convention.

For instance, in February 2005, the ACLU filed a suit challenging the confinement of mentally ill prisoners at the Wabash Valley Correctional Facility’s Secured Housing Unit (“SHU”), a supermax penal facility in Indiana.²²⁴ The extreme conditions in this unit have led to four suicides since 2000, including a prisoner who hanged himself, one who

²¹⁹ *Russell v. Johnson*, No. 02-261, WL 22208029 (N.D.Miss. May 21, 2003); see also Press Release, ACLU, Court Finds “No Excuse” for Deplorable Conditions on Mississippi’s Death Row, Orders Immediate Remedies (May 21, 2003), available at <http://www.aclu.org/prison/conditions/14701prs20030521.html>.

²²⁰ *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004); ACLU, *Appeals Court Affirms that Mississippi Death Row Conditions are Unconstitutional*, June 30, 2004, available at <http://www.aclu.org/prison/conditions/14782prs20040630.html>.

²²¹ U.S. Report, *supra* note 1, ¶ 95.

²²² 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*, at 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).

²²³ *Id.*

²²⁴ Complaint, *Mast v. Donahue*, No. 05-037 (S.D. Ind. filed Feb. 3, 2005) (hereinafter “Mast Complaint”), available at <http://www.aclu.org/prison/conditions/14789lg120050203.html>.

set himself on fire, another who cut his wrist and throat, and another who choked himself to death with a washcloth.²²⁵ The Indiana Department of Corrections (“IDOC”) maintains that the SHU functions as a disciplinary segregation unit for prisoners who have received two years of disciplinary segregation and are deemed inappropriate to house elsewhere.²²⁶ A disproportionately high number of mentally ill prisoners, however, are transferred to the SHU because their inability to obey prison rules causes them to accumulate disciplinary infractions.²²⁷ Indeed, the IDOC admits that “well over half” of the prisoners in the SHU are mentally ill.²²⁸

Prisoners are locked in windowless concrete cells virtually twenty-four hours a day. They are allowed one hour of solitary exercise in a fifteen by twenty-four feet concrete cell.²²⁹ Because the exercise area is exposed, recreation is frequently cancelled because of inclement weather.²³⁰ Each cell is illuminated twenty-four hours a day and prisoners are not allowed contact with each other. Whenever a prisoner leaves his cell he is placed in restraints. Meals are provided through a slot in the locked door of the cell.²³¹ Prisoners who report feeling suicidal or who demonstrate symptoms of mental illness may be placed in four-point restraints for four hours or more. Those who are deemed dangerous to themselves are stripped to their underwear and returned to their cells with nothing more than a blanket for seventy-two hours or longer.²³² Some prisoners are confined in the SHU for years on end.²³³

In 2005, the ACLU also filed a complaint on behalf of prisoners confined in Mississippi State Penitentiary in Parchman, Mississippi. This supermax facility houses 1000 men—many of them for decades—who are confined twenty-three to twenty-four hours a day in total isolation and complete monotony. They are constantly exposed to pervasive filth and stench, malfunctioning plumbing, human excrement, lethal extremes of heat and humidity, grossly inadequate physical and mental care, and the constant pandemonium created by severely mentally ill prisoners housed in adjoining cells without treatment, who scream, rave, and hallucinate.²³⁴ Many of the 1000 men confined to this facility are held in supermax conditions not for any actual disciplinary or security reason, but because they are HIV positive, have special medical needs, are severely mentally ill, or at some point requested protective custody. They are deprived of any meaningful review of their placement in, or indefinite confinement to, the supermax, and they have no opportunity to earn their way into less-restrictive housing. The lack of due process and of any reward for good behavior greatly intensifies the already profound hopelessness and mental illness engendered by the conditions of confinement. In February 2006, the ACLU

²²⁵ *Id.* at ¶ 46.

²²⁶ *Id.* at ¶ 1.

²²⁷ *Id.* at ¶ 44.

²²⁸ Howard Greninger, *Suit Targets Carlisle Prison*, TERRE HAUTE TRIBUNE-STAR, Feb. 4, 2005.

²²⁹ Mast Complaint, *supra* note 224, at ¶¶ 24-26.

²³⁰ *Id.* at ¶ 27.

²³¹ *Id.* at ¶¶ 32-35.

²³² *Id.* at ¶¶ 53-54.

²³³ *Id.* at ¶¶ 43, 58, 76, 91.

²³⁴ Complaint, *Presley v. Epps*, No. 05-148 (D. Miss. filed June 22, 2005), available at <http://www.aclu.org/FilesPDFs/unit%2032%20complaint%20-%20file-stamped.pdf>.

reached an agreement, in principle, with the Mississippi Department of Corrections to settle the suit, which will comprehensively address these conditions.

d. Inadequate Medical Care and Mental Health Care

Medical and mental health care is deficient and frequently life-threatening in prisons throughout the United States. Correctional systems too often lack adequate funds to hire and retain qualified medical personnel and fail to institute proper procedures to treat prisoners. For instance, in September 2004, a quadriplegic twenty-seven-year-old man in the District of Columbia who had no previous arrests, and who had been sentenced to ten days in a jail for possession of a single marijuana cigarette, died four days into his sentence due to the lack of medical care. Although he told jail staff he needed a ventilator to breathe at night, he was never provided with one. Indeed, staff did not even bother to help him get enough food and water, and at times he was locked into a cell with absolutely no way to communicate his needs.²³⁵

Tragically, this is not an isolated case. Throughout the country, the failure to provide minimally adequate health care becomes a death sentence for too many prisoners. For example, in the ACLU's case against the oldest and largest prison complex in Michigan, a federal judge recently described a series of prisoner deaths over a short period of time. These deaths included a prisoner who "died of neglect, a drug resistant staph infection and gastro-intestinal bleeding," as well as patients whose cancers went untreated until treatment was useless.²³⁶ Similarly, pretrial detainees in the Baltimore Jail presented a federal court with evidence of failure to provide necessary medical care to over 100 detainees, including a woman whose breast lump grew to the size of a golf ball, while staff ignored her repeated requests for medical care. Another detainee who suffered from cancer was left untreated in his bed, with no attempt to keep him comfortable and clean. A month later, when he was released from the jail, he had a bedsore covering most of one buttock. Another woman came into the jail suffering from a drug-resistant staph infection. Although the medical staff noted that she had an abscess, with green and yellow discharge from multiple sites, she was not treated for four days nor placed in medical isolation.²³⁷

Poor mental health care in prisons has also resulted in the deaths of prisoners. In 2002, the ACLU filed a suit on behalf of seriously mentally ill prisoners in El Paso County Jail in Colorado Springs, Colorado. The suit alleged that the condition of mentally ill prisoners was exacerbated due to the lack of adequate mental health treatment and that, as a result, they were at risk of serious injury and death conditions amounting to cruel and unusual punishment. This badly overcrowded jail, whose population regularly exceeds 1000, makes available only two hours of psychiatric service per week. Ten prisoners have

²³⁵ Complaint, *Scott v. District of Columbia*, No. 05-1853 (D.D.C. filed July 20, 2005); see also ACLU, *ACLU and Local Attorneys File Lawsuit Over Quadriplegic Left To Die At DC Jail* (Sept. 20, 2005), available at <http://www.aclu.org/prison/gen/20115prs20050920.html>.

²³⁶ *Hadix v. Caruso*, No. 4:92-cv-00110-RAE, 2005 U.S. Dist. LEXIS 25295, at *4-7 (W.D. Mich, Oct. 19, 2005).

²³⁷ *Duwall v. Ehrlich*, No. 04-7518 (4th Cir. filed Sept. 22, 2004), Joint Appendix at 432-33; 443; 448; 446-47; 533-35; 655-56a; 1033-40; 1069.

died in the jail since 1998, including five suicides, a prisoner who died while tied to the jail's "restraint board," and a prisoner suffering from alcohol withdrawal who died after being repeatedly pepper-sprayed by staff. The jail also fails to provide necessary psychotropic medications, fails to provide in-patient hospitalization for those mentally ill prisoners who need it, and uses restraints on the mentally ill in an unsafe manner.²³⁸ Most recently, in July 2005, a twenty-one-year-old woman hanged herself in the jail, three days after jail staff dismissed her request for mental health care as "manipulation."²³⁹

The ACLU is also resisting jail officials' attempt to end federal court oversight of the Maricopa County Jail in Phoenix, Arizona, the nation's fourth largest jail.²⁴⁰ An independent consultant recently concluded that the jail's health care staffing "is insufficient to meet the needs of the inmate population," and that due to the jail's failure to provide care, "an inmate's health status is likely to deteriorate while in the custody of ... Maricopa County."²⁴¹ The jail's mental health care is no better; an Arizona state judge concluded that "[s]evere overcrowding, unsanitary conditions, cockroach infestations, extreme noise, lack of air conditioning and bullying by professional criminals, including assaults, extortion and stealing medications, are typical of the conditions under which the mentally ill must live."²⁴² The judge further found that, in the jail's psychiatric unit, "at times patients must be kept in the day room and hallways. The overcrowding results in diminished hygiene, including [living units] that are at times cockroach infested and filthy, flooded with urine and smeared with feces."²⁴³

2. Prison Rape and Sexual Assault

Adult and juvenile prisoners confront prison rape and sexual assault across the nation. The ACLU receives many complaints of rape and of prison officials' failure to provide protection from rape and violence. The corrections industry estimates that there are 12,000 rapes per year, which exceeds the annual number of rapes reported by women in New York City, Los Angeles, Philadelphia, Boston, San Diego, and Phoenix combined.²⁴⁴ In July 2005, the U.S. Bureau of Justice Statistics reported a total of 8,210 allegations of sexual violence in 2004; nearly one-third were substantiated following

²³⁸ Complaint, *Shook v. Board of County Commissioners*, 216 F.R.D. 644 (D. Colo. 2003), available at <http://www.aclu.org/FilesPDFs/shook.pdf>.

²³⁹ Media Release, El Paso County Sheriff's Office, Inmate Death at CJC (July 30, 2005), available at <http://shr.elpasoco.com/pressrelease.asp?ID=1380&itla=SHR&selectdept=SHR&selecttime=current&offset=50>.

²⁴⁰ *Hart v. Arpaio*, No. CIV 77-479-PHX EHC-MS (D. Ariz. filed June 16, 1977).

²⁴¹ Liebert & Associates, *Maricopa County, AZ Staffing Plan, Volume III, Correctional Health Services, Final Report*, at 3, 6 (Aug. 2003).

²⁴² *State v. Marstella*, CR 2003-009489-001 DT, CR 2003-033247-001 SE, Minute Entry (Maricopa County Superior Court, Feb. 24, 2004), at 3.

²⁴³ *State v. Trujillo*, CR 2003-009208-001 DT, Minute Entry (Maricopa County Superior Court, Mar. 10, 2004), at 4.

²⁴⁴ Eli Lehrer, *A Blind Eye, Still Turned: Getting Serious About Prison Rape*, NATIONAL REVIEW, June 2, 2003.

investigations. Almost 42 percent of those allegations involved staff-on-prisoner sexual abuse and an additional 11 percent involved sexual harassment of prisoners by staff.²⁴⁵

Sexual abuse in prisons is vastly under-reported. Only a very small percentage of victims report sexual abuse to prison authorities; they remain silent out of shame and out of a well-founded fear of retaliation by sexual predators, prison staff, and prison gangs.²⁴⁶ According to the prison code, “snitching” on other prisoners is a crime punishable by severe beating or death.²⁴⁷ And when the complaint is against a staff member—either for sexual abuse, or for failing to protect from sexual abuse—correctional officers can easily bring false disciplinary charges, punishable by solitary confinement and loss of good times credits adding more years to the time a prisoner must serve. Moreover, even when coerced sex is reported, the authorities usually treat it as consensual, and refuse protection. This is especially the case in prisons dominated by violent prison gangs (including many Texas prisons) where prison authorities have essentially abdicated control of the prison population to violent gang leaders. The gangs force vulnerable prisoners—those who are young, slight, non-aggressive, mentally ill, medicated, effeminate, homosexual, transsexual, or non-gang affiliated—to serve as sex-slaves to generate funds for the gang and to enhance its power.²⁴⁸

To escape from sexual slavery and violent abuse, vulnerable prisoners have no choice but to attach themselves to a “protector” or strong man, to be his exclusive sexual property, in return for his protection from being prostituted out to the gangs. This kind of protective pairing is inevitably characterized as “voluntary” by prison authorities. In reality, the only “choice” the vulnerable prisoner is allowed to exercise is whether to be sexually “owned” by a single predator, or to be utterly at the mercy of violent gangs.²⁴⁹

In April 2002, the ACLU filed a civil suit seeking damages and injunctive relief on behalf of Roderick Keith Johnson, a gay African-American who alleged that from September 2000 to April 2002 he was subjected to a system of gang propagated sexual slavery. Gang members routinely bought and sold him as chattel, raped and degraded him on virtually a daily basis, and threatened him with death if he resisted. He repeatedly pleaded with prison officials to house him in protective custody, but they refused to conduct any meaningful investigation of his complaints and denied his pleas for safekeeping.²⁵⁰ They repeatedly expressed contempt for non-aggressive gay men, and as a matter of practice failed to protect such prisoners from sexual assault, at least until they had been beaten or “guttled.” The month-long trial of the case began in September 2005 in Wichita Falls, Texas. The testimony corroborating Johnson’s claims included not only eye-witnesses to the rapes and beatings he endured, but also the testimony of gang leaders who had

²⁴⁵ 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>.

²⁴⁶ See Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), available at <http://www.hrw.org/reports/2001/prison/report.html>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Complaint, *Johnson v. Johnson*, No. 7:02-CV-87-R, 2003 WL 21510816 (N.D.Tex. 2003), available at <http://www.aclu.org/FilesPDFs/johnson.pdf>.

forcibly pimped him out to other prisoners. The twelve-person jury, after deliberating over eight hours, returned a verdict ten to two in favor of the defendants. Jurors interviewed by the press made it clear that the jury believed Johnson had been raped, but were unwilling to hold prison officials liable because they had been “following policy” in denying Johnson protection.

In a first step in acknowledging the pervasive problem of rape in prisons, the U.S. Congress, in 2003, passed the Prison Rape Elimination Act, which is applicable to private and public institutions holding adults and juveniles.²⁵¹ The law requires the Bureau of Justice Statistics to conduct annual surveys and research on the prevalence and effects of prison rape in local, state and federal prisons.²⁵² It also established a National Commission to study prison rape, report its findings to Congress, and develop national standards for preventing prison rape.²⁵³ The National Commission held three hearings in 2005, and received testimony from prisoners, officials, and advocates about prisoner and staff sexual violence.²⁵⁴

Despite enactment of the law, much remains to be done to protect prisoners from sexual assault and rape in prisons and jails and to provide them with real possibilities to seek redress. Prison officials themselves rarely push for the prosecution of prisoner rape by other prisoners and are even less likely to hold perpetrators accountable for sexual assault of prisoners by officials. Few public prosecutors are concerned with prosecuting crimes committed against prisoners, preferring to leave internal prison problems to the discretion of prison authorities. As a result, the perpetrators of prison rape and assault virtually never face criminal charges or receive punishment.

3. Cruel Use of Restraint and Electro-Stun Devices

The use of restraint and electro-stun devices under international law is limited to situations where they are necessary to prevent escape, or to prevent prisoners from injuring themselves or from damaging property.²⁵⁵ In 2000, the Committee expressed concern about “[t]he use of electro-shock devices and restraint chairs as methods of constraint, which may violate the provisions of Article 16 of the Convention” and recommended that the U.S. “[a]bolish electro-shock stun belts and restraint chairs as

²⁵¹ Prison Rape Elimination Act of 2003, PL 108-79, 117 Stat 972 (2003).

²⁵² *Id.* at § 4 (a).

²⁵³ *Id.* at § 7. The law also creates the Review Panel on Prison Rape in the Department of Justice, which will hold annual public hearings concerning the operation of the prisons with the highest and lowest rates of prison rape. *Id.* at § 4(b).

²⁵⁴ *Public Meeting at the University of Notre Dame of the of National Prison Rape Elimination Commission* (Mar. 31, 2005), available at http://www.nprec.us/proceedings_notredame.htm; *The Cost of Victimization: Why Our Nation Must Confront Prison Rape: Hearing Before the National Prison Rape Elimination Commission* (June 14, 2005), available at http://www.nprec.us/proceedings_prea.htm; *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing before the National Prison Rape Elimination Commission* (Aug. 19, 2005), available at http://www.nprec.us/proceedings_sf.htm.

²⁵⁵ U.N. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ¶ 33, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

methods of restraining those in custody; their use almost invariably leads to breaches of Article 16 of the Convention.”²⁵⁶ The United States has failed to implement the Committee’s recommendation. There are still no binding national standards on the use of restraint chairs and electro-shock devices. In U.S. prisons and jails, restraints are still used routinely to subdue prisoners, resulting in abuse and even some deaths.

In the absence of enforceable national standards on usage and safety, the use of restraint chairs and pepper spray has resulted in abuse of prisoners and even some deaths.²⁵⁷ For example, the ACLU in Georgia filed suit on behalf of a group of six prisoners and pre-trial detainees who were repeatedly placed in a restraint chair and pepper sprayed by Dooly County jail officials, even after they were subdued.²⁵⁸ The jail has been using restraint chairs to punish prisoners despite a U.S. Supreme Court decision emphasizing that restraint should not be used to impose “wanton and unnecessary pain,” and should not be applied once a prisoner has been subdued.²⁵⁹

Plaintiffs alleged that they were strapped to a restraint chair and exposed to 40 degrees Fahrenheit (4.4 degree Celsius) conditions; were repeatedly pepper sprayed in the eyes and face; were strapped to a restraint chair without a bathroom break and forced to defecate on themselves; and hosed with water while in a restraint chair.²⁶⁰ One plaintiff, who suffered from depression and a related mental illness, had attempted suicide twice while in detention; after his second suicide attempt he was strapped in a restraint chair while still smeared with feces. After an hour he was hosed down but then restrained for another three to four hours without a bathroom break.²⁶¹

In addition to ongoing use of restraint chairs and pepper spray, Tasers are now used throughout the nation by law enforcement agencies to subdue suspects by law enforcement agencies. Tasers are hand-held electronic stun guns that fire two barbed darts up to a distance of 21 feet, penetrate up to two inches of the target’s clothing or skin, and deliver a 50,000 volt electro shock. From 1999 to September 2004, at least 148 people in the United States and Canada died after encounters with police who shocked them with Tasers.²⁶² In September 2005, the ACLU of Northern California published a report reviewing the use of Tasers by seventy-nine law enforcement agencies in northern and central California and found that, despite the growing number of deaths and the increasing concern from medical experts about Taser safety, the use of Tasers remains

²⁵⁶ *Concluding Observations Concerning the United States*, *supra* note 14, at ¶¶ 179 (e), 180(c).

²⁵⁷ The restraint chair is a wooden chair with straps for inmates’ wrists and ankles that prevents all movement except for the turning of one’s head. Olerosin Capsicum, commonly known as pepper spray, an inflammatory agency derived from cayenne pepper causes coughing, gagging, shortness of breath, acute sensation on skin and other exposed areas.

²⁵⁸ Complaint ¶¶ 29-31, *Delong v. Dooly County*, No. 5:05-cv-00051-CWH (M.D. Ga. filed Nov. 30, 2004) (hereinafter “Delong Complaint”), available at www.acluga.org/briefs/dooly.prison/Complaint2.pdf.

²⁵⁹ *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

²⁶⁰ Delong Complaint, *supra* note 258, ¶¶ 40, 50-52, 56, 81.

²⁶¹ *Id.* at ¶¶ 89, 96-108.

²⁶² ACLU of Northern California, *Stun Gun Fallacy: How the Lack of Taser Regulations Endangers Lives*, at 1 (Sept. 2005) (hereinafter “*Stun Gun Fallacy*”), available at <http://www.aclu.org/police/abuse/19977prs20051006.html>.

largely unregulated.²⁶³ ACLU found that police departments rely on training materials provided by the manufacturer, Taser International, which grossly exaggerate the safety of Tasers.²⁶⁴

Deaths Associated with Use of Tasers

On January 2, 2005, Gregory Saulsbury, age 30, was acting violently, apparently under the influence of drugs. Saulsbury's family called for medical help but members of the Pacifica Police Department in California were the first to arrive at the scene. A struggle ensued, and two officers shot Saulsbury with their Tasers eleven times. A coroner's report showed twenty-two marks on Saulsbury's body. The confrontation lasted less than four minutes. The medical examiner found that a combination of high levels of cocaine, the struggle with the police, and the Taser contributed to Saulsbury's death.²⁶⁵

Andrew Washington, age 21, died on September 6, 2004, shortly after being shot seventeen times with a Taser in a three-minute period in Vallejo, California. Washington was fleeing police after allegedly hitting a parked car. As he climbed a fence, a Vallejo police officer repeatedly shocked Washington with a Taser until he noticed that Washington was having trouble breathing. Police called for an ambulance but Washington, who had no prior history of heart problems, was pronounced dead at the hospital. The autopsy report indicated that the cause of death was "cardiac arrest associated with excitement during the police chase and cocaine and alcohol intoxication, occurring shortly after Taser." ²⁶⁶

Children and drug users are particularly susceptible to ventricular fibrillation as a result of Taser shock.²⁶⁷ Multiple applications of Taser also increase the risk of death as it increases the chance that an electrical charge will reach the heart.²⁶⁸ ACLU found that only 43 percent of police departments surveyed in California had any policy prohibiting the use of Tasers on pregnant women, just 35 percent had any policy regulating use on the elderly, and only 19 percent had policies restricting the use of Tasers on children.²⁶⁹

In Colorado, the ACLU received several complaints of individuals being stunned by Tasers while already restrained. In a letter to the Denver Mayor's Task Force ACLU pointed out that the use of 50,000 volt shock on a subject who is restrained and poses no

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 3 (citing Transcript from 911 call obtained from Santa Rosa Police Department; *Six Shots Preceded Santa Rosa Man's Death*, CBS 5 NEWS, July 19, 2005; and Jeremy Hay, *Santa Rosa Man Dies After Police Struggle*, SANTA ROSA PRESS DEMOCRAT, July 17, 2005.).

²⁶⁶ *Id.* at 3 (citing Andrew Washington Autopsy Report; Matthias Gafni, *Pathologist Expounds on Autopsy*, VALLEJO TIMES-HERALD, Feb. 2, 2005). *See also* Christina Jewett, *Suspect Hit with Tasers, Then Dies*, SACRAMENTO BEE, Aug. 6, 2005.

²⁶⁷ *Stun Gun Fallacy*, *supra* note 262, at 4.

²⁶⁸ *Id.* at 4.

²⁶⁹ *Id.* at 13.

physical threat to an officer or anyone else, “constitutes abusive, excessive, and unreasonable force.”²⁷⁰ For example:

- A man was shocked in the genitals by an electroshock weapon while he was handcuffed and seated in the back of a squad car. The police report confirms that the officer carried out what he called “a drive stun to the groin area.”
- A woman six-and-one-half months pregnant was tased in the abdomen while she was handcuffed and seated in the back of a squad car.
- A county jail prisoner was shocked twice with a stun gun while he was handcuffed to a wall in the booking room. The officer’s report explains that the prisoner was “mouthing off.”
- Police responded to a call of an overdose and took a visibly intoxicated and possibly suicidal subject to a hospital. Hospital personnel put him in soft restraints on a hospital bed. When the subject failed to follow police orders to shut up, the police report states that police responded by shocking him with a Taser.²⁷¹

Notably, in March 2005 two federal enforcement divisions of the Department of Homeland Security announced that they were not purchasing Tasers because of safety concerns.²⁷² Given the serious safety risks associated with Tasers, use of Tasers by law enforcement should be banned at the local, state and federal level.

4. Cruel Punishment for Juveniles

In a welcome move, the U.S. Supreme Court in February 2005 prohibited the imposition of the death penalty against people who commit crimes under the age of eighteen. In *Roper v. Simmons*, the court held that juveniles are “categorically less culpable” than adult criminals. The ruling noted that juveniles lack the “well-formed” identities of adults, are susceptible to “immature and irresponsible behavior,” and are vulnerable to “negative influences and outside pressures.”²⁷³ Unfortunately, in a similarly cruel practice, forty-one states continue to sentence children to life without parole for crimes committed before the age of eighteen.²⁷⁴ In many states, juveniles can be transferred to adult courts and sentenced to life without any chance of parole regardless of their age, and without consideration of the circumstances of the offense. Over two thousand people

²⁷⁰ Letter from Mark Silverstein, Legal Director ACLU Colorado to Denver Mayor’s Task Force on police (Mar. 15, 2004), available at http://www.aclu-co.org/docket/200319/ACLU_letter_Taskforce_taser_abuses.pdf.

²⁷¹ *Id.*

²⁷² Kevin Johnson, *Federal Bureaus Reject Stun Guns*, USA TODAY, Mar. 18, 2005.

²⁷³ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁷⁴ ACLU, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, at 3 (2004) (hereinafter “ACLU, *Second Chances*”), available at <http://www.nicic.org/Misc/URLShell.aspx?SRC=Catalog&REF=http://nicic.org/Library/020290&ID=020290&TYPE=PDF&URL=http://www.aclumich.org/pubs/juvenilelifefers.pdf>.

in the United States are currently incarcerated for life without parole for crimes they committed as children.²⁷⁵

In Michigan, according to the ACLU's research, at least 307 individuals are serving life without parole for crimes committed as juveniles.²⁷⁶ Michigan has the third-highest rate in the nation of sentencing child offenders to life without parole. Almost half (146) are serving the sentence for crimes committed when they were sixteen or younger. Most were sixteen or seventeen at the time of the offense, forty-three were fifteen and two were fourteen. While all the youth serving the sentences were convicted of an offense involving a homicide, not all were principally responsible for the death. Nearly half reported that they were convicted on an "aiding and abetting" theory and nearly half reported that they were not the principal and had adult co-defendants.²⁷⁷ Nationwide, an estimated 59 percent received the sentence for their first-ever criminal conviction.²⁷⁸ Sixteen percent were between thirteen and fifteen years old at the time they committed their crimes, and an estimated 26 percent were convicted of felony murder (participation in a robbery or burglary during which a co-participant committed murder without the knowledge or intent of the teen).²⁷⁹

The unfairness of imposing an adult punishment on children is heightened by racial and gender inequities. The majority (221) of juvenile lifers in Michigan are minority youth, 211 of whom are African-American.²⁸⁰ Nationwide, the estimated rate at which black youth receive life without parole sentences (6.6 per 10,000) is ten times greater than the rate for white youth (0.6 per 10,000).²⁸¹

Girls in Michigan comprise two percent of those serving life without parole. Unlike boys who are sent to Michigan Youth Correctional Facility and housed with other prisoners under the age of twenty, girls are sent directly to adult women's prisons and housed with adults.²⁸²

Excessive punishment becomes cruel, inhuman or degrading if its severity or length is disproportionate to the crime or to the culpability of the offender. The preamble of the Convention Against Torture prohibits cruel, inhuman or degrading punishment by recognizing that such "rights derive from the inherent dignity of the human person."²⁸³

²⁷⁵ Human Rights Watch and Amnesty International, *The Rest of their Lives: Life Without Parole for Child Offenders* (2005) (hereinafter "Human Rights Watch, *Rest of their Lives*"), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

²⁷⁶ ACLU, *Second Chances*, *supra* note 274, at 4.

²⁷⁷ *Id.*

²⁷⁸ Human Rights Watch, *Rest of their Lives*, *supra* note 275, at 1.

²⁷⁹ *Id.*

²⁸⁰ ACLU, *Second Chances*, *supra* note 274, at 6.

²⁸¹ Human Rights Watch, *The Rest of their Lives*, *supra* note 275, at 1.

²⁸² ACLU, *Second Chances*, *supra* note 274, at 7.

²⁸³ See also ICCPR, *supra* note 38, Art. 10 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"); United Nations Convention on the Rights of the Child, Art. 37(a) Sept. 2, 1990, 1577 U.N.T.S. 3. (prohibiting sentence of capital punishment or life imprisonment without possibility of release for offenses committed by persons below eighteen years of age).

For treatment to be humane, it must be appropriate to age and legal status.²⁸⁴ Sentencing children to life without parole violates these standards.

5. Abuse of Non-Citizens in Detention in the United States

a. Abuse of Non-Citizens in Immigration Detention Centers

In 2004, the Department of Homeland Security detained more than 200,000 non-citizens in jails and prisons for violating civil immigration laws.²⁸⁵ The press and human rights advocates have reported on unsanitary conditions of confinement, inadequate medical treatment resulting in death, and abuse by guards of non-citizens detained for immigration violations. In 2004, the press reported on the physical abuse of non-citizen detainees in Hudson and Passaic county jails in New Jersey, including multiple allegations of physical assault and attacks by guard dogs. The press also reported that the medical records showed that at least two prisoners had been taken to the hospital for treatment for dog bites.²⁸⁶

Following the publicity of the story about the use of dogs, the Department of Homeland Security issued a memorandum ordering its field offices to refrain from contracting with jails and detention centers that use dogs around immigration detainees.²⁸⁷ Jails not holding immigration detainees are not covered by this memorandum and may continue to use dogs to sniff for drugs and other contraband and to guard prisoners.²⁸⁸

In December 2005, the press reported that several non-citizens detained for immigration civil violations died after guards and medical staff failed to provide immediate proper medical care.²⁸⁹ The Department of Homeland Security's detention centers and federal prisons have medical standards which require staff to respond to medical emergencies "within a 4 minute response time" and to apply life-saving measures if needed. In the four cases reported by *National Public Radio*, each detainee died due to failure of the

²⁸⁴ U.N. Human Rights Committee, *General Comment No. 9 on Article 10*, at ¶ 13 (Forty-fourth session, 1992), available at

<http://www.unhcr.ch/tbs/doc.nsf/0/3327552b9511fb98c12563ed004cbe59?Opendocument>.

²⁸⁵ Daniel Zwerdling, *The Death of Richard Rust*, NATIONAL PUBLIC RADIO, Dec. 5, 2005; Asjlyln Loder, *Speziale Boots Feds Probing Alleged Abuse of Detainees*, HERALD NEWS, Aug. 17, 2005.

²⁸⁶ 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.

²⁸⁷ Wayne Perry, *Jails Must Stop Using Dogs Near Immigration Detainees*, ASSOCIATED PRESS, Dec. 7, 2004.

²⁸⁸ *Id.* See also Asjlyln Loder, *Passaic Jail Still Relying on Dogs; Federal Ban is Limited*, THE RECORD, Dec. 24, 2004 (Critics say that dogs should be banned from all jails as questions have arisen whether dogs can be used safely to control inmates. In March 2003, two jail guards assaulted a federal prisoner and used a dog to intimidate the prisoner).

²⁸⁹ See, e.g., Zwerdling, *The Death of Richard Rust*, *supra* note 285. Witnesses who held a prayer service to remember Richard Rust were locked in their cells for two to three days and told to keep quiet. Rust, who collapsed suddenly in Oakdale Federal Detention Center, was not provided medical assistance until ten to twelve minutes later by which time he had already died. *National Public Radio's* attempts for several months through emails, letters, and phone calls to get the Department of Homeland Security and Oakdale Detention Center to discuss the events surrounding Rust's death were refused. *Id.*

guards and medical staff to provide immediate medical attention. This deliberate indifference to a person's serious medical needs constitutes cruel treatment in violation of the Convention Against Torture.

b. Abuse of Non-Citizens Detained in the “Global War on Terror”

Shortly after the terrorist attacks on New York and Washington, D.C., the United States rounded up, arbitrarily detained, and mistreated hundreds of men who were from Arab, South Asian or Muslim countries. According to two official reports published by the Office of the Inspector General of the U.S. Department of Justice (“OIG”), few if any had real links to terrorism. The process of naming them as “of special interest” to the investigation was often based on the most tenuous and haphazard of connections.²⁹⁰ These men were detained often for months at a time, even in cases where they were not contesting deportation and the government could have effectuated their immediate removal from the country. The United States refused to disclose to the public a list of all these so-called “special interest” detainees, and many of them remain unknown.

While detained, these immigration detainees were subjected to a regime of physical and psychological abuse. According to the conclusions of the second OIG report (“OIG Supplemental Report”), staff and supervisors engaged in the following types of physical brutality: slamming, bouncing and ramming detainees against the walls; bending detainees’ arms, hands, wrists and fingers; pulling and stepping on detainees’ restraints to cause pain; improper use of restraints; and rough and inappropriate handling.²⁹¹

Anser Mehmood, a Pakistani national, was detained by the U.S. from October 2001 to May 2002. Border Patrol agents took him to the Metropolitan Detention Center in Brooklyn, New York in leg, arm and wrist shackles. Upon arrival, federal correctional officers threw him against a wall so hard that his mouth started to bleed and a bone in his hand was broken. He was not given x-rays or appropriate medical treatment even though a doctor saw that his hand was broken. The correctional officers told him that he was being held as a “World Trade Center suspect,” even though he had been arrested for immigration violations. For the first four months of detention, Mehmood was held in a solitary, illuminated cell for twenty-four hours a day, and was regularly insulted by prison guards for being a Muslim.²⁹²

²⁹⁰ 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) (hereinafter “OIG Supplemental Report”), 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) (hereinafter “ACLU, America’s Disappeared”), available at <http://www.aclu.org/FilesPDFs/un%20report.pdf>; Larry Cohler-Esses, *Brooklyn’s Abu Ghraib: Terror Suspects Allege Abuse*, DAILY NEWS, Feb. 20, 2005.

²⁹¹ OIG Supplemental Report, *supra* note 290, at 16, 18, 20, 22, 25, 28.

²⁹² ACLU, Petition to the United Nations Working Group on Arbitrary Detention, Annex A, at 18-20 (Jan. 27, 2004) (hereinafter “ACLU Arbitrary Detention Petition”), available at <http://www.aclu.org/FilesPDFs/complaint.final.012704.pdf>.

These incidents were not isolated. The OIG Supplemental report is replete with evidence substantiating the systemic nature of the abuse, noting that “almost all the detainees were slammed against walls,” at least “one officer always twisted detainees’ hands,” some officers stepped on detainees’ leg chains “whenever they were stopped,” and detainees were often handled roughly and inappropriately.²⁹³

Two reports published by the ACLU also document the devastating impact that the deportation of these men has had on their families and on immigrant communities in the United States.²⁹⁴ In January 2004, the ACLU filed a petition to the U.N. Working Group on Arbitrary Detention (“the Working Group”), on behalf of certain immigrants detained by the U.S. in connection with the events of September 11, 2001.²⁹⁵ In November 2005, the Working Group issued an opinion on the case of Benamar Benatta. Benatta, an Algerian national, was held in U.S. custody for over three years “without [the government] actually taking any procedural action on the offense with which he is accused”—a violation of Article 9 (prohibition on arbitrary detention) of the ICCPR. The Working Group also condemned the “high-security prison regime (involving impositions that could be described as torture), which for no reason whatsoever, was imposed on [Benatta] while he was under investigation by the FBI.”²⁹⁶

c. Misuse of Material Witness Act

Following the September 11 attacks, the Department of Justice detained at least seventy men living in the United States—all Muslim but one—under a federal law that permits the government, in narrow circumstances, to arrest and briefly detain “material witnesses” who have information about a criminal case and who might otherwise flee to avoid testifying in a criminal proceeding. The government secured the indefinite detention of such persons not for criminal purposes but as possible terrorist suspects. A report published jointly by the ACLU and Human Rights Watch in June 2005 documented how witnesses were often arrested at gunpoint in front of families and neighbors and transported to jail in handcuffs, typically held around-the-clock in solitary confinement, and subjected to the harsh and degrading high-security conditions typically reserved for prisoners accused or convicted of the most dangerous crimes.²⁹⁷ They were taken to court in shackles and chains. In at least one case, a material witness was made to testify in shackles.

²⁹³ OIG Supplemental Report *supra* note 290, at 10, 17, 21, 26.

²⁹⁴ ACLU, *America's Disappeared*, *supra* note 290; ACLU, *World's Apart: How Deporting Immigrants After 9/11 Tore Families Apart and Shattered Communities* (Dec. 2004), available at <http://www.aclu.org/FilesPDFs/worldsapart.pdf>.

²⁹⁵ ACLU Arbitrary Detention Petition, *supra* note 292.

²⁹⁶ U.N. Econ. and Soc. Council, *Opinions Adopted by the Working Group on Arbitrary Detention*, Commission on Human Rights, ¶ 9, U.N. Doc. E/CN.4/2005/6/Add.1 (Nov. 19, 2004), available at http://www.aclu.org/FilesPDFs/benatta_opinion.pdf.

²⁹⁷ ACLU and Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (July 2005), available at <http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf>.

The government has jailed almost all of the material witnesses in maximum security prison and sometimes in the same special units holding the most dangerous prisoners in the facility. Many have been kept in solitary confinement twenty-four hours a day, with little time outside their cells for recreation. Some have been in windowless cells. In some cells the lights have been kept on morning, noon, and night. In the early stages of their detention, they have not been allowed to call their families or friends. Some of the material witnesses have endured physical and verbal abuse by prison guards who accused them of being terrorists.

Many material witnesses reported that they were subjected to derogatory comments by prison guards, were physically abused while in federal custody, and were humiliated by what they considered gratuitous strip searches by multiple guards, often in public places. Albader al-Hazmi, held as a material witness at Metropolitan Detention Center in Brooklyn, recalled:

I was searched naked many times sometimes twice daily in front of many guards. The guards, they were enjoying searching us naked. When they felt like it they would beat us. . . . One of the guards said to me while beating me say thanks to Allah.

The report found that the U.S. Department of Justice relied on false, flimsy or irrelevant evidence to secure arrest warrants for the men and to persuade courts that they were a flight risk and needed to be incarcerated. Almost all the men, in fact, had cooperated with federal authorities before their arrest. Many proved to have no information relevant to a criminal proceeding.

One-third of the seventy confirmed material witnesses were incarcerated for at least two months. Some were imprisoned for more than six months, and one actually spent more than a year behind bars. The Department of Justice apparently used the material witness statute to buy time to conduct fishing expeditions for evidence to justify arrests on criminal or immigration charges. When there was no such evidence, the Justice Department simply held the men under the material witness law until it concluded that it had no further use for them or until a judge finally ordered their release.

In October 2005, Senator Patrick Leahy introduced a bill (S.1739) to amend the material witness statute. The bill provides that material witnesses must be confined in the least restrictive means possible and detained to the extent practicable in a facility separate from accused or convicted criminals. The bill also provides material witness detainees with the right to have notice of the arrest warrant and the right to a prompt hearing to determine whether the witness poses a flight risk.

The bill falls short in some respects, however. For example, it continues to permit the use of the material witness statute in grand jury proceedings, which pose the greatest potential for abuse. Grand jury proceedings often last for months or years, and because they occur at a far earlier stage in the criminal process, a witness to a grand jury proceeding could more easily be detained for a much longer period than a witness to a

trial proceeding. In addition, because grand juries have wide latitude as investigative bodies, it is far more difficult for a detained witness to establish that his or her testimony is not “material”—or for a judge to evaluate materiality—at the grand jury stage. The bill also fails to limit or reform the secrecy of many material witness proceedings.²⁹⁸ At this submission, the bill is pending before the Judiciary Committee of the United States Senate.

F. Inadequate Review of Interrogation Rules (Article 11)

The Abu Ghraib photographs of torture and abuse became public in April 2004. Secretary of Defense Rumsfeld and other officials in the United States government knew, or had reason to know, about the abuses being reported as early as 2002,²⁹⁹ and yet they failed to adequately review interrogation techniques that contributed to the abuse or to issue new policy guidelines for soldiers to apply in their handling of detainees in Afghanistan and Iraq. Only in December 2004 did the Department of Justice withdraw the August 2002 memorandum. But the new memorandum fails to define torture and to prohibit cruel, inhuman or degrading treatment or punishment. It also fails to address the August 2002 memorandum’s assertion that the President can authorize torture and that there can be various defenses against criminal liability for torture such as “necessity” and “self-defense.” Instead, the new memorandum simply asserts that to address such concerns is “unnecessary” because of the “President’s unequivocal directive that United States personnel not engage in torture.”³⁰⁰

Moreover, the Pentagon Working Group report of April 2003 was not deemed inapplicable to Department of Defense activities until March 2005.³⁰¹ In November 2005, the Department of Defense did, however, issue a new policy directive that applies to all intelligence interrogations conducted by DOD military and civilian personnel, contractor employees under the DOD, law enforcement personnel and counterintelligence personnel

²⁹⁸ Letter from ACLU to Senator Patrick Leahy, *Re: S. 1739, providing safeguards for material witness detentions* (Oct. 26, 2005), available at <http://www.aclu.org/safefree/detention/21244leg20051026.html>.

²⁹⁹ See, e.g., Molly Moore, *Villagers Released by American Troops Say They Were Beaten, Kept in “Cage,”* WASH. POST, Feb 11, 2002; Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002.

³⁰⁰ Memorandum from Daniel Levin, Acting Deputy Assistant Attorney General, Office of Legal Counsel to James Comey, Deputy Attorney General, *Re. Legal Standards Applicable Under 18 U.S.C. § 2340-2340A*, (Dec. 30, 2004) (hereinafter “December 2004 Memorandum”), available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

³⁰¹ Memorandum from William J. Haynes II, General Counsel, Dept. of Justice to the JAG Corps (Mar. 17, 2005). Haynes’s memo states that “in light of the Justice Department’s modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views of the relevant law.” Haynes continued: “I determine that the Report of the Working Group on Detainee Interrogations is to be considered a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense. This determination should be disseminated throughout the Department of Defense, as appropriate.” *Id.* See also Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1.