



**United States' Compliance with the
Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment**

**American Civil Liberties Union
Shadow Report to the 3rd-5th Periodic Reports of the United States**

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Introduction

Twenty years ago, the United States ratified the world's landmark international treaty banning torture and cruel treatment. The *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* was signed by President Ronald Reagan in 1988, approved under President George H.W. Bush, with implementing legislation signed into law by President Clinton in 1994. The bi-partisan support for this treaty represented a consensus against torture and abuse by and in the United States. Unfortunately, this bi-partisan commitment to the Convention has not been fully realized. In fact, upon ratifying the treaty, the United States incorporated Reservations, Understandings and Declarations (RUDs) that have been read over-broadly by the U.S. government to water down the legal force and applicability of the treaty as domestic law. The Bush Administration wrongly used these RUDs as a crutch to argue that the treaty's protections were limited, especially in the context of counter-terrorism and military operations overseas, and to justify abusive interrogation techniques and other unlawful practices such as secret detention and renditions to torture.

This report is submitted to the UN Committee against Torture as an alternative (or "shadow") report to the U.S. government report submitted in August 2013, as part of U.S. treaty obligations to report on progress made with respect to treaty implementation and compliance. The ACLU's aim in this report is to highlight for the Committee, which will review the U.S. report on November 12th and 13th 2014, key areas in which the U.S. government has failed to uphold its human rights commitments under the Convention.

Since the United States underwent its last review by the Committee in May 2006, the U.S. record has shown progress in certain areas, most notably: the closing of secret CIA detention sites by executive order; Supreme Court rulings curtailing the use of life sentencing without parole for juveniles; and enforcement of civil rights by the Civil Rights Division of the Department of Justice, particularly through federal pattern and practice investigations and litigation against police departments and prison authorities across the country.

In other areas, however, there is significant need for improvement. The U.S. report lacks concrete information on state and local compliance with the Convention and ignores serious legal and policy questions raised by the Committee. For example, the U.S. has failed to adopt legislation making torture a federal crime, as recommended by the Committee in 2000 and 2006. Moreover, the Obama administration has failed to reverse positions taken by the Bush administration which have proven to be inconsistent with the Convention and international law, especially with regard to the applicability of the Convention overseas. As we explained in our last [report](#) to the Committee, Bush administration interpretations of the scope of articles 3 and 16 of the Convention were used to justify abusive U.S. programs that authorized torture, cruel treatment, and transfers to torture abroad. The Obama administration has thus far missed an important opportunity to make clear that it is fully committed to strengthening the ban on torture and cruelty. In particular, it has failed to make it clear that the U.S. government is no longer

fabricating loopholes that the previous administration used to avoid its obligations to prevent and punish torture and cruel treatment.

As this report demonstrates, there are many areas where U.S. law, policy, and practices continue to fall short of U.S. treaty obligations and set dangerous examples to other countries, including force-feeding, indefinite detention, and unfair trials of detainees at Guantanamo, as well as punitive detention and deportation of immigrants, often in violation of non-refoulement obligations. Our submission includes additional questions for the Committee to pursue with the U.S. government during the review process, and recommendations for the Committee to consider in regards to: intelligence, counter-terrorism, and military operations; use of solitary confinement and access to legal remedies for prisoners; and the mistreatment of immigrants including abusive detention conditions, prolonged and indefinite detention and handling of migrant children and families at the US-Mexico border. The ACLU report also highlights key aspects of the criminal justice system that do not comply with article 16 of the Convention, which requires the prevention of acts of cruel, inhuman or degrading treatment or punishment, including through racial profiling, use of the death penalty, life without parole sentences, and militarization of law enforcement.

In addition to the concerns raised here, the ACLU has endorsed other reports submitted to the Committee by coalitions of civil society organizations on other issues, including sexual violence in the U.S. military, shackling of incarcerated pregnant women, and criminalization of homelessness.

The United States review before the UN Committee next month will likely coincide with the much-anticipated release of the approximately 500-page summary, findings, and conclusions of the Senate Intelligence Committee's landmark review of the CIA's secret detention and torture program. That review culminated in a more than 6,000 page report which the Senate Intelligence Committee adopted in December 2012. The executive branch and the Senate Intelligence Committee are currently engaged in disputes over how much of the summary will be divulged to the public. It is critical that the report be released, with only those redactions necessary to protect legitimate and current intelligence sources and methods, to prevent such abuses from ever occurring again. But more importantly, steps towards accountability must be taken to fulfill United States international commitments under the Convention.

President Obama recently said in response to a question on the Senate Intelligence Committee torture report,

*“that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, **but we tortured some folks.** We did some things that were contrary to our values. ... And my hope is, is that this report reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard. And when we engaged in some of*

these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line. And that needs to be -- that needs to be understood and accepted. And we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future.”¹

The Obama administration currently has a unique opportunity to take a clear stand against torture and abuse by clearly and credibly demonstrating to the world a firm commitment to the prohibition of torture, and to meet its human rights obligations to fully investigate acts of torture and provide redress to victims. Failure to do so will set a dangerous standard for future presidents to sidestep accountability for human rights violations and leave the door open for reoccurrence of these barbaric abuses.

The ACLU looks forward to engaging with the Committee and the government next month and hopes that the concerns and recommendations raised in this submission will be meaningfully addressed by the U.S. government during its appearance before the Committee.

Jamil Dakwar
Director, ACLU Human Rights Program
17 October 2014

¹ The White House, Office of the Press Secretary, Press Conference by the President (Aug. 1, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>.

Non-Refoulement: Rendition by U.S. Intelligence Agencies and Diplomatic Assurances

I. Issue Summary

In 2009, by Executive Order 13491 (Ensuring Lawful Interrogations) the United States effectively ended the United States involvement in the Bush Administration's "extraordinary rendition" program by closing any detention facilities then operated by the CIA and prohibiting the CIA from operating any such facilities in the future.¹ Executive Order 13491 also established a Special Task Force to review interrogation and transfer policies and to ensure their future compliance with domestic and international legal requirements. More specifically, the Task Force was directed to study and evaluate:

[T]he practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitment or obligations of the United States to ensure the humane treatment of individuals in its custody or control.²

On August 29, 2009, the Special Task Force announced, in summary form, the policy recommendations of its review. In regards to transfers, the Task Force stated that where:

[T]he United States moves or facilitates the movement of a person from one country to another or from U.S. custody to the custody of another country to ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture.

In the course of its review, the Task Force considered seven types of transfers conducted by the United States, including those pursuant to intelligence authorities. Although the summary does not detail the safeguards to ensure against torture, it identifies the receipt of assurances from the receiving country as a key component of the revised transfer policy, including improved evaluation of the reliability of such assurances by U.S. government agencies involved in transfers and improved monitoring of the individual after transfer from U.S. custody.³

Based on the summary, the United States has left the door open to the possibility of transfers, including by U.S. intelligence agencies, outside of established legal procedures, provided transferring agencies secure diplomatic assurances that individuals transferred will not be subject to torture. However, as numerous NGO's have documented, such assurances, even with effective oversight and post-transfer monitoring mechanisms in place are unreliable and completely ineffective in preventing torture and prohibited ill-treatment.⁴

II. CAT Position

The Committee requested that the Administration provide, in its fifth periodic report, information on:

- “The procedures in place for obtaining ‘diplomatic assurances’”;
- “Steps taken to establish a judicial mechanism for reviewing, in last instance, the sufficiency and appropriateness of diplomatic assurances in any applicable case”;
- “Steps taken to guarantee effective post-return monitoring arrangements”; and
- “All cases since 11 September 2001 where diplomatic assurances have been provided.”⁵

III. U.S. Government's Response

In its third to fifth periodic report, the U.S. government stated that it was implementing recommendations of the Special Task Force, including the recommendations that agencies annually prepare a report on all transfers involving diplomatic assurances. The U.S. stated there were cases where it rejected assurances as insufficient to satisfy its non-refoulement obligations.⁶ It added that “[a] judicial mechanism is generally not available to review diplomatic assurances” and emphasized that it has “robust procedures to review and the sufficiency and appropriateness of human treatment assurances” within the Executive Branch.⁷ With regard to monitoring, it stated that “in general” the U.S. would seek “consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.”⁸

IV. Other UN and Regional Human Rights Bodies Recommendations

The U.N. Human Rights Committee and U.N. independent experts have raised concerns about transfers based on assurances and extrajudicial transfers more generally. Categorized broadly, these concerns relate to the U.S. government’s failure to disclose whether policies and procedures exist that:

- Rule out the transfer of individuals to countries which systematically violate human rights standards;
- Ensure a thorough examination of the merits of each individual case, including through judicial review; and
- Establish post-return monitoring arrangements.⁹

Indeed, U.N. bodies and experts have repeatedly expressed concern about the secrecy of the U.S. government’s procedures and standards.¹⁰

In April 2014, the U.N. Human Rights Committee called on the U.S. to “strictly apply the absolute prohibition against refoulement” and “continue exercising the utmost care in evaluating

diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries and take appropriate remedial action when assurances are not fulfilled.”¹¹

V. Recommended Questions

1. Please describe the U.S. government position on its non-refoulement obligations in the context of rendition, proxy detention, or other cases in which the U.S. extrajudicially facilitates a transfer or is involved in the interrogation of an individual held in the custody of a foreign government.
2. Since the issuance of the Special Task Force’s recommendations, in how many transfers has the U.S. government used diplomatic assurances? Has the U.S. government conducted any extrajudicial transfers, with or without the use of assurances?
3. In compliance with the Special Task Force’s recommendation that agencies issue annual reports on the use of assurances, we are aware that the Department of Homeland Security has issued at least one report on the use of assurances and the Department of Defense has issued three reports. What other agencies have issued these reports, and how many reports have they issued?
4. Please describe U.S. minimum standards for the content and use of assurances, including under what circumstances the U.S. government regards post-return monitoring as “required for the transfer to proceed.”¹² Does the United States rule out the use of assurances for the transfer of individuals to countries that: systematically violate human rights standards; have previously breached diplomatic assurances; or refuse to provide “consistent, private access to the individual who has been transferred, with minimal advance?”¹³
5. Please describe U.S. post-return monitoring practices, including the training of monitoring personnel; the frequency and duration of post-return monitoring; and any cases in which returned detainees have reported the breach of assurances against torture, as well as any remedial steps the government has taken in response.

VI. Suggested Recommendations

1. Do not conduct, facilitate or participate in extrajudicial transfers, which deprive a detainee of the opportunity to provide information about his individual risk factors for torture or challenge the reliability of assurances.
2. Establish minimum standards for the contents of assurances, including access to a lawyer and the ICRC, recording of all interrogations, independent medical examination, prohibition of incommunicado detention, and post-return monitoring. Do not conduct transfers where the receiving government systematically commits torture or cruel, degrading or inhuman treatment or punishment.
3. Establish effective post-return monitoring standards and procedures. Prohibit transfers where receiving governments are unwilling to permit monitoring compliant with these standards and procedures.
4. Adopt transparency measures with regard to transfers with assurances. In particular, make publicly available the Special Task Force on Interrogation and Transfer Policy's report, as well as the annual reports on transfers with assurances that agencies submit (with only those redactions necessary to protect information that is properly classified).
5. Clarify the government's position on judicial review and ensure that all detainees are afforded an opportunity for meaningful judicial review of transfer decisions.

¹ Exec. Order No. 13491 (Ensuring Lawful Interrogations), 3 C.F.R. 13491 (2009).

² Press Release, U.S. Dep't of Justice, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009), available at <http://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president>.

³ *Id.*

⁴ See e.g., Columbia Law School Human Rights Institute, *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Dec. 2010) available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>.

⁵ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶11 (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

⁶ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶78 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

⁷ *Id.* at para. 79

⁸ *Id.* at para. 82

⁹ See UN Human Rights Council, *Report submitted by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ¶¶60-63 (Feb. 3, 2011), U.N. Doc. A/HRC/16/52.

¹⁰ The U.N. Human Rights Committee has called on the U.S. to "adopt clear and transparent procedures" regarding transfers based on assurances. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶16 (Dec. 18, 2006), U.N. Doc. No. CCPR/C/USA/CO/3/Rev.1.

¹¹ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶13 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

¹² U.S. Dep't of State, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights* ¶¶285-286 (Dec. 30, 2011).

¹³ *Id.* at para. 82

Non-Refoulement: Asylum-Seekers at the Border

I. Issue Summary

Each year, many foreign nationals arrive in the United States escaping persecution or torture and seeking protection in the United States. While some are able to enter the United States, be interviewed by an asylum officer, and present their asylum case in court, others are instead deported rapidly at the border and returned to the persecution they fled, sometimes with devastating consequences. In the broadly defined border zone¹ and at ports of entry, U.S. law allows immigration officers to order deported individuals who arrive in the country without valid travel documents immediately upon their arrival through a procedure called “expedited removal.”² When this law was introduced in 1996, the U.S. government recognized the danger that *bona fide* asylum seekers could be erroneously *refouled* to danger through this process.³ Thus, when an immigration officer processes an individual for deportation under expedited removal, he is also supposed to inquire whether the individual is afraid to return to her country of origin,⁴ and, if so, refer her to an asylum officer with specialized training in immigration law who will determine whether the individual can pursue her claim in immigration court.⁵

However, since expedited removal (and other summary removal procedures⁶) was introduced and expanded, the U.S. government has deported asylum-seekers back to danger without providing them the opportunity to present their claims to an independent and qualified decision-maker, in violation of U.S. *non-refoulement* obligations. In 2004, a U.S. government-commissioned study on expedited removal found “serious implementing flaws which place asylum-seekers at risk of being returned from the U.S. to countries where they may face persecution.”⁷ In particular, the study noted that in 50% of the interviews observed, arriving noncitizens were not informed they could ask for protection if they feared torture or persecution in their home country; in 15% of observed interviews, a person who expressed a fear of returning was nonetheless deported without a referral to an asylum officer.⁸ Instead of reforming expedited removal, the U.S. government expanded its use in 2005, and it now accounts for 44% of all deportation orders from the United States.⁹

The expansion of expedited removal without necessary reforms and safeguards has had devastating consequences. A forthcoming ACLU investigation (based on interviews with individuals deported by immigration enforcement officers at the U.S. border) found that 55% of individuals said they were not asked about fear of returning to their country—or were not asked anything in a language they understood. Of the 28% who said they *were* asked about their fear of persecution, 40% said they told the border agent of their fear of returning to their country but were nevertheless *not* referred to an asylum officer before being summarily deported.¹⁰ In many cases, individuals reported being coerced to sign forms they didn’t understand, threatened by law enforcement officers, and told that asylum was not available in their case and they would have to be deported back to their home country even if they faced persecution or torture there.

II. Human Stories

Nydia R. is a 36-year-old transgender woman from Mexico. After years of threats and harassment for being transgender, Nydia fled to the United States in 2003 but was turned away with an expedited removal order, despite having several visible bruises from a recent attack in Mexico. After securing asylum, she returned to Mexico to attend a funeral where she was again attacked and raped. When she tried, twice, to return to the United States, Nydia was illegally ordered deported by immigration officers and returned to Mexico, where she was attacked and trapped in sex trafficking.

Rosa, a 22-year-old woman, fled domestic violence in El Salvador and was arrested by border officials when crossing into Texas. Although she was asked about her fear of returning, she was never referred to an asylum officer. Instead she was deported back to El Salvador where her ex-boyfriend found her and continued to abuse her. She eventually was able to return to the United States and seek asylum.

Hermalinda and her husband are indigenous Guatemalans, political activists who were involved in challenging mining companies' extraction activities. Their activism put them in danger, however. Hermalinda recalls, "On the 5th of March 2011, about four men came to our house and beat us. Two were police officers and two were dressed in civilian clothes. They beat us and took us 30 minutes by car. Then they made us get out of the car and they beat us more. They took off my clothes and they raped me."¹¹ Hermalinda and her husband fled to the U.S. to seek protection but were arrested near the U.S.-Mexico border by U.S. immigration agents who issued a deportation order and removed them from the United States.

III. CAT Position

Article 3 of the Convention against Torture states, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹² In its General Comment No.3, this Committee observed that in order to "guarantee non-repetition of torture or ill-treatment," States should "ensur[e] compliance with article 3 of the Convention prohibiting refoulement."¹³

In response to the 2006 Committee against Torture observations, the U.S. government claimed that "in the context of immigration removals from the United States . . . there are procedures for alleging torture concerns and procedures by which those claims can be advanced."¹⁴ These procedures, however, are not self-activating and are only available when an immigration officer asks about a person's fear, records it, and refers the individual to those processes. More recently, the Committee requested information from the United States on steps taken to ensure compliance with "the non-refoulement guarantee to all detainees in its custody."¹⁵ The U.S. response contends that the U.S. government conducts a "thorough and

rigorous process [to] ensure[] that any transfers are consistent with the U.S. non-refoulement commitment,¹⁶ but did not specifically discuss procedures like expedited removal, and other processes where an individual never sees a judge, where asylum-seekers are deported (often at the border) by immigration enforcement agents with limited review. For individuals who were never asked about the torture they face if deported or whose pleas were ignored, it is unlikely that the U.S. government conducts a meaningful review before or after the deportation.

IV. Recommended Questions

1. In light of mounting evidence that border officers do not consistently ask noncitizens about fear of torture if returned to their country, what steps is the U.S. government taking to ensure that asylum seekers are asked about their fears and referred to an asylum officer?
2. What processes are in place to monitor border officers' compliance with U.S. obligations under Article 3 and to censure officers who routinely disregard those obligations?

V. Suggested Recommendations

1. Create stronger, independent monitoring of interviews between immigration officers and asylum seekers to ensure that asylum seekers are not deported back to danger without the opportunity to first seek protection in the United States.
2. Independent monitoring should include periodic audits and video recording of asylum interviews.
3. Ensure that asylum seekers are not misled or coerced into abandoning their rights to seek asylum before being removed from the United States.

¹ Customs and Border Protection, an agency of the US government responsible for border protection and apprehending unauthorized migrants, operates within 100 miles of any international land or sea border, maximizing its interpretation of "reasonable distance" in I.N.A. § 287(a)(3). ACLU, *Customs and Border Protection's (CBP's) 100-Mile Rule*, available at <http://legalactioncenter.org/sites/default/files/CBP%20100%20Mile%20Rule.pdf>.

² I.N.A. § 235(b).

³ See generally, PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* (2000); Eric Schmitt, *Senate Votes Bill to Reduce Influx of Illegal Aliens*, N.Y. TIMES, May 3, 1996, available at <http://www.nytimes.com/1996/05/03/us/senate-votes-bill-to-reduce-influx-of-illegal-aliens.html>.

⁴ 8 C.F.R. § 235.3(b).

⁵ *Id.*

⁶ Summary removal procedures are a variety of administrative processes used by the U.S. government to remove or return an individual without a judicial hearing. These processes include expedited removal, reinstatement of removal, administrative removal, stipulated orders of removal, and voluntary return (which is not technically a deportation, as it does not include a deportation order, but comes with many of the same consequences and is issued by an immigration enforcement officer). Unlike expedited removal, these processes are not limited to the U.S. border zone and may also sweep up and remove individuals with asylum claims who do not see a judge before being deported or returned to their country of origin.

⁷ U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *REPORT ON ASYLUM-SEEKERS IN EXPEDITED REMOVAL* (Feb. 8, 2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1.

⁸ *Id.*

⁹ U.S. Dep't of Homeland Security, Office of Immigration Services, *Immigration Enforcement Actions: 2013* (Sept. 2014), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

¹⁰ Information and interviews on file with the ACLU as part of forthcoming report. Other organizations have also recorded problems with the referral system at the border, with asylum-seekers being turned away and ordered deported by immigration officers. See Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border: A Blueprint for US Government Policy* (Jun. 2014), available at <http://www.humanrightsfirst.org/resource/how-protect-refugees-and-prevent-abuse-border>; AMERICAN IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT (May 2014), available at http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.

¹¹ Interview with Hermalinda L., Berkeley, CA, Mar. 18, 2014 (on file with the ACLU).

¹² Art. 197.

¹³ U.N. Comm. against Torture, *General Comment No. 3, Implementation of article 14 by States parties* ¶ 18 (Dec. 12, 2012), U.N. Doc. CAT/C/GC/3.

¹⁴ U.S. Dep't of State, *Comments by the Government of the United States of America to the Conclusions and Recommendations of the Committee against Torture (CAT/C/USA/CO/2)* ¶5 (Nov. 6, 2007), U.N. Doc. CAT/C/USA/CO/2/Add.1.

¹⁵ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶10(a) (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

¹⁶ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶69 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

Lack of Transparency and Accountability for the Bush Administration's Torture Program

I. Issue Summary

During the administration of President George W. Bush, many hundreds of people were tortured and abused by the Central Intelligence Agency (“CIA”) and the Department of Defense, primarily in Afghanistan, Iraq and at Guantánamo Bay, but also in other states after unlawful renditions. Yet, to date, there has been little accountability for abuses including torture, arbitrary detention and enforced disappearances.

In January 2009, President Barack Obama took important steps to dismantle the previous administration's torture program. In Executive Order 13491, President Obama ordered the CIA to close its secret prisons, banned the CIA from all but short-term transitory detention, and put the CIA under the same interrogation rules that apply to the military.¹ But since then—as the ACLU and other NGOs have documented—the Obama administration has undermined that early promise by thwarting accountability for torture and other abuses.

No survivor of the U.S. torture program has had his or her day in a U.S. court. The United States and government officials have repeatedly invoked state secrecy and the doctrine of qualified immunity to dismiss civil suits alleging torture, unlawful detention, and enforced disappearance before the merits are heard.² With domestic avenues for redress closed, a number of victims of U.S. torture have filed petitions against the United States with the Inter-American Commission on Human Rights. But the United States has yet to respond to any of these petitions, including one filed over six years ago on behalf of Mr. Khaled El-Masri, a German national traveling to Macedonia who was unlawfully detained, tortured, and transferred to the custody of the CIA in Afghanistan as part of a U.S. government rendition program.³

A comprehensive, independent and effective criminal investigation, including into the role of the senior officials who authorized the torture program, is long overdue. The principal Justice Department investigation into torture and abuse by CIA agents was conducted by Assistant U.S. Attorney John Durham, who was mandated to conduct an investigation into the destruction of interrogation videotapes and a preliminary inquiry into incidents where interrogators inflicted abuses different from those authorized by legal memos.⁴ Although the record is clear that the Bush administration's torture program was devised at the highest levels, there are no assurances that Durham investigated the role of senior officials. Durham did recommend full investigations be opened in two cases—one involving the death of Gul Rahman at the Salt Pit Prison in 2002, and another involving the death of Manadel al-Jamadi in Iraq in 2003—but the Justice Department closed both cases without charging anyone.⁵

The anticipated release of the summary, findings, and conclusions of the Senate Intelligence Committee's landmark review of the CIA's secret detention and torture program provides the United States an opportunity to demonstrate its commitment to providing

accountability for the previous administration's torture program. In December 2012, the Senate Intelligence Committee adopted its full 6,000 page report. The executive branch and the Intelligence Committee are currently engaged in a struggle over how much of the summary will be divulged to the public.⁶ It is critical that the report be released, with only those redactions necessary to protect legitimate intelligence sources and methods, to prevent such abuses from ever occurring again. Even more transparency beyond the summary is also needed. The ACLU continues to press in Freedom of Information Act ("FOIA") lawsuits for the release of the full report, the CIA's response, and an internal CIA review, as well as 2,000 photographs of detainee abuse.⁷

II. CAT Position

In its 2006 concluding observations, the Committee recommended that the United States make accessible to all victims of torture "mechanisms to obtain full redress, compensation and rehabilitation."⁸ In its subsequent list of issues prior to reporting (List of Issues), the Committee requested information on implementation, including statistical data on the number of requests for redress, and on measures to provide compensation to Guantanamo detainees who had been subjected to torture and other ill-treatment (questions 8(d), 27(a), (b)).⁹

The Committee also recommended prompt, thorough and impartial investigations of all cases of torture and ill-treatment by civilian and military personnel and of the responsibility of senior officials for "authorizing, acquiescing, or consenting in any way, to acts of torture."¹⁰ The Committee expressed its concern over lenient sentences of less than a year in cases of detainee abuse and stressed that torture and ill-treatment should be prosecuted and punished "in accordance with the seriousness of the crime."¹¹ The Committee requested an update in the List of Issues on steps taken to implement these critical recommendations, including information on John Durham's mandate (question 23 (a), (b)).¹²

III. U.S. Government's Response

In its third to fifth periodic report, the United States provides generic descriptions of avenues of redress theoretically open to victims of torture.¹³ This response ignores that the U.S. government and its officials have foreclosed avenues of redress sought by victims of torture and rendition by invoking various privileges and immunities.

The United States also lists multiple criminal statutes that could be used to prosecute torture and other ill-treatment, cites military prosecution statistics, and refers to two civilian prosecutions, without acknowledging that not one person has been charged with torture or the war crimes of torture or cruel or inhuman treatment in connection with its torture program.¹⁴ With respect to Mr. Durham's investigation, the United States simply provides links to press releases without revealing whether he investigated the role of senior officials.¹⁵

In response to the Committee's requests for detailed information on the existence of secret detention facilities and the legal authority under which they were established, the United States acknowledges only that 14 men were transferred from CIA custody to Guantánamo Bay in 2006¹⁶—when it is known that more than 100 people were held by the CIA.¹⁷ The United States then refers the Committee to a heavily redacted CIA Inspector General Special Review¹⁸ and legal memoranda that were disclosed in 2009.¹⁹ Neither the CIA report nor the legal memos reveal the locations of CIA secret prisons—which the Obama administration continues to refuse to declassify—even as the European Court of Human Rights has held European states responsible for their role in the CIA's torture.²⁰ Further, a September 17, 2001 legal memo said to authorize the creation of the CIA black sites remains secret. Moreover, as we discuss in the section on the executive order prohibiting CIA detention, the prohibition is not absolute and the order contains a loophole which allows the CIA to operate detention facilities so long as those facilities are “used only to hold people on a short-term, transitory basis.”²¹

IV. Other UN and Regional Human Rights Bodies Recommendations

In April 2014, the UN Human Rights Committee expressed concern regarding the “limited number of investigations” of torture or other cruel, inhuman or degrading treatment or punishment and that criminal investigations into human rights abuses committed by the CIA were closed in 2012. It recommended that the United States ensure that “all cases of . . . torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies.”²² The Committee also expressed its concern “that many details of the programmes remain secret, thereby creating barriers to accountability and redress for victims,” and recommended that the United States “declassify and make public” the Senate Intelligence Committee's report.²³

V. Recommended Questions

1. Provide further details on the scope of Assistant U.S. Attorney John Durham's investigation. Was Durham authorized to investigate the role of senior Bush Administration officials in approving the CIA's torture program, and did he conduct any such investigation? Has any government investigation considered the criminal responsibility of high-level administration officials or senior military officers in approving and implementing the abuse of detainees held by the Department of Defense?
2. The U.S. government's report to the Committee indicates that a series of courts-martial were convened for members of the armed forces. Please provide further details on the outcome of these cases, including the names of the defendants, the

charges, and the sentences. Has any member of the armed forces been charged with the war crimes of torture or cruel or inhuman treatment?

3. As every lawsuit for civil redress brought by a victim of the previous administration's torture program has been dismissed by U.S. courts as a result of claims of state secrecy and other privileges asserted by the United States or its officials, has the United States taken any measures to provide redress, including compensation and rehabilitation, to such victims outside of the U.S. court system? Has the United States publicly acknowledged or apologized to any victim, including family members? If the United States has provided compensation or rehabilitation services, please provide statistics concerning the number of victims, the amount of compensation paid, and the rehabilitation services provided.

VI. Suggested Recommendations

1. Ensure that all cases of torture or other ill-treatment, unlawful detention, and enforced disappearance are effectively, independently, and impartially investigated. Ensure that perpetrators including, in particular, senior military and civilian officials who authorized or acquiesced in torture, are investigated and prosecuted if warranted by the evidence.
2. Establish an independent body to provide compensation and rehabilitation to those who suffered torture or other cruel, inhuman or degrading treatment. President Obama should also publicly acknowledge and apologize to the victims of U.S. torture policies.
3. Release still-secret records concerning the extent of U.S. government abuse, with only those redactions that are necessary to protect legitimate sources and methods, including:
 - i. The full Senate report on its investigation into the CIA's torture program.
 - ii. The memorandum issued by President Bush on September 17, 2001 authorizing the CIA to establish secret overseas detention facilities.
 - iii. Hundreds of CIA cables describing the use of waterboarding and other abusive interrogation techniques.
 - iv. Over 2,000 photographs of detainee abuse at detention facilities in Iraq and Afghanistan.

¹ See Exec. Order No. 13491 (Ensuring Lawful Interrogations), 3 C.F.R. 13491 (2009).

² See e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (case alleging torture and unlawful rendition dismissed due to state secrecy privilege), *cert. denied* 552 U.S. 947 (2007); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (case alleging torture and other ill-treatment of detainees held in Iraq and Afghanistan dismissed on qualified immunity and other grounds), *rehearing en banc denied*; see also *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (suit against private contractor that allegedly assisted CIA in its rendition and torture program dismissed on state secrecy grounds), *cert. denied* 131 S. Ct. 2442 (2011); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (state secrecy and qualified immunity arguments raised, case dismissed on other grounds).

³ Petition, *El-Masri v. United States*, Case 419-08, Inter-Am. Comm'n H.R. (Apr. 9, 2008), available at <https://www.aclu.org/national-security/el-masri-petition-iachr>.

⁴ See Press Release, U.S. Dep't of Justice, Office of Public Affairs, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), <http://1.usa.gov/NnFsyY>.

⁵ See *id.*; Scott Shane, *No Charges Filed in Harsh Tactics Used by CIA*, N.Y. TIMES, Aug. 30, 2012, available at <http://nyti.ms/1g9yAvR>.

⁶ See e.g., Jonathan S. Landay and Michael Doyle, *Obama Officials, Senate Intelligence Panel Spar Over Deletions from Torture Report*, MCCLATCHY, Aug. 4, 2014, <http://bit.ly/1qOyReS>; Julian Harrem, *'Torture Report' Delayed in Redaction Fight*, THE HILL, Aug 4, 2014, <http://bit.ly/1lsVjHt>.

⁷ Senate Torture Report and CIA Reply – FOIA, ACLU, <https://www.aclu.org/national-security/senate-torture-report-and-cia-reply-foia>; Joseph Ax, *U.S. Judge Signals He May Order More Abu Ghraib Photos Released*, REUTERS, Aug. 27, 2014, <http://reut.rs/1qCHd7n>.

⁸ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 28 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2 [hereinafter “Concluding Observations”].

⁹ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶ 8(d), 27, (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5 [hereinafter “List of Issues”].

¹⁰ Concluding Observations at ¶ 19.

¹¹ *Id.* ¶ 26.

¹² List of Issues at ¶ 23(a), (b).

¹³ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶ 17 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5 [hereinafter “State Report”].

¹⁴ *Id.* ¶¶ 127-34.

¹⁵ *Id.* ¶ 135.

¹⁶ *Id.* ¶ 23.

¹⁷ The Senate Intelligence Committee report is said to conclude that the CIA held 119 people, and the Open Society Justice Initiative has documented 136 cases by using public sources. See Ali Watkins, Marisa Taylor, and David Lightman, *Senate Finds CIA Illegally Interrogated Terror Suspects After 9-11*, MCCLATCHY, Apr. 3, 2014, <http://bit.ly/1IEh6jC>; OPEN SOCIETY JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 12* (2013).

¹⁸ CIA Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities* (May 7, 2004), available at <https://www.thetorturedatabase.org/document/special-review-counterterrorism-detention-and-interrogation-activities-office-inspector-gen>.

¹⁹ See Press Release, ACLU, *ACLU Obtains Detailed Official Record of CIA Torture Program* (Aug. 24, 2009), <http://bit.ly/1jbJOZ1>. The ACLU has created an on-line database of more than 100,000 pages of government documents, including legal memoranda, obtained primarily through its FOIA litigation. See *The Torture Database*, <https://www.thetorturedatabase.org/about>.

²⁰ Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, N.Y. TIMES, July 24, 2014, <http://nyti.ms/1x7f2Sb>.

²¹ Exec. Order No. 13491 (Ensuring Lawful Interrogations), 3 C.F.R. 13491 (2009).

²² U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶ 5, 12 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

²³ *Id.* ¶ 5.

Detention and Trials at Guantanamo

I. Issue Summary

Almost 13 years after it opened, the prison at Guantánamo Bay still holds 149 foreign detainees. Seventy-nine of these men are cleared for transfer from the prison yet remain detained, the vast majority having been cleared by a U.S. government interagency task force¹ in 2010. Another 60 men have even less recourse from the U.S. policy of indefinite detention without charge or trial. And 7 men face charges in the flawed military commission system.²

Delays in Transfers

Due to delays within the executive branch as well as legislative restrictions, transfer of cleared detainees has become infrequent. Only one detainee in this category has been transferred in 2014.³ Moreover, the Obama administration bears responsibility for opposing in court the release of detainees against whom it has presented scant evidence of wrongdoing. For its part, the United States Congress has enacted provisions banning or otherwise unnecessarily restricting the transfer of detainees. Yet even in the intermittent absence or easing of such restrictions, the Obama administration has been exceedingly slow in executing transfers. Nearly a dozen transfer agreements with foreign governments await final approval by the Secretary of Defense.⁴ In addition, current language in draft text of the National Defense Authorization Act (NDAA)—a bill that is essentially guaranteed a final vote each year—would ban transfers of even cleared detainees to Yemen. Of the 79 detainees at Guantánamo cleared for transfer, 57 are Yemeni. A Yemen transfer ban would punish these Yemeni detainees by subjecting them to on-going detention based solely on their country of origin.

Lack of Relief from Indefinite Detention

The Periodic Review Boards (“PRB”), which began in 2013, after more than two years of delay, are meant to provide an opportunity for indefinitely imprisoned detainees to challenge their continued detention through an administrative hearing.⁵ Thus far, the hearings have proven to be painfully slow, inherently unfair, and have largely only aggravated the practice of indefinite detention. The boards have held hearings for only nine detainees out of an eligible 71, and no new hearings are scheduled.⁶ Further, the admissibility of secret evidence means that a detainee and his representatives may be unable to meaningfully contest the government’s assertion that the detainee represents a continued threat or the reliability of its sources. In such a scenario, the detainee’s representatives may be given only summaries of the evidence collected by the government.

The PRB system is not meant to replace detainees’ right to petition for the writ of habeas corpus, but even that right has been constrained by recent prison policy and court decisions adopting positions urged by the US government. Moreover, since May 2013, detainees are forced to undergo—as one detainee described them—“humiliating and degrading” groin searches for each

meeting with attorneys.⁷ These intrusive searches have led some detainees to refuse attorney meetings, chilling detainees' efforts to contest the lawfulness of their detention or prepare for PRB hearings. The searches were upheld by a federal appeals court earlier this year.⁸

Potential Indefinite Detention in the United States

There are also troubling reports that the Obama administration supports closing the Guantánamo prison by moving detainees to a Department of Defense detention facility in the United States. Indefinite detention in the United States is as unlawful and unacceptable as it is at Guantánamo.

Force Feeding Hunger Strikers

The Defense Department has responded to hunger strikes protesting indefinite detention at Guantánamo by using painful, inhuman and cruel force feeding methods. By July 2013, more than 100 detainees were participating in a hunger strike, and nearly half of them were on a list to be force fed.⁹ In December, the Defense Department stopped reporting the number of hunger strikers.¹⁰ This year, it released a redacted version of a new force feeding protocol that indicates that hunger strikers subjected to so-called "enteral feedings" are restrained in a special chair with nasal feeding tubes inserted and removed up to twice a day.¹¹ "I can't describe how painful it is to be force-fed this way," said one detainee of the tube insertion process.¹² Lawyers continue to challenge the practice in the federal courts. The government has refused to substitute a less painful procedure, and seeks to respond to court challenges largely in secret.¹³

Military Commissions Trials of Torture Victims

The legacy of the U.S. torture program pervades the Guantánamo military commission prosecutions. Six defendants accused of responsibility for the 9/11¹⁴ and U.S.S. Cole attacks were tortured, extraordinarily rendered, and unlawfully detained before being charged in a system that lacks fair trial safeguards. All six men face the death penalty.¹⁵

In July 2014, the European Court of Human Rights found Poland complicit in the CIA's torture of one defendant, Abd al-Rahim Hussayn Muhammed al-Nashiri, and ordered Poland to seek assurances from the United States that he will not be executed.¹⁶ According to his lawyers, Mr. al-Nashiri has also not received adequate medical treatment for the post-traumatic stress disorder he suffers as a result of torture.¹⁷

Key among the concerns about military commission trials' fairness is the possible use of coerced evidence, and the fact that the U.S. government is seeking to keep information related to torture secret from the defendants' lawyers and the public. Although the Military Commissions Act of 2009 excludes statements obtained through torture, the statute and rules could permit evidence tainted by torture, such as statements made by the defendant after the torture stopped, and information derived from torture statements.¹⁸ The United States considers the locations of

the CIA black sites and details about abusive interrogation and conditions of confinement to be classified. On that basis, the prosecution has fought to withhold the full details of the defendants' abuse from their lawyers, who need that information to defend their clients, including in challenges to the death penalty.¹⁹ Relatedly, the government has sought and received a restrictive protective order that purports to classify the 9/11 defendants' thoughts, memories and experiences of torture.²⁰ This also makes it harder for defense counsel to represent their clients, and could mean that testimony about torture will be censored from the public.²¹

II. Human Stories

Mohamedou Ould Slahi is a Mauritanian national who has been unlawfully detained by the United States for more than twelve years. Mr. Slahi was arrested in Mauritania in November 2001 on suspicion of ties to al-Qaeda. He was then illegally transferred by the U.S. government to Jordan, Bagram, Afghanistan, and finally to Guantánamo, where he has been held since August 2002. At Guantánamo, Mr. Slahi was held in total isolation for months, kept in a freezing cold cell, shackled to the floor, deprived of food, made to drink salt water, forced to stand in a room with strobe lights and heavy metal music for hours at a time, threatened with harm to his family, forbidden from praying, beaten, and subjected to a sleep deprivation program. His abuse was confirmed and well documented in a 2009 report by the Senate Armed Services Committee that investigated allegations of detainee abuse at Guantánamo. After a federal district court held that Mr. Slahi's detention was unlawful and granted his habeas corpus petition, the U.S. government appealed and continues to maintain that Mr. Slahi should be detained.²²

III. CAT Position

The Committee's last review of the United States in 2006 took place just after the U.S. Supreme Court struck down the military commissions created by executive order in 2001 and two years before the Court held that all detainees at Guantánamo Bay have the right to habeas corpus under the U.S. Constitution.²³ At the time, the Committee recommended that the United States close Guantánamo and provide detainees with access to a judicial process or release them without delay.²⁴

In 2010, the Committee requested updates in the list of issues prior to reporting on steps taken to close Guantánamo and to end indefinite detention. The Committee also asked for information on legal safeguards for detainees who were to be tried and on steps taken to address inhumane conditions of confinement at Guantánamo.²⁵

IV. U.S. Government's Response

The United States' third to fifth periodic report focuses on changes in law and policy regarding the Guantánamo Bay prison and the military commissions since President Obama took office.

The report points to President's Obama's repeated promises to close Guantánamo, explains the work of the inter-agency task force, notes the President's signing statements objecting to Congressional restrictions on transfers, and reports on the establishment of the PRBs and the appointment of special envoys to negotiate transfers.²⁶ As detailed above, Guantanamo remains open, 79 men cleared for release are still held there, and prospects of release or a fair trial for the remaining men are dim.

With respect to hunger strikers, the United States reports that they are "nourished" in accordance with procedures similar to those used for federal prisoners,²⁷ without acknowledging that the World Medical Association, the American Medical Association, and each of the Special Rapporteurs on Torture, Human Rights and Counter-Terrorism, and Health oppose force feeding.²⁸

On military commissions, the report summarizes changes made in the military commissions system since 2006 and declares the United States' belief that "the Military Commissions Act of 2009 is fully consistent with the Convention."²⁹

V. Other UN and Regional Human Rights Bodies Recommendations

In April 2014, the Human Rights Committee expressed its regret that the United States failed to provide a timeline for closing Guantánamo and recommended that the United States "expedite the transfer of detainees designated for transfer, including to Yemen," accelerate the PRB process, end detention without charge or trial, close the Guantánamo Bay prison, and try any criminal cases against detainees held in Guantánamo in the criminal justice system and not the military commissions.³⁰

In August 2014, the Committee on the Elimination of Racial Discrimination similarly urged the United States to close Guantánamo, end detention without charge or trial, ensure fair trial rights to those who are charged, and release any detainee who is not charged or tried.³¹

In his March 2014 thematic report to the Human Rights Council, the Special Rapporteur on Torture stressed that coerced evidence, including statements obtained through torture or other ill-treatment of the defendant or a third party, evidence obtained in a third state through acts of torture or ill-treatment, and "other evidence obtained as a result of the acts of torture" must be excluded from trials without exception. He recommended that all States ensure that such coerced evidence is excluded from all proceedings and that the burden of proof shift to the State

whenever a party “advances a plausible reason” that evidence may have been obtained by torture or cruel, inhuman or degrading treatment.³²

VI. Recommended Questions

1. In 2014, only one detainee cleared for release has been transferred. 79 remain. What is the United States’ timetable for transferring these men? In addition, please explain why only 9 Periodic Review Board hearings have been held in the last year. What is the timetable for conducting the rest of the reviews? Upon reflection of their first year of operation, what steps are being taken to increase the transparency and effectiveness of the Periodic Review Boards, specifically in regard to a detainee’s access to evidence used against him?
2. How many Guantánamo detainees are currently engaging in a hunger strike? How many are being force-fed and how many are hospitalized? Please describe the standard operating procedures for involuntary feeding presently used by the Department of Defense.
3. In its periodic report, the United States claims that the Military Commissions Act of 2009 is consistent with the Convention against Torture. Since then, the Special Rapporteur on Torture has issued a thematic report focused on the exclusionary rule in which he recommends the exclusion from evidence of all statements obtained through torture or other ill-treatment of the defendant or a third party, evidence obtained in a third state through torture or ill-treatment, and evidence derived from statements taken under torture. What measures will the United States take to ensure that such coerced evidence is not admitted as evidence in the military commission trials at Guantánamo?

VII. Suggested Recommendations

1. Take all necessary measures to immediately end the practice of indefinite detention at Guantánamo, including opposing any legislation that would delay efforts to transfer detainees from Guantánamo or export indefinite detention to new locations. Oppose transferring any detainee to the United States itself for either indefinite detention or military commission proceedings.
2. Take all necessary measures to execute transfers without further delay for every detainee who is cleared for release; restart and accelerate the Periodic Review Board process; and ensure a meaningful, timely hearing for each detainee eligible for a board review.

3. End the practice of force-feeding hunger strikers and launch a prompt, thorough, and impartial investigation into all past cases of force-feeding. Release all protocols describing the standard operating procedures for managing hunger strikers. Resume the practice of reporting a daily count of the number of detainees who are engaging in a hunger strike, being force fed, and hospitalized.
4. Ensure that coerced evidence including statements obtained through torture or other ill-treatment of the defendant or a third party, evidence obtained in a third state, and evidence derived from torture is excluded from all military commission proceedings. Ensure that all relevant records concerning torture and other ill-treatment, including the CIA's rendition, detention and torture program, are turned over to defense counsel. Promptly release to the public information about the CIA's rendition, detention and torture program with only those redactions that are necessary to protect legitimate sources and methods.
5. Withdraw the possible imposition of the death penalty as punishment in all military commission cases in which the defendant was subjected to torture or CIDT.

¹ The United States describes this review in paragraphs 42-45 of its report. U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶¶42-45 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5 [hereinafter "State Report"].

² Of the three remaining detainees, one is serving a life sentence and two are held pending sentencing at a future date under plea agreements. See *Guantánamo by the Numbers* [Infographic], ACLU, <https://www.aclu.org/national-security/guantanamo-numbers>.

³ See The Guantanamo Docket, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline>.

⁴ Nedra Pickler, *Obama's Goal of Guantanamo Closure Stalled by Slow Pentagon Process of Approving Transfers*, U.S. NEWS, Sept. 30, 2014, <http://bit.ly/1x2SKCF>.

⁵ The PRBs were established in an executive order that mandated a review within one year of all detainees who had not been cleared for release in the 2010 interagency task force process, except for those charged before a military commission. See Exec. Order No. 13,567 (Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force), 3 C.F.R. 13,567 (2011).

⁶ U.S. Dep't of Def., *Periodic Review Board Secretariat, Full Review*, <http://www.prs.mil/ReviewInformation/FullReviewPage.aspx>.

⁷ *Prisoner Boycotts Guantanamo Hearing Over Search*, ASS'D PRESS, May 2, 2014, <http://bit.ly/1n45b0I>.

⁸ See *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. Aug. 1, 2014).

⁹ See Zachary Katznelson, *ACLU Joins Human Rights Coalition Opposing Force-Feeding at Guantánamo*, ACLU Blog of Rights (May 14, 2013), <http://bit.ly/1ncFJ9x>; *National Digest: Guantanamo Inmates Stay on Hunger Strike*, WASH. POST, July 6, 2013, <http://wapo.st/1vmeiJ3>.

For more information on the history of the hunger strike, see *Tracking the Hunger Strike*, MIAMI HERALD, http://pubsys.miamiherald.com/static/media/projects/gitmo_chart/.

¹⁰ See *Guantanamo Detainees' Hunger Strikes Will No Longer Be Disclosed by U.S. Military*, WASH. POST, Dec. 4, 2013, <http://wapo.st/191POg0>.

¹¹ Zak Newman, *What's the Difference Between Force Feeding and Waterboarding?*, ACLU Blog of Rights (Mar. 24, 2014),

<http://bit.ly/1gizYBo>; Joint Medical Group SOP No. JMG 001, Medical Management of Detainees with Weight Loss, Dec. 16, 2013, available at <http://bit.ly/1u6F4ab>.

¹² Samir Naji al Hasan Moqbel, *Gitmo Is Killing Me*, N.Y. TIMES, Apr. 14, 2013, <http://nyti.ms/1voGMDk>.

¹³ See *Dhiab v. Obama*, Case No. 05-1457 (GK), 2014 WL 2134491 (D.D.C. May 22, 2014) ("Thanks to the intransigence of the Department of Defense, Mr. Dhiab may well suffer unnecessary pain from certain enteral feeding practices and forcible cell extractions."); Josh Gerstein, *Feds Want Guantanamo Force-Feeding Hearing Secret*, POLITICO, Sept. 28, 2014, <http://www.politico.com/blogs/under-the-radar/>.

¹⁴ Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER, Feb. 15, 2010, <http://www.newyorker.com/magazine/2010/02/15/the-trial-2>.

¹⁵ The seventh military commission defendant has been charged with several war crimes but does not face the death penalty. See Abd al Hadi al Iraqi, Human Rights Watch, <http://bit.ly/Yyfkap>.

¹⁶ See Marcellene Hearn, *Prisoners Tortured by the CIA Find Justice in Europe*, ACLU Blog of Rights (July 25, 2014), <http://bit.ly/1AoUo4w>; *Al-Nashiri v. Poland*, Case No. 28761/11 (Eur. Ct. H.R. July 24, 2014).

¹⁷ See Carol Rosenberg, *Expert Testifies Accused USS Cole Bomber Was Tortured*, MIAMI HERALD, Apr. 24, 2014, <http://hrl.us/1plb9FR>.

¹⁸ The provision concerning the use of evidence derived from torture is not in the statute. Compare Military Commissions Act of 2009 § 949r with Military Commissions Rule of Evidence, Rule 304 available in MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2012), <http://bit.ly/1vrGawE>.

¹⁹ See Marcellene Hearn, *Guantanamo Judge to Prosecution: Turn Over the Torture Evidence*, ACLU Blog of Rights (July 14, 2014), <http://bit.ly/1yw2jOY>; Dorothy Samuels, *Torture Details for U.S.S. Cole Suspect*, N.Y. TIMES, June 26, 2014, <http://nyti.ms/1BsI54V>.

²⁰ The ACLU intervened in the military commissions to challenge this aspect of the protective order. See *Challenge to Censorship of Torture Testimony at Guantánamo Military Commission Trial*, ACLU, <http://bit.ly/1qOySO4>.

²¹ See Samuels. To cite just one example of how this works in practice, earlier this year, an expert called by the defense on the issue of whether Mr. al-Nashiri is receiving adequate medical care, was able to testify that she observed scars on Mr. Nashiri's body that are consistent with allegations of torture, but not what those allegations are. See Marcellene Hearn, *In Guantánamo Death Penalty Case, Torture Matters*, ACLU Blog of Rights (Apr. 29, 2014), <http://bit.ly/1rDuoPH>.

²² The ACLU represents Mr. Slahi in his habeas corpus case challenging his detention. For more information on his case, see *Mohamedou Ould Slahi Challenges Guantánamo Detention: Salahi v. Obama*, ACLU, <http://bit.ly/1rughur>.

²³ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

²⁴ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 21 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2.

²⁵ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶¶ 8(b), 26, 38 (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

²⁶ State Report at ¶¶ 40-49, 62, 145.

²⁷ *Id.* ¶ 219.

²⁸ See Letter to Secretary of Defense Chuck Hagel from 13 NGOs (Apr. 10, 2014), available at <http://bit.ly/1vpJCqO>.

²⁹ State Report ¶¶ 50-57, 146.

³⁰ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶ 21 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

³¹ U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* ¶ 22 (Aug. 29, 2014), U.N. Doc. CERD/C/USA/CO/7-9.

³² U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶¶ 66, 67, 68, 82 (Apr. 10, 2014), U.N. Doc. A/HRC/25/60.

Prohibiting Secret Detention by the Central Intelligence Agency

I. Issue Summary

In 2009, President Obama signed Executive Order 13491 on “Ensuring Lawful Interrogations,” which ordered the Central Intelligence Agency (CIA) to close “any detention facility that it currently operates” and prohibited it from operating “any such detention facility in the future.”¹ However, the executive order’s prohibition of CIA detention is not absolute. The order contains a loophole which allows the CIA to operate detention facilities so long as those facilities are “used only to hold people on a short-term, transitory basis.”²

There is currently no publicly available directive establishing parameters for such “short-term” and “transitory” detention operations. This absence, coupled with the secret nature of CIA covert operations, creates the possibility of continued CIA overseas detention facilities, sometimes described as “black sites,” in an altered form. The U.S. government in its third to fifth periodic report stated that any such transitory detention facilities operate “consistent with applicable U.S. law and policy and international law.” This assurance is insufficient given that secret detention is per se a violation of the Convention. The United States should clearly articulate the terms and conditions under which the CIA may continue to operate detention facilities, and ensure that any continued detention operations by the CIA do not amount to incommunicado detention in violation of the Convention.

II. CAT Position

In its 2006 Concluding Observations on the United States, the Committee emphasized that secret detention constitutes a “per se” violation of the Convention and urged the United States ensure that no one is detained in any secret detention facility. The Committee emphasized that the United States “should investigate and disclose the existence of any such facilities and the authority under which they have been established and the manner in which detainees are treated.”³

With regard to then-active CIA secret prisons, the Committee noted that “intelligence activities, notwithstanding their author, nature or location, are acts of the State party, fully engaging its international responsibility.”⁴

In its 2010 list of issues the Committee requested that the United States provide additional information on whether it has “adopted a policy that ensures that no one is detained in any secret detention facility under its de facto effective control and that publicly condemns secret detention, pursuant the Committee’s previous concluding observations.”⁵

III. U.S. Government's Response

In its report, the U.S. government stated that the “CIA does not operate any detention facilities.” However, that declaration was qualified with the statement that “the United States operates battlefield transit and screening facilities, the locations of which are often classified for reasons of military necessity.”⁶

The U.S. stated that operation of any such facility is “consistent with applicable U.S. law and policy and international law, including Common Article 3 of the Geneva Conventions, the Detainee Treatment Act of 2005, and DoD Directive 2310.01E.” Per the government’s response, the ICRC and “relevant host governments” are informed about such facilities with the ICRC being allowed access to individuals detained in a law of war context.⁷

The U.S. also stated that “under U.S. law every U.S. official, wherever he or she may be, is prohibited from engaging in torture or in cruel, inhuman or degrading treatment or punishment, at all times, and in all places” but has not acknowledged that secret detention is a violation of the Convention.⁸

IV. Other UN and Regional Human Rights Bodies Recommendations

In their 2010 joint study, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced and Involuntary Disappearances emphasized that “[s]ecret detention is irreconcilable with international human rights law and international humanitarian law.” The study found that the practice “amounts to a manifold human rights violation” – representing at a minimum a *per se* violation of the right to liberty and security of the person and the prohibition of arbitrary arrest or detention under Article 9 of the International Covenant on Civil and Political Rights – “that cannot be justified under any circumstances, including during states of emergency.”⁹

In the case of *El-Masri v. The Former Yugoslavia Republic of Macedonia*, the European Court of Human Rights found that “unacknowledged and incommunicado detention” outside a judicial framework was an “unacceptable” deprivation of liberty in violation of the European Convention on Human Rights Article 5 right to liberty and security. The case involved the applicant’s confinement and interrogation as part of the CIA Rendition, Detention, and Interrogation program.¹⁰

In 2014, the European Court of Human Rights reiterated its finding on secret detention operations in another case concerning the CIA interrogation program. The court found in *Zubaydah v. Poland* that “the unacknowledged detention of an individual is a complete negation of [the substantive rights found in the Convention which are intended to minimise the risks of

arbitrariness] and [is] a most grave violation of Article 5.”¹¹

Upon its adoption of Special Rapporteur for the Committee on Legal Affairs and Human Rights Dick Marty’s report on secret detentions and illegal transfers in 2007 the Parliamentary Assembly of the Council of Europe passed Resolution 1562 repudiating member states’ participation in the CIA Rendition, Detention, and Interrogation program in particular and the practice of secret detention more generally. “[S]ecret detention as such,” the Assembly found, “is contrary to many international undertakings, both of the United States and of the Council of Europe member states concerned.”¹²

V. Recommended Questions

1. Executive Order 13491 contains a loophole which allows the CIA to operate “short-term” and “transitory” detention facilities. Is there any document which defines “facilities used only to hold people on a short-term, transitory basis” or which sets out terms governing the CIA’s operation of these facilities? What laws or policies regulate the placement of detainees, their treatment, and the conditions in such facilities?
2. Has the Central Intelligence Agency (CIA) held any person in any such short-term or transitory detention facility since the signing of the Executive Order? If so, how many detainees, for what length of time, and in what conditions?
3. Is the CIA authorized to interrogate detainees at short-term or transitory facilities? If yes, is the CIA restricted to interrogation techniques and approaches set out in the Army Field Manual?

VI. Suggested Recommendations

1. Close Executive Order 13491’s loophole for “short-term” or “transitory” detention facilities operated by the CIA.
2. Publicly account for the existence of any “short-term” or “transitory” detention facilities operated by the CIA, with full disclosure of number of detainees held in such facilities, the length of their detention, and their conditions of confinement and any associated interrogation practices.
3. Enact federal legislation that permanently bans the CIA from operating any detention facility or holding any person in its custody and that subjects the CIA to the same interrogation rules as the armed forces.

¹ Exec. Order No. 13491, 74 FR 4893 §4(a) (2009), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13491.pdf>.

² *Id.* §2(g).

³ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 17 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2.

⁴ *Id.*

⁵ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶ 5(a) (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

⁶ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶ 26 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5

⁷ *Id.*

⁸ *Id.* para. 36.

⁹ U.N. Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* ¶¶ 17-18 (Feb. 19 2010), U.N. Doc. A/HRC/13/42.

¹⁰ *El Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. 5-6 ¶ 236 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>.

¹¹ *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. 5-6 ¶ 522 (2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047>.

¹² Eur. Consult. Ass., Resolution 1562 (on secret detentions and illegal transfers of detainees involving Council of Europe member states) ¶ 7, 23d Sitting (2007), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1562.htm>.

Interrogation Policies

I. Issue Summary

Executive Order 13491 Did Not End All Interrogation Techniques that Amount to Torture or Ill-Treatment

On January 22, 2009, President Obama issued Executive Order 13491¹ prohibiting the use of any interrogation technique not authorized by and listed in the Army Field Manual on human intelligence collection (“Army Field Manual”).² While the order rightly put an end to the authorization of most interrogation techniques that amount to torture or other cruel, inhuman or degrading treatment or punishment, it did not end them all.

The currently applicable Army Field Manual was revised in September 2006 and includes an appendix authorizing techniques that individually or together could constitute torture or ill-treatment. Appendix M of the Army Field Manual authorizes the use of the so-called “separation” interrogation technique, permitting the use of isolation for up to 30 days, which can be extended.³ Although Appendix M purports to prohibit sensory deprivation, that prohibition is undermined by the Appendix’s explicit authorization of the use of sensory deprivation means such as goggles, blindfolds and earmuffs to “generate a perception of separation” when physical separation is not possible.⁴ The objective of separation according to the manual is to “foster a feeling of futility” and decrease “the detainee’s resistance to interrogation.”⁵ Appendix M also appears to permit sleep deprivation, authorizing interrogators to manipulate a detainee’s sleep provided that the detainee is not prevented from “getting four hours of continuous sleep every 24 hours.”⁶

Appendix M’s conflicting guidance on isolation, sensory deprivation, and sleep deprivation could permit practices that have a severe detrimental impact on a prisoner’s mental and physical health.⁷ As Appendix M, itself, notes that the treatment it authorizes “could be perceived as an impermissible act.”⁸ As the ACLU and other human rights groups have urged, Appendix M should be revoked.

The main text of the 2006 Army Field Manual also deletes examples of prohibited conduct included in a prior, more protective version of the Army Field Manual. Specifically, the section describing examples of prohibited torture no longer includes “abnormal sleep deprivation” and “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time.”⁹ These examples should be reinserted to emphasize that these techniques are forbidden.

In August 2009, the Attorney General announced that a U.S. government task force mandated by Executive Order 13491 to review the use by other agencies, including intelligence

agencies, of the practices and methods set out in the Army Field Manual concluded that no revisions were needed.¹⁰ The special task force's report has never been released to the public.¹¹

More recently, the Department of Defense issued policy directives that also raise concerns about the use of impermissible interrogation techniques. A 2012 directive, No. 3115.09, permits interrogations of detainees who are being physically segregated from other detainees for reasons unrelated to interrogation.¹² An August 2014 revised directive on detention, No. 2310.01E,¹³ also suggests that sensory deprivation is still authorized. Although the prior version of the detention directive prohibited all sensory deprivation, the new version prohibits only "sensory deprivation intended to inflict suffering or serve as punishment."¹⁴ The change could lead military personnel to conclude that sensory deprivation is allowed. Neither directive provides procedural safeguards, such as a review of placement in segregation, which would reduce the risk of abuse inherent in interrogation of a person placed in segregation.

II. CAT Position

At the time of the last review in July 2006, the adoption of the new version of the Army Field Manual was imminent and the Committee urged the United States to ensure that its interrogations rules and policies were consistent with the prohibition on torture and CIDT and to "rescind" the use of interrogation techniques that amounted to torture or CIDT including sexual humiliation, waterboarding and short shackling.¹⁵

In the list of issues prior to reporting issued in 2010, the Committee asked if (1) the revised Field Manual and the interrogation techniques it authorizes are consistent with the Convention against Torture, (2) all interrogation techniques in use conform to the Convention, (2) legislation has been enacted that prohibits "interrogation techniques amounting to torture," and (4) the CIA is restricted to using the interrogation methods set out in the Manual. The Committee also asked for an update on the work and recommendations of the interagency task force established to review the Army Field Manual.¹⁶

III. U.S. Government's Response

In the U.S. government report to the Committee, the U.S. reported on the entry of Executive Order 13491 and explained that a special task force established by the order had concluded that the Army Field Manual "provides appropriate guidance on interrogation for military interrogators" and that no other guidance is needed for other government agencies.¹⁷

IV. Recommended Questions

1. Appendix M of the Army Field Manual permits the use of isolation, sleep deprivation and a form of sensory deprivation in interrogations. Please provide statistics on the number of detainees on whom each of these techniques, individually or together, have

- been used since January 22, 2009. What measures are in place to prevent interrogators from abusing detainees who are being subjected to “separation” as an interrogation technique? Is there any mechanism for a detainee who is held in isolation to complain about ill-treatment?
2. Department of Defense Directive No. 3115.09 permits interrogation of detainees who have been “segregated,” which it defines as physically removing a detainee from other detainees for purposes unrelated to interrogation. What procedural safeguards govern the placement of a detainee in segregation? What measures are in place to prevent officials from placing a detainee in “segregation” in order to circumvent restrictions on using isolation as an interrogation method? What measures are in place to reduce the risk that interrogators will subject detainees in segregation to torture or other ill-treatment?

V. Suggested Recommendations

1. Rescind Appendix M and amend the body of the Army Field Manual to clarify that the “separation” technique, sleep deprivation and sensory deprivation are prohibited at all times. Release the report and findings concerning the Army Field Manual issued by the special task force on interrogation and transfer established by Executive Order 13491.
2. Revise Department of Defense Directive No. 2310.01E to clarify that sensory deprivation is prohibited.

¹ See Exec. Order No. 13491 (Ensuring Lawful Interrogations), 3 C.F.R. 13491 (2009).

² U.S. DEP’T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS FM 2-22.3 (FM 34-52) (Sept. 2006), available at <http://fas.org/irp/doddir/army/fm2-22-3.pdf> [hereinafter “ARMY FIELD MANUAL”].

³ ARMY FIELD MANUAL app. M ¶¶ M-29, M-30.

⁴ *Id.* ¶¶ M-27, M-28.

⁵ *Id.* ¶¶ M-1, M-28.

⁶ *Id.* ¶¶ M-26 to M-30.

⁷ HUMAN RIGHTS FIRST AND PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS, ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 22-23, 31-33 (Aug. 2007).

⁸ ARMY FIELD MANUAL app. M ¶ M-18.

⁹ Compare ARMY FIELD MANUAL at 5-21 with U.S. DEP’T OF THE ARMY, INTELLIGENCE INTERROGATION (FM 34-52) 1-8 (Sept. 28, 1992).

¹⁰ U.S. Dep’t of Justice, Office of Public Affairs, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009), <http://1.usa.gov/YDK9dP>.

¹¹ Derek Jinks, *An Inauspicious Anniversary: It’s Time to Release the Report of the Special Interagency Task Force on Interrogations and Transfer Policies*, Just Security (Jan. 23, 2009), <http://bit.ly/YCw28h>.

¹² U.S. Dep’t of Def., Directive No. 3115.09: DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning encl. 4 (Oct. 12, 2012).

¹³ U.S. Dep’t of Def., Directive No. 2310.01E: DoD Detainee Program (Aug. 19, 2014).

¹⁴ Compare Directive No. 2310.01E, at para. 3(b)(2) with U.S. Dep’t of Def., Directive No. 2310.01E: The Department of Defense Detainee Program encl. 4 (Sept. 5, 2006).

¹⁵ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶¶ 12, 19, 24 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2.

¹⁶ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶¶ 18, 19 (a)-(e) (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

¹⁷ U.S. Dep’t of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶¶ 27, 38, 118 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

Solitary Confinement

I. Issue Summary

Solitary confinement is the policy or practice of physically and socially isolating a prisoner for 22 hours per day or more, and for one or more days.¹ Recent decades have seen an explosion in the use of this practice in detention facilities in the United States. It is employed for a broad variety of reasons, including for administrative and security purposes, discipline, protection from harm, and health-related reasons. Although many prisoners in solitary confinement are housed in specially constructed ‘supermaximum’ facilities, solitary confinement is practiced in jails, prisons and other federal, state and local detention facilities throughout the United States. Placement may stretch on for days, weeks, months or years. Any prisoner or detainee, regardless of age, gender, or physical or mental health, may be subject to solitary confinement. Persons with mental disabilities are dramatically overrepresented in solitary confinement.² Children are subjected to solitary confinement in juvenile facilities as well as in jails, and prisons that otherwise house adults.³ Reports also document that women prisoners, vulnerable LGBTI prisoners and immigration detainees are all placed in solitary confinement, in both civil and criminal detention facilities.⁴ An estimated 20,000 to 25,000 prisoners are held in the harshest levels of solitary confinement;⁵ more than 80,000 prisoners are housed in some form of restricted population unit.⁶

Typically solitary confinement cells are designed to separate the prisoner from most forms of human contact and environmental stimulation. Frequently they have solid-metal doors with small openings that allow only minimal light to enter. Food and other items are usually handed to the prisoner through a slot in the door. While some periods in solitary may be brief, lasting only a few days, many prisoners remain in solitary confinement for months or years at a time.

Prisoners held in solitary confinement are denied most of the privileges afforded to other prisoners. Visits or phone calls with family members may be limited or prohibited altogether. This environment also hinders access to necessary medical and mental health care. The latter is particularly problematic given that prisoners with serious mental illness are prone to psychological decompensation while housed in solitary confinement.⁷ Prisoners may likewise be at an elevated risk of committing acts of self-harm.⁸ However, access to mental health care for these prisoners is often curtailed and may be limited to speaking with mental health staff through their cell doors.⁹

A substantial body of research over several decades has demonstrated the harmful, and sometimes devastating, effects of solitary confinement on physical and mental health.¹⁰ These harmful effects are most starkly illustrated by the significantly higher rates of suicide among prisoners in solitary confinement than among those in the general prison population.¹¹ Some

groups, such as children and persons with mental illness, are particularly vulnerable. In the case of children, research suggests that the harmful effects of solitary confinement are exacerbated by the developmental immaturity of the isolated individual.¹² In order to fully understand the impact of solitary confinement on children, more research is needed. In short, the human rights violations associated with widespread use of solitary confinement in the United States are manifold.¹³

While in recent years some jurisdictions have taken legislative or administrative steps to potentially end or limit the use of solitary confinement for certain categories of prisoners, litigation remains the primary means of addressing the problem.¹⁴ However, pursuing remedies for victims of the practice in U.S. courts is an often lengthy and complicated process, fraught with legal obstacles. The ACLU is involved in several class action lawsuits challenging the use of solitary confinement.¹⁵ Evidence gathered in two of these cases, from Mississippi and Arizona, illustrates the egregious conditions that often accompany periods spent in solitary confinement.

Mississippi

The East Mississippi Correctional Facility is designated to house the state's most seriously mentally ill prisoners. Many of these prisoners are held in the prison's solitary confinement units. Following an inspection of these units, Dr. Terry Kupers, M.D., M.S., an expert in correctional psychiatry retained on behalf of the prisoners, issued a report finding that "[a] large group of prisoners, very many suffering from serious mental illness, are consigned to long-term segregation . . . for years and seemingly have no exit route."¹⁶ Many prisoners in solitary confinement are "forced to live in the dark for weeks or months on end"¹⁷ and that conditions "press the outer bounds of what most humans can psychologically tolerate."¹⁸ The isolation and idleness is "profound" and "unremitting"¹⁹ – access to telephone calls with family is denied,²⁰ there is essentially no access to programming, and there is little to no interaction with staff.²¹

During his inspection, Dr. Kupers observed a "shocking level of filth and lack of sanitation" and "Styrofoam trays and food waste scattered all around, mixed with large puddles of water and what appeared to be excrement and/or blood."²² He further noted:

Evidence of feces smeared on the walls in the segregation pods . . . reflect extreme neglect of the prisoners by staff. . . . In the segregation units at EMCF there is so much severe and inadequately treated mental illness, such gross inattention by staff, and such intolerably filthy and harsh conditions that the smearing of feces becomes a predictable response by mentally ill prisoners to their dreadful plight.²³

Prisoners in solitary confinement are ignored and abandoned by staff. A former state correctional administrator, also retained as an expert on behalf of the prisoners, observed that:

“[p]risoners [in solitary] can get attention for their most basic human needs only by setting fires, flooding their cells, cutting themselves, or violating rules by refusing to remove their arms from the food slots in their cell doors, thereby knowingly subjecting themselves to being gassed with pepper spray.”²⁴

In one recent example, two days before his death, a prisoner with a serious cardiac condition had to set a fire in his cell to get medical attention.²⁵



Fire set by a prisoner in a solitary confinement unit, East Mississippi Correctional Facility, April 3, 2014



Cell doors in a solitary confinement unit, East Mississippi Correctional Facility, April 3, 2014

Arizona

The Arizona Department of Corrections has solitary confinement units in prisons throughout the state. These units house a substantial population of prisoners with serious mental illness, some of whom are housed in solitary as a consequence of behavior directly related to symptoms of their illness: that is, behavior that they cannot control.²⁶ Dr. Craig Haney, Ph.D., J.D., an expert in the effects of solitary confinement retained on behalf of the prisoners, concluded the state had “taken the ill-advised step of housing large numbers of mentally ill prisoners in isolated conditions that cause suffering and place their psychological well-being at risk. . . .”²⁷ He also found that the state further jeopardized the health and safety of these vulnerable prisoners by spraying them with chemical agents (e.g., pepper spray).²⁸ Further, the state subjected these prisoners to dangerous levels of heat notwithstanding the added risk of heat-related illness faced by prisoners taking psychotropic medications.²⁹ Based on the evidence, Dr. Haney concluded that,

“[t]he adverse consequences of exposure to these conditions can be extreme and even irreversible, including the loss of psychological stability, significantly impaired mental functioning, the inability to function in social settings and personal relationships, self-mutilation and harm, and even death.”³⁰

II. CAT Position

In 2006, the Committee against Torture (“the Committee”) expressed its ongoing concern about “the extremely harsh regime imposed on detainees in ‘supermaximum prisons’” and, in particular about the “the prolonged isolation periods detainees are subjected to, [and] the effect such treatment has on their mental health. . . .”³¹ The Committee stated that the United States should “review the regime imposed on detainees in ‘supermaximum prisons,’ in particular the practice of prolonged isolation.”³²

Consistent with this concern, the Committee’s List of Issues requested that the United States “describe steps taken to improve the extremely harsh regime imposed on detainees in ‘super-maximum security prisons[,]’ in particular the practice of prolonged isolation.”³³

III. U.S. Government’s Response

The United States reiterates its position that “[t]here is no systematic use of solitary confinement in the United States,”³⁴ even though a recent study undertaken by the U.S. Government Accountability (“GAO”) found that the federal Bureau of Prisons (“BOP”) housed 435 inmates in the federal Administrative Maximum Facility in Colorado (“ADX”), and an additional 377 inmates across its other facilities, confined alone in their single-bunked cells for around 23 hours per day.³⁵ In addition, tens of thousands of prisoners are held in solitary confinement in non-federal facilities.

The U.S. further responds that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the use of solitary confinement in “certain circumstances, especially with regard to persons with serious mental illness and juvenile detainees” and that other statutes and regulations restrict and regulate its use.³⁶ However, limitations on placing seriously mentally ill or juvenile prisoners in solitary confinement are generally the products of litigation in federal courts and apply to only specific facilities. As a general matter, there is no federal or state statute categorically prohibiting the housing of juveniles or the mentally ill in conditions of substantial isolation. Rather, state and federal law continues to accept the appropriateness of solitary confinement for the vast majority of American prisoners.

The U.S. further cites a settlement agreement reached between the Department of Justice (“DOJ”) and a Tennessee jail, which prohibited the holding of mentally ill detainees in solitary confinement, as well the results of a DOJ investigation of prison conditions in Pennsylvania,

which found that prolonged isolation of prisoners with mental illness or intellectual disabilities violated the U.S. Constitution as well as state and federal law.³⁷ However, the DOJ has no independent authority to order Pennsylvania – or any state or local facility – to cease these practices. Similarly, the statute that enables the DOJ to bring litigation against states and counties that violate the constitutional rights of prisoners does not permit the agency to investigate federal facilities.³⁸

Finally, the U.S. defends conditions at ADX,³⁹ which were of particular concern to the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the report of an expert in correctional psychiatry concluded that “the environmental conditions at ADX, with their strict disciplinary regimes and the universal use of solitary confinement, are likely to exacerbate any mental illness that exists upon arrival.”⁴⁰ The expert further concluded that intake procedures at the ADX “clearly fail to identify and address the needs of a very large proportion of those prisoners who need mental health care The process at ADX, as it is implemented, is in my opinion extremely flawed.”⁴¹

The 2013 GAO study noted that the BOP failed to centrally monitor the policies at the ADX and, more generally, found it notable that the BOP’s Office of Research and Evaluation had not “studied the impact of long-term segregation on inmates because of competing priorities...”⁴²

IV. Other UN and Regional Human Rights Bodies Recommendations

During its most recent review of the United States, the U.N. Human Rights Committee recommended that the U.S. “should impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide, and abolish the practice in respect of anyone under the age of 18 and prisoners with serious mental illness.”⁴³ The Human Rights Committee also addressed conditions on death rows, where prisoners under sentences of death are housed pending execution, recommending that the U.S. “should also bring the detention conditions of prisoners on death row into line with international standards.”⁴⁴

In a statement submitted to the U.S. Senate, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, concluded that:

Depending on the specific reasons for its application, as well as on the conditions, length, severity of the effects and other circumstances, solitary confinement can amount to cruel, inhuman and degrading treatment or punishment, and even torture. This is the case where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering.⁴⁵

Based on these conclusions, the Special Rapporteur issued multiple recommendations, including prohibiting the use of prolonged solitary confinement (defined as exceeding 15 days) and solitary confinement for indefinite periods, and excluding any person below 18 years of age and persons with mental disabilities from solitary confinement.⁴⁶

The Inter-American Commission on Human Rights has emphasized that “[i]n essence, solitary confinement should only be used on an exceptional basis, for the shortest amount of time possible and only as a measure of last resort. Additionally, the instances and circumstances in which this measure can be used must be expressly established by law (as provided in Article 30 of the American Convention), and its use must always be subject to strict judicial oversight. In no instance should the solitary confinement of an individual last longer than thirty days.”⁴⁷ The Inter-American Commission on Human Rights also stressed that members of the Organization of American States “must adopt strong, concrete measures to eliminate the use of prolonged or indefinite isolation under all circumstances . . . [T]his practice may never constitute a legitimate instrument in the hands of the State. Moreover, the practice of solitary confinement must never be applied to juveniles or to persons with mental disabilities.”⁴⁸

While no specific recommendation was made with respect to solitary confinement in the 2011 report of the UN Human Rights Council issued after the United States Universal Periodic Review (UPR), the US government accepted recommendation 177 to “ensure the full enjoyment of human rights by persons deprived of their liberty, including by way of ensuring treatment in maximum security prisons in conformity with international law.”⁴⁹

V. Recommended Questions

1. Please provide data regarding the use of solitary confinement (including data regarding segregated housing units, special management units and administrative maximum facilities) in the Federal Bureau of Prisons, including:
 - i. State the number of prisoners in the custody of the Federal Bureau of Prisons who are currently in solitary confinement and have been continuously held in solitary confinement for more than 15 days.

For those prisoners identified in question 1(i), identify:

- ii. The institutions where the prisoners are held and the number of prisoners in solitary confinement in each facility.

- a. State the number of prisoners held in solitary confinement in the last 24 months who have a Medical Duty Status (MDS) Assignment for mental illness or mental retardation, as set forth in Chapter 2 of the Federal Bureau of Prisons, Program Statement 5310.12 “Psychology Services Manual” (pp. 12-13);
 - b. State the number of suicides or other incidents of self-harm in the last 24 months among prisoners held in solitary confinement.
2. What measures are required by federal, state, and local governments to limit or regulate the imposition of solitary confinement on particularly vulnerable detainees, including children, non-citizens, the elderly, persons with mental illness or disabilities, and LGBTI persons?

VI. Suggested Recommendations

1. The federal, state and local governments should promote transparency with regard to all physical and social isolation practices by making public all relevant rules and regulations governing placement and conditions in isolation, the costs associated with these practices, and data about rates and duration of physical and social isolation practices, and particularly solitary confinement.
2. The federal, state and local governments should ban prolonged solitary confinement whether for administrative, punitive, protective or health-related reasons, and strictly regulate all other physical and social isolation practices.
3. The federal, state and local governments should ban the use of solitary confinement whether for administrative, punitive, protective or health-related reasons, of children and persons with mental disabilities.
4. The federal, state and local governments should compile data on the effect of isolation, and particularly solitary confinement, on children.
5. Support passage of the Solitary Confinement Study and Reform Act of 2014, introduced by Congressman Cedric Richmond in the House of Representatives.
6. Extend an invitation to the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to conduct a fact-finding mission, and facilitate unimpeded access to facilities and prisoners and detainees held in prolonged solitary confinement.

- ¹ See U.N. Human Rights Council, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez* (August 5, 2011), U.N. G.A. Doc., A/66/268 [hereinafter INTERIM REPORT].
- ² Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYC. L. 104, 104-05 (2010).
- ³ The ACLU and Human Rights Watch released a joint report about the solitary confinement of juveniles in the United States in October 2012. The report goes into detail about the practice of isolating children in prison and the effects this isolation can have. See AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN (Oct. 2012), available at <http://www.aclu.org/files/assets/us1012webwcover.pdf>. See also, ACLU, ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES, available at <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>.
- ⁴ ACLU, WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES, available at https://www.aclu.org/sites/default/files/assets/worse_than_second-class.pdf; HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (Sept. 2012), available at http://www.immigrantjustice.org/press_releases/invisible-in-isolation#_UMOu05PjmQ8.
- ⁵ See DANIEL P. MEARS, URBAN INST. JUSTICE POLICY CTR., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 4 (2006).
- ⁶ "Restricted population units" include administrative segregation, death row housing, and other classifications that may include single-cell solitary confinement housing. See Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46 (2011).
- ⁷ James L. Knoll IV & Gary E. Beven, *Supermax Units and Death Row*, in HANDBOOK OF CORRECTIONAL MENTAL HEALTH 435, 446 (Charles L. Scott ed. 2010).
- ⁸ Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*. 104 AM. J. PUB. HEALTH 442 (2014).
- ⁹ Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME AND DELINQUENCY 124, 143 (2003).
- ¹⁰ See, e.g., Sharon Shalev, London School of Economics, London: Manheim Centre for Criminology, *A Sourcebook on Solitary Confinement* (2008); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); S.L. Brodsky & F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (2003).
- ¹¹ Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYC. L. 104 (2010).
- ¹² AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN (Oct. 2012), available at <http://www.aclu.org/files/assets/us1012webwcover.pdf>.
- ¹³ See Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Judiciary Comm., 112th Cong. (2012) (statement of the American Civil Liberties Union).
- ¹⁴ ACLU, Written Statement of the American Civil Liberties Union Before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights (Feb. 25, 2014), available at https://www.aclu.org/sites/default/files/assets/aclu_testimony_for_solitary_ii_hearing-final.pdf.
- ¹⁵ See, e.g., *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014); *Carty v. DeJongh*, CIV. 94-78, 2010 WL 2024524 (D.V.I. May 18, 2010); Complaint, *Dockery et al. v. Epps et al.*, No. 3:13-cv-00326 (S.D. Miss. filed May 30, 2013).
- ¹⁶ Expert Report of Dr. Terry A. Kupers, M.D., M.S.P., on the East Mississippi Correctional Facility, *Dockery et al. v. Epps et al.*, No. 3:13-cv-00326-TSL-JCG (S.D. Miss.), September 25, 2014 (Doc. No. 179-4) at 15.
- ¹⁷ *Id.* at 16.
- ¹⁸ *Id.* at 15.
- ¹⁹ *Id.* at 16.
- ²⁰ *Id.* at 18.
- ²¹ Expert Report of Eldon Vail, on the East Mississippi Correctional Facility, *Dockery et al. v. Epps et al.*, No. 3:13-cv-00326-TSL-JCG (S.D. Miss.) (Doc. No. 179-6) at 8.
- ²² Expert Report of Dr. Kupers at 19.
- ²³ *Id.* at 19.
- ²⁴ Expert Report of Eldon Vail, 6.
- ²⁵ Expert Report of Dr. Marc F. Stern, M.D., M.P.H., on the East Mississippi Correctional Facility, *Dockery et al. v. Epps et al.*, No. 3:13-cv-00326-TSL-JCG (S.D. Miss. filed Sept. 25, 2014) (Doc. No. 179-5) at 2.
- ²⁶ Expert Report of Dr. Craig Haney, Ph.D., J.D., on the Arizona Department of Corrections Facilities, *Parsons v. Ryan*, No. 2:12-cv-00601-DJH (D. Ariz. filed Sept. 8, 2014) (Doc. No. 1104-8) at 27-28.
- ²⁷ *Id.* at 29.
- ²⁸ *Id.* at 28.
- ²⁹ *Id.* at 28-29.
- ³⁰ *Id.* at 105.
- ³¹ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 36 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2 [hereinafter "CONCLUSIONS AND RECOMMENDATIONS"].
- ³² CONCLUSIONS AND RECOMMENDATIONS ¶36.
- ³³ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶37, (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.
- ³⁴ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶ 214 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5 [hereinafter "PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE"].
- ³⁵ See U.S. Government Accountability Office. (2013). *Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing: Report to Congressional Requesters* (Publication No. GAO-13-429), 12 n. 11, available at <http://www.gao.gov/assets/660/654349.pdf> [hereinafter GAO REPORT OF IMPROVEMENTS NEEDED].
- ³⁶ PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE ¶209.

³⁷ PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE ¶212.

³⁸ See 42 U.S.C. §1997a(a) (limiting DOJ to litigating against a “State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State . . .”).

³⁹ PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE ¶214.

⁴⁰ Declaration of Jeffrey L. Metzner, M.D., in Support of Plaintiffs' Motion for Class Certification, *Cunningham v. BOP*, No. 1:12-cv-05170 (D. Colo. filed Dec. 20, 2013) (Doc. No. 149-6) at ¶21 [*hereinafter* “Metzner Declaration”].

⁴¹ Metzner Declaration ¶20.

⁴² See GAO REPORT OF IMPROVEMENTS NEEDED at 41. In its reply submitted prior to the final publication of the report, BOP represented that it would conduct a study of restricted housing at the ADX facility, with the exception of H Unit. See GAO REPORT OF IMPROVEMENTS NEEDED at 64.

⁴³ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶20 (2014), U.N. Doc. CCPR/C/USA/CO/4/ [*hereinafter* HUMAN RIGHTS COMMITTEE CONCLUDING OBSERVATIONS].

⁴⁴ HUMAN RIGHTS COMMITTEE CONCLUDING OBSERVATIONS ¶20.

⁴⁵ Letter from Juan E. Méndez, United Nations Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, to Senator Dick Durbin, Chairman, Subcommittee on the Constitution, Civil Rights, and Human Rights, Senate Committee on the Judiciary, Feb. 24, 2014, at 2, *available at* <http://antitorture.org/wp-content/uploads/2014/02/Special-Rapporteur-on-Torture-Submission-to-Second-Congressional-Hearing-on-Solitary-Confinement.pdf>.

⁴⁶ Letter from Juan E. Méndez at 2-4.

⁴⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, REVISION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS ¶ 411, UNODC/CCPCJ/EG.6/2014/INF/2 (Oct. 8, 2013), *available at* http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IACHR_English.pdf.

⁴⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, ANNEX TO THE PRESS RELEASE ISSUED AT THE CLOSE OF THE 147TH SESSION, 023A (Apr. 5, 2013), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp.

⁴⁹ ACLU, UNFINISHED BUSINESS: TURNING THE OBAMA ADMINISTRATION’S HUMAN RIGHTS PROMISES INTO POLICY (Mar. 21, 2012), https://www.aclu.org/files/assets/unfinished_business_aclu_final.pdf.

Denial of Access to Justice under the Prison Litigation Reform Act

I. Issue Summary

In 1996, Congress passed the Prison Litigation Reform Act (PLRA) with the stated purpose of curtailing allegedly frivolous litigation by prisoners.¹ However, since its enactment, the PLRA has had a disastrous effect on the ability of prisoners to seek protection of their rights, creating numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.² As a result of these restrictions, prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, have had their cases dismissed. Three provisions in particular affect the ability of prisoners, most of whom have no access to legal counsel, to bring their claims before the federal courts.

The PLRA provisions often referred to as the “physical injury requirement” prevent prisoners, including juvenile and pre-trial detainees, from obtaining money damages in federal court for violations of their civil and human rights that can amount to torture or cruel, inhuman and degrading treatment.³ These provisions require that a prisoner must demonstrate a “prior showing of physical injury or the commission of a sexual act” before she can win damages for mental or emotional injuries. Most federal courts have applied this provision to bar damages for all constitutional violations that do not intrinsically involve a physical injury. The following are examples of cases in which prisoners were denied relief because they were found to have no “physical injury:” actions challenging the violation of prisoners’ religious rights;⁴ a prisoner’s false arrest and illegal detention;⁵ prison officials’ failure to protect a prisoner from repeated beatings;⁶ and a prison official’s denial of a prisoner’s psychiatric medications to deliberately cause him to experience pain and depression.⁷ These cases represent serious and in some cases intentional rights violations, but the PLRA leaves prisoners without a remedy.⁸

The PLRA’s “exhaustion requirement” provides that before a prisoner may file a lawsuit in federal court, he must first comply with all deadlines and other procedural rules of the prison or jail’s internal grievance system; if he fails to strictly comply with all technical requirements or misses a filing deadline, he may not sue.⁹ In practice, this provision has sharply limited the ability of prisoners to seek protection and judicial remedies for serious violations of their human rights for several reasons.¹⁰ First, prisoners have low rates of literacy and education,¹¹ and the number of severely mentally ill and cognitively impaired persons in prison is significant.¹² Second, internal complaint procedures or grievance systems create numerous stumbling blocks for prisoners seeking a remedy. Deadlines are very short in many grievance systems—almost always a month or less, and sometimes five days or less—and these deadlines operate as statutes of limitations for federal civil rights claims.¹³ In addition, a typical system may have three or more deadlines that could lead to forfeiture of a claim, as prisoners must timely appeal to all levels of a grievance system. For illiterate, mentally ill, or cognitively challenged prisoners,

these complex administrative systems are virtually impossible to navigate. Third, prisoners who file grievances may be subject to threats and retaliation.¹⁴ All these factors bar prisoners' access to the courts and deny them remedies for serious violations of their rights.

The provisions of the PLRA also apply to children confined in prisons, jails, and juvenile detention facilities.¹⁵ Application of the PLRA to children is especially problematic because youth are exceptionally vulnerable to abuse in institutions, and court oversight is therefore particularly important.¹⁶ The PLRA's exhaustion requirement has been an especially significant obstacle to justice for incarcerated children, particularly because some courts have ruled that efforts to pursue grievance procedures by a prisoner's parent or lawyer do not satisfy the PLRA.¹⁷ The PLRA creates a lack of oversight and accountability for abuse of children, and increases their vulnerability to physical and sexual abuse and other rights violations.

II. CAT Position

In its 2006 Conclusions and Recommendations, the Committee said the following:

29. The Committee is concerned at section 1997 e (e) of the 1995 Prison Litigation Reform Act which provides "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury" (art. 14).

The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.¹⁸

In its 2010 List of Issues, the Committee posed the following question to the United States:

28. Please indicate if the State party has amended the Prison Litigation Reform Act, including to guarantee the right of victims to bring civil actions, as recommended by the Committee in its previous concluding observations (para. 29).¹⁹

III. U.S. Government's Response

The United States government did not respond to the Committee's 2006 recommendation regarding the PLRA.²⁰ In response to the Committee's 2010 List of Issues, the government stated that "the United States has not amended section 1997e(e) [of the PLRA]."²¹

IV. Other UN and Regional Human Rights Bodies Recommendations

The mandate of the U.N. Special Rapporteur on violence against women highlighted the challenges faced by women in detention in accessing legal remedies, particularly, the impact of the PLRA. After her 2011 fact finding visit to the United States, the Special Rapporteur

reiterated civil society's concerns regarding obstacles to access justice and legal remedies and recommended to amend the PLRA.²²

V. Recommended Questions

1. Has the United States determined how many lawsuits alleging torture or cruel, inhuman or degrading treatment or punishment are dismissed pursuant to the provisions of the PLRA?

VI. Suggested Recommendations

1. The United States should act immediately to repeal the PLRA, and subject lawsuits brought by prisoners to the same legal regime as those brought by all other persons.

¹ Pub. L. 104-134, 110 Stat. 1321 (Apr. 26, 1996).

² See HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 2 (June 2009), available at <http://www.hrw.org/en/reports/2009/06/15/no-equal-justice>.

³ The provision reads as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . ." 42 U.S.C. § 1997e(e). See also 28 U.S.C. § 1346(b)(2) (applying "physical injury requirement" to suits where the United States is a defendant).

⁴ *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (no damages for violation of religious rights).

⁵ *Young v. Knight*, 113 F.3d 1248 (10th Cir. 1997) (unpublished table decision).

⁶ *Luong v. Hatt*, 979 F. Supp. 481, 485 (N.D. Tex. 1997).

⁷ *Weatherspoon v. Valdez*, No. 3-05-CV-0586-P, 2005 WL 1201118, at *2 (N.D. Tex. May 17, 2005).

⁸ The Convention against Torture defines torture as either "physical" or "mental." The Committee Against Torture has called for repeal of the PLRA's "physical injury" provision, citing article 14 of the Convention, which requires that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 29 (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2; see also U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* ¶ 179-80 (May 15, 2000), U.N. Doc. CAT/C/SR.424, 427 and 431.

⁹ 42 U.S.C. § 1997e(a).

¹⁰ See Giovanna E. Shay and Joanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA.)* 29 CARDOZO L. REV. 291, 321 (2007) (reporting that in cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 548 U.S. 81 (2006), all of the prisoner's claims survived in fewer than 15% of reported cases).

¹¹ The National Center for Education Statistics reported in 2007 that adult prisoners had lower average literacy levels than persons in the community and that 16% of prisoners performed at the "below basic" level of prose literacy, a level that limits them to only the simplest of tasks. NATIONAL CENTER FOR EDUCATION STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 4, 13, 29 (2007), available at <http://nces.ed.gov/pubs2007/2007473.pdf>.

¹² According to a 2006 U.S. Department of Justice report, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffered from recent symptoms of mental illness or had recent histories of being treated for mental illness. Moreover, experts estimate that people with intellectual disabilities may constitute as much as 10% of the prison population. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2006); Leigh Ann Davis, The Arc, *People with Intellectual Disabilities in the Criminal Justice System* (Aug. 2009), available at <http://www.thearc.org/document.doc?id=3664>.

¹³ See *Woodford v. Ngo*, *supra* n. 10 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two and five days).

¹⁴ See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dammenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances).

¹⁵ See 18 U.S.C. § 3626(g)(3), (5); 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); and 28 U.S.C. § 1915A(c).

¹⁶ For example, a 2012 survey by the Bureau of Justice Statistics recently found that 9.5% of youth in state facilities reported being sexually victimized at least once during the previous 12 months. See U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2012* 4 (June 2013). Staff sexual and physical abuse and harassment of youth in custody has been an issue in states from New York to Hawaii. In the Texas juvenile system, for example, boys and girls were sexually and physically abused by prison staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained. See, e.g., U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* 1 (Jan. 2010); STOP PRISONER RAPE, THE SEXUAL ABUSE OF

FEMALE INMATES IN OHIO (Dec. 2003), available at <http://www.spr.org/pdf/sexabuseohio.pdf> (including discussion of sexual assaults by staff in juvenile wing of facility); ACLU OF HAWAII, HAWAII YOUTH CORRECTIONAL FACILITY TO PAY OVER HALF A MILLION DOLLARS FOR 'RELENTLESS CAMPAIGN OF HARASSMENT' OF GAY AND TRANSGENDER YOUTH (June 15, 2006) (threats of violence and physical and sexual assault), available at http://www.aclu.org/lgbt-rights_hiv-aids/hawaii-youth-correctional-facility-pay-over-half-million-dollars-relentless-cam; Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 1996 (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS, 44-56, 63-71 (2006); Gregg Jones, et al., *TYC Facilities Ruled by Fear*, DALLAS MORNING NEWS, Mar. 18, 2007.

¹⁷ See, e.g., *M.C. ex rel. Crider v. Whitcomb*, No. 1:05-cv-0162-SEB-TAB, 2007 WL 854019, at *3 (S.D. Ind. Mar. 2, 2007); *D. Harris v. Le Roy Baca*, No. CV01-10905 RSWL(CTX), 2003 WL 21384306, at *3 (C.D. Cal. June 11, 2003) (rejecting the contention that a grievance filed by counsel on prisoner's behalf satisfies the exhaustion requirement); *El'Shabazz v. City of Philadelphia*, No. 05-353, 2007 WL 2155676, at *3 (E.D. Pa. July 25, 2007) (grievances filed by prisoner's father on his behalf did not satisfy PLRA); *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538, at *7 (N.D. Ind. July 27, 2005) (efforts of detained juvenile's mother to stop ongoing abuse of her son did not satisfy PLRA); *Brock v. Kenton County, KY*, 93 Fed. Appx. 793, 795, 799 (6th Cir. 2004) (juvenile's contention that a grievance system was not "available" to him if juveniles were not made aware of its existence and it had never been used by any juvenile offender was rejected).

¹⁸ U.N. Comm. Against Torture, *Concluding Observations and Recommendations of the Committee against Torture: United States of America* (July 25, 2006), U.N. Doc. CAT/C/USA/CO/2

¹⁹ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

²⁰ U.S. Dep't of State, *Comments by the Government of the United States of America to the Conclusions and Recommendations of the Committee against Torture (CAT/C/USA/CO/2)* (Nov. 6, 2007), U.N. Doc. CAT/C/USA/CO/2/Add.1.

²¹ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

²² U.N. Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its causes and consequences: Mission to the United States of America* (June 1, 2011), U.N. Doc. A/HRC/17/26/Add. 5.

Prolonged and Indefinite Immigration Detention

I. Issue Summary

Every year, the US government detains hundreds of thousands of individuals in administrative immigration detention. Some of these individuals, who include asylum-seekers, longtime residents, children, and people with disabilities, are detained for months or years while their immigration cases and any subsequent appeals proceed. Moreover, many detainees are subject to “mandatory detention” and never receive the most basic element of due process: a bond hearing to determine if their detention during the pendency of their cases is even necessary. As a result, many detainees are subjected to prolonged detention even though they have substantial challenges to removal and pose no significant danger to public safety or flight risk.

The Department of Homeland Security (DHS) subjects four main categories of individuals to prolonged detention without individualized review and the opportunity to be released. First, individuals are subject to mandatory detention because they are allegedly removable on certain criminal grounds (which can be as minor as shoplifting or turnstile jumping). These individuals receive *no* review of whether their detention is warranted based on flight risk or danger. The second category consists of individuals detained upon arrival in the United States, including asylum seekers who have established a “credible fear” of persecution and are mandatorily detained during their proceedings. Such individuals only receive a paper review of their detention by the detaining agency (DHS), not a custody hearing or any custody review by an independent and impartial decision-maker.¹ The third category consists of individuals detained pending judicial review of their removal orders. However meritorious their cases may be, or how long their detention extends, DHS takes the position that these individuals are not entitled to independent review of their detention by an immigration judge. Finally, DHS subjects individuals with final orders of removal to mandatory detention even if their removal cannot be effectuated. In 2001, the US Supreme Court in *Zadvydas v. Davis* struck down the government’s policy of indefinitely detaining such individuals, holding that it raised serious constitutional problems.² However, subsequent federal regulations permit the continued detention, without temporal limit, of individuals who are not “cooperating” (for example, by procuring a travel document) or if DHS finds them to be “specially dangerous” because of a mental disability and their criminal history.³ In all these cases, individuals are subject to prolonged, potentially indefinite administrative detention, in the absence of periodic, independent review of their case and personal circumstances.

II. Human Stories

Errol Barrington Scarlett is a longtime lawful permanent resident from Jamaica who has lived in the United States for over thirty years. After his release from incarceration for a drug possession offense, Mr. Scarlett returned to his family and found employment with his

brother's real estate business. A year and a half later, Mr. Scarlett was summoned to a DHS office, charged with removability based on his drug possession conviction, and was summarily detained without a bond hearing. Mr. Scarlett remained in mandatory detention for the next five years. In 2009, Mr. Scarlett filed a pro se habeas petition in federal court, which granted his petition and ordered a bond hearing, where Mr. Scarlett ultimately won his release.⁴

Lobsang Norbu, a Buddhist monk from Tibet, fled China after he had been arrested, incarcerated, and tortured on the basis of his religious and political beliefs. Upon arrival in the US, he sought asylum and was immediately placed in immigration detention pending adjudication of his claim. Although the American Tibetan community pledged to provide him lodging and ensure his appearance at any hearings, DHS denied his request for release on parole, a decision that DHS claims is unreviewable by an immigration judge. As a result, Mr. Norbu spent approximately 14 months in detention before he ultimately won asylum and was released.

Amadou Diouf suffered 20 months of detention while litigating the denial of his motion to reopen his removal proceedings on the basis of his prima facie eligibility for adjustment of status. The only process Mr. Diouf was provided during his detention was a file review by ICE, after which he received ICE's decision to continue his imprisonment: a single, boilerplate sentence. Mr. Diouf won his release only after filing a habeas action in district court, after which an immigration judge ordered his release on \$5,000 bond.

III. CAT Position

The Committee against Torture has earlier recognized that all persons deprived of their liberty are entitled to certain basic guarantees, including the right to challenge the legality of their detention.⁵ Individuals in immigration detention in the United States, however, are unable to meaningfully challenge their detention, even when it becomes prolonged in nature, when the US government refuses to provide a bond hearing where the individual's detention can be evaluated and reviewed. For this review, the Committee asked the US government to describe steps taken to ensure that immigration laws are not used to detain individuals with more limited protections than exist in the criminal justice setting.⁶ In response, the US government defended the constitutionality of pre-deportation detention and observed that "[a]liens subject to mandatory detention under the immigration laws, may [] file petitions for writs of habeas corpus to challenge the legality of their detention. In addition, an alien may challenge in a hearing before an immigration judge the propriety of his or her inclusion in the category of aliens subject to mandatory detention under 8 U.S.C. 1226(c). 8 C.F.R. 1003.19(h)(2)(ii)."⁷

IV. U.S. Government's Response

Notably, the US government did not address its practice of subjecting many other classes of noncitizens to prolonged detention, including asylum seekers detained at the border and individuals seeking judicial review of their removal orders. Moreover, the avenues of review

cited in the US response are complex, often slow, and not easily accessed by most immigration detainees, who are overwhelmingly not represented by a lawyer, may not speak or read English or have significant formal education, and lack familiarity with the US legal system. Furthermore, detainees' ability to challenge their placement in mandatory detention before the immigration judge is largely rendered meaningless by the highly onerous standard applied by the government in those hearings (called "*Matter of Joseph*" hearings), which requires the detainee to show that the government is "substantially unlikely" to prevail on the charges of removal—in effect, that those charges are frivolous. The standard used by the US government is not required by the statute or regulations, and results in the mandatory detention of countless individuals who have substantial challenges to removal, including claims to relief that would permanently entitle a noncitizen to remain in the United States.

V. Other UN and Regional Human Rights Bodies Recommendations

Under human rights law, detention must have a legal basis and justification, and that its "nature and duration" must be related to its purpose, a principle also recognized under U.S. Supreme Court jurisprudence.⁸ The UN Human Rights Committee has previously addressed immigration detention and declared that detention is arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of *proportionality* becomes relevant in this context."⁹ Detention becomes arbitrary under human rights law when it "manifestly cannot be linked to any legal basis."¹⁰ The Human Rights Committee explicitly stated that meaningful review of the "lawfulness of detention" under Article 9(4) of the ICCPR "must include the possibility of ordering release, [and] is not limited to mere compliance of the detention with domestic law."¹¹ In its April 2014 concluding observations on the United States, the Human Rights Committee expressed its concern with the mandatory detention of immigrants in the United States "for prolonged periods of time without regard to the individual case" and recommended that the United States review its mandatory detention policies.¹² The U.N. Special Rapporteur on the Human Rights of Migrants earlier concluded that the U.S. immigration detention system lacked necessary safeguards to ensure that detention was not "arbitrary" within under the ICCPR and called upon the US to "revise regulations to make clear that asylum-seekers can request [their] custody determinations from immigration judges."¹³ Finally, the Committee on the Elimination of Racial Discrimination similarly raised concerns with prolonged mandatory detention and called upon the U.S. to undertake "thorough and individualized assessment for decisions concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters."¹⁴

VI. Recommended Questions

1. What steps has the U.S. government taken to decrease its use of mandatory and prolonged detention and ensure that all immigration detainees have the opportunity to seek individualized review of that detention?

2. Since 2013, pursuant to court order in *Rodriguez v. Robbins*, immigrants detained more than six months within the region of the Ninth Circuit have been given bond hearings before an immigration judge. Approximately one quarter of all immigration detainees are held in facilities within the region of the Ninth Circuit. A growing number of trial courts outside the Ninth Circuit have adopted the Ninth Circuit approach. Why hasn't the U.S. government adopted a nationwide, uniform rule that extends the Ninth Circuit rule to all regions of the country?
3. Why has the U.S. government failed to fully utilize alternatives to detention to limit the expansion of prolonged detention?
4. Why isn't the U.S. government treating someone previously detained but then released on bond or placed on alternatives to detention, as a detained case? If such a case (where the individual was initially detained) were to continue as a detained case and not automatically transferred to the non-detained docket, that would be an efficient way to move along both the detained and non-detained cases, which face significant backlogs.

VII. Suggested Recommendations

1. The U.S. government should construe the general immigration detention statutes to require a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention. The U.S. government should issue an affirmative policy rule implementing a six-month bond hearing rule nationwide.
2. The U.S. government should provide bond hearings to all detainees who are seeking federal court review of a removal order and have in the meantime obtained a judicial stay of removal.

¹ See 8 C.F.R. § 1003.19(h)(2)(i)(B) (providing that immigration judges lack jurisdiction to conduct bond hearings for "arriving aliens").

² *Zadvydas v. Davis*, 533 US 678 (2001).

³ 8 C.F.R. §§ 241.1, 241.4.

⁴ See *Scarlett v. DHS*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009).

⁵ U.N. Comm. Against Torture, *General Comment No. 2, Implementation of article 2 by States parties* ¶13 (Jan. 24, 2008), U.N. Doc. CAT/C/GC/2.

⁶ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* ¶9 (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

⁷ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶65 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

⁸ International Covenant on Civil and Political Rights (ICCPR) art.9; U.N. Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, Annex 1 (Jan. 21, 1992), U.N. Doc. E/CN.4/1992/20; *Jackson v. Indiana*, 406 US 715, 738 (1972).

⁹ U.N. Human Rights Comm., *A v. Australia* Communication No. 560/1993 ¶9.2 (Apr. 30, 1997), U.N. Doc. CCPR/C/59/D/560/1993 (emphasis added).

¹⁰ U.N. Comm'n on Human Rights, *Report of the Working Group on Arbitrary Detention* (Jan. 21, 1992), U.N. Doc. E/CN.4/1992/20.

¹¹ *Supra*, n. 9 at para. 9.5.

¹² U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶15 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

¹³ U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America* ¶¶122-23 (Mar. 5, 2008), U.N. Doc. A/HRC/7/12/Add.2.

¹⁴ U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* ¶18 (Aug. 29, 2014), U.N. Doc. CERD/C/USA/CO/7-9.

Conditions of Confinement in US Immigration Detention Facilities

I. Issue Summary

Every day, tens of thousands of noncitizens are administratively detained in jails and prisons throughout the United States. Despite years of advocacy and some additional oversight, these detention facilities, generally run by Immigration and Customs Enforcement (ICE), continue to be plagued by inhumane conditions, including over-use of solitary confinement and sexual assault. In short-term custody cells and facilities, run by Customs and Border Protection (CBP) along the US border, adults and unaccompanied children have been subjected to abuse, harassment, and mistreatment.

Sexual assault

Sexual assault and abuse against detained immigrants, including children and LGBT¹ and trans individuals, is not a new crisis.² The Government Accountability Office examined 215 allegations of sexual abuse and assault in ICE detention facilities from October 2009 through March 2013 and found that detainees face challenges in reporting abuse.³ Even when detainees do report it, many local ICE offices fail to inform headquarters.⁴ In 2013, the US government extended the protections of the Prison Rape Elimination Act (PREA)⁵ to immigration detainees (although final regulations were not issued until 2014).⁶ However, these protections have not been fully implemented; notably, privately-owned contracted detention facilities and local jails have not been required to fully and immediately comply with PREA's standards.⁷ Moreover, despite these reforms, abuse and mistreatment of vulnerable immigrant populations continues. For example, the US government continues to detain trans female detainees in men's facilities, placing them in predictable danger.⁸

As recently as September 30, 2014, a complaint was filed with DHS and ICE demanding the immediate investigation of and swift response to widespread allegations of sexual abuse and harassment at one of the newest family detention centers in Karnes City, Texas.⁹ The Karnes facility, which opened in August 2014, currently holds over 500 women and children, many of whom have fled violence and persecution in Central America, and is privately operated by the The GEO Group, Inc. The complaint cites abuse allegations such as removing female detainees from their cells late in the evening and early morning hours for the purpose of engaging in sexual acts in various parts of the facility, calling detainees their "novias," or "girlfriends" and requesting sexual favors from female detainees in exchange for money or promises of assistance with their pending immigration cases, and kissing, fondling, and/or groping female detainees in front of other detainees, including children.¹⁰

Unaccompanied children are particularly vulnerable to abuse and face unique barriers in reporting that abuse due to their immigration status, language, social, and cultural barriers. Even before the recent increase in the numbers of unaccompanied migrant children in Department of Health and Human Services (HHS) custody, there were many documented cases of sexual abuse

of these children by staff.¹¹ Under the Violence Against Women Reauthorization Act of 2013, HHS, which is responsible for the care and welfare of unaccompanied minors in removal proceedings, is required to implement regulations protecting children from sexual assault. To date, however, it has failed to do so; and yet, as these cases of abuse demonstrate, HHS lacks transparent and effective monitoring and investigatory systems for the incredibly vulnerable children in its care.¹²

Short-term custody at the US border

While in short-term custody, unaccompanied children have been subjected in inhumane treatment by CBP upon arrival in the United States. In June 2014, the ACLU and several advocacy organizations filed a complaint with the Department of Homeland Security (DHS) regarding the abhorrent treatment of unaccompanied minors at border patrol stations.¹³ The complaint, based on 116 cases, found that “approximately one in four children included in this complaint reported some form of physical abuse, including sexual assault, beatings, and the use of stress positions by CBP officials. More than half of these children reported various forms of verbal abuse, including racially- and sexually-charged comments and death threats. . . . Children consistently reported being held in unsanitary, overcrowded, and freezing-cold cells, and roughly 70 percent reported being held beyond the legally mandated 72-hour period.” These complaints are not new, nor are they unique to children; in 2011, the organization No More Deaths documented over 30, 000 incidents of abuse against children in CBP custody and several other organizations have issued reports in recent years with similar allegations of abuse and inhumane treatment in CBP custody.¹⁴ However, DHS oversight agencies have generally failed to respond to or meaningfully investigate complaints of abuse, resulting in a growing culture of impunity.¹⁵

Solitary confinement

The ACLU has long been concerned about the widespread use of solitary confinement in immigration detention, which mirrors the use of solitary confinement in US prisons and jails generally. In March 2013, The New York Times reported that on any given day, more than 300 immigrants are held in solitary in just the 50 largest immigration detention facilities – and nearly half of those are isolated for 15 days or more. The United Nations Special Rapporteur on Torture has described solitary confinement of 15 days or more as amounting to torture, because of the risk of permanent psychological harm from such extended isolation.¹⁶ Immigration detention facilities have often used solitary as a punishment for minor offenses, as well as to “protect” especially vulnerable populations like youth, LGBT people, and persons with mental disabilities.¹⁷

In September 2013, in response to pressure from Congress and NGOs, U.S. Immigration and Customs Enforcement (ICE) released a new policy directive regulating the use of solitary confinement in ICE detention, which applies to all ICE detention facilities nationwide. The new policy substantially increases ICE’s monitoring of the use of solitary confinement and sets

important limits on its use, especially for vulnerable populations, such as individuals with mental disabilities and alleged victims of sexual assault.¹⁸ Although it does not bring ICE's policies fully in line with the guidance of the UN Special Rapporteur on Torture – for example, it does not set specific limits on the duration of solitary confinement – the policy directive will represent a major step forward if strictly enforced. In a worrisome sign, however, ICE has not provided public information on how the directive is being implemented or to what extent the more than 250 private, local and government facilities where ICE detains immigrants are complying with it. Indeed, in April 2014, the ACLU filed suit in Washington State over ICE's use of solitary confinement to retaliate against detainees who went on hunger strike to express concerns about national immigration policy and raise public awareness about the conditions of their confinement.¹⁹

II. Human Stories

In July 2014, Marichuy Leal Gamino, a transgender woman, was sexually assaulted at the Eloy Detention Center, a for-profit immigration detention facility in Eloy, Arizona. The ACLU has received reports that Ms. Gamino was encouraged to live in solitary confinement for her own safety, a practice that inflicts lasting psychological damage and stigma on the individual.

D.G. is a 16-year-old Central American girl who was detained by CBP. When CBP officers searched her, they violently spread her legs and touched her genital areas forcefully, making her scream. D.G. was detained with both children and adults and described the holding cell as ice-cold and filthy, with bright fluorescent lights left on all day and night.²⁰

In March, 2014, several hundred detainees at the Northwest Detention Center in Washington State initiated a hunger strike to express concerns with national immigration policy and to raise awareness about the conditions of their confinement. Beginning on March 27, ICE began placing individuals in solitary confinement, for 23 hours a day, in retaliation for their support of the hunger strikes. The individuals represented by the ACLU were placed in solitary confinement after corrections officers entered their living area and invited approximately 20 detainees to meet and to discuss the reasons for the hunger strike. ACLU clients and other detainees who volunteered to attend the meeting were immediately placed in handcuffs and placed in isolation.

III. CAT Position

In 2006, the Committee expressed its concern with the number of documented cases of sexual assault on detainees, including those in US immigration detention and detainees “of differing sexual orientation.”²¹ The Committee recommended that the United States “ensure that all allegations of violence in detention centers are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including

appropriate compensation.”²² The Committee also recommended that the US government “promptly, thoroughly and impartially” investigate all allegations of cruel or degrading treatment by law enforcement personnel.²³ For this review Committee requested that the United States describe steps to prevent, investigate, and punish sexual assault in all detention centers and information regarding the success of these measures in preventing sexual assault of detainees.²⁴ The Committee also requested information on detention of children.²⁵

In 2006, the Committee also recommended that the United States review its use of prolonged isolation on detainees given the “effect such treatment has on their mental health, and that its purpose may be retribution, in which case it would constitute cruel, inhuman or degrading treatment or punishment.”²⁶ The Committee similarly requested the US explain the steps it has taken vis-à-vis prolonged isolation of detainees for this review.²⁷ The Human Rights Committee also recently recommended that the US “impose strict limits on the use of solitary confinement” and prohibit its use against juveniles and individuals with serious mental disabilities.²⁸

IV. U.S. Government’s Response

With respect to sexual assault, the US government contends that the Department of Homeland Security (DHS) takes seriously any allegations of sexual assault in immigration detention facilities, and points to the 2013 proposed standards issued by DHS.²⁹ It further points to the Directive on Sexual Abuse and Assault Prevention and Intervention and an agency-wide Prevention of Sexual Assault (PSA) Coordinator, both introduced in 2012 by Immigration and Customs Enforcement, the division of DHS that has custody over most immigration detainees.³⁰ ICE’s Performance-Based National Detention Standards also include standards for reporting, monitoring, and investigating sexual abuse in its detention facilities.³¹ These standards, while providing long-overdue minimal immigration detention standards, are not uniformly or universally implemented.³² The US response also contends that “the needs” of unaccompanied migrant children are “promptly met” but did not discuss allegations of abuse or maltreatment.³³

Although the Committee’s questions on solitary confinement were directed at the use of supermax prisons for criminal detainees, the recommendation and observations apply equally to the isolation of immigration detainees. The US response, however, did not acknowledge the use of solitary confinement on immigration detainees.³⁴

V. Recommended Questions

1. What steps is the US government taking to ensure PREA regulations are fully and immediately implemented in all facilities housing immigration detainees?
2. What steps is the US taking to fully and independently monitor and investigate complaints of sexual assault, particularly against children and transgender detainees?

3. What steps has the US taken to ensure that its directive on solitary confinement in immigration detention is uniformly and properly enforced in all facilities housing immigration detainees?
4. What steps has ICE/DHS taken in response to the September 2014 complaint re Karnes sexual abuse complaint? Have any of the families detained in Karnes (as of September 30, 2014) been deported from the U.S.? What assurances/safeguards has the US government taken to ensure that none of the victims or witnesses to the alleged Karnes sexual abuse is deported? Has ICE screened Karnes detainees for U visa relief? Has ICE permitted non-profits to screen mothers detained at Karnes (as of September 30, 2014) for U visa relief?

VI. Suggested Recommendations

1. Ensure that all facilities where immigrants are detained have fully implemented PREA and other federal regulations to prevent sexual assault, limit the use of solitary confinement, and protect transgender and LGBT detainees.
2. Institute regular monitoring and audits of all facilities used for administrative detention of immigrants, and publicly report on each facility's compliance, to ensure that detention conditions are humane and that federal regulations are uniformly and consistently implemented.
3. Terminate the ICE-GEO contract for the Karnes family detention facility, and release all families detained at Karnes on reasonable bond or place them on alternatives to detention.

¹ SHARITA GRUBERG, CENTER FOR AMERICAN PROGRESS, DIGNITY DENIED: LGBT IMMIGRANTS IN U.S. IMMIGRATION DETENTION (Nov. 2013), available at <http://cdn.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf>. A June 2011 report from the ACLU of Arizona documented extensive harassment, discrimination, and abuse of LGBT immigrant detainees at Immigration and Customs Enforcement (ICE) facilities throughout Arizona. ACLU OF ARIZONA, IN THEIR OWN WORDS 22-23, 25 (2011), available at <http://www.acluaz.org/sites/default/files/documents/detention%20report%202011.pdf>.

² Government documents obtained by the ACLU revealed nearly 200 allegations of sexual abuse and assault at detention facilities across the country between 2007 and 2012. Press Release, ACLU, *Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem* (Oct. 19, 2011), <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>.

³ GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE, GAO-14-38 (2013), available at <http://www.gao.gov/assets/660/659145.pdf>.

⁴ *Id.*

⁵ National Standards To Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. § 115.42 (2012).

⁶ Press Release, U.S. Dep't of Homeland Security, *DHS Announces Finalization of Prison Rape Elimination Act Standards* (Feb. 28, 2014), <http://www.dhs.gov/news/2014/02/28/dhs-announces-finalization-prison-rape-elimination-act-standards>.

⁷ See, e.g., Zack Ford, *Transgender Woman Says Immigration Detention Officials Told Her To Pretend Her Rape Was Consensual*, THINK PROGRESS (Aug. 5, 2014), <http://thinkprogress.org/lgbt/2014/08/05/3467761/transgender-immigration-rape/>. See generally American Bar Association, Letter to Secretary Napolitano, American Bar Association Comments on *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 77 FR 75299 (Dec. 19, 2012); DHS Docket No. ICEB-2012-0003, Feb 26, 2013, available at

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013feb26_abuseinconfinementfacilities_l.authcheckdam.pdf; National Immigrant Justice Center, “U.S. Department of Homeland Security’s Sexual Assault Regulations Take Effect Today,” (May 6, 2014), available at http://www.immigrantjustice.org/press_releases/us-department-homeland-security%E2%80%99s-sexual-assault-regulations-take-effect-today#.VCLsTkjD8iA (and observing that one of their clients, a father of seven and long-time U.S. resident who was raped when housed with criminal inmates, might not have been protected by PREA even after this announcement, depending on when the contract between ICE and the jail was renegotiated).

⁸ *Supra*, n. 1; Letter to Secretary Napolitano from the ACLU et. Al, RE: Comments on *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 77 FR 75299 (December 19, 2012), Feb. 26, 2013, available at http://www.justdetention.org/Group_comment_on_DHS_PREA_NPRM.pdf.

⁹ Press Release of the Mexican American Legal Defense Fund, *MALDEF and Other Groups File Complaint Detailing Sexual Abuse, Extortion, and Harrassment of Women at ICE Family Detention Center in Karnes City*, Sep. 30, 2014, available at http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city/.

¹⁰ Complaint to Department of Homeland Security, U.S. Immigration and Customs Enforcement, Karnes County Residential Center, and The GEO Group, Inc., Regarding Complaints Regarding Sexual Abuse of Women in DHS Custody at Karnes County Residential Center (Sep. 30, 2014), available at http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf.

¹¹ Susan Carroll, *Crossing Alone: Children Fleeing Violence Land in a Shadowy System* (Houston Chronicle May 24, 2014) which found 100 reported cases of staff on youth sexual abuse between March 2011 and March 2013, available at <http://www.houstonchronicle.com/news/investigations/article/Crossing-alone-Children-fleeing-to-U-S-land-in-5503127.php>

¹² See Letter to Secretary Sylvia Mathews Burwell, U.S. Department of Health and Human Services, (Sept. 18, 2014), available at https://www.aclu.org/sites/default/files/assets/14_9_18_letter_to_hhs_secretary_burwell_re_prea_final.pdf.

¹³ Complaint to Department of Homeland Security, Office of Civil Rights and Civil Liberties and Office of Inspector General, Regarding Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection (June 11, 2014) (“OCRCL/OIG complaint”), available at <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

¹⁴ See Women’s Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America* (October 2012), available at <http://bit.ly/1idNuUo>; No More Deaths, *Crossing the Line: Human rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border* (2008) available at <http://bit.ly/1uFDsTJ>; No More Deaths, *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, (2011,) available at <http://bit.ly/1prx9z>; Florence Immigrant and Refugee Rights Project, *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-term Immigration Detention*, (2009) available at <http://bit.ly/1prCKx>; Betsy Cavendish and Maru Cortazar, Appleseed, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors* (2011) available at <http://bit.ly/1mt5hbi>.

¹⁵ The Office of Inspector General did recently respond to the complaint on behalf of unaccompanied minors, after investigating 16 of the 116 cases and finding the claims could not be substantiated. DHS Office of Inspector General, Memorandum, *Oversight of Unaccompanied Alien Children*, Aug. 28, 2014, available at http://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf. The ACLU and its partners, however, have concerns with the thoroughness and handling of this investigation with respect to the cases reviewed thus far. Moreover, from 2009 to 2011, No More Deaths and partner organizations filed 75 CRCL complaints regarding CBP abuses, but did not receive a response from the agency in a single case. No More Deaths, *A Culture of Cruelty*, *supra*, at 8. The American Immigration Council recently found that 97 percent of the 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012 resulted in the classification “no action taken.” American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, at 8 (2014), available at <http://bit.ly/1ozFLdd>. Approximately 60 of these complaints involved abuse of immigrant children, including one case in which a child reported that an agent “hit him on the head with a metal flashlight 20 times, kicked him five times, and pushed him down a hill.” Damien Cave, “Complaints of Abuse by Border Agents Often Ignored, Records Show,” *New York Times*, May 5, 2014, available at <http://nyti.ms/1iTzDY5>.

¹⁶ Ian Urbina and Catherine Rentz, “Immigrants Held in Solitary Cells, Often for Weeks,” *The New York Times*, March 23, 2013, available at <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>.

¹⁷ See generally, American Civil Liberties Union, *Stop Subjecting Immigration Detainees to Widespread and Prolonged Solitary Confinement* (Apr. 12, 2013), available at <https://www.aclu.org/blog/defending-targets-discrimination/stop-subjecting-immigration-detainees-widespread-and-prolonged>.

¹⁸ ICE, “Review of the Use of Segregation for ICE Detainees,” Sept. 4, 2013, available at www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

¹⁹ ACLU of Washington, “Lawsuit Challenges Federal Immigration Officials over Placing Hunger Strikers in Solitary Confinement at the Northwest Detention Center,” (April 3, 2013), available at <https://acluwa.org/news/lawsuit-challenges-retaliation-against-hunger-strikers-nw-detention-center>.

²⁰ OCRCL/OIG complaint at 8-9.

²¹ Conclusions and recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, July 25, 2006, para 32, available at <http://www.refworld.org/publisher,CAT,CONCOBSERVATIONS,USA,453776c60,0.html>

²² *Id.* at para 32.

²³ *Id.* at para. 25.

²⁴ UN Committee against Torture, List of issues prior to the submission of the fifth periodic report of United States of America, CAT/C/USA/Q/5, para. 32 (Jan. 20, 2010), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en.

²⁵ *Id.* at para. 34.

²⁶ UN Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, July 25, 2006, para. 16, available at <http://www.refworld.org/publisher,CAT,CONCOBSERVATIONS,USA,453776c60,0.html>.

²⁷ UN Committee against Torture, List of issues prior to the submission of the fifth periodic report of United States of America, CAT/C/USA/Q/5, para. 37 (Jan. 20, 2010), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en.

²⁸ UN Human Rights Committee, “Concluding observations on the fourth periodic report of the United States of America,” April 23, 2014, para. 20, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en

²⁹ United States of America Report to the U.N. Committee against Torture, C/USA/3-5 (Aug. 12, 2013), para. 172, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en

³⁰ *Id.* at para. 173.

³¹ *Id.* at para. 174.

³² National Immigrant Justice Center, Press Release, “U.S. Department of Homeland Security’s Sexual Assault Regulations Take Effect Today--Thorough Implementation Required to Protect People in Department’s Custody,” May 6, 2014, *available at* http://www.immigrantjustice.org/press_releases/us-department-homeland-security%E2%80%99s-sexual-assault-regulations-take-effect-today#.VCWxCRatbTo; Testimony of Organizations Supporting LGBT Equality, US Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences,” (Feb. 25, 2014), *available at* <http://transgenderlawcenter.org/wp-content/uploads/2014/02/2014-Testimony-of-Organizations-Supporting-LGBT-Equality.pdf>.

³³ *Id.* at para. 198.

³⁴ United States of America Report to the U.N. Committee against Torture, C/USA/3-5 (Aug. 12, 2013), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en.

Administrative Family Detention

I. Issue Summary

Every year, the U.S. Department of Homeland Security (DHS) imprisons hundreds of thousands of non-citizens, including children and families, in administrative immigration detention. Families with children can be detained for months while their immigration proceedings go forward in court. An estimated 66,000 unaccompanied children and an additional 66,000 family units have crossed the U.S.-Mexico border since October 2013,¹ in what some observers have termed a refugee crisis and President Obama² has recognized as a humanitarian situation. In response, the U.S. government dramatically expanded the detention of immigrant families, though international human rights law strongly disfavors the use of administrative immigration detention, and rejects it completely for children.³ Prior to this summer, the United States had begun to move away from family detention. In 2009, ICE stopped detaining families at the T. Don Hutto facility in Texas following ACLU litigation and other advocacy challenging the deplorable conditions of confinement and treatment of children there; and until this summer, the administration had reduced its detention of immigrant families to 96 beds at one facility. But in July 2014, the U.S. government reversed course and announced plans to expand family detention, with plans to create up to 6,350 new beds in the near future.⁴ Already, the government has opened a new 646-bed family detention facility in New Mexico;⁵ another family detention facility, run by a private prison company, opened August 1st in Karnes County, Texas, with almost 600 beds.⁶ By early November, the government will open an additional facility – which will eventually have a shocking 2,400 beds – in West Dilly, Texas. It will be run by a private prison company.⁷ The majority of the families detained in these facilities are seeking asylum in the United States. However, the U.S. government has imposed a no-bond policy for these mothers and children (including persons who pass credible fear interviews, who would normally be eligible for parole or bond), despite individual circumstances supporting release or supervision in the community rather than jail detention.⁸

Detention harms children's health. Their physical and psychological development suffers during detention, and the harms can be long-lasting. Being held in a prison-like setting, even for a short period of time, can cause psychological trauma for children and increase their risk factor for future mental disorders.⁹ According to Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, detention can also exacerbate the trauma experienced by both children and adults who have fled violence in their home countries – precisely the population detained at Artesia and Karnes.¹⁰ Finally, detention damages the family structure in particular by stripping parents of their role as arbiter and decision-maker in the family unit, confusing children and undermining child-rearing.¹¹ This adds to the already extreme stresses on detained children and erodes their trust in their parents at a time when they need it most.

The U.S. government's expansion of family detention is also troubling given its problematic history at Hutto and on-going complaints regarding conditions of confinement and allegations of abuse by immigration officials. The facilities in Artesia and Karnes have already raised serious concerns among advocates. In September, widespread allegations of sexual abuse and assault of women detained in Karnes were made public¹², and are now under investigation by the U.S. government. Medical experts and child welfare specialists have reported that many children had lost considerable weight after entering Artesia and several displayed symptoms of depression.¹³

Finally, remote detention facilities like Artesia and Karnes impede fair hearings because there are few private or free legal service providers available in those areas to provide representation in incredibly complex legal proceedings, and it is difficult to build cases for legal relief from inside a detention facility.¹⁴

II. Human Stories

The ACLU and other organizations are currently representing several mothers and children detained at Artesia who experienced severe violence or threats of violence in Central America. While detained in the remote detention facility, their ability to meet with attorneys, access any information about the asylum process, or prepare for their asylum interviews has been significantly curtailed by their detention. For example, as detailed in the complaint:

- Although the law requires detainees to be permitted phone access so they can try to find counsel on their own through family and other contacts, the Artesia families have extremely limited access to telephones. For example, detainees are told they can only make one time-limited telephone call per day. Detainees therefore have to decide between calling their attorney or their family. Moreover, detainees have been routinely told they only have 3 to 5 minutes on the phone with their attorneys.
- While in detention, and with limited access to attorneys, detainees rely upon immigration officials as the near-sole source of information about their proceedings. However, the information they receive is often incomplete, incorrect and sometimes coercive. Mothers have been told to sign forms they don't understand and told they will certainly be deported. The Artesia "law library" does not provide detained families with adequate access to legal materials in Spanish. Indeed, the "library" contains no books at all. Some detainees have been also been refused access to the library.
- Detention officers have also impeded access to attorneys for detainees by prohibiting volunteer attorneys from "providing know your rights information," failing to provide a private place where attorneys can meet with clients, misinformed detainees that an

attorney would actually facilitate their deportation, and allowing insufficient time for attorneys and clients to meet before the client must go forward in an asylum interview.¹⁵

III. CAT Position

The Committee against Torture has recognized the responsibility of states both to prevent ill-treatment and to provide redress and care for those subjected to torture or ill-treatment. For example, the Committee earlier noted that States have a responsibility to provide rehabilitative services for victims of torture, including “community and family-oriented assistance and services” and recognizing that “victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured.”¹⁶ Many of the families arriving in the U.S. seeking asylum have escaped torture and persecution and yet, upon arrival in the U.S., are detained in prison-like facilities and monitored by armed guards. In its second general comment, the Committee also observed that States are responsible preventing ill-treatment of all individuals in their custody, including in detention as well as in institutions providing care for children.¹⁷

In 2010, the Committee requested that the U.S. government provide information on conditions of detention for children and steps taken to address ill-treatment of detained women, as well as for information regarding inadequate medical care for women in immigration detention.¹⁸ In its responsive 2013 report to the Committee, the U.S. government acknowledged that it detains families in removal proceedings in one facility in Pennsylvania, and stated that the environment in that facility “empowers parents to continue to be responsible for their children, including for their supervision and discipline.”¹⁹ With respect to this last point, advocates are concerned that family detention in fact breaks down family structures and relationships because it is the immigration officer who is in charge of discipline, meals, and availability of basic sanitation and social services.²⁰ But more generally, the U.S. response does not address the necessity of family detention, despite the deleterious effects of detention on children and their parents, and in spite of the availability of alternatives to detention. Since the U.S. response was submitted, moreover, the U.S. government has dramatically expanded the use of family detention, even though detention of children, whatever the conditions, is internationally recognized as objectionable.

IV. Other UN and Regional Human Rights Bodies Recommendations

In the United States, the detention of families, including those with young children, is part of a larger scheme of administrative detention for immigrants, one which the Committee on the Elimination of Racial Discrimination recently called upon the United States to reform so that detention decisions were based on an individualized assessment.²¹ In recent years, international consensus and human rights law have cautioned against the use of administrative immigration detention, particularly for children detained with or without their families.²² The United Nations

Working Group on Arbitrary Detention has stated that immigration detention should be abolished and only used as a last resort,²³ and the Committee on the Rights of the Child has called upon States to “expeditiously and completely cease the detention of children on the basis of their immigration status” and that detaining children “constitutes a child rights violation and always contravenes the principle of the best interests of the child.”²⁴ In May 2014, the U.N. Secretary-General expressed particular concern with administrative detention of young immigrant children.²⁵ Furthermore, the Inter-American Commission on Human Rights, which recently concluded a visit to the U.S.-Mexico border, expressed its “concern that families who are detained following their processing at a border station or a port of entry are generally maintained in detention for the duration of their immigration proceedings, even where a positive credible fear determination has been made by an asylum official.”²⁶ Indeed, detention of families raises tremendous concerns, and, regardless of the particular detention conditions, inhibits access to due process, harms children’s mental health, and damages the family structure.²⁷

V. Recommended Questions

1. Why has the U.S. government expanded its use of family detention, rather than investing in currently available effective, less costly, and more humane alternatives to administrative immigration detention?
2. How is the U.S. government responding to complaints of abuse of immigrants in its custody and what steps are being taken to investigate complaints and sanction and correct abuse?
3. What steps is the U.S. government taking to ensure that immigrants in detention, including children, are provided with necessary in-person psychological, medical, and social services?
4. What is the U.S. government doing to ensure adults and children in detention can secure legal representation?
5. Will the U.S. government commit to ending its no-bond policy for detained mothers and children who are entitled to an individualized determination of the need to detain before losing their liberty?

VI. Suggested Recommendations

1. Reject the detention of families and children, unaccompanied or with their parents, as an immigration enforcement tool. Abandon the no-bond policy and ensure that every parent and child receive an individualized assessment of the need to detain. Ensure that the detention of families and children is only used as a last resort, for the shortest

- period of time possible. Use and expand the use of alternatives to detention in place of institutional detention.
2. Ensure that administrative detention, when absolutely necessary, comply with all human rights obligations to provide humane treatment and care, including medical, legal, and social services.
 3. Investigate all complaints regarding conditions of confinement or abuse, ensure that officers who abuse immigration detainees are held accountable, and revise oversight protocol, training, and other policies to prevent inappropriate conditions of confinement or officer behavior in the future.

¹ See Customs and Border Protection, “Southwest Border Unaccompanied Alien Children (0-17 yr old) Apprehensions,” available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (accessed Sept. 15, 2014).

² Memorandum for the Heads of Executive Departments and Agencies, *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border* (June 2, 2014) (on file with the ACLU).

³ The United Nations Working Group on Arbitrary Detention has stated that immigration detention should be abolished and until then only used as a last resort (UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 58 and 59, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/102/94/PDF/G1010294.pdf?OpenElement>). The Convention on the Rights of the Child, to which the United States is a signatory, requires that the detention of a child be used only as a last resort. (Convention on the Rights of the Child, article 37(b).) The UN Committee on the Rights of the Child clarifies further that “States should expeditiously and completely cease the detention of children on the basis of their immigration status” (Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration* (2012), para. 78, available at <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>). The UNHCR Executive Committee has stated that “States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child” (UN High Commissioner for Refugees (UNHCR), *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, available at: <http://www.refworld.org/docid/471897232.html>).

⁴ Statement of Jeh Johnson, Secretary of the U.S. Department of Homeland Security before the Senate Committee on Appropriations, July 11, 2014, available at <http://www.appropriations.senate.gov/sites/default/files/hearings/SAC%20Hearing%20S1%20Testimony%207-10-14.pdf>.

⁵ Dara Lind, *Inside the remote, secretive detention center for migrant families*, Vox (July 24, 2014), available at <http://www.vox.com/2014/7/24/5932023/inside-the-remote-secretive-detention-center-for-migrant-families#interview>.

⁶ Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, THE NEW YORK TIMES, (Aug 5, 2014), available at http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html?smid=tw-share&_r=0; Susan Carroll, *Feds will house immigrant families at detention center near San Antonio*, HOUSTON CHRONICLE (July 18, 2014), available at <http://www.chron.com/news/article/Feds-will-house-immigrant-families-at-detention-5630925.php>

⁷ Forrest Wilder, *Feds Set to Open Massive New Family Detention Center in November*, Texas Observer (Sept. 23, 2014), available at <http://www.texasobserver.org/feds-set-open-massive-new-family-detention-center-november/>

⁸ John Stanton, “Government Declares Undocumented Immigrant Child, Mother A ‘National Security Threat.’” BuzzFeed (Aug. 5, 2014), available at <http://www.buzzfeed.com/johnstanton/government-declares-undocumented-immigrant-child-mother-a-na>. Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, New York Times, Sep. 5, 2014, available at http://www.nytimes.com/2014/09/06/us/in-remote-detention-center-a-battle-on-fast-deportations.html?smid=tw-share&_r=0.

⁹ Janet Cleveland, Cecile Rousseau, and Rachel Kronick, Brief Submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the *Protecting Canada’s Immigration System Act*, “The harmful effects of detention and family separation on asylum seekers’ mental health in the context of Bill C-31,” (April 2012), pp. 3, 7, available at http://www.cssdelamontagne.qc.ca/fileadmin/csss_dlm/Publications/Publications_CRF/brief_c31_final.pdf.

¹⁰ Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), available at <http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf>.

¹¹ Women’s Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families* (Feb. 2007), pp. 42, 43, available at <http://lirs.org/wp-content/uploads/2012/05/RPTLOCKINGUPFAMILYVALUES2007.pdf>; Cleveland, Rousseau, & Kronick, *supra* note 6, at 11.

¹² Press Release, *Maldef and Other Groups File Complaint Detailing Sexual Abuse, Extortion, and Harassment of Women at ICE Family Detention Center in Karnes City*, MALDEF, http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city/.

¹³ See generally, Press Release, *Advocates Call For Moratorium On Deportation Of Refugee Women And Children At Artesia Detention Center Until Basic Due Process Needs Addressed*, National Immigrant Justice Center (July 24, 2014), http://www.immigrantjustice.org/press_releases/advocates-call-moratorium-deportation-refugee-women-and-children-artesia-detention-ce; American Civil Liberties Union, Letter, *ACLU Views on S. 2648, the Emergency Supplemental Appropriations Act, 2014* (July 29, 2014), available at

https://www.aclu.org/sites/default/files/assets/14_7_29_aclu_letter_to_senate_re_views_on_s_2648_the_emergency_supplemental_appropriati

ns_act_2014.pdf.; Dara Lind, *Inside the remote, secretive detention center for migrant families*, Vox News (July 24, 2014), available at <http://www.vox.com/2014/7/24/5932023/inside-the-remote-secretive-detention-center-for-migrant-families>.

¹⁴ Laura W. Murphy, Family detention: A shame and a waste, The Hill (Aug 1, 2014), available at <http://thehill.com/blogs/congress-blog/civil-rights/214001-family-detention-a-shame-and-a-waste>; Eleanor Acer, *Immigrant Families Not Treated Properly*, ALBUQUERQUE JOURNAL, (Aug. 3, 2014), available at <http://www.abqjournal.com/439865/opinion/immigrant-families-not-treated-properly.html>.

¹⁵ *M.S.P.C. v. Johnson*, Case 1:14-cv-01437 (D.D.C. Aug. 22, 2014), available at https://www.aclu.org/sites/default/files/assets/filed_complaint_1.pdf

¹⁶ UN Committee against Torture, General Comment No. 3, CAT/C/GC/3, para. 13 (Dec. 2012).

¹⁷ UN Committee against Torture, General Comment No. 2, CAT/C/GC/2, para. 15 (Jan. 2008).

¹⁸ Committee against Torture, List of issues prior to the submission of the fifth periodic report of the United States of America (CAT/C/USA/5), paras. 33, 34, 39 (Jan. 20, 2010), available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en

¹⁹ United States of America Third Periodic Report to the Committee against Torture, para. 199 (August 2013), available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en.

²⁰ Detention Watch Network, *Expose & Close: Artesia Family Detention Facility, New Mexico*, at 9 (Sept. 2014), available at

http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf.

²¹ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports

Of United States of America, para. 1, (August 2014) available at

http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf.

²² U.N. High Commission for Refugees UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, (2012) available at <http://www.unhcr.org/505b10ee9.html>, para 54. See also Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration* (2012), para 32, available at:

<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> .

²³ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 59.

²⁴ U.N. Office of the High Commissioner for Human Rights, Committee on the Rights of the Child, *General Discussion of the Committee on the Rights of the Child in the Context of International Migration*, para. 78 (2012), available at

<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.

²⁵ *In Stockholm, Ban calls for optimizing benefits of 'journey of hope' for migrants, society as a whole*, UN NEWS CENTRE (May 14, 2014),

<http://www.un.org/apps/news/story.asp?NewsID=47786#.U9eIPFbAjZq>.

²⁶ Inter-American Commission on Human Rights, Press Release, "IACHR Wraps Up Visit to the United States of America," (Oct. 2, 2014) (further noting that a "top concern is the use of a widespread regime of immigration detention, given that the vast majority of families are being automatically detained under the custody of ICE."), available at http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp

²⁷ Women's Rights Commission & Lutheran Immigration and Refugee Service, LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES, (2007), available at <http://www.womensrefugeecommission.org/programs/migrant-rights/806-the-detention-of-immigrant-families>.

Life-without-Parole Sentences

I. Issue Summary

Life in prison without a chance of parole is, short of execution, the harshest imaginable punishment. Life without parole (LWOP) is permanent removal from society with no chance of reentry, no hope of freedom. One would expect the U.S. criminal justice system to condemn someone to die in prison only for the most serious offenses. Yet across the United States, at least 3,278 people are serving life sentences without the possibility of parole for nonviolent crimes as petty as siphoning gasoline from an 18-wheeler, shoplifting three belts, breaking into a parked car and stealing a woman's bagged lunch, or possessing a bottle cap smeared with heroin residue. Many thousands more are serving life without parole for other non-homicide offenses, or are serving mandatory sentences of life imprisonment without parole for crimes committed as adults. More than 2,500 other individuals are serving life sentences without the possibility of parole for crimes committed when they were children. These prisoners will languish in prison until they die, irrespective of whether they pose a threat to society or have been rehabilitated.

Human rights law and principles have long required proportionality between the seriousness of the offense and the severity of the sentence. These disproportionately severe sentences violate fundamental rights to humane treatment, proportionate sentence, and rehabilitation, and they constitute a form of cruel, inhuman, or degrading punishment¹ in violation of Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²

Rise in Life-without-Parole Sentences

More than 49,000 people—one of every 30 people in prison—are serving life-without-parole sentences in the United States.³ LWOP is imposed in 49 states, up from 16 in the mid-1990s.⁴ Six states and the federal system have abolished parole for prisoners sentenced to life, meaning that all life sentences in these jurisdictions are imposed without the possibility of parole.

The number of people sentenced to life without parole has quadrupled nationwide in the past 20 years, even while violent crime has been declining during that period.⁵ Prisoners serving LWOP comprise one of the most rapidly growing populations in the prison system. The rate of growth of the LWOP population has been nearly four times the percentage rise in people serving parole-eligible life sentences.⁶

Not only has the use of life-without-parole sentences exploded, but the punishment is available for a broader range of offenses. In 37 states and in the federal system, a life-without-parole sentence is available for non-homicide offenses, including selling drugs, burglary,

robbery, carjacking, and battery.⁷ In 29 states, a LWOP sentence is mandatory upon conviction of particular crimes, thus denying judges any discretion to consider the circumstances of the crime or the defendant.⁸

Life-without-Parole Sentences for Nonviolent Offenses

According to data collected and analyzed by the ACLU, 3,278 prisoners are serving LWOP for drug, property, and other nonviolent crimes in the United States as of 2012.⁹ Nearly two-thirds of prisoners serving LWOP for nonviolent offenses nationwide are in the federal system; of these, 96 percent are serving LWOP for drug crimes. Of the states that sentence people to LWOP for nonviolent offenses, Louisiana, Florida, Alabama, Mississippi, South Carolina, and Oklahoma have the highest numbers of such prisoners, largely due to three-strikes and other habitual offender laws that mandate a LWOP sentence for the commission of a nonviolent crime if the person has previously been convicted of certain prior felonies, which need not be violent or even serious in most of these states.

An ACLU sample study of prisoners serving life without parole for nonviolent offenses found that 21.9 percent of the federal cases reviewed were of people sentenced to LWOP for their first criminal conviction. The overwhelming majority (83.4 percent) of the federal and state LWOP sentences for nonviolent crimes surveyed by the ACLU were mandatory. In these cases, judges had no choice in sentencing due to laws requiring mandatory minimum periods of imprisonment, habitual offender laws, statutory penalty enhancements, or other sentencing rules that mandated LWOP.

As a result of the expansion of the crimes eligible for LWOP sentences to include a greater range of offenses, even people convicted of low-level nonviolent offenses are punished with LWOP sentences, often because of prior convictions. For example, the ACLU documented scores of cases in which people were sentenced to LWOP for nonviolent drug crimes of possession, sale, or distribution, including:

- possession of a crack pipe
- having a single, small crack rock at home
- possession of 32 grams of marijuana with intent to distribute
- acting as a go-between in the sale of \$10 of marijuana to an undercover officer
- selling a single crack rock
- verbally negotiating another man's sale of two small pieces of fake crack to an undercover officer
- having a stash of over-the-counter decongestant pills that could be manufactured into methamphetamine

In cases documented by the ACLU, the nonviolent property crimes that resulted in life-without-parole sentences include:

- attempting to cash a stolen check
- a junk-dealer's possession of stolen junk metal (10 valves and one elbow pipe)
- possession of stolen wrenches
- stealing tools from a tool shed and a welding machine from a yard
- shoplifting several digital cameras
- shoplifting two jerseys from an athletic store
- taking a television, circular saw, and a power converter from a vacant house
- breaking into a closed liquor store in the middle of the night

The ACLU's research also revealed that there is staggering racial disparity in life-without-parole sentencing for nonviolent offenses in the United States. Nationwide, 65.4 percent of prisoners serving LWOP for nonviolent offenses are Black, 17.8 percent are white, and 15.7 percent are Latino. In the federal system, Blacks were sentenced to LWOP for nonviolent crimes at 20 times the rate of whites. In Louisiana, the ACLU's survey found that Blacks were 23 times more likely than whites to be sentenced to LWOP for a nonviolent crime. The racial disparities range from 33-to-1 in Illinois to 18-to-1 in Oklahoma, 8-to-1 in Florida, and 6-to-1 in Mississippi.

Life-without-Parole Sentences for Children

More than 2,500 people convicted as children are serving life sentences without the possibility of parole in the United States. Since the 1990's, many states have adopted laws restricting the availability of juvenile courts to children or requiring children to be tried and sentenced as if they were adults.¹⁰ This led to an explosion in the number of children sentenced to life without the possibility of parole. The United States is the only country in the world that imposes sentences of life imprisonment without the possibility of release on children.¹¹

In recent years, legal challenges to life-without-parole sentences in the United States have met with a measure of success and resulted in important restrictions on the use of these sentences for persons below 18 years of age, but judicial rulings have fallen short of prohibiting such sentences. In *Graham v. Florida*, the U.S. Supreme Court ruled that life imprisonment without the possibility of release constitutes "cruel and unusual" punishment for non-homicide offenses committed by persons below 18 years of age.¹² In *Miller v. Alabama*, the Court struck down as unconstitutional mandatory sentences of life imprisonment without possibility of parole for children convicted of homicide offenses.¹³

Significantly, the rulings leave open the possibility of judges imposing LWOP sentences in homicide cases, even where the child played a minimal role such as a “lookout” or accomplice, and courts continue to impose the sentence.¹⁴ While many of the individuals who were sentenced to mandatory terms of life without the possibility of parole for crimes that occurred before they turned 18 may have the opportunity to be resentenced in light of *Miller*, U.S. courts are still free to impose the same life sentence upon rehearing.

Moreover, some courts have refused to give retroactive effect to *Miller v. Alabama*. The highest courts in only seven of the 28 states that required mandatory LWOP sentences for juveniles convicted of homicide offenses have ruled that *Miller v. Alabama* must be applied retroactively, and three states (Pennsylvania, Louisiana, and Minnesota) have refused to hold *Miller* retroactive.¹⁵ In June 2014, the U.S. Supreme Court refused to review a Pennsylvania court decision holding that *Miller* does not apply retroactively, and in May 2014 the Supreme Court denied *certiorari* review of a Louisiana court decision similarly refusing to retroactively apply *Miller*.¹⁶ Most recently, in October 2014, the Supreme Court declined to review an Ohio court decision refusing to retroactively review the mandatory LWOP sentence of a child convicted of murder.¹⁷ Since the *Miller* decision, a majority of the 28 states have not passed legislation to comply with the ruling.¹⁸ Of the 13 states that have passed compliance legislation, many require lengthy minimum time served before parole review (25 to 40 years) and only four allow for resentencing of prisoners currently serving mandatory LWOP sentences for a crime committed as a juvenile. Even in those states where courts have ruled *Miller* applies retroactively, prisoners continue to await resentencing; for instance in Iowa 25 prisoners serving mandatory LWOP sentences for crimes committed as children are still awaiting resentencing.¹⁹

Some state and federal courts have interpreted the prohibition of mandatory LWOP sentences for children extremely narrowly and ruled that sentences of extreme length, without consideration of their child status and that exceed normal life expectancy—de facto life without parole sentences—are permissible under the U.S. Constitution because they technically are not life without parole sentences.²⁰ The U.S. Supreme Court is yet to rule on the constitutionality of this issue.²¹ There are an unknown number of individuals nationwide serving these de facto life sentences for crimes they committed when they were children.

The Immense Physical and Psychological Toll of Serving Life without Parole

LWOP sentences have profound, negative psychological impacts on prisoners. In interviews with the ACLU, prisoners reported feelings of unremitting hopelessness, loneliness, anxiety, depression, fear, isolation from family and their community, and suicidal thoughts. Many struggle to find purpose or meaning in their lives. Some expressed the wish for death so that their suffering would end, and some reported contemplating or attempting suicide because of the hopelessness of their sentences. Prisoners described the anguish of being separated from family, being unable to be present to parent their children or support aging and ailing parents,

missing funerals of parents and siblings who died during their incarceration, being forgotten by friends and family, and facing the prospect of growing old and dying in prison without any hope for release.

Prisoners serving LWOP for nonviolent crimes variously described their sentences to the ACLU as “a slow death sentence,” “a slow, painful death,” “a slow, horrible, torturous death,” “akin to being dead, without the one benefit of not having to suffer any more,” “like you’re...a walking dead,” and “like you are a living dead person on a [life] support machine.”²² Libert Roland said of his LWOP sentence for cocaine possession, “It feels like someone or something is suffocating the life out of you slowly...the only relief you have left, the only hope, is to die [a] fast death.”²³ Timothy Hartman, who is serving LWOP for armed burglary and has been incarcerated for 13 years, says, “As the years go on, it gets worse. You lose hope, the will to live.”²⁴ He told the ACLU that his sentence has driven him to such profound despair that he has considered suicide, explaining, “So many have no hope—it’s turned [us] insane. Mentally, you break...you cannot justify staying alive. It’s pointless. You put a human being in a situation so bad, so evil, death is the *only* end.”²⁵

Imprisonment with no release date causes psychological trauma. Clinical research on the psychological consequences of LWOP and other death-in-prison sentences suggests that the mental health impact of LWOP sentences differs from parole-eligible sentences in which a prisoner has a release date that he or she is likely to reach during his or her lifetime.²⁶ The Sentencing Project found that a higher percentage of LWOP prisoners suffered from mental illness—primarily serious depression—than parole-eligible prisoners with a life sentence. Studies on the mental health consequences of indefinite detention have found that the indefinite terms of detainees’ confinement causes them to develop feelings of hopelessness and helplessness that lead to depressive symptoms, chronic anxiety, despair, and suicidal ideation.²⁷

For children, the psychological consequences of LWOP sentences may be exacerbated. Given their stage of growth and development children are less able than adults handle prison environments, especially when they are housed in adult facilities. Psychologically, children are different from adults, making prison time even more difficult for them. They experience time differently—a day for a child feels longer than a day to an adult—and they have a greater need for social stimulation. Consequently, children are psychologically unable to handle indefinite incarceration with the resilience of an adult.²⁸ Incarceration in adult jails and prisons also place youth at great risk of physical and sexual violence. Youth are over five times as likely to have a substantiated incident of sexual violence,²⁹ and twice as likely to be physically harmed by staff.³⁰ Incarceration in adult facilities places tremendous stress on youth and fails to provide adequate mental health services and programming. As a result, youth in adult facilities are eight times more likely to commit suicide than youth in juvenile facilities.³¹

II. Human Stories

Kevin Ott is serving life without parole for three-and-a-half ounces of methamphetamine. When Ott was on parole for marijuana charges, parole officers found the drug and paraphernalia in a warrantless search of the trailer in which he was living. He was sentenced to mandatory LWOP under Oklahoma's state habitual drug offender law based on prior convictions arising from two arrests, one for having a small amount of meth in his pocket while exiting a bar, and the other for possession and manufacture of marijuana. During his incarceration after both of these arrests, he repeatedly requested treatment for his drug addiction but was denied. Now 50, Ott has served 17 years in prison and has stayed clean despite being ineligible for drug treatment due to the fact that he will never be released from prison. Ott likens his sentence to a "slow death penalty."³²

Timothy Jackson is serving life without parole for shoplifting a jacket worth \$159 from a department store in New Orleans in 1996. Jackson, then 36 years old, worked as a restaurant cook and had only a sixth-grade education. A store security agent followed Jackson, who put the jacket down on a newspaper stand and tried to walk away when he realized he was being followed. At the time, Jackson's crime carried a two-year sentence for a first conviction; it now carries a six-month sentence. Instead, the court sentenced Jackson to mandatory life without parole, using a two-decades-old juvenile conviction for unarmed robbery and two unarmed car-burglary convictions to increase his sentence to LWOP under Louisiana's four-strikes law.³³ Although an appellate court called the sentence "excessive," "inappropriate," and "a prime example of an unjust result,"³⁴ the Louisiana Supreme Court ruled that judges may not depart from life-without-parole sentences mandated by the habitual offender law except in rare instances.³⁵ Of his sentence, Jackson says, "A life sentence without parole, it take all hope from a person and their family."³⁶ Now 52, Jackson has served 16 years in prison and suffers from various health problems, including diabetes, high blood pressure, and blackouts.

Dicky Joe Jackson, a 55-year-old father of three, was sentenced to life without parole for a federal drug conspiracy conviction because he transported and sold methamphetamine to pay for a life-saving bone marrow transplant and other medical treatments for his sick son.³⁷ After the family's insurance company terminated their coverage for missing a payment, Jackson did not have the financial means to pay for the transplant his then-two-year-old son required. A trucker from Texas, Jackson started carrying methamphetamine in his truck to earn the money from a local drug dealer. He says of his sentence, "It's like someone dying but not being put to rest."³⁸ He has now served 18 years in prison and told the ACLU, "There's lots of nights in your prayers you ask to not wake up the next day... There's no hope in here for us lifers."³⁹ He added, "I wish it were over, even if it meant I were dead.... When I lie down at night I think it would be great not to wake up in the morning, then all this would be over."⁴⁰

Henry Hill was only 16 years old when he was charged for his involvement in a shooting that took place in a Michigan park. In 1980, Henry and a few friends went to a park to confront three other boys they had been feuding with previously. Henry fired several shots in the air with a handgun to scare off other people in the park, but never fired his gun at the victim. Despite the fact that all four bullets found in the victim's body were characteristic of the weapon used by one of Henry's co-defendants, Henry was still charged with first-degree murder for aiding and abetting. After his arrest, Henry was evaluated and found to have the academic ability of a third grader, and the mental maturity of a nine-year-old. The doctor who did his evaluation recommended that Henry remain under the jurisdiction of the Juvenile Court. Based on the charge against him, Henry stood trial as an adult. The trial court had no discretion to consider Henry's juvenile status, mental age or maturity. Michigan law required that the trial court charge and punish Henry as if he were an adult and sentence him as such to the mandatory adult sentence of life imprisonment. Because of the nature of the offense, the Michigan Parole Board has no jurisdiction to consider Henry for parole. Henry is now 49 years old and has spent over 30 years—nearly two-thirds of his life—behind bars.

III. CAT Position

The Committee against Torture has stated that sentencing a child to life imprisonment without the possibility of release may in itself amount to cruel, inhuman or degrading treatment. In its July 2006 Concluding Observations following its previous periodic review of the United States, the Committee against Torture expressed its concern about the large number of children sentenced to life imprisonment in the United States.⁴¹ The Committee recommended that the United States “should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment.”⁴²

IV. U.S. Government's Response

In its periodic report submitted to the Committee in December 2013, the U.S. Government reported on two Supreme Court cases (*Graham v. Florida* and *Miller v. Alabama*) limiting the applicability of juvenile LWOP sentences.⁴³ The U.S. periodic report fails to mention that some courts have ruled that *Miller v. Alabama* does not apply retroactively. Courts continue to impose the sentence and the reality is that despite *Graham* and *Miller*, at least 2,500 individuals are still serving LWOP for crimes they committed as children.

In its response to the Committee's 2006 Concluding Observations, the U.S. Government took the position that “The Convention does not prohibit the sentencing of juveniles to life imprisonment without parole” and asserted that “The United States, moreover, does not believe that the sentencing of juveniles to life imprisonment constitutes cruel, inhuman or degrading treatment or punishment as defined in United States obligations under the Convention.” The U.S. Government further highlighted the reservation it entered at the time it ratified the CAT, stating

that the United States considers itself bound by the obligation to prevent cruel, inhuman or degrading treatment or punishment under Article 16 “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the...Constitution of the United States.”⁴⁴ The U.S. Government also asserted that because it did not ratify the Convention on the Rights of the Child, “it is under no obligation to prohibit the sentencing of juveniles to life imprisonment without the opportunity for parole.”⁴⁵

Recently, in its May 2014 response to the petitioners’ post-hearing Final Observations in the *Henry Hill et al. v. United States of America* case brought by the ACLU before the Inter-American Commission on Human Rights, the U.S. Government took the extraordinary and erroneous position that neither the American Declaration nor international law prohibits the United States from imposing LWOP sentences on juveniles.⁴⁶

V. Other UN and Regional Human Rights Bodies Recommendations

In its April 2014 Concluding Observations on U.S. compliance with the ICCPR, the Human Rights Committee expressed its concern “that a court may still, at its discretion, sentence a defendant to life imprisonment without parole for a homicide committed as a juvenile, and that a mandatory or non-homicide-related sentence of life imprisonment without parole may still be applied to adults.”⁴⁷ The Human Rights Committee recommended that the United States “should prohibit and abolish the sentence of life imprisonment without parole for juveniles, irrespective of the crime committed, as well as the mandatory and non-homicide-related sentence of life imprisonment without parole.”⁴⁸ Concerning racial disparities in sentencing, the Human Rights Committee also recommended that the United States “should continue and step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state and local levels” and by ensuring “the retroactive application of the Fair Sentencing Act and reform mandatory minimum sentencing statutes.”⁴⁹ In its previous 2006 Concluding Observations of its periodic review of the United States, the Human Rights Committee stated that a categorical prohibition of imposition life-without-parole sentences on children is incorporated in article 24(1) of the ICCPR.⁵⁰

In its August 2014 Concluding Observations, the Committee on the Elimination of Racial Discrimination repeated its concern that “despite the recent Supreme Court decisions which held that mandatory sentencing of juvenile offenders to life imprisonment without parole is unconstitutional, 15 states have yet to change their laws, and that discretionary life without parole sentences are still permitted for juveniles convicted of homicide.”⁵¹ The CERD Committee reiterated “its previous recommendation to prohibit and abolish life imprisonment without parole for those under 18 at the time of the crime, irrespective of the nature and circumstances of the crime committed, and to commute the sentences for those currently serving

such sentences.”⁵² The CERD Committee also expressed concern that racial and ethnic minorities are disproportionately subjected to harsher sentences, including life without parole, and recommended that the United States “amend[] laws and policies leading to racially disparate impact in the criminal justice system at the federal, state and local levels.”⁵³

In July 2013, the Grand Chamber of the European Court of Human Rights (ECHR) ruled by a vote of 16-to-1 in *Vinter and Others v. the United Kingdom* that life sentences with extremely limited or no possibilities for review and release violate Article 3 of the European Convention for the Protection of Human Rights, which prohibits cruel, inhuman, or degrading treatment or punishment.⁵⁴ The court concluded that Article 3 requires that life sentences must incorporate an opportunity for review in which authorities can consider progress toward rehabilitation and other changes in the life of the prisoner that indicate an individual’s imprisonment no longer serves a legitimate purpose and that he or she is entitled to conditional release.⁵⁵ The prisoners serving LWOP who brought the case had committed serious crimes: one had been convicted of murdering his wife; another of murdering his parents, his adoptive sister, and her children for financial gain; and the third of murdering four people.⁵⁶ Even taking into account the seriousness of these crimes, the court ruled that there must be an opportunity for review of the prisoners’ life sentences.⁵⁷

VI. Recommended Questions

1. What measures are being undertaken to eliminate or limit the imposition of life-without-parole sentences for nonviolent and non-homicide crimes, and to ensure that people currently serving such sentences are afforded a meaningful opportunity for release?
2. What efforts is the United States making to prohibit and abolish the sentence of life without parole for children, irrespective of the crime committed, and to ensure that all people currently serving life-without-parole sentences for crimes committed as children are resentenced and ensured a meaningful periodic review of their eligibility for release before a parole or review panel?
3. How will the United States eliminate or limit the imposition of mandatory sentences of life without parole for both adults and children and ensure that sentences of life-without-parole are based on an individualized determination that the severity of the sentence is proportionate to the seriousness of the offense?

VII. Suggested Recommendations

1. Abolish the sentence of life without parole for non-homicide offenses. Congress should eliminate all existing laws that either mandate or allow for a sentence of LWOP for a non-homicide offense. State legislatures should repeal all existing laws or the portions of such laws that either allow for or mandate a sentence of life without parole for a non-homicide offense. Such laws should be repealed for non-homicide offenses, regardless of whether LWOP operates as a function of a three-strikes law, habitual offender law, or other sentencing enhancement. Make elimination of non-homicide LWOP sentences retroactive and require resentencing for all people currently serving LWOP for nonviolent offenses.
2. Abolish the sentence of life without parole for offenses committed by children under 18 years of age. Enable child offenders currently serving life without parole to have their cases reviewed by a court for resentencing, to restore parole eligibility and/or for a sentence reduction.
3. Congress should enact comprehensive federal sentencing reform legislation such as the Smarter Sentencing Act of 2013 or the Justice Safety Valve Act of 2013, which would reduce some mandatory minimum sentences, including mandatory LWOP sentences for drug offenses, and would retroactively apply the Fair Sentencing Act—which reduced the crack/powder cocaine sentencing disparity—to those currently serving LWOP and other excessive and disproportionate sentences for these offenses.

¹ See e.g., REPORT ON THE 1960 SEMINAR ON THE ROLE OF SUBSTANTIVE CRIMINAL LAW IN THE PROTECTION OF HUMAN RIGHTS AND THE PURPOSE AND LEGITIMATE LIMITS OF PENAL SANCTIONS, organized by the United Nations in Tokyo, Japan, 1960 (noting that punishments “prescribed by law and applied in fact should be humane and proportionate to the gravity of the offence”).

² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment preamble, art. 16, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

³ ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 5 (2013).

⁴ Only Alaska provides the possibility of parole for all life sentences. Alaska’s version of LWOP is a 99-year sentence without the possibility of parole.

⁵ ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1, 6 (2013); ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, *NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA* 10 (2009).

⁶ ASHLEY NELLIS, THE SENTENCING PROJECT, THROWING AWAY THE KEY: THE EXPANSION OF LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES, 23 FED. SENT’G REP. 1, 27 (2010).

⁷ *Id.* at 28.

⁸ Those states are Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming. *Id.* at 27.

⁹ AMERICAN CIVIL LIBERTIES UNION (ACLU), A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES (Nov. 2013), available at <http://www.aclu.org/livingdeath>.

¹⁰ Gerard Rainville & Steven Smith, U.S. Dep’t of Justice, *Juvenile Felony Defendants in Criminal Courts* (May 2003), Nat’l Crim. Justice Reference Service, NCJ 197961, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jfdcc98.pdf>; Bureau of Justice Statistics, Nat’l Corr. Reporting Program (2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/jfdcc98.htm>; Patrick Griffin, Patricia Torbet & Linda Szymanski, Nat’l Ctr. for Juvenile Justice & Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions* (Dec. 1998), Nat’l Crim. Justice Reference Service, NCJ 172836, available at <https://www.ncjrs.gov/pdffiles/172836.pdf>.

¹¹ See Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, & Dana Marie Isaac, Univ. of San Francisco School of Law, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 61 (2012), available at <http://www.usfca.edu/law/clgj/criminalsentencing>.

¹² *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)

¹³ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

¹⁴ For example, despite *Miller*, since the ruling five youth in Michigan have been sentenced to life without possibility of parole. See, e.g., Gary Ridley, *Flint teen gets life in prison without parole in first-of-its-kind juvenile sentencing hearing*, MLIVE (Aug. 20, 2013), available at http://www.mlive.com/news/flint/index.ssf/2013/08/flint_teen_gets_life_in_prison.html.

¹⁵ The seven states whose high courts have ruled that *Miller* applies retroactively are Nebraska, Illinois, Iowa, Massachusetts, Mississippi, New Hampshire, and Texas. See Marsha Levick, Juvenile Law Center, *Between Hope and Despair, Waiting for Meaningful Implementation of Miller v. Alabama*, HUFFINGTON POST (June 24, 2014); THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE (2014), available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

¹⁶ See *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), cert. denied, 82 U.S.L.W. 3555 (2014); *Louisiana v. Tate*, No. 2012-OK-2763, 2013 WL 5912118 (La. Nov. 5, 2013), cert. denied, No. 13-8915 (May 27, 2014).

¹⁷ See *Evans v. Ohio*, Case No. 2013-1550 (Ohio 2014) cert denied, No. 14-5425 (Oct. 6, 2014).

¹⁸ See Marsha Levick, Juvenile Law Center, *Between Hope and Despair, Waiting for Meaningful Implementation of Miller v. Alabama*, HUFFINGTON POST (June 24, 2014); THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE (2014), available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

¹⁹ Grant Rodgers, *25 Young Killers Await New Prison Sentences in Iowa*, DES MOINES REG. (June 25, 2014).

²⁰ Compare *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), cert denied *Bunch v. Bobby*, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013) (89 years prison sentence not unconstitutional for a child convicted of a non-homicide offense), *Angel v. Commonwealth*, 281 Va. 248 (Va. 2011) (The possibility of geriatric parole at age 60 counts as a meaningful opportunity for release) and *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (254 years for a child convicted of a non-homicide offense unconstitutional), *People v. Caballero*, 282 P.3d 291 (Cal. 2012) (110 years to life sentence for a child offender for a non-homicide offense unconstitutional), *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (52.5 year sentence for a child offender sufficient to trigger *Miller*-type protections), *Iowa v. Pearson*, 836 N.W.2d 88 (Iowa 2013) (imposing some restrictions on the length of prison sentences that children convicted of non-homicide offenses can receive before they become parole eligible).

²¹ Most recently, in October 2014 the Supreme Court declined to review three de facto juvenile LWOP cases (*Goins v. Ohio*, *Barnette v. Ohio*, and *Bunch v. Ohio*).

²² Letter to the ACLU from Antawn Tyrone Bolden, Jefferson Correctional Institution, Monticello, Florida, Mar. 10, 2013; letter to the ACLU from Timothy Hartman, Charlotte Correctional Institution, Punta Gorda, Florida, July 17, 2013; letter to the ACLU from Louis Scott White, Holmes Correctional Institution, Bonifoy, Florida, July 23, 2013; letter to the ACLU from Thomas Tinghino, Suwannee Correctional Institution Annex, Live Oak, Florida, July 20, 2013; ACLU telephone interview with Tommy Bryant, Jesup Federal Correctional Institution, Jesup, Georgia, July 17, 2013; letter to the ACLU from Eduardo Toranzo, Cross City Correctional Institution, Cross City, Florida, July 20, 2013.

²³ Letter to the ACLU from Libert Roland, Louisiana State Penitentiary, Angola, Louisiana, May 11, 2013.

²⁴ Letter to the ACLU from Timothy Hartman, Charlotte Correctional Institution, Punta Gorda, Florida, July 17, 2013.

²⁵ *Id.*

²⁶ See, e.g., Robert Johnson and Sandra McGunigall-Smith, *Life, or Something Like It: Pains of Imprisonment among Life-Sentence Prisoners*, paper presented at American Society of Criminology conference (Nov. 2006); M. E. Leigey, *Life While Serving Life: Examining the Correctional Experiences of Older Inmates Serving a Life without Parole Sentence* (2007) (unpublished doctoral dissertation, University of Delaware, Newark); Glenn Abraham, *Prisoners Serving Sentences of Life Without Parole: A Qualitative Study and Survey*, University of Kentucky Doctoral Dissertations Paper 814 (2011); Sandra McGunigall-Smith, *Men of a Thousand Days: Death-Sentenced Inmates at Utah State Prison* (2004) (unpublished doctoral dissertation, University of Wales, Bangor); Robert Johnson and Sandra McGunigall-Smith, *Life without Parole, America's Other Death Penalty: Notes on Life under Sentence of Death by Incarceration*, PRISON JOURNALS (2008); S. COHEN AND L. TAYLOR, PSYCHOLOGICAL SURVIVAL: THE EXPERIENCE OF LONG-TERM IMPRISONMENT (Pelican Books, 1972); Y. Jewkes, *Loss, Liminality and the Life Sentence: Managing Identity through a Disrupted Lifecourse*, in THE EFFECTS OF IMPRISONMENT 366-388 (A. Lieblich & S. Maruna, eds., Willan Publishing, 2005); R. Johnson and A. Dobranska, *Mature Coping Among Life-Sentence Prisoners: An Exploratory Study of Adjustment Dynamics*, 30 CORR. COMPENDIUM 6, 8-9, 36-38 (2005).

²⁷ See, e.g., I. Robbins et al., *The Psychiatric Problems of Detainees under the 2001 Anti-Terrorism Crime and Security Act*, 29 PSYCHIATRIC BULLETIN 407, 408 (2005) (helplessness and hopelessness are “integral aspect[s] of indefinite detention”); K. Robjant et al., *Mental health implications of detaining asylum seekers: systematic review*, 194 BR JOURNAL PSYCH 306, 309 (2009); Z. Steel and D. Silove, *The mental health implications of detaining asylum seekers*, 175 MEDICAL J OF AUSTRALIA 596 (2001); C. Pourgourides, *A second exile: the mental health implications of detention of asylum seekers in the UK*, 21 PSYCHIATRIC BULL. 673, 674 (1997); PHYSICIANS FOR HUMAN RIGHTS, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE US (2011).

²⁸ Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD.DEV.28 (2009), available at <http://www.wisspd.org/html/ATPracGuides/Training/ProgMaterials/Conf2011/AdDev/ADFO.pdf>; Jennifer Woolard et al., *Juveniles in Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT’L J.OF FORENSIC MENTAL HEALTH 1 (2005), available at <http://www.policyarchive.org/handle/10207/bitstreams/20668.pdf>; Deborah Laible et al., *The Differential Relations of Parent and Peer Attachment to Adolescent Adjustment*, 29 J.OF YOUTH & ADOLESCENCE 45(2000), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1050&context=psychfacpub>; David E. Arredondo, *Principles of Child Development and Juvenile Justice Information for Decision-Makers*, 5 J.CTR. FOR FAMILIES, CHILD & COURTS 127 (2004).

²⁹ This figure is calculated by comparing the percentage of substantiated incidents of sexual violence experienced by incarcerated youth and the percentage of youth in the entire inmate population. From 2009-2011 youth under 18 were 1.3 percent of substantiated incidents of violence (2009-2011) and .26% of the population in 2011 (1790 of 671,551), making them 5 times as likely to be a victim of sexual abuse; See DOJ Supplemental Statement on PREA regs. 75 Fed. Register, 37106-01, 37128, stating that youth are 8 times as likely to have substantiated instance because youth were 1.5% of substantiated incidents (2005-2008) and .2% of the population. Recent Bureau of Justice Statistics (BJS) reports show youth are at greater risk of sexual victimization than adults in prisons (4.5%-youth, 4% adults) and jails (4.7%-youth, 3.2% adults). But in juvenile facilities is higher 9.5% (but note that rates by other youth 2.5% and guards 7.7%).

³⁰ M. Forst et al. *Youth in Prisons and Training Schools*, JUVENILE & FAMILY COURT, vol. 4 (1989).

³¹ *More Than Meets the Eye*, Washington, D.C.: American Bar Association Juvenile Justice Center (1997).

³² ACLU telephone interview with Kevin Ott, Oklahoma State Reformatory, Granite, Oklahoma, Mar. 8, 2013.

³³ *State v. Jackson*, No. 96-KA-2540 (La. App. 4 Cir. 11/26/97).

³⁴ *State v. Jackson*, No. 96-KA-2540.

³⁵ State Ex Rel Jackson v. State, 1999-KH-2705 (La. 3/31/00).

³⁶ Letter to the ACLU from Timothy Jackson, Louisiana State Penitentiary, Angola, Louisiana, Apr. 23, 2013.

³⁷ Letter from Judge Michael R. Snipes, Criminal District Court #7, Dallas County Veterans Court, former federal prosecutor who tried Dicky Joe Jackson's case, Jan. 30, 2013 (stating "I saw no indication that Mr. Jackson was violent, that he was any sort of large scale narcotics trafficker, or that he committed his crimes for any reason other than to get money to care for his gravely ill child.")

³⁸ ACLU telephone interview with Dicky Joe Jackson, Forrest City Medium Federal Correctional Institution, Forrest City, Arkansas, Mar. 12, 2013.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 34, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

⁴² *Id.*

⁴³ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶202 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

⁴⁴ Comments by the United States of America to the Conclusions and Recommendations of the Committee against Torture, ¶ 31, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/USA/CO/2/Add.1 (Nov. 6, 2007).

⁴⁵ *Id.* ¶ 32.

⁴⁶ Response of the Government of the United States of America to the Inter-American Commission on Human Rights Concerning the March 25, 2014 Hearing Before the Commission, *Henry Hill, et al. v. United States of America*, Case No. 12.866 (May 6, 2014) available at https://www.aclu.org/sites/default/files/assets/usg_response.pdf.

⁴⁷ Human Rights Comm., Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United States of America, ¶ 23, 110th Sess., March 10-28, 2014, U.N. Doc. CCPR/C/USA/CO/4 (April 23, 2014).

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 6.

⁵⁰ Human Rights Comm., Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, ¶ 34, U.N. Doc. CCPR/C/SR.2395 (July 27, 2006) (noting that "sentencing children to a life sentence without parole is of itself not in compliance with article 24(1) of the Covenant.")

⁵¹ Comm. on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination on the Combined Seventh to Ninth Periodic Reports of United States of America, ¶ 21, 85th Sess., Aug. 11-29, 2014, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014).

⁵² *Id.* See also Comm. on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 21, 72nd Sess., Feb. 18-Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) (recommending that the United States "discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.")

⁵³ Comm. on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination on the Combined Seventh to Ninth Periodic Reports of United States of America, ¶ 20, 85th Sess., Aug. 11-29, 2014, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014).

⁵⁴ *Vinter and Others v. The United Kingdom*, Application Nos. 66069/09, 130/10, and 3896/10, Eur. Ct. H.R. (July 9, 2013).

⁵⁵ *Id.* ¶ 119.

⁵⁶ *Id.* ¶¶ 15-32.

⁵⁷ *Id.* ¶ 112 (Explaining, "[I]f... a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, [a life sentence without the possibility of parole is] a poor guarantee of just and proportionate punishment.")

The Death Penalty

I. Issue Summary

Since 1976, when the modern death penalty era began in this country,¹ 1,389 people have been executed.² As of July 2014, there were 3,049 people awaiting execution across the country.³ The U.S. death penalty system in 32 states, the federal system, and the military violates international law and raises serious concerns regarding the United States' international legal obligations under the Convention against Torture.

There continue to be positive developments regarding the death penalty in the United States. The number of new death sentences continues to drop, and on May 2, 2013, Maryland became the sixth state in six years to repeal the death penalty. Despite these positive signs, the U.S. death penalty system remains fraught with problems.

Although the Supreme Court has held that one current method of lethal injection used in the U.S. is constitutional,⁴ that method depended upon a drug that is no longer available after its manufacturer objected to the use of the drug for executions. States have hurriedly switched to new, untested methods, with little information released or oversight allowed.⁵ As a result, many states—including South Dakota, Pennsylvania, Colorado, Georgia, Texas, Ohio, and Missouri—have begun purchasing lethal drugs from compounding pharmacies. These pharmacies produce derivative drugs that have not been approved by the Food and Drug Administration⁶ and have turned to novel and untested drug combinations. As a result, several condemned prisoners have suffered excruciating pain during executions. Moreover, the states of Alabama, Arkansas, Florida, Kentucky, Oklahoma, and Tennessee continue to authorize the electric chair as a method of execution under certain circumstances.⁷

Since 1973, 146 innocent people have been released from death row, many after spending decades on death row.⁸ Still many others have been released from death row after their guilt for the capital offense was put in doubt, though they have not been exonerated completely.⁹ Tragically, not all innocent people have escaped execution.¹⁰

Racial bias continues to taint the capital punishment system in the United States, from jury selection through decisions about who faces execution. The death penalty is disproportionately imposed on people of color.¹¹

Condemned prisoners often wait decades in solitary confinement before execution, in violation of internationally-recognized prohibitions against this mistreatment.¹² This “death row phenomenon” may cause some prisoners, like Robert Gleason executed in Virginia in January 2013, to “volunteer” for execution rather than remain on death row.¹³

II. Human Stories

On April 29, 2014, Clayton Lockett suffered an excruciating death using an untested drug protocol, in the state of Oklahoma. Prison officials had severe difficulty locating a vein and finally located one in his groin. Mr. Lockett writhed, breathed heavily, clenched his teeth, and tried to rise off the bed. The warden, finally realizing that something had gone horribly wrong, called off the execution. Mr. Lockett died shortly thereafter of a heart attack. The State never disclosed the source of the drugs or their efficacy.

On January 16, 2014, Denis McGuire gasped for about 25 minutes while the drugs used in his execution took effect. Witnesses reported that Mr. McGuire was heaving, making horrible snorting and choking sounds, appearing to writhe in pain.

On July 23, 2014, in the state of Arizona, Joseph Wood choked and snorted for over an hour after the drugs were injected.

Henry Lee McCollum, a Black man, spent nearly three decades on North Carolina's death row before DNA evidence exonerated him just last month. His half-brother Leon Brown, who was serving a life sentence but had previously spent 12 years on death row for the same crime, was also exonerated. When Mr. McCollum's case had been before the United States Supreme Court years earlier on a challenge to the constitutionality of lethal injection, Justice Antonin Scalia held up Mr. McCollum as an example of someone who deserved to die.¹⁴

III. CAT Position

After the last US review in 2006, the Committee had expressed concern "at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering." In its concluding observations, the Committee urged the U.S. to "carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering."

In its list of questions prior to the submission of the third to fifth periodic reports of the United States of America, the Committee asked the United States (a) to address whether it is considering abolishing the death penalty? (b) "to provide information on steps taken to address the continuous concern that executions by lethal injection can cause severe pain and suffering," and specifically requested information on the failed execution on September 15, 2009, in Ohio, and "the fact that the revised execution procedure used by the State of California for carrying out executions continues to be lethal injection;" and (c) to "provide information on the Nebraska Supreme Court's ruling that the use of the electric chair constitutes cruel and unusual punishment" and to "indicate in how many states executions by electric chair are still performed."

IV. U.S. Government's Response

In the fast-moving and ever-changing realm of executions by lethal injection in the United States, the information in the United States' response is inaccurate and severely outdated. The United States maintains, for example, that "execution procedures utilized in the United States are carried out in a humane manner by appropriately trained and qualified personnel, and have been effectively utilized by the states and federal government."¹⁵

Recently, in fact, the White House itself characterized the gruesome execution of Clayton Lockett as falling short of the requirement that the death penalty be carried out humanely. On May 2, 2014, President Obama tasked Attorney General Eric Holder with conducting a full policy review of capital punishment in the U.S., acknowledging both the cruelty of lethal injections and racial disparities in sentencing. It is unclear what type of investigation or review Attorney General Holder will conduct and no further information has been provided at this time.¹⁶

At the Committee's request, the U.S. government included information on the failed execution of Romell Broom on September 15, 2009 in Ohio. The U.S. government report, which was submitted in August 2013, does not mention the subsequent botched execution of Dennis McGuire earlier this year. The government's statement that executions are now on hold in Missouri is outdated. Missouri, in fact, has emerged as a leader in executions, second only to Texas in the number of people executed this year, and an investigative report by St. Louis Public Radio revealed that Missouri state officials deliberately hid crucial facts about the state's lethal injection drugs and their administration.¹⁷ In light of this new information, four justices of the U.S. Supreme Court voted to halt Missouri's most recent execution of Earl Ringo, Jr., but were one vote short of the required majority.

V. Other UN and Regional Human Rights Bodies Recommendations

In its most recent review of the United States, the Human Rights Committee welcomed news of the decline in executions and increasing number of abolitionist states, it remained concerned about the racial bias in the administration of the death penalty, the high number of exonerations from death row, and the "reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs (arts. 2, 6, 7, 9, 14 and 26)."¹⁸

The Human Rights Committee recommended, among other things, that the United States should take measures to ensure that the death penalty is not tainted by racial bias¹⁹; to strengthen safeguards to protect against wrongful convictions and executions; to "ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition

of such drugs is made available to individuals scheduled for execution”; and to consider a federal moratorium on the death penalty.²⁰

In his 2012 report to the UN General Assembly, the UN Special Rapporteur on torture, Juan Mendez, expressed concern about lethal injection as practiced in the United States. He explained that “the conventional view of lethal injection as a peaceful and painless death is questionable” and stated that experts believe lethal injection protocols in the United States “probably violate the prohibition of cruel and unusual punishment.”²¹ Special Rapporteur Mendez also explained that “death row phenomenon” produces “severe mental trauma and physical deterioration in prisoners under sentence of death” and can sometimes constitute cruel, inhuman or degrading punishment.²²

The Inter-American Commission on Human Rights has also expressed deep concern over several recent executions in light of the experimental methods of lethal injection, the secrecy surrounding the process, and the lack of training of persons administering the drugs.²³

VI. Recommended Questions

1. What measures will the United States take to ensure that it will not subject persons under sentence of death to cruel, inhuman, and degrading treatment?
2. What is the scope of the Department of Justice review, which was announced in May 2014?

VII. Suggested Recommendations

1. The United States should immediately cease all federal death penalty prosecutions and impose a moratorium on executions. It should encourage state governments to do the same.
2. The United States should fulfill its commitment in the UPR process to study the racial disparities of the death penalty in the United States.
3. The federal government, through the Food and Drug Administration, should ensure that state Departments of Correction do not acquire drugs to use in lethal injection procedures illegally.
4. The federal government should encourage states to disclose the combination of drugs that are being used in lethal injection procedures before the execution is scheduled.

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

² Executions by Year, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/executions-year>.

³ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. (Summer 2014), available at http://www.naacpldf.org/files/publications/DRUSA_Summer_2014.pdf.

⁴ *Baze v. Rees*, 553 U.S. 35 (2008).

⁵ Lethal Injection—Changes to state execution protocols, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision#changes>.

⁶ Compounding Pharmacies and Lethal Injection, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/compounding-pharmacies>.

⁷ Methods of Execution, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245#state>.

⁸ The Innocence List, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

⁹ Partial Innocence – Conviction Reduced, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/additional-innocence-information#Released>.

¹⁰ Executed but Possibly Innocent, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/executed-possibly-innocent>. See also, e.g., James Liebman et al., *Anatomy of an Execution, Los Tocayos Carlos*, COLUM. HUM. RTS. L. REV., Vol. 43, No. 3 (Summer 2012), available at <http://www3.law.columbia.edu/hrlr/ltr/>.

¹¹ U.S. Dep't of State, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights* (Dec. 30, 2011).

¹² See, e.g., *Pratt & Morgan v. AG for Jamaica*, 4 All. E.R. 769, Judicial Committee of the Privy Council (Nov. 2, 1993); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (Ser. A, No. 161) (1989).

¹³ See e.g. Dena Potter, *Robert Gleason, Inmate Who Asked to Die, Will Be Executed*, HUFFINGTON POST, Jan. 15, 2013, http://www.huffingtonpost.com/2013/01/15/robert-gleason-execution_n_2482079.html.

¹⁴ *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring).

¹⁵ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶163 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

¹⁶ Carrie Johnson, *With End in Sight, Holder Reflects on His Legacy*, NPR, Sept. 28, 2014, <http://www.npr.org/2014/09/28/352091675/after-announcing-resignation-holder-reflects-on-his-legacy>.

¹⁷ Chris McDaniel, *State Reveals More Details of Midazolam Use When Inmates are Executed*, ST. LOUIS PUBLIC RADIO, Sep. 6, 2014, <http://news.stpublicradio.org/post/state-reveals-more-details-midazolam-use-when-inmates-are-executed>.

¹⁸ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶ 8 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

¹⁹ And in August 2014, the UN Committee on the Elimination of Racial Discrimination expressed concern “that members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately . . . subjected to harsher sentences including life imprisonment without parole and the death penalty.”

²⁰ *Id.*

²¹ U.N. Human Rights Council, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* ¶ 38 (Aug. 9, 2012), U.N. Doc. A/67/279 (by Juan Mendez).

²² *Id.* ¶¶ 42, 48.

²³ Press Release, Inter-American Commission on Human Rights, *IACHR Expresses Deep Concern over Execution of Joseph Wood in the United States* (July 25, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/078.asp.

Racial Profiling

I. Issue Summary

Racial profiling in law enforcement is a persistent problem in the United States. Although top U.S. officials have condemned racial profiling, noting that it “can leave a lasting scar on communities and individuals” and is “bad policing,” federal policy fails to protect against it.¹ In particular, despite repeated calls by civil society, the U.S. Department of Justice has failed to issue a revision to its 2003 Guidance on the Use of Race by Federal Law Enforcement.² Although the U.S. government states that the purpose of the Guidance is to ban racial profiling, the current Guidance has the perverse effect of tacitly authorizing the profiling of almost every minority community in the United States.

The Guidance exempts from its ban on racial profiling practices that are related to “protecting the integrity of the Nation’s borders” and “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security).” Furthermore, the Guidance does not ban profiling based on religion, national origin, or sexual orientation.

A stronger, fundamentally revised Guidance is necessary because racial and ethnic profiling persists at the federal, state, and local levels, as the ACLU has described in previous reports to the United Nations Human Rights Committee and Committee on the Elimination of Racial Discrimination.³ Examples of profiling include:

- **Federal Bureau of Investigation (FBI) racial mapping:** Local FBI offices have collected demographic data to map where people with particular racial or ethnic makeup live, basing this data collection on crude stereotypes about the types of crimes different racial and ethnic groups supposedly commit. This profiling is largely possible due to an exemption in the Guidance for investigating or preventing threats to “national security.”
- **Transportation Security Administration (TSA) profiling:** The TSA has conducted passenger screening based on techniques that constitute racial and ethnic profiling. The Screening Passengers by Observation program, which began in 2007, deploys behavior detection officers to U.S. airports to look for preselected facial expressions, body language, and certain appearances deemed suspicious. Behavioral detection officers recently came to the ACLU to report that colleagues at Boston’s Logan Airport were racially profiling airline passengers in an effort to boost arrests for drug and immigration violations. TSA officers were also previously caught profiling at airports in Newark, New Jersey and Honolulu, Hawaii.⁴

- **Border enforcement:** In the past decade, the federal government has made unprecedented financial investments in border enforcement without creating corresponding oversight mechanisms, leading to an increase in serious human and civil rights violations, including the racial profiling and harassment of Native Americans, Latinos, and other people of color.⁵ The ACLU has documented numerous cases of profiling at ports of entry, the use of internal checkpoints, and the spread of Border Patrol roving patrols. The federal government asserts near limitless authority to conduct suspicionless investigative stops and searches within a “reasonable distance” from the border; outdated federal regulations define this distance as 100 air miles from any external U.S. boundary.⁶ This area includes roughly two-thirds of the U.S. population, several entire states, and nine of the country’s ten largest metropolitan areas.⁷ Federal agents also overuse and exceed their statutory authority to enter private property without a warrant within 25 miles of any border (except dwellings).⁸
- **Immigration Enforcement:** “Secure Communities” and “Section 287(g) Agreements” are programs that have led to extensive racial profiling by local police.

 - Section 287(g) of federal immigration law allows state and local law enforcement agencies to enter into an agreement with the federal Immigration and Customs Enforcement to enforce immigration law within their jurisdictions. In effect, it turns state and local law enforcement officers into immigration agents, many of whom are not adequately trained, and some of whom improperly rely on race or ethnicity as a proxy for status as an undocumented immigrant. The predictable result is that any person who looks or sounds “foreign” is more likely⁹ to be stopped by police and more likely to be arrested (rather than warned, cited, or simply let go) when stopped.¹⁰
 - Secure Communities is a program under which everyone arrested and booked into a local jail has their fingerprints checked against Immigration and Customs Enforcement’s immigration database. Under this program, some police engage in unjustified stops and arrests for low-level offenses in order to put people through the screening process, actions for which the federal government has failed to develop sufficient oversight mechanisms.¹¹ Secure Communities has been shown to foster racial profiling, undermine community policing, and harm public safety.¹²
 - When an individual is identified through these programs, DHS can issue an immigration detainer (or “hold”) requesting that state or local police hold the individual for up to 48 hours (not including weekends) after the person is eligible to be released from state custody, so that the government can decide whether to

take him or her into federal custody. The number of detainers has soared in recent years, with more than 270,000 issued in 2012 alone. This compares to about 80,000 in 2008, prior to the rollout of Secure Communities.¹³ Determinations to issue detainers are made with limited verification of information and no supervisory approval at DHS headquarters. Indeed, deputized state and local police under the 287(g) program issue detainers on their own. Detainers request detention without a constitutionally required judicial determination of probable cause. As a result, state and local authorities may improperly detain people who are misidentified or profiled through these programs—including U.S. citizens—or people who are not immigration enforcement priorities and may be eligible for immigration relief. In addition, in some cases, jurisdictions have held individuals for longer than 48 hours, including a case in New Orleans, Louisiana, in which local police held an immigrant on a detainer in excess of 160 days.¹⁴ In response to the negative impacts on local communities, jurisdictions in several states have passed laws or policies that limit compliance with U.S. Immigration and Customs Enforcement detainers in some fashion.

As can be seen, the result of these broad exemptions and omissions is that the Guidance sanctions profiling against almost every minority community in the United States in violation of Article 16 of the Convention which requires prevention of acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. Allowing profiling in “border integrity” investigations disproportionately impacts Latino communities and communities living and working within the 100-mile zone; profiling in national security investigations has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent. In fact, U.S. Border Patrol recently settled a lawsuit brought by the ACLU of Washington and allied organizations, which challenged Border Patrol’s practice of routinely stopping vehicles on Washington’s Olympic Peninsula and interrogating occupants about their immigration status based solely on the occupants’ racial and ethnic appearance.¹⁵ Moreover, given the diversity of the American Muslim population, the failure to ban religious profiling specifically threatens African-Americans as well, who comprise from one-quarter to one-third of American Muslims.¹⁶

II. Human Stories

Ernest Grimes is a resident of Neah Bay, Washington, a correctional officer at Clallam Bay Corrections Center, and a part-time police officer. In 2011 near Clallam Bay, a Border Patrol agent stopped the vehicle in which Mr. Grimes was traveling, approached with his hand on his weapon, and yelled at Mr. Grimes to roll down his window. Without offering a reason for the stop, the agent interrogated Mr. Grimes about his immigration status. Mr. Grimes, who is African-American, was wearing his correctional officer uniform at the time.¹⁷



Hamid Hassan Raza is an American citizen living with his wife and child in Brooklyn, New York. He serves as imam at Masjid Al-Ansar, a Brooklyn mosque, where he leads prayer services, conducts religious education classes, and provides counseling to members of the community. The New York City Police Department has subjected Imam Raza to suspicionless surveillance since at least 2008, and, as a result, he has had to take a range of measures to protect himself. For example, he records his sermons out of fear that an officer or informant will misquote him, or take a statement out of context. He also steers clear of certain religious topics or current events in his sermons and conversations, so as to avoid statements that the NYPD or its informants might perceive as controversial. Imam Raza's knowledge and fear of suspicionless police scrutiny have diverted his time and attention from ministry and counseling while chilling his ability to speak on topics of religious and community importance. The NYPD's unlawful surveillance prevents Imam Raza from fulfilling his duty as a religious minister, educator, and scholar in the Masjid Al-Ansar community.¹⁸



On the night of October 10, 2012, U.S. Border Patrol agents shot and killed **Jose Antonio Elena Rodriguez**. At the time of the shooting, Jose Antonio was unarmed and walking peacefully down a major street in Nogales, Mexico, directly across from the metal border fence separating the United States and Mexico. An autopsy report revealed that Jose Antonio had been struck by 10 bullets, virtually all of which entered his body from behind. He was sixteen years old. Jose Antonio's funeral drew scores of mourners, who, along with his family, were outraged at the cross border shooting of an innocent Mexican boy. His grieving mother, Araceli Rodriguez, told reporters that her youngest son dreamed of being a soldier, so he could fight the growing violence in his country. According to press reports, the U.S. Border Patrol acknowledged that surveillance video of the shooting exists, but the footage has never been publicly released. To this day, we do not know the names of the agent or agents involved in the shooting. As far as we know, not one Border Patrol agent has been disciplined in any way for Jose Antonio's senseless death.¹⁹

III. CAT Position

In its 2009 List of Issues, the Committee requested that the United States “[p]rovide information on measures taken by the State party to put an end to racial profiling used by federal and state law enforcement officials.” The Committee also asked if the United States “federal and state government had adopted comprehensive legislation prohibiting racial profiling” and requested that Statistical data “be provided on the extent to which such practices persist, as well as on complaints, prosecution and sentences in such matters.”²⁰

IV. U.S. Government’s Response

In its recent submissions to the Committee Against Torture and other UN treaty bodies, the U.S. has repeatedly condemned racial profiling and has claimed to be “continuing and intensifying its efforts to end racial profiling...by federal as well as state law enforcement officials.”²¹ The U.S. has also criticized racial profiling as ineffective and inconsistent with its “commitment to fairness in our justice system.”²²

In its August 2013 report to the Committee, the United States makes reference to its 2013 CERD report, where it specifically noted the Justice Department’s review of the 2003 Guidance.²³ More than four years ago, at a November 2009 U.S. Senate hearing, outgoing Attorney General Eric Holder announced that he had initiated an internal review of the 2003 Guidance. Unfortunately, the Attorney General has still not announced the results of its review, let alone issued a revision.

Moreover, in its report to the Committee, the U.S. government refers to its report submitted to the Committee on the Elimination of Racial Discrimination in 2013, which states that the Guidance is “binding on all federal law enforcement officers,” however, the U.S. has also previously conceded that the Guidance’s ban on profiling is not enforceable. Indeed, the Guidance states that it is “intended only to improve the internal management of the executive branch” and blocks accountability by stating that it “does not create any right of review in an administrative, judicial or any other proceeding.”

V. Other UN and Regional Human Rights Bodies Recommendations

In its 2014 Concluding Observations on the United States, the Committee on the Elimination of Racial Discrimination urged the U.S. to adopt and implement “legislation which specifically prohibits law enforcement officials from engaging in racial profiling, such as the End Racial Profiling Act”, revise policies “insofar as they permit racial profiling, illegal surveillance, monitoring and intelligence gathering, including the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” and end “immigration enforcement programmes and

policies, which indirectly promote racial profiling, such as the Secure Communities programme and the 287(g) programme”²⁴

In its 2014 Concluding Observations on the United States, the UN Human Rights Committee urged the U.S. to review the 2003 Guidance and to expand the “protection against profiling on the basis of religion, religious appearance, and national origin.”²⁵ It generally called on the U.S. to “step up measures to effectively combat and eliminate” various forms of racial profiling, noting specifically the targeting of ethnic minorities and surveillance of Muslims—in the absence of any wrongdoing—by the FBI and New York Police Department.²⁶

Through the 2010 Universal Periodic Review process, several member states of the Human Rights Council recommended that the United States address racial profiling in the immigration and national security contexts, in particular.²⁷ The U.S. government supported some of these recommendations in part, noting that the U.S. has comprehensive federal and state legislation and strategies to combat racial discrimination.²⁸ During the review’s interactive dialogue, the U.S. delegation addressed the issue more specifically: it recognized the problems of racial and ethnic profiling in the context of immigration enforcement and pledged to significantly strengthen protections and trainings against it;²⁹ it also pledged to take “concrete measures to make border and aviation security measures more effective and targeted to eliminate profiling based on race, religion or ethnicity.”³⁰

VI. Recommended Questions

1. What steps has the U.S. taken to make good on its commitments, expressed most recently during the Universal Periodic Review process, to significantly strengthen protections against racial and ethnic profiling in the context of immigration and border enforcement? How can these efforts be reconciled with the U.S. government’s broad claims of authority to conduct warrantless searches in the 100-mile zone of U.S. borders?
2. Will the U.S. commit to: making the Department of Justice’s Guidance Regarding the Use of Race enforceable and revising it to: (a) prohibit profiling based on religion or national origin; (b) explicitly extend its application to border enforcement, immigration enforcement, and national security operations; and (c) apply the Guidance to state and local law enforcement agencies that work in partnership with the federal government or receive federal funds?

VII. Suggested Recommendations

1. Revise the Department of Justice's Guidance Regarding the Use of Race to: (1) prohibit profiling based on religion or national origin; (2) end exceptions for border integrity and national security; (3) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; (4) explicitly state that the ban on racial profiling applies to data collection, intelligence activities, assessments and predicated investigations; and (5) make the Guidance enforceable. Revise the Department of Homeland Security's April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates the Justice Department's Guidance by reference, accordingly.
2. Declassify and release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to incorporate prohibitions on the use of race and ethnicity in law enforcement investigations and the amendments to the Justice Department Guidance requested above.
3. End the 287(g) program, including all jail partnerships and task force agreements. End the Secure Communities program. Collect and make public data regarding the race, national origin, and religion of individuals stopped, apprehended, or detained pursuant to the 287(g) and Secure Communities programs. Halt the government's use of immigration detainers in their current form; do not issue detainers except upon a judicial finding of probable cause; and restrict detainers to individuals convicted of a serious crime.
4. Extend the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, applying its Fourth Amendment training and data collection provisions to all checkpoints and roving patrols.³¹
5. Support the passage of the End Racial Profiling Act (ERPA).

¹ See Eric Holder, Att'y Gen., Speech at the American-Arab Anti-Discrimination Committee's 30th Anniversary National Convention (June 5, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100604.html>.

² U.S. Dep't of Justice, Civ. Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

³ See ACLU, UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: ACLU SHADOW REPORT TO THE FOURTH PERIODIC REPORT OF THE UNITED STATES (2013), available at https://www.aclu.org/files/assets/american_civil_liberties_union_shadow_report_to_the_u.s._fourth_periodic_report_final.pdf; see also, ACLU, UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: ACLU SHADOW REPORT TO THE 7TH-9TH PERIODIC REPORTS OF THE UNITED STATE (2014), available at https://www.aclu.org/sites/default/files/assets/2014.07.09_cerd_shadow_report_final.pdf.

⁴ Carol Rose, *Racial Profiling at Logan Airport Undermines Security and Freedom*, ACLU Blog of Rights (Aug. 12, 2012), <https://www.aclu.org/blog/national-security-racial-justice/racial-profiling-logan-airport-undermines-security-and-freedom>.

⁵ See, e.g., UNIV. OF ARIZ., CENTER FOR LATIN AM. STUDIES, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY (2013), available at <http://bit.ly/1n0QRRt>; HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS (2013), available at <http://bit.ly/1pBRUZL>; NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011), available at <http://bit.ly/1o42JjI>; NO MORE

DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER (2008), available at <http://bit.ly/1o42N6S>.

⁶ See 8 C.F.R. § 287.1(b).

⁷ States that lie entirely or almost entirely within this area include Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Nine of the ten largest metropolitan areas, as determined by the 2010 U.S. Census, also fall within this zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, and San Jose. See U.S. Census 2010—Interactive Population Map, U.S. Census Bureau, <http://1.usa.gov/1qF0Wsx>; see also Know Your Rights: The Government's 100-Mile "Border" Zone- Map, ACLU, <http://bit.ly/1fZZQ0h>.

⁸ See 8 C.F.R. § 287.1(b); see also, e.g., Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at <http://nyti.ms/1bjgk7R>.

⁹ In Tennessee, a study of arrest data found that the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program in that county. See Tenn. Immigrant and Refugee Rights Coal., *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007* 1 (July 31, 2007), available at http://www.tnimmigrant.org/storage/misc/Arrests_for_NDL_by_Race_and_Ethnicity%206-2008.pdf; Tenn. Immigrant and Refugee Rights Coal., *Citations/Warrants for No Drivers License by Ethnicity and Race: Comparing the Year Prior to 287(g) and the Year Following 287(g)* 1 (May 7, 2008), available at http://www.tnimmigrant.org/storage/misc/No_Drivers_License_1_year_overview%206-2008.pdf. In Alabama, 58 percent of motorists stopped by a 287(g) police officer were Latino, although Latinos make up less than two percent of the population. See David C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org, Nov. 27, 2007, available at <http://www.pewstates.org/projects/stateline/headlines/police-join-feds-to-tackle-immigration-85899386665>.

¹⁰ See ACLU, *Joint Hearing on The Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law & the Subcommittee on the Constitution, Civil Rights, and Civil Liberties U.S.H.R.*, 111th Cong. (2009) [hereinafter "ACLU Written Statement"], available at <http://www.aclu.org/immigrants/gen/39242leg20090401.html>.

¹¹ Letter from ACLU to Charles K. Edwards, Acting Inspector Gen. on Secure Communities, 7 (Jun. 20, 2011), available at http://www.aclu.org/files/assets/letter_to_dhs_oig_re_scomm_audit.pdf.

¹² NIK THEODORE, DEP'T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013); AARTI KOHLI, PETER L. MARKOWITZ, & LISA CHAVEZ, UNIV. OF CAL., BERKELEY SCH. OF LAW, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (2011).

¹³ National Immigrant Justice Center Data, available at <https://immigrantjustice.org/ICEdetainerdata#.UzrTZvRDs1K>; TRAC Immigration, Number of Immigration Detainers Drops by 19% (January 2013), available at <http://trac.syr.edu/immigration/reports/325/>.

¹⁴ See *Cacho & Ocampo v. Gusman*, Pl. Compl. (filed Feb. 2, 2011), available at <http://nowcrj.guestworkeralliance.org/wp-content/uploads/2011/02/Complaint-Cacho-V.-Gusman.pdf>.

¹⁵ Press Release, ACLU, *Settlement Reins in Border Patrol Stops on the Olympic Peninsula* (Sept. 24, 2013), available at <https://aclu-wa.org/news/settlement-reins-border-patrol-stops-olympic-peninsula>.

¹⁶ Muslims in America – A Statistical Portrait, U.S. Embassy of the United States in Iraq (last accessed June 23, 2014), <http://iraq.usembassy.gov/resources/information/current/american/statistical.html>.

¹⁷ Anthony Romero, *Written Statement Submitted to the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights Hearing on "Ending Racial Profiling in America,"* (Apr. 17, 2012), available at https://www.aclu.org/files/assets/senate_hearing_ending_racial_profiling_in_america_written_statement_romero.pdf.

¹⁸ *Raza v. City of New York* – Legal Challenge to NYPD Muslim Surveillance Program, ACLU (last accessed June 27, 2014), <https://www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program>.

¹⁹ Mitra Ebadollahi, *An Evening Stroll, a Volley of Fire: A Senseless Death in Mexico*, ACLU Blog of Rights (July 29, 2014), available at <https://www.aclu.org/blog/immigrants-rights-racial-justice/evening-stroll-volley-fire-senseless-death-mexico>.

²⁰ U.N. Comm. Against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America* (Jan. 20, 2010), U.N. Doc. CAT/C/USA/Q/5.

²¹ U.S. Dep't of State, *Third to Fifth Periodic Reports of the United States to the Committee Against Torture* ¶247 (Dec. 4, 2013), U.N. Doc. CAT/C/USA/3-5.

²² *Committee on the Elimination of Racial Discrimination (CERD) Report at* ¶ 80; see also U.S. Dep't of State, *United States Response to Specific Recommendations Identified by the Committee on Elimination of Racial Discrimination* (January 13, 2009), available at <http://2001-2009.state.gov/documents/organization/113905.pdf>; U.S. Dep't of State, *Second Periodic Report of the United States to the Committee on Torture* ¶ 247 (Oct. 21, 2005) ("The United States is continuing and intensifying its efforts to end racial profiling").

²³ *Committee on the Elimination of Racial Discrimination (CERD) Report at* ¶28.

²⁴ U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* (Aug. 29, 2014), U.N. Doc. CERD/C/USA/CO/7-9.

²⁵ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America* ¶7 (2014), U.N. Doc. CCPR/C/USA/CO/4/.

²⁶ *Id.*

²⁷ U.N. Human Rights Comm., *Report of the Working Group on the Universal Periodic Review* ¶24 (Malaysia), 92.64 (Egypt), 92.68 (Democratic People's Republic of Korea), 92.79 (Guatemala), 92.101 (Bolivia, Mexico), 92.102 (Sudan), 92.108 (Mexico), 92.219 (Qatar) (Jan. 4, 2011), UN Doc. No. A/HRC/16/11, available at <http://www.state.gov/documents/organization/158198.pdf>

²⁸ U.S. Dep't of State, *Response to UN Human Rights Council Working Group Report* ¶¶ 5-6 (Mar. 10, 2011), available at <http://www.state.gov/j/drl/upr/157986.htm>.

²⁹ U.N. Human Rights Comm., *Report of the Working Group on the Universal Periodic Review* ¶74 (United States of America) (Jan. 4, 2011), U.N. Doc. A/HRC/16/11.

³⁰ *Id.* ¶85.

³¹ *Sanchez et al. v. United States Office of Border Patrol et al.*, No. 3:10-cv-05378 (W.D. Wash. filed Apr. 26, 2012).

The Excessive Militarization of Policing

I. Issue Summary

As the nation watched Ferguson, Missouri, in the aftermath of the death of Michael Brown, it saw a highly and dangerously militarized response by law enforcement. Media reports indicate that the Ferguson Police Department responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles like those used by forces in Iraq and Afghanistan, rubber-coated pellets and tear gas.”¹ Protestors were denied the right to assemble and a curfew was instituted. Almost a dozen reporters were arrested while exercising their First Amendment rights and other journalists reported being harassed and physically removed by police.² Veterans from the Iraq and Afghanistan wars expressed horror and shock that they, while on active duty overseas, were less heavily-armed and combative than the local police in Ferguson.³ Domestic and international media equated the images from Ferguson to familiar ones from combat zones in Iraq and Gaza. Law enforcement’s response in Ferguson gave pause to many, and brought the issue of police militarization to national attention, especially in Washington, where President Obama said “[t]here is a big difference between our military and our local law enforcement, and we don’t want those lines blurred.”⁴

Militarized policing is not limited to situations like those in Ferguson or emergency situations—like riots, barricade and hostage scenarios, and active shooter or sniper situations—that Special Weapons And Tactics (SWAT) were originally created for in the late 1960s.⁵ Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations, with the number of these teams having grown substantially over the past few decades. Dr. Peter Kraska has estimated that the number of SWAT teams in small towns grew from 20% in the 1980s to 80% in the mid-2000s, and that as of the late 1990s, almost 90% of larger cities had them. The number of SWAT raids per year grew from 3,000 in the 1980s to 45,000 in the mid-2000s.⁶

A recent ACLU report titled *War Comes Home: The Excessive Militarization of American Policing*, found that 79% of the incidents reviewed involved the use of a SWAT team to search a person’s home, and more than 60% of the cases involved searches for drugs. We also found that more often in drug investigations, violent tactics and equipment, including armored personnel carriers (APCs) were used. The use of a SWAT team to execute a search warrant essentially amounts to the use of paramilitary tactics to conduct domestic criminal investigations in searches of people’s homes. This sentiment is shared by Dr. Kraska, who has concluded that “[SWAT teams have] changed from being a periphery and strictly reactive component of police departments to a proactive force actively engaged in fighting the drug war.”⁷

Just as the War on Drugs has disproportionately impacted people and communities of color, we have found that the use of paramilitary weapons and tactics also primarily impacts

people of color. Of the people impacted by SWAT deployments for warrants, at least 54% were minorities. When data was examined by agency (and with local population taken into consideration), racial disparities in SWAT deployments were extreme. In every agency, African Americans were disproportionately more likely to be impacted by a SWAT raid than whites, sometimes substantially so. For example, in Allentown, Pennsylvania, African Americans were nearly 24 times more likely to be impacted by a SWAT raid than whites were, and in Huntington, West Virginia, African Americans were 37 times more likely. Further, in Ogden, Utah, African Americans were 40 times more likely to be impacted by a SWAT raid than whites were.⁸

The militarization of American policing has occurred in part as a result of federal programs that use equipment transfers and funding to encourage aggressive enforcement of the War on Drugs by state and local police agencies, specifically:

- The Department of Defense 1033 program, which has resulted in the free transfer of over \$4 billion worth of military equipment to state and local law enforcement agencies;
- The Homeland Security Grant Program, which has provided billions of dollars to state and local law enforcement agencies for “terrorism prevention-related law enforcement activities,” though that phrase does not appear to be clearly defined;⁹ and
- The Department of Justice’s Edward Byrne Memorial Justice Assistance Grant program, which state and local law enforcement agencies often use to fund lethal and less-lethal weapons, tactical vests, and body armor.¹⁰

President Obama has ordered a review of these programs. His administration is in the process of evaluating these programs in order to determine whether they are being administered as intended and whether they are effective.

II. Human Stories

After the Phonesavanh family’s home in Minnesota burned down, they drove their minivan to stay with relatives in a small town just outside of Atlanta, Georgia. On the back windshield, the family pasted six stick figures: a dad, a mom, three young girls, and one baby boy.

This van was parked in the driveway of the home where they were staying when, just before 3:00am on a night in May of 2014, a team of SWAT officers armed with assault rifles burst into the room where the family was sleeping. Some of the kids’ toys were in the front yard, but the officers claimed they had no way of knowing children might be present. One of the officers threw a flashbang grenade into the room. It landed in Baby Bou Bou’s crib.

It took several hours before Alecia and Bou, the baby's parents, were able to see their son. The 19-month-old had been taken to an intensive burn unit and placed into a medically induced coma. When the flashbang grenade exploded, it blew a hole in two-year-old Bou Bou's chest so deep it exposed his ribs. The blast covered Bou Bou's body in third degree burns. Bou spent this Father's Day in the hospital with his son. As of the date of this submission, Bou Bou has had at least seven surgeries, most recently to re-attach his nose, and will require additional surgeries at least annually for the twenty years. Medical bills have totaled more than \$1 million, which the family is unable to pay.

The SWAT team was executing a "no knock" warrant to search for someone who did not live in the home that was raided: Bou's nephew, who was suspected of making a \$50 drug sale. "After breaking down the door, throwing my husband to the ground, and screaming at my children, the officers – armed with M16s – filed through the house like they were playing war," said Alecia. The officers did not find any guns or drugs in the house and no arrests were made. Bou's nephew was eventually arrested at another location, with a small amount of drugs on him.

Bou, the baby's father, was born in Laos during wartime. He remembers communist soldiers breaking down the door of his childhood home. "It felt like that," he said. "This is America and you're supposed to be safe here, but you're not even safe around the cops."

The Phonesavanhs have three daughters who are now scared to go to bed at night. One night after the raid, their 8-year-old woke up in the middle of the night screaming, "No, don't kill him! You're hurting my brother! Don't kill him." Alecia and Bou used to tell their kids that if they were ever in trouble, they should go to the police for help. "My three little girls are terrified of the police now. They don't want to go to sleep because they're afraid the cops will kill them or their family," Alecia said.

III. CAT Position

While this issue was not raised in the Committee's 2011 list of questions or in the last U.S. review in 2006, militarization of the police in the United States raises CAT-related concerns, particularly in relation to the obligation to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. Militarization of the police force increases the risk of the employment of methods that may constitute or result in cruel, inhuman or degrading treatment, including the storming of civilian households and the infliction of unjustified injury or death. Furthermore, militarization of the police exacerbates already existing abuses within the law enforcement system, such as selective policing, racial profiling, excessive and disproportionate use of force.

IV. Other UN and Regional Human Rights Bodies Recommendations

In its 2014 Concluding Observations on the United States, the Committee on the Elimination of Racial Discrimination expressed concern “at the increasingly militarized approach to immigration law enforcement, leading to the excessive and lethal use of force by the CBP personnel”.¹¹

V. Recommended Questions

1. What is the current status of President Obama’s review of the federal programs that use equipment transfers and funding to encourage aggressive, militaristic enforcement of the War on Drugs by state and local police agencies? Will the Administration implement a moratorium on the 1033 program while the review is being conducted? Will President Obama’s review be guided by U.S. CAT obligations and other human rights commitments?
2. Is there a legitimate role for the United States government to play in providing free military equipment to state and local law enforcement agencies, in light of the traditional distinction that has been drawn between the military and the police? If so, what is the scope of that role?
3. What steps will the United States government take to ensure that state and local law enforcement agencies are not making inappropriate use of weapons designed for combat and in violation of U.S. human rights obligations? Specifically, will the United States government ban the free transfer of automatic and semi-automatic rifles, APCs, and other military weapons and equipment not suitable for law enforcement purposes to state and local law enforcement agencies? What steps will the United States government take to ensure appropriate oversight of the 1033 program, Homeland Security Grant Program, and Edward Byrne Memorial Justice Assistance Grant program?

VI. Suggested Recommendations

1. The United States Department of Defense should immediately stop providing automatic and semi-automatic rifles, APCs, and other military weapons and equipment not suitable for law enforcement purposes to state and local law enforcement agencies. The Secretary of Defense should submit to Congress an annual written certification that each agency participating in the 1033 Program has provided documentation accounting for all equipment transferred to the agency, and should prohibit additional transfers to any agency for which the Secretary cannot provide such certification.

2. The United States Department of Homeland Security should condition receipt of grant funding to state and local law enforcement agencies on an agreement not to use the funding to purchase automatic and semi-automatic rifles, APCs and other military weapons and equipment not suitable for law enforcement purposes and violate U.S. human rights obligations. The Department of Homeland Security should also require state and local law enforcement agencies that receive funding from the agency to certify that they have not used equipment purchased with such funding except in actual high-risk scenarios, to make a record of each equipment purchase made using such funding, and to make such records available to the public.

3. Congress should condition state and local law enforcement agencies' receipt of federal funds on an agreement not to use the funds to purchase automatic or semi-automatic rifles, APCs, or other military weapons and equipment not suitable for law enforcement purposes. This condition should be applied to grants made through the Department of Homeland Security's Homeland Security Grant Program, the Department of Justice's Byrne JAG Program, and all other funding streams through which money is transferred from the federal government to state and law enforcement agencies. Congress should also impose strict limits on the 1033 Program, including prohibiting the transfer of automatic or semi-automatic rifles, APCs, or other military weapons and equipment not suitable for law enforcement purposes; eliminating the preference for "counter-drug" operations; and requiring the Secretary of Defense to submit an annual written certification that each agency participating in the 1033 Program has provided documentation accounting for all equipment transferred to the agency. The Secretary of Defense should be required to prohibit additional transfers to any agency for which the Secretary cannot provide such certification.

¹ David Nakamura & Niraj Chokshi, *Obama Orders Review of Military Equipment Supplied to Police*, WASH. POST, Aug. 23, 2014, available at http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html.

² Brian Stetler, *6 More Journalists Arrested in Ferguson Protests*, CNN, Aug. 19, 2014, available at <http://www.cnn.com/2014/08/19/us/ferguson-journalists-arrested/>.

³ Matthew Farwell, *What Combat Veterans See In Ferguson, Missouri*, VANITY FAIR, Aug. 16, 2014, available at <http://www.vanityfair.com/online/daily/2014/08/veterans-ferguson-matthew-farwell>.

⁴ Erin McPike & Jessica Ravitz, *Obama Orders Review of Military Equipment Sales to Police*, CNN, available at <http://www.cnn.com/2014/08/23/politics/military-equipment-police-review/>.

⁵ DARYL GATES, CHIEF: MY LIFE IN THE LAPD 131 (1992). For an excellent summary of the creation and evolution of SWAT, see RADLEY BALKO, *RISE OF THE WARRIOR COP* (2013).

⁶ Peter Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, POLICING 6 (Jan. 1, 2007).

⁷ *Id.* at 7.

⁸ *See supra*, n. 1 at 36-37.

⁹ U.S. Dep't of Homeland Security, *FY 2013 Homeland Security Grant Program* (FY 2013 HSGP Fact Sheet) (2013), available at http://www.fema.gov/medialibrary.data/8d0439562c89644a68954505a49cbc77/FY_2013_Homeland+Security+Grant+Program_Fact_Sheet_+Final.pdf.

¹⁰ *Id.* at 4.

¹¹ U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* (Aug. 29, 2014), U.N. Doc. CERD/C/USA/CO/7-9.