



## **UNITED STATES OF AMERICA**

### **Submission to the United Nations Universal Periodic Review Ninth Session of the Working Group on the UPR Human Rights Council**

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Submitted by Just Detention International

#### **Executive Summary**

Just Detention International (JDI) is an international human rights organization dedicated to ending sexual abuse in all forms of detention. Specifically, JDI works to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to promote access to resources for those who have survived this form of abuse. All of JDI's work rests on the conviction that the international human rights framework is an essential, but often neglected, tool for promoting social justice in the U.S. generally and inside prisons in particular.

Prisons, jails, and other detention facilities across the U.S. maintain dangerous policies and practices that have resulted in widespread sexual violence and other abuses. To make matters worse, few jurisdictions empower an oversight entity to monitor their corrections facilities. JDI believes that, to conform with its obligations under the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), the U.S. must take affirmative steps to improve safety in detention. Specifically, the U.S. should ratify strong binding standards that address prisoner rape and improve oversight mechanisms by ratifying the Optional Protocol to the Convention Against Torture (OPCAT), accepting communications under Article 22 of the CAT, and amending the Prison Litigation Reform Act (PLRA).

#### **I. Sexual Abuse in U.S. Detention Facilities**

The sexual assault of prisoners, whether perpetrated by corrections officials or by inmates with the acquiescence of corrections staff, is a crime and an internationally recognized form of torture. Victims of prisoner rape are left beaten and bloodied, contract HIV and other sexually transmitted diseases, and suffer severe psychological harm. Sexual violence has been used as a tool to punish inmates for misbehavior, or to further

marginalize vulnerable populations. Even when corrections staff are not the perpetrators, some officials have set up inmate-on-inmate rape by intentionally housing vulnerable inmates with known predators. Furthermore, the failure of corrections officials to take appropriate steps to prevent and address prisoner rape amounts to state acquiescence.

While anyone can become the victim of sexual violence, the most marginalized members of society at-large also tend to be the most vulnerable behind bars. In particular, inmates who are gay, transgender, young, mentally ill or incarcerated for the first time and for non-violent offenses tend to be victimized. Despite the widespread nature of sexual violence behind bars, relatively few cases of this type of abuse are reported. Due to the fear of retaliation and the often well-founded perception that reporting sexual abuse is futile, many survivors suffer in silence, often enduring sexual abuse over long periods of time. Those who do file a complaint often find that they are denied assistance and accused of fabricating reports in order to manipulate the system to their benefit.

The widespread failure of corrections officials to take seriously reports of sexual abuse, and to put into place simple preventive measures, contribute to a corrections environment in which perpetrators of sexual abuse are able to act with impunity. This in turn, compromises the safety of inmates and staff. Once released – and 95 percent of inmates do eventually return home – survivors bring their emotional trauma and medical conditions back to their communities.

Although the U.S. has ratified the CAT and the ICCPR – both of which protect the fundamental human right to be free from sexual abuse – sexual violence is a pervasive problem in all types of detention throughout the U.S. In a 2007 survey of prisoners across the country, the U.S. Department of Justice’s Bureau of Justice Statistics (BJS) found that 4.5 percent (or 60,500) of the more than 1.3 million inmates held in federal and state prisons had been sexually abused at their current facility in the preceding year alone.<sup>1</sup> A 2008 BJS survey in county jails was just as troubling; nearly 25,000 jail detainees reported having been sexually abused at the jail in the past six months.<sup>2</sup>

A 2010 report by the BJS found pervasive sexual abuse of incarcerated juveniles across the nation, with 12 percent of youth in state juvenile facilities reporting one or more incidents of sexual victimization at their current facility within the past year.<sup>3</sup> Shockingly, the BJS has confirmed that juvenile detention officials who sexually abuse youth in their custody rarely are held accountable. In substantiated cases of staff-on-youth sexual abuse, only 39 percent of officials were arrested and/or referred for prosecution. Even more disturbing, 25 percent of confirmed staff perpetrators in state youth facilities were allowed to keep their jobs.

In a promising development, the U.S. passed the Prison Rape Elimination Act (PREA) of 2003, which, among other things, required the development of binding national standards addressing sexual violence in detention. Recommended national standards, developed in accordance with PREA by the National Prison Rape Elimination Commission, were released in June 2009 and are currently before the U.S. Attorney General, who by law has one year to issue a final rule making them binding regulation. They are the product of

several years of research and extensive consultation with corrections professionals, researchers, advocates, and survivors of sexual abuse in detention. Nonetheless, opponents to PREA are actively working to water them down, claiming that even though they are legally obliged to protect inmates in their charge, it is too costly to implement these basic measures. In addition to trying to assess the costs of implementing the standards without a corresponding analysis of any the benefits of doing so, the Attorney General has acknowledged that he will need an extension, perhaps by as much as a year, before issuing his final rule.

## **II. U.S. Implementation of the ICCPR and the CAT**

The CAT Committee and the Human Rights Committee have identified sexual violence as a serious problem in the U.S. When they reviewed U.S. compliance with the CAT and the ICCPR respectively in 2006, the CAT Committee and the Human Rights Committee commended certain U.S. initiatives, while detailing numerous concerns with U.S. policy and practice.

In commendation, the committees recognized the enactment of the Prison Rape Elimination Act of 2003 (PREA).<sup>4</sup> PREA calls for a “zero-tolerance” standard for rape in U.S. detention facilities, the gathering of information about the problem, and the development of binding national standards to guide corrections officials in how to prevent, detect, and respond to sexual violence in their facilities.<sup>5</sup>

Each Committee’s report explicitly noted the need to improve protections for those vulnerable to sexual abuse. The CAT Committee pointed to the failure to prevent sexual abuse of gay and transgender inmates, to separate detained children from adult inmates, and to investigate instances of prisoner rape in a prompt and transparent manner.<sup>6</sup> The Human Rights Committee expressed concern that male officers continue to have full access to women’s detention quarters and noted its concern about widespread hate crimes committed against lesbian, gay,<sup>7</sup> bisexual, transgender, and queer (LGBTQ) individuals, including by law enforcement.

Similarly, the Standard Minimum Rules for the Treatment of Prisoners (SMR), though not binding, also provide important guidance in this regard. The SMR state that young prisoners shall be kept separate from adults.<sup>8</sup> Despite the CAT and SMR provisions, more than 10,000 detainees under the age of 18 are currently held in U.S. adult prisons and jails, where they are at risk for abuse by adult inmates and corrections staff.<sup>9</sup> The SMR also advise that where dormitories are used to house prisoners, prisoners housed together must be “carefully selected as being suitable to associate with one another in those conditions.”<sup>10</sup> Such deliberate planning is especially important with respect to those categories of inmates most vulnerable to sexual abuse, including gay men and transgender women incarcerated in men’s prisons. In a 2007 academic study, funded by the California Department of Corrections and Rehabilitation, and conducted at six California men’s prisons, 67 percent of inmates who identified as gay, bisexual or transgender reported having been sexually assaulted by another inmate during their incarceration, a rate that was 15 times higher than for the inmate population overall.<sup>11</sup>

The full implementation of PREA, particularly the ratification of national binding standards to prevent and address sexual abuse in detention, would address many of the concerns highlighted by the CAT Committee and the Human Rights Committee. The National Prison Rape Elimination Commission, created under PREA in part to draft these standards, released its final report and recommended national standards on June 23, 2009.<sup>12</sup> The standards are premised upon the four pillars of preventing, detecting, responding to, and monitoring sexual abuse and address core safety issues. They include: inmate screening and classification; staff training and inmate education; investigations; and the provision of medical and mental health care in the aftermath of a sexual assault.

The U.S. Attorney General has one year from the Commission's release (or until June 23, 2010) to publish a final rule adopting national standards. The standards will then be immediately binding on federal facilities; states will have one year to certify their compliance or risk losing five percent of their federal corrections-related funding. By ensuring that the standards ultimately adopted by the Attorney General maintain their rigor – and that they are promulgated without delay – the U.S. would significantly further its compliance with the CAT and the ICCPR.

### **III. External Oversight of U.S. Detention Facilities**

There is growing recognition internationally that prisons and jails must be transparent, and – in addition to having strong internal accountability mechanisms – must be open for external monitoring. In the corrections context, few U.S. jurisdictions empower an external entity, such as an Inspector General or ombudsperson, to respond to inmate complaints and/or to audit facilities. Private accreditation organizations, such as the American Correctional Association, have their own standards but only review prisons at request of the corrections administrators and generally charge a fee for this service.

The historical lack of transparency of U.S. detention systems has been a major contributing factor to human rights abuses, such as rape and other forms of sexual violence – the kinds of abuses that international monitoring systems are put in place to eliminate. For example, without external monitoring, officials who participate or acquiesce in sexual violence behind bars wield tremendous unchecked power over detainees. Even the most well-intentioned officials often cannot identify problems within their own systems – shortcomings that a neutral outsider frequently is able to recognize – and may not be aware of best practices from other jurisdictions.

The U.S. has declined to participate in two mechanisms already in place through the CAT that would significantly enhance external oversight of detention facilities. In particular, the U.S. has not signed the Optional Protocol to the Convention Against Torture (OPCAT)<sup>13</sup>, and has refused to recognize Article 22 of the CAT.

The OPCAT does not impose new obligations on signatory states, but creates a system for monitoring compliance with the requirements already in place through the CAT. It also establishes a collaborative approach to monitoring whereby international and domestic entities visit detention facilities and confidentially propose recommendations to prevent torture, without the public shaming component common in human rights instruments. Specifically, the OPCAT

requires signatory governments to establish an independent, national body that conducts regular visits to prisons and other detention settings with the aim of preventing torture and ill-treatment. As sexual violence in detention rarely is reported, the additional oversight provided through the OPCAT is urgently needed in the U.S. to ensure a zero-tolerance approach to this type of abuse.<sup>14</sup>

In addition, the U.S. should recognize the competence of the CAT Committee to consider communications from or on behalf of detainees under Article 22 of the CAT. Thus far, the U.S. has refused to permit victims of abuse to communicate with the CAT Committee once they have exhausted available avenues of relief within the U.S. legal system. In countless cases, U.S. prisoner rape survivors are virtually barred from the courthouse due to the complex procedural requirements and substantive demands of the Prison Litigation Reform Act (PLRA). According to the PLRA, prisoner rape survivors who failed to file and appeal a grievance within deadlines imposed by their facilities are unable to have a judge review the merits of their claims.<sup>15</sup> The PLRA also requires a “physical injury” in order for damages to be awarded; shockingly, some courts have found that some forms of sexual assault do not constitute a physical injury.<sup>16</sup> Permitting Article 22 communications – which would require the U.S. to report in writing the steps it has taken in response to individual communications to the CAT Committee – would help address abuse that often remains unresolved by the U.S. legal system.

Finally, the PLRA should be amended so that serious constitutional violations, such as the sexual abuse of prisoners, are not excluded from court based on arbitrary technical barriers. The Prison Abuse Remedies Act<sup>17</sup> (PARA), introduced by Representative Bobby Scott, reinstates the ability of prisoners to challenge conditions of confinement that violate their constitutional rights while retaining the effective provisions within the PLRA. In particular, PARA addresses the unintended consequences of the PLRA by repealing the “physical injury” requirement; exempting juveniles under age eighteen (18) from the burdens created by the PLRA; and amending the “exhaustion requirement” to allow prison officials to deal administratively with problems in the first instance, but without the ability to block legitimate claims from reaching the federal courts.

#### **IV. Recommendations**

In light of the serious human rights violations addressed above, JDI makes the following recommendations:

- Adopt swiftly and fully the national standards for addressing sexual abuse in detention, as recommended by the National Prison Rape Elimination Commission.
- Ratify the Optional Protocol to the Convention Against Torture;
- Permit Article 22 communications with the Committee Against Torture; and,
- Enact the Prison Abuse Remedies Act of 2009, H.R. 4335 (PARA).<sup>18</sup>

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<sup>1</sup> ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007).

<sup>2</sup> ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 (2008).

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<sup>3</sup> ALLEN J. BECK, PAIGE M. HARRISON, & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010).

<sup>4</sup> Committee Against Torture, 36th Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, CAT/C/USA/CO/2, at ¶ 9; Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1, at ¶ 33.

<sup>5</sup> *The Prison Rape Elimination Act of 2003*, 42 U.S.C. § 15601, *et seq.* For more information about PREA, see Just Detention International, Fact Sheet, *The Prison Rape Elimination Act* (2009).

<sup>6</sup> Committee Against Torture, *supra* note 10, at ¶¶ 32, 34.

<sup>7</sup> Human Rights Committee, *supra* note 10, at ¶¶ 25, 33.

<sup>8</sup> Standard Minimum Rules for the Treatment of Prisoners (SMR), E.S.C. Res. 663C (XXIV), 24 UN ESCOR, Supp. (No. 1) at 11 (1957), Rule 8(d).

<sup>9</sup> SARAH LIVSEY, MELISSA SICKMUND & ANTHONY SLADKY, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2004: SELECTED FINDINGS 2 (2009); WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR, 2007 9 (2008) (calculating that more than 2,600 juveniles under the age of 18 were incarcerated in adult state prisons in 2007); WILLIAM J. SABOL & TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR, 2007 10 (2008) (estimating the average daily population of people under 18 years old in local jails at more than 7,600).

<sup>10</sup> SMR, *supra* note 14, Rule 9(2).

<sup>11</sup> See Valerie Jenness, et al., Center for Evidence Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007).

<sup>12</sup> The NPREC report and the recommended national standards are available at: <http://www.cybercemetery.unt.edu/archive/nprec/20090820154816/http://nprec.us/publication> (last visited Dec. 10, 2009).

<sup>13</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“OPCAT”), G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002). See also Just Detention International, Fact Sheet, U.N. Optional Protocol to the Convention Against Torture (OPCAT) (2009).

<sup>14</sup> Similarly, Rule 55 of the SMR calls for regular inspections of detention facilities by qualified inspectors appointed by a competent authority.

<sup>15</sup> 42 U.S.C. §1997e(a); for more information, see Just Detention International, Fact Sheet, *The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention* (2009).

<sup>16</sup> 42 U.S.C. §1997e(e).

<sup>17</sup> H.R. 4335

<sup>18</sup> PARA reinstates the ability of prisoners to challenge conditions of confinement that violate their constitutional rights by reforming the PLRA. In particular, PARA addresses the unintended consequences of the PLRA by repealing the “physical injury” requirement; exempting juveniles under age eighteen (18) from the burdens created by the PLRA; and amending the “exhaustion requirement” to allow prison officials to deal administratively with problems in the first instance, but without the ability to block legitimate claims from reaching the federal courts.