

Youth Incarcerated in Adult Prisons in the U.S. List of Issues Nos. 13b, 16 and 18

This letter is submitted by a coalition of U.S. organizations to address the widespread practice in many U.S. states of incarcerating youth in adult jails and prisons in violation of Articles 4, 7, 8, 10, 14, 24 and 26 of the International Covenant on Civil and Political Rights (“ICCPR”). The letter supplements the December 26, 2012 submission of the ACLU Michigan Juvenile Life Without Parole Initiative and the International Women’s Human Rights Clinic (“ACLU/IWHR Letter”) and responds to the United States Responses to Questions from the United Nations Human Rights Committee (“U.S. Response”).

Although the federal government has prohibited placement of youth in adult jails and prisons, U.S. Response ¶ 95, and the U.S. has promoted law reform separating youth from adult prison populations in other countries,¹ the practice continues at the state level where youth tried as adults are routinely subjected to adult criminal sentences and incarcerated in adult facilities. This practice violates the human rights of thousands of youth each year and places them in grave danger of other human rights abuses including physical and sexual abuse by corrections officials and inmates and abusive use of electro-muscular disruption devices (EMDs) also known as Tasers and solitary confinement.

The U.S. Response describes efforts that the federal government has taken that partially address this issue. U.S. Response ¶¶ 93-97. In particular, standards promulgated under the Prison Rape Elimination Act (PREA) require sight and sound separation of youth in adult facilities.² While this is a laudable first step, PREA does not prohibit placing youth in adult settings. It only requires sight and sound separation. Moreover, because of the United States’ federal system of government, PREA *does not and cannot require state compliance*. States stand to lose 5% of federal funds for prison purposes for failure to comply with the PREA standards. At this point, it is unclear whether states will choose to comply with PREA and whether the measures in the standards will adequately protect youth from violence. To date, states continue to place children

¹ U.S. State Dept., Bureau of Democracy, Human Rights and Labor, International Prison Conditions: Global Conditions in Prisons and Other Detention Facilities, p.11 (“USAID has also supported juvenile justice reform programs in the Caribbean and Central America, aimed at reducing youth incarceration and recidivism and separating youth from adult prison populations.”), available at <http://www.state.gov/documents/organization/210160.pdf>

² The standards provide:

Youthful inmates.

(a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.

(b) In areas outside of housing units, agencies shall either:

(1) Maintain sight and sound separation between youthful inmates and adult inmates, or

(2) Provide direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.

(c) Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny youthful inmates daily large-muscle exercise and any legally required special education services to comply with this provision. Youthful inmates shall also have access to other programs and work opportunities to the extent possible. 28 C.F.R. 115.14.

in prison cells with adult inmates or in solitary confinement for disciplinary or “protective” reasons. There is also a danger of increased use of solitary confinement to comply with PREA’s separation requirements.

Moreover, PREA does not address the underlying problem of subjecting youth to adult criminal proceedings and sentencing them to serve time in adult prisons. PREA does not address detention of youth in jails. It also fails to restrict cross-gender searches of children in adult facilities or the lack of age appropriate education and rehabilitation programs for youth.

Background

Domestic Legal Framework & Scope of Problem

- The combined single day counts of youth in adult prisons and jails in 2011 were 7,690.³ The total number of youth who serve time in adult prisons and jails in a given year is estimated to be much higher.
- Youth under 18 end up in adult jails and prisons because they can be tried, sentenced and punished as adults in states where the juvenile justice system does not extend to 16 or 17 year olds and where state laws allow children to be transferred to the adult criminal system in certain circumstances. *See* ACLU/IWHR Letter, p. 3-4.
 - An estimated 175,000 youth are tried in the adult criminal justice system each year as a result of state laws that set the maximum age limit for juvenile court jurisdiction below 17.⁴
 - All states have laws that require, or allow, youth who would otherwise be under the jurisdiction of juvenile courts to be transferred to adult criminal courts under certain circumstances.⁵
 - According to the DOJ, Office of Juvenile Justice and Delinquency Prevention, because of the combination of juvenile transfer laws and the maximum age limit for juvenile court

³ This figure updates the 2009 figures provided in the ACLU/IWHR Letter. The U.S. Department of Justice does not provide data on the number of youth under 18 admitted to adult correctional facilities throughout the year. However, it does provide estimated single-day counts, once a year. The 2011 count of youth under 18 in jails on June 30, 2011 was 5,900. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JAILS INMATES AT MIDYEAR 2011- STATISTICAL TABLES 6 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>. The count of youth under 18 in adult state prisons on December 31, 2011 was 1,790. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2011 33 (2012) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

⁴ U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults: An Analysis of States Transfer Laws and Reporting* (Sept. 2011), p. 21, at <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>. Ten states try 17 year olds as adults. Two states try 16 and 17 year olds as adults. U.S. Dept. of Justice, Nat’l Institute of Corrections, *You’re an Adult Now* (Dec. 2011), p. 4, available at: <http://static.nicic.gov/Library/025555.pdf>.

⁵ U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults: An Analysis of States Transfer Laws and Reporting* (Sept. 2011), p. 1, 3.

jurisdiction, it is estimated that close to 2.2 million youth under the age of 18 are subject to routine criminal procession as adults every year.⁶

- The different state statutes that allow youth to be transferred to adult courts result in discriminatory treatment depending upon where youth live, their socio-economic class, and their race and gender. *See* ACLU/IWHR Letter, p. 5.
- The majority of children tried, sentenced and incarcerated as adults have not committed serious crimes. For instance, in the state of Michigan, the majority of youth in adult prisons have committed property crimes and an increasing number are sent to prison for probation violations.⁷

Incarceration in Adult Jails and Prisons Place Youth in Grave Danger and Violates Their Human Rights

- The Department of Justice (DOJ) has recognized the increased risk of violence faced by youth in adult facilities.⁸ Youth are over eight times as likely to have a substantiated incident of sexual violence⁹ and twice as likely to be physically harmed by staff.¹⁰
 - More than a third of youth in adult prisons in Michigan responding to a survey by the ACLU and IWHR (38%) reported that they had been sexually assaulted while incarcerated (12% by staff, 35% by other prisoners and 9% by staff and other prisoners). In addition to assaults, youth are often sexually exploited or coerced into having sex. Youth in Michigan reported when they first arrive in prison adult prisoners will give them food and hygiene products and then later demanded sexual services as payment.¹¹
 - Youth in Michigan prisons also reported being trafficked by other prisoners in violation of ICCPR Article 8. Youth reported that adult prisoners threaten them or offer “protection” in exchange for the 'right' to sell them to other prisoners for sexual services. Youth also reported that prison gang members force them to engage in sexual services, and they are told they will be stabbed or beaten if they refuse sex with gang members.

⁶ Testimony of Melodee Haines, IACHR Hearing: Human Rights Situation of Children Deprived of Liberty with Adults in the United States, March 11, 2013 at 00:39:15-00:39:29. Hearing available at: http://www.youtube.com/watch?v=DtIHjB1m76o&list=PLkh9EPEuEx2st1_l-W6cr0o3oH9DxBSDc

⁷ J. Shook and R. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons*, 54 Wayne L. Rev. 1725 (2008)

⁸ 42 U.S.C. § 15601(4).

⁹ National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106-01, 37128 (Jun.20, 2012) (amending 28 C.F.R. pt II5)

¹⁰ M. Forst et al. *Youth in Prisons and Training Schools*, *JUVENILE & FAMILY COURT*, vol. 4 (1989). A recent BJS report found that youth reported a greater risk for sexual violence than adults, but that the magnitude of increased risk was not as great as prior studies. The report has been criticized by juvenile justice groups given the prevalence of underreporting by youth and problems with the BJS's survey methods and assumptions.. *See* John Kelly, *Group Disputes Justice Dept. Numbers of Youth Victimized in Adult Lockup*, *THE CHRONICLE OF SOCIAL CHANGE*, May 16, 2013, available at: <https://chronicleofsocialchange.org/news/2013/05/16/group-disputes-justice-dept-numbers-on-youths-victimized-in-adult-lockup/>.

¹¹ ACLU Interview.

- 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.¹²
- A disproportionate number of youth end up in solitary confinement because of misconduct or for protection.¹³ Solitary confinement of youth is prohibited under international law and constitutes cruel, inhuman and degrading treatment.¹⁴
 - According to an HRW/ACLU report, youth in solitary in U.S. prisons reported physical harm,¹⁵ self-harm (including cutting themselves and suicide attempts),¹⁶ hallucinations,¹⁷ and anxiety.¹⁸ They are provided little to no physical activity,¹⁹ are not given age- and developmentally-appropriate nutrition,²⁰ are denied contact with family members,²¹ are prevented from continuing educational pursuits,²² and are denied rehabilitative programming as mandated by international law.²³
- Although the U.S. states that the sole electro-shock device used on persons in federal custody is an electric custody control belt,²⁴ inmates in state prisons, including youth, are subject to EMDS, also known as Tasers.
 - Ten out of 38 youth questioned in Michigan indicated that they had been tasered, and 31 of them witnessed the tasered of other youth.²⁵
 - Although U.S. legal standards require that officers using Tasers balance the amount of force against the need for force, taking into account the vulnerability of the victim and whether she or he poses “an immediate threat to the safety of the officers or others,”²⁶ interviews of youth in Michigan suggest that officers often use Tasers unnecessarily to control their behavior. Youth reported being tasered if they ran across the yard or if they ran away from staff. Youth also were tasered to stop them going back to their cells.²⁷
- Youth in adult facilities are also denied opportunities for rehabilitation. Youth in the adult criminal system are 34% more likely to be re-arrested than youth who remain in the juvenile

¹² *More Than Meets the Eye* (Washington, D.C.: American Bar Association Juvenile Justice Center (1997).

¹³ ACLU & HRW, *Growing Up Locked Down*, 101-111 (2012).

¹⁴ U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, Rule 67.

¹⁵ ACLU & HRW, *Growing Up Locked Down*, 37 (2012).

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 33.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 37.

²⁰ *Id.* at 39.

²¹ *Id.* at 23.

²² *Id.* at 45.

²³ *Id.* at 47.

²⁴ U.S. Response, ¶ 65.

²⁵ ACLU/IWHR follow-up survey.

²⁶ U.S. Response, ¶ 63.

²⁷ ACLU interviews.

system.²⁸ The DOJ linked high recidivism rates “to the lack of access to rehabilitative resources in adult corrections system.”²⁹

Prior Statements of Human Rights Bodies

In its List of Issues Concerning the Fourth Periodic Report of the United States, the Human Rights Committee requested that the U.S. describe efforts to “ensure that all juveniles are separated from adults” in prison and detention settings and clarify whether it “will take steps to ensure that juveniles are not transferred to adult courts but are tried in juvenile courts with specific juvenile protections.” (Issue 18). The Committee also requested information on steps to reduce the practice of solitary confinement and protect detainees from violence (Issue 16) and to regulate the use of EMD devices (Issue 13b). During the U.S. review in 2006, the Committee expressed concern about the practice of subjecting youth to the adult criminal sentence of life without the possibility of parole (LWOP). The Committee Against Torture and the Committee on the Elimination of All Forms of Racial Discrimination also have encouraged the U.S. to end the practice of detaining youth in adult prisons and juvenile LWOP sentences. ACLU/IWHR Letter, p. 2.

The Inter-American Commission on Human Rights has criticized the U.S. practice of trying youth in adult criminal proceedings and incarcerating them in adult facilities. In a recent report on Juvenile Justice in the Americas, the Commission stated that it was “extremely disturbed” that a number of states have set the upper limit for juvenile jurisdiction below 18 and also expressed concern about laws that allow children to be transferred to adult criminal court in various situations as well as the exclusion of children tried as adults from a U.S. federal law prohibiting the imprisonment of children in adult facilities.³⁰

On March 11, 2013, the Inter-American Commission held a hearing on the “Human Rights situation of children imprisoned with adults in the U.S.” Following the hearing, the Commission reiterated that “completely abolishing the practice of incarcerating children and adults in the same facility is an imperative of international law” and that current practice in the U.S. constitutes a violation of the U.S.’s obligations under the ICCPR.³¹

The Commission also emphasized that the *federalist political structure* (emphasis added) of the U.S. cannot be used to “justify the continuation of a situation that is so serious and that runs contrary to binding obligations taken on by the State.” The Commission urged the U.S. “to identify and urgently implement a federal mechanism that would classify anyone under the age of 18 years as a child, to keep that person from being tried as an adult or incarcerated with adults.”³²

²⁸ U.S. DEP’T OF JUST., OFFICE OF JUV. JUST. AND DELINQUENCY PREVENTION, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* 1-2 (Sept. 2011) available at <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf>.

²⁹ *Id.* at 26.

³⁰ Inter-American Commission, *Juvenile Justice in the Americas*, OEA/Ser.L/V/II, Doc. 78, July 13, 2011, ¶¶ 40, 86, 415, available at <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>.

³¹ IACHR, Annex to the Press Release Issued at the Close of the 147th Session, April 5, 2103, available at: http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp.

³² *Id.*

PREA Requires Separation of Youth in Adult Prisons, But its Implementation is Uncertain.

Recognizing that incarceration of youth in adult facilities creates a grave risk of physical and sexual violence, the federal Prison Rape Elimination Act and its implementing regulations requires “sight and sound separation” for children under 18 in adult prisons and jails in their housing units, common spaces, showers and shared day rooms.³³ Outside of their housing units, youth may come into contact with adult inmates while under the direct supervision of facility staff.³⁴ While, implementation of PREA has the potential to provide significant protections for youth in prison, it is too early to gauge its impact. The first audits of facilities occur this year³⁵ and while state prison systems by and large are trying to comply with the standards, jails and lockups that house most youth have resisted implementing the standards.³⁶

- PREA applies to all confinement facilities, whether state, county or local. PREA’s mode of ensuring compliance is the loss of federal funds.³⁷ States that fail to comply with PREA stand to lose five percent of prison funding grants from the DOJ. Moreover, those funds are not at risk if the state’s Governor submits an assurance that the state will use the 5% that is at risk to enable PREA compliance in future years.³⁸ Many county jails and lockups are independent entities not under the control of a state’s governor and receive limited funds so there are very limited incentives for them to comply with the standards.
 - The federal Government Accounting Office, which was charged with determining the financial cost of PREA, has stated that it is “virtually certain” that state and local facilities will not spend the funds necessary to fully comply.”³⁹
- In order to ascertain whether states are complying, PREA requires an audit of one-third of all the facilities under the governor’s authority each year.⁴⁰ The state selects the facilities that will be subject to the audit, so states may lead with their least troubled facilities. Additionally, facilities not under the governor’s purview or with whom the state does not have contracts, such as county jails and lockups, may never be audited unless they agree to be audited. Finally, concerns have been expressed about the independence of the audits

³³ See, 28 C.F.R. 115.14 (a), *supra* note 2.

³⁴ 28 C.F.R. 115.14(b). *Id.*

³⁵ 28 C.F.R. 115.401(a).

³⁶ Tate McCotter, *Compliance to PREA: Know the Law*, available at: <http://jailtraining.org/node/1199> (stating that jails are not required to comply with PREA standards).

³⁷ PREA and the final rule providing limitations on the confinement of juveniles with adults, is only binding on the federal bureau of prisons. States risk losing federal funding if they do not comply. U.S. Response ¶ 80. The federal Government Accounting Office has noted that beyond loss of funds, PREA “does not require full nationwide compliance with the standards, nor does it enact a mechanism for [the Justice Department] to direct or enforce such compliance.” <http://www.gao.gov/products/GAO-12-1005R#mt=e-report>.

³⁸ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 986, Section 8(c)(2).

³⁹ <http://www.gao.gov/products/GAO-12-1005R#mt=e-report>

⁴⁰ 28 C.F.R. 115.401(b),

given the significant involvement of the American Correctional Association in conducting the audits.⁴¹

- PREA states that “correctional facilities must use best efforts to avoid placing youth in isolation” to comply with the separation requirement.⁴² U.S. Response ¶ 93. Many states already use solitary confinement as a means to separate or “protect” prisoners. PREA’s failure to ban “protective” solitary confinement creates a risk that youth will be placed in isolation to meet the separation requirements.⁴³
 - Solitary confinement of youth constitutes cruel, inhuman and degrading treatment.⁴⁴ Separation of persons cannot be used to justify “discrimination, the use of torture, cruel, inhuman or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group.”⁴⁵

Even if PREA is fully implemented trying youth as adults and imprisoning them in adult facilities violates their human rights.

Article 14 of the ICCPR requires that juveniles be subject to separate judicial proceedings that “take into account their age and the desirability of promoting their rehabilitation.” By allowing state law to determine the age of adult criminal responsibility and to enact laws that allow youth to be transferred to the adult criminal system, the U.S. is in violation of Arts. 14 and 24.

Youth who have been accused or convicted of a crime must be separated from adults and accorded treatment appropriate to their age and legal status. Arts. 10(2)(b) and (3) and 24. Even if youth are housed separately from adults, incarcerating them in adult prisons places them in danger and violates their right to special protection.

- There is no federal requirement that youth be placed in age appropriate facilities with specialized staff and resources designed for youth, which respond to their needs and encourage their education and rehabilitation. The Inter-American Commission has expressed concern where staff “have no training at all regarding the specific rights and needs of children” and there is a “lack of training in medical, psychiatric, or psychological areas in order to respond to the special needs of certain adolescents and children.”⁴⁶
- Under PREA, youth can still come into contact with adult prisoners outside their housing unit, and they continue to be supervised by prison correction officers in a setting that may foster abuse. The Inter-American Commission has cautioned that efforts to separate children

⁴¹ ProPublica, *In Effort to End Prison Rape, Questions About a Monitor’s Independence*, Aug. 30, 2013, available at <http://www.propublica.org/article/in-effort-to-end-prison-rape-questions-about-a-monitors-independence>.

⁴² 28 C.F.R. 115.14(c).

⁴³ The PREA standards state that agencies “shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision” but does not ban the use of isolation. 28 C.F.R. 115.14(c)

⁴⁴ U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, Rule 67.

⁴⁵ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XIX.

⁴⁶ Juvenile Justice in the Americas, para. 94

within adult facilities are insufficient where children come into contact with the adult population in various ways, "making the arrangement one of segregation in name only."⁴⁷

Questions For the U.S.: What efforts are being made to:

- Encourage state law reform to ensure that youth under 18 are not tried or sentenced as adults?
- Encourage state law reform to ensure that youth under 18 are not incarcerated in adult jails and prisons?
- Comply with international standards prohibiting the solitary confinement of youth?
- Address the disparate impact that adult sentencing practices have on youth of color?
- Improve data collection on the precise number of youth held in adult prisons and jails and the rates at which they are subjected to solitary confinement, assault, and sexual violence, disaggregated by age, race, sex, gender or gender identity, disability status and sexual orientation?

Prison Rape Elimination Act

- Encourage states and localities to implement PREA's requirements?
- Enforce the PREA regulations? What mechanisms are in place for monitoring, training, reporting and auditing information to ensure compliance?
- Continue to collect data on the incidence and prevalence of abuse in custodial settings, particularly as that relates to youth in adult prisons and jails?
- Evaluate the audit results?
- Report on the results of the audits as a whole?
- Discourage the use of solitary confinement used as a method of PREA compliance

Juvenile Justice and Delinquency Prevention Act: The Juvenile Justice and Delinquency Prevention Act (JJDP A) require that states prohibit the placement of children under juvenile court jurisdiction in adult jails in order to receive federal funding. However, these protections do not apply to the "to juveniles who are under the jurisdiction of the adult criminal court and charged and/or convicted of a felony." U.S. Response ¶ 96.

- What efforts are being made to reauthorize and expand protections of the JJDP A to include all juveniles, irrespective of whether they are tried as adults? What mechanisms are in place for monitoring, training, reporting and auditing compliance?

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⁴⁷ Juvenile Justice in the Americas, para. 420

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University of Miami Human Rights Clinic