



UNITED STATES OF AMERICA

A Report Submitted for the 53rd Session of the United Nations Committee Against Torture

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Just Detention International (JDI) is a health and human rights organization that seeks to end sexual abuse in all forms of detention. JDI is the only U.S.-based organization exclusively dedicated to ending this type of violence. Specifically, JDI works to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to ensure that those who have survived this form of abuse get the help they need. All of JDI's efforts are guided by the expertise of men, women, and children who have endured sexual violence behind bars and who have been brave enough to share their experiences.

I. Issue Overview

A. *Sexual Abuse Remains Rampant and Poorly Handled in Many U.S. Detention Facilities*

Since the last Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment review in 2006, sexual abuse in U.S. detention facilities has continued to occur at alarming rates. During this time, federal research into the crisis has improved dramatically and now provides reliable data on rates and characteristics of abuse. This research is being conducted by the federal Bureau of Justice Statistics (BJS), which estimates that roughly 200,000 men, women, and children are sexually abused in detention each year — a figure that has remained largely unchanged since 2007.

The perpetrators of this abuse are at least as likely to be corrections staff — officials whose very job it is to keep inmates safe — as other inmates.¹ While the number of inmates who report sexual abuse to officials has climbed significantly during the past several years, these inmates continue to find that their reports are not taken seriously.² Indeed, BJS has determined that almost half of staff found to have committed sexual misconduct faced no legal action.³ More shocking still, 15 percent of known staff perpetrators of this type of abuse were allowed to keep their jobs — and continue to have access to potential victims.⁴ BJS also found that inmates who reported sexual abuse were as likely to be punished themselves as to get to talk to an investigator.⁵ Few inmates who were victimized received the medical and mental health care they needed, and many were placed in solitary confinement, where they were in isolation for 23 hours per day and cut off from vital services and programs. Not surprisingly, placement in solitary confinement, particularly for survivors of sexual abuse, causes significant emotional distress.

B. Strengths and Weaknesses of the Prison Rape Elimination Act (PREA) Standards

In May 2012, U.S. Attorney General Eric Holder finalized comprehensive standards mandated by the Prison Rape Elimination Act (PREA).⁶ With the adoption of the PREA standards, the U.S. has taken its most significant step so far toward addressing this horrific form of abuse. The standards consist of basic, commonsense measures that can be fully implemented without undue burden or cost.

Among the many laudable provisions of the PREA standards, corrections agencies must house particularly vulnerable inmates — such as those who are lesbian, gay, bisexual, or transgender — safely. The standards also spell out requirements for inmate education and staff training on sexual abuse prevention, including specialized training for investigative and medical staff. They demand that facilities offer survivors access to rape crisis counselors — trained experts who provide crisis intervention and emotional support in the aftermath of an assault. The standards further require that youth in adult facilities no longer be detained in housing units with adults and they seek to limit excessive use of solitary confinement for inmates who have been sexually abused or are at high risk for abuse. Critically, the PREA standards require that all facilities be audited by independent auditors every three years. The results of the audits must be made public, with identifying information redacted to protect the safety and privacy of any individuals named.

While the standards as a whole are quite strong, they contain a number of notable gaps. For example, while a ban on pat searches applies to female inmates being searched by male staff, it does not apply to male inmates being searched by female staff. Female staff are exempted from the ban despite federal data indicating that most staff sexual abuse is committed by female staff against male inmates.⁷ Additionally, the standards allow staff to punish inmates deemed to have made allegations “in bad faith.” This troubling provision can be easily misused by rogue staff when there is no hard evidence that the abuse occurred.

C. Six States Refuse to Adopt the PREA Standards

In May 2014, the chief executive of each state and territory in the U.S. was required to attest that her or his jurisdiction was either in full compliance with the PREA standards or in the process of implementing the standards. Six states — Arizona, Florida, Idaho, Indiana, Texas, and Utah — failed to do either.⁸ As a result, the Justice Department is in the process of redirecting a percentage of each of these six states’ federal dollars to those states that are in compliance with PREA.

D. Other Federal Agencies Operating Detention Facilities Fail to Issue PREA Standards

On May 17, 2012, the same day that the PREA standards were released, President Barack Obama issued a crucial Presidential Memorandum confirming that PREA applies to “all agencies with Federal confinement facilities.” The memorandum directed all applicable agencies to finalize any rules or procedures necessary to adopt high standards to prevent, detect, and respond to sexual abuse. Two years later, the Department of Homeland Security is the only agency that has issued its own PREA regulations. Other agencies operating confinement facilities — including the Departments of Health and Human Services, the Department of Defense, and the Department of the Interior — are at varying stages of the process. In the meantime, widespread sexual harassment and abuse of detainees continue to plague facilities run by each of these agencies.

E. Just Detention International’s PREA-Related Recommendations

The PREA standards are commendable. However, the U.S. government, at the federal, state, and local levels, must commit the time and resources needed to end sexual abuse in detention, once and for all. To begin with, the U.S. must take the following steps:

- The U.S. Department of Justice should require every governor to confirm that her or his state has fully implemented the PREA standards by May 2016 and should consider increasing penalties for non-compliant states.
- The Department of Homeland Security should ensure that all facilities holding immigration detainees are in compliance with its PREA standards no later than May 2016.
- The Department of Defense should propose and publish regulations that apply PREA to all of its detention facilities, including those which are located extraterritorially, without further delay.
- The Department of the Interior should propose and finalize PREA regulations governing all confinement facilities in lands under its jurisdiction.
- The Department of Health and Human Services should propose and publish PREA regulations governing facilities holding unaccompanied immigrant children under the Department's authority.

II. 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 — 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 the request of corrections administrators and generally charge a fee for this service.

To date, the U.S. has not signed the Optional Protocol to the Convention Against Torture (OPCAT),⁹ and continues to refuse to recognize Article 22 of the Convention Against Torture (CAT), both of which would significantly increase U.S. prison oversight. OPCAT does not impose new obligations on signatory states, but creates a system for monitoring compliance with CAT requirements already in place. 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. Further, permitting Article 22 communications would help address the systemic failure of the U.S. legal system to hold agencies accountable for sexual abuse in their facilities. The comprehensive external oversight afforded by adoption of OPCAT and acceptance of Article 22 communications with the CAT Committee is especially important given that PREA does not provide a basis for a private right of action.

State and federal courts are poor oversight bodies due to the procedural requirements and substantive demands of the Prison Litigation Reform Act (PLRA), which prevents many meritorious cases from being heard. While the U.S. Congress modified PLRA in small part in 2013, to the benefit of survivors of sexual abuse in detention, the most onerous provisions of the act remain intact. As a result, many serious constitutional violations are excluded from court review based on arbitrary technical barriers.

A. Just Detention International's Oversight-Related Recommendations

- The President should sign and the Senate ratify the Optional Protocol to the Convention Against Torture (OPCAT). OPCAT would provide urgently needed independent oversight of U.S. corrections and detention facilities.
- The U.S. should permit Article 22 communications with the Committee Against Torture (CAT Committee), thus recognizing the competence of the CAT Committee to consider communications from or on behalf of detainees once they have exhausted available avenues of relief within the U.S.

legal system. 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 Committee Against Torture — would help address abuses that often remain unresolved by the U.S. legal system.

- Congress should repeal PLRA. U.S. prisoners are virtually barred from challenging conditions of confinement that violate their constitutional rights, due to the complex procedural requirements and substantive demands of PLRA.

III. Just Detention International’s Recommendations Reflect Previous CAT Committee Concerns About Rape in Detention and Lack of Effective Accountability

The CAT Committee has a long record of expressing concern about the crisis of sexual abuse in U.S. detention. The Committee has specifically called for adoption of strong preventive and accountability measures.¹⁰ To ensure the measures are effective, the Committee correctly instructed the U.S. to make them applicable in all of its detention centers, including pretrial, immigration detention, and other institutionalized settings.¹¹ The Committee and JDI agree that all allegations of sexual violence in detention must be investigated promptly and by an independent body; that perpetrators must be prosecuted; and that victims must be able to seek redress, compensation, and rehabilitation.¹² In fact, ahead of the 2014 U.S. review under CAT, the Committee appropriately reiterated its alarm over sexual violence in detention and explicitly requested the U.S. to assess the “impact and effectiveness” of measures, such as PREA, “in reducing cases of sexual violence in detention centres.”¹³

Finally, the Committee has expressed grave concerns many times about an individual prisoner’s ability to seek justice after an incident of sexual abuse in detention in the U.S. For instance, following her 2011 visit to the U.S., the UN Special Rapporteur on Violence against Women alerted the Committee that, because PREA fails to afford enforceable private remedies, cases alleging rape and sexual assault that mention PREA have “been summarily dismissed on the ‘no private right of action’ grounds” by courts.¹⁴ The Rapporteur concluded that such lack of recourse undermined PREA’s effectiveness “as an instrument to prevent and protect against acts of rape and sexual assault in custodial settings and to address root causes of the problem.”¹⁵ The Committee itself has stressed the state obligation to provide redress for victims of sexual violence in detention, including appropriate compensation.¹⁶

In response to the Committee’s concerns, the U.S. acknowledged the limited right of recourse in its report to the Committee, but asserted that the availability of other potential constitutional remedies is sufficient.¹⁷ In light of the curtailed right to remedy and the lack of independent oversight of detention facilities, however, the Committee — like JDI — continues to urge the U.S. to ratify OPCAT and to accept the competence of the Committee under article 22 of CAT.¹⁸

IV. Sexual Violence in Detention Constitutes Torture and Ill-Treatment Necessitating State Action Under the Convention

Rape and sexual abuse of individuals in detention constitute torture under Article 1 of the Convention. This type of abuse violates the state duty to prohibit and prevent torture under Article 2. And, it contravenes the state duty to prohibit and prevent other acts of cruel, inhuman, or degrading treatment under Article 16. A signatory is required to criminalize “torture, attempts to commit torture, or any act that amounts to complicity or participation in an act of torture” under Article 4. It also must ensure victims’ access to redress and compensation under Article 14.¹⁹

The Committee, in General Comment No. 2 on the implementation of CAT’s absolute ban against torture,²⁰ mandates state action to “stop, sanction, and provide remedies to victims of torture”, including rape and gender-based violence.²¹ CAT requires the U.S. to prevent, investigate, and punish all such violations²² at all levels of government and in confinement facilities.²³ Yet despite such obligations,

as highlighted above, not all U.S. federal agencies operating detention facilities have adopted and implemented effective measures to do so.

To be effective, all such measures must apply equally regardless of who the perpetrator of the torture is.²⁴ General Comment No. 2 states that where state authorities know or have reasonable grounds to believe that acts of torture are being committed by private actors, such as other inmates, but fail to exercise due diligence to prevent, investigate, prosecute, or punish such acts, such failures amount to complicity and acquiescence in violation of CAT's Article 2.²⁵ Particularly where individuals are held in custodial settings and deprived of their liberty, state authorities must take measures to stem and address the sexual abuse of inmates perpetrated by state officials, as well as by any staff, private contractors, and other inmates.

Further, government measures to protect the safety of inmates must address the extreme vulnerability of certain detainees. Persons deprived of their liberty who are at risk of sexual abuse or who have already been victimized must receive particular protection. General Comment No. 2 explains that individuals may be at particular risk of torture due to their gender, sexual orientation, gender identity, or mental or other disability.²⁶ The Committee, along with other treaty bodies and international consensus documents,²⁷ have recognized the gendered nature of sexual abuse in detention and highlighted the heightened vulnerability of individuals with intersecting "identifying characteristics or status," such as differing sexual orientation.²⁸

However, such protection must not be implemented through the widespread use of solitary confinement. Placing individuals in solitary confinement — even with the best of intentions — has been clearly shown to harm their well-being. Concerned about ongoing reports of the overuse of solitary confinement and its adverse effects, the Human Rights Committee in its 2014 Concluding Observations to the United States has instructed the state to "impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide," including in private detention facilities.²⁹

As support for this position, the Committee can look to the Special Rapporteur on Torture's conclusion that solitary confinement is a harsh measure with severe psychological and physiological consequences. The Special Rapporteur further found that, due to its negative psychological side effects, the use of solitary confinement can itself amount to an act of torture as defined by Article 1 of CAT.³⁰

V. JDI's Recommended Questions

1. Why has the United States not ratified the Optional Protocol to the Convention Against Torture (OPCAT) and permitted Article 22 communications with the Committee Against Torture (CAT Committee)?
2. What measures is the United States taking to ensure full national compliance with the Prison Rape Elimination Act standards?

VI. JDI's Suggested Recommendations

PREA-Related Recommendations

- The U.S. Department of Justice should require every governor to confirm that her or his state has fully implemented the PREA standards by May 2016 and should consider increasing penalties for non-compliant states.
- The Department of Homeland Security should ensure that all facilities holding immigration detainees are in compliance with its PREA standards no later than May 2016.

- The Department of Defense should propose and publish regulations that apply PREA to all of its detention facilities, including those which are located extraterritorially, without further delay.
- The Department of the Interior should propose and finalize PREA regulations governing all confinement facilities in lands under its jurisdiction.
- The Department of Health and Human Services should propose and publish PREA regulations governing facilities holding unaccompanied immigrant children under the Department’s authority.

Oversight-Related Recommendations

- The U.S. should ratify the Optional Protocol to the Convention Against Torture (OPCAT), and permit Article 22 communications with the Committee Against Torture (CAT Committee).
- The U.S. government should repeal the Prison Litigation Reform Act (PLRA).

ENDNOTES

¹ *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, Bureau of Justice Statistics, May 2013, p. 6. (Among state and federal prison inmates, 2% reported an incident involving another inmate and 2.4% reported an incident involving facility staff. About 1.6% of jail inmates reported an incident with another inmate and 1.8% reported an incident with staff.)

² *Sexual Victimization Reported by Adult Correctional Authorities, 2009–11*, Bureau of Justice Statistics, January 2014, p. 1. (The overall number of allegations reported by authorities in adult corrections facilities rose from an estimated 6,241 in 2005 to 8,763 in 2011.)

³ *Ibid.*, p. 16, Table 12. (Almost 45% of staff named as perpetrators in sustained reports of sexual misconduct faced no criminal penalties.)

⁴ *Ibid.*

⁵ *Sexual Victimization Reported by Former State Prisoners, 2008*, Bureau of Justice Statistics, May 2012, p. 31, Table 19. (28.5% of victims were written up after reporting and 28.3% were allowed to speak to an investigator.)

⁶ Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, 28 CFR Parts 115.5–115.501.

⁷ *Ibid.*, 1, p. 6. (“Among victims of staff sexual misconduct, 79% were males reporting sexual activity with female staff.”)

⁸ “The Shameful Six,” Just Detention International (2014), www.justdetention.org/en/shameful-six.aspx.

⁹ 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 (December 18, 2002). *See also* “U.N. Optional Protocol to the Convention Against Torture (OPCAT),” Just Detention International Fact Sheet, (2009).

¹⁰ U.N. Comm. Against Torture, “Conclusions and Recommendations of the Committee against Torture: United States of America,” ¶¶ 32, 42, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f2&Lang=en.

¹¹ *Ibid.* at ¶ 32, 42.

¹² CAT Conclusions and Recommendations, *supra* note 10, at ¶¶ 32, 42.

¹³ U.N. Comm. Against Torture, List of Issues Prior to the Submission of the Fifth Periodic Report of United States of America, ¶ 32, U.N. Doc. CAT/C/USA/Q/5 (January 20, 2010) [hereinafter LOI], *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en.

¹⁴ Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences — U.S. Country Visit*, ¶ 75-78, U.N. Doc. A/HCR/17/26/Add.5 (June 6, 2011).

¹⁵ *Ibid.*

¹⁶ LOI, *supra* note 13, at ¶ 32.

¹⁷ U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Third to Fifth Periodic Reports [hereinafter 2013 U.S. Report], ¶¶ 149-152, U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013), *available at* <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuLMmldNURtE47fFHU%2bcDW25gShYIR7OMYs8fhIEzNcAt8DYZW3SCBS3bNhaaOC%2bjbpXaOp7VVYtXThT0%2bi4JOj2LYM9PN5UBp3vIIXnsCLM>.

¹⁸ LOI, *supra* note 13, at ¶¶ 44-45.

¹⁹ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, U.N. Doc A/RES/39/46 (Dec. 10, 1984), *available at* <http://www.un.org/documents/ga/res/39/a39r046.htm>. *See also*, the U.N. Human Rights Committee in its 2014 review of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR) critiqued the U.S. for its “lack of comprehensive legislation criminalizing all forms of torture.”

²⁰ *General Comment No. 2, supra* note 17.

²¹ *Ibid.* at ¶ 18.

²² *Ibid.* at ¶ 4.

²³ *Ibid.*

²⁴ *Ibid.* at ¶ 18.

²⁵ *Ibid.*

²⁶ *General Comment 2, supra* note 5, at ¶ 21.

²⁷ The UN Declaration on the Elimination of Violence against Women stressed its concern that “some groups of women, such as . . . women in institutions or in detention . . . are especially vulnerable to violence.” Declaration on the Elimination of Violence Against Women, ¶ 7, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), *available at* www.un.org/documents/ga/res/48/a48r104.htm. *See also*, Platform for Action adopted at the U.N. Fourth World Conference Women, which highlighted violence against women in detention and suggested that “punishment of perpetrators of violent acts against women would help to ensure that such violence does not take place at the hands of public officials in whom women should be able to place trust, including . . . prison officials.” World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 114, U.N. Doc. A/CONF.177/20 (October 27, 1995).

²⁸ *General Comment 2, supra* note, at ¶ 22. *See also*, 2013 U.S. Report, *supra* note, at ¶ 32. The UN Committee on the Elimination of Racial Discrimination in *General Comment No. 25* further cautions that “[c]ertain forms of racial discrimination may be directed towards women . . . such as sexual violence committed against women . . . in detention.” U.N. Comm. on the Elimination of all Forms of Discrimination, 56th Sess., *General Recommendation No. 25, annex V* at 152 ¶ 2, U.N. Doc. A/55/18 (Mar. 6-24, 2000), *available at* www.un.org/documents/ga/docs/55/a5518.pdf.

²⁹ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, at ¶ 20 (April 23, 2014).

³⁰ Special Rapporteur on Torture, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 70, U.N. Doc. A/HRC/22/53 (February 1, 2013) (Juan E. Méndez), *available at* www.refworld.org/docid/51136ae62.html.