

Gender-based Violence and Discrimination in the Treatment of Persons Deprived of Liberty

Independent Information for the 107th session
of the Human Rights Committee (HRC)

Submitted by the Avon Global Center for Women and Justice at Cornell Law School, the Cornell International Human Rights Clinic, and the University of Chicago Law School
International Human Rights Clinic
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I. Reporting Organizations

Cornell Law School's Avon Global Center for Women and Justice, located in Ithaca, New York, works with judges, legal professionals, governmental and nongovernmental organizations to improve access to justice, in an effort to eliminate violence against women and girls.¹ The Cornell International Human Rights Clinic, also located in Ithaca, NY,² and the University of Chicago Law School International Human Rights Clinic, located in Chicago, Illinois, both provide high quality legal assistance to organizations and individual victims of human rights abuse through projects that range from fact-finding and reporting to domestic and international litigation to human rights education.

II. Issue Summary

Gender-based violence against individuals deprived of liberty is a serious problem in U.S. detention and correctional facilities. According to a recent report by the U.S. Bureau of Justice Statistics (BJS), nearly one in ten former state prisoners reported one or more incidents of sexual victimization during their most recent period of incarceration.³ Women prisoners were particularly at risk, with 16.1 percent of former female state prisoners reporting sexual victimization and twice as many women as men reporting sexual misconduct by prison staff in cases where the prisoner was unwilling.⁴ The problem of gender-based violence is exacerbated by the continued practice of assigning male guards to supervise female prisoners as well as severe overcrowding in many prisons, which is one of the results of the over-incarceration of women (and women of color in particular), generally for non-violent crimes.⁵ LGBTI prisoners are also extremely vulnerable to sexual abuse; in the BJS study, 39 percent of male prisoners who said they were gay had been victimized by other inmates and 12 percent by prison guards.⁶ The U.S. Department of Justice issued important new regulations in May 2012 to give effect to the Prison Rape Elimination Act of 2003 and provide guidance to federal, state, and local officials on how to prevent and respond to sexual violence in prisons and jails. However, much remains to be done at the federal and state level to ensure that these regulations are effectively implemented. In addition, the regulations do not apply to immigration detention facilities, and the U.S. Department of Homeland Security has not yet promulgated corresponding standards to protect civil immigration detainees.⁷

¹ For more information, please see Avon Global Center for Women and Justice at Cornell Law School, www.womenandjustice.org.

² For more information, please see Cornell International Human Rights Clinic, <http://www.lawschool.cornell.edu/academics/clinicalprogram/int-human-rights/index.cfm>.

³ Allen J. Beck and Candace Johnson, Sexual Victimization Reported by Former State Prisoners 15 (May 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf>.

⁴ *Id.* at 5, 6, 15.

⁵ *Id.* at paras. 45-47.

⁶ *Id.* at para. 5.

⁷ Human Rights Watch, US Issues Comprehensive Prison Rape Protections for All Immigration Detainees, Letter to Secretary of Homeland Security Janet Napolitano, June 13, 2012, available at <http://www.hrw.org/news/2012/06/13/us-issue-comprehensive-prison-rape-protections-all-immigration-detainees>

The United States also denies individuals deprived of liberty adequate health care that meets their gender-specific needs, including sexual and reproductive health, mental health, and counseling for victims of sexual and physical abuse.⁸ The shackling of women prisoners during labor, delivery, or post-delivery recovery also remains a serious problem. Despite a federal Bureau of Prisons (BOP) policy and a number of state laws restricting the practice of shackling except in exceptional circumstances, the majority of states continue to permit the shackling of pregnant and post-delivery female prisoners. Moreover, where anti-shackling laws and policies exist, they are inadequately enforced and implemented.⁹

In addition, U.S. policies promote the separation of prisoners from their families and especially of parents from their children. The UN Special Rapporteur on Violence Against Women recently noted that “the remoteness and geographical isolation [of prison facilities in the United States], and the high cost of telephone calls impedes the ability of inmates to maintain regular contact with their family.”¹⁰ These policies affect all prisoners but hold particular challenges for women, who are most likely to be their children’s primary caretakers. The Adoption and Safe Families Act of 1997 facilitates the termination of parental rights of parents whose children have been placed in foster care for more than 15 months, which includes many women prisoners, whose children are more likely to be placed in foster care than those of male prisoners.¹¹

III. Concluding Observations

The Human Rights Committee made two recommendations in its 2006 Concluding Observations on the last reported submitted to it by the United States that relate to the issues outlined above. To date, these recommendations have not been fully implemented.

- Paragraph 32: “The State Party should scrutinize conditions of detention in prisons, especially maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.”
- Paragraph 33: “The Committee reiterates its recommendation that male officers should not be granted access to women’s quarters, or at least be accompanied by women officers. The Committee also recommends the State party to prohibit the shackling of detained women during childbirth.”

IV. U.S. Government Report

⁸ UN Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum, Mission to the United States of America, 6 June 2011, paras 32, 38-41, UN Doc. A/HRC/17/26/Add.5, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/138/26/PDF/G1113826.pdf?OpenElement>

⁹ *Id.* at paras 42-44; ACLU Briefing Paper: The Shackling of Pregnant Women and Girls in U.S. Prisons, Jails, and Youth Detention Centers, October 12, 2012, available at <http://www.aclu.org/womens-rights/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention>

¹⁰ UN Special Rapporteur on Violence Against Women, *supra* note 8, at para. 49; Rebecca Project, National Women’s Law Center, Mothers Behind Bars, October 2010, 12-13, available at <http://www.rebeccaproject.org/images/stories/files/mothersbehindbarsreport-2010.pdf>; Julie Kowitz Margolies & Tamar Kraft-Stolar, Correctional Association of New York, When “Free” Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State (2006), available at <http://www.correctionalassociation.org/resource/when-free-means-losing-your-mother-the-collision-of-child-welfare-and-the-incarceration-of-women-in-new-york-state>

¹¹ UN Special Rapporteur on Violence Against Women, *supra* note 8, at para. 49.

The following list provides a summary of relevant statements made by the United States Government in its Fourth Periodic report to the Human Rights Committee.

- **Paragraph 217:** The United States notes that “State policy regarding the medical care that will be provided to those in state custody must be made with due regard for an individual’s medical needs and the medical judgment of qualified health care providers” and that civil and criminal remedies are available where constitutional standards of detention are not met.
- **Paragraph 218:** The United States acknowledges that concerns have been raised about the treatment of persons in custodial settings, including prison rape and sexual harassment of women and the shackling of female prisoners.
- **Paragraphs 226-30:** The United States notes that two new laws increased penalties under federal law for the prosecution of staff sexual abuse of federal prisoners and describes measures that have been taken to implement the Prison Rape Elimination Act of 2003, including through the development of then-draft regulations and other policies to help prevent, identify, and respond to sexual abuse in prisons.
- **Paragraphs 231-33:** The United States notes a trend—though far from complete—towards policies banning or restricting shackling of pregnant female prisoners during transportation, labor, and delivery, describing changes in this direction in federal and some state laws and policies.
- **Paragraphs 670-672:** The United States responds to paragraph 32 of the Committee’s 2006 Concluding Observations. It asserts that the US Constitution, along with federal and state laws establish standards of care for persons deprived of liberty which are consistent with the ICCPR and claims that the federal BOP meets those standards for safe and humane treatment. It does not specifically address the compliance of state prison systems with the ICCPR but does note that the Department of Justice investigates conditions in state facilities and initiates civil law enforcement actions where standards are unlawful.
- **Paragraphs 673-75:** The United States responds to paragraph 33 of the Committee’s 2006 Concluding Observations. It asserts that the federal BOP and most state corrections departments do not restrict corrections officers to work only with prisoners of the same sex. It notes, however, that same sex supervision is generally required for certain forms of body searches. It also describes the mandatory training provided to BOP officials on preventing and responding to sexual abuse of inmates. It does not discuss the training or other relevant policies of state corrections departments. The United States also reiterates the information earlier provided about its efforts to implement the Prison Rape Elimination Act and the trend towards restricting shackling of pregnant women prisoners.

V. Legal Framework: ICCPR Articles and Human Rights Committee General Comments

ICCPR, Article 7: Right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment

ICCPR, Article 10: Right of persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person

ICCPR, Article 17: Right not to be subjected to arbitrary or unlawful interference with one’s privacy

HRC, General Comment 16 (Article 17, Right to Privacy, Family, Home and Correspondence, Protection of Honour and Reputation), paragraph 8 (“...So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the

person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.”).

HRC, General Comment 28 (Article 3, Equality of Rights Between Men and Women), paragraph 1 (“...States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that accused juvenile females shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits. Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.”).

HRC, General Comment 21 (Article 10, Humane Treatment of Persons Deprived of their Liberty)

HRC, General Comment 20 (Article 7, Prohibition of Torture, or Cruel, Inhuman or Degrading Treatment or Punishment)

VI. Other UN Body Recommendations

Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rashida Manjoo, Mission to the United States, June 2011, para. 115(c).¹²

Report on the Working Group of the Universal Periodic Review: United States of America, January 4, 2011, e.g. paras. 150, 152, 162-64, 177-79, 212.¹³

VII. Recommended Questions

- What measures is the United States taking to ensure that its new Prison Rape Elimination Act regulations are effectively implemented in federal and state correctional facilities and what progress is being made to promulgate regulations that would extend similar protections to immigrant detainees?
- Please provide information about what the United States is doing, particularly at the state level, to address the non-enforcement of current laws and policies banning or restricting the shackling of pregnant women prisoners and to ensure that shackling is prohibited in all jurisdictions?
- Please provide information about what the United States is doing to ensure that individuals deprived of liberty have the ability to maintain regular contact with their family, especially their minor children and that their detention does not easily result in the loss of parental rights.

VIII. Suggested Recommendations

- Ensure that the Prison Rape Elimination Act regulations are effectively implemented and enforced and develop comprehensive standards to implement the Prison Rape Elimination Act in immigration facilities.

¹² [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument)

¹³ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/USSession9.aspx>

- Adopt federal and state policies to ensure that women in prison receive comprehensive and gender-sensitive physical and mental health care, including reproductive services and counseling for victims of abuse.
- Ban the use of restraints on pregnant women and women who have recently given birth and ensure that these prohibitions are fully enforced.
- Enhance the protection of parental rights for incarcerated parents with children in foster care and expand visiting and reunification programs for all families separated by incarceration.
- Consider the use of alternatives to incarceration in appropriate cases, particularly for detainees who are the primary caregivers of children.