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INTERNATIONAL

RAPE IS NOT PART OF THE PENALTY

Just Detention International

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Subcommittee on Human Rights and the Law

Hearing on U.S. Implementation of
International Human Rights Treaties

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Just Detention International (JDI) would like to thank Chairman Durbin and members of the Senate Subcommittee on Human Rights and the Law for holding this hearing and for taking into consideration this submission, focusing on the U.S. implementation of international human rights treaties with respect to the sexual abuse of detainees.

Formerly known as Stop Prisoner Rape, JDI is an international human rights organization that seeks to end sexual abuse in 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 promote access to resources for those who have survived this form of abuse.¹ 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. Sexual Abuse in U.S. Detention Facilities: A Human Rights Crisis

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.² The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides a definition of torture, stating that: the act must result in severe mental and/or physical suffering; it must be inflicted intentionally; and, it must be committed by or with the consent or acquiescence of a public official or other person acting in an official capacity. (Pain and suffering resulting from lawful actions are excluded).³

Sexual violence behind bars meets each of the conditions specified under the CAT. 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 in this type of abuse.

The U.S. has ratified the CAT and the International Covenant on Civil and Political Rights (ICCPR)⁴, both of which protect the fundamental human right to be free from sexual abuse. Nevertheless, 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 previous year alone.⁵ 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.⁶

The results of the first-ever survey of detained youth is due to be released in early January 2010; a pre-test of this survey found that almost 20 percent of detained youth had been sexually abused in the past year.⁷ Shockingly, the BJS has confirmed that juvenile detention officials are rarely held accountable. In substantiated cases of staff-on-youth sexual abuse, only 39 percent of officials were arrested and/or referred for prosecution.⁸ Even more disturbing, 25 percent of confirmed staff perpetrators in state-run youth facilities were allowed to keep their jobs.

To date, no similar data has been compiled to assess sexual violence in immigration detention. However, the risk of sexual abuse faced by immigration detainees is often heightened due to linguistic and cultural barriers, a lack of legal assistance, and the ever-present threat of deportation.⁹

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 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 act with impunity. This in turn, compromises the safety of inmates and staff. Once released - and 95 percent of inmates do return home - survivors bring their emotional trauma and medical conditions back to their communities.¹⁰

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).¹¹ 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.¹²

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 consistently detained children from adult inmates, and to investigate instances of prisoner rape in a prompt and transparent manner.¹³ 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, bisexual, transgender, and queer (LGBTQ) individuals, including by law enforcement.¹⁴

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.¹⁵ 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 heightened risk for abuse by adult inmates and corrections staff.¹⁶ 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."¹⁷ 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.¹⁸

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, 2009.¹⁹ The standards are premised upon the four pillars of preventing, detecting, responding to and monitoring sexual abuse, 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 they 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 establishing 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)²⁰, and refuses 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 prisoner rape.²¹

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 were unable to file and appeal a grievance within deadlines imposed by their facilities are unable to have a judge review the merits of their claims.²² The PLRA also requires a “physical injury” in order for damages to be awarded – and, shockingly, some courts have found that some forms of sexual assault do not constitute a physical injury.²³ 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.

IV. Next Steps

In December 2010, the human rights record of the U.S. will be reviewed during a Universal Periodic Review (UPR), at which point the Office of the High Commissioner on Human Rights will call upon the U.S. to specify what actions it has taken to improve the human rights situation and to overcome challenges to the universal enjoyment of human rights.²⁴ With the UPR examination approaching, JDI calls on the U.S. to fulfill its international treaty obligations by complying fully with the mandates of the CAT and the ICCPR, ratifying the OPCAT and recognizing Article 22 communications with the CAT Committee. These actions will help restore U.S. standing as a human rights leader and significantly improve safety for the incarcerated adults and children at risk of sexual violence.

¹ To learn more about Just Detention International, please visit <http://www.justdetention.org>.

² For more information, *see* Just Detention International, Fact Sheet, Prisoner Rape is Torture Under International Law (2009).

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”), G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987 and ratified by the U.S. Oct. 14, 1994).

⁴ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976 and ratified by the U.S. June 8, 1992).

⁵ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007).

⁶ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 (2008).

⁷ ALLEN J. BECK, DEVON B. ADAMS & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-06 (2008) (calculating that the estimated total number of sexual violence allegations was 2,047 in 2005 and 2,025 in 2006).

⁸ *Id.*, at 8.

⁹ For more information, *see* Just Detention International, Fact Sheet, Sexual Abuse in U.S. Immigration Detention (2009).

¹⁰ For more information, *see* Just Detention International, Fact Sheet, Mental Health Consequences of Sexual Abuse in Detention (2009); Just Detention International, Fact Sheet, Sexual Abuse in Detention is a Public Health Issue (2009).

¹¹ 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.

¹² *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).

¹³ Committee Against Torture, *supra* note 10, at ¶¶ 32, 34.

¹⁴ Human Rights Committee, *supra* note 10, at ¶¶ 25, 33.

¹⁵ 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).

¹⁶ 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).

¹⁷ SMR, *supra* note 14, Rule 9(2).

¹⁸ See Valerie Jenness, et al., Center for Evidence Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007).

¹⁹ 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).

²⁰ 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).

²¹ Similarly, Rule 55 of the SMR calls for regular inspections of detention facilities by qualified inspectors appointed by a competent authority.

²² 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).

²³ 42 U.S.C. §1997e(e).

²⁴ For more information, visit: http://www.ushrnetwork.org/campaign_upr (last visited Dec. 10, 2009).