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RAPED BY THE SYSTEM: A COMPARISON OF PRISON RAPE IN THE UNITED STATES AND SOUTH AFRICA

Alexandra Ashmont

INTRODUCTION

Wimpie, a white boy who was dabbling with dagga, is put in our cell. I don't know how old he really is, perhaps 16 or more, but he looks no older than 14, with skinny arms and short, spiky-crowned, brown hair. He tries to fight, and so they hit him. His resistance stops abruptly when one grabs the back of his head and smashes his face into the steel bars . . . The 20 men take it in turns to rape him. It goes on for more than eight hours, almost the whole night. The boy does everything he can, in his pathetic, limited range of action, to try to deter them, but he is ignored. He screams, he cries, he begs, he tries to bargain, he prays. . . . It is in the morning, though, that I am forced to see what life has coughed up before me. What's left of Wimpie is lying in a corridor between the bunks, just in front of my bed. He is still naked, shivering in a pool of his own blood where they have discarded him. I will literally have to step over the small body to go and eat my breakfast.¹

This is a description by Gayton McKenzie, a hardened gang member, of the rape of a young white teenager only known as Wimpie. Where is Wimpie today? Probably dead of Aids, or suicide, like so many male victims of gang rape. If he is alive, he might be homeless or addicted to drugs or alcohol like many others who manage to survive the experience; their lives

¹ *Police-jail rapes of white SA men is a war crime pattern*, THE EUROPEAN UNION TIMES, Mar. 30, 2010, <http://www.eutimes.net/2010/03/police-jail-rapes-of-white-sa-men-is-a-war-crime-pattern-2/>.

in ruins around them.²

Not only does this story illustrate the brutal reality within prison walls, it more importantly illustrates the absolute depraved indifference of everyone in society. Prisoners, like the one telling the story above, are completely desensitized to the extreme violence going on around them. It is so common behind prison bars that prisoners simply accept it as a way of life. To people who have never been imprisoned, this story will impact them very differently, if it even affects them at all. The well-known revolving prison jokes, “don’t drop the soap” and “he’s way to pretty for prison” sum up society’s perception of prisons all around the world. Unfortunately, what people fail to realize is that these sayings are not jokes at all, but a crude way to use humor to cover up the faults of a country’s prison systems. In prisons all around the world, these stories are everything but “jokes,” they are a prisoner’s reality.

The main objective of this article is to create overall awareness and to give people a real sense of the events that go on every day inside prison walls. The article is meant to show people that the way they think about prison and prison rape specifically is severely jaded. What happens behind prison bars should certainly not stay behind prison bars. The stories within this article are unlike any prison rape stories people have heard before. They are harsh, inhumane, and deeply disturbing. The only way to incite change is to open people’s eyes to the true conditions within prisons. People tend to want to change things that pull at their heartstrings and evoke strong emotions. Most people do not exactly reserve a warm spot in their heart for criminals. Hopefully, this article will change their minds.

This article will compare prison rape in two countries, the United States and South Africa. These two specific countries were strategically chosen because of their contrasting societies. The United States is one of the most affluent countries in the world, while South Africa severely lags behind. The dynamics between gender and race are also very different within the countries, which would lead one to believe their treatment

² *Id.*

of prisoners would be drastically different.

This article will illustrate how two radically different countries are surprisingly and disturbingly alike in how they manage their prison systems. It will first compare the basic prison conditions and general populations of the two countries. It will then journey into the uncharted territory of sexual violence in each country's prison systems. Then it will explore the actions that each country is taking to better their prison systems. Lastly, it will present the argument that prison rape is considered torture under international law, in addition to a violation of the Eighth Amendment.

"The degree of civilization in a society can be judged by entering its prisons."³ Let us see exactly what kind of society we live in.

I. PRISONS IN THE UNITED STATES

The United States has the largest prison population in the entire world.⁴ According to the U.S. Bureau of Justice Statistics, there were 2,228, 434 people incarcerated in the U.S in 2012.⁵ There were 744,524 prisoners in local jails and 1,483,900 in state or federal prisons, including state prisoners in private facilities.⁶ Based on an estimated national population of 315.1 million at that end of 2012, there are 707 people incarcerated for every 100,000 people in the United States.⁷ There are currently 4,575 prison institutions, including 3,283 local jails, 1,190 state facilities, and 102 federal facilities.⁸ Even with all of these prisons, the United States still exceeds its official capacity of prisoners, the capacity being 2,265,000.⁹ This puts

³ *Our prisons are a mirror showing the soul of America. It's not a pretty picture*, FABIVS MAXIMUS (Mar. 28, 2011), <http://fabiusmaximus.com/2011/03/28/26297/>.

⁴ *World Prison Brief*, INTERNATIONAL CENTRE FOR PRISON STUDIES, available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Mar. 12, 2014).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

them at an occupancy level of 106%.¹⁰

SEXUAL VIOLENCE IN UNITED STATES PRISONS

The harsh reality is that sexual abuse in detention is a widespread and systemic problem in U.S. prisons.¹¹ Prisoner rape is “arguably the most widespread and neglected form of human rights abuse in the U.S. today.”¹² According to the most recent research, one in five male inmates and one in four female inmates in the U.S. face sexual assault behind bars.¹³ Furthermore, cases reported to facilities do not nearly represent the full scope of the problem, due to underreporting caused by fear, stigma, and a “code of silence” in prisons.¹⁴ According to the report written by Stop Prisoner Rape prepared for the U.N. Committee Against Torture in 2006, the amount of prisoner rape is disproportionate when divided by gender.¹⁵ Male victims make up 86%, while women make up 13% of prison rape victims.¹⁶ The statistics of male survivors are as follows: 54% were sexually assaulted by another prisoner, 17% were assaulted by a prison official, 3% by a non-custody staff member, and 25% refused to reveal who assaulted them.¹⁷ The statistics of female survivors are as follows: 12% were sexually assaulted by another prisoner, 48% were assaulted by a prison official, 26% by a non-custody staff member, and 14% refused to reveal who assaulted them.¹⁸ Out of these men and women, 6% of them were assaulted for the first time when they were under the age of twenty-one, 36% were assaulted by more than one person, and 37% were assaulted more than once. Of these,

¹⁰ *Id.*

¹¹ Stop Prisoner Rape, *In the Shadows: Sexual Violence in U.S. Detention Facilities* JUSTDETENTION.ORG 3 (2006), http://www.justdetention.org/pdf/in_the_shadows.pdf.

¹² *Id.*

¹³ Cindy Struckman-Johnson and David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 THE PRISON JOURNAL 379 (2000).

¹⁴ Stop Prisoner Rape, *supra* note 11, at 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

only 51% reported the assault and an atrocious 3% of the reported assaults resulted in discipline of the abuser.¹⁹

Various prison conditions give rise to sexual abuse in U.S. prison facilities. Overcrowding creates opportunities for predators,²⁰ including corrections officers.

The prisons are so overcrowded, and the officers take advantage of that. They see all your weaknesses. Some of them are predators. The gym is where I slept in and there were 120 women in there. There is no privacy. There are no partitions. There are no doors....What happens when you kick the covers off in bed at night? You have got officers walking by with flashlights looking at you. Being locked up in that kind of environment was devastating – emotionally, physically, and mentally draining.²¹

This is testimony from a woman named Theresa Smith, who was incarcerated for eleven years for the possession and sale of drugs.²² During this time she was raped by corrections officers twice, and was repeatedly sexually harassed and assaulted throughout her years in prison.²³

In addition, the lack of a proper inmate classification system contributes to the prevalence of rape in prison.²⁴ Inmates must be correctly classified when they enter the facility, and then rapidly re-classified when problems arise.²⁵ Despite this well-known fact, many state departments of corrections do not collect data needed to assess an inmate's risk of harming other inmates.²⁶ Twelve of the U.S.' fifty-two correctional facilities do not collect information on an inmate's history of violence and seventeen do not collect information on gang membership.²⁷ Pure negligence of this kind results in the following stories:

¹⁹ *Id.*

²⁰ Terry Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 113 (Don Sabo et al. eds., 2001).

²¹ Stop Prisoner Rape, *supra* note 11, at 8.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 9.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Sophia Brooks, a transgender woman from Florida who is a U.S. army veteran, began the transition to becoming female in 1999. She initiated hormone therapy, adopted a feminine voice and mannerisms, grew her hair long, and acquired breast implants. In 2002, she was arrested for drug possession and sentenced to seven years in a mens prison. She recounted her harrowing experiences in detention to SPR.²⁸

When I arrived at the reception center...I stepped off the bus and was strip-searched in front of two guards and about a dozen male inmates. A sergeant yelled, 'Look at the tits on that one! Those are the best-looking tits I've ever seen on a man.' He pointed me out to a six-foot, three-inch inmate and said to him, 'You like that one, don't you? I'm going to put you in a cell with that one.' Another sergeant called me 'tits' and 'titty man'.... While the rest of my group went through the intake process, I was left sitting on a bench until the afternoon so that all the other intake inmates could see me. My head was completely shaved, and my sports bra was taken away, because 'males' don't need bras in prison. I was placed in a locked-down 'protective management' unit with murderers and a predator who had a prior 'relationship' with a transsexual before my arrival.²⁹

Soon after her arrival, Brooks was raped by that predator in the protective custody unit. She told SPR, "I yelled for him to stop, but nobody heard me. He kept saying, 'Yeah, you like that, bitch. I knew you wanted it.' When he was done, he left, and...I cried all night. I was ashamed of feeling so helpless." Brooks emphasized to SPR that corrections authorities must, "acknowledge the problem of placing minimum-custody transsexuals into locked-down protective management areas with mixed custody levels."³⁰

The prison "code of silence" is considered a norm in correctional facilities. In U.S. detention facilities, "snitching" on another prisoner is unacceptable and considered a sign of weakness. By reporting sexual violence to an official or another prisoner, the victim violates a longstanding male prison code

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

and invites retaliation from the perpetrator(s).³¹ Administrative procedures and corrections officials aggravate the situation further by pressuring a rape victim to reveal the name of his/her assailant, but refuse to protect them from retaliation.³² Thus, most prisoners refuse to file a complaint and some will even forego medical assistance and psychological counseling following sexual abuse.³³

A pervasive code of silence among corrections officials at the Corcoran State Prison in California contributed to the 1999 acquittal of four prison staff members charged with arranging the rapes of Eddie Dillard. A 23-year old, 120-pound, first-time prisoner, Dillard was deliberately housed in solitary confinement with a sexual predator known as the 'Booty Bandit,' in an effort by prison officials to 'teach him a lesson' after he kicked a female corrections officer. The 'Booty Bandit' raped Dillard repeatedly over a two-day period, as corrections officers passed by the cell and laughed.³⁴

Similarly, inmates who report sexual abuse are often placed in protective custody after the attack.³⁵ As a result, the stigma of having been in protective custody follows a vulnerable prisoner long after he or she is returned to the general population.³⁶

Anyone can fall victim to sexual violence in prison, however certain groups are especially prone to this type of abuse.³⁷ First-time, non-violent offenders are inexperienced in prison life and lack the skills to protect themselves behind bars.³⁸ First-time offenders are especially at risk because prison officials fail to house them according to their vulnerability for abuse; they only consider the crime for which they are incarcerated. Overcrowded conditions make it even more likely that non-violent offenders will be placed with violent, potentially

³¹ Kupers, *supra* note 20, at 112.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE, 146-47 (1980).

³⁶ *Id.*

³⁷ Stop Prisoner Rape, *supra* note 11, at 12.

³⁸ *Id.*

predatory cellmates.³⁹

[B]efore the abuse began, I told the officials that I felt vulnerable in the open dormitory unit and... that I felt threatened by the assailant. My assailant...was known for being violent. When he began to threaten and harass me, I told prison officials, but...[they] did nothing.⁴⁰

Juveniles aged thirteen to eighteen are particularly vulnerable to sexual violence when placed in adult prisons and jails.⁴¹ When incarcerated with adults, youths are five times more likely to be sexually assaulted than when they are held in youth facilities.⁴² Moreover, juveniles held in adult prisons are eight times more likely to commit suicide than those housed in juvenile facilities.⁴³ Research indicates that this is attributed to feelings of isolation and an intense fear of sexual violence or physical assault.⁴⁴ Nevertheless, more than 7,000 youth under the age of eighteen were being held in adult facilities.⁴⁵ Moreover, juveniles are also sexually abused by correctional officials in juvenile facilities.⁴⁶

In 1995, 16 year-old Rodney Hulin was sentenced to eight years in an adult facility in Texas for setting a dumpster on fire. In prison, he became an easy target, with a 5'2", 125-pound frame. He was raped multiple times by other inmates and reported the assaults to doctors and prison officials on numerous occasions, pleading for help. In particular, using the prison's established administrative procedures, he requested to be removed from the general prison population. His pleas were

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 13.

⁴² Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment- Custody Dichotomy*, 2 JUV. & FAM. CT. J. 9 (1989).

⁴³ MICHAEL G. FLAHERTY, AN ASSESMENT OF THE NATIONAL INCIDENCE OF JUVENILE SUICIDE IN ADULT JAILS, LOCKUPS, AND JUVENILE DETENTION CENTERS 10 (1980); Jason Ziedenberg & Vince Schiraldi, *The Risks Juveniles Face: Housing Juveniles in Adult Institutions is Self-Destructive and Self-Defeating*, 60 CORRECTIONS TODAY 22, 24 (1998).

⁴⁴ *Id.*

⁴⁵ HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 236 (2006).

⁴⁶ Stop Prisoner Rape, *supra* note 11, at 13.

rejected. Prison officials decided that Hulin did not meet the 'emergency grievance criteria' and told him that '[t]his happens every day, learn to deal with it. It's no big deal.' Unable to tolerate any further abuse, Hulin hanged himself in January 1996, and died after lying in a coma for four months.⁴⁷

Gay, lesbian, and transgender prisoners are especially at risk of being victims of sexual abuse.⁴⁸ Gay inmates are three times more likely to be victims of rape.⁴⁹ Furthermore, transgender inmates who have developed breasts or a feminine appearance, for example, are vulnerable to various forms of sexual harassment by other inmates and prison officials. Gay and transgender inmates, who have the courage to come forward, face greater institutional apathy and obstacles than other detainees.⁵⁰ Corrections officials tend to condemn homosexuality and transgender status.⁵¹ They often assume that if an inmate is gay or transgender, then he or she consented to the rape, and as a result, they trivialize these inmates' claims.⁵² Officials often ignore or even laugh at their reports of sexual abuse.⁵³ "In some cases, prison officials have set gay and transgender prisoners up for abuse, and then are dismissive of or refuse to cooperate with investigations."⁵⁴ Perhaps the best-known recent example of such conduct is the case of Lisa Nelson:

Lisa Nelson is a pre-operative transgender woman who suffers from mental illness. In September 2004, while being held at a California jail on charges of smuggling drugs into a correctional facility, another inmate threatened to stab her if she did not come with him to the shower stalls, where he proceeded to rape her. A corrections official walked by as the rape was being perpetrated and laughed, doing nothing to stop it. Subsequently, the facility placed the perpetrator in a cell to-

⁴⁷ *Id.*

⁴⁸ *Id.* at 14.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

gether with Nelson. Nelson told SPR that, 'he did nothing but beat me and rape me. When I finally got out of there, I had two black eyes that were completely closed up. I didn't deserve this.' In September 2005, after refusing Nelson's requests to be housed in the unit for gay and transgender inmates, the facility placed her in a protective custody unit with about six other inmates. Two of them immediately forced her to perform oral sex. A deputy who saw the attacks taking place did nothing. Nelson told SPR that the next day, 'the deputy made jokes about it. He asked me how much I charge for that.' Nelson went on to tell SPR that '[s]ometimes, I want to die. I'm scared to close my eyes at night.'⁵⁵

Also, U.S. Immigration and Customs Enforcement Detainees are targets for sexual abuse for many reasons.⁵⁶ Some of the factors are overcrowding, lack of independent monitoring by advocacy organizations, an absence of data on sexual abuse of detainees, fear of deportation, inadequate access to counsel, and varied literacy and language skills.⁵⁷ Few immigration detainees challenge the conditions of their confinement, including those who suffer sexual abuse, because they are threatened with deportation if they do.⁵⁸

EFFECTS OF PRISON RAPE IN THE UNITED STATES

Prison rape increases the level of overall violence in prisons.⁵⁹ It increases the number of homicides, attacks against other inmates and staff, and insurrections and riots.⁶⁰ Prison rape also increases the level of interracial tensions inside and outside of prisons.⁶¹ In addition, victims of prison rape suffer severe physical and psychological injuries that greatly hinder their ability to integrate into the community once they are re-

⁵⁵ *Id.*

⁵⁶ *Id.* at 15.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2003).

⁶⁰ Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2003).

⁶¹ *Id.*

leased.⁶² They are unable to maintain stable employment, and thus more likely to become homeless and/or require government assistance.⁶³

The effects of prison rape are not limited to the inmates alone. The outside community as a whole is greatly effected in various ways. Most importantly, prison rape endangers the public safety by making these brutalized inmates more likely to commit violent crimes when they are released.⁶⁴ There are as many as 600,000 inmates released into the community a year.⁶⁵ Many of these inmates were not violent to begin with and were not convicted of violent crimes. After they are brutalized in prison, they come out a different person.

Prison rape also has a huge effect on the public health. Prison rape undermines the public health by contributing to the spread of diseases. Infection rates for sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than for the American population as a whole.⁶⁶ When these infected prisoners are released, the risk of the spread of these diseases increases greatly. Many of these inmates do not even know they are infected, which makes them even more likely to spread the disease to the public, once released.

On another note, prison rape greatly impacts government programs and spending. It increases physical and mental health care expenditures, both inside and outside of prison systems.⁶⁷ It reduces the effectiveness of the government's disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases.⁶⁸ It also substantially increases the rate of Post-Traumatic Stress Disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

inmates.⁶⁹

The high incidence of prison rape has a significant and negative impact on interstate commerce.⁷⁰ It substantially increases the costs incurred by Federal, State, and local jurisdictions to administer their prison systems.⁷¹ It also increases the incidence of infectious diseases and mental illnesses, which increases health and medical expenditures throughout the U.S.⁷² Lastly, the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape also increases.⁷³

PRISON RAPE ELIMINATION ACT OF 2003

The 108th Congress passed the Prison Elimination Rape Act in 2003.⁷⁴ The goal of the Act was explicitly stated “to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape.”⁷⁵ The numerous purposes of this Act are as follows: to establish a zero-tolerance standard for the incidence of prison rape in the U.S.; to make the prevention of prison rape a top priority in each prison system; to develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; to increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; to standardize the definitions used for collecting data on the incidence of prison rape; to increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; to protect the Eighth Amendment rights of Federal, State, and local prisoners; increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment and homelessness; and to reduce the costs that prison rape imposes on interstate commerce.⁷⁶

Congress plans to accomplish these goals by using a number of strategies. First, every year the Bureau of Justice Statistics of the Department of Justice is required to carry out a comprehensive statistical review and analysis of the incidence and effects of prison rape.⁷⁷ This review must include, but is not limited to, both victims and perpetrators of prison rape and prisons and prison systems with a high incidence of prison rape.⁷⁸ In carrying out this review, the Bureau must consider: how rape should be defined for the purposes of the statistical review and analysis; how the Bureau should collect information about staff-on-inmate sexual assault; how the Bureau should collect information beyond inmate's self-reports of rape; how the Bureau should adjust the data in order to account for differences among prisons; the categorization of prisons; whether a preliminary study of prison rape should be conducted to inform the methodology of the comprehensive statistical review.⁷⁹ The Bureau of Justice Statistics must solicit views from representatives of the following: State departments of correction; county and municipal jails; juvenile correctional facilities; former inmates; victim advocates; researchers; and other experts in the area of sexual assault.⁸⁰ The review and analysis shall be based on a random sample of not less than ten percent of all Federal, State, and county prisons, and a representative sample of municipal prisons.⁸¹ The selection shall include at least one prison from each state.⁸² Surveys that provide data for this review must be made available to all in-

⁷⁶ *Id.*

⁷⁷ *Id.* at § 15603.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

mates.⁸³

Under the Prison Rape Eliminate Act, the National Institute of Corrections is required to conduct training and education programs for Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.⁸⁴ Congress has authorized a \$5,000,000 budget to carry out these programs.⁸⁵ They have also made grants available to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape.⁸⁶ The grants may also be used to investigate prison rape, prosecute prison rape, and provide community safeguards.⁸⁷

The Prison Rape Elimination Act also established the National Prison Rape Reduction Commission, which carries out comprehensive legal and factual studies of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States on the government, communities, and social institutions generally including individuals, families, and businesses within such communities.⁸⁸ They then create and submit a report of their recommendations and solutions to specific ongoing problems.⁸⁹ This Commission also has the authority to hold public hearings.⁹⁰

Lastly, not more than 1 year after receiving the report, the Attorney General must publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.⁹¹ The Attorney General cannot create a national standard that would impose a substantial financial burden on the Federal, State, or local prison authorities.⁹² Within ninety days of publishing a new national standard, the Attorney General shall transmit these new laws to the chief executive of each State, the head of the Department of Corrections of each State, and to the appropriate authorities in those units of local government respon-

⁸³ *Id.*

⁸⁴ *Id.* at §15604.

⁸⁵ *Id.*

⁸⁶ *Id.* at §15605.

⁸⁷ *Id.*

⁸⁸ *Id.* at §15606.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at §15607.

⁹² *Id.*

sible for overseeing operations in one or more prisons.⁹³

Although the Prison Rape Elimination Act is by far the greatest attempt by the United States government to reform its prison systems, it is deeply flawed. First, the yearly review and analysis is based on a trivial sample of approximately ten percent of all Federal, State, and county prisons. Second, the Act completely ignores the fact that most inmates do not report sexual violence making it impossible to make a fair and accurate analysis. Third, the Act does not create any legal obligation for the prisons to comply with the standards set forth. The only consequence of not abiding by the Act is reduction in funding from the government. Without the threat of legal action, the Act simply puts forth “recommendations.”

II. PRISONS IN SOUTH AFRICA

The prison population in South Africa has reached an all-time high. As of 2012, there were 187,000 prisoners incarcerated in the South African prisons.⁹⁴ This gives South Africa the ninth largest prison population in the world.⁹⁵ According to the International Centre for Prison Studies, the official capacity of the prison system is 114,000.⁹⁶ Overcrowding in South African prisons runs at just over 200%.⁹⁷

The percentage of incarcerated males and females in South Africa's prisons is drastically disproportionate.⁹⁸ As of March 2011, there were 162,162 inmates in 241 correctional fa-

⁹³ *Id.*

⁹⁴ *In pictures: South Africa's prison life*, BBC NEWS (Apr. 27, 2012), http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/05/africa_south_africa0s_prison_life/html/2.stm.

⁹⁵ *World Prison Brief*, INTERNATIONAL CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=45.

⁹⁶ *In pictures: South Africa's prison life*, *supra* note 94.

⁹⁷ Laura **Smith-Spark**, *What's life like in a South African prison?* CNN, Feb. 21, 2013, <http://www.cnn.com/2013/02/21/world/africa/south-africa-prison-conditions>.

⁹⁸ *Statistical Information*, DEPARTMENT CORRECTIONAL SERVICES: REPUBLIC OF SOUTH AFRICA, <http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx> (last visited Feb. 23, 2014).

cilities throughout the country.⁹⁹ Of those offenders, approximately 158,400 were male and 3,762 were female.¹⁰⁰ Out of the 241 correctional facilities, eight are for women, thirteen are for youths, 129 are for men, and ninety-one are mixed with women and men.¹⁰¹ There are only two private prisons in South Africa.¹⁰²

Due to the severe overcrowding of South African prisons, the living conditions are far below the U.N. Standard Minimum Rules.¹⁰³ Three to four men may share a single cell, or communal cells designed for forty people are jammed with double the number they were intended to hold.¹⁰⁴ Men are sleeping in double or triple bunks.¹⁰⁵ Men in remand for the first year sleep on the floor and then “graduate” to a bunk.¹⁰⁶ Many inmates are kept locked up without cross ventilation for twenty-three hours a day.¹⁰⁷ The air is often thick with cigarette smoke.¹⁰⁸ If they are lucky, they get an hour outside their cell.¹⁰⁹ Some prisons go into lockdown as early as 3 p.m., which leaves the prisoners cooped up for twelve hours or more at a time.¹¹⁰

Furthermore, cell furniture ranges from scarce to nonexistent. Most cells do not have beds and the prisoners are forced to sleep on the floor.¹¹¹ Those who are lucky enough to get a bed, rarely receive pillows, sheets, or blankets, which are often infested with lice.¹¹² Tables, chairs, and desks are also rare.¹¹³

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Prison Conditions in South Africa: Africa Watch Prison Project*, HUMANRIGHTSWATCH.ORG 11 (1994), <http://www.hrw.org/reports/pdfs/s/safrica/safrica942.pdf> [hereinafter *Prison Conditions in South Africa*].

¹⁰⁴ Smith-Spark, *supra* note 97.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Prison Conditions in South Africa*, *supra* note 103.

¹¹² *Id.* at 14.

¹¹³ *Id.* at 12.

The food in South African prisons is often of poor quality and insufficient quantity.¹¹⁴ Some prisons only serve two meals a day.¹¹⁵ The food is often spoiled and makes the prisoners ill.¹¹⁶ In some prisons, food is served in dining halls.¹¹⁷ In others, the food is served in their cells, where the prisoners eat in the presence of foul-smelling toilets while sitting on the bare floor.¹¹⁸ Spoons are the only utensils given, if utensils are given at all.¹¹⁹

Overcrowding is partly due to the lack of efficiency in the South African justice system. One issue is that police are too quick to arrest people, because they have only forty-eight hours from arrest to bring charges.¹²⁰ After they are charged, many suspects cannot afford to make bail or hire a lawyer and are forced to spend months or even years behind bars awaiting trial.¹²¹ Police investigations are often poorly run and courtrooms can be severely overcrowded.¹²²

SEXUAL VIOLENCE IN SOUTH AFRICAN PRISONS

Racial discrimination also plays a big part in the sexual violence that goes on behind prison bars. “It’s a pattern: often white South African men are arrested on frivolous charges, dumped in holding cells with black criminals and raped – and then released without charges the next day...”¹²³ The charges are often spurious, such as speeding, being witnesses to other incidents, or outstanding fines.¹²⁴ They are put in the same cells as dangerous, hardened criminals.¹²⁵ Most of the time, the charges are dropped only after they have been brutalized and

¹¹⁴ *Id.* at 14.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 15.

¹²⁰ Smith-Spark, *supra* note 97.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Police-jail rapes of white SA men is a war crime pattern, supra* note 1.

¹²⁴ *Id.*

¹²⁵ *Id.*

gang-raped in prison cells. Some of these men also reported that the black police egged these rapists on to rape them... to “teach the white man a lesson.”¹²⁶

An unnamed diabetic man aged 52 from Primrose, Germiston is suing the minister of security for 4.3 million after being illegally arrested twice and being raped in police custody the second time. He was put into a detention cell with 30 black inmates at the Witbank police station. He described how four men carried him around naked in the cell while the rest sang and danced. The man became so emotional, the court had to wait for him to continue with his testimony. The inmates forced him to kneel over a rolled up mattress, then they proceeded to sodomize him until he later lost consciousness. The ‘case’ against him for which he had been arrested in the first place, was withdrawn.¹²⁷

In March 2008 in Polokwane (Pietersburg) a young local man named Nico Bouwer, left with his bride, was sodomised repeatedly while in police custody just a few weeks before he was due to get married. He’s since lost his job due to the emotional trauma, and delivers pizzas to stay alive and keep food on the table for his family. A fundraising effort was launched by Rapport newspaper to help pay his medical bills. Bouwers life is totally in ruins after the attack. Mr. Bouwer was on his way home from a friend’s house when his left tyre burst and he hit a light pole and a stop-light. He was taken by ambulance to the Polokwane hospital where he was arrested, and despite being injured in the accident taken to holding cells. He demanded his rights to a phone call but was turned down. In the cell were 25 black inmates. Eight of these black men attacked Bouwer and repeatedly raped him. Some held his arms and forced his face into a pillow while they were sodomizing him. He was only allowed to call his lawyer the next day when he was finally released on bail.¹²⁸

Gang rapes, like these, of white victims in holding cells in South Africa take place on a regular basis and are rarely reported.¹²⁹ These gang rapes by black inmates committed on solitary white victims, are in fact war crimes, acts of aggression in a sexual manner, under conditions of coercion intended to hu-

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

miliate and degrade the victim, and have nothing to do with sexual gratification.¹³⁰

South African prisons are plagued with high levels of sexual violence.¹³¹ Pre-trial detainees, first-time offenders, non-violent offenders, and those who are gay or transgender, physically small or mentally disabled are among the most likely targets of sexual abuse.¹³² Young inmates are also targeted by older, more powerful, prisoners as commodities that can be traded or sold.¹³³ Since inmates are not properly classified, those most vulnerable to sexual violence are commonly housed with predatory gang members in large communal cells.¹³⁴

The most problematic practice in prisons throughout South Africa is the system of “lock-up.”¹³⁵ Each afternoon, inmates are provided their dinner in a paper bag and sent back to their cells, which are locked until the next morning.¹³⁶ “During the late afternoon, evening, and throughout the night, the prisons operate with a minimal staff, leaving inmates to fend for themselves. It is during lock-up that the vast majority of sexual assaults in South African prisons occur.”¹³⁷

“Gangs play an integral role in perpetuating sexual violence in South Africa’s prisons.”¹³⁸ The most notorious South African prison gang is called the “28s.”¹³⁹ The Number Gangs, including the 26s, 27s, and 28s, have their origin in the violence of white rule.¹⁴⁰ The 28s was formed by a group of twenty-eight black prisoners in 1906.¹⁴¹ The gang’s purpose was to re-

¹³⁰ *Id.*

¹³¹ Fact Sheet: *Sexual Violence Plagues South African Prison*, JUST DETENTION INTERNATIONAL, (Mar. 2009), <http://www.justdetention.org/en/factsheets/SouthAfricaFactsheet.pdf>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Allan Little, *Killers Don't Cry*, BBC NEWS, (Sept. 4 2001), <http://news.bbc.co.uk/2/hi/programmes/correspondent/1298829.stm>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

volt against the atrocities of the white prison regime.¹⁴² Mogamat Benjamin holds the rank of “General” in The 28 Gang.¹⁴³ He has been in prison for thirty-four years and he has killed more fellow inmates than he can remember.¹⁴⁴ He has beheaded and mutilated their corpses, and cut out his victims’ hearts in a grim semi-mystical ritual in which the life force of the victim is supposed to pass into the bodies of the killers.¹⁴⁵ In his own words, Benjamin describes his leadership: “I am powerful. I am partly God. No man has a higher rank in Pollsmoor than me. In the camp of the 28s a person’s life is in my hands. The final decision is mine. There are people who I said should be killed and they were killed.”¹⁴⁶

The 28s “developed its own military-style hierarchy, its own elaborate codes of punishment and reward, and its own sexual mores. For what distinguishes the men of the 28s is sex. An intricate protocol determines which new recruits will serve as sexual partners for which established gang members.”¹⁴⁷ The 28’s use rape as a means to recruit and control so-called “wyfies.”¹⁴⁸ “Wyfies” are forced to provide sex and domestic services to other gang members.¹⁴⁹ While the 28s is most often associated with rape and forced prison “marriages,” all of the dominant gangs, including the two other Number Gangs (the 26s and 27s) are also involved in severe sexual abuse.¹⁵⁰ It was as a revolt against sodomy that the second main gang was formed, the 27s.¹⁵¹ They are known in prison as the “men of blood.”¹⁵² Their loyalty to their officers is tested by murdering prison officials and other inmates.¹⁵³ In Pollsmoor Maximum, almost half the prison guards have been stabbed or cut at least

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Allan Little, *supra* note 139.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

once by a member of the 27s.¹⁵⁴ The gang known as “the 26s” prove their loyalty by robbing prison officials and fellow inmates of whatever material possessions can be smuggled in.¹⁵⁵

Late-night soft porn and “adult” films on television are shown to male prisoners at Pollsmoor Prison in Cape Town, South Africa.¹⁵⁶ These “movie nights” are often preceded by the use of alcohol and drugs smuggled into the prison.¹⁵⁷ Young first-time male offenders were forced to walk around naked and were taunted by prison gangsters, who called them women’s names, such as “Britney Spears” and “Whitney Houston.”¹⁵⁸ Before the movies started, beds were pushed together and tents were built with sheets.¹⁵⁹ While these movies were being played, the men grabbed other inmates and raped them, often three or four of them at a time.¹⁶⁰ The main culprits were members of the notorious 26, 27 and 28 prison gangs.¹⁶¹ “If you’re not a gangster, you have no chance.”¹⁶²

In South African prisons, the line between sex and rape is blurred.¹⁶³ “During our interviews with prisoners and ex-prisoners it was tricky to tell whether certain interviewees were more disapproving of the fact that forced sex acts involved only men or that one of the participants was unwilling.”¹⁶⁴ An ex-prisoner provided the following response when asked about why he finally decided to report the sexual abuse by a cell-mate on a recently arrived young prisoner: “You see, for me it is not right for a man to sleep with another man. It’s not right . . . be-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Andrew Ingram & Helen Bamford, *SA prison’s porn rape cocktail*, IOL NEWS, (Nov. 30, 2003), <http://www.iol.co.za/news/south-africa/sa-prison-s-porn-rape-cocktail-1.117896#.UQK4xujKWjc>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Sasha Gear, *Behind the Bars of Masculinity: Male Rape and Homophobia in and about South African Men’s Prisons* 10 SEXUALITIES 209-14 (2007).

¹⁶⁴ *Id.*

cause you are also a man.”¹⁶⁵ In prisons,

the term ‘homosexuality’ is often used as a hold-all term to refer to all sexual encounters involving two men, no matter what the content or terms of the encounter. This usage conflates consensual sexual acts between men with sexual violence involving only men. Some talk about ‘victims’ of homosexuality and people going into prison ‘afraid of homosexuality’ when it is clear that what they are afraid of is being forced into unwanted sex. In a similar vein, an activist organization reported to a parliamentary committee their concern about the common ‘misperception [in prison] that sodomy and rape are the same thing.’

South Africa’s historical criminalization of anal sex between men has largely contributed to this current situation.¹⁶⁶ Before 1998, anal or oral sex between men constituted a criminal offense regardless of whether it was consensual or forced.¹⁶⁷ Currently, there is no legislation or legal category providing for male rape.¹⁶⁸ Rape in South African law currently only relates to vaginal penetration of a female by a male.¹⁶⁹

“Not only are male victims not acknowledged as such, but they are commonly believed to have been turned into ‘women.’”¹⁷⁰ Unfortunately, many countries, including South Africa, have not reached gender equality like others have. This greatly contributes to the rape of men and women in prison. The sense of demolished masculinity and the newly found label of “woman” is central to the immense stigma and shame that keeps most victims suffering in silence.¹⁷¹ These prisoners have now lost their status as a male, and just like their female counterparts outside prison, they are regularly blamed for what has happened to them.¹⁷² In their minds, these men could not even manage to hold on to their manhood and allowed themselves to be turned into women.¹⁷³ Even when released from prison, the-

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 215.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 216.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

se men cannot tell anyone. "Of course they can't tell their families! The wife and children will think 'You're nothing! You've been raped. You are only as good as we women!'"¹⁷⁴

First-time offenders are especially susceptible to manipulation and sexual violence.¹⁷⁵ They are regularly employed as sexual subordinates.¹⁷⁶ In South African prisons, a typical path into being made a "woman" is for a new offender to accept food, drugs, or protection from another prisoner.¹⁷⁷ By doing so he is unknowingly creating a debt, which he will be expected to repay with sex.¹⁷⁸ Men regularly refer to these prisoners as "wives" or "wyfies."¹⁷⁹ This means they are now in long-term relationships known as "marriages," which are initiated with the man raping his new "wife."¹⁸⁰ "Wyfies" are expected to take care of the "home space" (cell) and serve their "husbands" who regulate their interaction with other inmates and prison officials.¹⁸¹ "Husbands," on the other hand, are required to provide materially for their "wives" via smuggling drugs, for example.¹⁸²

Researchers believe that the idea of "marriages" in prisons has somehow come from the traditional views of marriage. According to South African culture, sex is only proper if you are in a marriage.¹⁸³ "You can't rape your wife."¹⁸⁴ Prison "women" are treated the same as regular women in South Africa.¹⁸⁵ The entire prison population is homophobic. In turn, the implantation of a marriage, "can be seen as a conscious strategy to create distance from notions of homosexuality."¹⁸⁶ Furthermore, the fear and disapproval of homosexuality forms a requirement for opposite sexes and is "translated into the search for opposi-

¹⁷⁴ *Id.* at 217.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 218.

¹⁸² *Id.*

¹⁸³ *Id.* at 217.

¹⁸⁴ *Id.* at 218.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 219.

tional stable sex roles (active penetration or passive receiving).”¹⁸⁷ “Thus inmate discourses ensure that raped men vanish, turning them into ‘women’ whose ‘job’ it is to provide ‘men’ with sex.”¹⁸⁸ This way, men are not engaging in homosexual acts, which are frowned upon in South Africa.

AIDS EPIDEMIC IN SOUTH AFRICA

HIV/AIDS is one of the world’s most critical issues.¹⁸⁹ Prisons, South African prisons in particular, are a breeding ground for HIV/AIDS. South Africa is alleged to have one of the highest rates of HIV/AIDS cases in the world and its prisons are alleged to have a rate of infection that is higher than the rate of its civilian population.¹⁹⁰ Approximately one in every seven people living in South Africa is infected with HIV/AIDS.¹⁹¹ The number of HIV/AIDS-related deaths in South African prisons was estimated to have grown by 750% since 1995.¹⁹² Sexual violence plays a large part in the high percentage of HIV positive prisoners. Male on male sexual interaction carries the highest risk of HIV infection, particularly in cases of rape.¹⁹³ “Forced anal intercourse is more likely to result in rectal tearing, which increases the likelihood of HIV transmission because the virus has a greater probability of entering the bloodstream.”¹⁹⁴ HIV transmission is compounded by the presence of untreated sexually transmitted infections (STI’s).¹⁹⁵ Some STI’s, such as herpes and syphilis, result in genital sores, which cause breaks in the skin which increases the likelihood of HIV transmission.¹⁹⁶ The prisoner population has a higher incidence of STI’s and prisoners are often not given their con-

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 217.

¹⁸⁹ Shanta, Singh, *Being a Criminology Ethnographer in a South African Prison: A Search for Dynamics and Prevalence of HIV/AIDS in the Westville Prison, Durban, South Africa*, 15 J. SOC. SCI. 71-82 (2007).

¹⁹⁰ *Id.* at 71.

¹⁹¹ *Id.* at 75.

¹⁹² *Id.* at 73.

¹⁹³ *Id.* at 78.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

stitutional right of access to proper treatment, nor do they use protection or have access to it.¹⁹⁷ “As a result, prisoners are more likely to have untreated STI’s than the general population and are also at greater risk for transmitting and contracting HIV - within and outside of prison.”¹⁹⁸

EFFECTS OF PRISON RAPE IN SOUTH AFRICA

Like in the United States, inmates who have been sexually victimized in South African prisons often take the scars of abuse home with them.¹⁹⁹ When released, these inmates want to reclaim their masculinity. As a result, they take out their anger on women and children. “An offender who has been raped doesn't see a child. He sees an object that he can abuse.”²⁰⁰ One South African inmate describes the experience:

There is no rehabilitation. None. You will come out there the worst possible person you could become. You need to fight off guys who want to fuck you every night. You need to become part of the drug trade just to survive. You need to become part of a gang. You could be in for a non-violent crime and you could come out a serial rapist, a drug dealer and, maybe even a killer.²⁰¹

In addition, South Africa’s severe AIDS crisis is directly linked to prison rape.²⁰² HIV prevalence in South Africa is among the highest in the world, and the rate among prisoners is estimated to be more than double that of the general population.²⁰³ With over 360,000 inmates released back into the community each year, addressing sexual abuse in detention is vital to slowing the pace of the epidemic.²⁰⁴ HIV and other diseases

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Plusnews.org, *SOUTH AFRICA: Dealing with sexual abuse in prison*, JUST DETENTION INTERNATIONAL (Oct. 5, 2012), http://www.justdetention.org/en/jdinews/2012/10_05_12.aspx [hereinafter *Dealing with Sexual Abuse*].

²⁰⁰ *Id.*

²⁰¹ Luka Vracar, *Take a Number: Prison Rape in SA*, PLAYBOY SOUTH AFRICA, (Aug. 2011), <http://playboy.co.za/take-a-number/>.

²⁰² *HIV AND Prison Rape*, JUST DETENTION INTERNATIONAL, <http://www.justdetention.org/en/HIV.aspx>. (last visited Feb. 23, 2014).

²⁰³ *Id.*

²⁰⁴ *Id.*

acquired by inmates during sexual violence in prison bleed into South African families and communities.²⁰⁵

PRISONER RAPE IS TORTURE UNDER INTERNATIONAL LAW

“Rape and other forms of sexual assault in detention are a particularly despicable violation of the inherent dignity and right to physical integrity of every human being; and accordingly constitute an act of torture.”²⁰⁶ The sexual assault of prisoners, whether perpetrated by corrections officers or by other inmates, amounts to torture under international law.²⁰⁷ Torture is prohibited by international conventions and treaties all over the world, including The International Covenant on Civil and Political Rights (ICCPR) and The Convention against Torture and Other Cruel, Inhuman or degrading Treatment or punishment (CAT). The ICCPR “provides that all people, including prisoners, have a broad range of civil and political rights, including that [n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁰⁸

The CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁰⁹

²⁰⁵ *SOUTH AFRICA: Dealing with sexual abuse in prison*, *supra* note 199.

²⁰⁶ *Summary Record of the 21st meeting*, U.N. ESCOR, Comm’n Hum. Rts, 48th Sess., ¶ 35, U.N. Doc. E/ CN.4/1992/SR.21 (1992).

²⁰⁷ Fact Sheet: *Prisoner Rape is Torture under International Law*, JUST DETENTION INTERNATIONAL (Feb. 2009), http://www.justdetention.org/en/factsheets/Prisoner_Rape_is_Torture.pdf.

²⁰⁸ 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).

²⁰⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp.

Based on this definition, four conditions are required for an act to qualify as torture: It must result in severe mental and/or physical suffering; it must be inflicted intentionally; it must be committed by or with the consent or acquiescence of a public official; and it excludes pain and suffering as a result of lawful actions.²¹⁰

Prisoner rape easily meets each element of the CAT definition of torture. Victims are left beaten and bloodied, contract HIV and other sexually transmitted diseases, and suffer severe psychological harm. Sexual violence is used as a tool to punish inmates for misbehavior or to further marginalize vulnerable populations. The corrections staff and prison officials often set up inmate-on-inmate rape by intentionally housing vulnerable inmates with known sexual predators. Furthermore, the failure of corrections officials to acknowledge and to take appropriate steps to prevent and address prisoner rape amounts to state acquiescence in this type of abuse. To ensure that a prisoner's right to be free from torture is protected, both the ICCPR and the CAT have international bodies that closely monitor their implementation in signatory states.²¹¹ The CAT is overseen by the U.N. Committee against Torture (the CAT Committee), and the ICCPR is overseen by the Human Rights Committee.²¹² Both Committees monitor compliance by relying on reports from the signatory countries and from advocacy groups that prepare "shadow reports."²¹³

The protection of persons deprived of their liberty against torture and other cruel, inhumane, or degrading treatment or punishment can be strengthened by non-judicial

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).

²¹⁰ Lukas Muntingh, *Guide to the UN Convention Against Torture in South Africa*, CIVIL SOCIETY PRISON REFORM INITIATIVE (2011), <http://cspri.org.za/publications/legal-guides/Guide%20to%20UN%20Convention%20Against%20Torture%20in%20South%20Africa.pdf>.

²¹¹ *Id.*

²¹² *Dealing with Sexual Abuse*, *supra* note 199.

²¹³ 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, 32 (citing the Prison Rape Elimination Act, 42 U.S.C. § 15601).

means of a preventive nature, based on regular visits to prison facilities.²¹⁴ There is a growing international recognition that prisons must be transparent, have strong internal accountability mechanisms, and be open for external monitoring.²¹⁵ Compared to Canada, the European Union, and even South Africa, the U.S. is severely lagging dangerously behind in allowing the vigorous scrutiny needed to protect inmates from sexual abuse.²¹⁶ In particular, the U.S. has not signed the Optional Protocol to the Convention Against Torture (OPCAT).²¹⁷ The OPCAT establishes a system of regular visits by international and national bodies to prisons.²¹⁸ Unlike other international treaties, the OPCAT focuses on preventing prison rape, rather than merely responding to the abuses that have occurred.²¹⁹ “The OPCAT does not impose new obligations on ratifying states, but instead creates a system for monitoring the requirements already in place through the Convention Against Torture (CAT). By ratifying the OPCAT, the U.S. would give consent for the U.N. Subcommittee on Prevention of Torture (SPT) and a National Preventive Mechanism (NPM) to conduct regular, periodic visits to places of detention.”²²⁰ In addition, these visitors can interview any detainee, with or without witnesses, and have access to records, rules, and other relevant documents.²²¹ The SPT is composed of ten experts who conduct scheduled visits to prison facilities and provide assistance in developing each NPM.²²² The NPM is established by each signatory in whatever

²¹⁴ Optional protocol to the Convention against Torture and Other Cruel, Inhuman or degrading Treatment or punishment, G.A. Res. 57/199, U.N. Doc. a/RES/57/199 (Dec. 18, 2002) [hereinafter “OPCAT”].

²¹⁵ Just Detention International, Fact Sheet, U.N. Optional protocol to the Convention against Torture (OPCAT) (2009).

²¹⁶ *Id.*

²¹⁷ OPCAT, *supra* note 214.

²¹⁸ *Id.*

²¹⁹ INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS AND THE ASSOCIATION FOR THE PREVENTION OF TORTURE, OPTIONAL PROTOCOL TO THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT: A MANUAL FOR PREVENTION 28 (2005) [hereinafter OPCAT Manual.]

²²⁰ *Dealing with Sexual Abuse*, *supra* note 199.

²²¹ *Id.*

²²² OPCAT, *supra* note 214, at Arts. 5, 11.

manner best suits the needs and capacity of that country.²²³

Although, “the federalist structure of the United States – whereby federal, state, and local jurisdictions each retain governmental powers and run their own detention facilities – creates unique challenges to establishing an NPM.”²²⁴ Several other countries with federalist or decentralized governmental structures, such as Mexico, the United Kingdom, Argentina, and Switzerland, have already ratified or signed the OPCAT.²²⁵ South Africa signed the OPCAT in 2006, but to this date has yet to ratify it.²²⁶ The OPCAT provides for flexibility in how the NPM is developed.²²⁷ It relies on human rights commissions, ombudspersons, non-governmental organizations, or composite mechanisms combining elements of such entities.²²⁸ Therefore, there is simply no excuse for the United States to refrain from adopting it and for South Africa to refrain from ratifying it.

PRISON RAPE IS A VIOLATION OF THE EIGHTH AMENDMENT

The Constitution “does not mandate comfortable prisons,”²²⁹ but neither does it permit inhumane ones.²³⁰ In *Helling v. McKinney*, the court held that “the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”²³¹ The Eighth Amendment prohibits “cruel and unusual punishments,” and also places restraints on prison officials from the use of excessive physical force against prisoners.²³² The Amendment also imposes a duty on these officials to provide

²²³ OPCAT, *supra* note 214, at Arts. 7, 18.

²²⁴ *Dealing with Sexual Abuse*, *supra* note 199.

²²⁵ *Id.*

²²⁶ Lukas Muntingh, *supra* note 210, at 38.

²²⁷ *Id.*

²²⁸ OPCAT Manual, *supra* note 219, at 133.

²²⁹ *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

²³⁰ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

²³¹ *Id.*

²³² *See Hudson v. McMillian*, 503 U.S. 1, 112 (1992).

humane conditions of confinement.²³³ All prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must “take reasonable measures to guarantee the safety of the inmates.”²³⁴ In particular, courts have uniformly held that “prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.”²³⁵

By placing these inmates in prison facilities in their own country, the government and its officials assume responsibility for their physical and mental state. Having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.²³⁶ Prison conditions may be “restrictive and even harsh,”²³⁷ but allowing the beating or rape of one prisoner by another serves no “legitimate penological objective.”²³⁸ Being violently assaulted and raped in prison is simply not “part of the penalty that criminal offenders pay for their offenses against society.”²³⁹

This is not to say that every injury of a prisoner suffered at the hands of another, translates into constitutional liability.²⁴⁰ A prison official violates the Eighth Amendment only when two requirements are met: the deprivation of liberty must be “sufficiently serious” and the prison official must have a sufficiently culpable state of mind.²⁴¹ In prison condition cases, courts hold that the state of mind must be one of “deliberate indifference” to inmate health or safety.²⁴² The court in *Farmer v. Brennan* defined “deliberate indifference” in a prison setting. The court said:

Deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will

²³³ *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).

²³⁴ *Id.*

²³⁵ *Cortes–Quinones v. Jimenez–Nettleship*, 842 F.2d 556, 558 (1988).

²³⁶ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

²³⁷ *Rhodes*, 452 U.S. at 347.

²³⁸ *Hudson*, 468 U.S. at 548.

²³⁹ *Rhodes*, 452 U.S. at 347.

²⁴⁰ *Farmer*, 511 U.S. at 834.

²⁴¹ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

²⁴² *Id.*

result. Thus, it is the equivalent of acting recklessly. However, this does not establish the level of culpability deliberate indifference entails, for the term recklessness is not self-defining, and can take subjective or objective forms.²⁴³

There is an overwhelming majority of cases where courts have found an Eighth Amendment violation from sexual abuse in prisons. Eighth Amendment violations were found where: a guard “stroked” a prisoner's nude penis for a few seconds for the guard's own gratification;²⁴⁴ a guard spent five to seven seconds fondling the plaintiff's testicles and penis through the plaintiff's clothing and then while strip searching him fondled his nude testicles;²⁴⁵ during a strip search, guards made sexual explicit comments, forced the inmate to perform provocative acts, and pointed their sticks towards his anal area while he bent over, with no allegation of physical injury;²⁴⁶ a male guard routinely entered a female inmate's cell at night and sexually assaulted her;²⁴⁷ prison officials knew an inmate was being raped, did nothing about it, and failed to refer the case to prosecutors;²⁴⁸ prison officials were told and had seen three male inmates being raped and did not do anything about it.²⁴⁹

SOUTH AFRICA'S SOLUTIONS

Although, South Africa was commended for submitting their initial report under CAT, the Committee still had numerous key issues that were in need of reform.²⁵⁰ Among these, the more important issues are as follows: South Africa must enact legislation criminalizing torture and must provide for penalties giving recognition to the seriousness of the crime of torture; enact legislation implementing the principle of the absolute prohibition of torture, prohibiting the use of any statement obtained under torture and establishing that orders from a supe-

²⁴³ Farmer, 511 U.S. at 826.

²⁴⁴ *Wood v. Beauclair*, 692 F.3d 1041, 1049–51 (9th Cir.2012).

²⁴⁵ *Washington v. Hively*, 695 F.3d 641, 642 (7th Cir.2012).

²⁴⁶ *Calhoun v. DeTella*, 319 F.3d 936, 939–940 (7th Cir.2003).

²⁴⁷ *Morris v. Eversley*, 205 F.Supp.2d 234, 242–43 (S.D.N.Y.2002).

²⁴⁸ *Vosburg v. Solem*, 845 F.2d 763 (8th Cir. 1988).

²⁴⁹ *Butler v. Dowd*, 979 F.2d 661, 664 (8th Cir. 1992).

²⁵⁰ Lukas Muntingh, *supra* note 210, at 43.

rior may not be invoked as a justification of torture; South Africa must ensure that under no circumstances are persons expelled, extradited or returned to a state where they may be subject to torture; all necessary measures should be taken to prevent and combat the ill-treatment of non-citizens detained in repatriation centers; all deaths in detention and all allegations of acts of torture or CIDT committed by law enforcement personnel must be promptly investigated; implement measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of all those deprived of their liberty, in particular regarding health care; children must at all times be detained separately from adults; and establish an effective monitoring mechanism for persons in police custody.²⁵¹

Furthermore, in 2009 the judges of the Constitutional Court of South Africa instituted a system of prison visits, which took effect in 2010.²⁵² Under this system, each judge is allocated a number of prisons to visit during each year.²⁵³ The judge visits and inspects the prison, and then compiles a final report.²⁵⁴ The reports are put into the public domain by being sent to the Minister for Correctional Services, the National Commissioner for Correctional Services, the Portfolio Committee for Correctional Services, and the Inspecting Judge for Prisons.²⁵⁵ At the end of the year, these reports are also published on the South African Constitutional Court website.²⁵⁶ The main objective of this system is for judges to inform themselves about prison conditions and how prisons work.²⁵⁷ Judges ultimately guard the constitutionality of the correctional system and being well-informed about prison conditions is neces-

²⁵¹ *Id.*

²⁵² *Prison Visits Reports: Constitutional Court Judges' Prison Visits*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/PrisonVisits/PrisonVisits.htm> (last visited Mar. 1, 2013).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

sary to fulfill this duty.²⁵⁸ Also, this system helps monitor and improve prison conditions.²⁵⁹ Judges cannot take over the job of the judicial inspectorate for prisons, but as the inspectorate's report itself indicates, judges' visits help to ensure humane conditions and efficient, clean administration.²⁶⁰ Lastly, it enables individual prisoners to make reports and lodge complaints on the spot to the visiting judge, where appropriate confidentially is provided, and the judges can relay problems directly to the National Director of Public Prosecutions or to Legal Aid South Africa for legal action.²⁶¹

In addition to these attempts to reform its prison system, the South African government has recently come up with a more unconventional solution. In 2012, the South African government stated that it could release more than 35,000 convicted criminals from their sentences to reduce the severe overcrowding in the country's jails.²⁶² Police minister, Nathi Mthethwa, confirmed that in May 2012, approximately 20,855 probationers and parolees and 14,651 sentenced inmates would be released conditionally or unconditionally following assessment on a special remission of sentence program.²⁶³ The special remission will grant all sentenced inmates, probationers, and parolees a six-month remission of sentence.²⁶⁴ The granting of special remissions in South Africa excludes people incarcerated for aggressive, sexual, firearm, and drug-related offenses.²⁶⁵ This will reduce the level of overcrowding in prisons from thirty-four percent to approximately twenty percent.²⁶⁶

The public has correctly criticized this bold move. First, it reduces the deterrent of custodial sentences, in a country

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Bill Corcoran, *Overcrowding could see over 35,000 prisoners released in South Africa*, THE IRISH TIMES, May 1, 2012, <http://www.irishtimes.com/news/overcrowding-could-see-over-35-000-prisoners-released-in-south-africa-1.512039>.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

where crime remains at epidemic levels.²⁶⁷ Also, the South African government has been accused of using the mass release of prisoners as a smokescreen behind which a number of high-profile South African political party (ANC) members will also gain their freedom.²⁶⁸ In addition, it has been confirmed that the South African President's former financial advisor, Mr. Shaik, who was convicted of fraud and corruption in 2005 and sentenced to fifteen years imprisonment, will benefit from this release.²⁶⁹ A former police chief, Jackie Selebi, who recently began a fifteen year sentence for accepting bribes, is also eligible to benefit from this program.²⁷⁰

Although it is commendable that the South African government recognizes its severe prison overcrowding issue, this solution will not solve the problem. It is not hard to believe that this move was politically motivated. Releasing prisoners would seem to be a simple solution on the surface, but it will have grave consequences. Instead, the South African government should focus on bringing its prisons up to U.N. standards and reducing the country's overall crime rate. The solution to prison overcrowding cannot simply be that easy.

CONCLUSION

Awareness is a powerful tool in constructing change. People cannot change something that they do not fully understand. Punishment within punishment is not permissible anywhere in the world. Individuals in all countries must demand that more be done about the prison rape epidemic circling the globe. Human rights exist behind bars as well as in society.

-“It is said that no-one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”- Nelson Mandela²⁷¹

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *In pictures: South Africa's prison life, supra note 94.*