

SISTERS IN MISERY: UTILIZING INTERNATIONAL LAW TO PROTECT UNITED STATES FEMALE PRISONERS FROM SEXUAL ABUSE

I. INTRODUCTION

[Robin's nightmare began on February 24, 1994, when the first-time offender] was halfway through a 33-month sentence for credit card fraud at the Federal Correctional Institution in Dublin, California. . . . She complained when the prison authorities put her and several other women in the men's "Secured Housing Unit (SHU)." But nothing happened to help her. Robin complained she was visible to male inmates and guards 24 hours a day, including when using the toilet and when she was in the shower. Still nothing happened. She complained that she was taunted because she was a lesbian: "Maybe we can change your mind." She fought off one attacker in her cell with a broomstick. Still the prison officials did nothing. She gave a sworn affidavit to the authorities naming a guard who sold entry to her cell to male inmates as well as one of her attackers. Still nothing was done to protect her. Some time after midnight on September 25, 1995, three male inmates unlocked the door to Robin's cell. She was handcuffed, then raped and sodomized, suffering severe injuries to her neck, arms, back, vaginal and anal areas. Her attackers called her a "snitch," told her to "keep her mouth shut," and threatened her with continued attacks if she kept complaining.¹

Among the major dilemmas facing incarcerated females in the United States prisons are sexual abuse, rape, and assault. "Few aspects of incarceration are more horrifying than the prospect of sexual exploitation and forcible rape within jail and prison walls. [Prison sexual abuse] is a subject to which society reacts with a combination of fear, disgust, and denial."² Many

1. Amnesty International website, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody*, (Mar. 4, 1999) Factsheets, page 3 (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/factsheets/discrimination.html>>. This report focuses upon the prevalent sexual abuse and human rights violations committed against female prisoners in the United States.

2. Brief of Stop Prisoner Rape, Inc. at § A, *Farmer v. Brennan*, 511 U.S. 825 (1994), available in *Prisoner Assault is Widespread* (visited Oct. 30, 1999) <<http://www.spr.org/docs/farmer/argument.html#a>> [hereinafter SPR Brief]. Stop Prisoner Rape, Inc. (SPR) is a small but growing national non-profit organization dedicated to combating the rape of male and female prisoners and to helping survivors of jailhouse rape.

women in United States prisons and jails are victims of sexual abuse by staff, including sexually offensive language, male staff touching inmates' breasts and genitals when conducting searches,³ male staff watching inmates while they are naked,⁴ and rape.⁵ Despite these continual tortures and abuses, common law provides little or no remedy for these women. Instead, many female prisoners are threatened with additional violence if they complain to anyone about the abuse.⁶ "Most officers will tell you, go ahead and tell—it's your word against mine. Who are they gonna believe? I'm an officer, I have a badge on, I'm in a superior position to you."⁷

Women serving sentences in federal and state prisons find that they are being required to give up much more than their freedom.⁸ More than sixty-nine thousand women are prisoners in the United States, which is more than

3. See Lisa Krim, Essay, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L. J. 85, 86 (Fall 1995).

4. See *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); *but cf.* *Canedy v. Boardman*, 801 F. Supp. 254 (W.D. Wis. 1992), rev'd, 16 F.3d 183 (7th Cir. 1994) (stating that male inmates do not possess a privacy right protecting against being viewed while nude by guards of the opposite sex).

5. See HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, New York, Dec. 1996 [hereinafter *All Too Familiar*]. This report documents pervasive sexual abuse and privacy violations by guards and other correctional department employees in state prisons in California, the District of Columbia, Georgia, Illinois, Michigan and New York. See *id.* The report exposed states' failures to respond to sexual abuse and harassment. See *id.* See *Women Behind Bars: Female Prisoners*, AMERICA, May 1, 1999 [hereinafter *Women Behind Bars*].

6. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-25.html>>; HUMAN RIGHTS WATCH, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, Vol. 10, No. 2(G) (1998) (visited Sept. 16, 1999) <<http://www.hrw.org/reports98/women>> (discussing intense retaliatory behavior by corrections guards and staff against female inmates in Michigan) [hereinafter *Nowhere to Hide*]. This report defined retaliation as "any act by a corrections officer, corrections employee, or official aimed at an inmate in order to punish her for having reported abuse or in order to keep her from reporting abuse." *Id.* at § III.

7. See Amnesty International website, *Stories* at 4 (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/stories/index.html>>, reported by Elizabeth Bouchard speaking on the radio, by telephone from Framingham prison (WBUR (Boston University) broadcast, *Here and Now*, Oct. 16, 1998).

8. The continual sexual assault and surrender of female inmates to this type of abuse is becoming a "common law" part of their prison sentences. "Federal and state laws govern the establishment and administration of prisons . . . and the rights of inmates. [However, it is the same federal and state laws in place for their protection that are condemning them to abuse]." Legal Information Institute, *Prisons and Prisoner's Rights: An Overview* (visited Oct. 29, 1999) <http://www.law.cornell.edu/topics/prisoners_rights.html>. "[A female prisoner] does not have full constitutional rights, [however, s]he is protected by the constitution's prohibition of cruel and unusual punishment (see Amendment VIII)." *Id.* It has been determined that the Equal Protection Clause enumerated in 14th Amendment applies to prison inmates. See *id.*

a five hundred percent increase since the 1980s.⁹ "And [along] with the increase in numbers has come a decrease in rights."¹⁰ It is uncontested that female prisoners should lose some rights. However, the right to be treated with the respect and dignity owed to any human being, and the right not to be subject to torture or cruel, inhumane, or degrading treatment is unconditional.¹¹

Human rights violations are becoming a daily part of life for female inmates across the country.¹² The lack of oversight and disciplinary actions on the part of those charged with the responsibility fuels the climate of sexual abuse by prison guards.¹³ Singer and actress Michelle Phillips, at an Amnesty International press conference stated:

I cannot understand why female inmates are not protected from sexual assault in prison and why their jailers or male inmates often attack them. . . . My question to the U.S. government and the American people is how can we demand that other countries respect the human rights of their citizens when we don't respect them ourselves.¹⁴

The sexual assaults against imprisoned women continually increase despite

9. See Bureau of Justice Statistics, Press Release, *The Nation's Prison Population Grew by 60,000 Inmates Last Year, the Largest Increase Since 1995*, Aug. 15, 1999. In 1998, the federal prison population grew by almost sixty thousand inmates. See *id.* The rate of women incarcerated increased 6.5%, exceeding that of men which increased only 4.7%. See *id.* See Bobbie Stein, *Sexual Abuse: Guards Let Rapists into Women's Cells*, THE PROGRESSIVE 23 (1996).

10. Stein, *supra* note 9.

11. See Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139 (1995). When the United Nations drafted the Universal Declaration of Human Rights, the Organization of American States adopted the American Declaration of the Rights and Duties of Man. *Id.* at 143. The American Declaration was not intended to be legally binding. See *id.* In pertaining to prisoners, the American Declaration provides that every individual has the right to humane treatment during custody and no accused is to receive cruel or unusual punishment. See *id.*

12. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/overview.html>>. "Three international human rights groups have criticized our country for turning our women's prisons into peep shows and whorehouses." Geraldo Rivera, *Women in Prison: Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999) available at <<http://www.msnbc.com/news/309802.asp>>. Mr. Rivera explored the growing problems women face while serving time in prison, their rejection by United States courts, and the lack of medical care available. See *id.*

13. See *id.*

14. Media statement of Michelle Phillips at Amnesty International's *Not Part of My Sentence Press Conference* (Mar. 4, 1999) available at <<http://www.amnesty-usa.org/rightsforall/women/conference/michelle.html>>.

extensive human rights legislation and laws proscribing such treatment both nationally and internationally.¹⁵

The international community extended its protection against cruel, inhumane, or degrading treatment or punishment, including sexual violations against women in prisons, by establishing the Universal Declaration of Human Rights and the Declaration on the Elimination of Violence against Women.¹⁶ The United Nations (U.N.) Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."¹⁷

International standards attempt worldwide consensus toward the preservation of human equality and dignity.¹⁸ The United States and other nations began recognizing the need for international protection with the adoption of the Universal Declaration of Human Rights by the United Nations.¹⁹ Consequently, "the attitude of the international community toward

15. See Steven A. Holmes, *Rape of Women Prisoners Increasing: Groups Say They Try to Help Win Some Cases, but Prisons Often Say Sex Was Consensual*, DALLAS MORNING NEWS, Jan. 19, 1997, available in 1997 WL 2640195. This article reported an incident where a prison guard raped a female inmate and then tossed his used condom on the bed and told her to flush it down the toilet. See also Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It's... A 13-Year Nightmare*, LOS ANGELES TIMES, Dec. 30, 1992 (detailing incidences where guards not only photographed women engaged in sex acts, they took inmates off the grounds to work as prostitutes). The alleged abuses discussed in the article go back as far as 1979. See *id.* See also Beth Stephens, *Problems of Proving International Human Rights Law in U.S. Courts: Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191 (1996) (noting that international law has begun to recognize violence against women as a human rights violation).

16. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810, Dec. 10, 1948. The United Nations General Assembly unanimously adopted the Declaration, which articulated fundamental human rights for all and provided a worldwide standard for the preservation of human equality and dignity. See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996) (stating that the Universal Declaration of Human Rights has become incorporated into customary international law binding on all states); Declaration on the Elimination of Violence Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. 46/A/34/46 (1980). The Declaration was entered into force on Sept. 3, 1981. See *id.* It created a reporting procedure requiring signatories to submit information about action taken concerning remedying discrimination against women. See *id.* The Declaration on the Elimination of Violence against Women was the first international human rights instrument which exclusively and explicitly addressed the issue of violence against women.

17. See Declaration on the Elimination of Violence Against Women, *supra* note 16, art. 1.

18. See Universal Declaration of Human Rights, *supra* note 16, art. 2.

19. See *id.* For a discussion on international human rights law and how these laws apply to American jurisprudence, see William D. Auman, *International Human Rights Law: A Development Overview and Domestic Application Within the U.S. Criminal Justice System*, 20 N.C. CENT. L.J. 1 (1992). A declaration is merely a general statement of intent or principle

the treatment of prisoners has evolved into a formal recognition of basic prisoners' rights."²⁰ The United States ratified international conventions and covenants²¹ which can be used to protect women from sexual violence occurring in U.S. prisons.²²

In 1900, the United States Supreme Court clarified that it would enforce the dictates of international law, stating that: "International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."²³

Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) and the International Covenant on Civil and Political Rights (ICCPR), the rape of a female prisoner by a correctional officer constitutes torture, and sexual abuse violates the right to be treated with respect for human dignity and the right to privacy.²⁴ The United States ratified the ICCPR in 1992 and the Convention Against Torture in 1994.²⁵ The United States must use international laws to its advantage by first recognizing the assault of female inmates as the human rights abuses they are and then drawing upon them for inmates' protection.

declared by a group or organization. *See id.* at 7. It is not necessarily signed, ratified or adopted by individual nations. *See id.*

20. *See* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 761 (1994).

21. Dissimilar to declarations, covenants or conventions legally bind governments who sign and ratify them. Auman, *supra* note 19, at 8. Therefore, a government which signs a convention or covenant only signifies an intention to ratify, but is not bound until the treaty's ratification. *See id.*

22. *See* Amnesty International website, *United States of America, Rights For All* (visited Nov. 12, 1999) <<http://www.rightsforall-usa.org/info/report/r02-htm>>. Since many human rights standards adopted by the international community are not treaties, they have little legal power. *See id.* However, since governments must first negotiate the treaties and then have the treaties adopted by their political bodies, the treaty is provided certain moral force. *See id.* Additionally, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also contains standards on how prisoners should be treated. *See id.*

23. Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refolement*, 1 YALE HUM. RTS. DEV. L.J. 2, ¶51 (1999) <http://diana.law.yale.edu/hrdlj/vol02/keller_kathleen_note.htm#p051> (stating that customary international law is now considered a type of federal common law which is supreme over state law based on Article VI of the Constitution); *see also* The Paquete Habana, 175 U.S. 677 (1900) (holding that international law is a part of United States law).

24. *See* Amnesty International website, (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-01.html>>.

25. *See* Amnesty International website (visited Sept. 1999) <<http://www.amnesty-usa.org/rightsforall/women-002.html>>.

Part II of this Note discusses the background of violence, retaliation, and pervasive sexual abuse aimed toward female inmates in U.S. prisons, citing prison statistics as well as discussing the background history of women prisoners. Part III explores why the sexual misconduct and abuse occurring in United States prisons constitute rape, torture and inhumane treatment, so as to fall within the purview of international law. Part IV chronicles the use of international human rights law to protect female inmates from sexual misconduct and abuse, specifically focusing on the Convention Against Torture and the IICPR, the United States' ratification of both laws, and the application of the international human rights issues to prisoners. Part IV further explores what role these international laws play in protecting United States female prisoners from rape, other sexual assault, sexual extortion, and groping during body searches. Part V discusses briefly the international human rights standards in China and its application of international human rights laws. Finally, Part VI details recommendations for solutions to the abuse problem in the United States.

II. A BACKGROUND OF FEMALE SEXUAL ABUSE IN UNITED STATES PRISONS

Each day, females incarcerated in United States prisons face rape, sexual assault, and other abuse.²⁶ "Rape in prison is hardly new—but with more and more women doing time, the Big House is being transformed into a veritable rape camp."²⁷ For many years, the United States court system neglected sexual abuse against female prisoners, refusing to recognize the serious human rights violations involved.²⁸

Further, the extensive abuse of female prisoners rarely received national attention until seven or eight years ago.²⁹ Eventually, incidents of prison staff sexually molesting and assaulting female inmates started gaining attention.³⁰ "Numerous female inmates in three Washington, D.C. prison and jail facilities [described being] awakened at two or three in the morning for a [medical . . . or legal visit] only to be led into the kitchen, the clinic, the visiting hall, or a

26. See Amnesty International website, *supra* note 25. Sexual abuse persists because women feel useless to complain. See *id.* The continued rapid growth of the female inmate population compounds the sexual abuse. See *id.*

27. Christopher D. Cook & Christian Parenti, *Rape Camp USA*, INSTITUTE FOR PUBLIC AFFAIRS 14, Dec. 27, 1998.

28. See *id.* The 1996 Prison Litigation Reform Act (PLRA) requires inmates to pay exorbitant court fees to file suit and imposes stiff penalties for sloppy lawsuits. See *id.* This law chills drastically the female inmates who attempt to combat sexual abuse and violence. See *id.*

29. See Nina Siegal, *Stopping Abuse in Prison: Widespread Sexual Abuse of Women Prisoners*, THE PROGRESSIVE, Apr. 1, 1999. Incidences of female inmates being molested by prison staff gained attention through human-rights groups, legal cases brought by the inmates and a shift in governmental policy. See *id.*

30. See *id.*

closet to [be raped]."³¹ Additionally, facilities denying conjugal visits had inmates that still became pregnant.³² "The sex involved not just correctional officers. It involved chaplains, administration, deputy wardens, contractors, and food service workers . . . [including] female staff."³³

As the sexual abuse of female inmates raced to the forefront of America's consciousness, the female inmate population steadily increased.³⁴ Alarming statistics show approximately 138,000 women are currently incarcerated in United States jails and prisons.³⁵ Incarcerated females in United States prisons come from extremely diverse backgrounds, and they are confined for various criminal and civil offenses.³⁶ Most female inmates are incarcerated for nonviolent crimes and have minimal or no prior criminal history.³⁷ Occasionally, women enter correctional facilities pregnant and give birth while serving their sentences.³⁸

31. *Id.*

32. *See id.*

33. *Id.*

34. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Survey of State Prison Inmates, 1991*, NCJ-145321 (Mar. 1994) [hereinafter *Special Report, Survey*]. The Bureau of Justice Statistics conducted a 1991 survey of inmates in 277 state correctional facilities nationwide. *See id.*

35. *See* Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/factsheets/assault.html>>. The number of women in state prisons grew 75% from year-end 1986 to year-end 1991, reaching almost 39,000 by June 1991. *See Special Report, Survey, supra* note 34. The number of men in prison increased only 53% during that same time. *See id.* About 71% of all state female prisoners had served a prior sentence to probation or incarceration, including 20% who had served a sentence as juveniles. *See id.*

36. *See id.* Women in state prisons in 1991 were most likely to be black (46%), age 25 to 34 (50%), unemployed at the time of arrest (53%), high school graduates, holders of a GED, or with some college (58%), and never married (45%). *See id.* The percentage of women in prison who had never married increased from 42% in 1986 to 45% in 1991. *See id.* About one-third of female inmates in both years were either separated or divorced. *See id.* Female prisoners who were tested for the human immunodeficiency virus (HIV), and reported the results, were more likely to test positive than male prisoners. *See id.*

37. *See id.* Women incarcerated for violent offenses included about three in ten female inmates in 1991, down from four in ten in 1986. *See id.* Despite this decrease in the proportion of violent female inmates, the number of women sentenced for a violent offense rose from 8,045 to 12,400 during a 5-year period. *See id.* About 28% of the women reported no previous sentences to incarceration or probation, compared to 19% of the men. *Id.* Four in ten women had a history of violence. *See id.* Nearly half of all women in prison were currently serving a sentence for a nonviolent offense and had only nonviolent offenses for prior convictions. *See id.* *See also* Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/factsheets/drugs.html>>.

38. *See* Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/factsheets/children.html>>. Thirteen hundred babies were born to women in prison in 1997-1998. *See id.* In only a handful of states are inmates allowed to keep their children for limited time periods. *See id.* Frequently, the infant is removed soon after birth. *See id.* More than three-quarters of all women in prison had children, and two-thirds of the women had children under age 18. *See Special Report, Survey supra* note 34. Regardless of race, the children's grandparents were the single most common category of care givers. *See*

In addition, the majority of women are in prison for economic crimes. The most typical convictions include property crimes, such as check forgery and illegal credit card use.³⁹ However, many women are also incarcerated for drug related offenses.⁴⁰ Moreover, many women committing violent crimes were defending themselves or their children from abusive husbands, fathers, and lovers.⁴¹ The women overcrowding United States prisons may remind us of ourselves, and are similar to mothers,⁴² daughters, and sisters that we interact with every day who have found themselves in egregious situations.

Another equally alarming statistic indicates that seventy percent of the correctional officers in women's prisons are male.⁴³ As a result, male correctional officials often watch women undressing in the shower, or on the toilet.

No certain type of woman becomes the target for sexual assaults, but several factors, such as age, sexual orientation, and race play significant roles.⁴⁴ Particularly vulnerable, first-time, young, or mentally ill prisoners often suffer more sexual misconduct.⁴⁵ Lesbians and transgendered prisoners

id. Nearly 10% of the women reported that their children were in a foster home, agency, or institution. *See id.* "Among the most egregious indignities to which pregnant women are subjected is that they are shackled while being transported to local hospitals to deliver their children . . ." *Women Behind Bars*, *supra* note 5.

39. *See Special Report, Survey*, *supra* note 34. In 1991, 10% of female inmates were in prison for fraud (which includes forgery and embezzlement), down from 17% in 1986. *See id.*

40. *See Amnesty International website*, *supra* note 37. From 1986 to 1996 the number of women sentenced to state prison for drug crimes increased tenfold. *See id.* Nationally one-in-three women in prison and one-in-four women in jail are incarcerated for violating a drug law. *See id.* Nearly one-in-three female inmates were serving a sentence for drug offenses in 1991, compared to one-in-eight in 1986. *See Special Report, Survey*, *supra* note 34. This increase in sentenced drug offenders accounted for 55% of the increase in the female prison population between 1986 and 1991. *See id.*

41. *See Amy Laderberg, "The Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 (1998); Karen D. McDonald, Note, *Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women*, 44 WAYNE L. REV. 289 (1998); Report by the Bureau of Justice Statistics, Selected Findings, *Domestic Violence: Violence Between Inmates*, NCJ-149259, Nov. 1994 [hereinafter *Selected Findings*].

42. *See Amnesty International website*, *supra* note 38.

43. *See Amnesty International website* (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/stories/elizabeth.html>>. Since the Civil Rights Act of 1964, prohibitions have been placed on U.S. employers who attempt to deny a person a job based on gender. *All Too Familiar*, *supra* note 5, at 2. This created serious disparity resulting in male correctional officers numbering twice the number of female officers, and in some facilities the disparity is even greater. *See id.* *See generally* Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1 (1999) (exploring the reliance on gender to promote the employment opportunities of females).

44. *See Jurado*, *supra* note 43.

45. *See id.*

find themselves singled out by officers because of the prisoners' sexual preferences.⁴⁶ Prison staffs pressure female inmates into sexual relations by depriving them of necessary feminine needs, withholding privileges, and granting extra favors to those who cooperate.⁴⁷ Often, because the female prisoner completely depends upon the correctional officers for basic necessities, the threat of withholding these items leaves the inmate feeling that she has no other choice but sexual submission.⁴⁸

A. Retaliation

The exact number of sexually assaulted female prisoners is unknown.⁴⁹ Generally, ongoing sexual assaults go unreported.⁵⁰ Human Rights Watch reported the Department of Justice's finding that fear of retaliation prompted female inmates not to report abuse.⁵¹ One report states:

There's a Bosnia-like epidemic of rape and psychosexual torture going on inside America's prisons. In public and private facilities across the United States, female inmates are routinely forced into performing strip teases, lap dances and sexual favors. They are raped regularly by guards, medical

46. *See id.* *See also* Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women/stories/robin.html> (describing the horrifying details of assault, sodomization, and rape which Robin, a homosexual female prisoner, experienced while incarcerated).

47. *See* Amnesty International website, *supra* note 46.

48. *See id.* "Even in those cases where an officer engages in sexual relations with a prisoner absent any form of pressure or exchange, he should still be liable for a serious criminal offense." *Id.* ¶ 13.

49. *See Women Behind Bars*, *supra* note 5; *Nowhere to Hide*, *supra* note 6; and Cook & Parenti, *supra* note 27.

50. *See* Cook & Parenti, *supra* note 27. *See also* Richard D. Vetstein, Note, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863 (1997) (explaining increased rampant nature of prison rape and deadly implications since female inmates fail to report assaults). Although this Note does not discuss male prison rape, some researchers estimate that of the forty-six million Americans entering the criminal justice system, ten million will be raped while in custody. *See id.* One expert testified that the actual number of rapes in prison may be five to six times greater than the number of reported assaults. *See id.* at 870.

51. *See Nowhere to Hide*, *supra* note 6. The Department of Justice concluded that the fear of retaliation and vulnerability prohibits inmates who would otherwise report sexual abuse and assaults. *See id.*

staff and even male prisoners—who pay corrections officers for access to women inmates housed in adjoining prison wings.⁵²

Female inmates are left to the mercy of the correctional officers once they decide to report an assault. Thus, inmates fear reporting assaults.⁵³ Often, the prisoner's allegations are not believed, and she simply returns to an environment where she faces retaliation from her abuser for speaking out.⁵⁴ This leads to many female inmates serving their sentences in silence and submission, merely perpetuating the abusive behavior.

Retaliation by a correctional officer can consist of verbal harassment,⁵⁵ intimidation, abusive pat-downs, denial of privileges,⁵⁶ rape, sodomization, and physical abuse. In many states, guards can access and are encouraged to review the inmates' personal history files. Inmates' files usually include complaints they reported against officers or other prison authorities.⁵⁷ "By leaking [this] private information . . . prison officials coerce women prisoners and staff into silence and insulate themselves from scrutiny."⁵⁸ In addition, allowing access and review of files creates a "chilling effect" on inmates reporting abuses.⁵⁹

"As . . . guards wield near-absolute power over the women, retaliation can be devastating to the women's security, health, and psychological well-

52. Cook & Parenti, *supra* note 27.

53. See *Nowhere to Hide*, *supra* note 6 § III. Heather Wells complained about sexual contact with a prison cook, which landed her in solitary confinement. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/stories/heather.html>>. She was warned never to accuse staff or report sexual misconduct or she would again suffer the consequences. See *id.*

54. See Amnesty International website, *supra* note 7.

55. See Amnesty International website, *supra* note 6. In November 1998, Valley State Prison correction officials in California informed Amnesty delegates that prisoners' rights were specified in writing and retaliation was not a problem. See *id.* Contrary to Valley State reports, the prisoners continued to report that they suffered verbal abuse and repeatedly had their possessions searched for complaining. See *id.*

56. See *Nowhere to Hide*, *supra* note 6. Guards not only threaten the prisoner's children, but also threaten to revoke visitation rights as a means of silencing the women. See *id.*

57. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/assault.html>>.

58. *Id.* Occasionally, correction officials punish inmates by segregation and security status change, which may prolong jail sentences. See *id.*

59. See *Nowhere to Hide*, *supra* note 6. This report discusses how correction officials make no attempt to keep the names of prisoners who file complaints away from the correctional officer committing the sexual assault. See *id.*

being.”⁶⁰ The Human Rights Watch’s⁶¹ 1996 and 1998 reports⁶² detailed the terrifying experience of being a female inmate in a U.S. prison.⁶³ The Human Rights Watch report discusses that a large number of women who complained experienced retaliation from the accused officers, their colleagues, or other inmates.⁶⁴ Additionally, the report stated that the Department of Justice should thoroughly investigate any complaints received by correction departments.⁶⁵

The report further discussed retaliation methods, such as guards sexually and physically assaulting prisoners involved in legal action against the Department of Corrections and confiscating legal mail as contraband; guards subjecting prisoners to unnecessarily intrusive body searches; guards verbally harassing inmates and threatening them with physical or sexual abuse; and staff falsely reporting inmate misconduct.⁶⁶ An unfortunate consequence reported is that “[i]f a guard has been reported by an inmate for sexual abuse, he may turn to his colleagues for assistance in retaliating against her.”⁶⁷ Retaliation of this nature creates difficulty for correctional facilities too since no link may exist between the retaliatory behavior of one guard and the actions of a separate guard carrying out his duties.⁶⁸

Further, United States courts have treated sexual assaults against women prisoners with leniency;⁶⁹ thus, “correction[al] employees continue to engage in abuse because they believe they will rarely be held accountable, administratively, civilly, or criminally.”⁷⁰ “Prisoner rape [and sexual assault]

60. *Id.* ¶ 18.

61. Human Rights Watch is an organization dedicated to protecting the human rights of people around the world. The organization investigates and exposes human rights violations.

62. See *Nowhere to Hide*, *supra* note 6.

63. See *id.* The report found that “[i]f you are sexually abused, [in a women’s correctional facility], you cannot escape from your abuser.” *Id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. *Id.*

68. See *id.*

69. See *Downey v. Denton County*, 119 F.3d 381 (5th Cir. 1997) (holding that inmate sexually assaulted and impregnated did not prove supervisor knew the substantial risk of harm); *Carrigan v. Delaware*, 957 F. Supp. 1376 (D. Del. 1997) (finding that inmate raped and threatened by officer failed to give administration notice of the risk of harm); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995) (finding no constitutional violation against guard sexually harassing inmate); *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997) (holding that the relationship between inmate and prison employee was consensual); *Laderberg*, *supra* note 41.

70. *All Too Familiar*, *supra* note 5 at 1. See also Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998) (discussing widespread leniency with which offending officers are treated); but cf. *Laura Neergaard, 14 Are Indicted in Georgia Prison Sexual Abuse Case*, BOSTON GLOBE, Nov. 14, 1992, available in 1992 WL 4201362 (discussing that at least 100 inmates are under a protective court order to prevent retaliation by correctional

is aided and abetted by a legal system in which inmates are deemed incurable criminals, forever guilty until proven innocent."⁷¹ The United States court system routinely places some of the responsibility and blame on the inmates themselves.⁷² This leaves female inmates with further feelings of violation, guilt, fear, and shame.

This may lead to the question of why other correctional officers do not speak out about the retaliation and sexual abuse. Unfortunately, officers wishing to do so often face the prospects of losing their job, physical harm, or their supervisor setting them up and getting them fired.⁷³

"By failing to monitor vigorously for retaliatory behavior and disciplin[ing] guards and employees who participate in retaliatory behavior, the correction's department sends a message to both the women and the guards that correction's employees may abuse, harass, threaten, and harm women with impunity."⁷⁴ Sadly, this leaves female inmates with no power over the correctional officers, and inmates continue to serve sentences suffering worse treatment and more severe abuse after reporting their attackers.

officers or prison staff).

71. Cook & Parenti, *supra* note 27. "States' failure to uphold their own laws regarding custodial sexual misconduct reflects their reluctance to prosecute such crimes, largely because of an ingrained belief . . . that the prisoner was complicit in the sexual abuse committed against her." *Id.* See Stein, *supra* note 9.

72. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/laws.html>>. Amnesty International detailed a survey of statutes on custodial sexual contact. See *id.* The abusive nature of sexual relationships between guards and inmates needs to be recognized. See *id.* Consensual sex cannot exist behind bars based on the imbalance of power between inmates and guards. See *id.* Seven states do not possess laws criminalizing consensual sex between inmates and staff. See *id.* at <<http://www.amnesty-usa.org/rightsforall/women/action.html>>. They include Alabama, Massachusetts, Minnesota, Utah, Vermont, West Virginia, and Alaska. See *id.* Since Amnesty's report was released, Illinois, Montana, Nebraska, Virginia and Washington enacted laws protecting female inmates. See *id.*

73. See *Nowhere to Hide*, *supra* note 6 at <http://www.hrw.org/reports98/women/Mich-05.htm#P380_96183>. Officers wishing to report abuse are afraid the crooked officers might do something to them. See *id.* "A lot of [officers] know what's right and what's wrong, but they don't have the guts to put up with it on a daily basis . . . How are you going to protect [officers] . . . because there's no way they're going to be able to function [in the facility] afterwards." *Id.* (quoting the deposition of Michigan Correctional Officer Julie Kennedy-Carpenter on April 13, 1998).

74. *Nowhere to Hide*, *supra* note 6, at 4.

II. SEXUAL MISCONDUCT AND RAPE AS TORTURE

Rape occurs in every prison system in every state, every city, and every town.⁷⁵ Inmate rape victims are being denied potential legal protections and remedies that unincarcerated women possess. Rape is defined as the unlawful carnal knowledge of a woman by a man, forcibly and against her will, or without her consent.⁷⁶ Rape is primarily directed toward women; thus, women are acutely vulnerable.⁷⁷ Between June 1990 and October 1991, 1.3 million American women became victims of rape or attempted rape.⁷⁸ In 1990, the number of rapes rose faster than the rate of any other major crime.⁷⁹

In most cases, men rape out of anger and a need to overpower, dominate, and humiliate.⁸⁰ However, correctional officers perpetrating sexual assault control daily nearly every aspect of the inmate's life.⁸¹ "[Officers] have used their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so."⁸² Regrettably, for female inmates, rape cannot always be avoided regardless of the precautions taken.⁸³

75. See Charlene Muehlenhard et al., *Definitions of Rape: Scientific and Political Implications*, 48 J. SOC. ISSUES, 23 (1992).

76. See 65 AM. JUR. 2D Rape § 1 (1972). The United States protects its citizens under laws such as the Eighth Amendment to the U.S. Constitution, which prohibits the unnecessary and wanton infliction of pain.

77. See Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197 (1992); Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996). "[R]ape is not primarily a sexual act . . . [r]ape is primarily an act of violence with sex as the weapon." *Id.* at 1920. "The view that rape is a private, sexual act may be one of the greatest obstacles to the classification of rape as torture." *Id.* at 1943.

78. See *id.* at 2198. Reports by the Bureau of Justice Statistics estimate 1.5 million women and 123,000 men were raped between 1973 and 1982. See *id.* at 2199.

79. See *id.*; *Special Report, Survey*, *supra* note 34; Holmes, *supra* note 15.

80. See Willis, *supra* note 77, at 2211. A woman's fear of rape acts as a constraint that ultimately defers her to the man's control. See *id.* at 2207. "Rape is not a natural product of the male sex drive, but rather an expression of sex discrimination." *Id.* at 2206.

81. See Cook & Parenti, *supra* note 27.

82. Siegal, *supra* note 29. See Holmes, *supra* note 15; and Cook & Parenti, *supra* note 27.

83. July 20, 1995: The air inside the D.C. jail is thick with humid heat. Jail staff have opened all the cells. Soul music bounces off the sticky concrete walls and steel bars. Down at the end of the tier the officer in charge, Yvonne Walker, starts dancing and inmates join in. Before long, one prisoner is undulating on a table, half-naked. Soon, Walker is partially disrobed, while another inmate is performing a sex trick with a lit cigarette. In a toxic blend of chaos and coercion, corrections officers begin calling for other inmates to strip. Sunday is a dancer, too, someone shouts, referring to inmate Sunday Daskalea, who is hiding in her open cell. A prison staffer dispatches a posse of

Women experience different conditions upon incarceration than men.⁸⁴ In *Jordan v. Gardner* the court stated women's reactions to rape and searches by male guards are different because most women have been sexually abused before coming to prison.⁸⁵ However, the majority of male rapes occur in prisons and other correctional facilities.⁸⁶

Thus, women entering prison have a greater fear of being sexually assaulted since they are disproportionately victims of such crimes.⁸⁷ "Men are rarely victims of sexual assault, [and] may view sexual conduct in a vacuum without a full appreciation of the . . . underlying threats of violence that a woman may perceive."⁸⁸ Although many people argue that the causes of and

three inmates to retrieve her. The guards, she is told, will be "mad" if she doesn't perform for the crowd.

Cook & Parenti, *supra* note 27.

84. See *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993). Women are primarily the caretakers in the home and experience great anguish upon separation from children and family. *Women Behind Bars*, *supra* note 5. There is gross inequality between men and women in the home, the workplace, and on the streets because men have significant power over women. See Willis, *supra* note 73, at 2206. "Sexual assault is a class based violence committed by men against women." *Id.* at 2200. The Violence Against Women Act, introduced on January 14, 1991, protects victims of sexual violence and Title III of the Act provides the victims a federal civil rights remedy. See *id.* at 2201.

85. See *id.* at 1525-26, 1531-34. More than 4 in every 10 women reported that they had been abused at least once before their admission to prison. See *Special Report, Survey*, *supra* note 34. An estimated 34% of female inmates reported being physically abused, and 34% reported being sexually abused. See *id.* About 32% said the abuse had occurred before age 18, and 24% said they had been abused since age 18. See *id.* An estimated 50% of women in prison who reported abuse said they had experienced abuse at the hands of an inmate, compared to 3% of men. See *id.* For more information regarding female pre-incarceration abuse rates, see Lynn Smith, *Majority of State's Women Inmates Abused as Children, Warden Says*, LOS ANGELES TIMES (Mar. 19, 1992), available in WL 2937221 (stating that the average female prisoner reports sexual abuse in original home). See also the Chicago Tribune's study, *Abuse Rates High Among Inmates*, Apr. 12, 1999 (noting that more than 36% of female state prison and jail inmates surveyed in 1996-1997 reported they were abused sexually or physically at age 17 or younger). See *id.*

86. See Willis, *supra* note 77, at 2225 (citing Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975)). The younger, weaker prison male is often raped and forced into playing the role typically assigned to women in the outside world. See *id.* Thus, "male on male rape generally occurs not as a result of animus toward men, but as a result of animus toward women or those assigned 'women's roles'." *Id.* See also SPR Brief, *supra* note 2 § F. The rape of male on male prisoners is an abuse of power. See *id.* "The issue . . . is not homosexuality but heterosexual brutality." *Id.* Many male on male prison rapists have wives and children but feel the need to practice "the customary sexual activity" of "penile penetration, by which most of them define their 'manhood'." *Id.*

87. See *Jordan*, *supra* note 84 (citing *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)). The majority of rape victims are women who live in a state of fear regarding sexual violence that men do not understand. See *id.* Police authorities frequently mock and victimize women reporting sexual crimes. See Willis, *supra* note 77, at 2199.

88. *Id.* at 1526.

reasons for rape remain deeply entrenched in America's social structure,⁸⁹ "[t]he time has come for international human rights law to recognize the pervasiveness and severity of rape and to punish, rather than forgive, the torturer and to compensate, rather than forget, the rape survivor."⁹⁰

"Recent developments recognize rape as among the worst human rights violations."⁹¹ Research demonstrates that rape victims regularly suffer from rape trauma syndrome,⁹² which is similar to Post-Traumatic Stress Disorder (PTSD).⁹³ PTSD symptoms are similar to the psychological distress associated with many torture survivors' experiences.⁹⁴ The severe suffering caused by rape is comparable to that inflicted by torture, which would justify treating rape as torture under international law.⁹⁵

Further, national classifications of torture fail to distinguish torture from what female inmates currently face.⁹⁶ When asked to explain the rape crisis, Jimmie Williams, Communications Director for the Washington, D.C. corrections department, accepts it as a part of prison life, responding: "I don't think anyone can answer that question. It happens in prisons all across

89. See A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 104-09 (1979); JEAN MACKELLAR, *RAPE: THE BAIT AND THE TRAP* 69 (1975).

90. Aswad, *supra* note 77, at 1943.

91. Berta Esperanza Hernandez-Truyol, *Article, Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 613 (1996).

92. See QueenDom.Com, *Mental and Emotional Health: Rape Trauma Syndrome* (visited Nov. 3, 1999) <http://www.queendom.com/articles/rapeintr.html>. More than half of rape victims show some level of rape trauma. See *id.* "Some women express their feelings, showing fear, anxiety; they often cry and are tense. Other women try to control their expression, mask their feelings and they attempt to look calm." *Id.* After a traumatic rape encounter, the victim deals not only with the rape's impact on herself, but others' reactions to it as well. See *id.*

93. See *id.* See also AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 424 (4th ed. 1994). "Until the 1970s, very few studies focused on the psychological aftermath of rape survivors." See Aswad, *supra* note 77, at 1931. Researchers identified "rape trauma syndrome" in 1974 as a condition from which many rape survivors suffer. See *id.* "PTSD is an anxiety disorder resulting from direct exposure to an 'extreme traumatic stressor.'" *Id.* at 1935.

94. "Most researchers agree with the APA's classification of rape trauma syndrome as a manifestation of PTSD." Aswad, *supra* note 77, at 1935. "Unlike other forms of torture, rape transforms an act that once symbolized unity and pleasure with another human into an act of combat." *Id.* at 1940. "Rape survivors also may relive their torture during future sexual contacts." *Id.*

95. See Theodor Meron, *Comment, Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426-27 (1993). Rape constitutes a crime against humanity and is morally and legally wrong. See Aswad, *supra* note 77, at 1940.

96. See Amnesty International website (visited Sept. 16, 1999) <http://www.amnesty-usa.org/rightsforall/women-23.html>. The degrading, cruel, and inhumane treatment a female prisoner receives by being raped is no different than the experience of torture victims. See *id.*

America . . . sex is a normal part of prison life. . . . It's not proper, but it happens."⁹⁷ Dr. William F. Schultz, Executive Director of Amnesty International USA, disagreed, stating that "[s]exual abuse of women inmates is torture, plain and simple."⁹⁸

The United Nations Special Rapporteur on Torture⁹⁹ recognizes that rape can constitute torture. The Rapporteur stated that "rape is a traumatic form of torture for the victim."¹⁰⁰ The Inter-American Commission on Human Rights¹⁰¹ also recently recognized rape as a form of torture.

The abuse and punishment that female inmates face is far in excess of their state-imposed sentences. "[I]n a custodial setting, if a guard uses force . . . or other means of coercion to compel a prisoner to engage in sexual intercourse . . . including aggressively squeezing, groping, or prodding women's genitals or breasts . . . [these acts] amount to torture."¹⁰²

III. INTERNATIONAL LAW AND THE PROTECTION OF FEMALE INMATES

A. *International Law: Treaties, Reservations, and Ratifications*

International law imposes upon nations certain duties with respect to individuals and incorporates rules and principles which govern the relationship between nations and how they deal with each other.¹⁰³ "The 1969 Vienna Convention on the Law of Treaties is the central source of

97. Cook & Parenti, *supra* note 27.

98. Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/conference/bill.html>>.

99. The position of the Rapporteur was created in 1985 to report to the United Nations Commission on Human Rights on matters relating to the prevalence of torture. In 1994, the Commission on Human Rights appointed a Special Rapporteur to specifically oversee issues dealing with violence against women.

100. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment*. Report of the Special Rapporteur, U.N. ESCOR Commission on Human Rights, 50th Sess., Provisional Agenda Item 10(a), para. 19, U.N. Doc. E/CN.4/1995/34 (1995). See Meron, *supra* note 95; Beth Stephens, *Women and the Atrocities of War*, 20 HUM. RTS. Q. 12, 13-15 (1993).

101. The Inter-American Commission on Human Rights publishes periodic reports on its visits to investigate allegations of human rights violations in various states. For one of the commission's reports, see The Inter-American Commission on Human Rights Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R. 43, MRE/RES 6/94 (1995).

102. *Nowhere to Hide*, *supra* note 6 § 60.

103. See Timothy F. Malloy, *Disentangling Treaty and Customary International Law*, 81 ASIL PROCEEDINGS 157 (1987); Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395 (1999).

international law on treaties.”¹⁰⁴ The Vienna Convention codified language on how participating states should handle treaty application, observance, interpretation, reservations, and termination.¹⁰⁵

However, states voluntarily sign and enter into treaties,¹⁰⁶ which do not become binding law until they are ratified.¹⁰⁷

Once a state has signed and ratified a treaty, a problem may arise with some states reservations made within the treaty.¹⁰⁸ Section 2, Articles 19 through 23 of the Vienna Convention deals with treaty reservations.¹⁰⁹ One of the primary reasons for treaty reservations in human rights documents is states’ domestic legislation and the treaty’s international requirements.¹¹⁰ Article 19 of the Vienna Convention provides that “[a] state may . . . formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty.”¹¹¹ United States’ reservations to any treaty it has become a signator to should not restrict or lessen any fundamental human rights recognized or existing in a State.

B. *Standard Minimum Rules for the Treatment of Prisoners*

The international community has extended its protection against cruel, inhuman or degrading treatment or punishment, including sexual violations against women in prisons.¹¹² In 1957, the United Nations Economic and

104. JOHN S. GIBSON, *DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW* 2 (1996). See Vienna Convention on the Law of Treaties, art. 26, U.N. Doc A/Conf. 39/27, May, 23, 1969 [hereinafter Vienna Convention]; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281 (1988).

105. See Vienna Convention, *supra* note 104.

106. One could argue that a state’s voluntary signature on any treaty should be justification enough to bind the state to the treaty’s articles.

107. “[R]atification,’ ‘acceptance,’ ‘approval’ and accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.” Vienna Convention, *supra* note 104 art. 2(1)(b). See U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS (Richard B. Lillich ed., 1981).

108. “[R]eservation means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.” *Id.* art. 2(1)(d).

109. See *id.* § 2, arts. 19-23.

110. See LIESBETH LIJNZAAD, *RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN?* 77-88 (T.M.C. Asser Instituut ed., 1995). “This . . . can be explained by the fact that by their very nature human rights instruments intend to operate in a field in which the State used to be the sole legislator.” *Id.* at 78.

111. Vienna Convention, *supra* note 104 art. 19(c).

112. See Universal Declaration of Human Rights, *supra* note 16; *Nowhere to Hide*, *supra* note 6; Amnesty International website, *supra* note 1.

Social Council¹¹³ (ECOSOC) formally approved the United Nations Standard Minimum Rules for the Treatment of Prisoners¹¹⁴ ("Standard Minimum Rules"), which constitute an international guide toward the treatment of prisoners. "The primary goal of establishing the Standard Minimum Rules was to encourage their enactment in national penal codes."¹¹⁵

The Standard Minimum Rules can be found in United States criminal laws under the 1962 Model Penal Code,¹¹⁶ and in the correctional standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973.¹¹⁷ "A few U.S. states have adopted the Rules as a 'Bill of Rights' for the treatment of prisoners."¹¹⁸ Regrettably, these integrations of the Standard Minimum Rules achieve nothing if the United States does not ensure their implementation nationally in its prisons and jails.

The Standard Minimum Rules contain provisions specifically related to women.¹¹⁹ Rule 53(2) provides that "[n]o male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer."¹²⁰ Rule 53(3) provides that "[w]omen prisoners shall be attended and supervised only by women officers . . ."¹²¹ Additionally, Rule 36(3) ensures

113. The Economic and Social Council promotes universal respect and observes fundamental human rights and freedoms for all without regard to race, sex, language, or religion.

114. See Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) on May 13, 1977. See Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 454-57 (1975).

115. Bernard, *supra* note 20, at 771. The Standard Minimum Rules do not set out a detailed model for penal institutions to follow. See *id.* Instead they give a general consensus constituting the essential elements of an adequate correctional facility's treatment of prisoners. See *id.*

116. See Miller, *supra* note 11, at 148.

117. See *id.*

118. *Id.*

119. See Standard Minimum Rules, *supra* note 114. "Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate." *Id.* ¶ 8(a). "In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment." *Id.* ¶ 23(1). "Where nursing infants are allowed to remain in the institution with their mothers, provisions shall be made for a nursery staffed by qualified persons." *Id.* ¶ 23(2). "In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution." *Id.* ¶ 53(1). "No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer." *Id.* ¶ 53(2). "Women prisoners shall be attended and supervised only by women officers . . ." *Id.* ¶ 53(3).

120. *Id.* at ¶ 53(2).

121. *Id.* at ¶ 53(3). "This [article of the Standard Minimum Rules] does not . . . preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women." *Id.*

prisoners the right to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority, or other proper authorities, through approved channels.¹²²

The Standard Minimum Rules' protection can be interpreted to mean that the violation of one's human rights constitutes torture; thus, since the sexual abuse of women inmates is a human rights violation, it is also torture.¹²³ Furthermore, these standards and rules are derived from the idea of universal human rights and an international responsibility to ensure those rights.¹²⁴ However, the ECOSOC's rules do not bind the United States since they have no legislative authority.¹²⁵ Acceptance by the United Nations and approval by ECOSOC is insufficient to give the Standard Minimum Rules the force of law.¹²⁶

C. *The Convention Against Torture*

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture") opened for signature in 1984.¹²⁷

The Convention Against Torture significantly encompasses prisoners' rights, since most torture victims are imprisoned or otherwise detained.¹²⁸

122. See *id.* at ¶ 36(3). See also *Nowhere to Hide*, *supra* note 6, Part IV. Regulations and standards for the running of prisons fail without proper mechanisms for reporting violations. See *id.*

123. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-01.html>>. Amnesty gathered and referenced this information from the United Nations Commission on Human Rights where the then United Nations Special Rapporteur on Torture, Professor Kooijmans noted that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." *Id.*

124. See *id.*

125. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-05.html>>; Bernard, *supra* note 20, at 770.

126. See *id.*

127. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, 93rd mtg., U.N. Doc. A/Res/39/46 (1984). The right to be free from torture and cruel, inhuman, or degrading treatment or punishment is found not only in the Standard Minimum Rules and the Convention Against Torture, but also in the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Declaration on the Rights and Duties of Man, and the American Convention on Human Rights. See Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 312 (1994).

128. Torture in this context does not refer to domestic or street violence. Rather, it is a process of brutal human degradation The World Medical Association, in its Declaration of Tokyo

Torture inflicts intense suffering, forcing individuals to act against their will.¹²⁹ The Convention Against Torture reaffirms all torture acts or other cruel, inhumane, or degrading treatment or punishment as offenses against human dignity.¹³⁰ The Convention Against Torture defines torture to be:

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 other 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹³¹

The Convention Against Torture requires governments to prohibit torture.¹³² Typically, sanctions are used to enforce convention provisions. However, the Convention Against Torture uses "moral [per]suasion and exposure to adverse public opinion."¹³³ Initially, parties to the Convention Against Torture submit yearly reports, and then submission is required every four years. These reports detail countries' actions toward meeting obligations that the Convention Against Torture outlines.¹³⁴ Mandatory governmental investigation is required whenever reasonable grounds surface detailing that

(1975), defines it as follows: "Torture is . . . the deliberate, systematic, or wanton infliction of physical or mental suffering by one or more persons, acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason."

Harvey M. Weinstein, M.D., MPH; Laura Dansky, Ph.D.; and Vincent Iacopino, M.D., Ph.D., *Torture and War Trauma Survivors in Primary Care Practice*, 1650 WESTERN J. MED. 112-17, (Sept. 1996).

129. *See id.* at 112.

130. *See* Amnesty International website, *supra* note 22.

131. Convention Against Torture, *supra* note 127 art. I. *See* Aswad, *supra* note 77, at 1917. The Inter-American Convention to Prevent and Punish Torture, entered into force in 1987, uses the same definition of torture. *See id.*

132. *See* Amnesty International website, *supra* note 22 art. 4. Parties must ensure that abuse is investigated and punished. *See id.* The Convention Against Torture prohibits parties from returning or extraditing an individual to a country when there is a substantial belief the subject may be tortured. *See* Aswad, *supra* note 77, at 1917. "[P]arties to the [Convention Against Torture] must treat torture as an extraditable offense between each other and help each other pursue complaints of torture." *Id.*

133. Bernard, *supra* note 20, at 767; *see* Aswad, *supra* note 77.

134. *See* Aswad, *supra* note 77.

acts of torture are being committed.¹³⁵ "Unless the human rights of women, as defined by international human rights instruments, are fully recognized and effectively protected, applied, implemented and enforced in national law as well as in national practice . . . they will exist in name only."¹³⁶ The Convention requires that effective measures preventing torture from being inflicted be taken and forbids parties from justifying these acts.¹³⁷ The Convention Against Torture provides that raping an incarcerated female in United States prison is torture.¹³⁸

The United States ratified the Convention Against Torture in October 1994, and the Convention entered into force for the United States on November 20, 1994.¹³⁹ However, the United States made a reservation to Article XVI¹⁴⁰ obligating itself only insofar as the Fourth,¹⁴¹ Eighth,¹⁴² and/or Fourteenth Amendments to the United States Constitution prohibit cruel,

135. See Amnesty International website, *supra* note 22 chap. 7. The United States refused persons within its borders permission to bring complaints alleging human rights violations to international monitoring bodies. See *id.*

136. Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-001.html>> (quoting the Beijing Declaration and Platform for Action report which was adopted at the Fourth World Conference on Women in 1993).

137. See Auman, *supra* note 19, at 10. One important feature of the Convention Against Torture is the creation of a committee authorized to investigate torture allegations by member nations. See *id.* Reports are made annually to all member states and to the U.N. General Assembly. See *id.*

138. See Amnesty International website, *supra* note 125.

139. See U.S. Department of State, *Initial Report of the United States of America to the UN Committee Against Torture* (visited Jan. 26 2000) <http://www.state.gov/www/global/human_rights/torture_intro.html> [hereinafter *Initial Report*]. "The United States also ratified the International Convention on the Elimination of All Forms of Racial Discrimination at the same time as it ratified the Torture Convention." *Id.*

140. See *id.* part II. "In the view of the United States, it was necessary to limit U.S. undertakings under this article primarily because the meaning of the term "degrading treatment" is at best vague and ambiguous." *Id.* "One specific concern involved the possibly extensive reach of governmental obligations under this article, especially in light of the constraints imposed by the federal character of the U.S. system and the limitations of the state action doctrine." *Id.*

141. The Fourth Amendment guarantees the rights of privacy and personal integrity, prohibiting unreasonable search and seizure. Lower U.S. courts interpret this to prohibit male guards from strip-searching female prisoners, conducting intrusive pat-frisks, and engaging in inappropriate visual surveillance. See *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993); *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982), *reh'g denied*, 696 F.2d 1007 (11th Cir. 1983); *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982).

142. The Eighth Amendment, which bars cruel and unusual punishment, has been interpreted by U.S. courts to protect prisoners against rape and sexual assault that occurs as a result of deliberate indifference by corrections officials who knew, or should have known, of the substantial risk of assault. *Farmer v. Brennan*, 114 S.Ct. 1970 (1994). See *Initial Report*, *supra* note 139.

unusual, or inhumane treatment.¹⁴³ A United States Foreign Relations Committee report stated that "degrading treatment or punishment . . . has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. [Thus, the United States feels it is necessary to make sure that it] construes the phrase to be coextensive with its constitutional guarantees."¹⁴⁴ The Human Rights Watch report stated the opinion that in partially ratifying the Convention Against Torture, the United States "shirk[ed] its full international human rights obligations [and such action was] both bad policy and legally indefensible."¹⁴⁵ With this partial ratification, the United States falls far short of ensuring the protections provided under international law. The United States was due to report in 1995 on its implementation of the Treaty requirements to the Committee Against Torture,¹⁴⁶ which monitors implementation of the Convention Against Torture.¹⁴⁷ As of January 1999, it had not done so.¹⁴⁸

The United States ratified the Convention Against Torture mainly due to its international position regarding human rights. However, the United States' reservation creates a loophole through which constant abuse and torture continue to occur in its prisons.¹⁴⁹

D. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) is the principal international treaty setting out fundamental civil and political rights

143. The term "torture" is defined in the Convention Against Torture but limitations exist since the treaty fails to define "cruel, inhuman, and degrading treatment." Bernard, *supra* note 20, at 766.

144. Miller, *supra* note 11, at 146 (quoting the Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S.Exec. Rep. No. 30, 101st Cong., 2d Sess. 26 (1990)). See *Initial Report*, *supra* note 139.

145. *All Too Familiar*, *supra* note 5, at 3.

146. The Committee Against Torture specifically supervises member states in order to protect against torture and other inhumane treatment.

147. See Amnesty International website, *supra* note 125.

148. See *id.*

149. By limiting its reservation and narrowing the torture definition, the United States effectively brings itself out of the Treaty's jurisdiction and limits the Treaty's enforcement for prisoner protection.

for all people.¹⁵⁰ The Treaty legally requires one hundred forty nations to protect the human rights of its citizens.¹⁵¹

Effective in 1976,¹⁵² the ICCPR requires state parties to protect against slavery and cruel, inhuman, or degrading treatment.¹⁵³ The Covenant also protects individual privacy. Article 17 protects individuals against interference with their privacy and states, "[n]o one shall be subjected to arbitrary or unlawful interference with their privacy"¹⁵⁴ Therefore, subjecting female inmates to intrusive body searches and pat frisks by male guards violates Article 17.

The ICCPR provides implementation powers and is a strong vehicle advancing the concerns of women.¹⁵⁵ Article 19 states, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds"¹⁵⁶ Punishing inmates for filing grievances against correctional employees is a freedom of expression violation, prohibited by the Covenant.¹⁵⁷ Additionally, Article 10 provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."¹⁵⁸ Thus custodial sexual abuse, retaliation, or any degradation upon female inmates violates their right to be treated with respect, their right to privacy, and their right to be treated humanely.

150. The International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 22d Sess., Supp. No. 16, 1496th mtg., U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. See Amnesty International website, *supra* note 24. The Covenant's governing body is the Human Rights Committee of the United Nations. See Auman, *supra* note 19, at 9. The Committee hears complaints submitted by member nations and requires periodic status reports. See *id.* For a discussion on the ICCPR, see PAUL R. WILLIAMS, TREATMENT OF DETAINEES: EXAMINATION OF ISSUES RELEVANT TO DETENTION BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 28-29, 35 (1990); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 369, 389 (1991).

151. Although this Covenant is non-binding, the signatories to it ensure its citizens and the citizens of its respective colonies that they will abide by these civil and political rights. Some of the provisions include the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7); the right of any detained person to be treated with humanity and with respect for the inherent dignity of the human person (Article 10); and the right to privacy without arbitrary or unlawful interference (Article 17).

152. See ICCPR, *supra* note 150. art. 17.

153. See *id.* See Michelle Lewis Liebeskind, Article, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645 (1994).

154. ICCPR, *supra* note 150 art. 17.

155. See *id.* "Targeting of women because of their race or ethnic identity violates their right against discrimination under the [Covenant]." Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-23.html>>.

156. *Id.* art. 19.

157. See *Nowhere to Hide*, *supra* note 6.

158. ICCPR, *supra* note 150 art. 10(1).

The United States ratified the ICCPR on June 8, 1992,¹⁵⁹ but reserved implementing certain provisions or either restricting its application.¹⁶⁰ The Human Rights Committee¹⁶¹ stated that the "United States reservation to Article 7 [was] incompatible with the object and purpose of the Covenant."¹⁶² Under the Optional Protocol¹⁶³ to the ICCPR, the Human Rights Committee considers individual human rights complaints by governmental parties.¹⁶⁴ Ninety-two governments agreed to be Protocol participants.¹⁶⁵ The United States did not adopt the Optional Protocol.¹⁶⁶

Sexual abuse violates the right to be treated with respect and the right to privacy. Those rights are protected by the ICCPR.¹⁶⁷ The United States must undertake an effort respecting female inmates' rights to privacy and dignity. The United States must ratify the Covenant completely and recognize that the abuse, rape, and torture situations female prisoners face constitute serious human rights violations.

E. People's Republic of China

The United States is not alone in its lack of protection for female prisoners. The People's Republic of China ("PRC") also falls short of the standards mandated by the Convention Against Torture.¹⁶⁸ The PRC adopted

159. See *Initial Report*, *supra* note 139.

160. See *id.*

161. The Human Rights Committee is a body of experts established by the Political Covenant who provide authoritative guidance on the interpretation of its provisions and monitor government implementation.

162. Amnesty International website, *supra* note 25. Other countries disagree with the United States' reservation to Article 7 for similar reasons. See *id.* Under international law, an incompatible reservation is not valid and the relevant treaty provision is still considered binding. See Vienna Convention on the Law of Treaties art. 19(c).

163. See *id.* Member nations may be participants to the Optional Protocol, which binds the party to stricter enforcement. See *id.* A second protocol required member nations to take steps to abolish the death penalty. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See Amnesty International website, *supra* note 24. "Sexual abuse also violates the right to be treated with respect for human dignity." *Id.*

168. See Sophia Woodman, Press Release Report, *Eight Years After Signing the Convention Against Torture, China has Failed to Incorporate its Standards into Chinese Law and Practice*, HUMAN RIGHTS IN CHINA (Apr. 8, 1996), available at <<http://www.igc.apc.org/hric>>. For a discussion regarding the violation of human rights in China, see China Rights Forum, *The Universal Declaration of Human Rights and China*, Fall 1998, available at <<http://www.hrichina.org/crf/english/98fall/fa9803.htm>>; AMNESTY INTERNATIONAL, *Human Rights Are Women's Right: Human Rights Violations Suffered by Women in China*, 1995; Ann Kent, *China and the International Human Rights Regime: A Case Study of Multilateral Monitoring 1989-1994*, 17 HUM. RTS. Q. 1 (1995).

its Prison Law in 1994.¹⁶⁹ The law provides that prison police shall not mistreat or subject prisoners to indignity without facing charges for commission of a crime.¹⁷⁰ While Chinese law stipulates that women must be supervised by women guards, some women's prisons employ both male and female guards.¹⁷¹ During interrogations and other periods of incarceration, male guards often gain private access to female inmates.¹⁷² Furthermore, Chinese women reported being sexually abused by male inmates who obtained the keys from guards.¹⁷³ Inmates reported that male guards frequented female holding areas despite the regulations.¹⁷⁴ The PRC ratified the Convention Against Torture in 1988¹⁷⁵ and has yet to ratify the ICCPR.¹⁷⁶ The PRC perceives torture much more narrowly than does the Convention Against Torture.¹⁷⁷ Human Rights in China¹⁷⁸ and other human rights organizations believe the Chinese government takes insufficient efforts to ensure the human rights of Chinese women.¹⁷⁹

PRC representatives informed the Committee Against Torture that the PRC's domestic law lined up with the Convention Against Torture requirements.¹⁸⁰ However, the PRC's revised Criminal Procedure Law refuses

169. See Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49, 67 (1999).

170. See *id.*

171. See China Rights Forum, *Women in China: Imprisoned and Abused for Dissent*, 1995 [hereinafter China Rights Forum, *Women in China*] (visited Nov. 15, 1999) <<http://www.hrichina.org/crf/english/95fall/e7.html>>.

172. See *id.*

173. See *id.*

174. See *id.*

175. See China Rights Forum, *Words Without Substance: China's Implementation of the Convention Against Torture*, 1996 (visited Nov. 15, 1999) <<http://www.hrichina.org/crf/english/96summer/e9.html>> [hereinafter *Words Without Substance*]. See also United Nations High Commissioner for Human Rights, *Treaties Bodies Database, China* (visited Nov. 15, 1999) <<http://www.unhchr.ch>> (showing that China made reservations to Article 20 & Article 30 of the Convention Against Torture).

176. See *Treaties Bodies Database*, *supra* note 175. China signed the ICCPR on May 10, 1998, but has yet to ratify the Treaty. See *id.*; *China's Intention to Sign UN Rights Covenant a "Cheap Gesture,"* AGENCE FRANCE PRESSE, Mar. 12, 1998, available in LEXIS, News Library.

177. See *Words Without Substance*, *supra* note 175. There is no mention of psychological torture in Chinese law. See *id.* Chinese law refers to torture as (1) coercing a statement and (2) subjecting imprisoned persons to corporal punishment and abuse for the first purpose. See *id.*

178. Human Rights in China is an organization dedicated to investigating and reporting human rights abuses in the People's Republic of China.

179. Amnesty International and other human rights organizations firmly believe that serious human rights violations continue in China. See Amnesty International website, *supra* note 162.

180. See *Words Without Substance*, *supra* note 175. The Chinese government submitted a report to the Committee Against Torture in 1989 but provided no information regarding torture in its detention facilities. See *id.* Upon submitting a second report in 1995, China provided no information regarding the prevalence of torture or any studies conducted. See *id.*

to make evidence produced through torture inadmissible in court,¹⁸¹ and female detainees continually face torture and sexual abuse with electric batons and sticks.¹⁸² "Women are not protected by the gender of their assailants: both female and male wardens are reported to have committed such acts."¹⁸³ The Chinese media only recently recognized the sexual abuse and molestation perpetrated on female prisoners.¹⁸⁴

Implementations of existing Chinese legal torture standards are severely hindered by: 1) political control of the judiciary;¹⁸⁵ 2) inadequate monitoring mechanisms and procedures; 3) evidence obtained through torture being admissible in courts; 4) denying defendants communication with family or lawyers before trial; 5) censoring the news media concerning legal matters and law enforcement; and 6) widespread use of administrative detention.¹⁸⁶

Similar to implementation procedures needed in the United States, the Chinese government must implement legal standards and requirements protecting female detainees from abuse. Additionally, "[i]nstituting real protections for the human rights of Chinese women will require the establishment of an independent, impartial judicial and legal system."¹⁸⁷ Both the United States and Chinese governments continually fail to treat women's rights as human rights. Each country must affirmatively take steps to protect women against rape, sexual assault, and abuse in their detention facilities.

IV. RECOMMENDATIONS

Both sexual abuse committed by prison staff and retaliation against women who report abuses are clearly prohibited pursuant to U.S.

181. China's legal and judiciary components tend to provide torturers leniency. *See id.*

182. *See* China Rights Forum, *Women in China*, *supra* note 171. "Sonam Drolkar, a Tibetan woman was arrested on July 29, 1990, and held at Seitru Prison where she was tortured so badly that she was eventually hospitalized." *Id.* "She was stripped naked . . . [e]lectric batons were pushed into her vagina." *Id.* "By February 1991 she was vomiting and urinating blood every day" *Id.* Female inmates also reported being raped and abused by male cellmates in pre-trial detention centers in China's southern provinces. *See id.*

183. *See* China Rights Forum, *Women in China*, *supra* note 171.

184. *See id.*

185. "A principal reason for the failure of the Chinese legal system to prevent torture effectively is the lack of judicial independence and the relative lack of status of the judiciary in comparison to other state organs." *Words Without Substance*, *supra* note 175, at 2.

186. *See id.*

187. Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, Fall 1995.

Constitutional law and binding international treaty law.¹⁸⁸ Human Rights Watch made the following recommendations to Congress and the Department of Justice in its report:

To the U.S. Congress

1. [P]ass legislation that requires states, as a precondition to receiving federal funding for the construction and maintenance of state prisons and holding cells, to criminalize all sexual contact between corrections staff and prisoners and, as discussed below, to report annually to the [Department of Justice] regarding conditions of incarceration in their respective facilities.
2. [P]ass legislation that requires states to prohibit departments of corrections from hiring staff who have been convicted on criminal charges, or found liable in civil suits, for custodial sexual misconduct. The names and identifying information of such individuals should be maintained by each department of corrections in a database that must be checked prior to hiring any correctional staff. This information should be collected by the [Department of Justice] data collection office, discussed below, for use by all states.
3. [A]ppropriate the funds necessary to enable the [Department of Justice] to conduct increased and thorough investigations of custodial sexual misconduct

* * *

6. [W]ithdraw the restrictive reservations, declarations, and understandings that the [United States] has attached to the [International Covenant on Civil and Political Rights] and the [Convention Against Torture].
7. [I]ntroduce implementing legislation for the [International Covenant on Civil and Political Rights] and the [Convention Against Torture] such that persons in the United States could legally enforce the protections of these treaties in U.S. courts; or it should formally declare that both treaties are self-executing and thus capable of sustaining claims in U.S. courts without further legislation.

188. *Nowhere to Hide*, *supra* note 6 § IV.

To the U.S. Department of Justice (Civil Rights Division)

1. [A]s a necessary step toward improving its responsiveness to sexual misconduct and the quality of its information about same, should establish a secure, toll-free telephone hotline to receive complaints of sexual misconduct by correctional staff and publicize the existence of this service.

* * *

6. [R]equire states, as a condition of continued federal assistance, to report annually to the Civil Rights Division regarding conditions of incarceration in their respective correctional facilities. Such reports should include, among other things, patterns of rape, sexual abuse, and other forms of violence against women. The [Department] should publish an annual report based upon this information.
7. [A]ppoint an attorney within its Special Litigation section responsible for overseeing all complaints of sexual misconduct lodged with the section.

To the U.S. Department of Justice (National Institute of Corrections)

[D]evelop standards akin to the U.N.'s Standard Minimum Rules, in order to provide national guidelines for the treatment of prisoners to ensure that state corrections procedure and practice comport with the international and constitutional protections.¹⁸⁹

Additionally, Amnesty International made the following recommendations relating to international commitments and the protection of female inmates:

- A. Only female officers should guard female inmates. Female officers should always accompany male staff who provide professional services in female facilities.
- B. All staff and inmates should be informed that sexual abuse is prohibited and those inmates have a right to complain if they are abused. Staff has a duty to report if they know that an inmate has been abused.

189. *Id.*, Recommendations, §§ I-II.

- C. Sexual abuse of inmates by staff should be expressly prohibited and action taken against staff who sexually abuse inmates. Sexual abuse should be widely defined to include sexual assault and threatened sexual assault; sexual contact, and sexually explicit language and gestures.
- D. Authorities need to immediately recognize that sexual abuse constitutes torture or cruel, inhuman or degrading treatment or punishment.
- E. Ratify in all forms without reservations, the human rights treaties that it has not yet ratified. In particular the Convention on the Elimination on All Forms of Discrimination Against Women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Woman and the American Convention on Human Rights
- F. Submit to the international monitoring bodies the USA's overdue reports on its implementation of the Convention Against Torture
- G. Inmates and staff who report abuses should be protected from retaliation by measures including: [I]nmates and staff must be informed that they have a right to protection from retaliation; as far as practicable, reports of abuse by inmates and staff should be treated in strict confidence; disciplinary and/or legal action, as appropriate, should be taken against any member of the staff who seeks to deter inmates and staff from reporting abuse or who, in any manner, harasses or intimidates inmates or staff who report abuses.¹⁹⁰

V. CONCLUSION

Somewhere along the line, the boundaries between punishment and abuse to women behind bars became blurred. The prevalence of abuse in women's prisons mandates further needed protection. The United States has the opportunity to take a concentrated step toward protecting these women by ratifying both the Convention Against Torture and the Political Covenant without any reservations. However, even if the United States wholly ratifies these agreements, it must still take extra steps.

190. See Amnesty International website (visited Sept. 16, 1999) <<http://www.amnesty-usa.org/rightsforall/women/report/women-50.html>>.

The United States must allow for some type of reporting mechanism for abused female inmates which precludes the possibility of retaliation by correctional officers. Otherwise, the behavior of those in complete authority over the powerless will remain insulated from the justice system's reach, and the system of torture will self-perpetuate. Also, both the United States federal system and state system that do not currently have laws against "consensual sexual contact" must realize that any sexual contact between correctional officers and prisoners constitutes abuse.

Amnesty International and Human Rights Watch recommend measures that establish a clear path for the United States to follow in protecting female inmates. The suggestions of these organizations set out the crucial steps the United States requires to enforce laws against correctional officers and others who continually violate women in our prisons. These women prisoners ask nothing less than their right to be treated like human beings—a God-given right. However, because these women have committed crimes and are imprisoned, they have somehow become less than human in the eyes of not only their abusers, but in the eyes of the criminal justice system as well.

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