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HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME**

**PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL**

Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences

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Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the human rights of migrants; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on violence against women, its causes and consequences pursuant to General Assembly resolution 60/251 and to Human Rights Council resolutions 17/12, 15/22, 16/23, and 16/7.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the situation of 16 gay and transgender individuals, **E.P., A.C-R., R.L., J.H, D.P., E.D., U.F., J.S-R., L.F-D., J.H., M.S-N., A.A-B., J.A., S.M., N and T**¹, who have allegedly been subjected to torture and ill treatment while in detention in U.S. immigration facilities.

According to information received:

E.P., A.C-R., R.L., J.H, D.P., E.D., U.F., J.S-R., L.F-D., J.H., M.S-N., A.A-B., J.A., S.M., N and T have been held in various immigration detention facilities between May 2009 and July 2011. Currently, **J.S-R., J.A., A.A-B., D.P. and L.F-D.**, are still being held at the Santa Ana City Jail in California and at the Kenosha County Detention Center in Wisconsin. It is our understanding that these five individuals are not eligible for release nor bond because they are subject to "mandatory detention" under U.S. Immigration law. However, it is alleged that they have not been individually assessed nor had their cases reviewed since the initial detention order.

¹The victims have consented to have their cases considered by the Special Rapporteur but due to the sensitive nature of the allegations have requested that only their initials be used.

According to the information received there are four main issues of concern regarding the above 16 individuals who have been, or are currently, in the custody of the Department of Homeland Security (DHS):

1. Repeated instances of sexual violence allegedly committed by inmates and staff in U.S. immigration detention facilities and the exclusion of immigrant detainees from the proposed standards afforded under the Prison Rape Elimination Act (PREA).
2. The arbitrary placement of lesbian, gay, bisexual and transgender (LGBT) and/or HIV+ individuals in indefinite segregation/solitary confinement without individualized assessment, documented reasons, or access to a review and appeal process.
3. Denial of adequate medical and mental health care, specifically with regard to chronic illnesses such as HIV, gender identity disorder, depression and anxiety.
4. Lack of protection from persecution and respect for the principle of non-refoulement where there is a risk of torture if returned to their home countries on account of their sexual orientation, gender identity or HIV status.

Regarding the allegations of sexual assault, two cases in particular have been brought to our attention. One involving J.H. who was reportedly sexually assaulted by two fellow detainees. The contracted staff did not allegedly provide adequate protection or investigate the violation. He requested to be transferred due to fear for his safety. Only three months after the violation did DHS Headquarters intervene and place him in what was effectively solitary confinement at Otero County Detention Center in New Mexico. Another case is "N" who was reportedly sexually assaulted by a guard while in segregation at the Eloy Detention Centre in Arizona. She received some mental health counseling but this was inadequate for the serious trauma that she experienced and no investigation was undertaken.

In addition to the specific allegations of sexual assault, we received reports of forced sexual acts and inappropriate touching during strip searches. This further increases our concern regarding reports that the recent National Standards To Prevent, Detect, and Respond to Prison Rape developed by the Department of Justice in compliance with the PREA, have excluded immigration detention from its provisions, despite numerous accounts of alleged abuse against immigration detainees. Although the Department of Homeland Security has developed performance-based standards for immigration facilities, these provisions are allegedly nonbinding and unenforceable. The result of the exclusion of immigration detention from the National Standards will be to deny effective protection to thousands of men, women and children who are in the custody of Immigration and Customs Enforcement (ICE), Border Patrol and the Office of Refugee Resettlement (ORR). LGBT individuals are at particular risk for sexual

abuse and assault.² The exclusion of immigration facilities from the National Standards would produce unjust results, since under the proposed rules, an immigrant detained in a local jail would be protected but would lose that protection once transferred to an ICE facility.

With respect to the alleged use of arbitrary and prolonged solitary confinement, a number of the victims claim to have been subjected to solitary confinement or confined to “lock down” in their cells for 22 hours per day. Of particular concern is that the practice of solitary confinement was allegedly applied for several months and without a formal assessment of its necessity and a lack of an appeals process. These individuals may need “protective custody” regarding their physical environment but the restrictive regime. i.e. the lack of access to recreation and the refusal to permit visits from family members cannot be justified.

Regarding the allegations of denial of medical treatment, we are informed that a number of detainees have had difficulties accessing their medication at the Santa Ana City Jail in California. In particular, transgender individuals are often diagnosed with a Gender Identity Disorder (GID) which is a serious medical condition yet a number of the victims listed above have been routinely denied hormone treatment by DHS authorities. For transgender individuals held in Santa Ana City Jail in California there is reportedly a blanket policy of denying hormone treatment which results in severe distress and depression due to withdrawal symptoms.

Without in any way implying any conclusion as to the facts of the above cases, we should like to appeal to your Excellency’s Government to seek clarification of the circumstances regarding the cases of the persons mentioned above. We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights and the Convention (ICCPR) against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT). In this connection, we would like to re-emphasize the importance of taking effective steps to investigate and punish acts of torture and ill-treatment, we would like to draw your Excellency’s Government’s attention to article 12 of the CAT, which requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, and article 7 of the CAT, which requires State parties to prosecute suspected perpetrators of torture. And also recall paragraph 7b of Human Rights Council Resolution 16/23, which urges States “To take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment investigated promptly, effectively and impartially by an independent, competent domestic authority, as well as whenever there is reasonable ground to believe that such an act has

² The Human Rights Committee has noted “allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials.” (CCPR/C/USA/CO/3/Rev.1, Dec 18, 2006 at 25).

been committed; to hold persons who encourage, order, tolerate or perpetrate such acts responsible, to have them brought to justice and punished in a manner commensurate with the gravity of the offence, including the officials in charge of the place of detention where the prohibited act is found to have been committed; and to take note, in this respect, of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the updated set of principles for the protection of human rights through action to combat impunity as a useful tool in efforts to prevent and combat torture;”

We would like to draw your Excellency’s Government’s attention to paragraph 2 of General Comment No. 20 of the Human Rights Committee, which provides that, “The aim of the provisions of article 7 [on the prohibition of torture and other cruel, inhuman and degrading treatment or punishment] of the ICCPR is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.” (adopted at the 44th session of the Human Rights Committee, 1992).

We would also like to bring to the attention of your Excellency’s Government article 4 (b) of the United Nations Declaration on the Elimination of Violence against Women, which stipulates that States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should refrain from engaging in violence against women. Article 4 (c & d) of the Declaration also notes the responsibility of States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. To this end, States should develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. Women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered. States should, moreover, also inform women of their rights in seeking redress through such mechanisms.

Additionally, we wish to recall the recommendations made by the Special Rapporteur on Violence against women following her mission to the United States of America from January 24 to February 7, 2011. These include, inter alia, 1) taking sexual orientation and/or gender identity into account when determining a prisoner’s vulnerability to abuse and adopting policies to strictly prohibit the singling out and harassment of non-gender-conforming prisoners; 2) improving and adopting national standards to transform the country’s immigration detention system into a truly civil model, thus avoiding the custody of immigrant detainees with convicted individuals, and ensuring that these standards are made legally binding in all detention facilities, including those run by state, local, or private contractors; and 3) adopting policies at the federal and state level to ensure that women in prisons receive the highest attainable level of physical and mental health care. In particular, women's prisons should provide comprehensive

reproductive health services and gender-sensitive mental health and drug treatment programs. Women should not be punished, through administrative segregation or otherwise, for behavior associated with their mental illness. Adequate independent oversight processes should be instituted to improve minimum standards of health services and to ensure that costs do not prohibit inmates from accessing health care.

We would also like to draw your Excellency's Government's attention to paragraph 18 of the General Comment No. 2 of the Committee against Torture (CAT/C/GC/2, 24 January 2008), where the Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.

We also wish to underscore the right of everyone to the highest attainable standard of physical and mental health as reflected, inter alia, in article 12 of the International Covenant on Economic, Social and Cultural Rights, which your Excellency's Government signed on 5 October 1977. Upon signing the Covenant, your Excellency's Government agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification.

Given its severe adverse health effects the use of solitary confinement itself can amount to acts prohibited by article 7 of the ICCPR, torture as defined in article 1 of CAT or cruel, inhuman or degrading punishment as defined in article 16 of the CAT. In General Comment No. 20, the Human Rights Committee concluded that the use of prolonged use of solitary confinement may amount to a breach of article 7 of the ICCPR.

Similarly, with regard to the allegation of a delay or outright denial of medical treatment including for HIV treatment, we would like to draw the attention of your Excellency's Government to the Standard Minimum Rules for the Treatment of Prisoners. Rule 22(2) provides that, "Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers." Furthermore, Rule 25(1) provides that, "The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is

pecially directed.” (approved by the Economic and Social Council by resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.)

Recalling the recent Human Rights Council Resolution (A/HRC/17/L.9/Rev.1) expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity, we urge your Excellency’s Government to take all necessary measures to guarantee that the rights and freedoms of the aforementioned persons are respected and that accountability of any person guilty of the alleged violations is ensured. We also request that your Excellency’s Government adopt effective measures to prevent the recurrence of these acts.

We would also like to recall that international human rights law and standards, including the right to physical and mental integrity of all persons, freedom from torture and more broadly from violence, the right to health, the right to be treated humanely are applicable to all those within the jurisdiction of the State concerned. In this regard the Human Rights Committee in its General Comment 31 of 2004 further explained that: “10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”. Furthermore article 26 of the ICCPR guarantees the right to equality to all without discrimination based inter alia on national origin.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation.

We understand that the concerns expressed above have been raised with the Department of Homeland Security’s Office of Civil and Human Rights (CRCL) and that your Excellency’s Government has indicated it will be completing its investigation in early 2012. We hope that the findings of the investigation will be made public. In the meantime, we would be grateful for your observations on the following matters:

1. How can allegations of sexual violence be promptly investigated if the Department of Justice's proposed regulations to exclude immigration detention facilities detainees from the Prison Rape Elimination Act (PREA) are passed?
2. What steps have been taken to investigate these victims' claims of torture and cruel, inhuman and degrading treatment while in the custody of the Department of Homeland Security?
3. Will the Government extend the protections of PREA to immigrant detention facilities by ensuring the definition of "prison" includes any confinement facility of a federal, state or local government, whether administered by the Government or a private company on behalf of the Government?
4. What steps will the Government take to provide oversight to ensure implementation of these policies?
5. Will the Government terminate immigration detention contracts with local counties and private prisons that engage in abusive conduct?
6. What steps will the Government take to ensure these individuals receive the medical treatment and medication they require?

We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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