United States’ Compliance with the
International Covenant on Civil and Political Rights

Suggested List of Issues to Country Report Task Force on the United States

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Reporting Organizations

*Human Rights Advocates* - Human Rights Advocates (HRA), a California non-profit corporation, was founded in 1978 and has national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years. HRA has raised criminal justice and racial equality issues at international for a and in the United States for over twenty years.

*University of San Francisco School of Law, Center for Law and Global Justice, Human Rights in Criminal Sentencing Project and the Project to end Juvenile Life Without Parole* - The University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice.

- The Center has advocated for juvenile justice reform through its Project to End Juvenile Life Without Parole, which assists juvenile defenders and justice advocates challenging juvenile life without parole sentence.
1. Juvenile Life Without Parole

1. Issue Summary

The United States is the only country in the world that sentences juveniles to life without parole in practice and does so at a staggering rate: as of April, 2011, an estimated 2,594 juveniles were serving life without parole sentences across the country. Forty-two States in the U.S. allow juvenile life without parole sentences. Research has shown that these sentences are disproportionately given to minority children. Before this year’s Supreme Court decision in Miller v. Alabama, which held that mandatory juvenile life without parole sentences are unconstitutional cruel and unusual punishment, 26 of these States had mandatory juvenile life without parole for certain crimes. In Miller v. Alabama, the Supreme Court recognized the need for individualized consideration of a number of factors before handing down a sentence of life without parole to a minor offender. While this decision is a clear step in the right direction, it is not a decisive ban on juvenile life without parole, nor does it address numerous related sentencing issues that may violate the U.S. Constitution as well as the obligations under the International Covenant on Civil and Political Right and customary international law.

While Miller abolishes mandatory juvenile life without parole sentences, it does not touch on discretionary juvenile life without parole. Thus, so long as States rewrite their statutes to require individualized consideration of a number of enumerated factors during the sentencing period, they may continue to sentence youth to life without parole. Given that there is no possibility for release, many youths sentenced to life without parole are never given access to recreation or education programs, virtually nullifying any possibility of rehabilitation or reformation. Nor does the decision in Miller provide any guidance as to how it should affect those already serving mandatory juvenile life without parole sentences. Thus States can decide whether or not the Miller holding should apply retroactively to the thousands of individuals already serving juvenile life without parole sentences.

Finally, Miller’s narrowly tailored holding applies only to those limited range of sentences that are actually called “juvenile life without parole” and does not take into account other sentencing schemes which operate as de facto life without parole sentences for minors. Accordingly, Judges may sentence juveniles to consecutive sentences for each component part of a crime, resulting in a sentence that is equivalent to life without parole but is unaffected by the decision in Miller. Nor does Miller foreclose the possibility of sentencing a juvenile to

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3 Id.
7 CRUEL AND UNUSUAL 60.
8 Miller, 132 S. Ct. 2455.
9 CRUEL AND UNUSUAL 57.
10 See Michigan v. Carp, No. 307758, slip op. (Mich. Nov. 15, 2012) (wherein the Michigan Supreme Court held that Miller does not apply retroactively and thus has no effect on existing juvenile life without parole sentences).
11 CRUEL AND UNUSUAL 7.
extremely long sentences, such as 90 years, which amount to life sentences without meaningful review.12

II. Concluding Observations

In their latest concluding observations in 2006, the Human Rights Committee expressed concerns about a number of states (42) and the Federal government continuing to sentence juveniles to life without parole and the number of juveniles across the country who had been so sentenced (2,225).13 The US has reservations to Articles 10(2)(b), 10(3) and 14(4) stating that juveniles may be treated as adults only in exceptional circumstances. Nevertheless, the Committee noted their concern that the US’s track record of juvenile life without parole suggests that the US is not limiting adult sentences for juveniles to exceptional circumstances.14 Moreover, the Committee stated that sentencing juveniles to life without parole is itself in non-compliance with Article 24(1) of the ICCPR.15 The Committee concluded by suggesting that the US ensure that no child offender be sentenced to life without parole, and should adopt “all appropriate measures to review the situation of persons already serving such sentences.”16

In addition, the Committee noted general concerns that the prisons in the United States, and especially maximum security prisons there, were incompatible with the goals of Article 10(3) to “comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners.”17 The Committee recommended that the US “scrutinize conditions of detention in prisons, in particular in maximum security prisons” to ensure that individuals housed there are being treated in accordance with Article 10 of the ICCPR.18

III. U.S. Government Report

The US addressed juvenile life without parole in its Fourth Periodic Report. The report first noted the Supreme Court’s decision in Graham v. Florida19 that prohibits sentencing a juvenile to life without parole for a non-homicide offense.20 The report noted that the court in Graham used reasoning similar to that adopted in previous death penalty cases by looking for a national and international consensus against the sentencing practice.21 While the Court noted that the judgment of the international community was “not dispositive,” it was useful in determining that non-homicide juvenile life without parole is cruel and unusual.22

12 See CRUEL AND UNUSUAL at 60 (describing the case of Bobby Bostick who was sentenced to 241 years in prison). But see People v. Argeta, No. TA103939, slip op. (L.A. Cnty. Ct. Nov. 13, 2012) (holding that a 100 year sentence handed down to a 15 year old offender is de facto juvenile life without parole under Miller).
14 Id.
15 Id.
16 Id.
17 Id. at ¶ 32.
18 Id.
21 Id.
22 Id.
The report additionally pointed out that a recent trend by states to remove confidentiality provisions regarding juvenile proceedings have made such records and proceedings more open.\textsuperscript{23} Thus, the report noted that while all states and federal criminal justice systems allow juvenile transfer to adult systems under certain circumstances, some of these procedures are mandatory while others are discretionary.\textsuperscript{24} The report stressed the US’s reservation to Article 14 of the ICCPR allowing it to maintain sentencing practices that try juveniles as adults.\textsuperscript{25}

Finally, the US responded to the Committee’s concerns in the 2006 Concluding Observations that the US should ensure that no child is sentenced to life without parole and should adopt all appropriate measures to review those who were previously sentenced to life without parole.\textsuperscript{26} The report responded that the issue was one “of particular concern” and again referred to the Supreme Court’s decision in \textit{Graham} which found that juvenile life without parole for non-homicide offenses violated the Eighth and Fourteenth Amendments as unconstitutional.\textsuperscript{27}

The Report went on to explain that while juvenile life without parole is still available in some circumstances, it “is accompanied by important safeguards.”\textsuperscript{28} Among these are the due process procedures of trial and conviction, and a number of a factors that are weighed by the Court before determining whether to sentence a minor as a juvenile or an adult (including: age, type and seriousness of offense, prior record and the juvenile’s role in the crime).\textsuperscript{29} Nevertheless, the report noted that while sentencing patterns vary, once a juvenile has been tried as an adult and found guilty of a serious crime punishable by life without parole, “a sentencing court may impose a term of imprisonment similar to other adult defendants.”\textsuperscript{30} Juvenile offenders will be separated from adult offenders to the extent possible, taking into account the need to secure the minor from harming fellow prisoners, themselves and the community.\textsuperscript{31}

\section*{IV. Legal Framework}

\begin{itemize}
  \item \textbf{Article 7} prohibiting cruel, inhuman or degrading treatment or punishment. The US has a reservation stating that they are bound to the Article only so long as the punishment prohibited therein is commensurate with the “cruel and unusual treatment or punishment” bans of the 5th, 8th and/or 14th Amendments of the United States Constitution.
  \item \textbf{Article 10(1)(2) 10(3)} providing for the central aims of reformation and social rehabilitation in the penitentiary system, the segregation of juveniles from adults therein and the guarantee that children be accorded appropriate treatment for their status.
  \item \textbf{Article 14(4)} providing for juvenile criminal procedures that account for age and the desire to rehabilitate. The US maintains the same reservation as described above in Article 7.
  \item \textbf{Article 15} providing that if, after commission of an offence, the law provides for a lighter penalty, the offender shall benefit thereby.
\end{itemize}

\textsuperscript{23} Id. at ¶316.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at ¶677.
\textsuperscript{28} Id. at ¶679.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
Article 24(1) providing rights for measures of protection to every child by society and the State as required by his/her status as a minor.

V. Human Rights Committee General Comments

In its 1982 General Comment on Article 7, the Human Rights Committee noted that the types of treatment and punishment prohibited “depend[s] on the kind, purpose and severity of the particular treatment” and should not be read as prohibiting only certain, enumerated punishments (e.g. torture). In its 1992 General Comment 21, the Committee stressed that Article 10, paragraph 1 imposes positive obligations on the state which are complementary to the prohibitions contained in Article 7. Additionally, the General Comment 21 states that all penitentiary systems must “essentially seek the reformation and social rehabilitation of the prisoner” and cannot be merely retributory. Accordingly, the Committee requested that information be provided regarding measures taken by Member States to provide educational, training and vocational opportunities to prisoners.

Addressing juveniles specifically, General Comment 21 reiterated that Article 10, paragraph 2(b) requires that accused juveniles and juvenile offenders be separated from adults, and “be accorded treatment appropriate to their age and legal status so far as conditions of detention are concerned.” This view echoes the Committee in its 1989 General Comment 17, where it was noted that the aim of the penitentiary system when dealing with juveniles must especially be “to foster reformation and social rehabilitation.” Also in General Comment 17, the Committee reiterated that the Covenant requires that children be protected from all forms of discrimination, including on the basis of race, color, national or social origin.

VI. Other UN Body Recommendations

In 2008, the Convention Against Torture (CAT) reiterated previous concerns regarding juveniles and adults being housed together during pretrial detention and after sentencing. CAT further noted that the large number of children sentenced to life without parole was a concern and could contravene Article 16 of the Convention. CAT concluded by recommending that the

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34 Id. at ¶10.
35 Id. at ¶11.
36 Id. at ¶13.
38 Id. at ¶5.
40 Id.
US separate minors from adults at all stages of the detainment process and “address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment.” \textsuperscript{41}

During its 2009 review, the International Convention of Elimination of All Forms of Racial Discrimination (CERD Committee) expressed particular concern with the fact that juveniles of racial, ethnic and national minorities were disproportionately sentenced to life without parole. \textsuperscript{42} The Committee viewed this as incompatible with article 5(a) of the Convention and recommended that the US discontinue the use of life without parole for offenders under the age of 18 and review the sentences of those already serving juvenile life without parole. \textsuperscript{43}

VII. Recommended Questions

1. While the holding in \textit{Miller v. Alabama} abolishes mandatory juvenile life without parole sentences, it does not affect discretionary juvenile life without parole. Given a minor’s unique developmental stage, reduced culpability and increased ability to respond to rehabilitation, isn’t any life without parole sentence a violation of the treaty provisions?

2. Does the Federal Government of the United States intend to provide the States with any direction as to the retroactive application of \textit{Miller} and how the holding applies to all de facto juvenile life without parole sentences?

VIII. Suggested Recommendations

1. The United States of America should abolish all de facto juvenile life without parole sentences, including discretionary sentences, uncapped consecutive sentences and long minimum sentences that are likely to exceed the offender’s life.

2. The decision in \textit{Miller} and any other Supreme Court decisions that affect juvenile life without parole sentencing schemes should be applied retroactively to all offenders currently serving such sentences.

2. Juveniles Transferred to Adult Court

I. Issue Summary

The United States allows juveniles to be tried in adult courts. \textsuperscript{44} By virtue of the transfer to adult court, juveniles are subject to adult punishments and in nearly all states are incarcerated in

\textsuperscript{41} Id.


\textsuperscript{43} Id.

\textsuperscript{44} \textit{Kent v. United States}, 383 U.S. 541 (1966). Morris Kent was tried in adult court for housebreaking, robbery and rape. The Supreme Court upheld his transfer as constitutional as well as his sentence of 30 to 90 years in prison.
adult institutions. Three procedures exist in the United States that effectively transfer a juvenile to adult court, stripping away any protections that a juvenile court would offer. One such transfer mechanism is through judicial waiver, where a judge makes the determination that the child should be tried in adult court.

While the exact requirements for a judicial waiver can depend on the state, the juvenile court judge is making the decision whether a child should face adult penalties and adult incarceration based on a prosecutorial motion. Currently, 45 states and the District of Columbia allow for judicial transfers.

The second mechanism available in the United States for trying a juvenile in adult court is a prosecutorial waiver, where a state prosecutor can file the case directly in criminal court, without the case ever being seen in juvenile court. Although minimum threshold requirements must be met, direct filing eliminates many of the due process protections afforded by juvenile courts by leaving the decision directly to the prosecutor’s discretion. Prosecutorial direct-file laws exist currently in 14 states and the District of Columbia.

The third and final way that juveniles are tried in adult court is through a legislative waiver. Under this transfer mechanism, the state legislature has codified the charges that require a prosecutor to charge a juvenile in adult court. Despite these legislative requirements, prosecutors will inherently retain their power to decide if the child should be tried in adult court, since they determine with what crime to charge the juvenile. Statutory transfer laws are in effect in 29 states.

It is important to note that in the United States, transfer to an adult court brings an adult sentence, which can include a sentence of life without parole in many states. This means that

47 Some states require that the factors established in the Supreme Court case *Kent v. United States* (see 383 U.S. 541 (1966)) be met while others give judges complete discretion to transfer so long as evidence supports the decision (see *Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 491 (1987)). The majority of states, however, require that the juvenile be of a certain age and charged with certain offenses, in order to be transferred. This, in effect, is almost a mandatory transfer with little to no discretion (see, for example, 705 Ill. Comp. Stat. Ann. 405/5-805 (2)(3) (2005)).
51 In Florida, for example, where a prosecutor can only directly file for a child who is 14 to 15 years of age and commits specific crimes, such as arson, sexual battery, robbery, kidnapping, aggravated assault, child abuse, aggravated assault, armed robbery, murder, manslaughter, etc... Fla. Stat. Ann. § 985.557 (West Supp. 2005).
54 Id. 1177-1178
the age of the offender is also not considered at sentencing, and that a juvenile is *de facto* treated as an adult throughout the entire trial and sentencing process.\(^{57}\) The United States remains one of only a handful of countries in the world where a juvenile remains a minor for all other legal purposes, but is treated as an adult in the criminal justice system.

II. Concluding Observations

In the 2006 Human rights Committee’s concluding observations discussed the problem of juveniles tried as adults in the United States: “The Committee, while noting the State party’s reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10 (2) (b) and (3) and 14 (4) of the Covenant, remains concerned by information that treatment of children as adults is not applied in exceptional circumstances only.”\(^{58}\) While the observation was made in the context of the use of life without parole sentences in the United States, it shows a growing concern for the lack of protections afforded to children when they are tried as adults.

III. U.S. Government Report

In the most recent report the United States acknowledged that “all states and the federal criminal justice system allow juveniles to be tried as adults in criminal court under certain circumstances. In some states, a prosecutor has discretion over whether to bring a case in criminal or juvenile court. Some state laws also provide for automatic prosecution in criminal court for serious offenses, repeat offenders, or routine traffic citations.”\(^{59}\) Despite this the US maintains that “A juvenile who is subject to the adult criminal justice system is entitled to the constitutional and statutory rights and protections provided for adults. The United States notes in this context its reservation concerning Article 14 in its instrument of ratification of the Covenant.”

IV. Legal Framework

Article 14(4) of the ICCPR states that “in the case of juvenile persons, the procedure shall be such as will take account for their age and the desirability of promoting their rehabilitation.” Additionally, the ICCPR requires that an individual’s status as a minor be taken into account during sentencing: Article 10(3) explicitly states that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

V. Human Rights Committee General Comments

Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. The text also

\(^{57}\) Id.


provides that cases involving juveniles must be considered as speedily as possible. Reports should specify the measures taken by States parties to give effect to that provision. Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).  

Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.  

VI. Recommended Questions

1. Despite the fact that the United States treats juveniles differently from adults under every area of the law (cannot contract, cannot drive, cannot drink, cannot serve in the military, etc…), why does the United States continue to allow children to be prosecuted criminally as adults?
2. In Miller v. Alabama, the United States Supreme Court determined that a mandatory sentence of life without parole was unconstitutional for those who were under 18 when they received the sentence. This adult sentence was often received once the juvenile had been transferred to adult court and was therefore eligible for an adult sentence. Following this ruling, will the United States amend its transfer provisions so that mandatory adult sentences are not given to children?

VII. Suggested Recommendations

1. The federal government and the states should eliminate the transfer provisions, ensuring that juveniles are tried in juvenile court with specific juvenile protections.
2. If the transfer provisions are not eliminated, states and the federal government should allow the age of the offender to be mentioned in adult court as mitigation.
3. Accurate numbers should be kept on the number of juveniles transferred to adult court as a tool for policy makers and advocates. This would allow civil society to see just how many children are treated as adults in the court system.

60 General Comment No. 21: Article 10, Forty-Fourth Session 1992, para. 13
61 General Comment No. 21: Article 10, Forty-Fourth Session 1992, para. 16
3. Juvenile Death Penalty

I. Issue Summary

The United States abolished the juvenile death penalty in the landmark U.S. Supreme Court decision *Roper v. Simmons*. This decision brought U.S. law into alignment with the principles of the ICCPR. However, the United States has failed to remove the reservation to Article 6(5). Considering that the law is now in compliance, the United States should take the symbolic yet important step of removing the reservation.

II. Suggested Recommendations

The United States should remove the reservation to Article 6(5).

4. Life Without Parole Sentences

I. Issue Summary

The United States is one of only a handful of countries that uses life without parole (LWOP) sentences, and is by far the world’s leader in the number of persons serving such a sentence. There are approximately 41,000 prisoners serving life without parole sentences in the U.S. The population of people serving LWOP sentences has tripled over the past 16 years. Forty-nine of 50 U.S. states, the United States, and the District of Columbia allow life without parole sentences. Six states and the United States require all life sentences to be without the possibility of parole. LWOP is mandatory upon conviction for at least one specified offense in 27 states. LWOP is mandatory in many states for a murder conviction, and in at least eight, it is mandatory upon conviction under a recidivism statute. The mandatory nature of LWOP in these states removes any discretion for judges or juries and deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court. For example, in New

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63 The 1962 Model Penal Code originally rejected the idea of life without parole sentences, stating “persons convicted of murder but not sentenced to death are subject to imprisonment for a maximum term of life and a minimum term of not more than ten years. This resolution reflects the judgment that supervised release after a period of confinement is altogether appropriate for some convicted murderers, even though incarceration for the prisoner’s lifetime may be required in other instances.” *MODEL PENAL CODE AND COMMENTARIES*, Part II, §§ 210.0 to 213.6, § 210.6 cmt. 10 at 152 (1980).
64 *ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA*, (2009) (this 41,000 figure also includes roughly 2,000 juveniles sentenced to LWOP).
66 *States Offering Life Without Parole, DEATH PENALTY INFORMATION CENTER*, http://www.deathpenaltyinfo.org/life-without-parole (last visited Apr. 13, 2012). The six states that require all life sentences to be without the possibility of parole are Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota; Nellis, supra note 95, at 27. There are about 5,200 prisoners serving life without parole in the federal system. Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 23 FED. SENT. REP. 21, 21 (2010).
67 Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, at 27.
68 Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, at 27 (the states are Alabama, California, Florida, Georgia, Louisiana, South Carolina, Virginia, and Washington).
Jersey, once an aggravating factor has been introduced, mitigating factors can no longer be introduced in court proceedings. In the federal system, mandatory minimum life sentences apply to murders, some gun and drug offenses, and habitual offenders, including third-time drug offenders.

The use of LWOP is widespread in the United States and available for non-homicide offenses. It is available as a punishment in instances where the death penalty is not a possible sentence, such as for conviction of kidnapping, armed robbery, drug crimes, and other crimes, including shoplifting. Thirty-seven states make LWOP available for non-homicide offenses. The number of persons serving life without parole has tripled from 12,000 in 1992 to more than 41,000 in 2008.

Most prison systems allow for review by a parole board or a judiciary to assess a prisoner’s possibility for release, usually on the basis of demonstrating reformation or good behavior. However, a life without parole sentence removes this possibility of review, and often restricts access to rehabilitative services such as education or training. Life without parole sentences remove any ambiguity allowing for the possibility of rehabilitation. Because they remove any possibility of subsequent revision, they are a “covenant with the past,” irrevocable and unwavering in the resolution that a person is a priori unable to reform sufficiently to re-enter society. For the individual they remove the possibility of hope of rehabilitation; the convict is seen as irredeemable, or beyond help.

II. U.S. Government Report

The U.S. Government did not directly address life without parole sentences but it addressed reform and rehabilitation in paragraph 235 of their report. They stated that, “All prison systems have as one of their goals the rehabilitation of prisoners to facilitate their successful reintegration into society. In addition to its mission of protecting society by confining offenders in controlled, safe environments, BOP has a responsibility to provide inmates with opportunities to participate in programs that can provide them with the skills they need to lead crime-free lives after release.”

III. Legal Framework

Article 10(3) of the treaty states that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” A life without parole sentence determines at the outset that the goal of giving that sentence is not to rehabilitate or reform the offender but to permanently incapacitate them and provide retributive justice.

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69 Nellis, Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States, at 29.
71 In Georgia, one of the few states with good data on LWOP, 60% of people serving LWOP were convicted of murder. The remaining 40% were convicted of other offenses. Op-Ed., The Misuse of Life Without Parole, N.Y. Times, Sept. 12, 2011 at A30.
72 Nellis, Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States, at 27.
IV. Human Rights Committee General Comments

The General Comment on Article 10 states that “[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.”\(^{74}\)

V. Other UN Body Recommendations

The Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations as guidance, states that countries “should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.”\(^{75}\)

The Basic Principles for the Treatment of Prisoners similarly provides that “favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.”\(^{76}\)

Regional human rights experts have agreed that long sentences can undermine the rehabilitative purposes of corrections. For example, the Special Rapporteur on Prisons and Conditions in Africa has stated, “Punishment which attacks the dignity and the integrity of the human being, such as long-term and life imprisonment…run contrary to the essence of imprisonment.”\(^{77}\)

VI. Recommended Questions

1. A request to do away with LWOP is not a request that all prisoners serving life sentences be eventually released, but rather that their cases be reviewed after sentencing with some regularity to assess whether continued detention can be justified. Why not provide parole review in order to ensure the proportional and individualized nature of the punishment?

VII. Suggested Recommendations

1. Review the validity of life without parole sentences; consider heightened restrictions for its use, such as only when it is an alternative to the death penalty.
2. Reinstate parole at the federal level so that all life sentences include the possibility of parole. Provide information to the states urging them to do the same.
3. Require access to rehabilitative programs for inmates serving life without parole at the federal level and ask the states to do the same.


5. The Right to Retroactive Application of Beneficial Law

I. Issue Summary

Currently the law in the United States does not enshrine the right to retroactive application of a lighter penalty. Federal law prevents retroactive application of a law unless specifically mandated by the legislature.\textsuperscript{78} States have different approaches to retroactivity. Some have statutes that provide for retroactive amelioration, while others leave it to the discretion of the legislature. Illinois, Iowa, Kentucky, New Hampshire, New Jersey, Ohio, Texas, Vermont, Virginia, and West Virginia all have statutes that provide for beneficial changes of law to apply prior to final judgment.\textsuperscript{79} Other states that do not have such a provision leave this decision up to the legislatures.

In 2006, the Colorado Legislature repealed a 1991 law that created life sentences without parole for juveniles.\textsuperscript{80} The Legislature, however, explicitly did not make it retroactive for the 48 people in Colorado who are serving sentences of more than 40 years or life in prison without parole for crimes committed during the 15-year window before the change in laws.\textsuperscript{81} This results in arbitrary outcomes for the 48 juvenile offenders who had the bad luck to commit their crimes during the 15-year window. They will remain ineligible for parole, even though the Colorado Legislature has decided that a life without parole sentence for a juvenile offender is too harsh. Even more egregiously, this occurs in the death penalty context. In New Mexico and Connecticut the legislature recently abolished the death penalty but refused to apply the prohibition retroactively to those on death row. These cases are currently being appealed.

II. Concluding Observations

In this Committee’s concluding observations of the United States in 1995 it was noted that, “The Committee regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.” The reservation taken by the United States to this article is exactly that type of reservation that simply defers to existing law in the United States.\textsuperscript{82}

\textsuperscript{78} 1 U.S.C.A. § 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.


III. U.S. Government Report

The United States did not mention retroactivity in its fourth periodic report. In the U.S. initial report to the Human Rights Committee the U.S. stated that, “While the Constitution thus prohibits imposition of punishment upon an offender that was statutorily unavailable at the time he committed the offence, the Constitution does not require that offenders benefit from less onerous laws passed after the commission of the crime. As the Supreme Court explained, "for a law to be ex post facto it must be more onerous than the prior law". Dobbert v. Florida, 432 U.S. 282, 294 (1977). In other words, new laws that are less onerous do not raise ex post facto concerns. State and federal courts permit the retroactive application of more lenient statutes but do not require it. For example, when the Federal Sentencing Commission lowers a sentencing range, that change is not automatically applicable to those defendants previously sentenced under the earlier, higher range. The sentencing court may reduce the sentence "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. section 3582(c)(2).

The U.S. went on to state that, “Because of the contrast between article 15, paragraph 1, clause 3 - which requires post offence reductions in penalty to accrue to the offender's benefit - and U.S. laws, which do not necessarily give an offender the benefit of subsequent reductions of penalty, the United States conditioned its ratification of the Covenant upon the following reservation to paragraph 1 of article 15: ‘As U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.’”

IV. Legal Framework

Article 15 of the International Covenant on Civil and Political Rights provides that “If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.” While the Committee has not spoken to this issue directly, the laws and practices of other nations demonstrate that this principle is firmly rooted in international and domestic legal practice. While the United States has attached a reservation to this article, the widespread acceptance of lex mitior internationally as well as the non-derogable nature of this right indicates that it should be raised in the U.S. review.

V. Other UN Body Recommendations

In the death penalty context, the U.N. Economic and Social Council issued a resolution which stated that, “[c]apital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

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83 Initial reports of States parties due in 1993: United States of America. 24/08/94. CCPR/C/81/Add.4. (State Party Report), n.511.
84 Initial reports of States parties due in 1993: United States of America. 24/08/94. CCPR/C/81/Add.4. (State Party Report), n.512.
85 CRUEL AND UNUSUAL 65-70.

VI. Recommended Questions

1. An offender who commits his or her crime prior to a beneficial change in law that reduces a given penalty is left in legal limbo as to whether they will benefit from that change. What are the concerns around the logistics of resentencing and should these take precedent over an individual’s life and freedom?

VII. Suggested Recommendations

1. The United States should remove its reservation to Article 15 of the ICCPR.
2. The federal government should change the law to allow for legislation that will lighten a given penalty to be automatically retroactive for people in all stages of sentencing including those that are already serving their sentences.
3. The government should encourage states to pass the same type of law regarding retroactivity as mentioned above.
4. The United States federal government and the states should establish a clear mechanism to facilitate resentencing in light of retroactive application of beneficial law.

6. Affirmative Action

I. Issue Summary

De facto discrimination exists related to a number of rights in the ICCPR, in particular in the education, employment, and criminal justice systems. This submission will focus on non-discrimination in education.86

The U.S. Supreme Court has upheld the use of race-conscious policies in higher education for diversity purposes.87 While the majority of the Court did not uphold their use for purposes of remedying de facto discrimination, in a concurring opinion, Justice Ginsberg did note that the decision comported with U.S. treaty obligations.88 A case is now pending before the U.S. Supreme Court appealing a decision that upheld the University of Texas’ use of race as one factor in its holistic approach to admissions aimed increasing unrepresented racial groups in its student body.89 This case could have a critical impact on the ability of the state and federal governments to comply with U.S. treaty obligations to remedy de facto discrimination in the United States.

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88 Id. at 344.
89 Fisher v. University of Texas at Austin, Case No. 11-345 on Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit.
A number of states of the United States have passed laws prohibiting the use of race in admissions decisions to universities and hiring decisions for employment. One example is California which passed Proposition 209 in 1996 that severely limited the use of affirmative action in higher education. The effect has been increased de facto discrimination at its premier public university: despite the fact that 44.8% of high school graduates are Latinos, Blacks, and Native Americans, those groups comprise only 15.3% of the entering class at UC Berkeley in 2007. The increased segregation that began in the late 1980’s has had an impact on certain professions such as doctors, lawyers, accountants, architects, and pharmacists.

II. Concluding Observations

In its 2006 review of U.S. compliance with the ICCPR, this Committee expressed concern over “de facto racial segregation in public schools,” and reminded the U.S. of its obligations under articles 2 and 26 to guarantee effective protection against practices with discriminatory effects. The Committee recommended that the U.S. conduct investigation into racial segregation in schools and “take remedial steps.”

III. U.S. Government Report

The U.S. Government’s report highlights the U.S. Supreme Court’s consideration of education –specific affirmative action plans and guidance issued by the Departments of Education and Justice to assist educational institutions in pursuing policies to achieve diversity and avoid racial isolation, as evidence of the United States’ compliance under ICCPR article 2. In doing so the government acknowledged that remedial steps in higher education serve to uphold the rights in the ICCPR and further the U.S.’ compliance with its obligations under the treaty.

IV. Legal Framework

Article 2 (1) provides that each State Party undertakes to respect and ensure that the rights in the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.”

Article 2(2) provides that each State Party undertakes to take the necessary steps “to adopt such legislative and other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Article 26 provides for equal protection of the law and a “guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

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90 See, de la Vega, supra at page 646 (Eng.).
91 Id. at 647 (Eng.)
92 Id. at 647 – 651 (Eng.).
V. Other UN Body Recommendations

The Committee on the Elimination of Racial Discrimination has also addressed U.S. policies on education. In its Concluding Observations commenting on its review of the U.S.’ report, the Committee noted that it had not done enough to enact special measures to eradicate de facto discrimination in schools and recommended that the U.S. undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education. It also suggested that the United States “take all appropriate measures to allow school districts to voluntary promote school integration through use of carefully tailored special measures…”\textsuperscript{95} The Committee has since adopted General Recommendation 32 provides that the special measures requirement of the treaty should include laws, policies, or practices that can affect areas such as housing, education, employment, and general participation in public life.\textsuperscript{96}

VI. Recommended Questions

1. What has been the practical effect of the specific affirmative action plans and guidance issued by the Departments of Education and Justice to assist educational institutions in pursuing policies to achieve diversity and avoid racial isolation?
2. If de facto discrimination has not decreased from these plans and guidance, does the United States have additional plans for remedial steps to address segregation in public schools?
3. Has the United States assessed the impact of state measures that prohibit the use of race as a factor in admissions like Proposition 209 in California on school segregation? What steps has it taken to address that impact? Has it undertaken a national plan for addressing segregation in all levels of public schools?
4. Has the United States assessed the potential impact of the decision in Fisher v. University of Texas at Austin?

VII. Suggested Recommendations

1. The United States should conduct additional studies regarding segregation in education and provide the states information and incentives for remaining segregation.
2. The United States should undertake a plan to address the impact of state laws that have had the effect of increasing racial segregation in public schools.
3. The United States should undertake a study to assess the impact of the decision in Fisher v. University of Texas at Austin. If the admissions policy in that case is upheld, the United States should assess whether it has decreased racial segregation in that state, and if so, take steps to encourage other states to undertake similar changes in their admissions policies.