Statement of Ryan King on Behalf of the Criminal Justice Policy Foundation, the Open Society Policy Center, Prison Reform International, and The Sentencing Project: Domestic Criminal Justice Issues in the United States and the International Covenant on Civil and Political Rights

Members of the Committee,

My name is Ryan S. King, a Policy Analyst with The Sentencing Project in Washington, DC. I am pleased to be speaking on behalf of the organizations listed above. The American criminal justice system is divided into three primary components: law enforcement (policing), the court system (conviction and sentencing), and corrections (community and institutional supervision). Each of these components in the continuum is comprised of countless decision points populated by interactions between individual citizens and representatives of the state. The imbalance of power that is so intimately weaved into these contacts underscores the critical need for protections of rights for individuals, extending from initial contact with law enforcement through criminal court proceedings, culminating in the conditions of supervision for persons who have been convicted. My remarks will address the failure of the United States to comply with the dictates of Articles 7, 10, 14, 24, and 26 as they pertain to protective rights in the domestic criminal justice system.

Access to Counsel

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees equality before the courts, a “fair and public hearing,” and an impartial demonstrative body. In spelling out the means by which these larger objectives are to be achieved, Article 14(3) (d) requires that all persons have the opportunity of counsel, must be notified of this right, and must have counsel provided if s/he cannot afford its provision. The United States government routinely fails to meet even the most basic rudiments of constitutional protections spelled out in the Sixth Amendment of the United States Constitution, and echoed in Article 14 of the ICCPR.

A recent study published in the Journal of Criminal Law and Criminology surveying 340 exonerations between 1989 and 2003, estimated that during that period there were likely “thousands, perhaps tens of thousands” of individuals who have been wrongly convicted of a crime.¹ The study found that the primary reasons for an erroneous conviction included eyewitness misidentification, police perjury, and coerced false confessions. The documented frequency of exonerations for capital and non-capital cases coupled with the overwhelming evidence suggesting the fragility of the fact-finding and guilt-

determination mechanisms in the United States criminal court system underscores the critical need for effective assistance of counsel.

The United States maintains in its October 2005 report that the right to counsel is protected by the Sixth Amendment and recognized by the U.S. Supreme Court in *Gideon v. Wainwright*. However, the United States report neglects to mention that in the 43 years since the *Gideon* ruling, the promise of assistance of counsel has been rendered an “enormous unfunded mandate” as states fail to sufficiently fund indigent defense programs. With approximately 75% of felony criminal defendants relying on public assistance of counsel, failing to provide a well-funded and effective indigent defense system is tantamount to violating the basic requirements of Article 14.

Criminal cases involve many legally complex elements with nuanced issues that need to be litigated by skilled attorneys. Law enforcement tactics raise Fourth Amendment issues regarding search of person and property, the constitutionality of interrogation techniques, and the admissibility of evidence. Arraignment, preliminary hearings, and pre-plea negotiations with the prosecutor provide a challenging legal obstacle course to negotiate where numerous constitutional rights and protections are invoked. Counsel is also critical at the sentencing phase, assisting the client to obtain an outcome that sufficiently reflects the needs of the defendant, the victim, and society.

Despite the pressing need for legal counsel from the earliest stages of a criminal proceeding and the high probability that public assistance will be necessary to afford counsel, the indigent defense system has been woefully underfunded, and as a result, is frequently unable to provide a vigorous defense. Public defenders routinely earn modest salaries, making recruitment and retention of talented attorneys very difficult. Contract public defenders are also poorly paid. In Virginia, for a case that holds the potential of resulting in a sentence in excess of 20 years, the state caps funding for contract defense counsel around $1,200. This frequently leads to minimal, procedural representation with few resources expended to investigate or exercise a vigorous defense for the client, and an incentive to seek a plea bargain. Many public defenders lack access to the services necessary to mount a credible defense, such as case investigators and social service experts. Meanwhile, prosecutors are often provided with substantial financial resources as well as greater access to expert witnesses to assist in their case, thereby exacerbating the disparity between the state and the defendant.

The implications of this system are profound for defendants, who, upon conviction, are more likely to be incarcerated if they have public counsel. This underscores the importance of counsel and associated support in preparing for the sentencing phase. The failing indigent defense system in the United States also exacerbates racial inequalities in

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3 For more information, see Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, at the National Legal Aid and Defender Association Conference, November 13, 2003.
5 http://www.ojp.usdoj.gov/bjs/id.htm#defendants
the criminal justice system, as African American defendants are more likely to rely upon the public provision of counsel than whites or Latinos. We request that the Committee ask the United States to address the national failure to adequately fund indigent defense programs and answer more specifically how it intends to guarantee effective access to counsel for indigent defendants.

Race and Sentencing

Article 26 of the ICCPR recognizes the right to equal protection of the law and prohibits discriminatory treatment. Despite this proscription, a double standard of justice has been evident in criminal sentencing, particularly for drug offenses. The prison population has more than tripled since 1980, with 40 percent of the current population being Black, although African Americans constitute only 12 percent of the U.S. population. The increase in the prison population is not evidence of rising crime, nor an indication of more criminal activity by Blacks, but a reflection of more stringent penalties such as mandatory minimum sentences.

A mandatory minimum sentence is a prison term predetermined by Congress and automatically levied for offenses mainly involving drugs and firearms. Mandatory minimum sentences have been wrought with racial bias, with a landmark study indicating that in cases where a mandatory minimum could apply, African American offenders were 21 percent more likely, and Latinos 28 percent more likely, than Whites to receive at least the mandatory minimum prison term.

One of the most egregious examples of mandatory sentences is the penalty disparity between crack and powder cocaine. Simple possession of more than five grams of crack cocaine is a felony carrying a mandatory sentence of five years without parole for a first time offender; possession of the same amount of powder cocaine, a misdemeanor, requires no incarceration. In 2003, 81% of those sentenced for crack cocaine offenses were African American, despite the fact that the greatest numbers of documented crack users are White. A report on federal sentencing disclosed that the higher proportion of Blacks charged with crack offenses was the single most important difference accounting for overall longer sentences imposed on African Americans relative to other racial groups. Revising this one sentencing rule, another official report concluded, “would better reduce the gap [in sentencing between Whites and Blacks] than any other single

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6 Ibid.
Another mandatory minimum sentence having a disproportionate racial impact is three-strike laws. Generally speaking, three-strike provisions impose a mandatory life sentence on offenders convicted of a third violent offense. Because Blacks are more likely to be arrested, prosecuted and convicted than Whites who engage in criminal activity, Blacks have been subject to automatic life imprisonment at a disproportionate rate.

While these examples do not cover the landscape of race-based disparities in federal U.S. sentencing, they do represent some of the more visible and prevalent abuses. We request that this Committee encourage the State Department to directly address the issue of the racial impact of U.S. mandatory minimum drug laws and enforcement, and provide detailed information for the Committee’s review with respect to U.S. compliance with the equal protection before the law provision of Article 26, to insure that there is no unwarranted discrimination in the administration of justice.

Conditions of Confinement and Institutional Oversight

The United States continues to have the highest rate of incarceration in the world, with more than 2.1 million people now behind bars. Of those serving more than one year, 41% are African American. Many of those prisoners are serving decades of time, including 32,000 serving life sentences without possibility of parole (1 in 10 prisoners), more than 2,000 of those sentenced as children. One in six United States prisoners is mentally ill. Many of them suffer from serious illnesses such as schizophrenia, bipolar disorder, and major depression.

The issues around children in conflict with the law are simply ignored in the United States’ report to the Committee with no mention of the specific needs of these children under Articles 7, 10 or 24. Under Article 14, the United States merely notes that children transferred to the adult criminal justice system receive the same constitutional protections as adults. We would ask the Committee to question the United States about the continued, often legislatively mandated, treatment of children as adults within all stages of the criminal justice system and what steps are taken to ensure their special needs are met bearing in mind the child’s rights under Article 24 “to such measures of protection as are required by his status as a minor.” In particular the United States should be asked to justify the widespread use of life imprisonment without possibility of parole for children. This sentence clearly contravenes Article 14(4) of the ICCPR (requiring

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13 Ibid., p. 132.
14 Harrison & Beck, A.J.
15 Ibid.
that imprisonment should promote rehabilitation) as it banishes children forever from society.

All the concerns about conditions of confinement raised by the Committee after the first report from the United States remain unresolved today. Conditions of detention, particularly in supermaximum security prisons and special housing units continue to violate Article 10 by holding people (including the mentally ill) in isolation in conditions of extreme sensory deprivation for long periods of time,\(^\text{19}\) overcrowding persists (federal prisons, under the direct control of the federal government, continue to operate at 140% of capacity),\(^\text{20}\) and male officers continue to have access to women prisoners’ housing.

As documented by Amnesty International, women in 23 state prison systems and the federal Bureau of Prisons who give birth while in prison continue to be subjected to cruel, inhuman, and degrading punishment by the use of restraints, including leg irons and shackles, during labor and childbirth.\(^\text{21}\)

In reading the United States’ report, the Committee will note that the emphasis under both Articles 7 and 10 is on the prosecution of those found to have contravened federal law, yet the number of lawsuits in this area brought by the government is declining and the Prison Litigation Reform Act continues to severely restrict the access of prisoners to the courts.\(^\text{22}\) With the single exception of the Prison Rape Elimination Act, there is no discussion in the report of ways to prevent abuses occurring nor of any training for state and private prison staff on their obligations under the ICCPR. There are no national mechanisms in place to set standards for the treatment of people deprived of liberty or to provide oversight and accountability. We hope that the Committee will ask the State to address the issue of lack of national standards and oversight and recommend that the United States adopt the Optional Protocol to the Convention Against Torture to ensure greater transparency in the treatment of all people deprived of their liberty consistent with the requirements of the ICCPR and other UN treaties and standards.

\(^{19}\) Supermax prison conditions and their harmful effects have been widely documented. See, for example, the judge’s opinion in \textit{Madrid v. Gomez}, 889 F.Supp. 1146 (N.D. Cal. 1995) on conditions at the California supermax at Pelican Bay, the judge’s opinion of the supermax in Texas in \textit{Ruiz v. Johnson}, 37 F.Supp.2d 855 (S.D. Tex. 1999), and reports by Human Rights Watch on conditions at the supermax facilities in Indiana and Virginia.

\(^{20}\) Harrison & Beck, 7.


\(^{22}\) Among the most egregious restrictions under the PLRA are the requirement that the prison grievance system must be exhausted in all cases before the court can intervene regardless of the relief available from the system and the type of claim being made (see, for example, \textit{Porter v. Nussle}, 534 U.S. 516 (2002)) and the ban on lawsuits alleging emotional and mental abuse without a prior showing of physical injury which has been used to bar claims from, for example, a segregated prisoner who alleged that he was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with his lawyers and family (\textit{Stames v. Gillespie}, D. Kan, Mar 29, 2004) and a prisoner whose complaint that he was forced to stand in a 2 ½ square foot cage for about 13 hours, naked for the first eight hours, unable to sit for more than 40 minutes of the total time, in acute pain with visible swelling in a portion of his leg that had previously been injured, repeatedly asking to see a doctor, was told by the court that his case did not meet the physical injury standard \textit{Jarriett v. Wilson}, 414 F.3d 634 (6th Circ. 2005).