



Human Rights Watch

**List of Issues Submission to the
United Nations Human Rights Committee
During its Periodic Review of the United States of America**

January 14, 2019

Harsh Criminal Sentencing

Summary

In the United States, state and federal courts regularly impose disproportionate criminal sentences, often in a racially disparate manner. This contributes to the large number of people behind bars in the country. In 2018, people in the state of Florida voted to end laws banning those with felony convictions from voting but questions remain about how to effectively implement the state's reforms. Thirty-three other states in the United States deny people the right to vote due to their criminal histories. Finally, 30 states continue to impose the death penalty.

Relevant ICCPR Articles

Articles 2, 6, 7, 8, 9, 14 and 26.

Prior Recommendations

- In its 2006 Concluding Observations, the Committee reminded the United States of the desirability of abolishing the death penalty, (para. 29), and expressed concern about the use of solitary confinement, noting that its prolonged use cannot be reconciled with the requirement that the aim of the penitentiary system be reformation and social rehabilitation of prisoners (para. 32).
- In its 2014 Concluding Observations, the Committee also addressed the death penalty, offering detailed recommendations, including the establishment of a moratorium on the death penalty at the federal level. (para. 8). It also: recommended the United States continue and step up its efforts to robustly address racial disparities in the criminal justice system; reform mandatory minimum sentencing statutes (para. 6); ensure the voting rights of all felons who have fully served their sentences, and improve registration processes (para. 24); and expressed concern again about the US' use of prolonged solitary confinement, particularly on juveniles and people with mental disabilities (para. 20).

Current US Government Policy or Practice

State and federal jails and prisons continue to hold over 2 million people, with another 4.5 million on probation or parole.¹ Women are the fastest growing correctional population nationwide, increasing by more than 700 percent between 1980 and 2016.² Oklahoma incarcerates more women per capita than any other US state.³ In September, Human Rights Watch documented the lasting harm of jailing mothers pretrial, many of whom simply cannot afford bail, in that state.⁴ Many states force prisoners to work for minimal wages, sometimes less than a dollar a day, and often doing jobs that do not help prisoners obtain marketable skills upon release.⁵

In the United States, people often receive life sentences or their equivalent for a range of violent crimes; as well as for property and drug-related offenses. In 2017 then US Attorney General Jeff Sessions rescinded policies instructing prosecutors to avoid charging crimes that would trigger disproportionately

¹ Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2018," May 14, 2018, <https://www.prisonpolicy.org/reports/pie2018.html> (accessed January 5, 2019).

² Human Rights Watch and the American Civil Liberties Union, *You Miss So Much When You're Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma*, September 28, 2018, https://www.hrw.org/sites/default/files/report_pdf/us0918_web_0.pdf, p. 16, citing The Sentencing Project, "Incarcerated Women and Girls, 1980-2016," May 2018, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (accessed July 16, 2018), p. 1.

³ Ibid.

⁴ Human Rights Watch and the American Civil Liberties Union, *You Miss So Much When You're Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma*, September 28, 2018, https://www.hrw.org/sites/default/files/report_pdf/us0918_web_0.pdf.

⁵ Prison Policy Initiative, "How much do incarcerated people earn in each state?" April 10, 2017, <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (accessed January 6, 2019); Jasmine L. Tyler (Human Rights Watch), "Prisoners striking for fair wages, humane conditions deserve support," Op-ed, *The Hill*, September 5, 2018, <https://www.hrw.org/news/2018/09/05/prisoners-striking-fair-wages-humane-conditions-deserve-support>.

long mandatory minimum sentences and were aimed at curtailing racial disparities in sentencing.⁶ In 2018, Sessions also rescinded a Justice Department policy giving federal prosecutors discretion to not prosecute marijuana offenses in jurisdictions where marijuana has been decriminalized.⁷

Millions of people still cannot vote due to felony disenfranchisement laws, though in a positive step, Florida voters recently approved a ballot initiative restoring the right to vote for 1.4 million residents with felony convictions.⁸ The initiative was one of several that states passed that advanced criminal legal system reform.⁹

The laws of 30 states still allow for the death penalty. In 2018 alone, 25 people in eight states were executed, all in the south and mid-west of the country.¹⁰ US President Donald Trump and former US Attorney General Jeff Sessions have called for the death penalty for drug sellers.¹¹

Human Rights Committee General Comments and Related UN Body Recommendations

The Human Rights Committee has stated that state actions that restrict rights “must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”¹² “Restrictive measures must conform to the principle of proportionality —”¹³ a principle reflected in Inter-American Court of Human Rights jurisprudence¹⁴ and emphasized by the UN Working Group on Arbitrary Detention.¹⁵ To the extent possible, prison labor should help prisoners prepare for a return to society and should never seek to cause suffering.¹⁶

“The criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.”¹⁷

⁶ Rebecca R. Ruiz, “Attorney General Orders Tougher Sentences, Rolling Back Obama Policy,” *New York Times*, March 12, 2017, <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html> (accessed January 5, 2019).

⁷ “Memorandum For All United States Attorneys’ on the Subject of ‘Marijuana Enforcement,’” from US Attorney General Jeff Sessions, January 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download> (accessed January 5, 2019).

⁸ The Brennan Center, “The State of Voting Rights Litigation (December 2018),” December 13, 2018, <https://www.brennancenter.org/analysis/state-voting-rights-litigation-december-2018>, (accessed January 5, 2019); Nicole Chavez, “Florida restores voting rights to more than 1 million felons,” *CNN*, November 7, 2018, <https://www.cnn.com/2018/11/07/politics/florida-felons-voting-rights/index.html> (accessed January 5, 2019).

⁹ Jasmine L. Tyler, “Human Rights Win Out in US Election,” commentary, Human Rights Watch Dispatch, November 13, 2018 <https://www.hrw.org/news/2018/11/13/human-rights-win-out-us-election>; The Sentencing Project, “Reform and the 2018 Midterms,” November 7, 2018, <https://www.sentencingproject.org/news/state-criminal-justice-reform-2018-midterms/> (accessed January 5, 2019).

¹⁰ Death Penalty Information Center, “Executions in 2018,” <https://deathpenaltyinfo.org/execution-list-2018> (accessed January 5, 2019).

¹¹ Jasmine L. Tyler (Human Rights Watch), “To end the opioid epidemic, save lives, don’t take them,” Op-ed, *The Hill*, April 4, 2018, <https://www.hrw.org/news/2018/04/04/end-opioid-epidemic-save-lives-dont-take-them>; Salvador Rizzo, “President Trump’s claim that death sentences would stop drug trafficking,” *Washington Post*, April 25, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/04/25/president-trumps-claim-that-death-sentences-would-stop-drug-trafficking/?utm_term=.da97816c7ff3 (accessed January 5, 2019); Sarah N. Lynch, “Federal Prosecutors Told to Seek Death Penalty in Drug Cases,” *Reuters*, March 21, 2018, <https://www.reuters.com/article/us-usa-opioids-deathpenalty/federal-prosecutors-told-to-seek-death-penalty-in-drug-cases-idUSKBN1GX25A> (accessed January 9, 2019).

¹² UN Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (Eightieth session, 2004), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.1326 (2004), para. 6.

¹³ UN Human Rights Committee, General Comment 27, Article 12 (Freedom of Movement) (Sixty-seventh session, 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 14.

¹⁴ The Inter-American Court of Human Rights has ruled, in the context of sentencing, that “no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality,” *Inter-American Court of Human Rights, Gangaram Pandey Case*, Judgement of January 21, 1994, Inter-Am.Ct.H.R., (Ser. C) No. 16 (1994), para. 48.

¹⁵ UN Human Rights Council, “Report of the Working Group on Arbitrary Detention,” June 30, 2014, https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session27/documents/a_hrc_27_48_eng.doc (accessed January 11, 2019), para 88. (“All measures of detention should be justified, adequate, necessary and proportional to the aim sought.”)

¹⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 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) of May 13, 1977, paras. 58-59.

¹⁷ United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”), adopted December 14, 1990 G.A. res. 45/110, annex, 45 UN GAOR Supp. (No. 49A) at 197, UN Doc. A/45/49 (1990), Rule 2.3.

As a point of comparison, the International Criminal Court, which has jurisdiction over grave crimes such as genocide, may impose up to 30 years or a life sentence but that sentence must be reviewed when the person has served two thirds of it or 25 years in the case of a life sentence.¹⁸

Recommended Questions

- What steps, if any, will the federal government take to ensure the successful restoration of the right to vote in states like Florida?
- What more will the federal government, in addition to the small steps taken by passing the First Step Act, do to reform mandatory minimum sentencing; ensure federal criminal sentences are not disproportionate to the offense; and incentivize states to adopt proportionate regimes of criminal sentencing?

Suggested Recommendations

- The State Party should restore Justice Department policies affording greater discretion to federal prosecutors in drug cases.
- The State Party should take concrete measures to support the right to vote without impediment or discrimination; press state governments to reinstate voting rights to people who have been convicted of felonies and to review with an eye to reforming state policies that deny voting rights to imprisoned persons.
- The State Party should review its state and federal criminal sentencing to ensure that all sentences are proportionate to the offense and offender, including with a view to abolishing the death penalty, and should in no circumstances impose the death penalty for drug offenses.

Racial Disparities, Drug Policy, Hate Crimes, and Policing

Summary

Racial disparities permeate every part of the US criminal legal system, with particularly acute problems in drug policy and policing. These disparities violate the United States' obligation to prohibit racial discrimination. The number of hate crimes has reportedly increased over the past several years.

Relevant ICCPR Articles

Articles 2, 7, 9, 10, 12, 14, 17 and 26.

Prior Recommendations

- In its 2014 Concluding Observations, the Committee recommended that the State Party “continue and step up its efforts to robustly address racial disparities in the criminal justice system.” (paras. 6 and 7).
- In its 2006 Concluding Observations, the Committee stated the State Party should “continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials.” (para. 24); and reminded the State Party “of its obligation under Articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis.” (para. 6). It also instructed the United States to “acknowledge its legal obligation under Articles 2 and 26 and ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence.” (para. 25)

Current US Government Policy or Practice

¹⁸ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 110.

Racial disparities permeate every part of the US criminal legal system. Black people are 13 percent of the population but close to 40 percent of those in prisons.¹⁹ They are incarcerated at more than five times the rate of white people. Black people use illegal drugs at similar rates to white people but suffer drug arrests at significantly higher rates.²⁰

In 2018, police reportedly shot and killed 996 people in the US.²¹ Of those killed, whose race is known, 26 percent were black.²² Of the unarmed people of known race killed by police, 38 percent were black.²³ The Justice Department rolled back efforts to investigate local police departments following credible reports of systemic constitutional violations. Some state governments have taken on this oversight role. Racial disparities in police use of force, arrests, citations, and traffic stops continue.²⁴

Multiple organizations²⁵ and the government,²⁶ which use different methodologies to collect different types of information about hate crimes, reported an increase in the number of hate-motivated incidents from prior years.

Since 2012, the US has reportedly held defendants in incommunicado detention for long periods of time, in some cases up to 90 days, on board US Coast Guard boats before bringing them to US shores and prosecuting them for alleged drug crimes. In many cases, the defendants have reported serious mistreatment.²⁷

Human Rights Committee General Comments and Related UN Body Recommendations

The Committee has repeatedly reminded States that the obligation of non-discrimination requires protection against discrimination in law as well as in fact.²⁸ Similarly, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which the United States has ratified, defines

¹⁹ The Sentencing Project, “The Color of Justice: Racial and Ethnic Disparity in State Prisons,” June 2016, <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> (accessed January 5, 2019).

²⁰ Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*, pp. 5 and 43-50.

²¹ “Fatal Force,” *Washington Post*, updated January 3, 2019, https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.08e8dffc4721 (accessed January 11, 2019).

²² *Ibid.*

²³ *Ibid.*

²⁴ German Lopez, “There are Huge Racial Disparities in How US Police Use Force,” *Vox*, November 14, 2018, <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities> (January 9, 2019); Joel Rubin & Ben Poston, “L.A. County deputies stopped thousands of innocent Latinos on the 5 Freeway in hopes of their next drug bust,” *Los Angeles Times*, October 4, 2018, <https://www.latimes.com/local/lanow/la-me-sheriff-latino-drug-stops-grapevine-20181004-htmlstory.html> (accessed January 9, 2019).

²⁵ John Eligon, “Hate Crimes Increase for the Third Consecutive Year, F.B.I. Reports,” *New York Times*, November 3, 2018, <https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html> (accessed January 5, 2019); Center for the Study of Hate and Extremism, “Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference,” May 14, 2018, https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf (accessed January 5, 2019); “U.S. anti-Muslim hate crimes rose 15 percent in 2017: advocacy group,” Reuters, April 23, 2018, <https://www.reuters.com/article/us-usa-islam-hatecrime/u-s-anti-muslim-hate-crimes-rose-15-percent-in-2017-advocacy-group-idUSKBN1HU240> (accessed January 5, 2019); Council on American Islamic Relations, “CAIR Report: Anti-Muslim Bias Incidents, Hate Crimes Spike in Second Quarter of 2018,” July 12, 2018, https://www.cair.com/cair_report_anti_muslim_bias_incidents_hate_crimes_spike_in_second_quarter_of_2018 (accessed January 5, 2018); South Asian Americans Leading Together, “This Week in Hate: hate continues to rise, our communities continue to suffer,” April 20, 2018, <http://saalt.org/this-week-in-hate-hate-continues-to-rise-our-communities-continue-to-suffer/> (accessed January 5, 2019); Anti-Violence Project, “A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer, Hate Violence Homicides in 2017,” January 22, 2018, <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf> (accessed January 5, 2019); California State University, “Report to the Nation: Hate Crimes Rise in US Cities and Counties in Time of Division and Foreign Interference,” May 2018, https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf (accessed January 6, 2019).

²⁶ John Eligon, “Hate Crimes Rise for the Third Straight Year,” *New York Times*, November 13, 2018, <https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html> (accessed January 6, 2019).

²⁷ Seth Freed Wessler, “The Coast Guard’s ‘Floating Guantánamos,’” *New York Times* magazine, November 20, 2017, <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html> (accessed January 6, 2019), (Prisoners on board boats have been held up to 90 days during which they reported being chained together on board decks, exposed to the wind, rain and sun, denied food, forced to sleep on the ground, and defecate in buckets); See, also, Seth Wessler, “U.S. Coast Guard detentions of drug smugglers ‘violating international law,’ and Canada may be complicit,” *CBC*, June 6, 2018, <https://www.cbc.ca/radio/thecurrent/coast-guard-detainees-canada-1.4673272> (accessed January 6, 2019); and Laura Pitter, “National Security and Court Deference: Ramifications and Worrying Trends,” in *Re-Imagining the National Security State* (Cambridge University Press: New York, forthcoming).

²⁸ UN Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994).

race discrimination as conduct that has the "purpose or effect" of restricting rights on the basis of race.²⁹ It proscribes race-neutral practices curtailing fundamental rights that unnecessarily create statistically significant racial disparities even in the absence of racial animus and³⁰ requires remedial action.³¹ In its General Comment 18, the Committee explained that the Covenant's "Article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination."³²

Recommended Questions

- Why do so few incidents of police use of force in the United States lead to findings that officers were at fault, and measures of legal accountability for those responsible?
- Since racial disparities in drug arrests cannot be explained by differences in drug usage between racial groups, why do such disparities persist?
- Please explain, through detailed reference to data, and not through reference to isolated prosecutions of discrimination in federal courts, how the State Party believes it is upholding its obligation to address racial discrimination *in fact* in its state and federal criminal legal systems?
- What steps if any has the State Party taken to ensure all rights within the Covenant, including the right to life, are enjoyed by all people in the United States, along with equality before the law and equal protection of the law, without discrimination?
- How does the US explain the reported prolonged, incommunicado detention, delayed presentment, and mistreatment of hundreds of detainees on board US Coast Guard ships?

Suggested Recommendations

- The State Party should increase and strengthen its efforts to investigate and hold accountable local police departments following credible reports of violations under US or international human rights law.
- The State Party should collect and publicize on an annual basis nationwide data on incidents of federal and state law enforcement use of force and the race of those affected and law enforcement officers involved, as well as any investigations and all measures of accountability taken.
- The State Party should take all effective steps necessary to end the experience of racial discrimination *in fact* in US state and federal criminal legal systems and should ensure all rights within the Covenant, including the right to life, are enjoyed by all people in the United States, along with equality before the law and equal protection of the law, without discrimination.
- Ensure those detained on board US Coast Guard ships are treated humanely and their right to be brought before a judge without unreasonable delay under Article 9 of the Covenant is respected.

Children in the Adult Criminal and Juvenile Legal Systems

Summary

Despite important and meaningful reforms, the United States continues to sentence children to life without the possibility of parole, in violation of its treaty obligations. In addition, children of color face disproportionately harsh treatment in the federal and state criminal legal system. The system-wide prosecution, trial and incarceration of children as adults persists in the United States, often in violation of the principle of proportionality and of the human rights of children.

Relevant ICCPR Articles

Articles 2, 6, 7, 9, 12, 14, 17 and 26.

²⁹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 UNT.S. 195, entered into force January 4, 1969, para. 1, art. 1.3.

³⁰ See ICERD, General Recommendation XIV (42) on art. 1, para. 1, of the Convention, UN GAOR, 48th Sess., Supp. No. 18, at 176, UN Doc. A/48/18(1993). See also, Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *American Journal of International Law*, vol. 79 (1985), pp. 283 and 287-88.

³¹ Committee on the Elimination of Racial Discrimination, General Recommendation on para. I, art. 1 of ICERD.

³² UN Human Rights Committee, General Comment 18.

Prior Recommendations

- The Committee has repeatedly called on the United States to ensure that no person under the age of eighteen at the time of offense “is sentenced to life imprisonment without parole, and... adopt all appropriate measures to review the situation of persons already serving such sentences.” (2006 Concluding Observation, para. 34; 2014 Concluding Observation, para. 23).
- The Committee has also recommended that the United States “ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not transferred to adult courts. It should encourage states that automatically exclude 16- and 17-year-olds from juvenile court jurisdictions to change their laws.” (2014 Concluding Observation, para. 23).
- See above recommendations regarding racial discrimination and the principle of proportionality.

Current US Government Policy or Practice

The juvenile arrest rate has been declining³³ but dramatic racial disparities persist: children of color are disproportionately represented at every stage,³⁴ and in 37 states rates of incarceration were higher for black children than for white.³⁵ Between 32,000 and 60,000 children under 18 are estimated to be admitted annually to adult jails.³⁶ All 50 states continue to prosecute some children in adult criminal courts,³⁷ and approximately 1,300 people have life without parole sentences for crimes committed under 18.³⁸

In 2018, the Washington State Supreme Court ruled that life sentences without parole for crimes committed below age 18 violated the state constitution.³⁹ In all, 21 states and the District of Columbia now prohibit juvenile life without parole.⁴⁰ Also in 2018, California passed a law that ends the sentencing of 14 and 15-year-olds in adult court.⁴¹ In April last year, New York ended the automatic trial of 16 and 17-year-olds in adult court, although children of these—or younger—ages, who are accused of violent crimes, will still begin their cases in adult court with the possibility of transfer to the juvenile system.⁴² Other US states, including Florida, continue to mandate the direct prosecution of children in their adult criminal legal systems.⁴³ In addition, juveniles continue to be subjected to periods of solitary confinement in juvenile facilities as well as in adult state jails and prisons throughout the country.⁴⁴

Human Rights Committee General Comments and Related UN Body Recommendations

³³ US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, “Statistical Briefing Book,” https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 (accessed January 5, 2019).

³⁴ National Conference of State Legislatures, “Racial and Ethnic Disparities in the Juvenile Justice System,” January 11, 2018, <http://www.ncsl.org/research/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-juvenile-justice-system.aspx> (accessed January 5, 2019).

³⁵ The Sentencing Project, “Still increase in racial disparities in juvenile justice,” October 20, 2017, <https://www.sentencingproject.org/news/still-increase-racial-disparities-juvenile-justice/> (accessed January 5, 2019).

³⁶ Citizens’ Committee for Children of New York, “New Report Examines Youth Incarcerated In Adult Jails,” August 28, 2018, <https://www.cccnewyork.org/press/releases/new-report-examines-youth-incarcerated-in-adult-jails/> (accessed January 5, 2019).

³⁷ US Department of Justice, Office of Juvenile Justice and Delinquency Programs, “Juvenile Offenders and Victims: National Report Series,” September 2011, <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (accessed January 5, 2019).

³⁸ The Campaign for the Fair Sentencing of Youth, “Montgomery Momentum: Two Years of Progress Since Montgomery v. Louisiana,” January 25, 2018, <https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf> (accessed January 5, 2019).

³⁹ Paige Cornwell and Hannah Rodriguez, “Washington Supreme Court rules sentencing youth to life without parole is unconstitutional,” *The Seattle Times*, October 18, 2018, <https://www.seattletimes.com/seattle-news/washington-supreme-court-rules-life-sentence-without-parole-for-youth-unconstitutional/> (accessed January 11, 2019).

⁴⁰ Samantha Michaels, “The Washington Supreme Court Just Banned Life-Without-Parole Sentences for Teens,” *Mother Jones*, October 18, 2018, <https://www.motherjones.com/crime-justice/2018/10/washington-supreme-court-bans-lifers-parole/> (accessed January 5, 2019).

⁴¹ David Greenwald, “Governor Brown Signs Bill Ending Sentencing of 14- and 15-Year-Olds in Adult Court,” *The Davis Vanguard*, October 2, 2018, <https://www.davisvanguard.org/2018/10/governor-brown-signs-bill-ending-sentencing-14-15-years-olds-adult-court/> (accessed January 5, 2019).

⁴² Eli Hager, “The Fine Print in New York’s Raise the Age Law,” *The Marshall Project*, April 14, 2017, <https://www.themarshallproject.org/2017/04/14/the-fine-print-in-new-york-s-raise-the-age-law> (accessed January 5, 2019).

⁴³ Human Rights Watch, *Branded for Life: Florida’s Prosecution of Children as Adults under its ‘Direct File’ Statute*, April 10, 2014, <https://www.hrw.org/report/2014/04/10/branded-life/floridas-prosecution-children-adults-under-its-direct-file-statute#>.

⁴⁴ Human Rights Watch and the American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, October 4, 2012, <https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>.

In its General Comment 21, para. 13, the Committee states that the Convention requires that “accused juvenile persons shall be separated from adults;” that “cases involving juveniles must be considered as speedily as possible;” and that juveniles 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 . . .” The Committee also states its view that the Convention’s “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.”

The Committee also recommends that the US “impose strict limits on the use of solitary confinement” and prohibit its use against juveniles and individuals with serious mental disabilities.⁴⁵

Recommended Questions

- What steps if any will the federal government take to end juvenile life without parole sentencing in the federal system?
- What steps if any will the federal government take to incentivize states to end: 1) juvenile life without parole sentencing; 2) the prosecution and transfer of children to adult courts; 3) the solitary confinement of persons under age 18 in any custodial facility in the country; 4) the disproportionate treatment of children of color?

Suggested Recommendations

- The State Party should end the sentencing of juveniles to life without parole in the federal system and provide meaningful incentives to all constituent states to end the practice.
- The State Party should ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not either directly prosecuted in or transferred to adult courts.
- The State Party should end the solitary confinement of juveniles in all custodial settings.

Poverty and the Criminal Legal System

Summary

In the United States, criminal law and policy often has a disparate impact upon the poor. This is especially the case when states impose costs upon accused and convicted individuals in an attempt to recoup costs associated with running policing systems, jails, courts, and prisons. As many criminal legal systems in the United States attempt to move away from using cash bail, pretrial detention, and other custodial curtailments on liberty, the State Party’s federal and state legal systems are increasingly using artificial intelligence, such as algorithmic risk scores, which can cement racial and income disparities in people’s enjoyment of their rights to privacy and liberty.

Relevant ICCPR Articles

Articles 2, 6, 14, and 26.

Prior Recommendations

- In its 2006 Concluding Observations, the Committee expressed its concern regarding the treatment of poor people, and in particular African Americans in the Hurricane Katrina evacuation and reconstruction efforts, and recommended the US increase efforts to “ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration . . .” (para. 26).
- In its 2014 Concluding Observations the Committee expressed concern about the criminalization of homelessness, including everyday activities such as eating, sleeping, and sitting in particular areas. (para. 19).

⁴⁵ UN Human Rights Committee, “Concluding observations on the fourth periodic report of the United States of America,” CCPR/C/USA/CO/4 April 23, 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en (accessed January 11, 2019), para. 20.

Current US Government Policy or Practice

Poor people accused of crimes are often jailed because judges require money bail as a condition of release, forcing people not convicted of any crime to stay behind bars for long periods of time awaiting trial, and resulting in coerced guilty pleas.⁴⁶ A movement to reduce the use of money bail is growing but many states, including California—which passed a bill⁴⁷ eliminating money bail in August this year⁴⁸—are replacing money bail with risk assessment tools that could entrench discrimination while failing to lower rates of pretrial incarceration.⁴⁹

Many local jurisdictions impose excessive fees and fines for even minor violations of law. If unpaid, these debts can result in disproportionate punishment across poor communities, and arrests that feed a cycle of incarceration and increased poverty.⁵⁰ Similarly, some states privatize misdemeanor probation services, which often puts poor people at risk of incarceration because they cannot afford to pay an exorbitant combination of court fines and probation company fees.⁵¹

Human Rights Committee General Comments and Related UN Body Recommendations

Under Article 2 of the Covenant, persons should not experience discrimination or be disadvantaged before the law due to their economic status. As the Committee has noted in its General Comment 32, “Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26 . . . to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that ‘all persons shall be equal before the courts and tribunals,’ but may also amount to discrimination.” In June 2018, the United Nations special rapporteur on extreme poverty and human rights issued a report sharply criticizing the US for its policies towards the poor.⁵²

Recommended Questions

- What steps if any is the State Party taking to ensure that algorithmic scoring tools and electronic monitoring are not unnecessarily curtailing the rights to privacy and liberty for persons involved in the criminal legal system?
- How can principles of non-discrimination and equality before courts and tribunals be upheld in the United States when poor people are mandated to pay for the costs of their involvement in the criminal legal system, and experience disproportionately harsh consequences when they are unable to pay fines and fees imposed by US criminal legal systems?

Suggested Recommendations

- Ensure that algorithmic scoring tools and electronic monitoring do not unnecessarily curtail the rights to privacy and liberty for persons involved in the criminal legal system.
- Due to their discriminatory effects, do not allow courts to rely on algorithmic scoring tools in sentencing or in decisions around pre-trial detention and release.

⁴⁶ “Q & A: Pretrial Incarceration, Bail and Profile Based Risk Assessment in the United States,” Human Rights Watch news release, June 1, 2018, <https://www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states>.

⁴⁷ John Raphling (Human Rights Watch) and Pete White, “California’s new money bail reform won’t actually reform an unjust system,” Op-ed, *Los Angeles Times*, September 5, 2018, <https://www.hrw.org/news/2018/09/05/californias-new-money-bail-reform-wont-actually-reform-unjust-system>.

⁴⁸ John Raphling (Human Rights Watch), “California Ended Cash Bail—but May Have Replaced It With Something Even Worse,” Op-ed, *The Nation*, September 24, 2018, <https://www.hrw.org/news/2018/09/24/california-ended-cash-bail-may-have-replaced-it-something-even-worse>.

⁴⁹ “Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions,” Human Rights Watch news release, June 1, 2018, <https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions>.

⁵⁰ US Department of Justice, Civil Rights Division, “Investigation of the Ferguson Police Department,” March 4, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (accessed January 11, 2019).

⁵¹ Human Rights Watch, *Set Up to Fail: The Impact of Offender-Funded Private Probation on the Poor*, February 20, 2018, <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor#>.

⁵² UN Commission on Human Rights, Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, Visit to United States of America, A/HRC/38/33/Add.1, May 4, 2018, <https://digitallibrary.un.org/record/1629536?ln=en> (accessed January 1, 2019).

- The State Party should press local and state governments to end their reliance on user fees to fund criminal justice and other state systems, and to establish safeguards to ensure that legal financial obligations do not create undue hardship for those who cannot afford to pay.

Rights of Non-Citizens

Summary

United States immigration laws and policies are abusive on a number of levels. The US has also continued to erect new barriers that threaten the right of people to seek asylum from persecution. In deportation proceedings, US law generally affords little or no weight to the rights to home and family unity and to be protected from arbitrary interference with home and privacy. Moreover, the United States has subjected immigrants to prolonged periods of immigration detention, including mandatory detention, has forcibly separated children from their parents after apprehension by immigration authorities, and has detained adults and children, in harsh and difficult conditions, including in conditions involving inadequate medical care that are linked to deaths.

Relevant ICCPR Articles

Articles 2, 9, 12, 17, 23, and 26.

Prior Recommendations

- In its 2016 Concluding Observation the Committee expressed concern about the increased level of militarization on the southwest border with Mexico. (para. 27).
- In its 2014 Concluding Observations, the Committee recommended that the United States “review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions; take measures to ensure that affected persons have access to legal representation; and identify ways to facilitate access to adequate health care, including reproductive health-care services, by undocumented immigrants and immigrants and their families who have been residing lawfully in the United States for less than five years.” (para. 15).

Current US Government Policy or Practice

More than 2,500 families were forcibly separated in 2018 after entering irregularly at the US border as the Trump administration ramped up criminal prosecutions of parents traveling with children.⁵³ In one of many cases that came to symbolize the cruelty of the Administration’s policies, a 10-year-old girl with Down Syndrome was separated from her mother. Though a federal court and tremendous public outcry put a stop to mass separations in late June, reunifications of hundreds of families lagged for months.⁵⁴ According to media reports families continued to be separated on a smaller scale after Trump issued an executive order supposedly ending the practice.⁵⁵ Ramped-up criminal prosecutions for illegal entry continued. Mental health professionals warned that separation was very likely to cause trauma, both immediate and long-lasting.⁵⁶

⁵³ “US: Separated Families Report Trauma, Lies, Coercion,” Human Rights Watch news release, July 26, 2018 <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>.

⁵⁴ “US: Deported Parents’ Agonizing Wait,” Human Rights Watch news release, September 5, 2018, <https://www.hrw.org/news/2018/09/05/us-deported-parents-agonizing-wait>.

⁵⁵ Ginger Thompson, “Families Are Still Being Separated at the Border, Months After “Zero Tolerance” Was Reversed,” *ProPublica*, November 27, 2018, <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed> (accessed January 5, 2019).

⁵⁶ Martin Teicher, “Childhood trauma and the enduring consequences of forcibly separating children from parents at the United States border,” *BMC Med* 16 (2018): 146, accessed January 11, 2019, doi:10.1186/s12916-018-1147-y; Colleen Kraft, “Separating parents from their kids at the border contradicts everything we know about children’s welfare,” *Los Angeles Times*, May 3, 2018, <https://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html> (January 5, 2019).

Hundreds of parents were deported separately from their children.⁵⁷ A June administrative ruling by former Attorney General Jeff Sessions placed new restrictions on access to asylum for people claiming persecution by non-state actors, including victims of domestic and gang violence.⁵⁸ In November, the administration issued an interim final rule barring migrants who enter between ports of entry from seeking asylum, in violation of international human rights law and in apparent violation of US law as well;⁵⁹ it was temporarily enjoined by a federal judge.⁶⁰ A march by migrants on November 26 seeking asylum at the US-Mexico border ended with clashes between some migrants and US border agents, who lobbed teargas projectiles at groups of migrants that included young children.⁶¹

The US Supreme Court upheld an executive order issued by Trump banning travel to the US from several predominantly Muslim countries,⁶² which Human Rights Watch and those challenging the ban in court said was discriminatory.⁶³ The administration also announced Temporary Protected Status would expire for almost 400,000 immigrants from Sudan, Haiti, El Salvador, Nicaragua, Honduras, and Nepal from late 2018 to early 2020, confronting most with likely deportation and separation from home and family.⁶⁴ Arrests and deportations of undocumented people arrested in the interior of the United States, often after minimal contact with the criminal justice system or in large-scale workplace raids continued to mount without regard to their rights to home and family.⁶⁵

Immigration authorities sought to detain more people in the already-sprawling immigration detention system. Immigration authorities sought to remove legal limits to detaining children in families indefinitely.⁶⁶ Of 15 recent deaths in immigration detention, Human Rights Watch found that eight were linked to poor medical care.⁶⁷

The fate of almost 800,000 young immigrants who hold work permits and protection from deportation under Deferred Action for Childhood Arrivals (DACA) remained uncertain as court challenges continued around the administration's 2017 decision to end the program. Proposed regulatory changes to the definition of "public charge" under US immigration law threatened to disrupt essential public health and benefit programs supporting many US citizen children of non-citizens.⁶⁸ A variety of policies, including changes to federal rules that sought to limit asylum for victims of gang and domestic violence,⁶⁹ and new "Migration Protection Protocols" requiring asylum seekers seeking to enter the United States from

⁵⁷ "US: Deported Parents' Agonizing Wait," Human Rights Watch news release, September 5, 2018, <https://www.hrw.org/news/2018/09/05/us-deported-parents-agonizing-wait>.

⁵⁸ "US Rolls Back Protections for Asylum Seekers, Again," Human Rights Watch news release, June 13, 2018, <https://www.hrw.org/news/2018/06/13/us-rolls-back-protections-asylum-seekers-again>.

⁵⁹ "US: Proposed Asylum Regulation Violates Law," Human Rights Watch news release, November 8, 2018, <https://www.hrw.org/news/2018/11/08/us-proposed-asylum-regulation-violates-law>.

⁶⁰ Emily Sullivan, "Federal Court Blocks Trump Administration's Asylum Ban," *National Public Radio*, November 20, 2018, <https://www.npr.org/2018/11/20/669471110/federal-court-blocks-trump-administrations-asylum-ban> (accessed January 5, 2019).

⁶¹ Jonathan Pedneault, "A Peaceful Demonstration Turns Ugly at the US Border," commentary, Human Rights Watch Dispatch, November 26, 2018, <https://www.hrw.org/news/2018/11/26/peaceful-demonstration-turns-ugly-us-border>.

⁶² Adam Liptak and Michael D. Shear, "Trump's Travel Ban is Upheld by the Supreme Court," *New York Times*, June 26, 2018, <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html> (accessed January 5, 2019); Caroline Kelly, Ariane de Vogue, and Dan Berman, "Supreme Court upholds block on Trump's asylum ban," *CNN*, December 22, 2018, <https://www.cnn.com/2018/12/21/politics/supreme-court-upholds-block-on-trumps-asylum-ban/index.html> (accessed January 9, 2019).

⁶³ Bill Frelick, "US Supreme Court Disregards Trumps Discriminatory Words to Uphold Travel Ban," commentary, Human Rights Watch Dispatch, June 26, 2018, <https://www.hrw.org/news/2018/06/26/us-supreme-court-disregards-trumps-discriminatory-words-uphold-travel-ban>.

⁶⁴ "Temporary US Status but Long-term US Lives," Human Rights Watch news release, April 4, 2018, <https://www.hrw.org/news/2018/04/04/temporary-status-long-term-us-lives>.

⁶⁵ Grace Meng, "Trump's Zero Tolerance Approach Goes Beyond Border," commentary, Human Rights Watch Dispatch, July 11, 2018, <https://www.hrw.org/news/2018/07/11/trumps-zero-tolerance-approach-goes-beyond-border>.

⁶⁶ "Comments on Proposed Rule Regarding Detention of Children," Human Rights Watch news release, November 6, 2018, <https://www.hrw.org/news/2018/11/06/human-rights-watch-submits-comments-proposed-rule-regarding-detention-children-and>.

⁶⁷ Human Rights Watch, *Code Red: Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, June 20, 2018, <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>.

⁶⁸ Henry J. Kaiser Family Foundation, "Fact Sheet: Proposed Changes to Public Charge Policies for Immigrants: Implications for Health Coverage," September 24, 2018, <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/> (January 5, 2019).

⁶⁹ Atenas Burrola, "US Rolls Back Protections for Asylum Seekers, Again," commentary, Human Rights Watch Dispatch, June 13, 2018, <https://www.hrw.org/news/2018/06/13/us-rolls-back-protections-asylum-seekers-again>.

Mexico to remain in that country while their claims are adjudicated, threatened their right to seek asylum from persecution in the United States.⁷⁰

Human Rights Committee General Comments and Related UN Body Recommendations

US deportation and detention policies threaten family rights

The Committee in General Comment 15 has stated that the right to family unity entails limits on states' power to regulate immigration,⁷¹ and, in its General Comment 19, that the right to found a family under the Covenant includes the right "to live together."⁷² In *Winata v. Australia*, the Committee found a violation where Australia sought to deport two Indonesian nationals whose 13-year-old son, Barry, had been born in, and had become a citizen of, Australia. The Committee held that in the circumstances of that case, Australia would have to demonstrate that it had interests more compelling than the mere enforcement of immigration laws to justify deporting the child's parents.⁷³

The Committee has since applied the same analysis in other cases, with varying results.⁷⁴ One clear constant in the Committee's jurisprudence is that any interference with a person's family caused by deportation is inevitably "arbitrary" if the state fails to weigh that human rights impact in the balance against its own interests in deporting the person. This is precisely what US immigration law does as a matter of routine.

In its recent decision to separate families arriving at the US border, the US federal government failed to weigh the harm to immigrant families before instituting its harsh separation and detention policies, the harmful effects of which are being felt to date by children and their parents. The UN special rapporteur on the rights of non-citizens has stated, "[D]eportation is justified only if the interference with family life is not excessive compared to the public interest to be protected."⁷⁵

US deportation law and policy may threaten rights to protection of privacy and home

The Committee has found that the definition of "one's own country" under Article 12(4) of the Covenant is broader than the concept of a person's country of nationality.⁷⁶ In two cases involving people who were brought to Australia and Canada from other countries as young children, the Committee found a violation of Article 12(4) where the state sought to deport those individuals later on in life.⁷⁷ The facts in both of these cases are closely analogous to the situation of US "Dreamers." The Human Rights Committee has stated in its General Comment 16 that the term "home" as defined in Article 17 is "to be understood to indicate the place where a person resides or carries out his usual occupation."⁷⁸

Restrictions on the access to asylum in the United States threaten to breach the obligation of non-refoulement

⁷⁰ "US: Don't Return Asylum Seekers to Mexico," Human Rights Watch news release, December 21, 2018, <https://www.hrw.org/news/2018/12/21/us-dont-return-asylum-seekers-mexico>.

⁷¹ UN Human Rights Committee, General Comment 15, The Position of Aliens Under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 18 (1994), paras. 5 and 7.

⁷² UN Human Rights Committee, General Comment 19, Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses (Thirty-ninth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 149 (2003), para. 5.

⁷³ *Winata v. Australia*, Communication No. 930/2000, UN Doc. CCPR/C/72/D/930/2000 (2001).

⁷⁴ See, for example, *Madaferrri v. Australia*, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001 (2004). See, also, *Husseini v. Denmark*, Communication No. 2243/2013, UN Doc. CCPR/C/112/D/2243/2013 (2014); *MGC v. Australia*, Communication No. 1875/2009, UN Doc. CCPR/C/113/D/1875/2009 (2015).

⁷⁵ UN Office of the High Commissioner for Human Rights (OHCHR), The Rights of Non-Citizens, 2006, HR/PUB/06/11, <http://www.refworld.org/docid/46ceabb2.html> (accessed 3 December 2017).

⁷⁶ UN Human Rights Committee, General Comment 27, Article 12 (Freedom of Movement) (Sixty-seventh session, 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 20.

⁷⁷ UN Human Rights Committee, *Nystrom v. Australia*, Communication No. 1557/07, UN Doc. CCPR/C/102/D/1557/2007; UN Human Rights Committee, *Warsame v. Canada*, Communication No. 1959/10, UN Doc. CCPR/C/102/D/1959/2010 (2011).

⁷⁸ UN Human Rights Committee, General Comment 16, Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (1988), para. 5.

In its General Comment 31, the Committee explained that “the article 2 obligation entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁷⁹ The non-refoulement obligation applies to indirect acts that have the effect of returning people to harm, including “detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers,”⁸⁰ as well as returns to third countries that in turn deport people to countries where they would face irreparable harm.⁸¹

US immigration detention threatens respect for dignity of persons, rights of children

The Committee has noted in its General Comment 35 that “detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.”⁸² The United Nations Working Group on Arbitrary Detention has argued that “immigration detention should gradually be abolished.... If there has to be administrative detention, the principle of proportionality requires it to be a last resort.”⁸³

In its General Comment 35, the Committee noted that “decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health”⁸⁴ The inadequate medical care provided to immigrants in certain cases violates the Committee’s requirement that State Parties provide “adequate medical care during detention.”⁸⁵

Immigration detention of children, alone, or with their families is inconsistent with international standards, particularly the fundamental principle—reflected in both international and US law—that the “best interest of the child” should govern the state’s actions toward children.⁸⁶ For these and other reasons, international standards recognize that children should not be detained solely because of their or their parents’ immigration status.⁸⁷ Moreover, deprivation of liberty has a negative effect on children’s

⁷⁹ UN Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Eightieth session, 2004), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add. 1326 (May 2004), para. 12.

⁸⁰ Committee against Torture, General Comment 4, On the implementation of article 3 of the Convention in the context of article 22*, UN Doc. CAT/C/GC/4 (2018), para. 14.

⁸¹ See International Law Commission, Draft Articles on the Expulsion of Aliens, with Commentaries (2014), art. 10.

⁸² UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35 (2014), para. 18.

⁸³ UN Commission on Human Rights, “Report of the Working Group on Arbitrary Detention,” A/HRC/13/30, January 18, 2010, https://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf (accessed January 11, 2019), para. 59.

⁸⁴ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person), para. 18.

⁸⁵ UN Human Rights Committee, Decision: *Pinto v. Trinidad and Tobago*, Communication no. 232/1987, July 20, 1990,

http://www.worldcourts.com/hrc/eng/decisions/1990.07.20_Pinto_v_Trinidad_and_Tobago.htm (accessed January 11, 2019), p. 69.

⁸⁶ The Convention on the Rights of the Child provides that children have the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them, both in the public and private sphere. Convention on the Rights of the Child, art. 3(1). The United States has not ratified the convention but has signed it. As such, the United States is not bound by the convention but cannot take actions that are contrary to the object and purpose of the treaty. The Committee on the Rights of the Child, which monitors adherence to the convention, has identified the best interests principle as one of four general principles for interpreting and implementing all rights of the child, and applies it as a dynamic concept that requires an assessment appropriate to the specific context. Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, UN Doc. CRC/C/GC/14 (May 29, 2014), para. 1.

⁸⁷ See, for example, UN Commission on Human Rights, Deliberation of the Working Group on Arbitrary Detention, Revised Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45

February 7, 2018, para. 11; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22* (2017), paras. 5-13; UN Committee on the Rights of the Child, General Comment 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/C/GC/2005/6 (2005), para. 61.

capacity to realize other fundamental rights, including the rights to education, health, and family unity, and can result in constructive (or indirect) refoulement.⁸⁸

Recommended Questions

- How can the State Party square its treaty obligations with its policies and practices that have: 1) led to the deaths of immigrant detainees due to inadequate medical care and that have 2) separated families during the course of detention and deportation policies and that have 3) effected the detention of children?
- What steps if any will the State Party take to ensure the non-refoulement of people seeking asylum from persecution in the United States?
- What steps if any will the State Party take to reform its deportation laws and policies to ensure that individuals' rights to family, and non-interference with home and privacy are adequately weighed against any legitimate government interest in deporting that person?

Suggested Recommendations

- The State Party should review its policies of mandatory detention and deportation in order to allow for individualized decisions in both instances.
- The State Party should reverse all policies that put at risk of refoulement refugees seeking asylum from persecution in the United States.
- The State Party should ensure that immigration detention is only used if reasonable, necessary and proportionate in the light of the circumstances and that there are mechanisms to reassess its proportionality as it extends in time. The State Party should take measures to end immigration detention of persons below the age of 18 when the sole basis of detention is immigration status.

Women's and Girls' Health

Summary

The United States has a patchwork of healthcare coverage and access that leaves many women and girls uninsured, and contributes to an environment where women die at high rates, compared to other similarly resourced countries, from preventable maternal and gynecological cancer related deaths. Recently, state and federal authorities have adopted a variety of laws and policies that further threaten women's and girls' rights to health.

Relevant ICCPR Articles

Articles 2, 3, 6 and 26.

Prior Recommendations

- In its 2006 Concluding Observations, the Committee recommended that the United States, "should take all steps necessary, including at state level, to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex, in particular in the area of employment." (para. 28).

Current US Government Policy or Practice

This Committee raised concerns in 2014 that the Affordable Care Act (ACA) did not extend healthcare coverage to millions of undocumented immigrants. The ACA did however create access to care for millions of people. States that expanded Medicaid eligibility saw the greatest gains in coverage. The ACA has been targeted consistently for repeal, and a tax reform that eliminated the individual mandate could

⁸⁸ See, for example, Committee against Torture, General Comment 4, General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, UN Doc. CAT/C/GC/4 (2018), para. 14. (Calling on states not to adopt "dissuasive measures" that would compel return to risk of torture and other ill-treatment).

lead to 13 million people to be without insurance coverage.⁸⁹ In addition, the Medicaid program, private insurance subsidies, non-discrimination protections for lesbian, gay, bisexual, and transgender (LGBT) people, and other key elements of the ACA were targets of federal and state action to restrict access to health care. Many states, with federal support, have imposed or are seeking waivers to impose work requirements, drug testing, and other barriers to Medicaid eligibility for low income individuals.

Human Rights Watch documented the harmful effects of the Trump administration's policies on access to health care for LGBT individuals, including strengthening of moral and religious objections to provision of health care without adequate consideration of protections from discrimination and the barriers to health care, including HIV prevention and treatment, for transgender women in the US.

Human Rights Watch has also documented⁹⁰ how failure to expand Medicaid eligibility, along with a mix of other policies and practices, in Alabama, has contributed to a high rate of preventable cervical cancer deaths that disproportionately impacts Black women in the state. The Alabama public health care system is not structured to ensure consistent access to care for poor women. Alabama, along with Texas, has the lowest Medicaid eligibility levels in the nation and is seeking a waiver to make eligibility even more difficult.⁹¹

The US is also taking steps that would reduce access to other safety net programs and insurance coverage for reproductive healthcare services or which would allow discrimination in the healthcare system.

Congress passed legislation in 2017 making it easier for states to restrict Title X grants by creating eligibility requirements that could exclude certain family planning providers, like Planned Parenthood.⁹² Title X is a national family planning program that funds services to more than 4 million Americans. The Department of Health and Human Services (HHS) proposed a "gag" rule in May to stop doctors receiving Title X funding from giving women the full range of pregnancy options and to eliminate a requirement that doctors give neutral and factual information to pregnant women.⁹³

In 2017, HHS issued a rule exempting nearly any employer claiming religious⁹⁴ or moral⁹⁵ objections to birth control from the ACA's requirement that they provide contraceptive coverage as part of their employee health insurance plans. In March 2018, it proposed another rule that would dramatically expand healthcare providers' ability to turn away patients based on religious or moral objections, including women seeking reproductive health services and lesbian, gay, bisexual, and transgender people.⁹⁶ At time of writing, the rule had not been finalized.

This is coupled with actions taken at the state level in several jurisdictions to adopt highly restrictive laws on abortion and reproductive health.⁹⁷

⁸⁹ US Congressional Budget Office, "Repealing the Individual Health Insurance Mandate: An Updated Estimate," November 2017, <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/reports/53300-individualmandate.pdf> (accessed January 11, 2019).

⁹⁰ Human Rights Watch, *It Should Not Happen: Alabama's Failure to Prevent Cervical Cancer Death in the Black Belt*, November 29, 2018, <https://www.hrw.org/report/2018/11/29/it-should-not-happen/alabamas-failure-prevent-cervical-cancer-death-black-belt#>.

⁹¹ Kaiser Family Foundation, "Where are States Today? Medicaid and CHIP eligibility levels for children, pregnant people and adults," March 28, 2018, <https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicare-and-chip/#table3> (accessed January 11, 2019).

⁹² Amanda Klasing, "US Congress Finds New Route to Attack Planned Parenthood," commentary, Human Rights Watch Dispatch, March 30, 2017, <https://www.hrw.org/news/2017/03/30/us-congress-finds-new-route-attack-planned-parenthood>.

⁹³ Amanda Klasing, "US to Strip Funding from Women's Health Providers: Trump's New Rule Will Hit Poor Women, Women of Color Hardest," commentary, Human Rights Dispatch, May 22, 2018, <https://www.hrw.org/news/2018/05/22/us-strip-funding-womens-health-providers>.

⁹⁴ "Comment on Interim Final Rule on Religious Exemptions and Accommodations under the ACA," Human Rights Watch news release, December 5, 2017, <https://www.hrw.org/news/2017/12/05/human-rights-watch-comment-interim-final-rule-religious-exemptions-and>.

⁹⁵ "Comment on Interim Final Rule on Moral Exemptions and Accommodations under the ACA," Human Rights Watch news release, December 5, 2017, <https://www.hrw.org/news/2017/12/05/human-rights-watch-comment-interim-final-rule-moral-exemptions-and-accommodations-0>.

⁹⁶ Letter from Human Rights Watch to US Secretary of Health and Human Services Alex Azar, March 27, 2018, <https://www.hrw.org/news/2018/03/27/human-rights-watch-letter-us-secretary-health-and-human-services-alex-azar>.

⁹⁷ Guttmacher Institute, "Policy Trends in the States: First Quarter 2018," April 2018, <https://www.guttmacher.org/article/2018/04/policy-trends-states-first-quarter-2018> (accessed January 6, 2019).

The US has also adopted a policy that strips US health funding from foreign nongovernmental organizations if they use funds from any source to supply information about abortions, provide abortions, or advocate to liberalize abortion laws. Human Rights Watch research in 2017 demonstrated that some organizations providing essential health services are already reporting negative impacts.⁹⁸

Human Rights Committee General Comments and Related UN Body Recommendations

The right to health is inseparable from provisions on the right to life and the right to be free from discrimination, protections included the ICCPR. The Committee, in its most recent General Comment 36, stated clearly that “The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.”⁹⁹ The Committee further states these general conditions may include health care and that the right to life may require developing strategic plans to advance enjoyment of the right to life, such as “for improving access to medical examinations and treatments designed to reduce maternal and infant mortality.”¹⁰⁰ It also has made clear that restrictions on women’s or girls’ ability to seek abortion must not “jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy,” and that new barriers to accessing abortion should not be introduced, “including barriers caused as a result of the exercise of conscientious objection by individual medical providers.”¹⁰¹

Recommended Questions

- Why do so many laws and policies related to health and healthcare seek to restrict or heavily regulate services used nearly exclusively by women and girls?
- Millions of people living in the United States lack healthcare coverage, exacerbating barriers to care and worsening health outcomes for many already marginalized populations. What if anything is the State Party doing to address this lack of access to care, and does it believe recent policies and laws that have the effect of restricting access to some key services conform with its obligations?
- Please explain, with detailed reference to data, whether and how the State Party believes it is upholding its obligation to protect the right to life, in relation to deaths that could reasonably be prevented through access to healthcare, with a focus on preventable maternal deaths and deaths from cervical and other preventable gynecological cancers.

Suggested Recommendations

- The State Party should take steps to increase access to all necessary health services to reduce preventable deaths, such as infant and maternal deaths, deaths from HIV, and preventable gynecological cancers.
- The State Party should collect and publicize data on the impact range of recent laws, policies and regulations on unplanned pregnancies rates, maternal mortality and morbidity and infant mortality.
- The State Party should take all effective steps necessary to end discrimination in access to healthcare.

Sexual Orientation and Gender Identity

Summary

⁹⁸ “US: Trump Policy Harming Kenya, Uganda Health Services,” Human Rights Watch news release, October 26, 2017, <https://www.hrw.org/news/2017/10/26/us-trump-policy-harming-kenya-uganda-health-services>.

⁹⁹ UN Human Rights Committee, General comment No 36, On article 6 of the International Covenant on Civil and Political Rights, on the right to life (One-hundred and twenty-fourth session, 2018), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. CCPR/C/GC/36, para. 26.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, para. 8.

A variety of policies in state and federal law heighten discrimination against persons based on sexual orientation and gender identity.

Relevant ICCPR Articles

Articles 2, 17, 18, 19, 21, 22 and 26.

Prior Recommendations

- The Committee recommended in its 2006 Concluding Observations that the United States “should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The State Party should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence and that federal and state employment legislation outlaw discrimination on the basis of sexual orientation.” (para. 25).

Current US Government Policy or Practice

In February 2017, the Departments of Justice and Education withdrew guidance clarifying that discrimination against transgender students constitutes sex discrimination under federal law. The withdrawal of these protections jeopardizes transgender students’ safety, health, privacy, and ability to learn.¹⁰² LGBT students also experience bullying and harassment in schools; restrictions on freedom of expression, assembly, and association; and restrictions on access to information, particularly in seven states with laws prohibiting LGBT-inclusive curricula in sexuality education.¹⁰³

In July 2017, President Trump announced on Twitter that transgender people would no longer be permitted to serve in the US military. The ban has been blocked by federal courts and has not yet taken effect.¹⁰⁴

The Department of Health and Human Services has announced plans to roll back a federal rule clarifying that the Affordable Care Act’s prohibition on sex discrimination includes discrimination based on gender identity. LGBT people face significant barriers when seeking health care in the US, and these rule changes will exacerbate existing health care disparities.¹⁰⁵

In 2018, the Bureau of Prisons announced it would default to housing transgender prisoners according to their sex assigned at birth, a decision which will exacerbate the alarming rates of physical and sexual abuse that transgender persons experience in detention.¹⁰⁶

In 2018, Oklahoma, Kansas, and South Carolina enacted laws permitting adoption and foster care providers asserting a religious objection to refuse to place children with LGBT people. Similar laws exist in Alabama, Michigan, North Dakota, South Dakota, Texas, and Virginia. A similar provision was added to an appropriations bill in the US House of Representatives but did not become law.

Mississippi permits a wide range of service providers to refuse goods and services to LGBT people based on the provider’s religious or moral objections. Tennessee allows counselors and therapists to decline to work with LGBT patients if they assert a religious or moral objection. These “license to discriminate”

¹⁰² Human Rights Watch, *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools*, September 2016, https://www.hrw.org/sites/default/files/report_pdf/uslgbttrans0916_web.pdf.

¹⁰³ Human Rights Watch, *“Like Walking Through a Hailstorm”: Discrimination Against LGBT Youth in US Schools*, December 2016, https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf.

¹⁰⁴ Order: *Jane Doe 2 v. James Mattis*, Civil Action No. 17-1597, US District Court for the District of Columbia, November 30, 2018, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1597-187.

¹⁰⁵ Human Rights Watch, *“You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care*, July 2018, https://www.hrw.org/sites/default/files/report_pdf/us_lgbt0718_web.pdf.

¹⁰⁶ Megan McLemore, “US Bureau of Prisons Policy Change Endangers Transgender Prisoners,” commentary, Human Rights Dispatch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/us-bureau-prisons-policy-change-endangers-transgender-prisoners>.

laws deprive LGBT people of goods and services, make them reluctant to seek out goods and services, and harm their dignity.¹⁰⁷

Federal law does not expressly prohibit discrimination based on “sexual orientation” or “gender identity” in employment, education, housing, or health care. Nineteen states have laws expressly banning discrimination based on both sexual orientation and gender identity in employment, housing, and public accommodations.¹⁰⁸ Wisconsin and New York prohibit discrimination based on sexual orientation but not gender identity, and Utah only prohibits discrimination in employment and housing.¹⁰⁹ Michigan, New York, and Pennsylvania interpret their statutory prohibition on sex discrimination to include discrimination based on sexual orientation and/or gender identity.¹¹⁰

Human Rights Committee General Comments and Related UN Body Recommendations

The Human Rights Committee has repeatedly recognized that discrimination based on sexual orientation and gender identity is impermissible under the ICCPR.¹¹¹

The Human Rights Committee has recognized that LGBT youth should be safe from violence and bullying in school environments. Article 9 of the ICCPR guarantees the right to liberty and security of person. This encompasses an obligation on the part of governments to protect people’s right to personal security against attacks by private persons.¹¹² Under Article 24 of the ICCPR, the US government has an additional responsibility to undertake “such measures of protection” to protect the rights of children “as are required by [their] status as minor[s].”¹¹³ The Human Rights Committee has previously expressed concern about violence and harassment against LGBT people.¹¹⁴

Article 17 of the ICCPR specifies that “[n]o one shall be subjected to arbitrary or unlawful interference with [their] privacy.”¹¹⁵ State efforts to guarantee that right should include steps to respect the gender identity of transgender people and refrain from classifying or treating transgender individuals in a manner that could “out” them against their will to other members of the community.

¹⁰⁷ Human Rights Watch, “*All We Want is Equality: Religious Exemptions and Discrimination against LGBT People in the United States*,” February 2018, https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf.

¹⁰⁸ Movement Advancement Project, “Non-Discrimination Laws,” http://www.lgbtmap.org/equality-maps/non_discrimination_laws (accessed Jan. 10, 2018).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Art 26. See, for example, also, UN Human Rights Committee, *Young v. Australia*, UN Doc. CCPR/C/78/D/941/2000 (September 18, 2003), <http://hrlibrary.umn.edu/undocs/941-2000.html> (accessed October 20, 2016); UN Human Rights Committee, *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (March 31, 1994), <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed October 20, 2016); UN Human Rights Committee, “Concluding Observations: Azerbaijan,” UN Doc. CCPR/C/AZE/CO/4 (November 16, 2016), paras. 8-9; UN Human Rights Committee, “Concluding Observations: Burkina Faso,” UN Doc. CCPR/C/BFA/CO/1 (October 17, 2016), paras. 13-14; UN Human Rights Committee, “Concluding Observations: Colombia,” UN Doc. CCPR/C/COL/CO/7 (November 17, 2016), paras. 16-17; UN Human Rights Committee, “Concluding Observations: Costa Rica,” UN Doc. CCPR/C/CRI/CO/6 (April 21, 2016), paras. 11-12; UN Human Rights Committee, “Concluding Observations: Denmark,” UN Doc. CCPR/C/DNK/CO/6 (August 15, 2016), paras. 13-14; UN Human Rights Committee, “Concluding Observations: Ecuador,” UN Doc. CCPR/C/ECU/CO/6 (August 11, 2016), paras. 11-12; UN Human Rights Committee, “Concluding Observations: Ghana,” UN Doc. CCPR/C/GHA/CO/1 (August 9, 2016), paras. 43-44; UN Human Rights Committee, “Concluding Observations: Jamaica,” UN Doc. CCPR/C/JAM/CO/4 (November 22, 2016), paras. 15-16; UN Human Rights Committee, “Concluding Observations: Kazakhstan,” UN Doc. CCPR/C/KAZ/CO/2 (August 9, 2016), paras. 9-10; UN Human Rights Committee, “Concluding Observations: Kuwait,” UN Doc. CCPR/C/KWT/CO/3 (August 11, 2016), paras. 12-13; UN Human Rights Committee, “Concluding Observations: Morocco,” UN Doc. CCPR/C/MAR/CO/6 (December 1, 2016), paras. 11-12; UN Human Rights Committee, “Concluding Observations: Slovakia,” UN Doc. CCPR/C/SVK/CO/4 (November 22, 2016), paras. 14-15; UN Human Rights Committee, “Concluding Observations: South Africa,” UN Doc. CCPR/C/ZAF/CO/1 (April 27, 2016), paras. 20-21.

¹¹² ICCPR Art 9. See also UN Human Rights Committee, *Delgado Paez v. Colombia*, CCPR/C/39/D/195/1985, August 23, 1990, <http://hrlibrary.umn.edu/undocs/session39/195-1985.html> (accessed October 20, 2016).

¹¹³ ICCPR, Art. 24 (1).

¹¹⁴ See, for example, UN Human Rights Committee, “Concluding Observations: Russian Federation,” UN Doc. CCPR/C/RUS/CO/6 (November 24, 2009), para. 27; UN Human Rights Committee, “Concluding Observations: Cambodia,” UN Doc. CCPR/C/COL/CO/6 (August 4, 2010), para. 12; UN Human Rights Committee, “Concluding Observations: Ireland,” UN Doc. CCPR/C/IRL/CO/3 (July 30, 2008), para. 8.

¹¹⁵ ICCPR, Art. 17.

The UN Human Rights Committee has clarified that the freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women, or racial and religious minorities.¹¹⁶ It has urged states considering restrictions on the manifestation of religion or belief to “proceed from the need to protect all rights guaranteed under the Covenant, including the right to equality and non-discrimination.”¹¹⁷

Article 19 of the ICCPR protects the freedom of expression and freedom to seek, receive, and impart information.¹¹⁸ The ICCPR also recognizes the right of peaceful assembly under Article 21 and the right to freedom of association with others under Article 22.¹¹⁹ The many obstacles that LGBT youth encounter when forming or operating LGBT student groups threaten to unduly limit or restrict LGBT students’ rights to expression, association, and assembly in schools. The absence of education related to LGBT issues and the continued existence of so-called “no promo homo” laws undermines the right to freedom of expression for both students and teachers. The UN Human Rights Committee, reviewing a conviction under Russia’s law prohibiting “propaganda of homosexuality among minors,” concluded that “there is no doubt that there has been a restriction on the exercise of the author’s right to freedom of expression” under such laws and that the restriction constituted a violation of Article 19.2 read in conjunction with Article 26 of the Covenant.¹²⁰

Recommended Questions

- As it weakens sex discrimination protections for LGBT people, what concrete steps if any is the federal government taking to prohibit discrimination based on sexual orientation and gender identity in keeping with Articles 2 and 26 of the ICCPR?
- What steps if any is the government taking to ensure that religious exemptions do not infringe on the rights of LGBT individuals?

Suggested Recommendations

- The State Party should expressly prohibit discrimination on the basis of sexual orientation and gender identity in employment, education, housing, health care, and other relevant domains.
- The State Party should withdraw its ban on transgender military service.
- The State Party should withdraw its policy housing transgender prisoners according to their sex assigned at birth and undertake a holistic assessment that respects a person’s gender identity.
- The State Party should strengthen protections for LGBT youth in schools by enacting LGBT-inclusive anti-bullying laws, repealing no promo homo laws, promulgating LGBT-inclusive curricula, and prohibiting discrimination against LGBT youth in schools.
- The State Party should press states to repeal “license to discriminate” laws that permit religious or moral objectors to deny LGBT people goods and services they provide to the general public.

Surveillance and Data Protection

Summary

¹¹⁶ See, for example, UN Human Rights Committee, General Comment 28, Article 3 (The equality of rights between men and women) (Sixty-eighth session, 2000), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 21 (“Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience, and religion.”); UN Human Rights Committee, General Comment 22, Article 18 (Forty-ninth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2 (“The committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”); *ibid.* at para. 7: (noting that “no manifestation of religions or beliefs may amount to ... advocacy of national, racial, or religious hatred that constitutes incitement to discrimination” and that “States parties are under the obligation to enact laws to prohibit such acts.”).

¹¹⁷ UN Human Rights Committee, General Comment 22, Article 18 (Forty-ninth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/21/Rev.1/Add.4, para. 8.

¹¹⁸ ICCPR, Art. 19.

¹¹⁹ ICCPR, Art. 21 and Art. 22.

¹²⁰ UN Human Rights Committee, Communication No. 1932/2010: Views Adopted by the Committee at its 106th Session, UN Doc. CCPR/C/106/D/1932/2010 (2012), para. 10.2.

The United States engages in a variety of surveillance methods at the federal, state, local, and tribal levels that may constitute unnecessary or disproportionate infringements on the right to privacy, or that may not be done in accordance with clear, publicly accessible laws. US federal laws also provide only weak and incomplete protections for the privacy of personal data. Moreover, US law provides inadequate access to remedies for individuals who may have experienced a violation of their right to privacy under Article 17.

Finally, US law and policy is especially problematic in protecting the rights of persons subjected to US surveillance executed outside the territory of United States. Due to the global reach and routing of internet communications, including those sent to, from, or even within the United States, such persons may be located anywhere in the world—including in the US.

Relevant ICCPR Articles

Articles 2 and 17.

Prior Recommendations

- In its 2006 Concluding Observations, the Committee instructed the United States to “ensure that any infringement on individual’s rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.” (para. 21).
- In its 2014 Concluding Observations, the Committee expressed detailed concerns about United States surveillance and data practices and recommended that the United States, *inter alia*, “Take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance. . . .” (para. 22).

Current US Government Policy or Practice

Since 1981, US intelligence agencies have had the power under Executive Order 12333 to execute surveillance techniques outside the US that may entail massive communications monitoring—including of correspondence or other data belonging to people within or outside the US—and are not subject to judicial or other independent authorization.¹²¹ Executive Order 12333 was the subject of comment during the second cycle of the Universal Periodic Review of the United States, but the Order and its potential for abuse remain unchanged.¹²² In 2017, Human Rights Watch revealed a US government policy allowing unknown forms of monitoring under Executive Order 12333 of people in the US whom the government regards as “homegrown violent extremists” based on criteria it has not disclosed.¹²³

In January 2018, Congress re-authorized Section 702 of the Foreign Intelligence Surveillance Act, a law permitting the warrantless surveillance of foreign people and entities overseas, as well as the capture and searching of the communications of people in the US in the process.¹²⁴ Under laws such as Section 702 and Executive Order 12333, the US continues to provide significantly weaker protections for the right to privacy for “non-US persons.”¹²⁵

¹²¹ Executive Order 12333 governs the US intelligence agencies’ activities (including, but not limited to, electronic surveillance). The order imposes certain broad restrictions concerning the surveillance of US persons’ communications under it; however, it appears to grant free rein to the agencies to conduct surveillance overseas of the communications of non-US persons who are outside the US. Executive Order 12333: United States Intelligence Activities (as amended), available at <https://fas.org/irp/offdocs/eo/eo-12333-2008.pdf>.

¹²² UN Human Rights Council, “Universal Periodic Review - United States of America, Second Cycle,” May 2015, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/024/66/PDF/G1502466.pdf?OpenElement> (accessed January 11, 2019, para. 176.298 – Switzerland. Other State comments raised the issue without specifically mentioning 12333.

¹²³ “US: New Evidence Suggests Monitoring of Americans,” Human Rights Watch news release, October 25, 2017, <https://www.hrw.org/news/2017/10/25/us-new-evidence-suggests-monitoring-americans>.

¹²⁴ Louise Matsakis, “Congress Renews Warrantless Surveillance – and Makes It Even Worse,” *Wired*, January 11, 2018, <https://www.wired.com/story/fisa-section-702-renewal-congress/> (accessed January 5, 2019).

¹²⁵ Under US law, “US Person” refers to citizens of the United States, aliens lawfully admitted for permanent residence, an unincorporated association with a substantial number of members who are citizens of the US or are aliens lawfully admitted for permanent residence, or a corporation that is incorporated in the US. Foreign Intelligence Surveillance Act, 50 USC 1801(i).

Under the Supreme Court’s 2012 ruling in *Clapper v. Amnesty*, a remedy against abuse in the surveillance context is not meaningfully available. The decision effectively requires plaintiffs show that they have been or will be monitored in order to establish standing to challenge the legality of a surveillance law or practice. Due to the secretive nature of intelligence surveillance establishing these facts is virtually impossible.

After *Clapper*, one of the few means by which surveillance might be established is in the context of a criminal prosecution, when defendants have rights to discover and challenge how the government obtained evidence. However, in January 2018, Human Rights Watch reported that US authorities may be failing to notify criminal defendants about the use of secret intelligence surveillance or other potentially controversial monitoring to obtain evidence in their cases, instead deliberately concealing the true origins of information by finding alternative ways to obtain it.¹²⁶ This practice, known as “parallel construction,” can prevent legitimate rights-based challenges.

The director of National Intelligence reported in May 2018 that the number of telephone call records that intelligence authorities collect under the USA Patriot Act more than tripled in 2017, to more than 534 million.¹²⁷ The next month, the National Security Agency revealed that it was deleting years’ worth of these records after receiving data it “was not authorized to receive.”¹²⁸

In March 2018, Congress adopted the Clarifying Lawful Overseas Use of Data (“CLOUD”) Act, which allows foreign governments (pursuant to agreements with the US executive branch) to demand data from US companies under weak and incomplete rights standards.¹²⁹ At time of writing, the US was negotiating an agreement with the United Kingdom under the law, which would empower the UK to demand data under standards lower than those required by the US Constitution. The UK would then be able to pass this data back to the US, enabling US authorities to evade domestic privacy laws.

Federal legal protections for personal data held by private companies remain insufficient,¹³⁰ as demonstrated by data analysis firm Cambridge Analytica’s massive access to Facebook users’ data.¹³¹ Regarding most types of personal data, individuals lack rights to transparency about, or correction or deletion of, information held by other entities, or easy access to effective remedies for abuses.

In a positive development, the Supreme Court decided in June 2018 in *Carpenter v. United States* that police need a warrant for access to extensive historic mobile phone location data, which reveals a person’s past movements and may be highly sensitive.¹³²

Human Rights Committee General Comments and Related UN Body Recommendations

Martin Scheinin, then-UN special rapporteur on human rights and counter-terrorism, stated in 2013 that the United States has “been involved, and continue[s] to be involved, in activities that are in violation of [its] legally binding obligations under the [ICCPR].” He asserted that US surveillance lacks an adequate

¹²⁶ “US: Secret Surveillance Erodes Fair Trial Rights,” Human Rights Watch news release, January 9, 2018, <https://www.hrw.org/news/2018/01/09/us-secret-evidence-erodes-fair-trial-rights>.

¹²⁷ US Office of the Director of National Intelligence, “Statistical Transparency Report,” April 5, 2018, <https://www.dni.gov/files/documents/icotr/2018-ASTR----CY2017----FINAL-for-Release-5.4.18.pdf> (accessed January 5, 2019).

¹²⁸ US National Security Agency, “Press Room,” <https://www.nsa.gov/news-features/press-room/statements/> (accessed January 11, 2019).

¹²⁹ Sarah St. Vincent, “US May Give Foreign Governments and Itself Easier Access to Data,” commentary, Human Rights Watch Dispatch, February 13, 2018, <https://www.hrw.org/news/2018/02/13/us-may-give-foreign-governments-and-itself-easier-access-data>.

¹³⁰ Sarah St. Vincent, “US Should Create Laws and Protect Social Media Users Data,” commentary, Human Rights Watch Dispatch, April 5, 2018, <https://www.hrw.org/news/2018/04/05/us-should-create-laws-protect-social-media-users-data>.

¹³¹ Sarah St. Vincent, “US Should Create Laws and Protect Social Media Users Data,” commentary, Human Rights Watch Dispatch, April 5, 2018, <https://www.hrw.org/news/2018/04/05/us-should-create-laws-protect-social-media-users-data>.

¹³² Sarah St. Vincent, “Supreme Court Cell Phone Decision Is a Victory for Reality,” commentary, Human Rights Watch Dispatch, June 22, 2018, <https://www.hrw.org/news/2018/06/22/supreme-court-cell-phone-decision-victory-reality>.

legal basis, intrudes into the “inviolable core of privacy,” is not necessary in a democratic society, leaves room for unfettered discretion, is disproportionate with respect to its benefits, and is open to abuse.¹³³

With regard to the problematic situation by which States Parties may engage in extraterritorial human rights abuses due to their interpretation of their surveillance powers, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, while noting problematic United States law on this point, has raised “serious concern with regard to the extra-territorial commission of human rights violations and the inability of individuals to know that they might be subject to foreign surveillance, challenge decisions with respect to foreign surveillance, or seek remedies.”¹³⁴

With regard to personal data protection, the Committee has explained in its General Comment 16 that “In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”

Recommended Questions

- Will the State Party declassify and publish all policies and legal interpretations concerning surveillance powers under Executive Order 12333?
- Will the State Party ensure that in every criminal prosecution in which US authorities have obtained information through surveillance activities, the defendant receives timely notice and an opportunity to challenge the legality of the monitoring regardless of whether the information was later re-obtained in a different way?
- What steps will the State Party take to increase federal protections for personal data, including that held by private companies, in law and practice?

Suggested Recommendations

- The State Party should respect the right to privacy of non-US persons outside the United States. Due to the nature of global communications, this will also help ensure respect for US persons’ rights.
- The State Party should ensure that authorities only engage in surveillance when specifically authorized by a judge or similarly independent body, and when the activity is necessary and proportionate to achieving a legitimate aim.
- The State Party should facilitate greater congressional and judicial oversight and review of intelligence surveillance activities.
- The State Party should prohibit authorities from engaging in or requesting parallel construction. Any surveillance leading to information that informs a criminal investigation should be disclosed to the defendant.

National Security

Summary

The United States reportedly changed its policy with respect to the use of armed drones without public notice – which already implicates the right to life – by eliminating the requirements that the individual targeted pose an “imminent threat” to the United States and that there be “near certainty” the target is

¹³³ Statement by Professor Martin Scheinin, Hearing before the LIBE Committee Inquiry on Electronic Mass Surveillance of EU Citizens, European Parliament, October, 14, 2013, <http://www.europarl.europa.eu/document/activities/cont/201310/20131017ATT72929/20131017ATT72929EN.pdf> (accessed January 11, 2019).

¹³⁴ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/23/40, Apr. 17, 2013, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf (accessed January 11, 2019).

present at the attack site. The US has assisted non-state armed groups running detention facilities in northern Syria and has transferred detainees under unclear processes to safeguard against abuse to several countries. The US also continues to hold 40 men at the Guantanamo Bay detention facility, 31 of them indefinitely without charge, and was reportedly considering transferring new detainees there.

Relevant ICCPR Articles

Articles 2, 4, 6, 7, 9, and 14.

Prior Recommendations

- In 2006, the Committee offered detailed recommendations related to detentions at the Guantanamo Bay detention facility, transfers of detainees to the custody of other governments or forces, and accountability for the use of torture and mistreatment after the September 11, 2001 attacks on the US World Trade Center. (paras. 14, 15, 16, 18, 20, 21). Specifically, it recommended that the United States “take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.” It also recommended that the US have mechanisms in place to ensure credible investigations of torture and mistreatment of persons transferred in these ways; such transfers are adequately monitored; and that victims of mistreatment or torture in such contexts have an effective remedy. (para. 16).
- In 2014, the Committee reiterated its recommendation that the US strictly apply the absolute prohibition against refoulement under Articles 6 and 7 of the Covenant; expedite the transfer of Guantanamo detainees designated for transfer out of the facility; review the cases of those it continues to detain; end detention without charge or trial at Guantanamo; and ensure that any detainees charged with crimes are prosecuted in the criminal justice system rather than military commissions and are afforded fair trial guarantees. (para. 13, 21).
- The Committee also urged the US to revisit its position regarding legal justifications for the use of deadly force through drone attacks, urging the US to ensure that any use of armed drones fully complies with obligations under Article 6 of the Covenant; that the US disclose the criteria used for targeting in drone strikes; provide for independent supervision and oversight in their use; take all feasible precautions to protect civilians; conduct independent, impartial, prompt and effective investigations of violations of the Covenant, and in such cases, establish accountability and provide victims or their families with an effective remedy. (para. 9).

Current US Government Policy and Practice

The US has been assisting Syrian Democratic Forces (SDF) to run and secure detention facilities in northern Syria where, as of July 2018, the SDF were holding nearly 600 men from 47 countries accused of being Islamic State (ISIS) fighters or members.¹³⁵ The US had also transferred¹³⁶ at least eight¹³⁷ detainees from SDF custody to Lebanon, seven to Macedonia, and other foreign nationals¹³⁸ to Iraq. One dual US-Saudi citizen was held in US custody for over a year¹³⁹ before the US, pressured through litigation, released him. The US was also reportedly considering transferring hundreds more detainees

¹³⁵ Charlie Savage, “As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away,” *New York Times*, July 18, 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html> (accessed January 5, 2019).

¹³⁶ Courtney Kube, Dan De Luce and Josh Lederman, “Trump admin may send captured ISIS fighters to Iraq prison, Guantanamo,” *NBC News*, August 30, 2018, <https://www.nbcnews.com/storyline/isis-terror/trump-admin-may-send-captured-isis-fighters-iraq-prison-guantanamo-n905066> (accessed January 6, 2019).

¹³⁷ “US Sent ISIS Detainees to Possible Abuse,” Human Rights Watch news release, August 3, 2018, <https://www.hrw.org/news/2018/08/03/us-sent-isis-detainees-possible-abuse>.

¹³⁸ “US: Detainees Transferred from Syria to Iraq,” Human Rights Watch news release, October 31, 2018, <https://www.hrw.org/news/2018/10/31/us-detainees-transferred-syria-iraq>.

¹³⁹ Charlie Savage, Rukmini Callimachi and Eric Schmitt, “American ISIS Suspect Is Freed After Being Held More Than a Year,” *New York Times*, October 29, 2018, <https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html> (accessed January 6, 2019).

from SDF custody to Iraq, Tunisia, other countries, and possibly Guantanamo Bay for detention.¹⁴⁰ It was not clear what kind of process to safeguard against abuse the US was providing detainees transferred, but the transfers raised concerns that detainees may face torture, ill-treatment or unfair trial, and not have an opportunity to challenge their transfers before they occur.¹⁴¹

The US continues to hold 31 men indefinitely without charge at Guantanamo, all of whom have been there for 12 years or longer. It also continued to hold 7 men for trial for alleged terrorist offenses, including the September 11, 2001 attacks on the US, in Guantanamo's military commissions system. The military commissions do not meet international fair trial standards and have been plagued by procedural problems and years of delay. Two men convicted by the commissions are serving their sentences at Guantanamo.¹⁴² The US has still not adequately accounted for its past use of torture. It has not adequately investigated or prosecuted those responsible or provided redress to victims.¹⁴³

Human Rights Committee General Comments and Related UN Body Recommendations

- In 2014, the UN Committee Against Torture, in their Concluding Observations reiterated that indefinite detention at Guantanamo constitutes per se a violation of the Convention against Torture, urged the US to end detentions there, comply with non-refoulement obligations, and conduct thorough and credible investigations into past use of torture and mistreatment.¹⁴⁴

Recommended Questions

- What laws or policies govern the US transfer of detainees to the custody of other governments or forces, including what safeguards are used to ensure no violations of the Covenant occur as a result of such a transfer. Can detainees challenge the decision to transfer?
- Since continued indefinite detention without charge at Guantanamo violates the State Party's Convention obligations, when will the detention facility there be closed, individuals held there transferred to safe countries, or properly charged with a criminal offense and provided fair trials?
- What if any steps have been taken to ensure that US use of armed drones is consistent with Article 6? Specifically, have any steps been taken to disclose publicly the legal basis for identifying targets, to protect civilians in target areas, and to conduct independent, impartial, thorough and transparent investigations of potential violations of the Covenant, including providing redress to victims and their families where appropriate?

Suggested Recommendations

- The State Party should strictly apply the absolute prohibition against refoulement including whenever it plays any kind of material role in the custody, control, or extraterritorial transfers of detainees, and ensure people have an opportunity to contest their transfers through fair process.
- The US has made progress in reducing the population at Guantanamo, but it should end indefinite detentions without charge there and ensure those who are accused of wrongdoing are prosecuted in a fair system, not the military commissions at Guantanamo. It should also independently

¹⁴⁰ Courtney Kube, Dan De Luce and Josh Lederman, "Trump admin may send captured ISIS fighters to Iraq prison, Guantanamo," *NBC News*, August 30, 2018, <https://www.nbcnews.com/storyline/isis-terror/trump-admin-may-send-captured-isis-fighters-iraq-prison-guantanamo-n905066> (accessed January 6, 2019).

¹⁴¹ "US Sent ISIS Detainees to Possible Abuse," Human Rights Watch news release, August 30, 2018, <https://www.hrw.org/news/2018/08/03/us-sent-isis-detainees-possible-abuse>; "US: Detainees Transferred from Syria to Iraq," Human Rights Watch news release, October 31, 2018, <https://www.hrw.org/news/2018/10/31/us-detainees-transferred-syria-iraq>.

¹⁴² "Q&A: Guantanamo Bay, US Detentions, and the Trump Administration," Human Rights Watch news release, June 27, 2018, <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration>; Charlie Savage, "Frustrated Military Tribunal Judge Indefinitely Halts Cole Bombing Case," *New York Times*, February 16, 2018, <https://www.nytimes.com/2018/02/16/us/politics/guantanamo-cole.html> (accessed Jan. 6, 2019).

¹⁴³ Human Rights Watch, *No More Excuses: A Roadmap to Justice for CIA Torture*, December 2015, https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf.

¹⁴⁴ UN Committee against Torture, "Concluding observations on the third to fifth periodic reports of United States of America," CAT/C/USA/CO/3-5/Add.1, November 20, 2014, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCaqhKb7yhsuLMmIdNURtE47fFHU%2BcDW3YqC%2F3zHkM7HdrMe8Ha0T3LrxFZw2DBuPPjJtmrR1GUBC%2FjzvD8gcT%2FCPPgMygXRPgJd4yWY90dyGDpYziQO4> (accessed January 6, 2019).

investigate and prosecute those responsible for torture and ill-treatment of detainees in US custody after the September 11, 2001 attacks and cooperate with international tribunals investigating the same incidents.

- Disclose the legal and policy framework for the use of armed drones, including the selection and identification of targets, methods of investigation to ensure accountability, and any process for providing redress to victims and their families in case of violations.

For more information, please contact:

In Washington, DC, Jasmine L. Tyler (English): +1-202-294-8292 (mobile); or tylerj@hrw.org. Twitter: @jazzyjtyler

In San Francisco, Alison Parker (English): +1-917-535-9796 (mobile); or parkera@hrw.org. Twitter: @alisonHRW

In New York, Laura Pitter (English): +1-917-450-4361 (mobile); or pitterl@hrw.org. Twitter: @Laurapitter