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**Alternative to the Death Penalty Will Contribute to  
Mass incarceration in the United States**

by Connie de la Vega

There has been a dramatic decrease in the use of the death penalty in the United States the past ten years. Death sentences have decreased by 75% and executions by over 50%. There were 43 executions last year, but they took place in only 9 states. Of the 32 states that have the death penalty, 13 have not carried out a death penalty sentence in the past 5 years. Six states have recently abolished the death penalty.

The main alternative when abolishing the death penalty in the United States has been a life sentence without parole. Some activists are beginning to note that this alternative is not necessarily more humane than the death penalty. One in 11 prisoners is now serving a life sentence in the US, which includes non-violent and youthful offenders, due to the already widespread use of life without the possibility of parole and other excessively long sentences. An additional 11% are serving sentences longer than 20 years. Between 1984 and 2008, the number of prisoners serving life sentences quadrupled from 34,000 to more than 140,000.

Every nation in the world has room for improvement in the area of criminal sentencing, but the problems that exist currently in the U.S. are particularly severe. This crisis is being compounded by lobbying by prison guard unions and private prisons: both have economic incentives in the imposition of long sentences.

Applicable International Law

In 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR), an international human rights treaty which in Article 10 states that countries have the obligation to make prison systems provide "treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Sentencing practices in the United States denying prisoners the chance for review contradict this article. This includes life without the possibility of parole sentences (LWOP) and long terms of incarceration that function similarly to LWOP, such as mandatory minimums, consecutive sentences, and recidivist statutes.

The excessively punitive nature of criminal sentencing in the United States is at odds with its stated international human rights law obligations. These practices contradict not only these obligations but also what the vast majority of countries in the world have deemed to be just punishment for crimes.

**1. Extreme Sentencing and mass incarceration**

The United States has the highest rate of incarceration in the world amounting to almost 2.3 million prisoners. Comprising 5% of the world's population, U.S. prisoners account for 25% of the world's

prison population. This is a recent development and distinguishes the U.S. from the rest of the world.

#### Recent shift in U.S. sentencing policy:

Sentencing policy in the United States has changed drastically in the past 3 decades. Despite a recently declining crime rate, “tough on crime” sentencing policies have increased the severity of sentences. These harsh sentencing practices have resulted in excessively long sentences, which are out of step with the rest of the world. Only 11 other countries in the world use all four of the following severe sentencing practices: LWOP, mandatory minimums, uncapped consecutive sentences, and recidivism statutes. The resulting extremely long sentences fail to provide prisoners with a meaningful review of their sentence.

#### LWOP:

The U.S. and 37 other countries in the world allow LWOP. Many countries have no statutory provision for such a sentence, or expressly prohibit LWOP (33 countries prohibit LWOP; 10 countries ban LWOP in their constitutions).

The majority of countries that permit LWOP reserve the punishment for extreme cases and the gravest crimes. The result is that most countries that allow LWOP have an extremely low number of prisoners serving LWOP (Australia: 59; England: 41; Netherlands: 37). In the U.S. however, the bar is much lower. Offenders are eligible for LWOP in most states for non-violent crimes. Given this low threshold, the U.S. prisoner population serving LWOP vastly exceeds that of all other nations, with 41,000 inmates serving LWOP – even taking the larger population into account this sentence is being used disproportionately in the US.

#### De facto LWOP and other long sentences:

In addition to LWOP sentences, numerous prisoners face the equivalent of life without parole without ever actually being sentenced to LWOP. By virtue of consecutive sentences or recidivist and habitual offender statutes, individuals throughout the world are serving de facto LWOP sentences, but again disproportionately in the US.

#### Consecutive Sentencing

When an offender is charged with more than one offense, some countries (including the U.S.) issue consecutive sentences, wherein each sentence is served separately and successively. Other countries cap the maximum term of incarceration, while others merge the lesser charges with the most serious offense to permit sentences to be served concurrently.

Consecutive sentencing raises several issues: it may lead to the imposition of a sentence that is grossly disproportionate to the offense; it may also result in de facto LWOP sentence when an offender’s parole date exceeds his or her lifetime. In these instances, offenders may serve life sentences for what amounts to a single transaction or non-violent crime.

- Seventy-nine countries in the world do not have consecutive sentences or mandate that the lesser offenses must merge with the most serious offense when both are a part of the same act.
- The United States is among only 36 countries (21%) that continue to allow concurrent sentencing without any cap.

#### Recidivist Statutes and mandatory minimums

Another problematic sentencing scheme is habitual recidivist statutes that give higher penalties to individual with prior convictions. Such statutes vary greatly worldwide, but are problematic because they remove judicial discretion and mandate the imposition of extreme sentences after a certain number of convictions. Accordingly, individuals may be sentenced to life imprisonment for minor theft or drug charges.

- The U.S. is among 33 other countries (21%) that require a mandatory increase in penalties with no judicial discretion, resulting in long and potentially disproportionate sentences.

A number of countries have recognized that while prior convictions are important to consider at sentencing, they should not be dealt with mechanically; thus,

- 74% of countries have developed statutory schemes that give the judge discretion when weighing previous convictions.
- Australia and Italy have adopted statutes that give the judge the discretion to weigh prior convictions and records on a case-by-case basis
- Nicaragua and Germany passed legislation that states that while previous convictions are a factor to be considered in sentencing, they should not be applied mechanically.

#### No penological purpose for such harsh sentencing and increased costs due to aging inmates:

This significant increase in the rate of incarcerations has had a profound impact on cost due to an aging prison population. The number of prisoners aged 65 or older grew 94 times the rate of overall prison population between 2007-2010. The cost of health care for an elderly prisoner is significantly higher than younger inmates.

The benefits of these extremely long sentences, which result in an aging prison population, are questionable. The likelihood of recidivism is low for aging inmates since most people mature out of criminal behavior as they age. Since there is no real chance for rehabilitation, these sentences are only justified as retributive. It is not clear that the retributive or potential deterrent benefits of these sentences outweigh the state's investment in rehabilitation, education, and health care.

## **2. Violations Resulting from using LWOP as an Alternative to the Death Penalty**

LWOP will not address some of the major violations resulting from the criminal justice system:

Innocence cases – it is estimated that 10 % of the death penalty cases involve innocent people. Instead of the death penalty these people will still be serving an excessive sentence.

Right to counsel – the Supreme Court has required that persons sentenced to death receive adequate counsel for handling appeals and habeas. This means that some states it takes as long as 5 years to be assigned appellate counsel because of inadequate resources. It is unclear once a person is given an LWOP sentence that they will be entitled to the same right to counsel as required in death penalty cases and there may be inadequate counsel for many appeals.

Racial bias – While Blacks constitute 12.8% of the US population, they represent 35% of individuals sentenced to death since 1977 when the death penalty was reinstated. However, they represent half of the people sentenced to life without parole.

Deterrence – Studies have indicated that the death penalty does not provide deterrence to crime. There is no reason to believe that LWOP will provide any deterrence either.

Rights of Children – The Convention of the Rights of the Child prohibits both death sentences and life without parole for offenders under 18 in the same article. The Supreme Court held death sentences were unconstitutional in 2005, and has recently limited the use of life without in non-homicide cases and under statutes that make the sentence mandatory. Nonetheless, the U.S. continues to be the only country in the world sentencing child offenders to LWOP.

### **3. Prison Privatization and Prison Unions**

The increasing role of private prisons raises concerns related to the issue of extreme sentencing and other potential human rights violations. Article 10(1) of the ICCPR provides that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” A multi-billion dollar private prison company creating a business model that profits off the detention of prisoners, is responsible to their shareholders, not to the public, and thus has little accountability for their treatment of prisoners. While public prison guards can be held accountable by the public for their treatment of prisoners, they likewise have an economic incentive in longer prison terms. In some US states, prison guard unions have been involved in efforts to increase prison sentences. Thus far the major problems with private prisons have been the inadequate staffing that has led to inhuman treatment of the inmates. However, private prisons have already been involved in legislation to criminalize behavior, in particular in the immigration context, and could also be involved in other efforts to increase the length of sentences.

### **Conclusion**

Replacing the death penalty with life without parole is not going to end the human rights violations related to the death penalty and sentencing in general in the United States. As Lily Hughes, the National Director of the Campaign to End the Death Penalty recently noted, “Life without parole shouldn’t be promoted by activists as a short-term strategy for abolition, only to try to return to the issue later and attack life without parole. [This won’t work] once life without parole has been cast by campaigners as a just sentence.”