Testimony of Gay McDougall
At a hearing on Mandatory Minimum Sentencing in the United States
Before the Inter-American Commission on Human Rights
Organization of American States
March 3, 2006

Good morning. It is a pleasure to be here and I thank you for convening this hearing regarding the discriminatory impact of mandatory minimum sentences in the criminal justice system of the United States.

My testimony today is based on my previous service as a member of the United Nations Committee on the Elimination of Racial Discrimination, or CERD, from 1997 to 2001. In that capacity, I participated in the CERD’s review of various States party reports, and we did address the issue of mandatory sentencing. From this experience, I will share with you how the CERD has addressed the issue of mandatory sentencing and what recommendations we made to the relevant governments.

The relevant international human rights norms that address mandatory minimum sentences
The U.S. practice of imposing mandatory minimum sentences raises concerns with respect to a number of human rights norms. As noted in the earlier testimony by my colleagues, mandatory sentencing schemes may raise concerns about the right to a fair hearing by an independent judiciary, the right not to be tortured or subjected to cruel, inhuman or degrading punishment, and the right not to be subject to arbitrary detention. Today, however, I will focus my remarks on the principles of non-discrimination and equal protection under the law.

As was discussed in my colleagues’ testimony today, and as amply documented by both governmental and non-governmental sources, the application of mandatory minimum sentences in the United States has had a serious racially discriminatory impact. The right not to be discriminated against is fundamental under international law and is guaranteed under all of the core international human rights treaties. In particular, the International Convention on the
Elimination of All Forms of Racial Discrimination (ICERD), to which the U.S. is a party, requires that governments “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws or regulations which have [the intent or] the effect of creating or perpetuating racial discrimination….” In ratifying another U.N. treaty, the International Covenant on Civil and Political Rights or ICCPR, the U.S. accepted the obligation to ensure that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” At the regional level, the American Declaration and the American Convention clearly recognize the right not be discriminated against on the basis of race, color, national or social origin, sex, or other social condition.

**How the International Treaty Bodies have viewed mandatory sentences**

Under the U.N. human rights treaty system, the treaty bodies for the seven core human rights treaties review periodic reports from state parties and publish “Concluding Observations” on their findings. They also publish “General Comments” or “General Recommendations” which lay out their interpretation of the content of specific human rights provisions in the treaties they oversee. Through these two procedures, several of the human rights treaty bodies have elaborated upon state obligations with regard to racial discrimination in the judicial process generally, as well as more specifically the practice of mandatory sentencing.

During my tenure on the U.N. Committee on the Elimination of Racial Discrimination or CERD, I had the opportunity to participate in the State party review of Australia in 2000. In that particular review, the CERD raised concerns over the situation of mandatory sentencing arrangements in one state and one territory of the country – Western Australia and the Northern Territory. In the latter, the relevant laws applied to minor property offences committed by 15 to 16-year-olds, requiring that upon a second or subsequent conviction, a person in that age group must be placed in custody in a juvenile detention center for a minimum of 28 days. In Western Australia, a separate law provided for mandatory sentencing for a third offence, such as home burglary, and resulted in a minimum 12-month sentence. A June 2000 report released by the Nevill Parliamentary Standing Committee in Australia provided information demonstrating that mandatory sentencing policies in Western Australia appeared to have a special impact on three
vulnerable groups: Aboriginal or indigenous people, who accounted for one-third of the prison population but represented only 3% of the overall population of the territory; women, whose rate of imprisonment was double the national average; and juveniles, whose rate of imprisonment was the second highest in the country.

In considering the obligations of the Australian government under the ICERD, we had to assess whether the laws adopted by the state and territory intended to discriminate against certain racial or ethnic groups. We then had to determine whether the laws had a disparate negative impact on certain racial or ethnic groups that constituted impermissible discrimination under the Convention (Article 2, para 1. c). Under Article 5 of the ICERD, governments must undertake to eliminate racial discrimination in the enjoyment of the right to equality before the law and the right to equal treatment before the tribunals. Under General Recommendation XIV, the CERD states that “[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”

The evidence was clear that the mandatory sentencing laws had produced a disparate impact on incarceration rates for the indigenous youth in the particular state and territory under consideration in Australia. In its Concluding Observations on the Australian report, the CERD expressed its concern about the minimum mandatory sentencing schemes, noting that they appeared to target offences that are committed disproportionately by indigenous Australians. It was also noted that the impact of the mandatory sentencing laws was a racially discriminatory one. The Committee recommended that the government review and revise those laws.

Similarly, in its review of the United States periodic report in 2001, the CERD expressed its concern over the high representation of racial, ethnic or national minorities within federal, state and local prisons. Although the CERD did not explicitly mention mandatory sentencing schemes during that U.S. review, its Concluding Observation were based on expert testimony regarding mandatory sentencing laws – particularly the crack and powder cocaine disparities – as well as
ample evidence of the significantly disproportionate population of African Americans and Latinos incarcerated in the U.S.

More recently, in August of 2005, the CERD adopted General Recommendation 31 on the *Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*. In this Recommendation, the CERD makes the following recommendations to all member states including the United States:

- States parties are urged to pay the greatest attention to indicators of structural racial discrimination, including the proportionately higher crime rates attributed to persons of certain racial or ethnic groups (particularly regarding drug offences) and the number and percentage of persons belonging to certain racial or ethnic groups who are held in prison or preventative detention.

- States parties are urged to eliminate laws that have a racially discriminatory impact.

- States parties are urged to implement national plans of action to eliminate structural racial discrimination, including adopting guidelines for prevention, recording, investigation and prosecution of racist incidents.

With regard to trial and court judgment procedures, General Recommendation 31 notes that States parties must ensure that all persons enjoy all the guarantees of a fair trial and equality before the law (Section III.3). In particular, the Recommendation urges states to guarantee a fair punishment, noting:

“Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences..., bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.”
Other U.N. treaty bodies including the Human Rights Committee (HRC), the Committee against Torture (CAT), and the Committee on the Rights of the Child have addressed the practice of mandatory sentencing in their State party reviews, raising concerns that the practice violates fundamental human rights norms. For example, the CAT has issued Concluding Observations expressing serious concerns with “[l]egislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system.” These treaty bodies have urged governments to examine the practice of mandatory sentencing and take steps to eliminate human rights violations associated with it.