

**THE LAW OF THE LAND: U.S. IMPLEMENTATION
OF HUMAN RIGHTS TREATIES**

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

DECEMBER 16, 2009

Serial No. J-111-68

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THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES

WEDNESDAY, DECEMBER 16, 2009

U.S. SENATE,
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:34 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Feingold, Cardin, and Franken.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. Welcome, everyone. This hearing of the Human Rights and the Law Subcommittee will come to order. The title of today's hearing is "The Law of the Land: U.S. Implementation of Human Rights Treaties." This is the first ever congressional hearing on U.S. compliance with our human rights treaty obligations.

Last Thursday, December 10th, was the 61st anniversary of the Universal Declaration of Human Rights. Eleanor Roosevelt, the architect of the Universal declaration, once said, "Where, after all, do universal human rights begin? In small places, close to home. . . . Unless these rights have meaning there, they have little meaning anywhere."

The United States has played a leading role in drafting and ratifying landmark human rights treaties. Congress has passed important legislation to implement these treaties. Just last year, this Subcommittee produced the Child Soldiers Accountability Act, which makes it a Federal crime and immigration violation to recruit or use child soldiers. This implements part of our obligations under the Optional Protocol on the Involvement of Children in Armed Conflict.

Democrats and Republicans alike agree that we must make every effort to comply with the legal obligations we undertake when we ratify a human rights treaty. Indeed, under our Constitution, these treaties are part of the supreme law of our land.

Democratic and Republican administrations alike monitor and report on U.S. compliance with our human rights treaty obligations. In fact, it was the Bush administration that brought the United States up to date with our human rights treaty reporting requirements for the first time and began preparations for the first

ever Universal Periodic Review of the United States, which will take place next year.

The Obama administration is building on this record, and I look forward to hearing more about their plans today. But reporting alone is not enough.

We have to look at ourselves in the mirror and ask the difficult questions. Let us take one example. Today in the United States of America, more than 2.3 million people are imprisoned. This is, by far, more prisoners than any country in the world and, by far, the highest per capita rate of incarceration in the world. African-Americans are incarcerated at nearly six times the rate of white Americans. There are human rights issues behind these numbers that we must look at honestly.

I also want to acknowledge our shortcomings in Congress. We have not held a single hearing on U.S. compliance with the human rights treaties that we have ratified. Hopefully today we will take a small step in the right direction.

Why is it important to comply with human rights treaties? It is not because we fear the judgment of the United Nations. Democrats and Republicans alike agree that some U.N. criticisms may go too far from time to time.

We take our treaty obligations seriously because it is who we are. The United States is a government of laws, and not people.

Complying with our treaty obligations also enhances our efforts to advocate for human rights around the world. When the United States leads by example, we can help make universal human rights a reality, both close to home and around the world.

I note that Senator Coburn has not arrived. I do want to note for the record that, though we disagree on so many things, we have been able to find such valuable common ground in this Subcommittee. He is a great ally and partner in our efforts on human rights, and I am going to, of course, defer to him when he arrives.

Unless my colleagues Senator Cardin or Senator Franken have an opening statement, I am going to recognize the first panel. Our first panel includes the top human rights official and the top civil rights official in the Obama administration. Their presence here today speaks volumes about the administration's commitment to implementing human rights treaty obligations. Each witness will have 5 minutes for an opening statement and their complete statements will be made part of the record. I would like to ask the witnesses to please stand and, in the custom of the Committee, be sworn.

Do you affirm or swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. POSNER. I do.

Mr. PEREZ. I do.

Chairman DURBIN. Thank you. Let the record reflect that both witnesses answered in the affirmative.

Our first witness, Michael Posner, is the Assistant Secretary of State for Democracy, Human Rights, and Labor. Previously the founding Executive Director and President of Human Rights First, which he headed for 30 years, Mr. Posner is one of our Nation's most prominent human rights advocates. Among other accomplish-

ments, he led the effort to enact the first law providing for political asylum. He also helped found the Global Network Initiative, a code of conduct for Internet companies, that this Subcommittee held a hearing on last year. He has a bachelor's degree from the University of Michigan and a law degree from the University of California at Berkeley.

Mr. Posner, thank you for being here today. The floor is yours.

STATEMENT OF MICHAEL H. POSNER, ASSISTANT SECRETARY FOR DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Mr. POSNER. Thank you, Chairman Durbin and members of the Committee, for holding this important hearing and for the work of this Subcommittee. I have submitted written testimony that I ask be made part of the record, and I am going to try to summarize it now.

I would also ask that the text of Secretary Clinton's speech on human rights earlier this week at Georgetown be made part of the record.

Chairman DURBIN. Without objection.

[The speech follows:]

Mr. POSNER. Chairman Durbin, I first want to thank you for your leadership in creating this important Subcommittee and the leadership you have demonstrated on issues like child soldiers, genocide accountability, Internet freedom, mental health issues in prisons, and today on U.S. implementation of international treaty obligations. We really appreciate your leadership.

I want to set the context for this discussion by noting the Obama administration's commitment to advancing human rights in the international community as guided by a commitment to principled engagement; a determination to apply human rights standards to every government, including our own; and a belief that sustainable change in any society, including in this country, must be rooted from within and, therefore, involve civil society and other internal agents of change.

Drawing from these broad principles, I want to focus this morning on three points, the first of which is this notion of principled engagement.

As President Obama made clear in his speech at the General Assembly and again last week in Oslo, and as Secretary Clinton spelled out earlier this week, this administration is committed both in word and deed to a new era of principled engagement with the world. Our decision to join the U.N. Human Rights Council earlier this year is one element, but we fully realize the challenges we face in engaging with the U.N. on human rights issues. All too often, the U.N. has been a venue for government to play politics and exploit grievances. In deciding to join the Human Rights Council, our intention is to challenge these practices and to make the council a venue for advancing the interests of vulnerable people around the world.

Second, our engagement at the U.N. and elsewhere is guided by our own history and a bipartisan commitment to the human rights agenda. The Founders of this country drafted a Constitution that was predicated on our commitment to human rights and funda-

mental freedoms, and in my written testimony I spell out a range of historic landmarks, including the Four Freedoms speech that President Roosevelt gave in 1941; Eleanor Roosevelt's leadership, which you referenced in your opening comments; and a range of comments also by Democratic and Republican leaders, including President Reagan.

The third element that is essential here today is that we apply the same international law principles to ourselves. That is the purpose of this hearing, and as President Obama has stated repeatedly, this must be a cornerstone of our human rights policy. We can and we should lead by example, meeting our own obligations under both domestic and international law and not shying away from self-reflection and debate about our own record. As Secretary Clinton again reaffirmed this week, holding ourselves accountable does not make us weaker but, instead, reaffirms the strength of our principles and our institutions.

I want to just summarize where we are on the treaty process. The United States has ratified, as you know, a range of human rights treaties, including the Covenant on Civil and Political Rights, the Convention Against Torture, the Convention Against All Forms of Racial Discrimination, and Optional Protocols to the Convention on the Rights of the Child, as well as the Convention on the Punishment of the Crime of Genocide.

These treaties require all parties to write periodic reports, and we have done so since the mid-1990s, and we will continue to do so, including reports on the Optional Protocols on the Convention on Child Soldiers, which will come out in January; on the Civil and Political Covenant, which we will submit next September; and, importantly, as part of the Human Rights Council, the Universal Periodic Review process, which is a new process. We are taking it seriously. We are committed to making sure that the United States engages in this process in a way that involves not only different agencies of the Federal Government, but that we also take it to the States, and we are an involved civil society. We had a meeting last month with a range of organizations, including the two that are testifying in the second panel, about how we can engage civil rights, human rights groups in this society in helping to make our answers stronger.

So this is for us a fundamental piece of what we are trying to do and build a human rights policy. I am excited about the prospect of being involved in it, and I welcome your questions. Thank you very much.

[The prepared statement of Mr. Posner appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Mr. Posner.

Our next witness is Thomas Perez. He is the Assistant Attorney General for the Civil Rights Division at the Justice Department. He has had quite an illustrious career in public service. He previously served as the Secretary of Maryland's Department of Labor, Licensing and Regulation. Prior to that, he was a member of the Montgomery County Council, including a stint as council president. Earlier in his career, he served as Director of the Office of Civil Rights in the U.S. Department of Health and Human Services, and as Deputy Assistant Attorney General for Civil Rights. He also was

a staffer to Senator Ted Kennedy, and we all know Senator Kennedy's reputation when it came to advocacy for human rights. Mr. Perez has a bachelor's degree from Brown University; a master's in public policy from the JFK School of Government and a law degree from Harvard Law School.

Mr. Perez, thank you for joining us, and please proceed.

STATEMENT OF THOMAS E. PEREZ, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. PEREZ. Thank you, Mr. Chairman. It is always a pleasure to be back in front of this Committee, and it is a particular honor to be in front of you and in front of my home Senator, and Senator Kennedy's spirit endures in this hearing because I am quite confident that this was an issue of great passion, among many passions in his life. So it is a pleasure and an honor to be here.

It is also a pleasure to be here with my friend and colleague, Assistant Secretary Posner. We are working very closely with the State Department, with other agency colleagues, with other NGOs to ensure that civil rights and human rights are understood as being inextricably intertwined.

From the time of our Nation's founding, in every generation there are Americans who have sought and struggled to realize the promise of our Constitution to ensure equality, equal opportunity, and fundamental fairness for all people, regardless of race, national origin, ancestry, gender, religion, or disability. And in recent years, as we remarked when we had the hearing in the Senate HELP Committee, Americans have worked in earnest to combat discrimination against individuals based on sexual orientation or gender identity. All of this ongoing work—our civil rights work—is firmly rooted in the human rights movement of the 1940s and 1950s. In fact, our civil rights movement began as a human rights movement, with giants such as W.E.B. Du Bois testifying, in 1947, before the U.N. General Assembly on the denial of the right to vote for African Americans, the continued pervasive discrimination in educational opportunity, and the need for recognition of human rights for African Americans. The Universal Declaration of Human Rights, which was adopted in December 1948, recognizes that domestic civil rights protections are integral to human rights.

That civil rights are part and parcel of human rights was underscored for me on a very personal level when I had my work-study job in college, working at the Rhode Island Commission for human rights. This was one of the oldest anti-discrimination law enforcement agencies in the country. It was established in 1949, the same period when the Universal Declaration of Human Rights was adopted. The Commission had then and has now responsibility for adjudicating domestic civil rights complaints arising in Rhode Island, but like so many other State and local human rights agencies, it is known as a Commission for human rights, recognizing the inextricable intertwinedness—if that is a word—between civil rights and human rights.

At the Federal level, the Civil Rights Division has, since its founding 1957, served as a primary force for realizing the promise of the Universal Declaration, having the responsibility to fully and

fairly enforce the laws within its jurisdiction and to coordinate domestic civil rights enforcement across the Federal Government. Our national commitment to meeting our international human rights obligations is manifested by our enforcement of the Nation's civil rights laws and by our recognition that civil rights, non-discrimination, and equal opportunity are indeed human rights.

As President Obama has so eloquently made clear on many occasions, the only way we can promote our values across the globe is by living them at home.

Today, the United States is party to three critical human rights treaties whose subject matters coincide with the work of the Civil Rights Division authorized under the Constitution and U.S. laws. They include the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination, which is known as the CERD; and the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment.

Under the President's leadership, we are working closely with our colleagues at the State Department and elsewhere in the Federal Government to ensure that the reports required under these treaties are done in a timely and thorough fashion and that they accurately reflect both the strengths and areas of improvement in our civil and human rights enforcement program. We are actively participating in the newly revitalized interagency policy Committee led by the National Security Council to explore ways in which we can enhance our compliance with and implementation of those human rights norms by which we are bound. And we are committed to the continuing with, in close partnership with the State Department in carrying out the Government's first ever participation in the U.N.'s Universal Periodic Review process. This effort, which is led by the State Department, will include surveying human rights in the United States, holding listening sessions across the country, and compiling our findings into a report that will provide a useful snapshot of where we are and where we need to go to meet our constitutional and international obligations.

At the same time that we are working to meet our international obligations, the Civil Rights Division at the Department of Justice is committed to pursuing our agenda of restoration and transformation, and one of the most important things that we can accomplish in the Civil Rights Division to meet our obligations under these treaties is to ensure that we are fully and effectively and impartially enforcing all of the civil rights laws that are on the books.

We recognize that as this Nation's leading civil rights enforcement agencies, we cannot pick and choose which laws to enforce, but we must be meaningfully and vigorously engaged across the board. Our aggressive program of restoration and transformation, therefore, spans the breadth of our authority and includes a host of areas—voting, religious liberty, nondiscrimination in employment, and the like. It also includes prosecuting hate crimes, official misconduct by law enforcement officers, and human trafficking. It includes renewed enforcement of our laws ensuring equal access to housing, nondiscriminatory lending and credit, and equal opportunities, to name a few more—equal educational opportunities, I should say, to name a few more.

Finally, it includes addressed the pressing civil rights challenges of the 21st century, including, for example, expanding Federal protection for LGBT communities in employment and the successfully enacted hate crimes law, which I was proud to be at the signing of roughly a month ago.

I also note that within the Department of Justice the Criminal Division and the National Security Division share the commitment of the Civil Rights Division to conduct our activities in a manner that is consistent with the human rights treaties outlined above.

Mr. Chairman, I look forward to working with you and other members of this Committee on all of these issues, and I thank you for your time and attention this morning.

[The prepared statement of Mr. Perez appears as a submission for the record.]

Chairman DURBIN. Thank you very much for your testimony.

It was about a week ago when Senator Boxer invited me and Senator Lautenberg, Senator Wyden, and Senator Merkley to come by her home and have dinner and then watch a documentary film entitled "Playground." It was a film that has not been released yet, but it was produced by a young woman named Libby Spears. She had begun this documentary in Asia on the issue of child trafficking and child prostitution and at one point was invited to meet with a person—I wish I remembered his name—in the United States who said to her, "Why are you going to Asia? The country with the most child trafficking in the world in the United States of America." Unfortunately, there are certain places within our country where it is notorious, primarily the Northwestern part of the United States.

The documentary focused on the trafficking of children for prostitution and sexual exploitation between the United States and Canada and other countries. It was, as you can imagine, a gripping and sad documentary, which led me to tell my staff to followup on this.

Well, let us put this topic in the context of today's hearing. Shortly, you are going to be submitting a report on our implementation of the Optional Protocol on Child Prostitution. As you do that, as you reflect on this in terms of not only the clear violation of American law, but our clear treaty obligations here, can you put this in context as to what that treaty does to either enlarge our responsibility or create an added reporting requirement?

Mr. PEREZ. The factual circumstances that you describe shock the conscience, and I had the privilege, Senator, Mr. Chairman, of working in my previous iteration in the Justice Department on a number of cases involving human trafficking, sometimes of adults, sometimes of children. And those cases—so many cases that came to our attention shocked the conscience, but those cases were the ones that really kept you up at night because you would see the exploitation of some of our most vulnerable people in this country.

The Criminal Division, under the very able stewardship of Lanny Breuer, is taking the lead in the issue of the child prostitution rings that you discussed. We work very closely with them because we also enforce the human-trafficking laws, including the laws that were passed in 2000 and reauthorized a number of times since

then. And so it is a joint venture led by the Criminal Division but assisted by the Civil Rights Division.

And certainly the laws that are on the books give us a remarkable set of tools at our disposal to move forward, and in enforcing those laws, I think we are giving meaning to a lot of the treaty obligations that you so correctly referred to, and I think—

Chairman DURBIN. Can I zero in on one in particular?

Mr. PEREZ. Sure.

Chairman DURBIN. In 2008, the U.N. Committee on the Rights of the Child criticized us for not having better data collection in the United States regarding the number of child prostitution victims. Are you familiar with that?

Mr. PEREZ. I have not seen that particular report, but one of the things we talk about repeatedly in the context of trafficking is the data collection challenges, whether it is in the child prostitution context or the human-trafficking context. Collecting data has been something that we have strived to do. It is very, very difficult for a number of reasons, but it is one of those job one's. If you cannot collect the data, just like in the hate crimes context, the Hate Crime Statistics Act, data collection informs your prosecutive judgments and your investigative strategies. And so—

Chairman DURBIN. Are we doing something about that data collection?

Mr. PEREZ. Yes, the Criminal Division is spearheading this effort, and we are certainly assisting in that enterprise.

Chairman DURBIN. Now, recently the State of New York passed a safe harbor law. Are you familiar with this?

Mr. PEREZ. No.

Chairman DURBIN. This law shielded sexually exploited children from being charged with prostitution. The law diverts child prostitution victims into counseling and treatment rather than into juvenile detention. The New York law appears to be the first such law in the land.

Are we contemplating similar action either at the Federal level or do you know of other action at the State level that would move us closer to our treaty obligations being fulfilled?

Mr. PEREZ. I am not familiar with the New York law to which you reference, but I will certainly go back to the Criminal Division and bring that to their attention and report back to you on their analysis of the New York law and how it could affect potential efforts in the Federal regard.

Chairman DURBIN. Mr. Posner.

Mr. POSNER. Yes, if I could just add, there is another dimension of this which is the State Department Office on Trafficking in Persons has for the last number of years done an annual report that looks at the whole world but the United States. And Secretary Clinton announce earlier this year that the next report, which is 2010, will also include a chapter on the United States. So that will help, I think, us as well do some of the—compel some of the reporting and gathering of statistics that you talk about. That is the first piece.

Then I think with that treaty and others, or with that report and others, we ought to be looking at laws and implementation, and we ought to take a broader policy look to say, as we find problems, as

we identify them in this kind of a comprehensive report, what are the policies at a State and Federal level that we can take to address the problem?

Chairman DURBIN. I always thought this annual report from the State Department with our human rights report card on the world was an interesting, some would say audacious position we are taking, that we are going to stand in judgment of others. If I understand you now, we are going to add the United States into this calculation in terms of our human rights record, at least with respect to the treaty obligations we have accepted.

Mr. POSNER. At this point it is with regard to traffic in particular, trafficking, but we are also going to do the period review which is going to take the whole look at everything in 2010, and then we will go from there.

Chairman DURBIN. Mr. Posner, I also note that there were some positive comments recently by the U.N. Special Representative on Children in Armed Conflict about two bills that we passed out of this Committee. That is good to know that people notice our efforts in that regard.

What is the State Department doing to implement the Child Soldier Prevention Act?

Mr. POSNER. Well, again, one of the pieces now that the laws in place—and we regard those bills as a very good policy tool. We are beginning, as the laws require for us, to report on this. And so the trafficking report and the human rights report now are going to incorporate going forward those issues into what we do as a starting point. And we are beginning to work on a bilateral basis with governments to encourage similar legislation and similar attention to these issues. That is really critical as a part of our foreign policy-making.

Chairman DURBIN. We examined the child soldier issue. We identified countries that organizations have said have been involved in this, which we would generally characterize as our allies, some of whom we provide foreign aid to. And now we asked that this be part of the calculation of our future relationship with these countries. Is that going to be done?

Mr. POSNER. Well, as a first step, we are going to do the reporting, and then coming out of that, we are going to take a look at what it means in terms of our relation and our aid program, yes.

Chairman DURBIN. I might add that we tried, rather than to be punitive, to be constructive in terms of making certain that resources would be dedicated to repatriating these child soldiers and giving them the help that they need to come back to a normal life. So it is not just a matter of saying we will cut you off, but hoping that we can use some of the resources to stop the practice and to deal with those who have been victimized by it.

Mr. POSNER. We agree. This is a high priority for us, and both elements are right. We need to put pressure on governments to stop the practice, and we need to recognize that the victims need to be rehabilitated and need support. And there are various programs that my bureau is involved in in a number of places trying to do that.

Chairman DURBIN. Thank you.
Senator Cardin.

Senator CARDIN. Well, Mr. Chairman, let me first point out that there would not be a Subcommittee on Human Rights and the Law but for the leadership of Senator Durbin, and I personally want to thank you for your commitment to put a focus in the U.S. Senate on human rights and the compliance by the United States on our human rights obligations, not just our treaty obligations but our obligations to what this Nation stands for.

This is a historic moment that we are having this hearing, and I just really want to first thank you for doing this.

Chairman Durbin knows of my interest and his interest in the Helsinki Commission and the process of the Helsinki Commission where we look at human rights and we put a spotlight on problems around the world. Our Commission has also put a spotlight on the United States because we do need to make advancements. We are not doing everything right. We can do a better job, and it is important that the international community understand that it is not only our interest in what is happening globally, but what is happening in the United States. So thank you for holding this hearing and thank you for your efforts that we have a Subcommittee that can focus on this issue.

I first also want to applaud the Obama administration. I think the actions taken by the President shortly after he took the oath of office to make it clear that the United States would deal with issues such as torture, making it clear that we would not tolerate torture in the United States under any circumstances, that we were going to comply with our international obligations and our domestic laws, Attorney General Holder's actions early in making clear that prior opinions of counsel would no longer be applicable. Declaring the intent to close Guantanamo Bay was a clear message to the international community. And Secretary Clinton's comments this past week about the importance of human rights was a welcome message. So I applaud the administration.

Now, let me get to some of the specifics. I think the point that Chairman Durbin made about these reviews that are required by law—and trafficking is an area where the United States has taken a major leadership role internationally and has changed the attitude internationally on trafficking, and we now have an action plan in many countries around the world. We know that there are countries that are the source of trafficking, and then it will not take place unless there is a destination country. And you have to have actions at both places.

We do require by law that there be a report by the State Department on the actions of all countries in dealing with trafficking, and we appreciate that that review now will take place as to our current laws in the United States and the actions taking place in the United States.

We do by law require you to do human rights evaluations of all countries. We do not have that by law required for the United States. And I think one of the things, Mr. Chairman, we might want to take a look at is whether we should not as a Congress institutionalize a review of our own actions and meeting standards on human rights as well as the trafficking issue. And I would welcome thoughts as to whether we can do this administratively, whether Congress should weigh in so we institutionalize. But these

reviews need to be given more attention, more attention in the United States and more attention internationally. And I am afraid that we have not used the reviews generally on human rights as effectively as we could.

A lot of work goes into it, but I think we need to have a more effective use of these reviews. And it would certainly have more credibility if the United States was part—if we reviewed actions in our own country with the same standards we use in the international community.

Let me just question you on some of the statements that you have first, Mr. Posner. The Convention on the Elimination of All Forms of Racial Discrimination, I appreciate the fact that you said that we will communicate on a regular basis as required by the Convention and give thorough reports, but that has not been the case in the past. The United States has been tardy in submitting its reports, and it certainly has not provided detailed information.

There have been criticisms of the U.S. compliance with the treaty obligations in racial profiling and the manner in which we treat juveniles. These issues have been raised in the past along with how Katrina was handled internationally, perceptions—not only perceptions, but reality.

Can you just elaborate a little bit more on our commitment to comply with this treaty as far as listening to the concerns that are being raised and giving a more timely and detailed response to the reporting?

Mr. POSNER. Yes, Senator. Thank you for asking the question. I think there are different approaches to how you look at these treaties and our reporting. One approach is to say this is something that is required by the U.N. or somebody and let us do it de minimis. Let us tell them what we need to tell them and tell them what the laws are, et cetera, but it is really not about us.

And there is another approach which is the approach that I favor and this administration, the President has articulated, which is to say let us actually take a look at the underlying issues and figure out how we can use the reporting process to improve our own record.

This is a great country, and we have a great democratic constitutional system, but there is always room for improvement. And we ought to use these reporting opportunities—and view them as opportunities—to take a look at our own performance and say where there are shortcomings and how do we address them at a Federal and at a State level. It is easier to say that than to do it, but beginning with the Periodic Review this year and the review of the Civil and Political Covenant, and then in subsequent years we are going to come back to the Convention on Racial Discrimination, the Convention on Torture, and we are going to look to see how do we both engage various Federal agencies that need to be part of this, how do we engage the States, and how do we take advantage of expertise of groups like the Leadership Conference on Civil Rights to figure out—and Wade Henderson's testimony lists a number of things that I think we need to be looking at when we come back to the review of the racial discrimination treaty.

So I do not have the particulars now of what we are going to do, but I can assure you that our intention is to be forthcoming, honest

in our evaluation, to be inclusive in the approach, and to use it as an opportunity to figure out what we need to change.

Senator CARDIN. Thank you.

Mr. Perez, in your written comments—you were unable because of the clock to give all of your statement. I just want to underscore two points and then ask a very quick question, and I know the Chairman is going to be a little lenient on me because I spent my first minute complimenting him. I am sure I can get an extra—

[Laughter.]

Chairman DURBIN. Take your time.

Senator CARDIN. But I really want to compliment you for taking this opportunity to continue your commitment in the Civil Rights Division and the Department of Justice is committed to pursuing a more robust approach to civil rights enforcement and accomplishment, that you are committed to ensuring full political participation by qualified voters in our democratic process through enforcement of our voting rights laws, and engage in affirmative programs to reinvigorate our enforcement of Title VI of the Civil Rights Act of 1964. That is in your written statement, and I just really want to put a spotlight on that because you and I have talked about this, and we are very much supportive of the Department of Justice and the Civil Rights Division doing its traditional role in these very important areas.

I have one specific question which deals with the torture treaty. When the Senate ratified that, they referenced amendments to our Constitution 5, 8, and 14 as saying that it is how we interpret the Convention Against Torture. That seemed to be adequate at the time, but now that I look how the Bush administration tried to justify torture, which I think was against our Constitution and our laws, but clearly against the Convention, do we need to take a better look at the treaty to make sure that it is clear that we are in compliance with the international agreements? And, second, does the statute of limitations—that is not mentioned here—cause any concern as to whether we would be restricted in a 5-year statute of limitations, which is generally used? And do we need to take further action in order to make it clear that torture is not going to be permitted?

Mr. PEREZ. Thank you for your questions, and thank you for your longstanding leadership, not only for the Nation but also in the State of Maryland on civil rights issues, Senator.

The torture issues are very, very critical, and what we have observed most recently, for instance—and this was a Criminal Division prosecution in the Southern District of Florida of Chuckie Taylor, the son of Charles Taylor of Liberia, under the Federal statutes that you enacted. In that particular context, actually in the briefs there was reference to the treaty that you just referred to, and so I think it was an example of where Federal law was informed by our treaty obligations and actually resulted in a very successful prosecution of an individual who had engaged in heinous acts. And so that was, I think, a very good example of the interplay between our treaty obligations and Federal laws that were enacted that really reflect those values embodied in those treaty obligations.

As it relates to the statute of limitations question, I would need to study that further because I have not really studied that in any

detail, and I am reluctant to give what prove to be uninformed answers. But I am very committed to getting back to you on that.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Chairman DURBIN. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. I have been here a while now. I did not know this rule. How many seconds extra do I get for every second I compliment you?

Chairman DURBIN. Two. It is a bonus.

Senator FRANKEN. OK. Well, in that case, thank you, Mr. Chairman, for your leadership and for calling this exceptionally important hearing. This is the first hearing in the Senate on our compliance with human rights treaties, and so I am proud to be a Senator on this day, and I am proud to be a Senator from Minnesota. My State has a long history in the fight for human rights. We are the first State in the Nation to have a center for the rehabilitation of victims of torture, and we consistently welcome more refugees to our State than any other State per capita, I think the second most in the Nation.

My predecessor, Paul Wellstone, was a consistent and unabashed advocate for human rights, authoring and passing, for example, the Trafficking Victims Protection Act in 2000. This has been bipartisan from Senators from our State, and I hope to keep that tradition alive.

Let me ask a few questions first of Mr. Posner. Last week, in a hearing I asked Secretary Napolitano about the detention of asylum seekers, and I know you know a lot about refugees seeking asylum. Now, this issue is very relevant at this hearing. Let me explain. You can be a human rights activist who was jailed and tortured in another country, get a visa to come to the United States, enter the country legally, and ask for asylum the second you arrive here, step off the plane, and you will be mandatorily detained. In fact, even after you have convinced two Government officials, the customs agent and asylum officer, that you have a credible fear of returning home, the Government can continue to detain you. This happened to thousands of asylum seekers in this country.

I know that you are scheduled to report on the United States compliance with the International Covenant on Civil and Political Rights. Do you think that these practices are consistent with Article 9, Section 1 of the International Covenant on Civil and Political Rights, which this Congress ratified in 1992 and which prohibits arbitrary detention?

Mr. POSNER. This is, Senator, as you know, something that in my previous life I worked on quite a bit, and I do still—this is not the focal point of what I am doing in the State Department, but it is something that I think we as a Government need to take a very close look at. We will take a look at it both in the context of reviewing the Civil and Political Covenant, but also in this Periodic Review.

One of the things we are going to do—and I think it mentioned in the opening statement—is to have a series of consultations around the country starting next month in New Orleans looking at some of the Katrina issues. And others are going to be set in dif-

ferent parts of the country. At least one of those reviews will be designed to look at a range of immigration and refugee issues in particular, and this is something that is very close to my heart.

Senator FRANKEN. I know that.

Mr. POSNER. And I can assure you we are going to look at it.

Senator FRANKEN. Then another point on that. Once an asylum seeker is detained and the Department of Homeland Security decides to keep him in detention, that asylum seeker cannot appeal his detention to an immigration court. That is an unappealable decision. I do not think that is consistent with Article 9, Section 4 of that treaty, the requirement that anyone detained be afforded access to a court to challenge his or her detention.

Could you look at that as you conduct these hearings and as you think more about this issue?

Mr. POSNER. We certainly will, and I would say just generally I am not up to speed on all of the details of this right now.

Senator FRANKEN. Sure.

Mr. POSNER. But I would say in general one of the things I certainly noticed, we noticed over the last 8 years, 9 years, is that refugee issues became very much part of a national security debate, and in that context, there was a lot of overreaching. And I think part of our challenge as an administration coming in is to take a fresh look at all those things. So that is what we will do.

Senator FRANKEN. Thank you.

Mr. Perez, first of all, "intertwinedness" is not a word.

[Laughter.]

Mr. PEREZ. OK. Thank you. I looked at you when I said that, Senator.

Senator FRANKEN. I know.

Mr. PEREZ. I do not know why I looked at you when I said that.

Senator FRANKEN. I got to "interconnectivity."

Mr. PEREZ. That works.

Senator FRANKEN. You referred to the HELP Committee hearing where you very rightly supported the Employment Nondiscrimination Act, at least in my mind, which would prohibit discrimination on the basis of sexual orientation and gender identity. Do you have a position on the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women? You did not mention CEDAW in your testimony, but I believe that we are one of just a handful of nations that have refused to ratify the Convention, and on this point we are really in the same league as Sudan and Iran. Do you have a position on that? Does the administration have a position on that?

Mr. POSNER. Maybe I can answer that. There are several human rights treaties that we have signed, the U.S. has signed but not ratified, and I think the Commission Clinton has made it clear that this treaty, CEDAW, the Convention on Elimination of Discrimination Against Women, is a priority—in fact, the first priority. So one of the challenges we have is coming up here and finding 67 of you to support it, but we are committed to doing it, and we are in the process of reviewing how we are going to go about coming up here and asking for it. But it is something that the Secretary is very, very committed to, as am I.

Senator FRANKEN. Very good. Thank you.

Chairman DURBIN. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Two months ago, Senators Leahy, Cardin, Franken, Kerry, and myself asked your respective Departments for recommendations on how to bring the United States back into compliance with the Vienna Convention on Consular Relations. The U.S. Supreme Court in *Medillin v. Texas* determined that the Congress must act to address the fact that the United States is currently out of compliance with its Vienna Convention obligations, as found by the International Court of Justice in the 2004 *Avena* case. In a recent letter, the United States Council for International Business explained the dangers of the situation and said, "The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention. Overseas employees of the U.S. business community as well as other Americans traveling or living abroad need this vital safety net." And John Bellinger, the legal adviser to the State Department under Secretary Rice, made the same point in a recent New York Times op-ed piece. I would ask first, Mr. Chairman, that various materials relevant to this issue be placed in the record.

Chairman DURBIN. Without objection.

[The information referred to appears as a submission for the record.]

Senator FEINGOLD. So given that background, do you agree that addressing this issue is critically important to the protection of Americans abroad? And when can we expect a response to our letter asking for your Departments' input on how to bring the United States back into compliance with the Vienna Convention?

Mr. PEREZ. I absolutely agree that it is a critically important question because it implicates foreign nationals here and Americans abroad, and I appreciate your leadership in this issue. I have reviewed your letter and consulted with others in the Department.

As you well know, it is a very complex question because it implicates both what we do at the Federal level and then what States do, and the reason for the delay—and I apologize for that—is simply the complexity of the issue, because as you know the *Medillin* case basically stood for the proposition that there are limits to what the Federal Government can say to a sovereign state. And so we are attempting to move forward, recognizing those complexities, to come up with a series of solutions that will address the issues that, you correctly point, ensure the security of Americans abroad and ensure our compliance with our treaty obligations here at home. I am continuing to consult with our colleagues at the Department, and we hope to get a response to you at the earliest possibility opportunity. And I can assure you that there is robust discussion underway within the various relevant components of the Department and our sister agencies as we address how best to address the myriad of complexities in this.

Senator FEINGOLD. What kind of timeframe are you suggesting for a response to the letter?

Mr. PEREZ. I will consult with my colleagues and attempt to get you an answer within the next few days about when that timeframe would be.

Senator FEINGOLD. That is good.

Assistant Secretary Posner, according to an Executive order issued by President Obama in January, the U.S. Government must “provide the International Committee of the Red Cross with notification of and timely access to any individual detained in any armed conflict” and in U.S. custody. The New York Times recently published a story alleging that there is a secret detention facility in Afghanistan to which the ICRC does not have access and where detainees allege that they have witnessed abuse as recently as this year. So let me ask you: Does the ICRC have access to all U.S. detention facilities in Afghanistan? And what does it mean to provide timely access to the ICRC?

Mr. POSNER. Senator, I have seen those articles, and I am going to have to refer back and give you a written answer to that. I am not the person who has the most timely information on that.

Senator FEINGOLD. When can we expect that answer?

Mr. POSNER. Soon. I will push hard to get that answer to you in the next few weeks.

Senator FEINGOLD. OK. Assistant Secretary Posner, again, as you know, 21 years ago the United States became a party to the Convention on the Prevention and Punishment of the Crime of Genocide, and you actually mentioned that treaty in your statement. The ratification of the treaty was obviously a momentous occasion, not just because it was the first human rights treaty passed by the U.N. General Assembly, but also because it was a signal to the world that the United States would never again sit back and watch as genocide took place. And I believe that when the United States ratified this treaty, it agreed to take decisive action to help prevent and punish genocide. I am raising this with you, perhaps obviously, because in 2004 the Bush administration made a determination that genocide had been committed in the Darfur region of Sudan and stated at the time that genocide could still be occurring.

So after making that determination, what obligation do you believe the United States has to attempt to halt the genocide? And do you believe that the United States has fulfilled its legal commitment in this instance?

Mr. POSNER. Senator, we have, obviously, in the last several years watched painfully as hundreds of thousands of people have been killed in Darfur and several million have been exiled or internally displaced. I do not think any of us are satisfied with the way in which it has unfolded or believe that there cannot be more done.

I do not view this so much as a legal obligation, but I think it is an absolute obligation of leadership in the world for us to do everything possible to address the genocide that occurred in Darfur and the continuing suffering. It is a tragic situation and one that in some ways continues to deteriorate.

So we are committed to trying to find the right answer there. The alternatives are tough, and there is also a growing concern—and I think this has been part of the challenge recently—in a disintegration of the country between north and south and General Gration is preoccupied, understandably, with trying to hold the country together. But my view would be—and I think it is the administration’s view—that we have to do both. We have to be engaged in trying to hold the country together and prevent a further

erosion of peace in the south, but at the same time continue to focus on the genocide and violence—

Senator FEINGOLD. Of course, I am aware of and deeply involved in all those policy arguments, but my question to you had to do with our legal obligation under the Genocide Convention. It is a narrower and important question. What are the ramifications of the position we have taken vis-a-vis the Genocide Convention in Sudan, particularly if we believe the genocide is still happening in Darfur?

Mr. POSNER. I think the legal obligation is that we have to respond to end the genocide. How you do it and what that means in practical terms I think is harder.

You know, there has been a discussion, as you know and have been involved in for a long time, about what are the military options, what are other options in terms of sanctions. All of those things are still being discussed and on the table.

Senator FEINGOLD. Does this administration continue to believe this is genocide occurring under the Genocide Convention?

Mr. POSNER. I would have to get back to you on that. There is no question and various administration officials have said that genocide occurred in Darfur and there are continuing gross violations occurring to this day. I do not think the determination of whether the word still applies is really the key thing. It is an unacceptable situation now, and we need to be operating with all of our energies to prevent the continued violence and killing and disappearance and rape that characterizes Darfur today.

Senator FEINGOLD. Thank you.

Chairman DURBIN. Thank you, Senator Feingold.

I want to thank this panel. This is not the last time we will probably call on you, because I think that we feel—and I think you share this feeling in the administration—that as painful as some of these questions may be, it is appropriate that we ask them and establish that we are trying our best to live up to the very standards that we have agreed to and that we suggest the rest of the world should abide by. So thank you very much for your service.

Mr. POSNER. I agree.

Mr. PEREZ. Thank you for your time, Mr. Chairman.

Chairman DURBIN. We are honored to welcome on our next panel two of our Nation's leading human rights and civil rights advocates. I am going to introduce them as they are sitting down in the interest of time.

The first one who will testify is Elisa Massimino. She is the President and CEO of Human Rights First, one of the country's most prominent and well-respected human rights organizations. Ms. Massimino joined Human Rights First in 1991 and was previously the organization's Washington Director. Ms. Massimino is also an adjunct professor at the highly regarded Georgetown University Law Center. She holds a bachelor's degree from Trinity University in San Antonio, Texas, a master's degree in philosophy from Johns Hopkins University, and a law degree from the University of Michigan. I want to especially note that Ms. Massimino has been very supportive of our Subcommittee efforts since it was created in 2007. Although we work very closely with Ms. Massimino, this is her first appearance before the Subcommittee.

I will introduce the next witness and then ask that they both take the oath.

A personal friend and a real leader, I am just honored that he is here today. Wade Henderson is President and Chief Executive Officer of the Leadership Conference on Civil Rights; the largest and oldest civil rights coalition in America. Mr. Henderson is also a law professor at the University of the District of Columbia. Previously, he was the Washington Bureau Director of the NAACP and Associate Director of the ACLU's Washington office. He has a bachelor's degree from Howard University and a law degree from Rutgers University School of Law.

If I could ask you both to stand for the oath, please. Do you affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. MASSIMINO. I do.

Mr. HENDERSON. I do.

Chairman DURBIN. Thank you. Let the record reflect that both witnesses answered in the affirmative.

Ms. Massimino, please proceed.

STATEMENT OF ELISA MASSIMINO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HUMAN RIGHTS FIRST, WASHINGTON, DC

Ms. MASSIMINO. Thank you, Mr. Chairman, and I thank the Committee for holding this important hearing. We are just profoundly grateful to you, Senator Durbin, for your leadership on so many human rights issues and, in particular, for the central role that you played in creating this Subcommittee. We think the Subcommittee's work signals a new approach and thinking about human rights in this country and that it will help educate Americans about their human rights and ensure that the U.S. Government views its human rights treaty requirements as a part of its domestic law. This is what the Constitution requires, so it is particularly fitting that the Judiciary Committee now formally can look at these issues explicitly. In the many years since the United States first started ratifying human rights treaties, I think this is the first hearing that I can remember ever explicitly addressing these issues, and we hope it is the first of many.

I also want to welcome the attention of the Government witnesses to these issues. I really do not think Congress could have any two better partners in this effort than Tom Perez and Mike Posner, both of whom really deeply understand the importance of implementation of human rights commitments. So we look forward to working with them and with you to further this.

You mentioned the Eleanor Roosevelt quote about human rights beginning close to home, and it is particularly fitting. It should be on this Committee wall somewhere because the human rights treaties are intended to protect people close to home against government abuses of their rights. They are the supreme law of the land under our Constitution, but most Americans have never heard of them, and most government agencies who have the jurisdiction over the subject matter that is covered in those treaties have never heard of them either.

Historically, the U.S. Government has kept the examination of human rights treaties behind a fence at the State Department, where they have been treated primarily as a matter of foreign policy. And for many years, Congress took the same approach, limiting jurisdiction over these issues—as human rights issues—to the committees that oversee the State Department and foreign relations.

But that approach misses Eleanor Roosevelt's point. The U.S. Government has to understand that human rights laws are part of our domestic law, and Congress and the executive branch need to work together to bring these obligations into the mainstream of the domestic agencies with primary jurisdiction over their subject matter.

Last week, we celebrated the 61st anniversary of the Universal Declaration of Human Rights, which is our foundation document setting out the principles that the human rights treaties are intended to operationalize as standards by which to judge all governments. And as an organization based in the United States, my organization, Human Rights First, has focused particular attention on making sure that the U.S. lives up to those obligations. Ensuring compliance with human rights treaty obligations strengthens the U.S. effort to advance human rights abroad. And as Secretary Clinton said in her speech on Monday, we have to lead by example. There is just no substitute for U.S. global leadership on human rights. Without it, the agenda crumble and repressive governments operate with greater impunity, and really the very fabric of the norms that are enshrined in the Universal Declaration starts to fray. When the U.S. itself violates these norms—or sets them aside for expediency's sake—the global consensus erodes. And as President Obama said in Oslo last week, “we honor those ideals by upholding them not when it's easy, but when it is hard.”

We can have many hearings—and I hope we will—about the distance, the gap between our obligations and ideals and the current reality in the United States, but my testimony, which I hope you will accept in full in the record, outlines a strategy going forward to create a structure to ensure greater fidelity to those ideals and obligations in the future. And that is based on three components which I will just summarize briefly.

First is the executive branch structure to enhance compliance, and you have heard about the Interagency Task Force on Treaty Implementation. I remember when the Interagency Task Force was formed, and we had high hopes for an expansive agenda for that Interagency Task Force. To my knowledge, it focused primarily on reporting externally to U.N. bodies and inquiries abroad about how we were complying with our treaty obligations, and that is very important. And as you mentioned, under President Bush we got current on our treaty reporting requirements. It is very important.

But, really, for there to be a revolution in how we think about human rights in the United States, there has to be a lot more, and we would propose that the executive branch create a structure that will do a few important things: ensure that the legislation that is promoted by the administration or on which the administration is taking a position is vetted for conformity with treaty obligations; educate State and local governments and the broader public about their rights and responsibilities under human rights treaties; de-

velop and execute a plan to monitor law, policy, and practice at the State level to assess conformity with human rights obligations; conduct an annual review of the reservations, understandings, and declarations to the treaties; and ensure that domestic agencies with the jurisdiction over this subject matter really have content experts who understand that this human rights law is part of their obligation.

I see my time is already up, so I am going to leave the rest of the discussion about what Congress can do for the questions and answers. Thanks.

[The prepared statement of Ms. Massimino appears as a submission for the record.]

Chairman DURBIN. Thank you.
Mr. Henderson.

STATEMENT OF WADE HENDERSON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, DC

Mr. HENDERSON. Thank you, Mr. Chairman, for this really important hearing, and thank you for having me here today on behalf of the Leadership Conference on Civil and Human Rights, a coalition of over 200 national organizations committed to building an America that is as good as its ideals. I appreciate your including the formal written statement in the record today, so thank you for that as well.

We believe that human rights instruments, like the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination, are not merely aspirational statements but effective tools for illuminating inequities here at home and abroad. Indeed, as Tom Perez noted in the previous panel, while it may have gone by a slightly different name, our Nation's modern civil rights movement was very much at its heart a human rights movement.

The Leadership Conference itself was founded at the dawn of this movement, just 2 years after the adoption of the Universal Declaration and only 5 years after the Holocaust and the internment of Japanese Americans on U.S. soil. Our leaders were motivated not only by the standards articulated in our Nation's founding documents, but those in the Universal Declaration as well.

Now, with that in mind, and with our 60th anniversary approaching, we have chosen to honor the legacy and the foresight of our Founders by fully incorporating the term "human rights" into our name. In January of 2010, we will officially become the Leadership Conference on Civil and Human Rights. Civil rights are human rights, but we also know that the concept of human rights extends beyond those personal rights guaranteed by the U.S. Constitution, to include protections such as the National Right to Education for All.

Moving more directly to today's subject, I want to thank you for this hearing again and for your efforts in general to step up Congress' oversight of our domestic human rights obligations. The fact that this Subcommittee did not even exist prior to 2007 points to a troubling fact. Congress has not done enough to ensure that the United States lives up to its treaty obligations, which represent not

just mere ideals but the law of the land. Today's hearing represents an encouraging turning point.

We are also encouraged that the United States has been working to reclaim the leadership on international human rights matters by joining the UN's Human Rights Council, signing the Convention on the Rights of Persons with Disabilities, and by the effort of U.S. NGOs to support the Senate's ratification of the Convention on the Elimination on All Forms of Discrimination Against Women.

But as our Nation takes on these new commitments, we cannot lose sight of those that we have already made. As we reclaim our leadership on human rights, our shortcomings at home are not only harmful, they also undermine our credibility with other nations, and as they have in the past, they also serve as easy fodder for opponents who want to divert attention from even worse wrongdoings of their own.

With that in mind, we would strongly encourage Congress to look at the following issues through a lens of our international treaty obligations:

One issue that clearly implicates our international treaty obligations is that of racial disparities in our criminal justice system, particularly the one in sentencing for crack and powder cocaine, which has had a disproportionate effect on African-Americans and has helped give the United States the largest prison population in the world.

To be sure, the sale of any cocaine product should be punished, but I think we can all agree that it should not be done in a disproportionately harsh and discriminatory manner, and that is the one area where the U.S. Sentencing Commission and the international community clearly agree.

A second area is with respect to D.C. residents who currently face taxation without representation and lack a vote in our National legislature in violation of the most important right that citizens have in a democracy. International human rights bodies have taken notice, and the disenfranchisement of D.C. residents continues to undermine our efforts to promote democracy elsewhere.

Third, the United States clearly needs a truly independent, bipartisan, national civil and human rights institution. For many years, we had one in the form of the U.S. Commission on Civil Rights, but the Commission has been weakened by political partisanship and is now a hollow shell of its former self. It is in dire need of overhaul.

Fourth, both international human rights standards and our Nation's civil rights movement have long recognized that the right to form unions plays a critical role in ensuring equality. As A. Philip Randolph, one of our founders, once said, "The two tickets to a better life are a voter registration card and a union card." But as workplaces change and as our Nation's policies fail to keep up, it is becoming harder and harder for all workers to organize, in violation of our obligations under the Universal Declaration, among other instruments.

Finally, and sadly, the United States has clearly not taken seriously its human rights obligations toward the indigenous peoples of this country, the first Americans, in clear contradiction of well-

established human rights principles and despite repeated condemnations by international human rights bodies.

We strongly believe that civil and human rights must be measured by a yardstick both at home and abroad. On issues such as these, Congress must step in and make sure that our country is living up to the standards that we are trying to establish throughout the rest of the world.

Thank you, Mr. Chairman, and I look forward to the questions.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Chairman DURBIN. Thank you both. Mr. Henderson, thank goodness for your voice. The fact that you are here so frequently and the message that you bring is an important part of this democratic process. I do not know what we would do without you, and I am glad you are here today.

Ms. Massimino, will you follow up on that? Mr. Henderson has been rather specific. Could you put it in this context? I am sure that, with your background in human rights and meetings with others from around the world, occasionally you will get into this exchange about how before the United States judges anyone else, why don't you take care of your own situation? You have heard Mr. Henderson's list. What would you add to it?

Ms. MASSIMINO. Well, I think we are in the context of the fight with al Qaeda in the last 8 years, I mean, this has been one of the biggest set-backs to U.S. global leadership, are the steps that the United States took to diverge from the Geneva Conventions, from the Convention Against Torture.

You know, shortly after 9/11, when these measures started to come to light internationally, I was at a meeting with many of my counterparts from all around the world—Asia, Africa, the Middle East—all of whom are on the front lines of the struggle for human rights and democracy in their own countries. And when I asked them then what can we do to help you, they all to a person said, "You have got to get the United States back on track, get your own house in order, because we need the United States to be a strong global leader on human rights." Without it, as I said, the consensus erodes and the norms become less than universal.

I was just at a conference last week in London with human rights activists and government leaders from around the world, and the topic was: Are universal human rights really universal anymore? And I really do not believe we would have had that conversation before the missteps of our own country with respect to torture and abuse of prisoners and the Geneva Convention problems, the divergence from the Geneva Conventions that we had.

So we still have work to do there, and the announcement yesterday with moves to close Guantanamo is a welcome step. But as you know, the devil is in the details, and the world is watching how we resolve these problems from accountability to prolonged, indefinite detention without charge. So we have to be vigilant.

Chairman DURBIN. Are there any other areas? Not that I want to diminish that, but there are so many different fronts that we can discuss. I spoke earlier about child trafficking. I am really asking you if your list would go to include any other topics that Mr. Henderson did not touch.

Ms. MASSIMINO. Oh, it is a very long list and I—
Chairman DURBIN. It sure is.

Ms. MASSIMINO. In fact, I think it was a wonderful opportunity that you provided to the public to solicit testimony from so many groups who are focused on this issue, and I have begun to look at all of the submissions. My own organization, as you know, we touched on this earlier—I think Senator Franken raised it—about the discrepancy between our obligations under the Refugee Convention and the protocol that the U.S. is a party to and how we treat refugees and asylum seekers in this country. Next year will be the 30th anniversary of the Refugee Act, and I think it would be a particularly appropriate time for this Subcommittee to look at the specifics of our obligations under that treaty and whether or not we are living up to them under our own domestic legislation.

There are many, many other areas that we could talk about, and I think I would—as a proud member of the Leadership Conference on Civil and Human Rights, Wade and I work closely together on a whole range of these issues.

One on which I think we ought to—that this Committee could focus particular attention on which has the added benefit of enabling us to—the State Department and the Justice Department to join together and share our wisdom about how we are dealing with these issues with other countries is on bias-motivated violence and hate crimes. We obviously have taken a step forward there with our laws recently with the Matthew Shepard Act, but now we need to implement that, collect the data and demonstrate that it makes a difference on the ground.

Those mechanisms and structures that we develop in Government to do that can be shared with other nations who also are facing in many places a disturbing rise in bias-motivated violence. So I would add that to the list as well.

Chairman DURBIN. Mr. Henderson, before I rechaired this Committee, I for a brief time was the Chairman of the Crime Subcommittee, which Senator Specter now chairs, of the Judiciary Committee. To demonstrate a certain “intertwinedness” between that Subcommittee and this Subcommittee—

[Laughter.]

Chairman DURBIN. One of the early hearings we had was on the crack/powder cocaine disparity. The administration has come out against the disparity and called for a 1:1 sentencing guideline. I have introduced legislation along that line, and it now is pending before the Committee, and we are working with the other side to see if we can find any common ground so that this can move in a fairly quick fashion.

But can I step back for a second from that and say that, even before that disparity, we could see racial disparities within our system of justice. As bad as this is, as much as it has aggravated the situation—and I plead guilty as one of those who voted for it along with many others in the House who thought this was the right thing to do at the time, and I now realize how wrong we were. But this is the thing that you headlined as the first on your list and one that I have often asked of people aspiring to the bench and other law enforcement positions in our Government, to try to explain for a moment what this country is all about, where 12 or 13

percent of the population is African-American and it turns out that the numbers are just out of line in terms of those arrested, convicted, and incarcerated, as I said here 6:1.

Can you step back for a moment, and be reflective and say what more can we do? I mean, we have made—for the record, we have made substantial progress.

Mr. HENDERSON. Absolutely.

Chairman DURBIN. Witness my former colleague in the Senate. But can you tell me what more you think we can or should do?

Mr. HENDERSON. Mr. Chairman, thank you for your question, but thank you for your incredible leadership on this really extraordinary issue. The fact that you have introduced a bill to address the crack/powder cocaine disparity, a bill in the Senate that is now the pending business of the Judiciary Committee, is extraordinary.

You know, this disparity is one of our Nation's most glaring examples of injustice in the criminal justice system. It is one of the most fundamentally challenging civil and human rights issues facing the Nation today. The truth is that racial disparities and racial discrimination in our criminal justice system is a stain on American democracy, and it undermines the principle of equal justice under law. It undermines the confidence really that all Americans have in the fundamental fairness of our system. And it holds us up to ridicule abroad because we are challenged on the hypocrisy and the gap between what we say our principles are and what we do in practice.

Now, you talked about the existence of racial discrimination within the criminal justice system, and indeed, it traces its legacy back to the period of slavery in American life. Yes, we have made as a country extraordinary progress in helping to reconcile that difference between America's ideals and American reality. But we still have a long way to go.

Structural inequality and racial discrimination of the kind that the crack/powder cocaine disparity reflects in my view cannot be entirely excised even with the passage of your extraordinarily important legislation, because the numbers that you allude to are as much a reflection of the problems at every step of the criminal justice system. Who is arrested, who is prosecuted, and, ultimately, how those individuals are sentenced upon conviction is often a reflection of inherent bias in the system that can only be addressed by bringing it to the surface, making it an open issue in which the country discussed and seeks remedy. And we need to do so.

Hence, this problem of racial profiling, which we also know exists, contributes to the very problem that you have talked about with the crack/powder disparity, because the truth is statistics of the U.S. Sentencing Commission and other bodies—human rights organizations and internationally recognized bodies—shows that the distribution of those who use these products is far closer to and equal a system than the prosecution and conviction rate would suggest.

So, you know, we thank you for your leadership in this area. It is important. Your effort to bring bipartisan support to this issue is extremely important. We were pleased at the Justice Sotomayor confirmation hearing that the Ranking Member of the Judiciary Committee, Senator Jeff Sessions, lifted up the issue of crack/pow-

der cocaine with which he shares concern as a former U.S. Attorney. But, ultimately, the issue is how do we come together to make a decision about how to equalize these penalties in a way that makes sense given that the two products are pharmacologically so similar that the disparity both in sentencing and penalty obviously should not exist.

So thank you for your effort to push this legislation, thanks for trying to make it a bipartisan issue, as it should be, because these kinds of disparities are not partisan issues. They are really national issues. And until we step back and really reflect on that and fashion solutions to the problem, we will not be able to make progress. But I think your leadership is really contributing to it, so thank you.

Chairman DURBIN. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, and once again I would like to compliment you on your comically ironic use of "intertwinedness." That was very good.

Mr. Henderson, your discussion of the disparities in sentencing and the prison populations reminds me of Richard Pryor's discussion of justice, when he said that he visited a prison and it was "Just us."

Let me turn to the Convention on Torture, if I might. In 1994, the U.S. Congress ratified the Convention Against Torture, and the treaty prohibits countries from returning or deporting anyone to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." That is the quote from the treat.

But our implementing regulations actually require someone claiming protection under the Convention to actually show "it is more than likely that he would be tortured."

So, Ms. Massimino, doesn't our standard seem higher than the Convention's standard? And doesn't that create a problem?

Ms. MASSIMINO. Yes. But there are many problems I actually think that are even worse than the standard of proof about whether it is more likely than not or substantial likelihood, actually. What we have seen over the years since the treaty was formally ratified is a real erosion of the whole concept of a responsibility not to send people to torture and, in fact, efforts to get around that, to reduce the opportunity for people who are in U.S. custody, whether they are in U.S. custody abroad—this is another issue that we have to pay close attention to. The United States has asserted at times that the obligation not to return people to face torture does not apply if the person is outside the United States but in the custody of the United States.

So you cannot have an adjudication about whether or not a person has a substantial—that there is a substantial likelihood that they would face torture unless that person has an opportunity to raise that claim in either a removal proceeding or any other kind of proceeding. Even in extradition proceedings, what we have found is that there is an inadequate level of protection, due process protection, for people to raise these claims, and it comes down to the discretion of the Secretary of State whether or not the person can

be extradited, even if there is a magistrate finding that there is a more likely than not chance that the person will be tortured.

Now, you know, the United States has cited this obligation in its refraining from sending the Uyghurs at Guantanamo back to China, and that is very welcome. But this is an issue that really needs a very close look at our—both in the extradition area and removal area to make sure that we have got sufficient procedures in place that will allow people to even raise these claims.

In the context of refugee cases and asylum cases, often it is protection under the Convention Against Torture that is the most appropriate protection, and yet for many years our immigration judges did not even have the opportunity to make a judgment about that claim.

So I think it would be very important for us to have a look at across the board, both when the U.S. acts internationally but also in removal proceedings. This was a problem in the *Arar* case, as you probably know, which people do not think of necessarily as an immigration case, but it was the failure to really have an opportunity—he raised a fear of torture when the United States said that it was not going to let him go back to his home country of Canada. And yet there was no procedure by which that could be adjudicated by an independent person.

So you are right very much to focus on it, and I think when the United States reports on its compliance with the Convention Against Torture, we need to take very seriously the recommendations to reform our procedures.

Senator FRANKEN. So when we have in the past—and I hope not now, but when we have engaged in rendition, you are saying that one of the issues has been just due process, the ability of the person being sent to another country being able to have this adjudicated in a proper court.

Ms. MASSIMINO. Absolutely, and I would not—I am not at all convinced that the executive branch has set aside assertions of the authority to conduct renditions. I think that as I understand it from the President's Executive orders, that was not definitively set aside by any stretch. And I think we need to make sure if there is going to—anytime that there is a transfer—that is why we have extradition treaties and removal proceedings, because anytime there is a transfer of a person from the custody of one government to the custody of another government, that person's life, liberty is, you know, in question. And so we have to have protections. And so anytime that it goes outside those processes, we need to make sure that there is a real reason for doing it and, second, that there is a kind of a process where that can be raised and adjudicated independently.

Senator FRANKEN. Thank you.

Mr. Henderson, my first cosponsorship in this body was of the Employment Free Choice Act, and I was heartened that the Leadership Conference views passage of EFCA as necessary for fulfillment of our obligations under the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination.

Can you tell us a little bit more about the provisions of these treaties that require passage of EFCA?

Mr. HENDERSON. Yes, sir. First of all, thank you for raising the question, Senator Franken.

You know, when we talk about civil rights in our country, I often find that those who are not as familiar with our constitutional obligations and international treaty obligations are frequently surprised to hear that a right to education on behalf of all children in our country is not recognized by our Supreme Court as a fundamental right. It is not. The case of *San Antonio v. Rodriguez* is a case which held the principle that education is not a fundamentally protected constitutional right in this country.

So, too, is the issue of the right to organize. I think Eleanor Roosevelt and those who helped fashion the Universal Declaration of Human Rights understood the seminal importance of allowing individuals to organize to protect their interests in the workplace: the 40-hour work week, the weekend that we now enjoy, the protections that workers who had high school diplomas but who were able by virtue of their hard work in the manufacturing context to create the middle class that we celebrate.

Walter Reuther of the United Auto Workers was one of our founding members of the Leadership Conference, and it was because of the UAW that there were adequate resources to bring individuals to Washington. They paid for the buses, for example, for the march on Washington. They helped provide the resources that were really necessary to help advance the causes that many of us support and celebrate today. And yet the interests of workers are largely ignored.

We find in many instances that employers have become increasingly sophisticated about misclassifying workers, calling them independent contractors, which strips them of their protections in the workplace, takes away their protection under many civil rights laws, does not allow them to petition for protection, to be an example of what we think is a real problem—worker misclassification. Or forcing workers into circumstances where they waive their constitutionally protected rights to challenge discriminatory practices in the workplace through processes of mandatory arbitration. We think that is a horrendous problem, and, you know, individuals have addressed that, including, Senator, your own efforts.

So there are indeed examples, concrete examples of how workers today are not adequately protected, and that is why the Employee Free Choice Act is such a fundamentally important piece of legislation and one that the Leadership Conference wholeheartedly supports.

I should also say, just as an addendum to my friend Elisa Massimino's response, the nongovernmental organizations, the civil and human rights groups of this country, there is a groundswell emerging, as Elisa knows and is leading helping to develop, to protect and enforce our treaty obligations internationally. There is a clear recognition of that.

I am privileged that the Leadership Conference works with a group called the Campaign for a New Domestic Human Rights Agenda, which is about 50 national and grassroots organizations that have come together to really support the full enforcement of our existing international obligations, and they are making a sig-

nificant difference both here in Washington and in communities all over the country.

So these issues that you and Chairman Durbin are bringing to the fore today are critically important. There is a base of support to implement these treaties effectively, and we are looking for ways to assist in the coordination of that effort.

Senator FRANKEN. Thank you so much, and, Mr. Chairman, I am sorry I have gone over my time and not done the requisite complimenting of you. I will just throw it back to you, but thank you so much for chairing this important hearing and calling it and for your leadership.

Chairman DURBIN. And if you want to add the compliment as part of the record, written record at a later date, we will keep the record open.

[Laughter.]

Senator FRANKEN. Oh, I can make up for the lack of compliments in the written record. Good.

Chairman DURBIN. Thank you, Senator Franken.

Thanks to everybody for being here. We asked a lot of organizations that did not have a chance to testify what they thought we should be focusing on. We had an amazing outpouring of response, 41 different organizations, and we are in the process, the staff has notified me, of going through their recommendations and finding a way to post them on a website, making them part of the congressional record, which we hope to continue to do on a regular basis.

There have been so many great organizations that have stepped forward, including the American Civil Liberties Union, Amnesty International, Center for American Progress, Human Rights Watch, the Lawyers Committee for Civil Rights under the Law, Open Society Policy Center, Rights Working Group, and all of those, without objection, will be included in the record.

[The information referred to appears as a submission for the record.]

Chairman DURBIN. I am going to bring this hearing to a close, and the hearing record will remain open—for a variety of reasons—over the next week for additional materials.

I want to make it clear for the record that this self-criticism does not overlook the fact that our Nation has been a leader in the world in championing civil rights and human rights, and I want to say with great pride that a lot of people who came before us took this very seriously. I hope that this effort will give us even more credibility and will also lead to a better country that we live in, which at the end of the day is what we are all here working toward.

We have concerns around the world. I could list all the different varieties of venues that have been discussed today. But as was said by President Obama just recently in his Nobel Peace Prize acceptance speech, “America cannot insist that others follow the rules of the road if we refuse to follow them ourselves.” I learned yesterday that our President did an all-nighter on that speech, if you thought that Presidents did not do those sorts of things. When we are honest about our own shortcomings and work to address them, we will be more effective at protecting human rights close to home and around the world.

The hearing stands adjourned.

Mr. HENDERSON. Thank you.

Ms. MASSIMINO. Thank you.

[Whereupon, at 12:05 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS
Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#1)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

1. Regarding the U.N.'s role in overseeing U.S. compliance with human rights treaties:
 - a. What is the process for presenting U.S. reports on these treaties to the U.N.?
 - b. Who from the U.N. hears the presentations and reviews the reports? What human rights qualifications and credentials do those who review the reports hold?
 - c. How does the U.N. evaluate reports?
 - d. Does the U.N. make an assessment as to whether a country is in compliance with a treaty?
 - e. What authority does the U.N. have over parties to human rights treaties?
 - f. Does the U.N. make recommendations to treaty signatories regarding compliance and implementation? If so, how do these influence U.S. behavior and how will past recommendations affect the content of the next reports we submit?
 - g. Is there any mechanism for the United States to dispute any of the U.N.'s response or recommendations to the reports we submit?
 - h. What effect does a negative response from the U.N. have on the United States' image both in the U.N. and around the world?

Joint Answer:

After the Senate provided its advice and consent to ratification, the

United States ratified each of the following human rights treaties:

- International Covenant on Civil and Political Rights (entered into force for the United States on September 8, 1992);

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force for the United States on November 20, 1994);
- International Convention on the Elimination of All Forms of Racial Discrimination (entered into force for the United States on November 20, 1994);
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force for the United States on January 23, 2003); and
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force for the United States on January 23, 2003).

Each of these treaties requires States Parties to report, shortly after ratification and periodically thereafter, on their implementation of the treaty. Each treaty (or the underlying Convention, in the case of the two Protocols) establishes a “treaty body,” a committee of experts with responsibilities related to the treaty. The members of each treaty body are generally required to be “experts of high moral standing and recognized competence in the field of human rights.” (This wording is from the Convention Against Torture; the other treaties use similar but slightly different phrases.)

Each of these treaty bodies has authority to review the initial and periodic reports submitted by states detailing the measures they have taken to implement their treaty obligations, and to issue non-binding and non-authoritative responses. Depending on details specific to the treaty, including in some cases whether a State Party has made an optional declaration or ratified an optional protocol, the treaty bodies may also have authority to

receive complaints about that State Party from other states or from individuals, if the State Party in question has accepted such authority. In these cases as well, the views or findings of the Committees are not legally binding.

Each State Party's report under these treaties is presented at a scheduled hearing held by the relevant treaty body. In the case of the United States, at such a hearing, a large and senior-level led interagency delegation typically presents the U.S. report and answers questions. Following consideration of a State Party's report, the relevant treaty body provides written observations and recommendations. The treaties describe these written products using words that identify their non-binding nature, such as "suggestions," "observations," "recommendations," and "comments." These comments may include the treaty body's assessments and recommendations regarding implementation of treaty obligations.

Through interagency deliberations, the United States reviews the conclusions and recommendations of the treaty bodies on its reports and, in subsequent U.S. reports to the treaty bodies, it provides its official reactions. Where the United States has changed its practices along the lines of a treaty body's recommendation, it may explain that change in a subsequent response. To the extent that the United States government disagrees with, or

concludes that it will not act pursuant to, treaty body comments or recommendations, it explains its position in its official follow-up responses. It may also explain its position in public statements or media interviews.

As to whether responses from the treaty bodies can affect a country's image, this is exactly what the United States intended by agreeing to the reporting process in the negotiations resulting in these treaties. The spotlight that these processes focus on each States Parties' actions and the resulting effects on a country's image can be significant tools to persuade these countries to implement the treaties. This is particularly significant with respect to States Parties that consistently violate their citizens' human rights. Such potential positive impacts on human rights practices are one reason the United States takes seriously these reports and the treaty body responses to them. We expect our principled engagement, including when we disagree with a committee, to show that the United States is a country that leads the world in taking seriously its human rights obligations and that is open to discussing and defending its record in public at the UN.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#2)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Please describe the response of the U.N. to the reports submitted by past administrations.

Joint Answer:

There have been many positive responses by the bodies created by UN human rights treaties and charged with monitoring implementation of these treaties, but these treaty bodies have also made negative comments regarding numerous issues, including the death penalty, police treatment of suspects or prisoners, and the detention facilities at Guantanamo Bay. All of the treaty body responses to the U.S. reports submitted during the last Administration are posted on the State Department website at:

<http://www.state.gov/g/drl/hr/treaties/>

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#3)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Mr. Perez, you testified that the U.S. government has come into compliance with our reporting requirements under the human rights treaties within your jurisdiction. Mr. Posner, you testified specifically that the Bush Administration achieved timely compliance with these requirements and sent teams to present U.S. reports to the U.N.

- a. Can either/both of you explain the process used by past administrations to fulfill these reporting responsibilities? (i.e., agencies and officials involved, time spent working on the reports, consultation with Congress, etc.)
- b. Can you provide more details about the reports submitted by past administrations? (i.e., description of content, length, scope, etc.)
- c. Do you believe these past reporting practices have been effective?
- d. Does this administration intend to follow these past reporting practices? What, if anything, do you intend to change?

Joint Answer:

U.S. reporting requirements under human rights treaties began after the United States became a party to the International Covenant on Civil and Political Rights (ICCPR), on September 8, 1992. ICCPR Article 40 required our first report within one year of that date. As detailed in answer #1, in 1994 and 2003 the United States became a party to other human rights treaties with similar reporting requirements. For several years after we first became subject to these reporting requirements in 1993, our human rights

treaty reports were overdue, in part because of resources and priorities. The belatedness of our reports was criticized by the treaty bodies (the committees of experts that are created by human rights treaties and charged with monitoring their implementation, as described further in the first answer), and hampered our ability to criticize other countries for inadequate reporting and other noncompliance with their human rights obligations. During the past ten years, the United States made a concerted effort to bring its reporting up to date, and that effort was successful. Today, the United States is among a small number of countries around the world that is fully up to date in meeting all of its human rights treaty reporting deadlines. As reflected in the U.S. government's timely submission on January 22, 2010, of reports on its implementation of two optional protocols to the Convention on the Rights of the Child, the Obama Administration intends to continue to produce timely human rights treaty reports, while improving their quality and continuing to increase our international engagement.

With respect to the questions regarding the report writing process, the production of these reports usually begins with a tasking by the National Security Council to all agencies that have responsibilities for implementing the various provisions under the relevant treaties to provide updates and reporting to the State Department. The Department then works intensively

with the interagency community over the course of about a year to write each of the reports. These reports and the responses to the relevant treaty bodies' observations are lengthy and detailed, frequently covering several hundreds of pages. In the immediate run-up to the U.S. government's presentation before the relevant treaty body, the treaty body will submit questions for the United States. Answers to these questions and to subsequent questions posed at the hearing itself can also be in excess of one hundred pages. Although not required under the treaties, many of the treaty bodies have requested one year follow-up submissions by States Parties. The U.S. reports and related materials submitted during the last Administration are posted at the State Department's website at:

<http://www.state.gov/g/drl/hr/treaties/>

With each report, we have learned lessons about self-reporting and improving the efficiency and impact of this complex interagency process. We plan to continue the Executive Branch commitment to timely reporting. We hope to increase the time and resources dedicated to this reporting process as well to engage in deeper and more frequent consultation with civil society, as well as interested members of Congress.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#4)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

What specific efforts will this Administration undertake to promote and preserve U.S. sovereignty as it works to ensure compliance with international treaty obligations?

Joint Answer:

The founders of this country drafted a Constitution that was predicated on a commitment to human rights and fundamental freedoms. Under the U.S. Constitution, all treaties, including international human rights treaties, that the United States has ratified after the Senate has given its advice and consent to ratification are part of the “supreme law of the land.” Key human rights treaties ratified by the U.S. government include those identified in response to the first question, as well as the Convention on the Prevention and Punishment of the Crime of Genocide.

The United States is proud of its efforts and record on human rights, and welcomes the opportunity to discuss them publicly at the UN, and is committed to leading by example. This commitment includes transparently

presenting the successes we have achieved, and soliciting constructive recommendations on how to improve further.

None of these processes interfere with the exercise by the United States of its sovereignty. As a matter of longstanding policy, the United States has supported these processes as a way of encouraging other countries to comply with their human rights obligations and commitments. The recommendations offered during the Universal Periodic Review session and by the treaty bodies are not legally binding. As a matter of longstanding U.S. policy, we intend to listen to such recommendations with an open mind, in part so as to set a positive example for other countries around the world. The Administration views implementation of our human rights obligations and reporting on them as an exercise of sovereignty and as an opportunity to communicate to the world the robust protection that the U.S. Constitution and laws afford to human rights within the United States. Compliance with our human rights treaty obligations also assists the United States by enhancing our credibility when we promote human rights in other countries.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#5)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Treaty obligations require the United States to submit reports on its compliance measures. What obligations do the U.N. reviewing committees have to the United States when reviewing those reports? (i.e., reviewing and responding to the content of submitted reports, U.S. domestic law, the U.S. Constitution, American values and public opinion, treaty reservations, etc.)

Joint Answer:

Human rights treaty bodies ought to review U.S. reports carefully, fairly and in light of the applicable treaty obligations, including any U.S. reservations, understandings, or declarations (RUDs). Those RUDs have been carefully drafted and endorsed by both the Executive Branch and the Senate to address any necessary legal, including Constitutional, or other significant concerns. In addition to reviewing U.S. reports, treaty bodies also review reporting from civil society about the state of human rights in the United States. As a matter of practice, human rights treaty bodies frequently make observations and recommendations to States Parties to take actions that extend beyond their treaty obligations. However, these recommendations are not legally binding in nature.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#6)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Have the U.N. review committees – specifically the CERD Committee – acted within the bounds of the treaties to which the U.S. is a party, as those treaties were understood at the time they were ratified?

Joint Answer:

As previously noted, in no case involving any of the UN human rights treaties to which the United States is a Party does any provision of those treaties vest the treaty bodies (the committees of experts that are created by human rights treaties and charged with monitoring their implementation, as described further in the first answer) with legally binding authority over a State Party. The treaty bodies are, of course, free to take different views on the meaning and scope of the underlying treaty, just as the Government of the United States is free to disagree with the treaty bodies, as we often do in our treaty reports and presentations before the treaty bodies.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#7)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Have the U.N. review committees – specifically the CERD Committee – exhibited any anti-U.S. bias in their response to U.S. reports?

Joint Answer:

The treaty bodies often issue opinions and make recommendations with which we disagree, as discussed more fully in the first answer, but we respect their ability to hold such views. We also recognize that they may hold the United States, and other countries that are firmly committed to respecting human rights, to a higher standard than they may apply to other countries. As a matter of practice, treaty bodies also make recommendations on subjects related to the relevant treaty that extend beyond the State Party's treaty obligations. Whether or not the United States government agrees with or intends to implement all such recommendations, it engages in an open and respectful dialogue with the treaty bodies because we accept the roles they were assigned pursuant to the treaties. We also believe in setting an example for other countries regarding robust, transparent and constructive reporting and dialogue on these important human rights matters.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#8)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

You both made reference to participation in an interagency process on human rights led by the National Security Council. Can you expand on that a bit? Who is involved? What does the process entail? What did the process begin? What are the group's responsibilities?

Joint Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to

resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

The working group will address a wide array of issues relating to implementation of U.S. human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate fully consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the federal government and at the state and local levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#9)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

U.S. reports on two human rights treaties are due soon — one in January 2010 and one in August 2010.

- a. When did the Administration begin preparing these reports?
- b. Which agencies have been involved in compiling and drafting the reports?
- c. Who will present these reports to the U.N.?

Joint Answer:

On January 22, 2010, the United States government submitted periodic reports under the two Optional Protocols to the Convention on the Rights of the Child (one on the involvement of children in armed conflict and the other on the sale of children, child pornography, and child prostitution). We began preparing these reports in January 2009. Many agencies have provided input and guidance on these reports, including: the Departments of Justice, Defense, Homeland Security, Health and Human Services, Labor, and Education, the U.S. Agency for International Development, as well as many offices and bureaus at the State Department, including the Office to Monitor and Combat Trafficking in Persons, the Office of the Legal Adviser, the Bureau of International Organization

Affairs, and the Bureau of Democracy, Human Rights and Labor. We also reached out to non-governmental organizations for input on the reports. Our Mission in Geneva formally submitted the reports to the Committee on the Rights of the Child, and the United States will likely be called up to present our reports and answer the Committee's questions in 2011 at the earliest. We have not yet decided the composition of that delegation.

As you noted, we also have another report due in August 2010 – our periodic report under the International Covenant on Civil and Political Rights (ICCPR) to be submitted to the Human Rights Committee, which is the treaty body created by the ICCPR and charged with monitoring implementation of the treaty. We began working on this report in April 2009. A number of agencies are assisting with the preparation of this report, including the Departments of Justice, Homeland Security, Defense, Interior, Education, Health and Human Services, and Labor, along with the Equal Employment Opportunity Commission, as well as several State Department offices. We have also begun to reach out to non-governmental organizations and to state human rights and civil rights commissions, and will continue to do so as we work on this report. We anticipate that the Human Rights Committee, in keeping with its normal practice, will schedule a hearing on this report within a year or two after receiving the U.S. report. We have not

yet determined the composition of our delegation to present this report to the Human Rights Committee.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#10)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

I would like for each of you to give your opinion as to whether the U.S. is in compliance with each of the following treaties. Please answer "yes" or "no." If not, why not?

- a. International Convention on Civil and Political Rights
- b. Convention Against Torture and All Forms of Cruel Inhuman or Degrading Treatment or Punishment
- c. International Convention on the Elimination of All Forms of Racial Discrimination
- d. Convention on the Prevention and Punishment of the Crime of Genocide
- e. Optional Protocols to the Convention on the Rights of the Child

Joint Answer:

In a country as large and diverse as the United States, it is impossible to state categorically that human rights obligations are subject to perfect enforcement and implementation. More meaningful and important is the commitment by all relevant U.S. institutions -- including all three branches of the Federal government -- to fulfill human rights protections accorded under the U.S. Constitution, U.S. domestic laws and human rights treaties to

which the United States is party, to vigilantly implement such obligations, and to hold accountable individuals and institutions that fail to abide by these essential requirements.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#11)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Each of the following recommendations was made by the 2008 CERD Committee report, urging the United States to take specific action. With respect to each, please explain: (i) whether and how each recommendation relates to the elimination of racial discrimination in the United States, (ii) whether and how the Obama Administration intends to respond to each recommendation, and (iii) whether each recommendation is contemplated by the CERD treaty?

- a. Ensure the right to judicial review for enemy combatants held at Guantanamo Bay, Cuba
- b. Place a moratorium on the death penalty
- c. Restore voting rights to convicted felons
- d. Protect illegal aliens from discrimination in the workplace
- e. Prohibit the sentence of life without parole for defendants under age 18

Joint Answer:

Treaty bodies frequently make observations and recommendations that extend beyond the States Parties' obligations under the relevant treaties,

as discussed in the fifth response. These observations and recommendations are not legally binding. In the process of writing its next periodic report, due in November 2011, on its implementation of the Convention to Eliminate All Forms of Racial Discrimination (CERD), after careful interagency review of relevant U.S. law and human rights policy and in consultation with U.S. civil society, the United States will examine and respond to all of the observations and recommendations of the CERD Committee, including those described in this question.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Tom Coburn (#12)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

You testified that U.S. obligations under human rights treaties “largely mirror our own domestic requirements under the U.S. [C]onstitution and our laws.” Yet, there are provisions in treaties that we have signed and ratified that clearly conflict with our Constitution. For example, Article IV of the CERD prohibits certain forms of hate speech and requires treaty parties to make such acts punishable by law. The U.S. filed a reservation on this point. The CERD Committee, however, repeatedly ignores this reservation, and in 2008, it recommended that the U.S. “consider withdrawing or narrowing the scope” of this reservation.

- (a) How should the United States respond to this request, in order to make clear that we will not elevate the opinions of an international body at the expense of our own Constitution?
- (b) Given the committee’s disregard for this reservation, how can the United States be sure that future constitutional reservations are both effected and respected?

Answer:

(a) At the outset, it is imperative to point out that the United States would never consider assuming a treaty obligation that would violate the U.S. Constitution or that would somehow undermine the freedoms enshrined in the Constitution. As a matter of their general practice, the treaty bodies established by human rights treaties to which the United States is a party

routinely request the United States and other States Parties to consider withdrawing or narrowing the scope of their reservations, understandings and declarations. As a matter of general U.S. treaty practice, the reservations, understandings and declarations the United States makes to treaties to which it becomes a party are formulated to be permissible under international law.

Regarding the formal treaty reservation referred to in these questions, the United States expressly conditioned its ratification of both the Convention on the Elimination of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) on reservations that made clear that the U.S. Constitution and laws contain extensive protections of individual freedom of speech, expression and association, and that the United States does not accept any obligation under those Conventions to restrict those rights in a manner contrary to our Constitution. When we report to the treaty bodies we vigorously defend our right to adopt such reservations. Particularly when it comes to issues relating to freedom of expression, we go to great lengths to explain to the treaty bodies, and to the world, how U.S. constitutional protections relating to freedom of expression and association exceed the available protections under the CERD or the ICCPR. Indeed, the United States believes so

strongly that the correct approach for combating intolerance and hatred is through a free marketplace of ideas, rather than restrictions or criminalization of speech, that we are seeking every available opportunity in UN fora to advocate such an approach.

(b) As noted previously, treaty body comments are not legally binding, and a recommendation by a treaty body to withdraw a U.S. treaty reservation could have no effect whatsoever on the obligation and abiding responsibility of the United States Government to execute fully and faithfully its obligations under the Constitution of the United States.

Questions for the Record Submitted to

**Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#1)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

You testified that the State Department will “participate in the newly revitalized interagency process on human rights implementation led by the National Security Council to explore ways that we can enhance compliance with and implementation of our human rights commitments.” Please provide additional information on this interagency group, including a) which agencies take part in the group; b) how frequently it meets; c) its main responsibilities and functions; d) whether it meets with human rights and civil rights groups and other stakeholders; and 3) how it will enhance compliance with our human rights treaty obligations.

Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the

Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

The working group will address a wide array of issues relating to implementation of U.S. human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate fully consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the federal government and at the state and local levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#2)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Human Rights First's Elisa Massimino, a witness on the second panel, recommended that the Executive Branch review legislation it proposes to ensure it conforms with our human rights treaty obligations. Does the State Department currently review proposed legislation for compliance with human rights treaties the United States has ratified? If so, what is the vetting process? If this is not being done, should it be?

Answer:

The State Department endeavors to review all Executive Branch legislative proposals related to foreign relations and other State Department activities through the OMB-led interagency review process. Legal analysis of those proposals is an important part of the State Department's review, and it includes review for consistency with all U.S. obligations under international law, including human rights and other treaties.

Questions for the Record Submitted to

**Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#3)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

When we ratify a human rights treaty, the United States frequently attaches Reservations, Understandings and Declarations (RUDs), which limit the application of the treaty. Ms. Massimino also recommends that the Executive Branch regularly review our RUDs to human rights treaties, with the goal of eliminating these limitations. Does the Administration have any plans to review the United States' RUDs to human rights treaties?

Answer:

The treaty bodies charged with monitoring compliance with UN human rights treaties often recommend that the United States consider modifying its RUDs, and in particular withdrawing its reservations. In preparing its periodic reports to each treaty body, the Executive Branch reviews each treaty body's recommendations and develops a formal, written response to each recommendation. In preparing its periodic reports, the Executive Branch considers these recommendations regarding the RUDs, assesses whether any could be removed, and provides a response to the treaty bodies. When U.S. laws have changed in a way that makes a RUD unnecessary, it may be appropriate for the executive branch in consultation

with the legislative branch to consider whether removal of the relevant RUD would be appropriate. It should be noted, however, that RUDs are usually submitted by the Senate as a condition of granting its advice and consent to U.S. ratification of a human rights treaty.

**Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#4)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

You testified that the Universal Periodic Review (UPR) is a new process that ensures the Human Rights Council reviews every country's human rights record. a) How is this different from the practice under the Human Rights Council's predecessor? b) What are the benefits of participating in the UPR for the United States?

Answer:

The UPR did not exist under the UN Commission on Human Rights. It was established when the Human Rights Council was created on March 15, 2006 by the UN General Assembly (UNGA). UNGA resolution 60/251 mandated the Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States."

By participating in the UPR at the UN, the United States will have an opportunity to discuss its many accomplishments promoting and protecting human rights, as well as the challenges it still faces. Ultimately, our goal is

to engage in a process that will set an example for the rest of the world. We hope to show that a country can undertake robust self-examination of its human rights record and engage in serious dialogue about its record with other countries and civil society. We believe that setting such an example will help us promote human rights in other countries.

Additionally, given the UPR preparation process involves extensive consultation with civil society and community and local government leaders throughout the United States, this will provide an opportunity for the U.S. Government to hear the concerns of its citizens, to highlight existing laws, policies and programs relevant to our international human rights obligations, and to identify potential areas of improvement for possible follow up by domestic agencies.

**Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#5)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Please provide additional information on the Administration's plans for the UPR, including: a) where and when the "listening sessions" will be held; b) what other Federal agencies will be involved; c) whether Members of Congress and state and local agencies will be consulted; and d) how the UPR process will help increase understanding of U.S. human rights treaty obligations by government agencies and the broader public.

Answer:

Administration plans for the UPR review of the United States include extensive consultation with domestic and international NGOs. As part of this review, the Administration will participate in consultation sessions in several locations, led by local civil society organizations, between January and April. The first consultations were held in New Orleans, on January 27-28; in Chicago, on February 18; in Washington, D.C. (for national NGO representatives), on February 19; and in New York, on February 25-26. The remainder of the schedule is not yet definite, but the current plan is to hold additional consultations in Birmingham, Alabama; El Paso, Texas; Albuquerque, New Mexico and Window Rock, Arizona; Detroit and

Dearborn, Michigan; San Francisco and Berkley, California; and Chicago, Illinois.

The State Department will attend each of these consultations, with other Federal agencies. The specific agencies may differ depending on the location, but may include the Departments of Justice, Homeland Security, the Interior, Health and Human Services, Education, Labor and Housing and Urban Development, as well as the Environmental Protection Agency. The Congress is being briefed.

We expect that the UPR process will increase understanding of U.S. human rights treaty obligations. Particular aspects that will do so include these consultations, the opportunities for NGO submissions to the UN process, the State Department's UPR website (<http://www.state.gov/g/drl/upr/index.htm>) and e-mail address (upr_info@state.gov), and the necessary cooperation among federal agencies and with state and local governments.

**Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#6)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

The U.S. government has provided important assistance to other countries, such as Angola, Afghanistan, Colombia, and Liberia, to support the demobilization of child combatants and their reintegration into society. This assistance has included training judges, public defenders and authorities on the legal protection framework for former child soldiers. Has the U.S. government developed similar guidelines and training in the United States to ensure former child soldiers are not penalized for the acts they committed while they were combatants?

Answer:

As a general matter the United States does not have its own “former child soldiers,” as the U.S. armed forces do not recruit or use children in a manner contrary to international law. The U.S. armed forces only voluntarily recruit those 17 and over, and take all feasible measures to ensure that service members under 18 do not take direct part in hostilities.

Nevertheless, the Department of Defense is adding training on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol) to existing training modules

on Combating Trafficking in Persons. This training will be required of all military and civilian personnel annually.

The U.S. Government generally advocates that child soldiers be treated as victims. However, the Optional Protocol does not impose a legal obligation on the USG to rehabilitate a child who was recruited or used in conflict outside of the jurisdiction of the United States, nor does it limit the ability to detain or prosecute child soldiers consistent with international and U.S. law.

Questions for the Record Submitted to

**Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#7)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

Under the Genocide Convention, the U.S. government has undertaken obligations to prevent and punish genocide. What is the State Department's policy for preventing genocide, pursuant to our obligations under the Genocide Convention?

Answer:

As President Obama noted to the UN General Assembly, we "begin with an unshakeable determination that the murder of innocent men, women and children will never be tolerated," and as he expressed earlier this year at the Holocaust Museum, "we have ... an obligation to confront" the scourges of mass atrocity and do "everything we can to prevent and end atrocities like those that took place in Rwanda."

While the Genocide Convention requires parties both to prevent and punish genocide, the two actions are related. Effective punishment of genocide sends a message that such crimes will not be tolerated. The Office of War Crimes Issues in the Department of State works to ensure that when genocide occurs, as it did in Rwanda, it is appropriately punished. But we

also recognize that preventing genocide requires a broad range of other initiatives, and the Administration is exploring additional ways to advance this agenda. Within the Department of State, we have been assessing ways to strengthen our responses to the threat such atrocities pose, focusing on several core issues.

First, we are working to strengthen existing tools for conflict management, promotion of human rights, humanitarian response, and protection of people vulnerable to abuse. For example, in her December 2009 speech at Georgetown University setting out the four aspects of our human rights approach – accountability, principled pragmatism, partnering from the bottom up, and keeping a wide focus where rights are at stake – the Secretary of State committed the Department to using all the tools at our disposal in pursuit of our human rights agenda. For example, she explained that we are working for positive change within multilateral institutions, such as the United Nations, where our presence has a constructive influence. These institutions are valuable tools that can, when operating at their best, leverage the efforts of many countries around a common purpose.

Second, we are working to further strengthen our ability to receive timely information about at-risk populations. Various watch lists already exist and in many of the countries at risk of genocide or other mass

atrocities, the Bureau of Democracy, Human Rights and Labor at the State Department funds projects that can help prevent such tragedies. The Bureau of Population, Refugees, and Migration also provides assistance and advocates strongly for those fleeing conflict and persecution, so that they may be protected from potential atrocities. Likewise, the Bureau of International Organization Affairs works to help give UN peacekeeping missions the mandates and resources needed to protect the innocent. However, we are all keenly aware that more must be done to ensure that we are alert to the specific risks and pathways of mass atrocity crimes. While there will never be one approach, formula, doctrine or theory that can be easily applied to every situation, we can continue to improve our understanding of how to interrupt escalations of violence.

Third, we are working to ensure a tight and timely connection between the information we receive and the decision-making processes that trigger effective policy responses. The Obama administration is reinvigorating the inter-agency working group under the leadership of the National Security Council that will aim to ensure that the information on such situations is getting to the right people within the government and that appropriate actions are being taken to address them. And we need to find ways to mobilize action before situations become acute. The Secretary of State has made clear that we will not ignore or overlook places of seemingly intractable tragedy and despair and we must do what we can when human lives hang in the balance.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#8)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009**

Question:

The last Administration took the position that U.S. human rights treaty obligations, including the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, did not apply to U.S. personnel operating outside the United States. The relevant treaty bodies have been consistent in stating that these treaties extend to places where a state has either formal jurisdiction or effective control over a territory or persons, and that these human rights treaties still apply even where the law of armed conflict is applicable. What is the position of the Obama Administration on whether: a) the International Covenant on Civil and Political Rights applies to U.S. personnel abroad; and b) whether the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies to U.S. personnel abroad?

Answer:

At the outset, we note that it is impossible to generalize about the extraterritorial scope of all human rights treaties, and that the analysis of the scope of application of treaty obligations by necessity begins with the text of the relevant treaty. Each treaty contains somewhat differently expressed provisions related to its territorial scope, while some -- most notably the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment -- contain within the same instrument provisions with different territorial scopes. To note some examples, one may compare, for example, Article 2(a) of the International Covenant on Civil and Political Rights (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals **within its territory and subject to its jurisdiction** the rights recognized in the present Covenant...”) with Article 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) (CAT) (requiring that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture **in any territory under its jurisdiction**) with CAT Article 5(1) (which requires States Parties to establish criminal jurisdiction over acts of torture committed by their nationals **wherever such acts occur**).

It must also be noted that under the longstanding legal doctrine of *lex specialis* (a doctrine providing that when two different set of legal rules purport to govern a particular situation, the more specialized body of law governs), the applicable rules for the lawful conduct of armed conflict are found in the Geneva Conventions and other international humanitarian law instruments, as well as in customary international law.

Determining the applicable international law that applies to a particular action taken by a government outside of its territory is thus a fact-specific determination, which cannot be easily generalized. In the context of preparing its reports on its implementation of human rights treaties, the United States government will examine the views and recommendations of the relevant human rights treaty bodies, which include recommendations regarding the issue of extraterritoriality, and will respond to those recommendations in those reports. As part of this process, the Department of State and concerned Executive Branch agencies will consult with Congress and U.S. civil society.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
U.S. Senator Russell D. Feingold (#1)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009**

Question:

On October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent Secretary Clinton and Attorney General Holder a letter seeking recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input.

I look forward to the Department's prompt response to our letter. Please provide a copy of that response for the record of this hearing.

Answer:

The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
U.S. Senator Russell D. Feingold (#2)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009**

Question:

I appreciate your commitment at the hearing that you will provide an expeditious written response on the following issues: (1) whether the International Committee of the Red Cross (ICRC) has access to all detention facilities in Afghanistan; and (2) what constitutes "timely notice" to the ICRC under section 4(b) of Executive Order 13491. Please provide a copy of that response for the record of this hearing.

Answer:

I appreciate the importance of this question and your interest in this topic. Given the subject matter, I would refer you to the Department of Defense for details about this issue.

**Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Russell D. Feingold (#4)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009**

Question:

At the hearing, you indicated that fulfilling our legal obligations under the Geneva Convention raises the question of how as a practical matter we can best prevent and punish genocide. What steps is the Obama administration taking to improve our institutional capacity as a government to identify, investigate, and respond to situations where genocide may be happening?

Answer:

As President Obama noted to the UN General Assembly, we “begin with an unshakeable determination that the murder of innocent men, women and children will never be tolerated,” and as he expressed earlier this year at the Holocaust Museum, “we have ... an obligation to confront” the scourges of mass atrocity and do “everything we can to prevent and end atrocities like those that took place in Rwanda.”

While the Genocide Convention requires parties both to prevent and punish genocide, the two actions are related. Effective punishment of genocide sends a message that such crimes will not be tolerated. The Office of War Crimes Issues in the Department of State works to ensure that when

genocide occurs, as it did in Rwanda, it is appropriately punished. But we also recognize that preventing genocide requires a broad range of other initiatives, and the Administration is exploring additional ways to advance this agenda. Within the Department of State, we have been assessing ways to strengthen our responses to the threat such atrocities pose, focusing on several core issues.

First, we are working to strengthen existing tools for conflict management, promotion of human rights, humanitarian response, and protection of people vulnerable to abuse. For example, in her December 2009 speech at Georgetown University setting out the four aspects of our human rights approach – accountability, principled pragmatism, partnering from the bottom up, and keeping a wide focus where rights are at stake – the Secretary of State committed the Department to using all the tools at our disposal in pursuit of our human rights agenda. For example, she explained that we are working for positive change within multilateral institutions, such as the United Nations, where our presence has a constructive influence. These institutions are valuable tools that can, when operating at their best, leverage the efforts of many countries around a common purpose.

Second, we are working to further strengthen our ability to receive timely information about at-risk populations. Various watch lists already

exist and in many of the countries at risk of genocide or other mass atrocities, the Bureau of Democracy, Human Rights and Labor at the State Department funds projects that can help prevent such tragedies. The Bureau of Population, Refugees, and Migration also provides assistance and advocates strongly for those fleeing conflict and persecution, so that they may be protected from potential atrocities. Likewise, the Bureau of International Organization Affairs works to help give UN peacekeeping missions the mandates and resources needed to protect the innocent. However, we are all keenly aware that more must be done to ensure that we are alert to the specific risks and pathways of mass atrocity crimes. While there will never be one approach, formula, doctrine or theory that can be easily applied to every situation, we can continue to improve our understanding of how to interrupt escalations of violence.

Third, we are working to ensure a tight and timely connection between the information we receive and the decision-making processes that trigger effective policy responses. The Obama administration is reinvigorating the inter-agency working group under the leadership of the National Security Council that will aim to ensure that the information on such situations is getting to the right people within the government and that appropriate actions are being taken to address them. And we need to find

ways to mobilize action before situations become acute. The Secretary of State has made clear that we will not ignore or overlook places of seemingly intractable tragedy and despair and we must do what we can when human lives hang in the balance.

**Questions for the Record Submitted to
Assistant Secretary of State Michael H. Posner by
U.S. Senator Russell D. Feingold (#5)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009**

Question:

In recognition of our treaty obligations, the Foreign Assistance Act was modified to generally prohibit the provision of security assistance to countries with a consistent pattern of gross violations of internationally recognized human rights. I have repeatedly raised concerns about our provision of aid to countries which, according to State Department human rights reports, have for years engaged in torture, extrajudicial killing or prolonged arbitrary detention, including, for example, Chad. Please explain the legal reasoning behind the Department's decision to request military assistance for Chad in 2010 notwithstanding its long history of engaging in human rights abuses.

Answer:

We continue to engage with the Government of Chad (GOC) on its human rights record, which as you noted, is poor. Military assistance for Chad is requested to support three objectives: 1) develop capacity of the military as a non-political, professional force respectful of human rights; 2) increase counterterrorism capabilities and cooperation, including that provided through the Trans Sahara Counterterrorism Partnership (TSCTP)

program, and 3) enhance the security capacity of Chad to maintain territorial integrity. In particular, U.S. training through the International Military Education and Training (IMET) for Chad exposes the Chadian military to U.S. professional standards in areas such as civil-military relations and respect for human rights during military actions

The State Department vets in accordance with the Leahy amendment to prevent any unit of Chad's security forces from receiving assistance if the Department has credible evidence that such unit has committed gross violations of human rights. The State Department conducts thorough Leahy vetting for USG training of Chadian security officials or units, and in some cases has denied training due to credible evidence of gross violations of human rights. We regularly discuss with the GOC our concerns with reports of human rights abuses attributed to Chadian security forces.

**Questions for the Record Submitted to
Assistant Secretary of State Michael H. Posner by
U.S. Senator Russell D. Feingold (#6)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009**

Question:

The Convention Against Torture, which the U.S. has ratified, prohibits sending individuals to countries where there are substantial grounds for believing the person would be in danger of being tortured. State Department human rights reports have made clear there is a direct connection between an individual being subjected to indefinite, incommunicado detention, and the likelihood that person will be tortured. If a country has a record of indefinite, incommunicado detention, does the United States still permit detainees to be transferred to that country?

Answer:

The United States does not transfer detainees to countries where it is more likely than not that they will be tortured. This assessment of whether a particular transfer can take place is necessarily undertaken on a case-by-case basis and taking into account relevant conditions of the country of origin.

The person to be transferred, the government entity to which he is to be transferred, the human rights situation in the country to which he is to be transferred, including the country's record on indefinite, incommunicado detention, the prevailing political circumstances that may be related to the risks of torture an individual may face, and other factors relevant to the risk of torture all play critical roles in a U.S. determination regarding such transfers.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 5, 2010

The Honorable Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Thomas Perez before the Subcommittee on December 16, 2009, at a hearing entitled "The Law of the Land: U.S. Implementation of Human Rights Treaties." We hope that this information is of assistance to the Subcommittee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Tom Coburn
Ranking Minority Member

Hearing before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Entitled
"The Law of the Land: U.S. Implementation of Human Rights Treaties"

December 16, 2009

Questions for the Record
Submitted to
Thomas E. Perez
Assistant Attorney General
Department of Justice

Questions Submitted by Senator Durbin:

Question:

1. You testified that the Justice Department is "actively participating in the newly revitalized interagency policy committee led by the National Security Council to explore ways in which we can enhance our compliance with and implementation of those international human rights norms by which we are bound." Please provide additional information on this interagency group, including: a) which agencies take part in the group; b) how frequently it meets; c) its main responsibilities and functions; d) whether it meets with human rights and civil rights groups and other stakeholders; and e) how it will enhance compliance with our human rights treaty obligations.

Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

A- 1

The working group will address a wide array of issues relating to implementation of United States human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate full consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the Federal government and at the State, local, and tribal levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

Question:

2. The Justice Department is the federal agency with primary responsibility for interpreting the law and determining whether the Federal government is complying with its legal obligations.
 - a) What is the Justice Department's role in determining whether the Federal government is complying with our human rights treaty obligations? b) Does the Justice Department consult with the State Department's Legal Advisor on human rights treaty compliance? c) What office in the Justice Department is responsible for this function?

Answer:

The Department of Justice is responsible for fully and fairly enforcing the civil rights laws within its jurisdiction, and coordinating domestic civil rights enforcement across the Federal government. Today, the United States is party to several critical human rights treaties whose subject-matters coincide with the work of the Civil Rights Division, including the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and the two Optional Protocols to the Convention on the Rights of the Child.

In recent years, under Presidents Clinton and Bush, the United States Government has come into compliance with our reporting obligations under these important treaties. Under President Obama's leadership, the Department is working with our colleagues at the State Department and elsewhere in the Federal government to ensure that we meet our reporting requirements in a timely and thorough fashion and that they accurately reflect both the strengths and areas of improvement in our civil and human rights enforcement program.

The Department is also committed to continuing to work in close partnership with the State Department in carrying out the Government's first ever participation in the United Nations' Universal Periodic Review process, which is reaching out to various civil society stakeholders and government agencies on the state of human rights in the United States and collecting that

information in a report. The Department is also actively participating in the newly revitalized interagency policy committee – led by the National Security Council – to explore ways in which we can enhance our compliance with and implementation of those international human rights norms by which we are bound. The Office of the Assistant Attorney General in the Civil Rights Division works closely with other Justice Department components to coordinate with the State Department on these issues.

Question:

3. Human Rights First’s Elisa Massimino, a witness on the second panel, recommended that the Executive Branch review legislation it proposes to ensure it conforms with our human rights treaty obligations. Does the Justice Department currently review proposed legislation for compliance with human rights treaties we have ratified? If so, what is the vetting process? If this is not being done, should it be?

Answer:

The Office of Management and Budget leads an interagency review process of Executive Branch legislative proposals. As Mr. Posner described in his response to a similar question posed by Senator Durbin, during that process the State Department is the agency that primarily reviews proposed legislation for consistency with United States obligations under international law, including obligations arising from human rights treaties.

Question:

4. When we ratify a human rights treaty, the United States frequently attaches Reservations, Understandings and Declarations (“RUDs”), which limit the application of the treaty. Ms. Massimino also recommends that the Executive Branch regularly review our RUDs to human rights treaties, with the goal of eliminating these limitations. Does the Administration have any plans to review the United States’ RUDs to human rights treaties?

Answer:

The treaty bodies charged with monitoring compliance with U.N. human rights treaties often recommend that the United States consider modifying its RUDs, and in particular withdrawing its reservations. In preparing its periodic reports to each treaty body, the Executive Branch reviews each treaty body’s recommendations and develops a formal, written response to each recommendation. In preparing its periodic reports, the Executive Branch considers these recommendations regarding the RUDs, assesses whether any could be removed, and provides a response to the treaty bodies. When United States laws have changed in a way that makes a RUD unnecessary, it may be appropriate for the Executive Branch in consultation with the legislative branch to consider whether removal of the relevant RUD would be appropriate. It should be noted, however, that RUDs are usually submitted by the Senate as a condition of granting its advice and consent to United States ratification of a human rights treaty.

Question:

5. You testified that the Universal Periodic Review (“UPR”) is a new process that ensures the Human Rights Council reviews every country’s human rights record. a) How is this different from the practice under the Human Rights Council’s predecessor? b) What are the benefits of participating in the UPR for the United States?

Answer:

The UPR did not exist under the U.N. Commission on Human Rights. It was established when the Human Rights Council was created on March 15, 2006 by the U.N. General Assembly (“UNGA”). UNGA resolution 60/251 mandated the Council to “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.”

By participating in the UPR at the U.N., the United States will have an opportunity to discuss its many accomplishments promoting and protecting human rights, as well as the challenges it still faces. Ultimately, our goal is to engage in a process that will set an example for the rest of the world. We hope to show that a country can undertake robust self-examination of its human rights record and engage in serious dialogue about its record with other countries and civil society. We believe that setting such an example will help us promote human rights in other countries.

Additionally, given that the UPR preparation process involves extensive consultation with civil society and community and State, local, and tribal government leaders throughout the United States, this will provide an opportunity for the United States Government to hear the concerns of its citizens, to highlight existing laws, policies and programs relevant to our international human rights obligations, and to identify potential areas of improvement for possible follow up by domestic agencies.

Questions Submitted by Senator Feingold:**Question:**

1. As we discussed at the hearing, on October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent Attorney General Holder and Secretary Clinton a letter seeking recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input.

I look forward to the Department's prompt response to our letter. Please provide a copy of that response for the record of this hearing.

Answer:

A copy of the Department's response is attached.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510

Dear Senator Feingold:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

The Department, and the Administration as a whole, take very seriously the international legal obligations of the United States. The Department is especially concerned with respect to the Vienna Convention on Consular Relations ("VCCR"), which, as you note in your letter, provides that a non-citizen who has been arrested or detained must be advised that he is entitled to have a consular official from his home country notified of the arrest or detention, as we want to ensure the same protection for United States citizens abroad.

Within the Department, we strive to ensure that our law enforcement officers and prosecutors comply with their obligations under the VCCR. We provide comprehensive guidance and training to all Department prosecutors and law enforcement agents regarding those obligations. They receive materials on the consular notification and access process prepared by the Department of State, which contain notices to foreign nationals translated into foreign languages. Prosecutors and agents also have electronic access to up-to-date listings and contact information for all foreign embassies and consular offices in the United States.

In addition, the Department has submitted to the Advisory Committee on the Criminal Rules a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure (as well as the corresponding Rule 58) which would require Federal courts to inform a defendant in Federal custody, at the initial court appearance, that if he or she is not a citizen of the United States, an attorney for the Government or Federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest. Such an amendment could supplement efforts currently undertaken by Federal law enforcement agents and prosecutors to ensure that foreign defendants arrested pursuant to United States charges receive the notifications

Questions Submitted by Senator Coburn:**Question:**

1. In your testimony, you expressed agreement with President Obama, that in order for the United States to be a "human rights beacon," we must "model at home the very human rights we seek to promote around the world." You also spoke about your commitment to "ensur[e] full political participation by qualified voters in our democratic process through enforcement of our voting rights laws."
 - a. How, then, do you defend the Department's decision to dismiss criminal charges against members of the New Black Panther Party, who were videotaped at the entrance of a polling place brandishing weapons?
 - b. Mr. Posner testified about the importance of the United States responding to complaints of human and civil rights violations issued by international bodies, in order to "demonstrate that democratic nations need not fear a discussion of their own record." Applying the same principle to the situation at hand, how do you defend the Department's recent instruction to attorneys who were subpoenaed by the Civil Rights Commission about this matter not to cooperate with that investigation?

Answer:

The Department is committed to the vigorous prosecution of those who intimidate, threaten, or coerce anyone exercising the right to vote. In the New Black Panther Party civil enforcement action, initiated by the Department on January 7, 2009, pursuant to Section 11(b) of the Voting Rights Act, the Department obtained an injunction against the only defendant known to have displayed a weapon outside the Philadelphia polling place on November 4, 2008. The injunction obtained by the Department prohibits that defendant from engaging in that conduct again and from otherwise violating 42 U.S.C. § 1973i(b)." The injunction remains under the supervision of the Federal district court until 2012, and the Department will fully enforce it. We are unaware of any evidence or allegation that more than one person brought a weapon to a Philadelphia polling place during voting hours on November 4, 2008.

The Department never dismissed any criminal charges arising from the November 4, 2008, incident because no Federal criminal charges were ever brought in connection with that matter. Our understanding is that local law enforcement officials also declined to pursue State criminal charges.

The Department did dismiss Federal civil claims against three defendants originally named in the complaint, i.e., an unarmed poll watcher present at the Philadelphia polling place during voting hours on November 8, 2008; the leader of the New Black Panther Party for Self-Defense, who was not at the polls when the incident occurred; and the party itself. The decision

to dismiss Federal civil claims against these three defendants was made by the career attorney serving as-Acting Assistant Attorney General for the Civil Rights at the time, with input from another long-time career attorney who was Acting Deputy Assistant Attorney General; they determined, after a review of the matter, that the facts and the law did not support pursuing those claims.

Regarding the U.S. Commission on Civil Rights, the Department wholeheartedly agrees with the proposition that “democratic nations need not fear a discussion of their own record,” and is therefore working cooperatively with the Commission to accommodate the Commission’s requests. The Department has responded to the Commission’s requests for information, including by producing more than 4,000 pages of documents, and the Assistant Attorney General for Civil Rights has testified before the Commission. However, the Department has a longstanding policy of not providing career litigating attorneys to testify about particular decisions taken in the course of their professional duties. The Department has an institutional need to protect against disclosures of internal recommendations and deliberations of Department employees, particularly those related to prosecutorial decisions. Such disclosures would have a chilling effect on the open exchange of ideas, advice, and analyses that is essential to the decision-making process. It is essential that career attorneys know that they will not be subjected to public scrutiny if they make prosecutorial decisions that they believe are legally sound, but which may be politically unpopular.

Question:

2. You testified at length about the Obama Administration’s goals for civil rights enforcement within your division at the Department of Justice, but you gave no details on what has been done over the years to enforce civil rights laws and, therefore, to comply with human rights treaty obligations. It is my understanding, however, that the Bush Administration submitted a lengthy report on compliance efforts to the U.N. CERD committee just a few years ago.
 - a. Please outline for the subcommittee what compliance measures were highlighted in that lengthy report.

Answer:

In April of 2007, the United States submitted a report to the U.N. Committee on the Elimination of Racial Discrimination on measures giving effect to its undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination. The report was prepared by the U.S. Department of State, with extensive assistance from the White House, the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, and other relevant departments and agencies of the Federal government and of the States. The full report is available here: <http://www.state.gov/documents/organization/83517.pdf>

The report discussed numerous measures taken to ensure compliance with the various requirements of the Convention, including but not limited to the following:

- Continued enforcement of anti-discrimination statutes against public and private entities in the areas of employment, housing and housing finance, access to public accommodations, and education.
- The continued use of procurement programs in Federal contracting aimed at remedying the effects of past and present discrimination, for example the Small Business Act requirement that Federal agencies set goals for contracting with “small and disadvantaged businesses.”
- Enforcement by the Civil Rights Division of several criminal statutes that prohibit hate crimes, including 18 U.S.C. § 241 (conspiracy against rights); 18 U.S.C. § 245 (interference with federally protected activities); 18 U.S.C. 247(c) (damage to religious property); 42 U.S.C. § 3631 (criminal interference with right to fair housing); and 42 U.S.C. § 1973 (criminal interference with voting rights).
- Enforcement by the Civil Rights Division of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789, which prohibit law enforcement agencies from engaging in a pattern or practice of violation of civil rights.
- Ensuring the right to participate fully in elections by enforcing the Voting Rights Act of 1965, as amended, the Uniformed and Overseas Citizen Absentee Voting Act of 1986, and the National Voter Registration Act of 1993, and other relevant Federal laws.

SUBMISSIONS FOR THE RECORD



**American Civil Liberties Union
Testimony Before the U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law**

Submitted by

Jamil Dakwar
Director, ACLU Human Rights Program

and

Michael W. Macleod-Ball
Acting Director, ACLU Washington Legislative Office

December 16, 2009

I. Introduction

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee:

On behalf of the American Civil Liberties Union (ACLU), its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, we commend the Senate Judiciary Subcommittee on Human Rights and the Law for conducting a hearing concerning the implementation of human rights treaties.

The ACLU is a nationwide, non-partisan organization dedicated to enforcing the fundamental rights set forth in the Constitution and United States laws. In 2004, the ACLU created a Human Rights Program dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy and works together with the ACLU's Washington Legislative Office on issues relating to racial justice, national security, immigrants' rights, women's rights, the death penalty, and children's rights.

We submit this written statement for the record to draw the Committee's attention to the importance of domestic implementation of human rights treaties ratified by the United States, highlight past examples of successful implementation measures, and to make recommendations regarding additional implementation measures.

The importance of this hearing cannot be overstated, as it is the first oversight hearing on human rights treaty implementation since 1992, when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR). It is our hope that this hearing will be first of many hearings to come to focus on U.S. compliance with human rights treaty obligations and elevate the role of Congress in monitoring and implementing human rights treaties. We commend the Subcommittee for its role in upholding human rights at home and abroad.

II. Historical Background of U.S. Human Rights Implementation

Sixty-one years ago, under the strong leadership of the United States, the United Nations adopted the Universal Declaration of Human Rights (UDHR). The foundational document of the modern human rights system, the UDHR was born to fulfill a commitment made in San Francisco by the 50 founding members of the United Nations Charter to promote and affirm “their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women” and “promote social progress and better standards of life in larger freedom.”¹

Former first lady Eleanor Roosevelt, who led the U.S. delegation to the U.N. Commission on Human Rights in the 1940s, called the UDHR “the Magna Carta for humanity.” This landmark document was clearly influenced by the U.S. Bill of Rights. The UDHR’s passage brought about worldwide awareness of the basic rights and protections to be enjoyed by all human beings everywhere, and it established the legal and moral basis for governments, non-governmental organizations, and advocates to take action anywhere human rights are threatened.

Historically, the civil rights movement in the United States inspired other nations and new democracies to commit to work for greater human rights protections for all as the cornerstone of peace, stability, and prosperity. The fundamental importance of promoting human rights has also been endorsed by civil rights leaders such as W.E.B. Du Bois, Dr. Martin Luther King Jr., and Malcolm X; civil liberties leaders such as ACLU founder Roger Baldwin; women’s rights leaders; and more recently, youth, persons with disabilities, and others in a growing movement of people around the world.

Under the guidance of Eleanor Roosevelt, the United States was a driving force in the creation of the UDHR. Since then, the U.S. government has played a leadership role in promoting human rights abroad and taking part in negotiating landmark treaties. Many U.S. Presidents and congressional leaders have championed human rights. As the most recent example, the United States, under the Obama Administration, has taken the important steps of joining the U.N. Human Rights Council and signing the Convention on the Rights of Persons with Disabilities (CRPD).

¹ *Universal Declaration of Human Rights* (UDHR), G.A. res. 217A(III), U.N. Doc A/810 at 71 (1948), Preamble.

And yet, while the United States has helped negotiate major human rights documents and treaties, it has fallen behind in ratification of new treaties and implementation of treaties to which it is a party. For example, the U.S. is one of a handful of nations that has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the U.S. stands alone with Somalia in failing to ratify the Convention on the Rights of the Child (CRC). Moreover, with few exceptions the United States has not acted to pass enabling legislation to effectuate treaty obligations. Often times, our actions do not match our rhetoric on human rights, especially our rhetoric in the foreign policy arena.

III. Importance of Human Rights Treaty Implementation

The United States is a party to a number of human rights treaties and protocols, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention Against Torture (CAT), the Genocide Convention, the Protocol Relating to the Status of Refugees, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. However, little oversight and minimal legislative initiatives have focused on codifying the rights and obligations under these treaties and protocols. In most cases, U.S. action has been limited to the periodic reporting and review process by the Geneva-based committees monitoring compliance with these treaties.²

While these human right treaties are first and foremost international commitments and obligations, they will have little impact and force if sovereign states do not take action and effectuate them by passing enabling legislation to bring the country in line with the international obligations contained in each treaty. Treaty implementation includes the passage and creation of specific laws, policies, and mechanisms that will fully honor the country's commitments to ensure the human rights of all people in the country or under United States effective control.

International human rights treaties should not be seen as merely non-binding international commitments between countries with no domestic effect, but rather must be treated as the supreme law of the land. The Supremacy Clause of the U.S. Constitution makes the

² The ACLU has submitted shadow reports to the United Nations treaty-monitoring bodies reviewing U.S. compliance. See ACLU, *THE PERSISTENCE OF RACIAL & ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)* (Aug. 2009), available at http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf; ACLU, *SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS* (May 2008), available at http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf; ACLU, *RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE, SHADOW REPORT SUBMITTED TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)* (Dec. 2007), available at http://www.aclu.org/files/pdfs/humanrights/cerd_full_report.pdf; ACLU, *ENDURING ABUSE: TORTURE & CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD* (Apr. 2006), available at http://www.aclu.org/files/safefree/torture/torture_report.pdf; ACLU, *DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)* (Jun. 2006), available at <http://www.aclu.org/files/pdfs/iccprreport20060620.pdf>.

Constitution, Federal Statutes, and U.S. treaties “the supreme law of the land.”³ This reflects the Framers’ desire that the U.S. government respect international commitments made under treaties signed by the President and approved by the Senate. The United States is obliged to recognize and respect U.S.-ratified treaties. Adherence to U.S. treaty obligations, as a demonstration of its commitment to the global community and the rule of law, is vital to the preservation of international peace and security. Respect for human rights is consistent with our constitutional democracy and is a U.S. national interest.

Furthermore, the concept of human rights as enshrined in human rights treaties speaks to all Americans. According to a national poll conducted by the Opportunity Agenda, Americans care deeply about human rights here at home and consider human rights to be crucial to our national identity.⁴ At the center of the human rights framework is the notion that human rights are universal—to be enjoyed by every human being regardless of race; color; religion; gender; language; political or other opinion; national, ethnic, indigenous or social origin; immigration status; sexual orientation; disability; property; birth; age, or other status. Human rights protections are comprehensive and no one is left behind or outside their protection.

IV. Reservations, Understandings, and Declarations

In order to understand why ratified human rights treaties, so far, have had little or virtually no impact on U.S. domestic laws and policies, it is important to remember the underlying principles that appear to have guided Congress during ratification. These principles were translated into Reservations, Understandings, and Declarations (RUDs) entered on the occasion of treaty ratification, which have limited full applicability of the treaties⁵:

1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the U.S. Constitution.
2. United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights treaty to which the United States adheres should be subject to a “federalism clause” such that the United States could leave implementation of the treaty largely to the states.

³ U.S. CONST. art. VI, para. 2.

⁴ Opportunity Agenda, *Human Rights in the U.S.: Opinion Research with Advocates, Journalists, and the General Public* (Aug. 2007), available at http://opportunityagenda.org/files/field_file/Human%20Rights%20Report%20-%202007%20public%20opinion.pdf.

⁵ Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int’l L. 341 (1995).

5. Every international human rights agreement should be “non-self-executing,” meaning that legislation may be necessary to implement the treaties’ provisions domestically.⁶

The ACLU has raised serious concerns about many of the RUDs, and in our statement to Congress prior to the ratification of the ICCPR in 1991 we noted that: “[T]he Covenant merely sets a minimum standard, which is a floor rather than a ceiling... The ACLU takes the position that, with rare exceptions, the Treaty represents an admirable set of minimum standards for all of the nations of the world. These other [RUDs] reflect the notion that any Treaty provision embodying a *higher* standard of human rights than is currently enforced in this country should be rejected.”⁷

The ACLU has also opposed the non-self-execution declaration on the ground that the question of self-execution traditionally has been left to the judiciary. The ACLU considers the non-self-execution declaration to be an attempt to strip human rights treaties of their domestic enforceability and to deprive the courts of the opportunity to use human rights treaty provisions to expand individual rights.

The U.S. government’s failure to reconsider its positions codified in the RUDs, together with the inadequate domestic implementation of human rights treaties to which the U.S. is party, significantly undermines these treaties and renders significant protections contained therein nearly meaningless.

V. Recommendations on Congressional Treaty Implementation Measures

Opening a new chapter in promoting and protecting human rights at home will require all branches of government to engage proactively and consistently to implement human rights treaties and bring current policies and laws into compliance with U.S. human rights commitments. Under our federal system, it also requires working with state and local governments. Further, effective implementation of human rights treaties requires strong educational efforts and outreach to the general public, constructive dialogue with civil society, and consultation with communities most affected by or at risk of human rights violations. Finally, non-governmental organizations play a key role in holding governments accountable for human rights commitments.

This backdrop only underscores the importance of the role of Congress in effectuating human treaty obligations. Congress bears the significant responsibility to implement human rights commitments by transforming them into detailed domestic laws, policies, and programs with effective enforcement and monitoring mechanisms. Implementation

⁶ The U.S. declaration concerning non-self-execution means that domestic implementing legislation is required for the treaty to have the force of law in the United States. In addition, it means that the treaty does not give rise to a private cause of action without enabling legislation that specifically creates a private cause of action for violations of the treaty—a position that is inconsistent with treaty language requiring effective remedy and access to courts for victims of treaty violations.

⁷ *Statement of the American Civil Liberties Union before the Foreign Relations Committee of the United States Senate on Ratification of the International Covenant on Civil and Political Rights*, Dec. 13, 1991.

of human rights treaties requires Congress to actively engage with other branches of government to ensure that our treaties are being promoted and respected at all levels. This can be done through a number of complementary measures:

- 1) Because all human rights treaties have been ratified with RUDs, including, in particular, the non-self-executing declaration, Congress should pass enabling or implementing legislation to help maximize treaties' domestic force. While Congress has passed such enabling legislation in the past, it has been the exception and not the rule. In one positive example, Congress passed legislation (the Foreign Affairs Reform and Restructuring Act (FARRA), which implemented the non-refoulement obligation under Article 3 of the CAT, and the Torture Statute) to bring U.S. law in conformity with the CAT.
- 2) Another vehicle for treaty implementation is passage of enabling legislation to effectuate treaty obligations at some point following treaty ratification. Such legislation was passed in several instances. Most recently, Congress passed the Child Soldiers Accountability Act and President Bush signed it into law in October 2008, a critical step toward implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.⁸
- 3) Congress should actively and consistently conduct oversight hearings on human rights treaties and examine progress made on implementation and enforcement of treaties by other branches of government. It would be especially effective to hold thematic hearings, either focusing on a single human right or a particular human rights treaty.
- 4) Congress should consider human rights obligations when crafting or evaluating proposed legislation. Any new legislation should be consistent with such treaty obligations. Congress should make every effort to ensure human rights protections are incorporated into legislation, especially with regard to the right to an effective remedy, which is a hallmark principle necessary to ensure full realization of human rights.
- 5) Congress should consider concluding observations issued by the United Nations committees that monitor treaty compliance. These observations often include direct recommendations to Congress to consider the passage of new laws or pending bills or to revoke laws that are in violation of treaty obligations. The End Racial Profiling Act (ERPA) is a clear example.⁹ Passage of ERPA, first introduced in 1997, is a critical means of implementing ICERD and bringing the

⁸ Press release, ACLU, *ACLU Welcomes Child Soldiers Accountability Act*, Sept. 9, 2008, available at <http://www.aclu.org/human-rights/aclu-welcomes-child-soldiers-accountability-act>.

⁹ The Traffic Stops Statistics Act, legislation to address racial profiling, was first introduced in 1997. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997). Subsequently, similar legislation was introduced as ERPA in 2001. End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2001). We anticipate ERPA will be reintroduced during the 111th Congress.

United States into compliance with the treaty because the legislation would address the intractable problem of racial and ethnic profiling. In March 2008 and again in September 2009, the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), the body charged with monitoring compliance with the ICERD treaty, recommended that the United States pass ERPA. Following its periodic review and a follow-up review of U.S. compliance with ICERD, the CERD Committee urged the United States to “mov(e) expeditiously towards the adoption of the End Racial Profiling Act” and “make all efforts to pass the End Racial Profiling Act (ERPA).”¹⁰

- 6) Congress should pass legislation that would create an independent agency such as a national U.S. Commission on Civil and Human Rights that would have authority over monitoring and investigating U.S. treaty implementation.¹¹
- 7) Congress should conduct or call for human rights impact assessments prior to the passage of key legislation or before funding programs, to ensure they honor and do not run afoul of U.S. treaty obligations and international commitments.

VI. Role of the Executive Branch in Human Rights Treaty Implementation

As the sole government body constitutionally authorized to negotiate and sign international treaties and agreements, the Executive Branch has a major role to play in human rights treaty implementation. In cooperation with other branches of government, the Executive Branch is mandated with the task of protecting, respecting, and promoting human rights embodied in U.S. treaty obligations. The Executive Branch may implement human rights treaties through policies and actions that use the enforcement and investigative arms of the Executive Branch and other resources, to hold accountable those parties responsible for human rights violations. For example, in the U.S., the Justice Department’s Civil Rights Division historically has been the primary administrative protector against illegal racial, ethnic, religious and gender discrimination. The Civil Rights Division’s mandate to investigate and prosecute anti-discrimination cases, including those based on employment, housing, education and voting laws, is critical to ensure effective implementation of the ICERD treaty.

The Executive Branch represents the U.S. government before international bodies, including human rights treaty bodies that monitor compliance with treaty obligations and advise countries on the implementation of their treaty obligations. The Executive Branch also has control over resources allocated by Congress for initiatives and programs that promote compliance with human rights obligations, including resources dedicated to

¹⁰ U.N. Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 14, U.N. Doc. CERD/C/USA/CO/6 (May 2008); U.N. Committee on the Elimination of Racial Discrimination, Response to U.S. Government on Progress on Addressing Racial Discrimination, Sept. 28, 2009.

¹¹ Leadership Conference on Civil Rights Education Fund, *Restoring the Conscience of a Nation: A Report on the U.S. Commission on Civil Rights* (March 2009), available at <http://www.civilrights.org/publications/reports/commission/introduction.html>.

local and state governments that often lack the resources to engage in such initiatives. Thus, any administration must work closely with Congress to effectively implement U.S. international commitments, provide support for enabling legislation, and testify regarding human rights treaty implementation.

The Executive Branch must also coordinate effectively around human rights issues. President Clinton issued Executive Order 13107 on December 10, 1998, creating the Interagency Working Group on Human Rights Treaties, coordinated by the National Security Council (NSC). The Interagency Working Group was created with a strong mandate, stating that "it shall be the policy and practice of the Government...fully to respect and implement its obligations under the international human rights treaties to which it is a party," including the ICCPR, the CAT, the ICERD, "and other relevant treaties...to which the United States is now or may become a party in the future."¹² Unfortunately, before this important initiative was firmly rooted, on February 13, 2001, George W. Bush issued National Security Presidential Directive 1, effectively disbanding the Interagency Working Group and replacing it with the weaker and less transparent Policy Coordination Committee on Democracy, Human Rights, and International Operations. The Obama Administration should fully implement U.S. treaty obligations by reactivating the Interagency Working Group on Human Rights Treaties by means of a new Executive Order. The Campaign for a New Domestic Human Rights Agenda coalition has drafted a proposed Executive Order that would ensure that the federal government can more effectively mainstream human rights into domestic policy.¹³ We believe a revitalized NSC-led Interagency Working Group would be an important mechanism for implementing U.S. human rights commitments. The Interagency Working Group would also increase effectiveness and coordination by creating, in one standing body, an identifiable focal point for an administration's human rights policy work.

Specifically, the possible coordination role the Interagency Working Group may assume can be illustrated by a recent example of a lack of rights-based coordination, the government response to Hurricanes Katrina and Rita. Many of the documented human rights violations in the Gulf Coast for which the government has been called to account were, unfortunately, avoidable had a rights-based approach been taken from the start. The availability of a system for providing human rights-based guidance across agencies and departments on disaster prevention and preparedness, evacuation, emergency assistance, and relief measures would have mitigated the human rights challenges during and after the storms. A standing coordination body could have played this role and provided the President, FEMA and other Executive Branch actors with guidance regarding immediate next steps and an appropriate response to the human rights crisis that was consistent with U.S. human rights obligations. An Interagency Working Group could have fundamentally altered the Executive Branch's response and readiness by

¹² Exec. Order No. 13,107, § 1. 63 Fed. Reg. 68,991 (Dec. 10, 1998), 38 ILM 493 (1999).

¹³ American Constitution Society, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (Oct. 2008), "Draft Executive Order," Appendix B, available at <http://www.acslaw.org/node/7549>.

providing policy leadership on the many human rights concerns implicated by the disaster and the federal response to it.

Another example of the Executive Branch's important role in ensuring that the United States meets its treaty obligations is an administration's role in ensuring consular access for foreign nationals under the Vienna Convention on Consular Relations (Vienna Consular Convention).¹⁴ While the United States had previously argued in a series of cases before the International Court of Justice (ICJ) that there was little the federal government could do to ensure that state criminal procedure complied with the Vienna Consular Convention, the Bush Administration later changed its position, at last taking seriously its obligations under the Vienna Consular Convention. In a case involving 51 Mexican foreign national prisoners on death row, the Administration took the position in a President's Memorandum to the Supreme Court that states must provide review and reconsideration of the claims of foreign nationals regarding violations of their Vienna Consular Convention rights.¹⁵ In addition, the State Department is advising state and local law enforcement agencies on requirements under the Vienna Consular Convention that arrested or detained foreign nationals be informed of their right to consult with their consulate.

However, in 2008 the Supreme Court held that the Vienna Consular Convention did not constitute binding federal law in the absence of Congressional action.¹⁶ In *Medellin v. Texas*, the Court reviewed the constitutionality of the presidential determination and the judicial enforceability of the ICJ decision in *Avena and Other Mexican Nationals* that the U.S. had violated the Vienna Consular Convention rights of the 51 Mexican death row prisoners. The Court held: "the responsibility for transforming an international obligation...into domestic law falls to Congress, not the Executive."¹⁷ Thus, the United States has still failed to comply with its treaty commitments to implement the ICJ decision in *Avena*, and only Congress can enact legislation that will implement the requirement of "review and reconsideration" in the cases addressed by the ICJ decision.¹⁸

Finally, the judiciary must also play a critical role in ensuring that laws are being applied in a manner that is consistent with U.S. international obligations. To provide one example, a long-standing legal principle, rooted in Supreme Court case law, requires that courts interpret state and federal law so that it does not conflict with international law.¹⁹ This principle is applicable both to treaties and customary international law. As a result, international human rights standards have been considered by courts in a broad and

¹⁴ *Vienna Convention on Consular Relations*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. See, e.g., American Constitution Society, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (Oct. 2008), available at <http://www.acslaw.org/node/7549>.

¹⁵ Brief for the United States as Amicus Curiae Supporting Petitioner, *Medellin v. Texas*, No. 06-984; Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, No. 04-5928; see also George W. Bush, *Memorandum for the Attorney General* (Feb. 28, 2005).

¹⁶ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

¹⁷ *Id.* at 1368.

¹⁸ *Case Concerning Avena and Other Mexican Nationals*, (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31).

¹⁹ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

diverse range of social justice issues—from the right of same sex couples to marry, to the rights of children and prisoners.²⁰

VII. Conclusion

Our constitutional system of checks and balances is a bedrock human right principle and one that is admired by nations of the world. However, in recent years the United States disturbed this equilibrium by violating U.S. human rights treaty obligations—for example, through the distortion of the definition of torture and widespread abuse of detainees—which resulted in the tarnishing of U.S. reputation and standing in the world. Congress and the current Administration have a historic opportunity to correct the transgressions of the past by honoring U.S. human rights obligations and commitments, and using our commitment as a beacon for setting policy at home and abroad. Effective implementation of our human rights treaty commitments through human rights protection and enforcement would send an unequivocal message to the world that the U.S. is taking seriously its treaty obligations and is ready to reclaim its role as a leader in human rights.

²⁰ ACLU, *Human Rights on the Judicial Front: Litigating Protection in U.S. Courts*, printed in HUMAN RIGHTS BEGINS AT HOME (Dec. 2008), available at http://www.udhr60.org/hr_on_judicial_front.pdf.



SUPPLEMENT TO THE

**WRITTEN STATEMENT OF
THE ADVOCATES FOR HUMAN RIGHTS**

**SUBMITTED TO THE UNITED STATES SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW**

**For The December 16, 2009 Hearing On
“The Law of the Land: U.S. Implementation of Human Rights Treaties”**

I. INTRODUCTION

The Advocates for Human Rights commends the Senate Judiciary Subcommittee on Human Rights and the Law for conducting this historic hearing concerning the implementation of human rights treaties. The Advocates for Human Rights is a non-governmental, 501(c)(3) organization dedicated to the promotion and protection of internationally recognized human rights. With the help of hundreds of volunteers each year, The Advocates investigates and exposes human rights violations; represents immigrants and refugees in our community who are victims of human rights abuses; trains and assists groups that protect human rights; and works through education and advocacy to engage the public, policy makers and children about human rights. The Advocates holds Special Consultative Status with the United Nations.

We submit this supplement to the written statement for the record to draw the Committee’s attention to specific gaps in the domestic implementation of international human rights treaty obligations related to the protection of sex trafficking victims and the prevention of sex trafficking. The Advocates for Human Rights published a human rights report entitled the *Sex Trafficking Needs Assessment for the State of Minnesota* in September 2008. We are pleased to submit recommendations regarding action to bring the U.S. into compliance with international human rights treaty obligations.

**II. GAPS IN IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS
TREATY OBLIGATIONS RELATED TO THE PROTECTION OF SEX TRAFFICKING
VICTIMS AND THE PREVENTION OF SEX TRAFFICKING**

Sex trafficking is a form of slavery and involuntary servitude resulting in grave human rights violations. Sex trafficking involves individuals profiting from the sexual exploitation of others and often results in brutal sexual assaults and devastating physical and psychological injuries.¹ As this subcommittee is aware, sex trafficking not only happens in foreign countries, but here in

¹ In passing the Trafficking Victims’ Protection Act of 2000, the U.S. Congress found that “trafficking in persons involves grave violations of human rights and is a matter of pressing international concern. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports [...]” Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1468 (2000) (codified at 22 U.S.C. § 7101(23) (2007)).

the United States. In addition, it is not new to Minnesota nor is it confined to the Twin Cities metropolitan area; it affects communities throughout the state. People from various backgrounds are trafficked for sexual exploitation to and within the state of Minnesota, although it primarily affects women and girls.² This is true nationally as well.

Various sources estimate from 600,000 to four million people are trafficked globally each year.³ In its 2004 Trafficking in Persons ("TIP") Report, the U.S. State Department estimated that between 14,500 and 17,500 people were trafficked into the United States annually.⁴ The 2008 report *Human Trafficking in Minnesota* found that service providers in Minnesota had served 93 labor trafficking victims and 731 sex trafficking victims over a three-year period.⁵ These data represent a limited picture of trafficking because it only captures information about persons who contact service providers.⁶ Research has shown that not all trafficked persons interact with government or non-government agencies⁷ and that trafficked persons are reluctant to report their situations, particularly to law enforcement or immigration officials.⁸ The Federal Bureau of Investigation ("FBI") identified Minneapolis as one of thirteen cities with a high concentration of criminal enterprises promoting juvenile commercial sexual exploitation.⁹

The United States, whether acting on its own or by and through state and local governments,¹⁰ is obligated to protect trafficked persons, to prevent trafficking and prosecute traffickers. The

² MINN. OFFICE OF JUSTICE PROGRAMS & MINN. STATISTICAL ANALYSIS CTR., HUMAN TRAFFICKING IN MINNESOTA: A REPORT TO THE STATE LEGISLATURE (2008),

http://www.ojp.state.mn.us/cj/publications/Reports/2008_Human_Trafficking_Report.pdf [hereinafter 2008 REPORT]. Accordingly, this report will primarily refer to trafficked persons as women and girls, while acknowledging that the sex trafficking of boys, men and transgendered persons also involves human rights violations and merits additional study, public and private response and appropriate assistance.

³ The U.S. government estimates 600,000 to 800,000 people per year are trafficked across international borders for exploitative labor or commercial sexual exploitation. This estimate does not include trafficking within a nation's borders. U.S. GOV'T ACCOUNTABILITY OFFICE, at 2. The International Labor Organization of the United Nations estimates that at any time 2.45 million people are in various forms of forced labor, including sexual exploitation, as a result of trafficking. INT'L LABOUR OFFICE, at 14.

⁴ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004),

<http://www.state.gov/documents/organization/33614.pdf>.

⁵ 2008 REPORT, at 1-2.

⁶ Available trafficking data are often limited by this institutional bias. See Guri Tyldum & Annette Brunkovskis, *Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking*, 43 INT'L MIGRATION 17, 25-26 (2005), <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.0020-7985.2005.00310.x>.

⁷ A 2007 study of thirty-nine trafficking victims and thirteen individuals in street prostitution in Serbia, Albania and Moldova found that "[i]n many cases, women came across the information [about assistance] by chance. This may indicate that there are many more trafficked persons who *do not* come across such information and never know about options for assistance." The study reported that most trafficking victims with alternatives to assistance would "generally decline trafficking specific assistance and seek help in other places." For example, trafficking victims with supportive families are more likely to return home than to seek assistance. ANETTE BRUNOVSKIS & REBECCA SURTEES, LEAVING THE PAST BEHIND? WHEN VICTIMS OF TRAFFICKING DECLINE ASSISTANCE 7, 10, 34-35 (2007), http://www.childtrafficking.com/Docs/fafp_past_victims_tra_ass_0408.pdf.

⁸ See KEVIN BALES & STEPHEN LIFE, TRAFFICKING IN PERSONS IN THE UNITED STATES 45 (2005),

<http://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf>; BRUNOVSKIS & SURTEES, *supra* note 7, at 34.

⁹ The basis for this ranking is unclear. Minneapolis Division FBI, FBI Priorities, http://minneapolis.fbi.gov/priorities.htm#violent_crime (last visited Aug. 20, 2008).

¹⁰ While the federalist structure of the United States may have an effect on the way in which the federal government works to comply with its obligations under international law, domestic legal systems cannot be used as an excuse for non-compliance with international obligations. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. b (1987) ("A state is responsible for carrying out the obligations of an international agreement. A federal state may leave implementation to its constituent units but the state remains responsible for

United States has ratified the International Covenant on Civil and Political Rights (“ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and is thus bound by the provisions of those treaties.¹¹ The United States has also signed, although not ratified, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).¹² Pursuant to Article 18 of the Vienna Convention on the Law of Treaties, the United States is therefore prohibited from taking any action that would violate CEDAW’s “object and purpose.”¹³

Other obligations stem from instruments that specifically delineate the United States’ obligation to eradicate and prevent slavery and slavery-like practices and, more recently, human trafficking with the *United Nations Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (“U.N. Trafficking Protocol”),¹⁴ *The Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* also mandates that the United States take action against the trafficking and sexual exploitation of children.¹⁵

A. Need for Training of Criminal Justice System to Appropriately Identify Sex Trafficking Victims

First responders often do not use or are unaware of tools to screen for sex trafficking. More often than not, these first responders do not look beneath the surface, which results in either treating

failures of compliance.”) [hereinafter RESTATEMENT]; *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 50, 999 U.N.T.S. 171, TIAS (the Covenant’s provisions “shall extend to all parts of federal states without any limitations or exceptions”) [hereinafter ICCPR]; *Nature of the General Legal Obligation on States Parties to the Covenant*, Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (government “may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility”); Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, *reprinted in* 25 I.L.M. 543 (a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”) [hereinafter Vienna Convention].

¹¹ RESTATEMENT, *supra* note 10 (“Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.”).

¹² Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 14 [hereinafter CEDAW]; *see also* Division for the Advancement of Women, Department of Economic and Social Affairs, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Aug. 26, 2008).

¹³ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, *reprinted in* 25 I.L.M. 543.

¹⁴ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Mar. 9, 1927, 60 L.N.T.S. 253 (ratified by United States Mar. 21, 1929), *amended by* The Protocol of December 7, 1953 (ratified by United States Mar. 7, 1956) [hereinafter Slavery Convention]; The Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (ratified by United States Dec. 6, 1967) [hereinafter Supplemental Convention on Slavery]; U.N. Trafficking Protocol, Annex II (ratified by United States Nov. 3, 2005).

¹⁵ United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 10, A/RES/54/263 (May 25, 2000), Vol. 2171, A-27531 [hereinafter U.N. Children’s Protocol]; *see also* Convention Concerning the Prohibition and Immediate Actions for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207, Art. 3(b), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (ratified by United States Dec. 2, 1999) [hereinafter Convention Concerning the Worst Forms of Child Labour]; *see also* CEDAW, Art. 6; *General Recommendation No. 19, Violence against Women*, Committee on the Elimination of Discrimination against Women, 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992).

the trafficking victim as a criminal or as a juvenile delinquent. As part of the "Rescue and Restore" campaign, the U.S. Department of Health and Human Services has developed tool kits for law enforcement officers, healthcare providers and service providers, which contain tips for identifying trafficking victims and screening questions.¹⁶

However, interviews revealed that these resources are not widely used. Law enforcement fails to effectively screen women and girls arrested for street prostitution or other crimes to determine whether they may be trafficked persons. The failure of government agencies, healthcare providers and service providers to use screening protocols¹⁷ contributes to the failure of trafficked persons to receive the assistance and services they need and the failure to prosecute traffickers. Without screening protocols, as one author notes, "the whole issue of assistance and protection" accorded to trafficked persons under state, federal and international law "becomes superfluous."¹⁸

Recommendation: Both federal and state government agencies, healthcare providers and service providers receiving federal or state funding should be trained and mandated to use human trafficking screening protocols particularly in cases where they encounter individuals presenting as "prostitutes" or as juveniles who are truant, delinquent or in need of protection.

B. Need to Respond to Sex Trafficking Victims as Crime Victims, not Criminals

Instead of being identified and treated as trafficked persons and crime victims, women and children who may be entitled to support and benefits are often treated as criminals. These individuals are not screened and the consequence is that service providers reported seeing many clients with some type of charge on their record,¹⁹ indicating the high incidence of women's and girls' interaction with the criminal justice system. In turn, this criminal history may impede women from getting out of prostitution by making it difficult to obtain services, public assistance, housing, custody of their children or employment.

Trafficked girls are not adequately served by Child Protection Services (CPS) in Minnesota. In many cases, CPS declines to take cases involving trafficked girls. A fundamental obstacle in cases of trafficked girls stems from CPS' narrow mandate to investigate only cases of actual or potential abuse or neglect by parents, guardians or other persons responsible for a child.²⁰ Although interviewees reported some examples of sex trafficking of children by their parents,²¹ in most cases, girls' traffickers are not their parents.²² For cases involving abuse by someone besides a parent or guardian, CPS must refer these cases to the appropriate law enforcement agencies.²³ In 2007, ECPAT reported that this problem occurs across the United States.²⁴

¹⁶ U.S. DEPT OF HEALTH & HUMAN SERVS., RESCUE AND RESTORE CAMPAIGN TOOL KITS, http://www.acluhhs.gov/trafficking/campaign_kits/index.html (last visited Sept. 15, 2008).

¹⁷ The term "screening protocol" encompasses a range of procedures designed to identify trafficked persons, including in-take questions and watching for "red flags" that may indicate someone has been trafficked.

¹⁸ DANISH RED CROSS, GOOD PRACTICES IN RESPONSE TO TRAFFICKING IN HUMAN BEINGS: COOPERATION BETWEEN CIVIL SOCIETY AND LAW ENFORCEMENT IN EUROPE at 29 (2005), [http://www.ungift.org/docs/ungift/pdf/knowledge/1088_drk_human_manual_web%20\(2\).pdf](http://www.ungift.org/docs/ungift/pdf/knowledge/1088_drk_human_manual_web%20(2).pdf), at 42.

¹⁹ Interview with advocate (Feb. 13, 2008); Interview with advocate (Oct. 12, 2007).

²⁰ MINN. STAT. § 626.556, subd. 2(c); see Interview with advocate (May 29, 2008).

²¹ Interview with law enforcement officer (Oct. 4 2007); Interview with advocate/survivor (Jan. 14, 2008); Interview with advocate (May 29, 2008).

²² Interview with child protection worker (Mar. 7, 2008).

²³ MINN. STAT. § 626.556, subd. 10a.

The *U.N. Recommended Principles and Guidelines* advocate “[e]nsuring that trafficked persons are not detained, charged or prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.”²⁵ Other recommendations include: ensuring safe shelter for trafficked persons, access to health, and access to information in an understandable language about legal actions taken against their traffickers; among other recommendations.²⁶

Recommendation: Rather than treat trafficked persons as criminals, federal and state prosecutors should provide practical assistance to trafficked women and girls based on their status as crime victims.

C. Need for Funding for Housing and Supportive Services for Sex Trafficking Victims

Only one service provider in Minnesota has received federal anti-trafficking grant money to provide direct services to trafficked persons.²⁷ Other service providers seeing trafficked women and girls must find other means to provide the necessary services to these clients.²⁸ Service providers repeatedly cited the lack of federal funds to assist U.S. citizens (“USCs”) or lawful permanent residents (“LPRs”) who have been trafficked as an obstacle.²⁹ Although Congress specifically found that trafficking occurs within the United States when it passed the TVPA reauthorization of 2005, the \$30 million it appropriated for services for trafficked U.S. citizens and lawful permanent residents was never included in the budgets for fiscal years 2006 and 2007.³⁰ The TVPA reauthorization of 2008 directs the Departments of Justice and Health and Human Services to study the “services gap” between domestic and foreign national victims in recognition of this problem nationally.

The immediate funding gaps mean that trafficking victims do not receive housing or other supportive services critical to assisting them in the process of recovery and reintegration. In fact, there is a lack of facilities to provide safe, appropriate emergency shelter to trafficked persons. Interviews revealed a largely ad hoc system of emergency housing. Trafficked persons may use or be referred to battered women’s shelters, homeless shelters, hotel rooms, or informal alternatives, such as volunteers who shelter trafficked women on an emergency basis.

²⁴ SARA ANN FRIEDMAN, ECPAT-USA, INC., ALTERNATIVE REPORT TO THE INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 20 (2007), <http://www.ecpatusa.org/pdfs/AlternativeReportUSAFinal2007.pdf> at 10, 20, 23.

²⁵ U.N. Econ. & Soc. Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Report of the United Nations Commissioner for Human Rights to the Economic and Social Council, princ. 7, guideline 2(5), U.N. Doc. E/2002/68/Add. 1 (May 20, 2002).

²⁶ U.N. Econ. & Soc., guideline 6.

²⁷ FY 2006 FUNDS REPORT, at 16; see Focus Group (July 23, 2007).

²⁸ Interview with advocate (May 29, 2008).

²⁹ Focus Group (July 26, 2007); see also Interview with advocate (Nov. 9, 2007); Focus Group (Aug. 6, 2007).

³⁰ TVPRA 2005 §§ 2(3)-(6), 202-203, 119 Stat. at 3358-59, 3569-70 (codified at 22 U.S.C. § 7101 note, 42 U.S.C. §§ 14,044a, 14,044b); see also POLARIS PROJECT, EQUAL BENEFITS FOR ALL SURVIVORS OF HUMAN TRAFFICKING IN THE UNITED STATES 3 (2007) (on file with author).

Trafficked youth face a dearth of available, age-appropriate housing. "A major draw is the hotels that pimps provide, and we don't have a better option," stated one healthcare provider.³¹ Less than 100 beds are available statewide to provide emergency shelter to youth, and frequently shelters have a waiting list for those spaces.³² Only two shelters in Minneapolis and St. Paul serve young teens under fifteen, which stems in part from different licensing requirements for programs based on participants' ages.³³ Young people ages eighteen to twenty-one may stay in youth or adult shelters, but those facilities also have limited capacity and most often lack services for trafficked youth.³⁴ The lack of appropriate shelter can result in women and youth returning to the trafficking situation.

Recommendations: Congress should immediately allocate emergency funds to address the gaps for trafficked U.S. citizens and lawful permanent residents. Long-term funding for housing and supportive services should be granted once the DOJ and HHS study is complete. In particular, funds should be allocated to emergency, transitional and long term permanent housing. States should direct federal funds to address current gaps in housing and supportive services for trafficking victims.

III. CONCLUSION

The Advocates for Human Rights encourages the Subcommittee to hold additional hearings on U.S. compliance with human rights treaty obligations and other human rights issues. We congratulate the Subcommittee for its role in protecting human rights at home and abroad and for its leadership in promoting human rights, which are fundamental and core values of the United States of America.

³¹ Interview with healthcare provider (Jan. 23, 2008).

³² Interview with advocate (Nov. 9, 2007).

³³ *Id.*

³⁴ *Id.*

The Law of the Land: U.S. Implementation of Human Rights Treaties**Statement by Amnesty International**

Prepared for the hearing before the United States Senate Judiciary Subcommittee on Human Rights and the Law, 16 December 2009

Introduction

Amnesty International welcomes this opportunity to address the Senate Judiciary Subcommittee on Human Rights and the Law. This hearing comes at an important time. On the occasion of Human Rights Day last week, Ambassador Rice re-stated the commitment of the US Government to placing human rights at the heart of its efforts to provide leadership in the world. We acknowledge the steps already taken by the US Government to turn those words into reality, and particularly because the current government follows an administration that appeared to view its obligations under international law as obstacles to be overcome rather than commitments to meet. We believe the Senate has an important role to play in supporting the US government in its efforts to realize fully its international treaty obligations by considering the government's reports to the international human rights bodies and the recommendations that come from those bodies, and to extend the protection of international human rights law through giving full consent to further ratifications.

To meet its aspirations, the US administration and the Senate must consider the significant steps that are still to be taken in order for the government to realize fully its international treaty obligations and to assume more treaty commitments. The core human rights treaties established in the 60 years following the 1948 Universal Declaration of Human Rights give effect to basic guarantees that all human beings should enjoy in order to fulfill their potential. They include the right not to be arbitrarily deprived of life or liberty; the right to humane treatment; to freedom of thought and association; to adequate food and shelter and respect for family life; and to freedom from discrimination on the basis of gender, race, ethnicity, social status or national origin.

The US Government was an active participant at the United Nations (UN) World Conference on Human Rights back in 1993, at which all member states identified human rights as being "universal, indivisible, interrelated, and interdependent". Amnesty International also believes that human rights treaties apply at all times – during armed conflict as well as in peace-time – and the provisions of human rights law are not displaced by the law of international armed conflict.

Amnesty International calls on the USA to move towards full ratification of all human rights law

At the time of presenting its candidature for election to the UN Human Rights Council, the US government pledged to consider the possible ratification of human rights treaties, including but not limited to, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which it signed in 1980.¹ Amnesty International believes that such ratification would be a critical demonstration of the government's commitment to women's equal protection and equality of treatment before the law. Next year marks the 15th anniversary since the adoption of the Beijing Declaration and Program of Action and would be a timely occasion

¹ UN Doc. A/63/831, letter dated 22 April 2009 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the General Assembly, 24 April 2009. The pledge also referred to possible ratification of International Labor Organization (ILO) Convention 111 concerning Discrimination in Respect of Employment and Occupation.

for the USA to announce its intention to join with 186 states parties from all regions of the world and be bound by the terms of that treaty.

The signing of the UN Convention on the Rights of Persons with Disabilities by the USA earlier this year is a positive development. However, given its overall and comparatively low rate of ratification of international human rights treaties, we believe it is important that the USA embarks upon a program of ratification including not only the CEDAW, but also the International Covenant on Economic, Social and Cultural Rights (ICESCR, signed in 1977 but not ratified), the International Convention for the Protection of All Persons from Enforced Disappearances; the Optional Protocols to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to the International Covenant on Civil and Political Rights (ICCPR). In addition, as Somalia has signaled its intention to ratify the Convention on the Rights of the Child, we expect that very soon, the USA will be the only country in the world which has not ratified this treaty.² Further ratifications of human rights treaties, particularly on economic, social and cultural rights, women's right to equality, and children's rights, would greatly enhance the protection of human rights of US citizens, residents, and other subject to the control and jurisdiction of the USA.

As the USA has signed these treaties, it is bound under international law not to do anything which would defeat their object and purpose.

Amnesty International regrets that the USA's reluctance to support and respect international human rights protection mechanisms has extended to the Inter-American system. Despite having long been a leading member of the Organization of American States (OAS), the USA has not ratified the American Convention on Human Rights and has on several occasions claimed that the 1948 American Declaration on the Rights and Duties of Man is not binding on the USA, even though the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights have considered the Declaration part of customary law binding on all member states of the OAS. Consequently, we take this opportunity to recommend that the US Government ratify the American Convention on Human Rights.

Amnesty International calls on the USA to ratify human rights treaties without attaching limiting conditions

Amnesty International has long been critical of the USA "pick and choose" approach to international law and standards. This has been a country that has been slow to commit itself to human rights treaties and has attached unprecedented conditions to those it has ratified.

For example, the US interprets its obligations under the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1992, as being inapplicable with respect to individuals under its jurisdiction who are outside its territory, and inapplicable in times of war. This is despite contrary opinions and established jurisprudence of the International Court of Justice and the expert bodies which oversee implementation of the human rights treaties (the treaty bodies). It has taken a similar position with regard to the UN Convention against Torture, which it ratified in 1994, a position about which both the treaty bodies have expressed deep concern.

² The USA ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2002.

The above are not the only ways in which the USA has sought to limit its treaty obligations. AI is concerned that the USA has conditioned its treaty ratification on a number of reservations, declarations and understandings to various articles, including those relating to the prohibition of torture and ill-treatment and aspects of the criminal justice system (for example, relating to the separation of juveniles from adults). The effect has been to limit the application of these treaties by ensuring that they confer no greater protection than exists under US law. While the USA has many laws and mechanisms to protect human rights, there are areas where US law or practice falls short of international treaty provisions, as noted in the recommendations of the treaty bodies themselves (see below).

Amnesty International calls on the USA not to enter reservations to any human rights treaty which would limit its effectiveness in any way: restrictive interpretations of treaties, as much as reservations, inhibit the effective implementation of human rights. This applies to reservations and restrictive interpretations relating to temporal or personal jurisdiction, as well as substantive scope. Amnesty International calls on the USA to withdraw all reservations, restrictive interpretations and declarations, where these purport to inhibit the full enjoyment of human rights.

Failure to fully observe international treaty obligations has had real and serious repercussions, for example in the conduct of the USA in its counter-terrorism policies and practices. The USA's failure to recognize the applicability of human rights treaties outside its own borders or in time of war – together with reservations and understandings that have applied a narrower definition of torture and cruel, inhuman or degrading treatment than under international law – has facilitated gross abuses of detainees held in US custody abroad. Such abuses have included the authorization of enhanced interrogation techniques such as “waterboarding” and other forms of torture and ill-treatment; prolonged arbitrary detention; enforced disappearances and rendition to other countries for the purpose of torture. These practices are not only wrong and shocking in themselves; they did untold damage to the USA's standing and reputation internationally.

Obligations under customary international law exist already – Amnesty International calls on the USA to go beyond the basics, to full enhancement of the human rights and human flourishing

Much of the content of these treaties constitutes obligations under international law, irrespective of treaty obligations (rules of customary international law). For the USA to ratify these treaties and participate in periodic monitoring would greatly enhance the implementation of existing obligations under customary international law, and ensure a comprehensive approach to the enjoyment of human rights by all who are subject to the jurisdiction of the US Government, whether on its territory, or subject to its effective control, no matter where this occurs in the world.

The benefits of constructive dialogue

As already indicated, the international human rights treaties are monitored by committees of independent experts known as treaty bodies. States parties provide periodic reports to the treaty bodies which are considered in public session, usually over the course of a day. Civil society, including non-governmental organizations, is able to submit information about implementation of the treaty concerned to the committee. This usually follows a process at the national level whereby NGOs coordinate their efforts to produce reports which cover a diverse range of rights and which come from international, national and state-level NGOs with direct experience of working to uphold these rights. There is an informed and comprehensive dialogue between the state and the treaty body members about the application of the treaty at the national level, with viewpoints from many stakeholders affected and concerned by the issues. At the end of the dialogue, the committee issues its “concluding observations”. These are among the most in-depth

and authoritative recommendations that come from the UN human rights system and, as such, can provide a focus for other parts of the human rights system. The US government, as for other states parties, is obliged to publish and widely disseminate the concluding observations at the national level and to the general public as well as to the judicial, legislative and administrative authorities. Increasingly, the treaty bodies have developed follow up procedures which means that they select a few priority concluding observations which they ask the state to report back on, normally within a year. Amnesty International welcomes the fact that the USA has engaged in such a follow-up procedures with the treaty bodies.

In submitting its candidature for election to the UN Human Rights Council (referred to above), the USA pledged to meet its treaty obligations and to engage in meaningful dialogue with treaty body members. This is an important commitment which should ensure the timely submission of periodic reports, engagement in the dialogue with the treaty bodies and follow up to and implementation of those recommendations.

The independent experts of the treaty bodies provide a valuable role in identifying shortfalls in the application of treaties in respect of law, administration and policy for all of the states which are party to the treaties. Through their in-depth consideration of the report prepared by the government and their rigorous questioning of state representatives at the public meeting, the treaty body members highlight positive aspect of implementation as well as subjects of concern and recommendations.

Having been through a period of failing to submit its periodic reports to the treaty bodies on time, the USA has recently been considered by the committees which oversee the Convention against Torture, the Convention on the Elimination of All Forms of Racial Discrimination (which the US government ratified in 1994), the Optional Protocols to the Convention on the Rights of the Child and the ICCPR. For the purposes of today's hearing, we wish to focus on the recent consideration of the US by the Human Rights Committee which oversees of the latter of these treaties, the ICCPR.

When the Human Rights Committee considered the US in July 2006³, it made a number of detailed recommendations, which included:

- That the US should ensure that its counter-terrorism measures are in full conformity with the ICCPR and in particular that the legislation adopted in this context is limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it;
- That the US government should ensure that any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the ICCPR (which prohibits torture and ill-treatment);
- That the US should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The state party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups;

³ UN Doc. CCPR/C/USA/CO/3/Rev.1, concluding observations of the Human Rights Committee, United States of America, 18 December 2006

- That the US should 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 – noting several areas of concern, including the disproportionate number of African Americans among the homeless and racial profiling by law enforcement officials;
- That the USA, in the aftermath of Hurricane Katrina, should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare;
- Regarding female prisoners, that the US should ensure that male officers should not be granted access to women's quarters, or at least be accompanied by women officers. The Committee also recommended the state party to prohibit the shackling of detained women during childbirth;
- That the US should ensure that no child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.

In respect of the concluding observations of the Human Rights Committee in 2006, the US Government provided some responses in respect of the priority recommendations identified by the Committee.⁴ Subsequently, in a letter to the US Government, the Human Rights Committee noted that the information provided was partly incomplete and further clarification was sought.⁵ We welcome the communication provided by the government to the Human Rights Committee confirming that it is preparing a report on this further information and strongly urge it to continue to engage in this process in this way. We also note that the US government has taken the unusual but important step of indicating that it will take into account the Committee's concluding observations in preparation for the Universal Periodic Review Mechanism (UPR, see below).

The deadline for submission of the next periodic report of the USA to the Human Rights Committee is 1 August 2010. The report is to be circulated for the attention of NGOs operating in the country. We recommend to this body that it consider requesting the US government to table the report in Senate with the recommendations of the Human Rights Committee. This would provide an authoritative assessment on which Senate may review the progress made by the US in implementing its treaty obligations.

As noted, we have focused on the Human Rights Committee, but the Committee against Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD) have also requested information to follow up on priority recommendations⁶. Their reports have identified similar areas where US domestic law and/or practice has failed to conform to international human rights standards. Both the CAT and the Human Rights Committee, for example, have criticized harsh conditions of isolation in US super maximum security prisons and the widespread use of electro-shock weapons in law enforcement as incompatible with the prohibition against torture or

⁴ UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, comments by the government of the USA on the concluding observations of the Human Rights Committee, 12 February 2008

⁵ UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.2, Further information received from the US on the implementation of the concluding observations of the Human Rights Committee, 24 September 2009

⁶ For CAT concluding observations see: UN Doc. CAT/C/USA/CO/2, conclusions and recommendations of the Committee against Torture, 25 July 2006; and for CERD, see: UN Doc: CERD/C/USA/CO.6, 8 May 2008.

other ill-treatment. They have also raised concern about reports of police brutality and excessive force towards racial minorities and other vulnerable groups. CERD has highlighted failure to protect the human rights of immigrants and non-US nationals, as well as racial disparities in areas such as housing, access to healthcare, employment and the criminal justice system. It has pointed to the obligation on states to prohibit and eliminate racial discrimination in all its forms, including laws and practices that may be discriminatory in effect, if not purpose.

Further areas where AI believes urgent action needs to be taken to fulfill the USA's obligations under international treaties include the following:

Taking a stand against discrimination

In 2008, the CERD drew attention, among other areas to the "stark racial disparities based on the administration and functioning of the criminal justice system" and called on the US government to tackle this issue, including through further studies to determine the nature and scope of the problem. We welcomed the pledge by President Obama to ban racial profiling in law enforcement and urged that this be done expeditiously, with effective enforcement, data collection and monitoring procedures.

The Human Rights Committee has also drawn attention to allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation and the failure to address such crime in the legislation on hate crime. It recommended that the US government acknowledge its legal obligations under article 2 and 26 to ensure to everyone the rights recognized by the ICCPR, as well as equality of the law. There are many other areas in which full enjoyment fundamental rights are affected by factors such as race, poverty and gender

In favor of women's rights

The implementation of the rights of women, without discrimination and ensuring equality in all areas of life – not just in work and education – requires an in-depth assessment of quantitative and qualitative data, to assess how to best address direct and indirect discrimination, irrespective of whether acts and omissions have a discriminatory purpose or effect, and propose recommendations. While the USA is already party to the ICCPR, which contains general non-discrimination clauses which relate to the grounds of gender, it would greatly enhance the enjoyment of human rights by American women if the US were to ratify CEDAW, thus enabling women to overcome de facto and historically generated disadvantage. This is particularly important given the inter-sectional discrimination faced by many women and girls, on the grounds of not only their gender, but also racial group, sexual orientation, age, disability or health status, notwithstanding the USA's signature of the Convention on the Rights of Persons with Disabilities and ratification of the CERD.

The rights of children – those needing most care

The rights of children, both their rights to be protected (i.e. from cruel, inhuman or degrading treatment, including and the death penalty) and their rights which require positive action (rights to health and education) also require the comprehensive approach that the Committee on the Rights of the Child can bring, through the constructive dialogue approach undertaken by the treaty bodies. Amnesty International repeats that we expect that very soon, the US will be the only country in the world which has not ratified this treaty.

Economic, social and cultural rights – at home and abroad

The economic, social and cultural rights of all those subject to US jurisdiction and effective control is also of primary importance. Even outside US control and jurisdiction, international human rights law can assist with the content of the obligation of overseas assistance. Despite

increasing attention to issues of development cooperation, there is little awareness that international assistance is a human rights obligation, and not merely a question of charity or enlightened self-interest. The ICESCR Article 2(1) requires that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In recent years, the Committee on Economic, Social and Cultural Rights has begun to give analysis on states' development cooperation policies, and even to call for greater resources to be made available through international cooperation.

Rights of individual petition

Amnesty International notes that the USA has not allowed for the submission of individual petitions under the treaties it is party to. While Amnesty International supports the right of individuals to approach the international treaty bodies to seek remedy for human rights violation, individual petitions can also assist states in abiding by their human rights obligation: such cases bring clarity about the situation of individuals, and bring attention to the kind of treatment, adjudication and services they need to receive in order to have their human rights respected, protected and fulfilled.

Universal Periodic Review mechanism

Following the establishment of the UN Human Rights Council, all member states of the UN are subject to a new state-on-state review mechanism known as the UPR. The US is scheduled to be considered under this mechanism in December 2010. The Human Rights Council will adopt the outcome of the UPR examination of the USA at its session in March 2011.

As the UPR is based on a state's application of the UN Charter, the UDHR and on the state's treaty obligations, the mechanism provides an important opportunity for states to report on what actions they have taken in respect of fulfilling their human rights obligations and commitments and to identify further measures to be taken to achieve this goal. Often this includes undertakings to ratify international human rights treaties, to review and remove limiting reservations to treaties, and to cooperate with the treaty bodies.

The UPR is based on three reports. One is prepared by the state under review; one contains the recommendations of UN bodies, including among others the treaty bodies, and one is a summary of submissions by other stakeholders, notably NGOs. Thus the treaty body recommendations can and do form a central part of the review. Further, a key feature of the UPR is that, in preparing their national report, states are expected to hold broad consultations at the national level. Amnesty International encourages your Sub-Committee to consider whether there is a role for itself or the Senate in reviewing the US national report for the UPR and in the follow-up to the outcome of the UPR examination. We believe that the Senate could use the UPR examination as a valuable opportunity to engage with the government on the implementation of the USA's international treaty obligations.

Recommendations:

We recommend that the Senate consider the role it can play in overseeing the US commitments under its international human rights treaty obligations, including through requesting the

government to table its reports to the treaty bodies and under the UPR mechanism with the recommendations that come out of those processes. In addition, we urge the Senate to encourage the US government to take the following steps:

1. to adopt a program of ratification of international treaties, which includes ratification of the Convention on the Elimination of All Forms of Discrimination against Women, the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child;
2. to include in that ratification program a strategy to provide for communications procedures under the international human rights treaties;
3. to ratify the American Convention on Human Rights;
4. to withdraw all limiting interpretations, declarations and reservations attached to its existing ratification of international human rights treaties;
5. to take measures to comply with recommendations of the international human rights treaty bodies, including through providing the committees with the timely submission of periodic reports and information through their follow up procedures;
6. to ratify treaties allowing for the right of individual petition, including making the appropriate declarations to the Convention against Torture, and the Convention on the Elimination of All Forms of Racial Discrimination;
7. to ensure that all US laws, policies and practices conform to these international instruments and are enforceable in the courts;
8. to table in the Senate the report of the USA under the UPR mechanism and the outcome of the UPR examination of the USA, as well as reports of the USA to UN human rights treaty bodies and the related concluding observations and recommendations of the treaty bodies.

Thank you for your attention.

The Law of the Land: U.S. Implementation of Human Rights Treaties
Hearing before the Senate Judiciary Committee on Human Rights and the Law

December 16, 2009

Testimony by the Armenian Assembly of America
Submitted by Bryan Ardouny, Executive Director

Mr. Chairman, Ranking Member Coburn, and Members of the Subcommittee, the Armenian Assembly of America greatly appreciates the pioneering work of this Subcommittee, including the enactment of bipartisan legislation that allows the government to prosecute serious human rights violators who have participated in genocide.

Today's hearing on U.S. implementation of its human rights treaty obligations, the first Congressional hearing of its kind, demonstrates your continued leadership to ensure that these do not become dead-letter treaties.

The treaties under review embody the spirit of America's values and our ongoing commitment to human rights. While ratification of these various treaties represents an important milestone, this is not the end, but rather, the beginning of a long journey to ensure that the inherent rights and dignity of every individual is achieved. The path is often tumultuous and requires constant vigilance. As Secretary of State Hillary Clinton noted in her December 14th *Remarks on the Human Rights Agenda for the 21st Century* at Georgetown University, "throughout history and in our own time, there have been those who violently deny that truth." This is especially true in the case of genocide. In fact, President Barack Obama, in 2008, stated that sadly genocide "persists to this day, and threatens our common security and common humanity. Tragically, we are witnessing in Sudan many of the same brutal tactics - displacement, starvation, and mass slaughter - that were used by the Ottoman authorities against defenseless Armenians back in 1915."

With respect to the ongoing carnage in Darfur, the Armenian Assembly remains deeply troubled and therefore welcomes this week's bipartisan push by Senators Russ Feingold and John McCain to ensure that the United Nations Council does not tolerate continued human rights violations by the Sudanese government in Darfur. Senators Feingold and McCain were joined by Senators Patrick Leahy, Olympia Snowe, Arlen Specter, Johnny Isakson, Robert Casey, Susan Collins, Joseph Lieberman, Richard Burr, Barbara Boxer, Bob Corker, Benjamin Cardin, Roger Wicker, Sherrod Brown, James Risch, Amy Klobuchar, Jeff Bingaman, Bernie Sanders, Ron Wyden, Michael Bennet, Byron Dorgan, Diann Feinstein, Frank Lautenberg, Kirsten Gillibrand, Jeanne Shaheen, and Jeff Merkley in sending a letter to the U.S. Ambassador to the United Nations, Dr. Susan Rice. We applaud this latest initiative.

While the scope of the hearing today is more broadly focused on the treaties to which the U.S. is a signatory, the Assembly's testimony will focus in particular on the United Nations Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which, along with the Universal Declaration of Human Rights, serves as a cornerstone from which the

foundation was built for addressing human rights issues and atrocities as a matter of international concern.

The Genocide Convention, as stated in the 1951 U.S. filing before the International Court of Justice (ICJ), "resulted from the inhuman and barbarous practices which prevailed in certain countries prior to and during World War II, when entire religious, racial and national minority groups were threatened with and subjected to deliberate extermination," of which the "Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are all outstanding examples of the crime of genocide."

Since its founding nearly four decades ago, the Armenian Assembly has strongly advocated in support of the Genocide Convention, and like this Subcommittee, has been at the forefront of critically important human rights issues. The Armenian Assembly was proud to be part of a broad-based coalition of organizations headed by the American Bar Association advocating for U.S. adoption of the Genocide Convention.

The Assembly also strongly echoed Senator William Proxmire's tireless campaign to ensure the Convention's ratification by the United States Senate. Senator Proxmire's efforts in this regard were not only extraordinary, but also legendary. He delivered over three thousand speeches on the floor of the United States Senate. At that time, the Assembly had the distinct honor of providing expert testimony in support of implementing legislation to enable U.S. adoption of the Genocide Convention.

The Assembly's testimony reflected the commitment of the entire Armenian-American community and its united and unequivocal support to end the scourge of genocide that sadly continues to plague humanity, despite the dedicated work of so many talented and passionate individuals from the late Senator Proxmire to the late Congressman Tom Lantos, Chairman of the House Foreign Affairs Committee, and organizations such as the Near East Relief chartered by Congress in 1919 and the important work of the Save Darfur Coalition and Investors Against Genocide to name a few.

The United States has much to be proud of, including its groundbreaking humanitarian intervention during the first genocide of the twentieth century against the Armenian people, which U.S. Ambassador Henry Morgenthau to the Ottoman Empire described as a "campaign of race extermination." The relief provided to the survivors of the Armenian Genocide helped save thousands of lives.

However, as the Genocide Prevention Task Force notes in its recommendations to Congress "while the United States has much to its credit, candor demands acknowledgment that it has not always lived up to the aspirations codified in the Genocide Convention..."

Time and time again, and especially in the case of U.S. reaffirmation of the Armenian Genocide, we have seen the effects of entrenched interests that thwart genocide affirmation and prevention efforts. In fact, millions upon millions of dollars by foreign entities have been spent to deny the Armenian Genocide, and in turn the proud chapter in American history in alerting the world to man's inhumanity to man and marshalling resources to help save the survivors. As a result, U.S.

credibility and leadership are compromised, which undermines American values and threatens core national interests. The corrosive nature of genocide denial can have dangerous spillover effects and empower would be evil-doers to commit mass atrocities.

The drafters of the Genocide Convention recognized that punishment alone was not enough, as it aspired for the prevention of genocide. Prevention, whether of a single crime, or atrocities on the scale of genocide, starts with education. The Genocide Prevention Task Force has called upon Congress to invest \$250 million annually in "crisis prevention and response." While this is an important step, this needs to be augmented with additional funding directed specifically for genocide education. Education and affirmation are critical elements to prevent genocide and combat denial. Both are part of the Armenian Assembly's core work for these many decades. In that regard, we strongly support passage of S.Res. 316, introduced by your colleague Senator Robert Menendez, which reaffirms the Armenian Genocide, as critically important to confront genocide denial. We urge the Members of this Subcommittee to cosponsor this bipartisan human rights legislation.

As this Subcommittee continues to actively review additional mechanisms to better protect individuals from gross violations of human rights and potential future genocides, we also urge you to enact legislation that ensures a strong education component for our nation's educational system to address the ongoing consequences of genocide denial, the case of the Armenian Genocide being a prime example. As Nobel Laureate Elie Wiesel stated, "Remember: silence helps the killer, never his victims."

On behalf of the Armenian Assembly and the Armenian-American community across the country, we commend this Subcommittee's commitment to human rights issues and look forward to its continued leadership as we work together to end the vicious cycle of genocide and give true meaning to the words "never again." "America," as President Barack Obama has previously stated, "deserves a leader who speaks truthfully about the Armenian Genocide and responds forcefully to all genocides."

Thank you.

STATEMENT OF
THE CAMPAIGN FOR A NEW DOMESTIC HUMAN RIGHTS AGENDA
SUBMITTED TO
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
UNITED STATES SENATE
FOR
THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES
WEDNESDAY, DECEMBER 16, 2009

The Campaign for a New Domestic Human Rights Agenda commends Chairman Durbin, Ranking Member Coburn and the other esteemed members of the Subcommittee on Human Rights and the Law of the Senate Committee on the Judiciary for convening the first, of what we hope will be many hearings regarding domestic human rights. The Campaign is a coalition of more than 50 human rights, civil rights and social justice organizations joined by our interests in strengthening this country's commitment to human rights at home and abroad. We are working to create a national political culture that supports and advocates for human rights. To this end, as we seek to achieve the following objectives:

- to revitalize an Interagency Working Group on Human Rights to coordinate the efforts of the Executive departments and agencies both to promote and respect human rights and to implement human rights obligations in U.S. domestic policy;
- to transform the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights, to expand its mandate to include not only the civil and human rights issues facing members of the LGBTI community, but also monitoring human rights implementation and enforcement efforts, and to make structural reforms to improve the Commission's ability to function as an independent national human rights institution;
- to ensure meaningful government compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, which the U.S. has ratified; and
- to strengthen federal, state, and local government coordination in support of human rights.

Enforcement and implementation of this country's human rights obligations are central to furthering the Campaign's key objectives. Consequently, we welcome the opportunity to submit a statement addressing these issues to this Subcommittee.

The Obama Administration has declared itself ready to lead by example in what it has dubbed an era of both engagement and responsibility.¹ Engagement requires full participation in international and

¹Remarks by President Barack H. Obama to the United Nations General Assembly, United Nations Headquarters, New York, New York (September 23, 2009). http://www.whitehouse.gov/the_press_office/remarks-by-the-president-to-the-united-nations-general-assembly/

regional human rights institutions guided by the principles these institutions are intended to uphold. Accordingly, full participants, *inter alia*, both review the human rights records of others and submit their records to their peers for review. These two functions are symbiotic in that the legitimacy of a participant as the reviewer depends, in large part, on the participant's record and conduct as the reviewed. In a world in which human rights are universal, responsibility helps to define the terms by which full participants are expected to engage. As interpreted by the Administration, this responsibility makes the legitimacy of United States global leadership contingent on both repudiating the exceptionalism with which this country has come to be associated and recommitting the country to upholding the human rights principles that are central to both U.S. and international law.

The Administration's articulated commitment to human rights principles and law implicates Congress' authority and responsibility to oversee the implementation and enforcement of our domestic human rights obligations. Indeed, rigorous and transparent congressional oversight is an essential, but largely unexplored area of legislative authority. It is one of the constitutional checks and balances designed to avoid any one of the three co-equal branches of the federal government accreting power at the expense of the others.² After eight years of ever-expanding Executive authority largely at the expense of Congress, efforts such as this hearing promise to put us on the path to realigning Congress and the Executive as the political co-equals the Constitution contemplates. Failing to assume these duties creates a vacuum in which the power of the Executive branch goes unchecked, leaving human rights particularly susceptible to being violated with impunity.

The power of congressional oversight of the implementation and enforcement of the treaties to which we are a party must be exercised carefully. This oversight authority sits at an intersection of political power mediated by the Constitution's checks and balances. Crafting the singular identity of the United States in the global community in which treaties are made and ratified is not an exclusively Executive function. Rather, it is shaped by constitutional imperatives regarding congressional power that include this subcommittee's oversight functions which are designed to ensure executive orders and other lawful unilateral mechanisms are used to further, rather than thwart, human rights standards, norms and values. This is the context in which our treaty obligations should be assumed, implemented and enforced.

The Obama Administration's "Era of Engagement and Responsibility" signals a significant change in how the United States both sees and conducts itself as a member of the international community. The Campaign welcomes the new direction in which the Administration appears to be moving, but we are concerned that the President's rhetorical commitment to human rights at home has not yet been followed with the types of concrete measures needed to fully address the substantive issues and problems addressed by the testimony and other statements that comprise this hearing's record. In the true spirit of bi-partisanship and inter-branch cooperation that acknowledges the American roots of human rights, it is only fitting that this subcommittee would also signal a change of course in the 111th Congress regarding the seriousness with which Senators such as the members of this esteemed subcommittee have taken their special responsibilities in the area of human rights. If, as Eleanor Roosevelt believed, human

² As the Supreme Court has observed, "[e]ven a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (contending that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity").

rights begin in “the [small] places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination,” then human rights must mean something “close to home.” Indeed, as Mrs. Roosevelt noted, “[u]nless these rights have meaning here, they have little meaning anywhere.”³ We applaud the subcommittee for taking this initial step to more clearly define Congress’ role in domestic human rights matters.

Clarifying Congress’ role in human rights treaty implementation and enforcement can also create a site for meaningful participation of those communities most affected by the human rights issues within this subcommittee’s jurisdiction. This hearing is an important intervention in the continuing conversation between the Executive branch, multilateral institutions, and civil society regarding the nature and scope of our country’s domestic human rights obligations. It is also a critical first step in assessing the extent to which legislation is needed to bring the United States into full compliance with the treaties it has ratified.

As the previous administration worked through a backlog of overdue treaty reports, members of civil society used these treaty compliance reviews to highlight, *inter alia*, the views and voices of those most affected by human rights violations. Like advocates before us, we strove to further “the rights which the world accords to [all], clinging unwaveringly to those great words which the sons [and daughters] of the Fathers would fain forget: ‘We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.’”⁴ From New York to Geneva to Durban, civil society labored assiduously to influence how this country’s human rights record was reviewed.⁵ For much of the past decade, most of our efforts in Washington were directed towards an Executive branch for which civil society consultation was, more often than not, an afterthought. This was compounded by the absence of an obvious congressional forum which civil society could access to have its domestic human rights concerns heard. Consequently, human rights advocates were forced to seek some relief in international fora for, what are essentially, matters of domestic law and policy. This unprecedented hearing, however, fills a gap in our treaty implementation and enforcement efforts. We are encouraged that, with the advent of this hearing, civil society now has a legislative forum in Washington to hear and address its human rights concerns.

While there are scores of issues that have been debated as part of our domestic human rights record, the remainder of this submission focuses on the need for a domestic human rights infrastructure. Whether expressed as concerns about either the absence of mechanisms for intra- and inter-branch government coordination or the paucity of data and analysis of treaty enforcement and implementation at the state and local level, treaty-bodies have consistently called on the United States to create a human

³ Eleanor Roosevelt at the presentation of “In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights” (March 27, 1958) <http://www.udhr.org/history/inyour.htm>

⁴ W.E.B. DuBois, *Of Mr. Booker T. Washington and Others* in *THE SOULS OF BLACK FOLKS* 392, 404 (The Library of America, 1986).

⁵ See e.g. Memorandum to Members of the U.N. Human Rights Committee from U.S. Civil Society Organizations and Advocates Re: List of concerns for the review of the U.S. Second and Third Periodic Report (January 9, 2006) http://www2.ohchr.org/english/bodies/hrc/87ngo_info.htm; US Human Rights Network, A Summary of U.S. NGO responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination (February 2008) <http://www2.ohchr.org/english/bodies/ceerd/ceerds72-ngos-usa.htm>.

rights infrastructure.⁶ In light of the particularities of this country, such an infrastructure must respect the separation of powers, federalism and state police powers on which our government rests.⁷ Consequently, this subcommittee has an important role to play that complements the role played by the Executive departments and agencies in meeting our human rights obligations.

Firstly, two of the three treaty-bodies to which the United States reported recently noted the need for coordinated implementation involving federal, state and local governments to fully implement the treaties to which we are a party.⁸ Key to addressing these concerns is reestablishing an Executive Interagency Working Group on Human Rights (IAWGHR) which would coordinate intra-branch human rights efforts and serve as point of contact for inter-branch efforts, including the oversight matters within the jurisdiction of this subcommittee. This working group is an important step in re-establishing the U.S.

⁶ Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6 (8 May 2008) (recommending that the United States not only “consider the establishment of an independent national human rights institution in accordance with the Paris Principles,” but also “establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels”). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>; Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3/Rev.1 (18 December 2006) (expressing regret “that only limited information was provided on the implementation of the Covenant at the State level”) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>

⁷ As the CERD acknowledged, members of the Bush Administration admitted the federal government was “bound to apply the Convention throughout its territory and to ensure its effective application at all levels, federal, state, and local, regardless of the federal structure of its Government.” Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6 (8 May 2008). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>; *see also* Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendation of the Committee against Torture, United States of America, CAT/C/USA/CO/2 (25 July 2006) (observing that the United States “has a federal structure, but recalls that the United States of America is a single State under international law and has the obligation to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”) in full at the domestic level”). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement>

⁸ Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6 (8 May 2008). (noting “that no independent national human rights institution established in accordance with the Paris Principles (General Assembly resolution 48/134, annex) exists in the State party (art. 2)” and noting “with concern the lack of appropriate and effective mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels”). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>. *See also* Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3/Rev.1 (18 December 2006) (requesting that the United States “include in its next periodic report information...on the implementation of the Covenant as a whole, as well as about the practical implementation of the Covenant, the difficulties encountered in this regard, and the implementation of the Covenant at state level” and encouraging it “to provide more detailed information on the adoption of effective mechanisms to ensure that new and existing legislation, at federal and at state level, is in compliance with the Covenant, and about mechanisms adopted to ensure proper follow-up of the Committee’s concluding observations”). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>;

as a leader in human rights and respect for the rule of law, as well as ensuring that we abide by the same human rights treaties that we expect other countries to follow. These reforms at the national level would help to create a better system of accountability around the United States' domestic and international human rights obligations, as well as to coordinate and support state and local efforts to make human rights real in the "small places...close to home," to which Mrs. Roosevelt referred.

Secondly, in 2008 the CERD called on the U.S. government "to establish an independent national human rights institution in accordance with the Paris Principles."⁹ Key to addressing these concerns is creating a US Commission on Civil and Human Rights which would not only be an independent, non-partisan national human rights institution, but also establish the credibility needed to fully engage in the UN system because of the important role played by such a commission in terms of monitoring compliance with human rights obligations. Expanding the Commission's mandate will enhance its ability to address contemporary civil and human rights matters and restore these issues to the prominence they deserve.

Finally, all of the concerns about the enforcement and implementation issues raised in this submission leave unaddressed the centrality of the struggle for racial justice to our country's attempts to overcome the constitutional compromise that made humanity contingent on race. This, however, is not merely a matter of history. Indeed, "[d]espite the achievements of the civil rights movement and many years of striving to achieve equal rights for all, racism still exists in our country and we continue to fight it."¹⁰ For this reason, the Administration has declared itself "strongly committed to fighting racism and discrimination, and acts of violence committed because of racial or ethnic hatred."¹¹ To this end, promoting dignity, fairness, and opportunity for all at home must be central to U.S. efforts to transform the rhetoric of human rights into a human rights reality. This is particularly true for those whose poverty, gender, national origin, religion, age, immigration status, or disability makes them susceptible to the types

⁹ Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6 (8 May 2008). <http://daccess-dds-ny.un.org/doc/UNDOC/GF/N/G08/419/82/PDF/G0841982.pdf?OpenElement>.

The Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights are commonly known as the "Paris Principles." These principles require national human rights institutions to have the following (a) a clearly defined and broad-based mandate, based on universal human rights standards; (b) independence guaranteed by legislation or the constitution; (c) autonomy from government; (d) membership that broadly reflects the society; (e) adequate powers of investigation; and (f) sufficient resources. The Paris Principles have been endorsed by the UN Commission on Human Rights (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993, annex). They also form the basis for accreditation of national human rights institutions at the international level by the International Coordinating Committee. This accreditation determines, *inter alia*, whether a national human rights institution can participate in the regular sessions of the United Nations Human Rights Council, to which the United States was elected earlier this year. <http://www2.ohchr.org/english/law/parisprinciples.htm> Consequently, the people of the United States cannot access all the possible points of advocacy in the Human Rights Council around domestic human rights issues because the United States has no national human rights institution. This absence will be felt in late 2010 when the United States participates in its Universal Periodic Review, a Human Rights Council process that contemplates input from both members of civil society and national human rights institutions.

¹⁰ U.S. Department of State – Bureau of Democracy, Human Rights and Labor, U.S. Human Rights Commitments and Pledges (April 16, 2009). <http://www.state.gov/g/drl/rjs/fs/2009/121764.htm#>

¹¹ *Id.*

of prejudice on which human rights violations are based. Far too often, these are the individuals whose race renders them overrepresented among those whose rights not only are routinely violated but also lack any clear remedy for their violation. As long as black and brown people are disproportionately poor, incarcerated, uneducated, homeless, and sick, this country has an obligation to remedy, rather than to explain, these obvious racial disparities. In this case, leading by example would require measures such as a comprehensive action plan for ICERD implementation featuring meaningful multilateral, government and civil society cooperation and consultation, as well as other legislation designed to put us on the path to full compliance with both the letter and the spirit of the treaty.

We thank the Subcommittee for joining the efforts of the Obama Administration and members of civil society to write a new chapter in the American book of domestic human rights. We look forward to making use of this congressional forum as we bridge the unnecessary divisions wrought by last century's Cold War and the ways in which this conflict tainted ideas that form the core beliefs of a country that often finds itself unable to meet its own articulated aspirations. As we embark on the Twenty-First Century, we are determined to redouble our efforts to assume the responsibilities of engagement. We also understand the enormous challenge of working to ensure human rights are respected, protected and fulfilled both at home and abroad. But, as Mrs. Roosevelt warned, "[w]ithout concerted citizen action to uphold [human rights] close to home, we shall look in vain for progress in the larger world."¹² This is the spirit in which we commit ourselves to advocate for the enforcement and the implementation of U.S. human rights obligations.

¹² Eleanor Roosevelt at the presentation of "In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights" (March 27, 1958)
<http://www.udhr.org/history/inyour.htm>

the CAMPAIGN *for the* FAIR
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December 14, 2009

The Honorable Dick Durbin
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, DC 20510

cc: Senate Judiciary Committee's Subcommittee on Human Rights and the Law

Dear Senator Durbin,

We commend you for holding a hearing about the U.S.'s obligations to international human rights treaties. On behalf of the Campaign for the Fair Sentencing of Youth, I'd like to thank you for your leadership on this issue. This hearing is a crucial step toward ensuring that the human rights of all Americans, particularly our children- a most vulnerable population- are protected here at home.

The Campaign for the Fair Sentencing of Youth is composed of national and state-based organizations, and individuals dedicated to ending the practice of sentencing youth to life in prison without hope for release. We believe that youth should be held accountable for their crimes in a way that reflects their age and potential for growth. Punishment of youth should be focused on rehabilitation and reintegration into society.

We work in more than fifteen states around the country to research current practices and advocate for fair, equitable sentencing of youth. Commendably, eleven states either forbid juvenile life without parole (JLWOP) or presently have no such juvenile offenders that we know of serving that sentence. The states that currently prohibit JLWOP are: Alaska, Colorado, Kansas, Kentucky, and Oregon. The District of Columbia also forbids JLWOP. The states where there are no people known to be serving JLWOP are: Maine, New Jersey, New Mexico, New York, Vermont, and West Virginia. The federal government also sentences youth to LWOP—there are currently at least 37 people serving JLWOP in federal prison.

Notably, there are no other countries in the world that sentence youth to life without the possibility of parole. International human rights law prohibits life without parole sentences for those who commit their crimes before the age of 18, a prohibition that is universally applied outside of the United States. The United

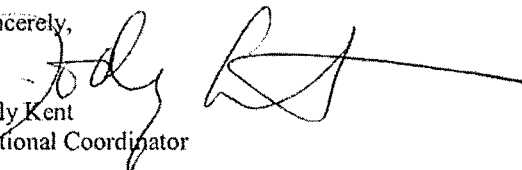
Nations (UN) Convention on the Rights of the Child (CRC) explicitly prohibits life without parole sentences for youth. Last month Somalia announced its plan to ratify the CRC, which will leave the United States as the only country a party to the UN that has not yet ratified the treaty. Additionally, JLWOP violates or drastically undermines at least three international treaties to which the United States is a party: the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination. The international committees responsible for monitoring compliance with these treaties have criticized the United States for its continued use of JLWOP as a form of punishment.

Despite popular thinking, JLWOP is not reserved for only the most serious crimes or the most violent criminals. The majority of people serving JLWOP were first-time offenders. One-quarter of them were convicted of "felony murder," which means they were participants in an underlying crime, which resulted in death. In other words, while these youth may have intended to commit some crime (for instance, robbing a store), they did not intend for anyone to be killed. Others sentenced to life without parole were convicted of crimes on a theory of accountability, which means that they were not the actual perpetrators of the crime.

The Supreme Court heard arguments last month in two Eighth Amendment challenges to JLWOP sentences. The cases, *Joe Harris Sullivan v. Florida* and *Terrance Jamar Graham v. Florida*, are striking examples of just how wrong-headed this law is. They highlight the fact that action is needed so that all 2,574 of these youth cases can be reviewed.

The United States is out of step with the rest of the world in its practice of sentencing youth to die in prison. This overly-harsh and unnecessary practice strips youth of hope and the opportunity to rehabilitation- a human right. In order to come into compliance with its treaty obligations, the U.S. must reform federal and state sentencing laws to ensure that they acknowledge the critical difference between youth and adults, and impose an age-appropriate sanction that recognizes a young person's potential for growth and reform.

Sincerely,


Jody Kent
National Coordinator

cc: Senate Judiciary Committee's Subcommittee on Human Rights and the Law

**STATEMENT OF THE
CENTER FOR JUSTICE AND INTERNATIONAL LAW ON
U.S. COMPLIANCE WITH THE OAS CHARTER AND THE
AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN**

Senate Judiciary Committee
Subcommittee on Human Rights and the Law
"The Law of the Land: U.S. Implementation of Human Rights
Treaties"
December 16, 2009



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I. Introduction

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee, it is a privilege to submit this written statement on behalf of the Center for Justice and International Law (CEJIL). We greatly value the Subcommittee's interest in the important issue of U.S. implementation of human rights treaties, and we are grateful for this opportunity to provide observations on the United States' compliance with its obligations under the Charter of the Organization of American States ("OAS Charter") and the American Declaration of the Rights and Duties of Man ("American Declaration").

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CEJIL is a regional organization dedicated to the defense and promotion of human rights, whose principal objective is to ensure the full implementation of international human rights norms in the Member States of the OAS, through the effective use of the Inter-American System for the Protection and Promotion of Human Rights ("Inter-American System" or "System").

CEJIL currently represents more than 12,000 victims of human rights violations before the Inter-American System, in conjunction with attorneys, nongovernmental organizations, and other human rights defense organizations throughout the Americas.¹ Furthermore, through its program to strengthen the Inter-American System, CEJIL

¹ For more information, see the CEJIL Activities Report 2006/2007 at www.cejil.org. Between 2006 and 2007, CEJIL, through its legal defense program, represented victims in 10 of the 31 contentious cases ruled on by the Inter-American Court of Human Rights. In 2006 and 2007, CEJIL represented victims in 173 cases before the Inter-American Commission on Human Rights, or 13.8% of all active cases before the Commission in 2007.

has launched a variety of initiatives within the framework of the OAS, the Inter-American Commission and the Inter-American Court of Human Rights, with a view to ensuring greater protection for human rights in the hemisphere. To this end, CEJIL has published studies on topics associated with strengthening the System, including compliance with the decisions of the Commission and the Court.²

We believe that the United States' compliance with its human rights treaty obligations is critically important for the U.S., its citizens and residents, and the world. Even in strong democracies with a longstanding commitment to the rule of law, human rights treaties serve to safeguard fundamental rights. All Americans benefit, therefore, when the U.S. commits itself to upholding certain basic standards of human dignity, and then takes concrete steps to meet these commitments.

Just as importantly, the United States sends a powerful message to the world when it assumes human rights treaty obligations and subjects itself to international scrutiny. The United States' historical role as a leader in the development of human rights law cannot be questioned; increasingly, however, its continuing leadership on human rights issues must be earned. This is especially so in the Americas, where almost all countries are democratic and many have subjected themselves to the full range of human rights treaties and mechanisms offered by the Inter-American human rights system. In this context, the U.S.'s ability to speak forcefully about backsliding on human rights and democracy in the hemisphere has been eroded in recent years, as neighboring countries—particularly in Latin America—challenge the United States' legitimacy to raise human rights concerns on the ground that the U.S. refuses to hold itself to the same standards that it uses to measure others.

The comments that follow offer just an introductory glimpse into some of the issues surrounding U.S. implementation of the OAS Charter and the American Declaration. We hope that they will nonetheless prove useful to the Subcommittee as it begins to study the current state of U.S. implementation of international human rights treaties. We again commend the Subcommittee for this initiative, and look forward to future opportunities to discuss the United States' obligations vis-à-vis the Inter-American human rights system.

² See CEJIL, *Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, Normativa y Experiencias Nacionales* (2007); Michael Camilleri and Viviana Krsticevic, "Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System", in *Derechos Humanos, Relaciones Internacionales y Globalización* (2nd edition), (forthcoming).

II. Background: the United States and the Inter-American human rights system

The United States is a founding member of the Organization of American States. The OAS, in turn, establishes the protection of human rights as one of its founding principles. The 1948 OAS Charter, ratified by the United States in 1951, proclaims in its preamble that “the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.” Several provisions of the OAS Charter mention fundamental rights, but it was left to the American Declaration of the Rights and Duties of Man to enumerate and define these rights.³ The Charter also announced the creation of an Inter-American Commission on Human Rights⁴.

The American Declaration, adopted at the OAS’ birth in 1948, is not itself a treaty, but it has been understood to embody the human rights obligations that States accept upon ratifying the OAS Charter⁵. Over time, the Inter-American human rights system has evolved to include not only the Inter-American Commission but also an Inter-American Court of Human Rights. In addition, in 1969 the American Convention on Human Rights (“American Convention”) was adopted by the OAS, and it has since been ratified by 25 Member States. The United States, of course, has signed but not ratified the American Convention, and it has not accepted the jurisdiction of the Inter-American Court. Nonetheless, the Inter-American Court has ruled in an advisory opinion that by virtue of the treaty obligations contained in the OAS Charter, the American Declaration constitutes a source of binding international obligations for all OAS Member States, including the U.S.⁶ Furthermore, the Inter-American Commission is authorized by the Charter and its Statute to issue binding interpretations of the American Declaration.⁷

³ See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 39.

⁴ OAS Charter, art. 106.

⁵ See *id.*

⁶ See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 45.

⁷ See *id.*, para. 41.

Notwithstanding this background, the United States government has consistently refused to accept the American Declaration as a source of binding international legal obligations. Instead, the U.S. maintains that with regard to non-states parties to the American Convention, the Inter-American Commission is limited to issuing non-binding “recommendations” in response to individual petitions claiming violations of the Declaration.⁸ Furthermore, the U.S. refuses to recognize the Commission’s authority to request precautionary measures (injunctive relief) of non-parties to the Convention⁹. The United States generally engages with proceedings before the Commission (albeit superficially so at times), responding to briefs and requests for information, and appearing at hearings. There remains, however, a legal controversy of great significance underlying the United States’ relationship with the Inter-American human rights system. While the Inter-American Commission and Court interpret the OAS Charter as providing a treaty basis for issuing binding interpretations of the United States’ human rights obligations under the American Declaration, the U.S. denies that such authority exists (this position has not changed under the Obama Administration). Unless and until the U.S. ratifies the American Convention—a step that we urge the Senate to seriously consider—this problem of interpretation will continue to constitute a fundamental obstacle to U.S. compliance with the OAS Charter and the American Declaration.

Finally, it is worth noting that, despite the aforementioned jurisdictional controversy, U.S. citizens continue to appeal to the Inter-American Commission in significant numbers. Between 2004 and 2008, for example, 369 individual petitions were presented before Inter-American Commission against the United States.¹⁰ Only a handful of Latin American countries, all of which have ratified the American Convention and accepted the jurisdiction of the Court, had more individual petitions during this time.

III. U.S. compliance with decisions of the Inter-American Commission on Human Rights

As mentioned, every year the Inter-American Commission continues to receive and process dozens of individual petitions alleging violations of the American Declaration by the United States government. When it deems necessary, the Commission also requests that the United States adopt precautionary measures to protect the rights of individuals from imminent harm. The U.S. government, represented by

⁸ See IACHR, Report No. 63/08, para. 41; Report No. 52/02, para. 92.

⁹ See *id.*

¹⁰ See IACHR Annual Reports, 2004-2008.

the State Department and other federal agencies, generally participates in these proceedings, though its responses to precautionary measures requests are generally procedural in nature (i.e. denying the Commission's authority to request that the United States adopt such measures).

Notwithstanding the number of petitions filed against the United States, the Commission has reached a merits decision (the final decision of the Commission in contentious cases presented before it) in relatively few of these cases. The Commission is currently monitoring U.S. compliance with 13 merits decisions issued since 2000. Of these, ten are death penalty cases, while the other three concern, respectively, the detention of Mariel Cubans, voting rights in the District of Colombia, and indigenous property rights. According to the Commission's latest review, the U.S. has failed to comply in four of the 13 cases, it has partially complied in eight of the cases, and it has fully complied in just one case.¹¹ These figures are somewhat misleading, however, insofar as they suggest a greater willingness to comply with Commission judgments than actually exists. Indeed, when the Commission issues a decision against the United States, the U.S. government's customary response is to issue a statement expressing that it disagrees with and declines the Commission's recommendations.¹²

In cases where the Commission has deemed the U.S. to be in partial or full compliance with Commission recommendations, compliance has sometimes occurred in spite of—rather than because of—the actions of the executive branch. The only recent case in which the U.S. has fully complied with the Commission's recommendations, the 2002 *Miguel Domingues* decision, is a case in point. The Commission recommended that the U.S. commute the sentence of Mr. Domingues, who had been sentenced to death for two homicides that occurred when he was 16 years old.¹³ The Commission further recommended that the United States "review its laws, procedures and practices to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age."¹⁴ The initial response of the U.S. government was to state that it did not accept the Commission's conclusions and recommendations, and to ask that the merits decision be "withdrawn."¹⁵ Subsequently, however, the United States Supreme Court ruled in *Roper v. Simmons* that the

¹¹ See IACHR 2008 Annual Report.

¹² See, e.g., IACHR, Report No. 63/08, para. 98; Report No. 91/05, para. 95.

¹³ IACHR, Report No. 62/02, para. 113.

¹⁴ *Id.*

¹⁵ *Id.*, para. 90.

juvenile death penalty violated the Eighth Amendment of the Constitution; this decision had the practical effect of bringing the U.S. into compliance with both of the Commission's recommendations in the *Miguel Domingues* case.¹⁶ In addition, the *Roper* decision brought the U.S. into partial compliance with four other Commission judgments in similar juvenile death penalty cases.¹⁷

The remaining cases in which the U.S. has achieved "partial compliance" are death penalty cases in which the Commission found, *inter alia*, that the U.S. had failed to adequately guarantee the defendant's right to consular assistance. Here, however, the executive branch does appear to have made some effort to comply with one of the Commission's recommendations, namely that the U.S. "ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance."¹⁸ While conveying its disagreement with the Commission's decision (as is its custom), the U.S. government has nevertheless in these cases expressed that it "takes its obligations under the Vienna Convention regarding consular notification and access very seriously."¹⁹ Subsequently, the U.S. has informed the Commission that the State Department has carried out an "aggressive program of awareness", distributing training materials and conducting 350 seminars on the right to consular assistance throughout the United States.²⁰ The Commission considered these actions sufficient to bring the U.S. into partial compliance in a series of cases where consular assistance rights had been violated.²¹ Still, the U.S. has shown little if any willingness to provide redress for the individual violations of consular assistance rights detected by the Commission.

Though a full analysis of U.S. compliance with precautionary measures is beyond the scope of this statement, it is worth mentioning that many of the most egregious examples of U.S. non-compliance with Commission decisions have occurred when the United States executed a death row inmate in defiance of a request to suspend the execution pending resolution of the inmate's case before the Commission. The Commission has understandably reacted with great

¹⁶ See IACHR 2008 Annual Report, ch. 3, paras. 707-710.

¹⁷ IACHR reports No. 97/03, No. 100/03, No. 101/03, and No. 25/05.

¹⁸ See, e.g., IACHR, Report No. 99/03, para. 72.

¹⁹ See, e.g., IACHR, Report No. 52/02, para. 95.

²⁰ See IACHR 2008 Annual Report, para. 730.

²¹ IACHR Reports No. 52/02, No. 99/03, No. 1/05, and No. 91/05.

frustration on the occasions that this has occurred,²² publicly denouncing the decision to proceed with execution in the following terms:

The failure of a Member State of the Organization of American States, including the United States, to preserve a condemned prisoner's life pending review of his or her petition [to the Commission] contravenes its international legal obligations by undermining the effectiveness of the Commission's procedures, depriving condemned persons of their right to petition before the Inter-American Human Rights System, and resulting in serious and irreparable harm to a petitioner's most fundamental right, the right to life.²³

In at least one of these cases, that of Mexican citizen José Ernesto Medellín, the U.S. did at least make an effort to communicate the precautionary measures request to the relevant authorities. On June 23, 2008, the then-U.S. Permanent Representative to the OAS forwarded the precautionary measures request to the governor of Texas, the attorney general of Texas, and the presiding officer of the Texas Board of Pardons and Paroles. Nevertheless, the state of Texas executed Mr. Medellín on August 5, 2008, highlighting the challenge that federalism can pose even in those rare cases where the executive branch is inclined to comply with a decision by the Inter-American Commission.²⁴

IV. Conclusions and Recommendations

This brief statement has aimed to provide the Subcommittee a snapshot of the issues, challenges and trends with regard to U.S. implementation of its obligations under the OAS Charter and the American Declaration of the Rights and Duties of Man. As described, significant levels of non-compliance exist with respect to decisions by the Inter-American Commission regarding the United States. Even when compliance has been partially or fully achieved, it has often been a result of a fortuitous judicial decision rather than a genuine concern with compliance on the part of the executive branch of the U.S. government. Indeed, the State Department consistently expresses its disagreement with the Commission whenever an unfavorable judgment

²² See IACHR, Press Releases No. 22/06, 33/08, and 35/08.

²³ IACHR, Press Release No. 35/08.

²⁴ For a more complete discussion of the Medellín case and the related litigation before the Supreme Court and the International Court of Justice, see related statement to the Subcommittee on the *Avena* judgment by Professor Sandra Babcock and others.

is issued, while also reminding the Commission that it considers the body's recommendations non-binding.

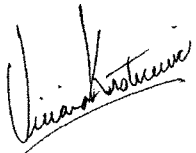
Against this backdrop, the U.S. Congress can and should take a series of steps to facilitate compliance with the United States' Inter-American human rights treaty obligations:

- The Subcommittee on Human Rights and the Law should continue holding hearings on the implementation of human rights treaties in the U.S.; one of these hearings should be dedicated to examining the U.S.' implementation of the OAS Charter and the American Declaration.
- Congress should encourage the State Department to reconsider its stance regarding the Inter-American Commission's authority to issue binding recommendations in cases and/or precautionary measures proceedings involving the United States. Whether or not such reconsideration eventually occurs, the legislature should urge the State Department to create a permanent treaty implementation mechanism that evaluates the validity and viability of all recommendations issued by the Commission and other international human rights bodies,²⁵ thus ceasing the practice of simply dismissing the Commission's recommendations as a matter of routine. This treaty implementation mechanism would also communicate Commission recommendations to the relevant state and local authorities, as well as coordinate efforts to comply with recommendations that lie within the exclusive purview of the executive branch of the federal government.
- Congress should monitor Commission decisions, which sometimes order legislative reforms, and move independently to enact the required reforms.
- The Senate should seriously consider ratifying the American Convention on Human Rights, a human rights treaty substantially similar to the International Covenant on Civil and Political Rights, to which the U.S. is already a party. Ratifying the American Convention would remove the ambiguity surrounding the status of U.S. legal obligations in the Inter-American system, and reaffirm the United States' continued leadership on issues of human rights and democracy in the

²⁵ For a discussion of similar mechanisms in other Member States of the OAS, see Viviana Krsticevic, "Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos," in CEJIL, *Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, Normativa y Experiencias Nacionales* (2007).

Americas. It is also worth recalling that ratification of the American Convention does not automatically subject a country to the jurisdiction of the Inter-American Court, and that concerns regarding specific provisions of the Convention could be addressed through an appropriate set of reservations, understandings and declarations.

Respectfully submitted,



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Michael J. Camilleri
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**Written Statement of the Center for Reproductive Rights
Submitted to the United States Senate Judiciary Committee
Subcommittee on Human Rights and the Law**

**For December 16, 2009 Hearing on:
"The Law of the Land: U.S. Implementation of Human Rights Treaties"**

The Center for Reproductive Rights (the Center) welcomes the opportunity to submit testimony to the Senate Judiciary Subcommittee on Human Rights and Law for this historic hearing on U.S. treaty implementation. We applaud the Subcommittee for holding this hearing and recognizing the importance of promoting respect for human rights in the United States and for encouraging compliance with our obligations under international human rights treaties.

The Center is a global human rights organization that uses constitutional and international law to promote women's equality by establishing access to reproductive health care and control over reproductive health decisions as fundamental rights that all governments around the world must respect, protect and fulfill.

Reproductive rights include a woman's right to make fundamental decisions about her life and family, to access the reproductive health services necessary to protect her health, and to decide whether and when to have children. Reproductive rights are based on a number of fundamental human rights, including the rights to health, life, equality, information, education and privacy, as well as freedom from discrimination and torture and cruel and degrading treatment. Many of these rights are reflected in, and protected by, the three human rights treaties ratified by the United States: the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture.

Our statement discusses three ways in which the U.S. can improve human rights implementation within its borders. First, the U.S. has already undergone UN reviews for its compliance with the three human rights treaties it has ratified. The federal government should take steps to address and implement the recommendations from these reviews. Our statement focuses on specific recommendations concerning reproductive rights and health. Second, to ensure ongoing compliance with its human rights obligations, the U.S. should adopt meaningful monitoring and implementation structures. Third, the U.S. should ratify human rights treaties, including the Convention on the Elimination of Discrimination Against Women (CEDAW).

Implementation of UN Recommendations

The U.S. should take steps to address racial disparities in reproductive health

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Many barriers exist for women of color seeking access to essential preventative services such as contraception and prenatal care. A disproportionate number of women of color lack health insurance and are confronted with multiple obstacles in accessing publicly funded health programs, such as eligibility bars and linguistic and cultural barriers to care. Consequently, preventable reproductive health disparities continue to be prevalent in communities of color as a whole, and specifically in women of color.

Despite the highest per capita expenditure on health care in the world, the U.S. has significantly poorer sexual and reproductive health indicators than other western developed countries. Racial disparities help to explain why these rates are so high. For the past five decades, African American women have been dying in childbirth at a rate four times that of white women. A disproportionate number of women of color have incomes below the federal poverty level and lack health insurance or meaningful access to publicly funded health programs, forcing many women of color to forgo prenatal care. Moreover, HIV/AIDS has reached epidemic proportions among women of color, who have the fastest growing infection rate of any population. African American women are 23 times more likely than white women to contract HIV/AIDS, and HIV/AIDS is the number one cause of death for African American women aged 25-34. Finally, women of color face a combination of inadequate sex education in the U.S. and barriers to accessing contraception, leading to disproportionate rates of unintended pregnancy, particularly among teenage women of color.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obligates ratifying countries to take positive steps to address and eliminate racial disparities in health care.¹ Upon review of U.S. implementation of ICERD in February 2008, the UN Committee on the Elimination of Racial Discrimination (CERD Committee) expressed concern about persistent disparities in reproductive and sexual health. In particular, the CERD Committee stated:

wide racial disparities continue to exist in the field of sexual and reproductive health, particularly with regard to high maternal and infant mortality rates among women and children belonging to racial, ethnic and national minorities, especially African Americans, high incidence of unintended pregnancies and greater abortion rates affecting African American women, and growing disparities in HIV infection rates for minority women.²

The Committee recommended that the U.S. take affirmative steps to improve access to contraception, preventative services such as family planning and prenatal care and comprehensive sexuality education.

We urge the federal government to ensure that reproductive health services are adequately covered by the new federal health care reform legislation and that barriers to Medicaid and proposed restrictions on participation in health care exchanges that disproportionately impact

¹ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) arts. 2, 5(e)(iv).

² *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States*, 72nd Sess., 1853-1854th, 1870th mtg., para. 33, U.N. Doc. CERD/C/USA/CO/6 (2008).

women of color, including the five year bar on Medicaid for recent immigrants and the citizen documentation requirements under the Deficit Reduction Act, be eliminated. Because of the disproportionate impact that the Hyde Amendment has on poor women of color, we urge Congress to repeal the Hyde restrictions on Medicaid funding for abortions.

The U.S. should eliminate shackling of pregnant incarcerated women

The use of shackles to restrain pregnant women during the birthing process is a barbaric practice that needlessly inflicts excruciating pain and humiliation. In many U.S. prisons, jails, and detention centers, pregnant women are routinely restrained by their ankles or their wrists when transported for prenatal medical appointments or go to the hospital for delivery, regardless of whether or not they pose a “flight risk.” Pregnant women often remain shackled during labor, delivery, and the post-delivery recovery period, for hours or even days, despite the fact that this practice poses serious, long-term, and otherwise avoidable health risks for the woman and the fetus. In October 2008, the Federal Bureau of Prisons adopted a policy barring the shackling of pregnant inmates in federal prisons in all but the most extreme circumstances; however, the vast majority of women in prison in the U.S. are in state custody. Only five states have enacted legislation restricting the use of shackles during labor and delivery, and there is evidence that even where statutory prohibitions exist, women continue to be shackled during labor and delivery.

The practice of shackling pregnant inmates during the birthing process is prohibited as cruel, inhuman, or degrading treatment by two major international human rights treaties ratified by the U.S., the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) and the International Covenant on Civil and Political Rights (the ICCPR). In 2006, following a review of U.S. implementation of the Torture Convention, the UN Committee Against Torture expressed concern that the United States was not in compliance with the treaty because some of its jurisdictions had yet to abolish the practice of shackling incarcerated pregnant women during the birthing process.³ These concerns were echoed by the UN Human Rights Committee, which recommended that the United States “prohibit the shackling of detained women during childbirth” in order to come into compliance with the ICCPR.⁴ Further, several courts have held that shackling also violates the Eighth Amendment’s prohibition on cruel and unusual punishment.⁵

We commend recent legislation in this area, including the recent passage of a New York law prohibiting shackling of incarcerated women during transport and during labor and delivery. We urge the Senate to adopt all appropriate measures to ensure that women in detention are treated in conformity with our obligations under international human rights law by ensuring compliance with federal policies prohibiting the shackling of pregnant women in federal facilities and by

³ See *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 36th Sess., 702-705th mtg., para. 33 U.N. Doc. CAT/C/USA/CO/2 (2006).

⁴ See *Concluding Observations of the Human Rights Committee: United States of America*, 87th Sess., 2395th mtg., para. 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).

⁵ *Nelson v. Norris*, 583 F.3d 522, 534 (8th Cir. 2009) (finding that by shackling an incarcerated woman during labor, the officer violated her clearly established Eighth Amendment rights); *Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 877 F. Supp. 634, 668-69 (D.D.C. 1994) modified on other grounds, 889 F. Supp. 659 (D.D.C. 1995) (holding that while a woman is in labor, shackling is inhumane and violates her constitutional rights).

encouraging states to abolish the practice of shackling pregnant women during the birthing process.

The US should adopt meaningful implementation structures

In addition to addressing specific recommendations to improve its treaty compliance, the U.S. must create meaningful human rights implementation and monitoring structures to ensure ongoing compliance with its human rights obligations. During United Nations reviews for compliance with human rights treaties ratified by the United States, the lack of an effective human rights infrastructure has been criticized. In February 2008, the ICERD Committee expressed “concern [with] the lack of appropriate and effective mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels.”⁶

The Center joins with other domestic civil and human rights organizations calling for (1) the creation of an inter-agency working group for human rights implementation to serve as a focal point to ensure coordination of all federal agencies and departments around human rights compliance and implementation of our human rights obligations, (2) transformation of the U.S. Civil Rights Commission to the U.S. Commission on Civil and Human Rights to monitor and investigate human rights abuses and (3) federal coordination and support for state and local human rights agencies to undertake implementation of treaty obligations at the subnational level.

We also encourage Congress to actively engage with other branches of government to ensure that treaties are being properly implemented. Congress should consider conducting oversight hearings in which the administration can report back on its participation in the Universal Periodic Review process and UN treaty body reviews, including efforts to engage a broad range of communities and stakeholders and steps undertaken to implement UN recommendations coming out of these processes.

The US should ratify CEDAW and other human rights treaties

By joining the UN Human Rights Council and signing the International Convention on the Rights of Persons with Disabilities, the Obama Administration has signaled its intent for the U.S. to regain its rightful place as a global human rights leader. As part of its commitments and pledges in support of its candidacy for membership to the United Nations Human Rights Council, the Obama Administration stated its commitment to work with the legislative branch to ratify CEDAW.⁷ Given the U.S.’s comparatively low rate of human rights treaty ratification, it is important that the U.S. take concrete steps to make good on its commitment to more meaningful engagement with the international human rights community. As we near the 15th anniversary of the Beijing Declaration and Program of Action, ratification of CEDAW would be an important place to start.

⁶ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States*, 72nd Sess., 1853-1854th, 1870th mtg., para. 13, U.N. Doc. CERD/C/USA/CO/6 (2008).

⁷ Bureau of International Organization Affairs, *U.S. Human Rights Commitments and Pledges: Produced in Support of the United States Candidacy For Membership in the UN Human Rights Council* (April 27, 2009), at <http://www.state.gov/documents/organization/122476.pdf>.

The U.S. is currently one of only a handful of countries that have failed to ratify CEDAW. Treaty ratification would have a significant impact on the protection of the human rights of women both at home and abroad. Engaging in periodic reviews of U.S. compliance with CEDAW would provide an opportunity for U.S. officials to participate in a constructive dialogue with international experts on women's human rights, identifying areas for improvement and sharing best practices. Further, ratifying the treaty will give the U.S. greater legitimacy to combat violations of the human rights of women worldwide. Participation in CEDAW, and the ability to nominate members of the UN Committee that oversees compliance with it, would also give the U.S. an opportunity to ensure that the international community takes the human rights of women seriously.

We urge the Senate to work with the Obama administration towards the ratification of CEDAW in 2010.

Center for the Human Rights of Users and Survivors of Psychiatry

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Center for the Human Rights of Users and Survivors of Psychiatry

Submission to:

**The Law of the Land: U.S. Implementation of Human Rights Treaties
Hearing Before the Senate Judiciary Subcommittee on Human Rights and
the Law
December 16, 2009**

The Center for the Human Rights of Users and Survivors of Psychiatry makes the following recommendations for U.S. implementation of human rights treaty obligations.

- I. General recommendations
 1. The proposals for a revived Inter-Agency Working Group on Human Rights, and for legislation converting the U.S. Civil Rights Commission to a U.S. Civil and Human Rights Commission, should be implemented. These complementary mechanisms will allow for federal-state cooperation and for creation of national policy focused on human rights, and will raise the profile of human rights as an issue for ordinary Americans.
 2. These and other mechanisms dealing with human rights implementation must provide for participation of civil society, particularly for the participation of groups and individuals whose human rights are affected on any given issue. Participation in political processes dealing with human rights implementation is itself a human right (ICCPR Article 25; OHCHR Summary of the Draft Guidelines on a Human Rights Approach to Poverty Reduction, paragraph 16).
 3. The U.S. must enact legislation to fulfill its treaty obligations, where legislation is required by the treaty itself or as a consequence of the non-self-executing declaration. Where human rights obligations require legislation or repeal of legislation by states, the federal government should exercise its constitutional powers to promote the required state action.
 4. The U.S. should adopt the highest human rights standards advanced by the United Nations, including those contained in General Comments and Concluding Observations by treaty bodies, recommendations by Special Procedures mandate holders, and guidelines issued by the Office of the High Commissioner for Human Rights. Human rights standards continue to evolve in a collaborative process involving states, individuals whose rights are affected, and experts. The United States should welcome and participate constructively in the evolution of these standards.

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5. Implementation of existing obligations cannot be divorced from treaty ratification. Thematic treaties, such as the Convention on the Rights of Persons with Disabilities, raise the level of commitment to human rights in areas where binding obligations may otherwise be unclear. In the case of the International Covenant on Economic, Social and Cultural Rights, ratification will complete the acceptance of binding obligations in all areas covered by the Universal Declaration of Human Rights.

II. Specific recommendations

The Center for the Human Rights of Users and Survivors of Psychiatry makes the following recommendations related to the rights of people with psychiatric disabilities.

1. The United States should incorporate into domestic law and policy the standards articulated by the United Nations Special Rapporteur on Torture in relation to torture and persons with disabilities, in his report of July 28, 2008 (U.N. Doc. A/63/175). In particular, the United States should adopt the Rapporteur's standards prohibiting medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose or aimed at correcting or alleviating a disability, without free and informed consent of the person concerned (paragraph 47). The Rapporteur considers treatments such as psychosurgery, electroshock and the administration of mind-altering drugs including neuroleptics, to be instances of intrusive and irreversible treatments aimed at correcting or alleviating a disability (paragraph 40, see also paragraphs 57, 59, 61-63). Such practices without free and informed consent may amount to torture and ill-treatment. The Rapporteur also addresses poor conditions of detention, restraint and seclusion, medical experimentation, compulsory abortion and sterilization, involuntary commitment to psychiatric institutions, and violence in the private sphere, including sexual violence, as practices that may constitute torture or ill-treatment.
2. The report on torture and persons with disabilities has been discussed by the Committee against Torture (in a public meeting on November 17, 2009), which may adopt a similar approach in monitoring obligations under that treaty, to which the United States is a party.
3. Incorporating the standards of the Special Rapporteur into U.S. law would entail:
 - Prohibiting compulsory mental health treatment
 - Ensuring that people with psychiatric disabilities retain the right to

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exercise self-determination at all times, and are provided with support needed to do so

- Providing a wide range of recovery-oriented options for mental health services, including peer support
4. Since mental health treatment, and decision-making in health care, are primarily regulated at the state level, the federal government must involve states in a collaborative effort to implement the human right of people with psychiatric disabilities to be free from torture and ill-treatment. Federal and state governments, including agencies responsible for civil and human rights, disability and mental health, will need to work collaboratively with legislatures, in partnership with people with psychiatric disabilities, to develop appropriate measures, including the repeal or modification of legislation, in line with their human rights obligations.
 5. Ratification of the Convention on the Rights of Persons with Disabilities would provide additional guidance and support to implementation of U.S. obligations to prevent torture and ill-treatment of people with disabilities. The CRPD obligations to conduct awareness-raising campaigns (Article 8), and to closely consult with persons with disabilities and their representative organizations on matters concerning them (Article 4.3), for example, make good sense for the initiatives that will be needed to conform U.S. law and policy to current human rights requirements in relation to the rights of people with psychiatric disabilities.
 6. It should be noted that the new approach based on non-discrimination, autonomy and respect for diversity, is replacing earlier non-binding standards that permitted compulsory mental health treatment, such as the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (U.N. Doc. A/RES/41/119) in the work of United Nations agencies, treaty bodies and independent experts, including the Special Rapporteur on Torture (see paragraph 44 of his report).
 7. The Office of the High Commissioner for Human Rights issued an Information Note on Detention and Persons with Disabilities for Dignity and Justice for Detainees Week, October 6-12, 2008, stating that obligations under the Universal Declaration of Human Rights and the ICCPR, as well as the CRPD, prohibit the deprivation of liberty on the basis of disability, saying that people with disabilities can only be lawfully deprived of their liberty for the reasons, and in accordance with the procedures, that are applicable to others in the same jurisdiction. OHCHR thus joins the Special Rapporteur on Torture in treating involuntary psychiatric commitment as a human rights violation.

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III. Conclusion

1. The rights of people with psychiatric disabilities have been both neglected and addressed in incomplete ways that still allowed a great deal of abuse to continue. In this submission, the Center for the Human Rights of Users and Survivors of Psychiatry has addressed recent changes in the evolving understanding of international human rights obligations that are especially relevant to this constituency. United States policy, as expressed in the recommendations of the New Freedom Commission on Mental Health, emphasizes recovery and consumer involvement, reflecting the same underlying values of self-determination and human rights as the new standards being articulated in the United Nations. The Center hopes that the United States will see these standards, and the recommendations for action made in this submission, as an opportunity to deepen its commitment to human rights in an area where it is much needed to combat serious violence and discrimination.
2. For more information about the Center for the Human Rights of Users and Survivors of Psychiatry, see www.chrusp.org or contact us at center@chrusp.org.

The Honorable Eric Holder
 Attorney General
 U.S. Department of Justice
 Washington, DC 20530

The Honorable Hillary Clinton
 Secretary of State
 U.S. Department of State
 Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We write to express our deep concern over the ongoing failure of the United States to abide by the decision of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, and to urge you to promote congressional passage of legislation implementing that binding judgment. As you know, the ICJ concluded in *Avena* that the United States must provide effective “review and reconsideration” of the convictions and sentences of a group of Mexican nationals who were denied their consular treaty rights, in order to determine in each case if the denial of access to consular assistance was prejudicial. Five years after this binding decision, it is unconscionable that the United States continues to ignore its obligations under *Avena* – particularly after assuring the ICJ more than a year ago that it fully intends to meet those requirements.

When the United States unconditionally ratified the Vienna Convention on Consular Relations (VCCR) forty years ago, it promised to inform all detained foreign nationals of their rights to consular notification and communication “without delay” and to facilitate timely consular access to them. At the same time, the United States voluntarily consented to the ICJ’s jurisdiction to adjudicate any disputes over non-compliance by ratifying the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes. These obligations were applicable at the time of the ICJ’s *Avena* decision; there should be little debate about the unremarkable proposition that the United States must abide by its international commitments if it expects other nations to do so. Adhering to the international rule of law requires, quite simply, abiding by our treaty obligation to give full effect to the compulsory decision of the ICJ in the *Avena* case.

Both at home and abroad, prompt access to consular assistance safeguards the fundamental human and legal rights of foreigners who are arrested and imprisoned. For that reason alone, it is essential that the United States lead by example and provide meaningful remedies for VCCR violations. In addition, any further delay in compliance with *Avena* will once again leave the international community with the perception that the United States ignores its binding legal commitments. This is dangerous on many levels: it erodes our reputation as a reliable treaty partner and undermines the effectiveness of international mechanisms for the peaceful settlement of disputes. It could also have a harmful impact on the millions of U.S. citizens who travel, live or work abroad. As the State Department conceded more than a decade ago in an apology to Paraguay for the U.S.’s failure to comply with the VCCR in a case that resulted in the execution of a Paraguayan national, the United States “must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.”

President George W. Bush commendably attempted to enforce the *Avena* requirement of “review and reconsideration,” recognizing that it was clearly in the national interest to comply with the ICJ’s compulsory decision. However, the Supreme Court subsequently held in *Medellin v. Texas* that the Optional Protocol is not a self-executing treaty that would have binding effect in the domestic courts and that the President did not have the authority to enforce the ICJ decision unilaterally. The Supreme Court further held that the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. We wholeheartedly agree with the *Medellin* Court that the grounds for full U.S. compliance with the requirements of *Avena* are plainly compelling. Because only Congress can give domestic effect to the *Avena* Judgment, we encourage you in the strongest terms to propose legislation to Congress that would accomplish this goal without further delay.

Throughout your careers you have both been leaders in preserving the rule of law and protecting human rights, and we welcome the Administration’s reinvigoration of the United States’ commitment to abide by its international obligations. We firmly believe that one of the most clear – and pressing – ways of demonstrating that commitment is by working with Congress to enact legislation giving full effect to the *Avena* decision.

Thank you for your immediate attention to this crucially important concern, and we look forward to your timely response.

Sincerely,

Advocates for Human Rights

American Civil Liberties Union

Amnesty International USA

The Constitution Project

Human Rights Defense Center

Human Rights First

Human Rights Watch

International Community Corrections
Association

International CURE
(Citizens United for Rehabilitation of
Errants)

Justice Now

Leadership Conference on Civil Rights

National Association of Criminal
Defense Lawyers

National Death Row Assistance Network
of CURE

Prison Legal News

Safe Streets Arts Foundation

**SECRETARY OF STATE HILLARY RODHAM CLINTON
THE HUMAN RIGHTS AGENDA FOR THE 21ST CENTURY
GEORGETOWN UNIVERSITY
WASHINGTON, DC
DECEMBER 14, 2009**

Thank you Jasdeep, Dean Lancaster, and President DeGioia for that kind introduction and thank you for having me here today.

There is no better place than Georgetown University to talk about human rights. President DeGioia, the administration, and the faculty embody the university's long tradition of supporting free expression and free inquiry and the cause of human rights around the world.

I know that President DeGioia himself has taught a course on human rights, as well as one on the ethics of international development with one of my old colleagues, Carol Lancaster. And I want to commend the faculty, who are helping to shape our thinking on human rights, conflict resolution, development and related subjects; and the university community overall, including the students, for working to advance interreligious dialogue, for giving voice to many advocates and activists working on the front lines of the global human rights movement through the Human Rights Institute at the law school and other programs; and for the opportunities you provide for students to work in a fine international women's rights clinic.

All of these efforts reflect the deep commitment of the Georgetown administration, faculty, and students here to this cause. Thank you.

Today I want to speak to you about the Obama administration's human rights agenda for the 21st century. It is a subject on the minds of many people who are eager to hear our approach, and understandably so. It is a crucial issue that warrants our energy and attention.

My comments will provide an overview of our thinking on human rights and democracy, and how they fit into our broader foreign policy, as well as the principles and policies that guide our approach. But let me also say that what this is not: It is not a comprehensive accounting of abuses or nations with whom we have raised human rights concerns. It is not a checklist or a scorecard. In that light, I hope that we can all use this opportunity to look at this important issue in a broader light and appreciate its full complexity, moral weight, and urgency.

With that, let me turn to the business at hand.

In his acceptance speech for the Nobel Prize last week, President Obama said that while war is never welcome or good, it will sometimes be right and necessary. Because, in his words: "only a just peace based upon the inherent rights and dignity of every individual can be truly lasting."

Throughout history and in our own time—there have been those who violently deny that truth. Our mission is to embrace it, to work for lasting peace through a principled human rights agenda and a practical strategy to implement it.

President Obama's speech also reminded us that our basic values, the ones enshrined in our Declaration of Independence—the rights to life, liberty, and the pursuit of happiness—are not only the source of our strength and endurance, they are the birthright of every woman, man, and child on earth.

That is the promise of the Universal Declaration of Human Rights; the prerequisite for building a world in which every person has the opportunity to live up to his or her God-given potential; and the power behind every movement for freedom, every campaign for democracy, every effort to foster development, and every struggle against oppression.

The potential within every person to learn, discover and embrace the world around them; the potential to join freely with others to shape their communities and their societies so that every person can find fulfillment and self-sufficiency; the potential to share life's beauties and tragedies, laughter and tears with the people we love—that potential is sacred.

That is a dangerous belief to many who hold power and who construct their position against an "other"—another tribe or religion or race or gender or political party.

Standing up against that false sense of identity and expanding the circle of rights and opportunities to all people—advancing their freedoms and possibilities—is why we do what we do.

This week we observe Human Rights Week. At the State Department, though, every week is Human Rights Week. Sixty-one years ago this month, the world's

leaders proclaimed a new framework of rights, laws, and institutions that could fulfill the vow of “never again.” They affirmed the universality of human rights through the Universal Declaration of Human Rights and legal agreements including those aimed at combating genocide, war crimes and torture, and challenging discrimination against women and racial and religious minorities. Burgeoning civil society movements and non-governmental organizations became essential partners in advancing the principle that every person counts, and in exposing those who violated that standard.

As we celebrate that progress, our focus must be on the work that remains to be done. The preamble of the Universal Declaration encourages us to use it as a “standard of achievement.” And so we should.

But, we cannot deny the gap that remains between its eloquent promises and the life experiences of so many of our fellow human beings.

Now we must finish the job.

Our human rights agenda for the 21st century is to make human rights a human reality.

The first step is to see human rights in a broad context. Of course, people must be free from the oppression of tyranny, from torture, from discrimination, from the fear of leaders who will imprison or “disappear” them. But they must also be free from the oppression of want—want of food, want of health, want of education, and want of equality in law and in fact.

To fulfill their potential, people must be free to choose laws and leaders; to share and access information, to speak, criticize, and debate. They must be free to worship, associate, and to love in the way that they choose. And they must be free to pursue the dignity that comes with self-improvement and self-reliance, to build their minds and their skills, bring their goods to the marketplace, and participate in the process of innovation.

Human rights have both negative and positive requirements. People should be free from tyranny in whatever form, and they should also be free to seize the opportunities of a full life.

That is why supporting democracy and fostering development are cornerstones of our 21st century human rights agenda.

This administration, like others before us, will promote, support, and defend democracy. We will relinquish neither the word nor the idea to those who have used it too narrowly, or to justify unwise policies. We stand for democracy not because we want other countries to be like us, but because we want all people to enjoy consistent protection of the rights that are naturally theirs, whether they were born in Tallahassee or Tehran. Democracy has proven the best political system for making human rights a human reality over the long term.

But it is crucial that we clarify what we mean when we talk about democracy. Democracy means not only elections to choose leaders, but also active citizens; a free press; an independent judiciary and legislature; and transparent and responsive institutions that are accountable to all citizens and protect their rights equally and

fairly. In democracies, respecting rights isn't a choice leaders make day-by-day, it is the *reason* they govern. Democracies protect and respect citizens every day, not just on Election Day. And democracies demonstrate their greatness not by insisting they are perfect, but by using their institutions and their principles to make themselves—and their union—“more perfect,” just as our country continues to do after 233 years.

At the same time, human development also must be part of our human rights agenda. Because basic levels of well-being—food, shelter, health, and education—and of public common goods—environmental sustainability, protection against pandemic disease, provisions for refugees—are necessary for people to exercise their rights. And because human development and democracy are mutually reinforcing. Democratic governments are not likely to survive long if their citizens do not have the basic necessities of life. The desperation caused by poverty and disease often leads to violence that further imperils rights and threatens the stability of governments. Democracies that deliver on rights, opportunities, and development for their people are stable, strong, and most likely to enable people to live up to their potential.

Human rights, democracy, and development are not three separate goals with three separate agendas: that view doesn't reflect the reality we face. To make a real and long-term difference in people's lives we have to tackle all three simultaneously with a commitment that is smart, strategic, determined, and long-term.

We should measure our success by asking this question: Are more people in more places better able to exercise their universal rights and live up to their potential because of our actions?

Our principles are our North Star, but our tools and tactics must be flexible and reflect the reality on the ground wherever we are trying to have a positive impact. In some cases, governments are willing but unable without support to establish strong institutions and protections for citizens, for example the nascent democracies in Africa. We can extend our hand as a partner to help them try to achieve authority and build the progress they desire. In other cases, like Cuba or Nigeria, governments are able but unwilling to make the changes their citizens deserve. There, we must vigorously press leaders to end repression, while supporting those within societies who are working for change. And in cases where governments are both unwilling and unable—places like the eastern Congo—we have to support those courageous individuals and organizations who try to protect people and who battle against the odds to plant the seeds for a more hopeful future.

The challenges we face are diverse and complicated. And there is not one approach or formula, doctrine or theory that can be easily applied to every situation. But today I want to outline four elements of the Obama administration's approach to putting our principles into action, and share with you some of the challenges we face in doing so.

First, a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves. On his second full day in office, President Obama issued an executive order prohibiting the use of torture or official cruelty by any US official and ordered the closure of Guantanamo Bay.

Next year we will report on human trafficking not only in other countries but also in our own, and we will participate through the United Nations in the Universal Periodic Review of our own human rights record, just as we encourage other nations to do.

By holding ourselves accountable, we reinforce our moral authority to demand that all governments adhere to obligations under international law, among them not to torture, arbitrarily detain and persecute dissenters, or engage in political killings. Our government, and the international community, must counter the pretensions of those who deny or abdicate their responsibilities and hold violators to account.

Sometimes, we will have the most impact by publicly denouncing a government action, like the coup in Honduras or the violence in Guinea. Other times, we will be more likely to help the oppressed by engaging in tough negotiations behind closed doors, like pressing China and Russia as part of our broader agenda. In every instance, our aim will be to make a difference, not to prove a point.

Calling for accountability doesn't start or stop at naming offenders. Our goal is to encourage—even demand—that governments must also take responsibility by putting human rights into law and embedding them in government institutions; by building strong, independent courts and competent and disciplined police and law enforcement. And once rights are established, governments should be expected to resist the temptation to restrict freedom of expression when criticism arises, and be vigilant in preventing law from becoming an instrument of oppression, as bills like the one under consideration in Uganda to criminalize homosexuality would do.

We know that all governments—and all leaders—sometimes fall short. So there have to be internal mechanisms of accountability when rights are violated. Often

the toughest test for governments, this is essential to the protection of human rights. And here, too, we should lead by example. In the last six decades we have done this—imperfectly at times but with significant outcomes—from making amends for the internment of our own citizens in World War II, to establishing legal recourse for victims of discrimination in the Jim Crow South, to passing hate crimes legislation to include attacks against gays and lesbians. When injustice anywhere is ignored, justice everywhere is denied. Acknowledging and remedying mistakes does not make us weaker, it reaffirms the strength of our principles and institutions.

Second, we must be pragmatic and agile in pursuit of our human rights agenda, not compromising on our principles, but doing what is most likely to make them real. We will use all the tools at our disposal. And when we run up against a wall we will not retreat with resignation—or repeatedly run up against it— but respond with strategic resolve to find another way to effect change and improve people’s lives.

We acknowledge that one size does not fit all. When old approaches aren’t working, we won’t be afraid to attempt new ones, as we have this year by ending the stalemate of isolation and instead pursuing measured engagement with Burma. In Iran, we have offered to negotiate directly with the government on nuclear issues, but have at the same time expressed solidarity with those inside struggling for democratic change. As President Obama said in his Nobel speech last week, “they have us on their side”.

And we will hold governments accountable for their actions as we have by terminating Millennium Challenge Corporation grants this year for Madagascar and Niger in the wake of government actions.

As the President said last week, “we must try as best we can to balance isolation and engagement; pressure and incentives, so that human rights and dignity are advanced over time.”

We are also working for positive change within multi-lateral institutions. They are valuable tools that, when at their best, leverage the efforts of many countries around a common purpose. So we have re-joined the UN Human Rights Council, not because we don’t see its flaws, but because we think that participating gives us the best chance to be a constructive influence.

In our first session, we co-sponsored the successful resolution on Freedom of Expression, a forceful declaration of principle at a time when that freedom is jeopardized by new efforts to constrain religious practice, including recently in Switzerland, and by efforts to criminalize the defamation of religion—a false solution which exchanges one wrong for another.

And in the UN Security Council, I chaired the September session where we passed a resolution mandating protections against sexual violence in armed conflict.

Principled pragmatism informs our approach on human rights with key countries like China and Russia. Cooperation with each is critical to the health of the global economy and the non proliferation agenda, to managing security issues like North Korea and Iran, and to addressing world problems like climate change.

The United States seeks positive relationships with China and Russia. That means candid discussions of divergent views. In China we call for protection of rights of minorities in Tibet and Xinxiang; for the rights to express oneself and worship freely; and for civil society and religious organizations to advocate their positions

within a framework of the rule of law. And we believe that those who advocate peacefully for reform within the constitution, such as Charter 2008 signatories, should not be persecuted.

With Russia we deplore the murders of journalists and activists and support the courageous individuals who advocate at great peril for democracy.

With China, Russia, and others, we are engaging on issues of mutual interest while also engaging societal actors in these same countries who are working to advance human rights and democracy. The assumption that we must either pursue human rights or our “national interests” is wrong. The assumption that only coercion and isolation are effective tools for advancing democratic change is also wrong.

Across our diplomacy and development efforts, we also keep striving for innovative new ways to achieve results. That’s why I commissioned the first ever Quadrennial Diplomacy and Development Review, to develop a forward-looking strategy built on analysis of our objectives, our challenges, our tools, and our capacities to achieve America’s foreign policy and national security objectives. And make no mistake, issues of Democracy and Governance—D&G as they call it at USAID—are central to this review.

The third element of our approach is that we support change driven by citizens and their communities. The project of making human rights a human reality cannot be just a project for governments. It requires cooperation among individuals and organizations—within communities and across borders—who are committed to securing lives of dignity for all who share the bonds of humanity.

Six weeks ago, in Morocco, I met with civil society activists from across the Middle East and North Africa. They exemplify how lasting change comes from within. How it depends on activists who create the space in which engaged citizens and civil society can build the foundations for rights-respecting development and democracy.

Outside governments and global civil society cannot impose change, but we can promote and bolster it.

We can encourage and provide support for local grassroots leaders: providing a lifeline of protection to human rights and democracy activists when they get in trouble—as they often do—for raising sensitive issues and voicing dissent. This means using tools like our Global Human Rights Defenders Fund, which in the last year has provided targeted legal and relocation assistance to 170 human rights defenders around the world.

We can stand with them publicly—as we have by sending high-level diplomatic missions to meet with Aung San Suu Kyi, and as I have done around the world from Guatemala to Kenya to Egypt to speak out for civil society and political leaders and to work backchannels to push for the safety of dissidents and protect them from persecution.

We can amplify the voices of activists and advocates working on these issues by shining a spotlight on their progress —so often courageously pursued in isolation—and by endorsing the legitimacy of their efforts. We can recognize their efforts with honors like the Women of Courage awards that First Lady Michelle Obama and I presented earlier this year and the Human Rights Defenders award I

will present next month, and we can applaud others like Vital Voices, the RFK Center for Justice and Human Rights, and the Lantos Foundation, that do the same.

We can give them access to public forums that lend visibility to their ideas, and continue to press for a role for non-governmental organizations in multilateral institutions like the United Nations and the OSCE. We can enlist other allies like international labor unions who were instrumental in the Solidarity movement in Poland or religious organizations like those championing the rights of people living with HIV/AIDS in Africa.

We can help change agents to gain access to and share information through the Internet and mobile phones so that they can communicate and organize. With camera phones and facebook pages, thousands of protestors in Iran have broadcast their demands for rights denied, creating a record for all the world, including Iran's leaders, to see. I've established a special unit inside the State Department to use technology for 21st century statecraft.

In virtually every country I visit – from Indonesia to Iraq to South Korea to the Dominican Republic -- I conduct a town hall or roundtable discussion with groups outside of government to learn from them, and to provide a platform for their voices, ideas, and opinions. When I was in Russia I visited an independent radio station to give an interview, and to express through word and deed our support for independent media at a time when free expression is under threat.

On my visits to China, I have made a point of meeting with women activists. The U.N. World Conference on Women in Beijing in 1995 inspired a generation of women civil society leaders who have become rights defenders for today's China. In 1998, I met a small group of lawyers in a crowded apartment on the fifth floor

of a walk-up building, who described their efforts to win rights for women to own property, have a say in marriage and divorce, and be treated as equal citizens.

When I visited again earlier this year, I met with some of the same women, but their group had grown and expanded its scope. Now there were women working not just for legal rights but for environmental, health, and economic rights.

Yet one of them, Dr. Gao Yaojie [Gow Yow Geeyah], has been harassed for speaking out about AIDS in China. She should, instead, be applauded by her government for helping to confront the crisis.

NGOs and civil society leaders need the financial, technical and political support that we provide. Many repressive regimes have sought to limit the independence and effectiveness of activists and NGOs by restricting their activities—including more than 25 governments that have recently adopted new restrictions. Our funding and support can give a foothold to local organizations, training programs, and independent media.

And of course one of the most important ways that we and others in the international community can lay the foundation for change from the bottom up is through targeted assistance to those in need, and through partnerships that foster broad-based economic development.

To build success for the long run our development assistance needs to be as effective as possible at delivering results and paving the way for broad-based growth and long-term self-reliance. Beyond giving people the capacity to meet material needs, economic empowerment gives them a stake in securing their futures, a stake in seeing their societies become the kind of democracies that

protect rights and govern fairly. We will pursue a rights-respecting approach to development—consulting with local communities, ensuring transparency, and midwife-ing accountable institutions—so that our development activities act in concert with our efforts to support democratic governance. That is the pressing challenge we face in Afghanistan and Pakistan today.

The fourth element of our approach is that we will widen our focus--we will not forget that positive change must be reinforced and strengthened where hope is on the rise; and we will not ignore or overlook places of seemingly intractable tragedy and despair: where human lives hang in the balance we must do what we can to tilt that balance toward a better future.

Our efforts to support those working for human rights, economic empowerment, and democratic governance are driven by commitment not convenience, and must be sustained for the long run. Democratic progress is urgent but it is not quick, and we should never take for granted its permanence. Backsliding is always a threat, as we've learned in places like Kenya where the perpetrators of post- election violence have thus far escaped justice; and in the Americas where we are worried about leaders who have seized property, trampled rights, and abused justice to enhance personal rule.

And, when democratic change occurs, we cannot become complacent. Instead we must continue reinforcing NGOs and the fledgling institutions of democratic governance. Young democracies like Liberia, East Timor, Moldova and Kosovo need our help to secure improvements in health, education and welfare. We must stay engaged to nurture democratic development in places like Ukraine and Georgia, which experienced democratic breakthroughs earlier this decade but have struggled because of internal and external factors to consolidate democratic gains.

So we stand ready—both in our bilateral relationships and through international institutions—to help governments who have committed to improving their institutions, by assisting them in fighting corruption and helping train police forces and public servants. And we will support others, including regional institutions like the Organization of American States, the African Union, and the Association of Southeast Asian Nations, where they take their own steps to defend democratic principles and institutions.

Success stories deserve our attention so that they continue to make progress in building sustainable democracies.

And, even as we reinforce successes, conscience demands that we are not cowed by the overwhelming difficulty of making inroads against misery in the hard places like Sudan, Democratic Republic of Congo, North Korea, and Zimbabwe, or on the hard issues like ending gender inequality and discrimination against gays and lesbians---from the Middle East to Latin America, Africa to Asia.

We must continue to press for solutions in Sudan where ongoing tensions threaten to add to the devastation wrought by genocide in Darfur and an overwhelming refugee crisis. We will continue to identify ways to work with partners to enhance human security there while at the same time focusing greater attention on efforts to prevent genocide elsewhere.

As I said in Beijing in 1995 “human rights are women’s rights, and women’s rights are human rights” but that ideal is far from being realized in Goma, the last stop I made in the Democratic Republic of Congo in August, and the epicenter of one of the most violent and chaotic regions on earth. When I was there, I met with victims of horrific gender and sexual violence and refugees driven from their homes by the

many military forces operating there. I also heard from those working to end the conflicts and to protect the victims in unfathomably dire conditions. I saw the best and worst of humanity in a single day in Goma: the unspeakable acts of violence that have left women physically and emotionally brutalized, and the heroism of the women and men themselves, and of the doctors, nurses and volunteers working to repair their bodies and their spirits.

They are on the front lines of the struggle for human rights. Seeing firsthand the courage and tenacity of these Congolese people – and the internal fortitude that keeps them going – is humbling, and it inspires me to keep working.

These four aspects of our approach—accountability, principled pragmatism, partnering from the bottom up, and keeping a wide focus where rights are at stake—will help build a foundation that enables people to stand and rise above poverty, hunger, and disease and that secures their rights under democratic governance. We must lift the ceiling of oppression, corruption, and violence. And we must light a fire of human potential through access to education and economic opportunity.

Build the foundation, lift the ceiling, and light the fire. All together. All at once. Because when a person has food and education but not the freedom to discuss and debate with fellow citizens—he is denied a life he deserves. And when a person is too hungry or sick to work or vote or worship, she is denied a life she deserves. Freedom doesn't come in half measures, and partial remedies cannot redress the whole problem.

Now, the champions of human potential have never had it easy. We may call rights inalienable, but making them so has always been hard work. And no matter

how clearly we see our ideals, taking action to make them real requires tough choices. Even if everyone agrees that we should do whatever is most likely to improve the lives of people on the ground, we won't agree on what course of action fits that description in every case. That is the nature of governing.

We all know examples of good intentions that did not produce results. And we can learn from instances in which we have fallen short. Past failures are proof of how difficult progress is, but we do not accept claims that progress is impossible.

Because progress does happen. Ghana emerged from an era of coups to one of stable democratic governance. Indonesia moved from repressive rule to a dynamic democracy that is Islamic and secular. Chile exchanged dictatorship for democracy and an open economy. Mongolia's constitutional reforms successfully ushered in multiparty democracy without violence. And there is no better example than the progress made in Central and Eastern Europe since the fall of the Berlin Wall twenty years ago, an event I was proud to help celebrate last month at the Brandenburg Gate.

While the work in front of us is vast, we face the future together with partners on every continent, partners in faith-based organizations, NGOs, and socially-responsible corporations, and partners in government. From India—the world's largest democracy, and one that continues to use democratic processes and principles to perfect its union of over 1.1 billion people—to Botswana where the new president in Africa's oldest democracy has promised to govern according to what he calls the "5 D's"—democracy, dignity, development, discipline, and delivery, providing a recipe for responsible governance that contrasts starkly with the unnecessary and man-made tragedy in neighboring Zimbabwe.

In the end, this isn't just about what we do; it's about who we are. And we cannot be the people we are — people who believe in human rights—if we opt out of this fight. Believing in human rights means committing ourselves to action. When we sign up for the promise of rights that apply everywhere, to everyone, the promise of rights that protect and enable human dignity, we also sign up for the hard work of making that promise a reality.

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Submission of the U.S. Human Rights Network

**The Law of the Land: U.S. Implementation of Human Rights Treaties
Hearing before the Senate Judiciary Subcommittee
on Human Rights and the Law**

December 16, 2009

USHRN, 250 Georgia Avenue, Atlanta, GA 30312, 404-588-9761, www.usnetwork.org

CONGRESS SHOULD LIFT THE NON-SELF-EXECUTING
“DECLARATIONS” IN THE INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS AND THE RACE CONVENTION, OR
EXECUTE THEM WITH IMPLEMENTING LEGISLATION

The U.S. Human Rights Network (USHRN) represents over 300 human rights organizations in the United States. The USHRN is very pleased that Senator Dick Durbin has convened this historic hearing to fully implement the U.S. obligations under our ratified treaties. The USHRN is hopeful that this will be the first of several hearings that lead to full implementation of these treaties.

Ratified Treaties are Part of U.S. Law

The United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992 and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994.

Article VI of the U.S. Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (U.S. Const., Art. VI; § I, cl. 2).

Thus both ICCPR and CERD are part of U.S. law. But although both treaties guarantee important rights to people in the United States, neither treaty provides a private right of action in U.S. courts.

The United States Should Lift the Non-Self-Executing “Declarations” in ICCPR and CERD

The United States, upon ratification of ICCPR and CERD, registered some Reservations, Understandings and Declarations (RUDs), indicating that it would refuse to follow certain provisions of those treaties. The United States declared that ICCPR and CERD would not be self-executing, thus requiring Congress to pass enabling legislation to enforce the provisions of these treaties.

Although the Constitution does not explicitly require that treaties be “executed” through federal implementing legislation in order to be binding, Chief Justice John Marshall established the self-executing/non-self-executing distinction in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (treaties in which the United States promises to perform an obligation must be executed like a contract).

Thus, where a treaty or covenant is not self-executing, and where Congress has not acted to implement the agreement with legislation, no private right of action is created by ratification. (*Sei Fujii v. State* 38 Cal.2d 718, 242 P.2d 617 (1952)).

Article 20(2) of CERD, however, states, “[a] reservation incompatible with the object and purpose of this Convention shall not be permitted.” Moreover, it is well established that RUDs which violate the object and purpose of a treaty are void. (See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 19, 1155 U.N.T.S. 331, 336; Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States’ Violation of Its International Obligations*, 43 VA. J. INT’L L. 249, 252-253 (2002)).

According to Professor Louis Henkin, “The pattern of non-self-executing declarations threatens to subvert the constitutional treaty system. That, for the present at least, the non-self-executing declaration is almost exclusively a concomitant of U.S. adherence to human rights conventions will appear to critics as an additional indication that the United States does not take such conventions seriously as international obligations.” (Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-48 (1995)).

By denying a private right of action to enforce the rights in these treaties, the non-self-executing declarations violate the object and purpose of the treaties. The “declarations” attached to ratification of ICCPR and CERD are thus void. Congress should lift the non-self-executing declarations in ICCPR and CERD.

Congress Should Execute ICCPR and CERD With Implementing Legislation

In the alternative, Congress should enact legislation to execute both ICCPR and CERD. ICCPR guarantees the right to life, and fair trial and due process

rights, and prohibits arbitrary arrest and detention. CERD prohibits "racial discrimination," that is, "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Without a private right of action, the important protections in these two treaties, which are part of U.S. law, are rights without remedies.

On December 15, 1998, President William Clinton, in Executive Order No. 13107, Implementation of Human Rights Treaties, declared: "It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

In 2006, the Human Rights Committee, which is the administrative body of the ICCPR, expressed concern over the United States' material non-compliance with the ICCPR, and urged the United States to take immediate corrective action to fully implement the ICCPR.

The U.S. Human Rights Network urges Congress to fully implement the United States' obligations under ICCPR and CERD.

Respectfully submitted,

Professor Marjorie Cohn, Thomas Jefferson School of Law
for the Board of Directors of the U.S. Human Rights Network

Opening Statement of U.S. Senator Tom Coburn, M.D.

Hearing before the United States Senate Judiciary

Subcommittee on Human Rights and the Law

"The Law of the Land: U.S. Implementation of Human Rights Treaties"

December 16, 2009

Mr. Chairman, I would like to start by thanking you for holding today's important hearing on the implementation of human rights treaties that have been signed and ratified by the United States. To my knowledge, this is the first hearing of its kind in the Senate, and I look forward to learning from our witnesses about the mechanisms used by the U.S. government to monitor our efforts and ensure our compliance with these important treaties.

Surely there is no dispute that the United States has solemn legal obligations with respect to treaties it has signed and ratified. Especially with respect to international human rights responsibilities, I expect that the United States stands head and shoulders above much of the world. This is not to say that our record has been perfect, or that there are not still improvements to be made, but on the whole, the United States remains a beacon of human rights around the world. I am proud of our record and of the American values that lead us all to strive for the best on these issues. This hearing provides yet another example of U.S. commitment to the human rights cause.

Today, we have an opportunity to establish and build a record on at least two fronts: mechanisms for ensuring U.S. compliance with human rights treaties, and specific measures that exhibit compliance with these treaties. What I hope to learn more about today are the specific obligations the United States has undertaken with respect to each of the treaties at issue, what we have done to meet those obligations, and where we may have fallen short. Additionally, I am interested in learning more about the process by which the United States submits itself for review before U.N. committees tasked with assessing parties' compliance.

We are fortunate to have witnesses from both the Department of Justice and the Department of State, both of which play a substantial role in implementing these human rights treaties and monitoring U.S. compliance. I am anxious to hear their testimony.

Thank you again, Senator Durbin, for calling today's hearing. It is a pleasure working with you on the Subcommittee on Human Rights and the Law, partnering on issues that concern us both deeply. As usual, I send my compliments to your staff for their professional and thorough approach to the issues, as well as the courtesy they always show my staff and me.

I look forward to the testimony.



TREATY IMPLEMENTATION

Columbia Law School's Human Rights Institute Statement for the Record

Senate Judiciary Committee

Subcommittee on Human Rights and the Law

Hearing Date: December 16, 2009

Columbia Law School's Human Rights Institute appreciates the opportunity to present this statement on domestic treaty implementation to the Senate Judiciary Subcommittee on Human Rights and the Law. We praise the Subcommittee's recognition of the importance of promoting respect for human rights here at home and the decision to focus upon the role of the federal government in implementing human rights treaties.

To comply with its obligations under ratified human rights treaties, the U.S. needs comprehensive human rights coordination, including mechanisms to monitor implementation, raise awareness of treaty obligations and ensure commitments are being fulfilled at the national, state and local level. This statement will briefly discuss the important role that state and localities play in treaty implementation and provide specific recommendations that we hope this Subcommittee will consider for Congressional action.¹ Each recommendation is aimed to ensure that the rights enshrined in ratified human rights treaties² are reflected and realized at every level of government and accessible for all individuals.

¹ This statement draws on research conducted for, and recommendations made, in a 2009 Report by Columbia Law School's Human Rights Institute and the International Association of Human Rights Agencies (IAOHRA) under the auspices of the Campaign for a New Domestic Human Rights Agenda, *State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework*, available at http://www.ushrnetwork.org/sites/default/files/State_and_Local_Human_Rights_Agencies_Report.pdf.

² The three core human rights treaties ratified by the United States to date are (1) the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR), available at <http://www2.ohchr.org/english/law/ccpr.htm>; (2) the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (CERD), available at <http://www2.ohchr.org/english/law/cerd.htm> and (3) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (CAT), available at <http://www2.ohchr.org/english/law/cat.htm>. The U.S. has not ratified the Optional Protocol to CAT, which establishes a system of regular visits to places of detention carried out by independent national and international bodies. These treaties are binding under the Supremacy Clause. See U.S. Const. art. VI, cl. 2.

Full Implementation Requires Coordinating and Supporting State and Local Efforts

The federal government must embrace and support state and local efforts to implement human rights treaties. States and localities play a critical role in bringing the United States into compliance with its international human rights commitments. The human rights framework embraces the importance of local decision-making and implementation as well as a significant role for subnational incorporation of human rights obligations. Comprehensive realization of human rights in affected communities requires local decision-making, as well as strong cooperation and collaboration between local, state and federal government, and between government and civil society. Moreover, state and local implementation of human rights may eventually help to influence broader acceptance of international human rights norms.

Indeed, human rights treaties are intended to be implemented at the local level, with a great deal of democratic input. For example, they provide mechanisms and opportunities for reporting on conditions within communities (both positive and negative); training government officials and agencies as well as the community to promote equality and non-discrimination; conducting hearings to explore and examine the relevance of findings by international treaty bodies; and issuing recommendations for future action. They also provide a set of standards that local governments should adhere to in administering their own laws and policies.

Subnational implementation of human rights, particularly in areas traditionally reserved for state and local regulation, is also consistent with the U.S.'s federalist system. In ratifying each of the human rights treaties that it has joined, the United States Senate has noted that in light of federalism, human rights treaty obligations will be implemented by state and local governments to the extent that they exercise jurisdiction over such matters.³ As Professor Louis Henkin has noted, international law permits the federal government to leave implementation of human rights treaty provisions to the states, although the United States remains internationally responsible for a state's failure to implement a treaty obligation.⁴

Thus, while states and localities can be effective sites for human rights implementation, the federal government maintains an important role in coordinating and supporting the efforts of states and localities in their efforts to engage in human rights compliance. Indeed, in its review of the U.S.'s compliance with its obligations under the race convention, the U.N. CERD Committee voiced concern over the United States' "lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards implementation of the Convention at the federal, state and local levels," and recommended establishing such mechanisms.⁵

³ 138 Cong. Rec. 8071 (1992) (recognizing that state and local governments shall implement obligations under the ICCPR); 140 Cong. Rec. 14326 (1994) (same understanding regarding CERD); 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (same understanding for CAT).

⁴ Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l. L. 341, 346 (1995).

⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/USA/CO/6 (2008), ¶ 13.

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While principles of federalism and the Supreme Court's recent decision in *Medellin v. Texas*⁶ may constrain or limit the scope of the federal government's power to require that state and local governments engage in these activities, the federal government can and should encourage these efforts. The federal government should also provide coordination and support where state and local human rights agencies, including state and local human rights and human relations commissions, undertake to implement human rights treaty obligations at the local level.

State and local human rights and human relations commissions can play a key role in ensuring broad human rights compliance within the United States. There are over 150 state and local government commissions or agencies mandated by state, county or city governments to enforce human and civil rights, and/or to conduct research, training and public education and issue policy recommendations on human intergroup relations and civil and human rights.⁷ Core to their mission is encouraging and facilitating institutional change through policy and practice to eradicate discrimination and promote equal opportunity. Many are longstanding, created prior to the 1960s civil rights movement. Most are organized into non-profit associations that are international, national, or state-wide in scope.⁸ Along with their state and local partner agencies and community-based non-profits and non-governmental organizations (NGOs), these institutions and associations provide an established infrastructure that can serve as a resource in developing a national network of state and local human rights agencies to effectively advance the implementation of international human rights principles and standards close to home.

The federal government already plays an important role in facilitating and supporting state and local human rights and human relations commissions in their efforts to enforce and monitor compliance with federal antidiscrimination laws. The Department of Housing and Urban Development provides grants to state commissions through its Fair Housing Initiatives Program to conduct fair housing education and outreach. The Equal Employment and Opportunities Commission (EEOC) contracts with state and local commissions to enforce federal anti-discrimination in employment laws at the local level. In these and other ways, the federal government should coordinate and support states and municipalities in their efforts to implement human rights treaty obligations, as well.

⁶ 128 S.Ct. 1346, 1369 (2008).

⁷ See Kenneth L. Saunders & Hyo Eun (April) Bang, "A Historical Perspective on U.S. Human Rights Commissions," Executive Session Papers: Human Rights Commissions and Criminal Justice (Marea L. Beeman ed., 2007), available at http://www.hrcej.org/pdfs/history_of_hrc.pdf. Because the figure includes Canadian agencies, the number of U.S. Commissions was also based on the list from the International Association of Official Human Rights Agencies.

⁸ These associations include IAOHRA, the National Association of Human Rights Workers (NAHRW); the California Association of Human Relations Organizations (CAHRO).

Recommendations to Improve Implementation and Compliance**1. Key Institutional Reforms: Federal Human Rights Implementing and Monitoring Bodies**

Heeding recent calls for institutional reforms at the federal level, including ensuring vigorous interagency coordination in the implementation of human rights treaties through an active and effective Inter-Agency Working Group for Human Rights Implementation and transforming and strengthening the U.S. Civil Rights Commission to a U.S. Civil and *Human Rights* Commission, would help to ensure effective human rights compliance in the U.S., including subnational human rights incorporation.⁹

First, as a federal human rights implementing body, a transparent and accountable Interagency Working Group on Human Rights would serve as a focal point within the federal government to ensure coordination among all of the federal agencies and departments around human rights issues, and could also help to coordinate state and local efforts. In 1998, through an Executive Order, former President Clinton created the Interagency Working Group on the Implementation of Human Rights Treaties to undertake a range of functions to oversee domestic implementation of the various U.N. treaties ratified by the United States.¹⁰ Among its functions, the Working Group was charged with (1) coordinating the treaty compliance reports to international bodies and responding to contentious complaints; (2) overseeing a review of all proposed legislation to ensure conformity with international human rights obligations; (3) ensuring annual review of the reservations, understandings and declarations the U.S. attached to human rights treaties; and (4) considering complaints and allegations of inconsistency with or breach of international human rights obligations.¹¹ In addition, the group had a public education function: it was responsible for ensuring public outreach and education on human rights provisions in both treaty and domestic law.¹²

The Interagency Working Group was never fully operationalized and was essentially dismantled during the Bush administration, replaced by a Policy Coordination Committee (PCC) on Democracy, Human Rights, and International Operations, directed by the Assistant to the President for National Security Affairs.¹³ This PCC was not in operation until 2003, when it came together on an *ad hoc* basis to compile and submit overdue treaty reports. Further, the PCC had no dedicated staff or resources for human

⁹ See Catherine Powell, American Constitution Society for Law and Policy, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (2008) [hereinafter *Blueprint*], available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>; see also Leadership Conference on Civil Rights, *Restoring the Conscience of a Nation* (2009) [hereinafter *LCCR Report*], available at http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf.

¹⁰ Exec. Order No. 13,107, § 1, 63 Fed. Reg. 68,991 (1998), 38 ILM 493 (1999).

¹¹ *Id.* § 4c.

¹² *Id.*

¹³ In 2001, President George W. Bush superseded the Interagency Working Group with a National Security Presidential Directive that transferred the duties of the Interagency Working Group to the Policy Coordination Committee. National Security Presidential Directive 1, Organization of the National Security Council System (Feb. 13, 2001), available at <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>.

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rights treaty monitoring, dedicating its resources to periodic reporting and other external presentations of the United States with international bodies.¹⁴ As an *ad hoc* mechanism with limited functionality, the PCC was ineffective in furthering treaty implementation and created no clear lines of accountability.¹⁵

Human rights advocates have proposed reinvigorating the Clinton-era Working Group model through a new and enhanced Executive Order with improvements to ensure effective coordination across federal agencies and promote accountability. The structure of the revived Working Group would include more relevant agencies and departments. Additionally, the mandate would be broadened to include overseeing follow up with treaty bodies once they have conducted a review of U.S. compliance; creating a more transparent process for treaty reporting; coordinating human rights impact statements on pending legislation, regulations and budgets; and coordinating with civil society, through non-governmental organizations.¹⁶ Significantly, the proposal also calls for the Working Group's mandate to require coordination with state and local governments.¹⁷

Second, by improving on the current U.S. Civil Rights Commission, a new U.S. Civil and *Human Rights* Commission would operate as a federal civil and human rights monitoring body, an independent and non-partisan entity that would include as part of its mandate an examination of the United States' compliance with international treaties and other international human rights obligations. This enhanced Commission would be mandated to coordinate and support the efforts of states and localities to implement human rights close to home.

National human rights institutions around the world, including national human rights commissions, monitor and promote governments' compliance with human rights obligations by conducting research, issuing reports, opinions and recommendations; issuing proposals to harmonize legislation and policies with human rights obligations; engaging in public education about human rights; contributing human rights reports to international and regional treaty bodies; and serving an investigative function. While the investigative function may not necessarily be tied to a judicial process, it may uncover issues that deserve attention and study, and lead to recommendations for critically needed changes in the relevant laws, policies and practices. Suggested minimum standards for national human rights institutions are set forth in the Principles relating to the Status of

¹⁴ See Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 *Yale J. Int'l L.* 389 (2009).

¹⁵ During the Bush Administration, the U.S. compiled and submit reports to relevant U.N. and O.A.S. bodies on an *ad hoc* basis, with the Office of Legal Advisor of the U.S. State Department coordinating the U.S. response to international human rights treaty bodies, in consultation with the National Security Counsel and the Departments of Homeland Security, Justice, Interior, Defense, Health and Human Services and Labor. See Margaret Huang, *Going Global: Appeals to International Regional Human Rights Bodies*, in 2 *Bringing Human Rights Home: From Civil Rights to Human Rights*, 105-25 (Cynthia Soohoo, Cathy Albisa & Martha Davis, eds., 2008).

¹⁶ See *Blueprint*, *supra* note 7, at 15-18.

¹⁷ *Id.*, Appendix B.

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National Human Rights Institutions (the “Paris Principles”), endorsed by the U.N. General Assembly.¹⁸

Consistent with the role played by national human rights commissions elsewhere, a reformed U.S. Commission on Civil and Human Rights would be empowered to issue reports and recommendations to the executive branch and Congress; contribute to the reports the United States submits to international bodies; develop public education materials on human rights; and conduct investigations and hold hearings on human rights abuses.¹⁹

Significantly, the Paris Principles explicitly call upon national human rights bodies to “setup local or regional sections” or “maintain consultation with the other bodies . . . responsible for the promotion and protection of human rights,” highlighting the importance of engaging with state and local efforts.²⁰ By supporting and engaging with state and local efforts at human rights compliance and implementation, a U.S. Commission on Civil and Human Rights could both improve domestic compliance with human rights obligations and move one step closer to adhering to internationally recognized standards for national human rights bodies.

2. Strategies for Successful Engagement of State and Local Human Rights and Human Relations Commissions

Federal human rights implementing and monitoring bodies, such as an enhanced Interagency Working Group on Human Rights and a transformed U.S. Civil and Human Rights Commission, can provide critical support for subnational incorporation of human rights, specifically through dedicated staff, education and training, and funding.

1. *Dedicated Staff*

First, federal implementing and monitoring bodies should have staff dedicated to liaising and coordinating with states and municipalities, specifically through their human rights and human relations commissions and other relevant state and local officials. For example, the U.S. Civil and Human Rights Commission should have dedicated staff charged with receiving reports, suggestions, and recommendations from state and local human rights and human relations commissions, and other relevant state and local officials, on matters falling within the jurisdiction of the U.S. Commission. Dedicated staff should also be charged with soliciting input from and consulting with state and local human rights and relations commissions and other relevant state and local agencies on reports to international and regional human rights bodies. Such staff should also initiate and forward advice and recommendations to state and local commissions and other relevant state and local officials on matters that the Commission has studied or on observations or reports received from international and regional human rights bodies.

¹⁸ Paris Principles, National Institutions for the Promotion and Protection of Human Rights, Annex, G.A. Res 48/134 (Dec. 20, 1993) [hereinafter Paris Principles].

¹⁹ See *Blueprint*, supra note 7, at 21-23; *LCCR Report*, supra note 7, at 43-45.

²⁰ See Paris Principles, supra note 16, Methods of Operation, (c); (f).

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The Commission's mandate should also include dedicating staff to assist state and local commissions and other relevant state and local officials in their own efforts to collect, analyze and report on human rights compliance at the state and local level in order to determine where compliance is strong, and where it needs improvement; organize and hold hearings on issues of state and local concern, including how state and local policy comport with the Commissions' findings and Concluding Observations issued by international and regional human rights bodies; engage in educational efforts with the public and with state and local agencies to raise awareness of international human rights standards; assist state and local commissions and other relevant officials in identifying best practices for human rights compliance and implementation; and assist in drafting recommendations and guidance encouraging, allowing or requiring governmental agencies to take international human rights standards into account in creating new policies and legislation. Through dedicated staff, a reformed federal monitoring body can effectively coordinate and support subnational efforts to incorporate human rights.

2. *Education and Training*

Through federal implementing and monitoring bodies, the federal government should also mandate and offer guidance on civil and human rights training for key state and local human rights commission and other relevant agency staff. Fostering awareness of governments' obligations under civil rights statutes, human rights treaties ratified by the United States, and relevant international, regional and national human rights mechanisms will help to develop an understanding of the obligations that state and municipal governments are expected to undertake, to assist with data collection and analysis, and to facilitate dialogue with international and regional human rights bodies.

For example, a U.S. Commission on Civil and Human Rights could work with local commissions and other relevant state and local government officials to engage in training with prosecutors, judges, and public defenders to inform them of their duties to implement human rights treaty obligations. The U.S. Commission should facilitate transmitting relevant Concluding Observations to such officials and engaging them in a discussion of the implications of the treaties and the Concluding Observations in their work.

A U.S. Commission on Civil and Human Rights could also take a lead role, in conjunction with relevant federal agencies, in working with state and local commissions and other state and local officials to help U.S. delegations prepare for international human rights conferences and disseminate the declarations or plans of action to the appropriate government bodies. Likewise, the Commission could play a role in working with state and local commissions to prepare for official mission site visits from international and regional human rights experts. The Commission should conduct pre-visit education with the local commissions and other relevant agencies of state and local government and help them take full advantage of the international experts' presence while they are in the United States.

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3. *Funding*

The federal government should also provide financial support for state and local governments to engage in civil and human rights implementation and compliance. Specifically, a federal human rights monitoring body, such as a U.S. Commission on Civil and Human Rights, could be authorized and funded to distribute and oversee a federal grants program supporting state and local agency and community based non-governmental agencies in their efforts to undertake civil and human rights education, monitoring, reporting and enforcement efforts.

There are several models for such a grants program. The EEOC contracts with state and local human rights and human relations commissions (Fair Employment Practice Agencies) to enforce federal anti-discrimination laws, including the Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990.²¹ This enables state and local agencies to manage federal claims of discrimination through work sharing agreements with the federal government. A U.S. Commission on Civil and Human Rights could enter into similar contracts with state and local human rights and human relations commissions to engage in periodic monitoring, reporting and data analysis under the human rights treaties ratified by the United States.

Similarly, the Department of Housing and Urban Development Fair Housing Initiatives Program (FHIP) provides grants to state and local human rights commissions to conduct fair housing education and outreach.²² A U.S. Commission on Civil and Human Rights could likewise issue grants to state and local agencies to develop and engage in general human rights education and training for the public, as well as education of state and local officials. Such education and training would include information on relevant civil and international human rights standards and mechanisms, and would focus on assisting staff within state and local commissions on collecting and analyzing data and reporting on how well their jurisdictions are complying with civil rights laws and human rights treaties.

Another potential model is the Safe Schools/Healthy Students Initiative Grants, a collaboration of the U.S. Departments of Education, Health and Human Services, and Justice.²³ The discretionary grant program provides students, schools and communities with federal funding to promote healthy childhood development and prevent violence and alcohol and other drug use. The program requires coordination with community based organizations and allows local governmental agencies to apply jointly for federal funding

²¹ See 42 U.S.C. § 2000e-8(b) (giving the EEOC authority to cooperate with local human rights commissions, including the ability to “engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission”).

²² Housing and Community Development Act of 1987, 42 U.S.C. § 3616, Pub. L. No. 100-242, *amended by* Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672.

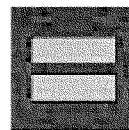
²³ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C § 7131).

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to support a variety of activities and services. A U.S. Commission on Civil and Human Rights could similarly invite state and local human rights agencies and other state and local agencies to partner with community organizations and other members of civil society to create integrated approaches to civil and human rights education and compliance.

Conclusion

In order to meet domestic treaty obligations, the U.S. must adopt a multi-layered approach to treaty implementation that includes agencies and institutions at every level of government. Meaningful implementation must include transparent and accountable federal mechanisms to monitor treaty compliance, raise awareness of human rights and ensure that treaty commitments are being fulfilled at the federal state and local level, as well as a process for reviewing legislation. However, federal mechanisms alone are not enough. In order to effectively strengthen institutional support for human rights, federal mechanisms must partner with state and local agencies and institutions, offering support through dedicated staff, education and training, and funding. Without incorporating local decision-makers and communities, the U.S. will continue to fall short of its obligations to respect, protect and fulfill human rights.



Statement for the Record

Council for Global Equality and the Human Rights Campaign

**Submitted to the
United States Senate**

Committee on the Judiciary

Subcommittee on Human Rights and the Law

“The Law of the Land: U.S. Implementation of Human Rights Treaties”

December 16, 2009

Under the Constitution of the United States, treaty obligations are the “supreme law of the land,” but they have rarely animated our domestic civil rights struggles. Many distinguished experts have explained the legal complexities that limit the direct domestic application of international human rights treaties in United States courts. Unfortunately those same complexities have occasionally isolated the United States from the larger international human rights movement. In simple terms, the lack of domestic treaty enforcement means that the struggle for full legal equality for lesbian, gay, bisexual and transgender (LGBT) Americans has rarely been understood within the context of a larger global effort to secure fundamental human rights for all individuals, regardless of their sexual orientation, gender identity or geographic location.

Nonetheless, the international movement in support of LGBT rights has been shaped by our own domestic civil rights struggle for LGBT equality here in the United States, just as surely as the international campaign has also shaped our domestic movement. The two movements are inextricably linked. That means that as we fight to secure full rights and responsibilities for LGBT Americans, we have an equally important opportunity to contribute to the larger global movement for LGBT equality. And if we begin to cloak our domestic advances in human rights terms, with reference to our international human rights obligations, we can simultaneously contribute to the international effort to define a fully inclusive understanding of global justice. We firmly believe that LGBT Americans should pick up the mantle of Eleanor Roosevelt, whose vision gave birth to the modern human rights movement, and proclaim a new era of U.S. leadership to advance human rights for all.

The principles of privacy and non-discrimination, as enshrined in the International Covenant on Civil and Political Rights (ICCPR), have long been defined to include protections for LGBT individuals. In the 1992 case of *Toonen v. Australia*, the Human Rights Committee, which interprets the ICCPR, considered the criminalization of private sexual activity between consenting, same-sex adults and found that the Australian law in question violated the treaty's non-discrimination and privacy provisions. That decision has been invigorated and advanced in subsequent decisions and comments by the Committee, by other human rights treaty bodies and by the UN experts who investigate human rights violations around the globe. As such, it has set the international legal foundation from which protections are now understood to extend to all LGBT individuals worldwide. Its reach must continue to advance both the domestic and the international movement.

The human rights legacy of *Toonen* has been reinforced by our President and our Secretary of State. Indeed, President Obama stated during the Presidential campaign that "treatment of gays, lesbians and transgender persons is part of this broader human-rights discussion," and that it needs to be "part and parcel of any conversations we have about human rights." More recently, Secretary Clinton emphasized that "over this past year, we have elevated into our human rights dialogues and our public statements a very clear message about protecting the rights of the LGBT community worldwide." Calling this human rights effort "a new frontier in the minds of many people," she noted that offering protection for the LGBT community "is at the top of our list because we see many instances where there is a very serious assault on the physical safety and an increasing effort to marginalize people. And we think it's important for the United States to stand against that and to enlist others to join us in doing so." Yet to advance human rights for the LGBT community more effectively abroad, we must continue to anchor our civil rights more firmly at home. As we do so, we should insist that our domestic advances form a core set of inalienable rights owing to all individuals worldwide.

In 2006, during a review of our nation's compliance with the ICCPR by the Human Rights Committee, the Committee noted that our country "should acknowledge its legal obligation under article 2 and 25 to ensure to everyone the rights recognized in the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation." In addition, the Committee commented that the U.S. "should ensure that federal and state law address sexual orientation-related violence in its hate crimes legislation and that it outlaw discrimination on the basis of sexual orientation in its federal and state employment legislation." Honoring the Committee's observations will bring our country closer to compliance with the ICCPR, and it will also provide leadership in international efforts to protect LGBT human rights.

In Warsaw, Poland in October of this year, we saw the domestic and the international come together through a powerful set of human rights statements from U.S. leaders. At an annual human rights meeting of the Organization for Security and Cooperation in Europe (OSCE), which includes Eastern and Western Europe and North America, the United States delegation spoke against violations of the right to freedom of association, especially those targeting gay pride marches in Eastern Europe, while also noting patterns of extreme violence targeting LGBT

citizens in the United States and Europe. Despite previous requests from LGBT leaders, this was the first time that the United States used its position within the OSCE to address LGBT-related human rights concerns.

The OSCE statement was powerful because it was delivered during the same week that many LGBT Americans were remembering the eleventh anniversary of the brutal murder of a 21-year-old gay American named Matthew Shepard. It was more powerful still because it came on the eve of Congressional action to pass a major expansion to our federal hate crime statute, a move that extended federal hate crime protections to LGBT individuals. In adopting that law, Congress invoked the memory of sexual orientation- and race-based hate crime victims Matthew Shepard and James Byrd, Jr. by naming the bill in their honor. Today, Matthew's violent murder is recognized as a national LGBT tragedy; the fact that similar tragedies have been repeated so often across the entire globe is a shameful reality. But with the adoption of this new law, the United States now has far more credibility to speak out against LGBT violence in other countries. In addition, we can also say that we are one step closer to complying with the requirements of the ICCPR.

Moreover, the Employment Non-Discrimination Act, which will protect LGBT individuals from employment discrimination, is also being considered by the United States Congress. Passage of this legislation, together with the Domestic Partnership Benefits and Obligations Act, will address the additional concerns expressed in the 2006 Human Rights Committee observations, and bring the United States even closer to compliance with the ICCPR. Through these actions, we can now say with great humility and even greater conviction that we are taking steps to address LGBT violence and discrimination in the United States, and that we believe that other countries must take similar steps to uphold their human rights obligations by addressing LGBT violence and discrimination in their own countries.

We look forward to working with this Committee and with the Obama Administration to give full implementation to our human rights obligations, and to ensure that those obligations extend to all LGBT Americans. As we do so, we will also continue to speak out on behalf of LGBT individuals in other countries who are simultaneously struggling to defend their lives and their livelihoods and to protect their families from the abuse and violence that have persecuted all of us for far too long.

Statement of

The Honorable Richard J. Durbin

United States Senator
Illinois
December 16, 2009

Statement of Senator Dick Durbin
"The Law of the Land: U.S. Implementation of Human Rights Treaties"
Hearing of the Human Rights and the Law Subcommittee
December 16, 2009

This hearing of the Human Rights and the Law Subcommittee will come to order. The title of today's hearing is "The Law of the Land: U.S. Implementation of Human Rights Treaties." This is the first-ever Congressional hearing on U.S. compliance with our human rights treaty obligations.

Last Thursday, December 10th, was the 61st anniversary of the Universal Declaration of Human Rights. Eleanor Roosevelt, the architect of the Universal Declaration, once said, and I quote, "Where, after all, do universal human rights begin? In small places, close to home. ... Unless these rights have meaning there, they have little meaning anywhere."

That is the focus of today's hearing. Every year, the State Department issues a report assessing the human rights records of other countries. But what about our own human rights record? Today we will ask: What is the United States doing to comply with human rights treaties that we have ratified? What are we doing to protect human rights at home?

Since Eleanor Roosevelt's time, the United States has been the world's leading human rights champion. We played a leading role in drafting the first human rights treaties. These founding documents of the international human rights movement drew their inspiration from the Declaration of Independence's promise that all people are created equal and endowed with certain unalienable rights.

More recently, the United States has ratified a number of human rights treaties with strong bipartisan support. And Congress has passed important legislation to implement these treaties. For example, last year this Subcommittee produced the Child Soldiers Accountability Act, which makes it a federal crime and immigration violation to recruit or use child soldiers. This implements part of our obligations under the Optional Protocol on the Involvement of Children in Armed Conflict.

It is conventional wisdom that Democrats and Republicans are bitterly divided over human rights issues. While we may disagree on issues like Guantanamo Bay, it is notable how much

consensus there is on human rights treaties.

Democrats and Republicans alike agree that we must make every effort to comply with the legal obligations we undertake when we ratify a human rights treaty. Indeed, under our Constitution, these treaties are part of the supreme law of the land.

Democratic and Republican Administrations alike monitor and report on U.S. compliance with our human rights treaty obligations. In fact, it was the Bush Administration that brought the United States up to date with our human rights treaty reporting requirements for the first time. After a thorough interagency process, the Bush Administration filed comprehensive reports with the relevant United Nations committees on U.S. compliance with a number of human rights treaties.

The Bush Administration also began preparations for the first-ever Universal Periodic Review of the United States, which will take place next year. Under the Universal Periodic Review, the UN Human Rights Council reviews the human rights record of all 192 UN member countries every four years.

I have been critical of the previous Administration's detainee policies, but I want to commend them for their efforts on treaty reporting. The Obama Administration is building on this record. It is my understanding that the current Administration will follow a similar interagency process for monitoring treaty compliance and reporting. And the Administration has committed to keeping the United States up to date with its reporting requirements, including the Universal Periodic Review. I look forward to hearing more about the Administration's plans today.

But reporting alone is not enough.

We have to look ourselves in the mirror and ask the difficult questions. Let's take one example. Today in the United States, more than 2.3 million people are imprisoned. This is – by far – the most prisoners of any country in the world and – by far – the highest per capita rate of prisoners in the world. And African Americans are incarcerated at nearly six times the rate of whites. These are human rights issues that we must address.

I also want to acknowledge Congress's shortcomings. Frankly, we have abdicated our oversight responsibilities when it comes to human rights treaties. Congress has not held a single hearing on U.S. compliance with the human rights treaties that we have ratified. Hopefully today's hearing will be a small step in the right direction.

Why is it important to comply with our human rights treaty obligations? It is not because we fear the judgment of the United Nations. Democrats and Republicans alike agree that some UN criticisms of the United States go too far.

We take our treaty obligations seriously because it is who we are. The United States is a government of laws, not people, and we take our legal commitments very seriously.

Complying with our treaty obligations also enhances our efforts to advocate for human rights

around the world. The reality is that the Universal Declaration of Human Rights remains an unfulfilled promise for many, from rape victims in Eastern Congo and Bosnia, to child soldiers in Burma and Colombia, and from the oil fields in the Niger Delta and Ecuador to the internet cafes in Beijing and Havana. But with leadership from the United States, we can make universal human rights a reality – both close to home, and around the world.

U.S. Senate Committee on the Judiciary, Subcommittee on Human Rights and the Law
Hearings to examine United States implementation of human rights treaties.

December 16, 2009

I. Introduction

In this position paper, we would like to provide a brief overview of the implementation of human rights treaties in the United States, particularly the Convention Against Torture. Review of this international treaty is welcomed and necessary to protect the rights of torture survivors.

The Heartland Alliance Marjorie Kovler Center (MKC) located in Chicago, Illinois provides treatment to survivors of torture including immigrants, refugees, unaccompanied minors, and asylum seekers. Since 1987, the Marjorie Kovler Center has worked with more than 1,600 survivors of torture from 74 different countries in Africa, Latin America, the Middle East, Asia, and Eastern Europe. Last year 357 individuals from 56 countries received services. The Marjorie Kovler Center helps clients overcome trauma and begin a life without fear through medical, mental health, emergency, and a wide range of other support services. Assistance is provided by staff, volunteers and by referral to other human service organizations. All services provided by the Marjorie Kovler Center are free of charge.

The goal of torture is to disempower individuals and communities. The goal of treatment, therefore, is to empower survivors to use their strengths to regain independence and personal integrity in their lives. Survivors receive psychological counseling and medical assistance as required. Many survivors who recently arrived in the United States also need assistance with food, housing, and employment. The Marjorie Kovler Center helps survivors restore trust in others and re-establish a sense of community by addressing these practical needs as well.

First and foremost, we would like to thank the Senate for ratifying the Convention Against Torture (CAT). It provides critical protection of torture survivors and those who are "more likely than not" to be persecuted if returned to their home country. We would also like to thank the Congress for appropriating funds on an annual basis to treatment centers working in the United States providing treatment to survivors of torture. Despite the limited funding available, these funds are vital to the delivery of much needed services to torture survivors.

II. Significant Provisions of the Convention Against Torture affecting clients of the Marjorie Kovler Center

Under the CAT, "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or

coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Pursuant to Article 3(1) of the CAT, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

Under Article 3(2) “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

II. The primary limitation on the implementation of the Convention Against Torture is the detention of survivors of torture upon their entry to the United States

A. Detention retraumatizes torture survivors.

In many countries, torture occurs in detention facilities where the torturers are agents or officials of the government. Placing torture survivors in detention replicates the conditions they are fleeing resulting in the vulnerability of reliving or being reminded of their past torture experience. Again, it is retraumatizing.

B. Criminalizing people for seeking asylum and protection.

Although asylum seekers are supposed to be kept separate from the regular criminal inmate population, many times asylum seekers are placed in close contact with the criminal inmates. Access to clinical services for detained individuals is poor. Access to emergency medical services is limited. Contact with social workers and other mental health providers may occur, however in our experience, torture survivors are not receiving access to such care. Without their physical and psychological needs being attended to, they are not receiving care that may be critical to their survival, such as treatment of severe depression which is a condition that increases risk of suicidality.

C. Lack of specialized clinical services.

Lack of specialized clinical services impacts the presentation of asylum applications since survivors do not access forensic medical/psychological evaluations which help to document the experiences of torture that they have suffered. Many times they are sent to remote locations where they do not have access to legal counsel. Psychologically, this kind of isolation exacerbates the effects of the traumatic experiences they had in their country of origin.

- D. Exposure to gangs and other violence within the detention system. Gangs within detention centers generate violence, exposing the survivor to an environment that supports the perpetuation of trauma. All of these elements negatively impact the physical and mental wellbeing of each torture survivor with consequences that may plague them for the remainder of their lives.

III. TVRA funding is too limited to serve the number of survivors living in the United States

Many of the established torture treatment programs located throughout the United States are not receiving adequate funding, and others receive no federal funding at all. Some treatment centers have had their funding severely cut and a few centers have had to close their doors. These programs or agencies are members of the National Consortium of Torture Treatment Centers. There is concern that funding based upon the original intent of the legislation to support established centers and to grow the network has been compromised.

IV. Improved access to clinical services would prevent many of the negative consequences that lead torture survivors to require protection under the Convention Against Torture

- A. It is important to provide immediate access to clinical services to allow survivors to successfully integrate themselves into society. Lack of treatment leads to marginalization and alienation.
- B. Our experience has been that once survivors receive clinical and other supportive services they become much more productive members of society, and have greater possibilities to contribute to the economic and social fabric of the United States. Mental health services effectively treat and reduce debilitating symptoms related to torture experiences including sleep disturbances, intrusive thoughts and memories, poor concentration and memory problems, flashbacks, depression, and social isolation. Without treatment, the likelihood that they become productive is more challenging.
- C. Without access to clinical services, isolation and its impact on mental health becomes an inherent aspect of the detention system. Conditions of depression and other mental health symptoms will continue to isolate the individual and undermines their successful integration into society. Ongoing isolation impacts their general well-being and makes them vulnerable to chronic medical and mental health conditions that may require costly emergency medical and mental health services.
- D. Although torture survivors come from all walks of lives, the majority were leaders in their communities of origin, persons who bring a richness of culture, experience, and knowledge, and a capacity to contribute greatly to

U.S. society, with some investment in restoring their health and sense of well-being.

IV. Conclusion

As a representative torture treatment center in the United States, the Marjorie Kovler Center speaks with more than twenty-two years of experience in providing services to torture survivors. We have learned many lessons over the years, and collectively, the National Consortium of Torture Treatment Centers has even a greater body of knowledge to contribute. With this knowledge base, we speak to you with experience and authority that detention of torture survivors contributes to their experience of trauma. The torture has not ended when they arrive with hopes of safety, but instead find they are imprisoned again. We ask the members of the U.S. Senate Committee on the Judiciary, Subcommittee on Human Rights and the Law, to take into consideration the knowledge we have shared, put an end to the detention practices of torture survivors seeking political asylum in the U.S. and provide the support survivors so desperately need and deserve. Thank you.

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Testimony of Maria Foscarinis
Executive Director
National Law Center on Homelessness & Poverty

Submitted to the Senate Judiciary Committee
Sub-Committee on Human Rights and the Law

For the Committee Hearing held December 16, 2009
Implementation of Human Rights Treaties

I am the Founder and Executive Director of the National Law Center on Homelessness & Poverty (NLCHP). NLCHP's mission is to serve as the legal arm of the national movement to prevent and end homelessness. NLCHP is a founding member of both the US Human Rights Network and the Campaign for a New Domestic Human Rights Agenda.

I would like to begin by thanking Senator Durbin for his work to re-establish the Senate Sub-Committee on Human Rights and the Law. Our nation was founded on the principle that all human beings are granted inalienable human rights, and Article VI of the Constitution makes clear that treaties, including human rights treaties, are the supreme law of the land. Human rights are legal obligations that we must uphold as much here at home as we encourage others to do abroad.

One of the most visible violations of human rights in our country, experienced by more than 3.5 million Americans each year, is homelessness. Housing is a basic necessity of life, and a basic human right. This is recognized in the Universal Declaration of Human Rights and the International Covenant on Economic Social & Cultural Rights, both signed by the U.S., and across a wide range of other human rights treaties. Other treaties, including the International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), both ratified by the U.S., recognize the right to non-discrimination, including in the right to housing.

The principles are reflected in U.S. law. In its preamble, the 1949 Housing Act, which states that "as soon as feasible...the goal of a decent home and a suitable living environment for every American family." In the sixty years since passage of this Act, important steps have been taken towards this goal. Just this year, the Protecting Tenants at Foreclosure Act, which protects tenants in foreclosed property from immediate eviction, helps advance renters' security of tenure, a critical component of their right to housing. The McKinney-Vento Homeless Assistance Act programs have had a significant impact on the lives of homeless Americans and McKinney-Vento funded programs have helped thousands of persons to leave homelessness permanently, advancing their right to housing. Similarly, by providing homelessness prevention and rapid rehousing within the American Reinvestment and Recovery Act, Congress has recognized and helped protect the housing rights of Americans on the verge of homelessness.

However, these programs and laws are under-funded and under-implemented. Beginning in the early 1980s, federal funding for low-income housing was severely cut back. At the same time, the destruction of inexpensive housing in the private market in favor of development of higher end housing further limited housing options for the poor. Indeed, according to recent estimates only one of every four Americans poor enough to be eligible for federal housing assistance actually receives it. Further, the U.S. department of Housing and Urban Development ("HUD") recently estimated that nationally, almost half of all homeless people were unsheltered. These estimates were made *before* the recent foreclosure and economic crises, which are now driving dramatic increases in

homelessness in communities across the country; the current gaps between need and available resources are likely much larger. The goal of the 1949 Housing Act has never been realized, and government has failed in its obligation to secure this basic human right and stated goal for all Americans.

The international community has increasingly taken note of America's failure to uphold the right to housing. Most recently, the UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, conducted her first official mission to the U.S., from October 23 – November 8. Her preliminary findings stated in part:

Millions of people living in the US today are facing serious challenges in accessing affordable and adequate housing. These are issues which have long been faced by the poorest people in the U.S. and today are affecting a greater portion of society.

The present affordable housing crisis is an opportunity for policy reform. Such reform should be based on a broad national consultation process in order to hear tenants' voices and concerns....

- Public resources should focus and provide for the needs of the most vulnerable, including homeless people.
- The definition of homelessness needs to be further expanded to include all those who truly lack adequate and affordable housing.
- The federal government provides much higher levels of subsidies to high income homeowners via tax exemptions as compared to subsidies for low income housing assistance. Low income housing assistance should receive higher funding.
- Preserve and upgrade the stock of subsidized housing, while maintaining them at affordable levels.
- Tenant protection legislation should be further strengthened for renters of foreclosed properties....
- The US should ratify the International Covenant on Economic, Social and Cultural Rights.

In 2006, the UN Human Rights Committee reviewed the U.S. for its compliance with the ICCPR, and expressed in its Concluding Observations:

The Committee is concerned by reports that some 50 % of homeless people are African American although they constitute only 12 % of the U.S. population.

The State party should take measures, including adequate and adequately implemented policies, to ensure the cessation of this form of de facto and historically racial discrimination.

In 2008, the Committee on the Elimination of Racial Discrimination expressed additional concerns about the disparate racial impact of lack of housing:

The Committee is deeply concerned that racial, ethnic and national minorities,

especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence.

The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the

State party:

- (i) support the development of public housing complexes outside poor, racially segregated areas;
- (ii) eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and
- (iii) ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of “steering” and other discriminatory practices carried out by private actors.

The Committee made additional recommendations with regards to housing, including calling for a right to counsel in civil cases where people’s housing is threatened.

Despite these clear concerns and recommendations, the U.S. government has made no concerted effort to develop and execute an action plan to remedy these violations. Most officials in the relevant housing agencies are completely unaware that these recommendations had even been made. This is a result of a lack of effective infrastructure for communicating the treaty monitoring bodies recommendations received by the State Department to the relevant domestic agencies and legislative bodies which could work to implement them, or, even worse, a willful rejection of the international obligations of the United States.

Several steps would help alleviate this disconnect between these international treaties and mechanisms and the domestic rights on the ground they are meant to help guarantee.

1. Hold Joint Hearings on the Report of the UN Special Rapporteur on the Right to Adequate Housing

The final report of UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik on her mission to the U.S. described above will be presented to the Human Rights Council in March 2010. This Subcommittee should work together with the Senate Committee on Banking, Housing & Urban Affairs to hold joint hearings with HUD, other relevant agencies at the federal and local levels, and members of civil society to determine what steps will be made to follow up on the concerns and recommendations made in her report.

2. Update Executive Order 13107 Creating and Interagency Working Group on Human Rights

Congress should call on the President to reissue and update Executive Order 13107 creating an Interagency Working Group on Human Rights treaty implementation. E.O. 13107 was never fully implemented under President Clinton, and was dissolved by President Bush's National Security Directive #1, leaving an ad-hoc and non-transparent system for human rights treaty implementation. The Obama Administration has created an Interagency Policy Committee along similar lines as the previous Interagency Working Group, but it is not firmly institutionalized. An updated E.O. in line with the recommendations made by the Blueprint for a New Domestic Human Rights Agenda would re-establish this working group with clear lines of accountability and transparency and provide for a two-way conversation between the State Department and domestic agencies regarding our human rights obligations.

3. Hold Oversight Hearings on Treaty Reports and Recommendations

The Senate Subcommittee on Human Rights and the Law should hold oversight hearings with the renewed Interagency Working Group on Human Rights referenced above, or failing that, with the State Department and relevant domestic agencies, on U.S. reports to international bodies under human rights treaties. Under each human rights treaty the U.S. has ratified, it is obligated to make periodic reports describing how it is implementing the rights of the treaty. For too long, the State Department has drafted these reports largely outside of public scrutiny, allowing at often dubious claims to go unnoticed by the public. For example, in its 2007 report to the Committee on the Elimination of Racial Discrimination, the State Department devoted only a single paragraph of its 150-page report to the aftermath of Hurricane Katrina

The Subcommittee should hold hearings and require the Working Group to present draft treaty reports *before* they are sent to the treaty bodies so the American people can be more fully informed. The Subcommittee should also hold hearings *after* the treaty bodies make their recommendations in their Concluding Observations, and inquire as to what action plans have been developed for implementing the recommendations. The Subcommittee should also work with other relevant Committees to determine if other Committees should hold hearings with agencies they have jurisdiction over and also what legislative steps may need to be taken to implement the treaty body recommendations. In all these steps, the Subcommittee should include the opportunity for concerned members of civil society to also provide testimony.

a. Hold Oversight Hearings on ICCPR Implementation

In particular, the U.S. must report to the Human Rights Committee on its progress in implementing the ICCPR next year. The Subcommittee should hold hearings inquiring what steps have been taken since the previous recommendations were issued, for example asking HUD what steps it has taken to reduce the disparate impact of homelessness on African Americans. While this overlaps with the Senate Committee on Banking, Housing, and Urban Affairs' areas of jurisdiction,

the Subcommittee also has jurisdiction based on the fact that an international human rights body made these recommendations, and the Congress should ensure that there is some method of holding the Administration accountable to these recommendations.

b. Hold Oversight Hearing on CERD Implementation

Again, working jointly with any other relevant Committees, the Subcommittee should determine a way of holding the Administration accountable for creating action plans or otherwise addressing the concerns raised in the 2008 CERD review.

c. Hold Oversight Hearings on, and attend the Universal Periodic Review before the UN Human Rights Council

The U.S. is required to issue a report to the Human Rights Council in 2010 under the Universal Periodic Review mechanism of the UN Human Rights Council. This will be the first such report by the U.S., and a tremendous opportunity for the U.S. to lead by example in both the substance and method of production of the report. The Subcommittee should hold hearings as described above both before issuance of the report and after the recommendations are returned. Additionally, Senate members or Sub-Committee staff should attend the hearings in Geneva to observe firsthand the proceedings before the Human Rights Council.

Thank you for your consideration. We offer our services to assist the Subcommittee, and look forward to working with you and your staff to help realize our nation's ideals of integrating human rights and the law not just abroad, but also here at home.



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FRIENDS COMMITTEE ON NATIONAL LEGISLATION

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**Friends Committee on National Legislation
Statement in Support of Immigration Detention Reform**

Hearing before the Subcommittee on Human Rights and the Law
Senate Committee on the Judiciary
December 16, 2009 on

“The Law of the Land: U.S. Implementation of Human Rights Treaties.”

The Friends Committee on National Legislation (FCNL) was founded in 1943 by members of the Religious Society of Friends (Quakers), to address a range of issues of concern to Friends. FCNL staff and volunteers work with a nationwide network of tens of thousands of people to advocate social and economic justice, peace, and good government.

As people of faith guided by the spiritual values of the Religious Society of Friends, FCNL’s work on immigration—and on human and civil rights generally—is led by the call for right relationships among all people. We believe that respect for human and civil rights is essential to safeguarding the integrity of our society and the inherent dignity of all human beings. We recognize that governments have an indispensable role in upholding these rights and that citizens have the responsibility to make governments more responsive, open, and accountable.

The Friends Committee on National Legislation affirms that all those seeking to enter the United States or residing here should, without regard to immigration status, be treated with justice and equity. They should be accorded equal protection under the law and full human rights. We are deeply concerned that the expansion of detention as a tool of immigration enforcement has resulted in widespread human rights violations. Recent changes in immigration enforcement policies and practices have led to an increased reliance on detention and a distinct lack of due process protections for persons suspected of immigration violations.

We thank the members of the Subcommittee for holding this hearing regarding the U.S. implementation of human rights treaties. By fulfilling its obligations under international human rights law, the United States could take important strides to ensure that this country’s immigration system respects the basic rights and dignity of all immigrants.

Arbitrary and Indefinite Detention

This hearing on the implementation of human rights treaties could not have come at a more important time. In the last decade, immigration enforcement has increased by more than tenfold. Immigration laws passed in 1996 expanded the scope of mandatory detention and expedited removal policies, which allow for the detention of thousands of immigrants each year without individualized hearings before an independent judicial body. At the same time as these laws were passed, the budget for the Department of Homeland Security increased significantly. This

unprecedented enforcement has resulted in more than 30,000 immigrants detained in jail-like settings on any given day, with a total of more than 360,000 people detained in fiscal year 2009 alone.

Mandatory detention, which denies immigrant detainees individualized hearings to determine the necessity of detention in their circumstances, violates the right to freedom from arbitrary detention. The U.N. Working Group on Arbitrary Detention has explicitly stated that “where the detention of unauthorized immigrants is mandatory, regardless of their personal circumstances, it violates the prohibition of arbitrary detention in Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).”¹

Article 9 of the ICCPR states, “No one shall be subjected to arbitrary arrest or detention... Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Article 9 of the UDHR likewise prohibits arbitrary arrest or detention.

Mandatory detention and expedited removal policies infringe on the rights of undocumented immigrants, legal permanent residents, and U.S. citizens. Legal immigrants with strong ties to the United States may be subject to mandatory detention if they have previously been convicted of a crime, even if the conviction is for a minor offense and even if they have already paid their debt to society. They are punished retroactively for crimes they committed years, even decades ago, even for crimes that were not deportable offenses at the time that they were committed. This fundamentally unjust policy also affects U.S. citizens, who may be wrongly detained for months or even years as they seek to prove their citizenship status. Regardless of their immigration status, all persons subject to mandatory detention are denied the right to judicial review of their cases.

Immigrant detainees effectively facing indefinite detention under current U.S. detention practices are also denied that right. The Immigration and Nationality Act specifies that non-citizens under final orders of removal may only be detained for the period necessary to bring about actual deportation.² Two U.S. Supreme Court decisions, *Zadvydas v. Davis* and *Clark v. Martinez*, further specify that U.S. Immigration and Customs Enforcement (ICE) may not detain an individual for longer than six months after final orders of removal if deportation is not likely in the near future. This may be the case for immigrant detainees whose country of origin is unwilling to accept their return or does not have diplomatic relations with the United States. However, the decision to release an individual from detention is made entirely at the discretion of immigration enforcement authorities. The U.N. Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has concluded from his findings on this subject that, “given that

¹ Amnesty International. March 2009. “*Jailed Without Justice: Immigration Detention in the USA.*” Available at: <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

² United Nations Human Rights Council. March 2008. “*Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America.*” Available at: <http://www.humanrightsfirst.info/pdf/080331-rpp-special-rapporteur-report.pdf>.

these discretionary decisions are not subject to judicial review, current United States practices violate international law.”³

Under international law, immigrant detainees have the right to an individualized judicial review of the lawfulness of their detention. As long as mandatory detention and expedited removal continue, the U.S. immigration system fails to protect that right. Safeguards must be put in place to ensure that those apprehended by immigration enforcement authorities are no longer subject to arbitrary or indefinite detention.

In order to restore justice to the U.S. immigration system and to realign the United States with its obligations under international law, mandatory detention and expedited removal should be ended and judicial review should be assured for immigrant detainees facing indefinite detention.

Due Process Protections

“Everyone shall have the right to recognition everywhere as a person before the law,” according to Article 16 of the ICCPR. However, the conditions in U.S. immigration detention facilities significantly impede detainees seeking to obtain legal representation and gather the necessary resources and materials to present their cases in removal proceedings. The broken U.S. immigration system fails to uphold due process protections for immigrant detainees.

Article 13 of the ICCPR states, “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” The United Nations Human Rights Committee, which monitors state compliance with the ICCPR, has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. Held in remote and rural locations with little access to legal representation, immigrant detainees are too frequently denied their fair day in court.

The U.N. Special Rapporteur on the Human Rights of Migrants found that in 2005, 65 percent of immigrants appeared at deportation hearings without the benefit of legal counsel. Under current U.S. law, immigrant detainees – unlike their counterparts in the criminal justice system – do not have the right to a government-appointed lawyer. As immigrant detainees prepare to argue their own cases, they often must rely solely on the detention facility’s telephones in order to contact family members, law offices, and consulates. However, they may be required to wait for significant periods as dozens of detainees share two or three telephones. In addition, immigrant detainees are unable to make free calls to pro bono legal services. The detention facilities’ law libraries often do not have immigration-related legal materials in appropriate languages and translation and interpretation services are nearly non-existent. Legal orientation programs are rare. In sum, immigrant detainees are often reliant on ICE officers for information about their cases, which amounts to a clear conflict of interests.

³ Ibid.

Immigrant detainees are frequently transferred to remote detention facilities in the United States, often hundreds of miles from their place of apprehension. Arbitrary and frequent transfers disrupt the relationship between immigrant detainees and their attorneys and families. The Department of Homeland Security Office of Inspector General issued a report on detainee transfers in November 2009 which concludes, "Transfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process. This leads to errors, delays, and confusion for detainees, their families, and legal representatives."⁴ The Office of Inspector General further cited evidence that detention officers do not consistently weigh factors such as legal representation and scheduled court proceedings when considering transfers.

Due process protections should be upheld for all immigrant detainees in ICE custody. These protections include access to legal counsel and law libraries, independent judicial review of individual circumstances before removal, and the ability to challenge detention before an independent judicial body in a timely manner.

Conditions in Detention

The steep increase in arrests and detention since 1996 has stressed the U.S. immigrant detention system, both creating and contributing to substandard and dehumanizing treatment of detainees, including poor medical treatment, limited or no access to telephones, sexual abuse, and arbitrary transfer. Many of those detained are even identified as members of especially vulnerable populations such as asylum seekers, survivors of trafficking and torture, pregnant and nursing mothers, and children. These people should not be incarcerated. Yet in the numerous reports of immigrant deaths, substandard treatment, and human rights violations in detention centers, many of those most affected are members of these vulnerable groups. ICE has developed a set of performance-based guidelines for immigration detention centers but these guidelines are not yet codified and standards are therefore difficult to enforce.

The majority of immigrants detained under the U.S. immigration system pose no threat to public safety as violations of immigration law are civil—not criminal—offenses. Yet immigrant detainees are held in a combination of detention facilities owned by ICE, prison facilities owned by private prison contractors, and over 300 local and county jails from which ICE rents beds. In this system, over 57 percent of immigrant detainees are mixed in with the local prison population. These practices are in clear violation of Article 10 of the ICCPR, which states, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This article also stipulates that accused persons "shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."

Binding detention standards should be developed to ensure access to basic rights, such as adequate access to health care, protection from unnecessary restraints and arbitrary transfer, access to telephones, and contact with families. Individualized risk assessments and humane alternatives to detention should be developed such that persons apprehended on suspicion of

⁴ Department of Homeland Security Office of Inspector General. November 2009. "Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers." Available at: http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-13_Nov09.pdf.

immigration violations are either released into the community or held in the least restrictive setting possible during removal proceedings.

Conclusion

At FCNL, we seek a society with equity and justice for all. To reach this goal, all human beings must receive fair and humane treatment; they also must be afforded due process of law. The government's current unprecedented campaign to roundup and detain undocumented immigrants has violated these rights and produced devastating consequences for our communities and families. FCNL is deeply worried about the effects of the current immigration enforcement program on human rights and dignity.

We urge the Subcommittee to call for the implementation of the United States' obligations under international law regarding arbitrary detention, indefinite detention, and due process protections. We hope that this hearing marks a continued effort to heal the broken U.S. immigration system in a fair and humane manner that promotes respect for the rights and dignity of all immigrants.

WRITTEN STATEMENT OF MEIKLEJOHN CIVIL LIBERTIES INSTITUTE
to
SENATE JUDICIARY SUBCOMMITTEE
on HUMAN RIGHTS AND THE LAW
on
THE LAW OF THE LAND:
U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES
in
BERKELEY and OAKLAND, CALIFORNIA

I am Prof. Ann Fagan Ginger, lawyer, author, first chair of the Berkeley City Commission on Peace and Justice, and Executive Director of the Meiklejohn Civil Liberties Institute (MCLI), a Non-Governmental Organization located in Berkeley using human rights and constitutional law since 1965 to promote within the U.S. fundamental human rights, including the right to jobs, food and housing.

It is unfortunate that I will not be able to attend your Subcommittee hearings in person and I look forward to reading the transcript when it is available.

I will discuss three basic points in this testimony:

I. KNOWLEDGE OF U.S.-RATIFIED HUMAN RIGHTS TREATIES EMPOWERS LOCAL GOVERNMENT OFFICIALS AND ACTIVISTS AND THE FAITH-BASED COMMUNITY WORKING ON LOCAL HUMAN RIGHTS ISSUES

II. CITY COUNCIL OF BERKELEY JUST VOTED TO MAKE REQUIRED PERIODIC REPORTS TO THREE U.N. HUMAN RIGHTS COMMITTEES

III. AMERICAN BAR ASSOCIATION and NATIONAL LAWYERS GUILD ARE CONDUCTING CONTINUING EDUCATION OF THE BAR TRAINING SESSIONS ON U.N. HUMAN RIGHTS TREATIES

...

I. KNOWLEDGE OF U.S.-RATIFIED HUMAN RIGHTS TREATIES EMPOWERS LOCAL GOVERNMENT OFFICIALS AND ACTIVISTS AND THE FAITH-BASED COMMUNITY WORKING ON LOCAL HUMAN RIGHTS ISSUES

Rev. Daniel Buford, of the Allen Temple Baptist Church in Oakland, California, frequently testifies that learning about the ratified U.N. human rights treaties has strengthened his work for justice.

After Rev. Buford became Vice-President of MCLI, he faced the issue of the unjustified killing of young African American Oscar Grant on New Year's Day 2009 by a police officer of the Bay Area Rapid Transit (BART). Rev. Buford found that quoting the ICERD and the ICAT provisions against racism and cruel and degrading treatment and punishment transformed discussions with BART officials, City of Oakland government officials, members of his congregation and the faith-based community, and the media.

Rev. Buford has also started using the provisions in the ICCPR and ICERD in his ongoing work to convince governments to insist on cleaning up the Toxic Triangle of severely polluted areas in San Francisco, Oakland and Richmond next to African-American and low income communities. He reports that citing the specific language in these treaties as "the supreme law of the land" is very convincing.

Rev. Buford, as a leader in the People's Institute for Survival and Beyond, centered in New Orleans, Louisiana, also frequently cites the U.N. treaties in his work with Katrina and Rita victims seeking recognition of the denial of their human rights and the legal requirement that the government fund recovery efforts.

II. CITY COUNCIL OF BERKELEY JUST VOTED TO MAKE REQUIRED PERIODIC REPORTS TO THREE U.N. HUMAN RIGHTS COMMITTEES

The Berkeley, California City Council voted unanimously on Sept, 29, 2009, to become the first city in the United States to implement the U.N. human rights treaties ratified by the United States by making periodic local reports to the three U.N. Committees administering the International Covenant on Civil and Political Rights (ICCPR), the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (ICAT), and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD).

Berkeley took this action to improve its enforcement of human rights in the city on the recommendation of its Berkeley Commission on Peace and Justice, a City Commission staffed by citizens, which has been working for several years on enforcing human rights treaties in Berkeley, and the Meiklejohn Civil Liberties Institute.

This action follows the City Council action in 1990 of adopting the Human Rights Ordinance that uses the language in human rights Articles 55 and 56 of the United Nations Charter as Berkeley Human Rights Ordinance 5985-N.S.

The Council resolution follows the suggestion of the Commission that the Commission hold a Public Hearing at which residents of the City can describe problems they face concerning the enforcement of human rights by City police, housing authority, and other city and school district bodies. The Commission will summarize this information for inclusion in its report. This will ensure that the report is not a mere whitewash of City and Board activities. It will also convince city residents, and the media, of the importance of this reporting process.

The Sub-Committee will be interested to learn that City Council Members stated, in their discussion on the proposal to file the reports, that making, publishing, and distributing the reports will have an affirmative effect on the actions of staff and officials of the City and the Board of Education. Council Members specifically mentioned two effects of making and publicizing City reports:

1. The "mobilization of shame" will take hold when residents of the City see copies of the City reports in the City publications, and hear about them on the radio and TV. The late Law Professor and California Supreme Court Justice Frank Newman taught many Berkeley students and residents this concept in decades of work for human rights.

2. The people at Berkeley City Hall and the Board of Education told Council Members that knowing that the U.N. Committees will issue their Concluding

Observations after reading and discussing the U.S. federal government's reports in Geneva and New York will require them to put human rights issues higher on their long agendas of work to be done.

Two affirmative results of the Council's action:

1) The next generation of citizen-voters is responding affirmatively when asked to participate in the detailed work required to prepare the reports on human rights for the U.N. Committees from existing reports by City bodies made for other purposes.

Several students in local high schools, junior colleges, universities, and graduate schools quickly volunteered when the human rights reporting project was explained to them by the Peace and Justice Commission.

2) The budgetary costs to the City and Board of Education are limited because many students are willing to work without pay in return for learning about the U.N. treaty reporting process and being able to describe this work on their resumes.

This means it is only necessary to pay for training the students in how to find the statistics in existing City/Board documents and place them in the correct categories on the templates used to make the reports.

By March, 2010, the Berkeley Commission on Peace and Justice will have completed their work in preparing the templates to use in making the first City reports. The Council action requires that the completed reports be submitted to:

Attorney General Jerry Brown
California Department of Justice
Attn: Public Inquiry Unit
Secretary of State Hillary Clinton
Navanethem Pillay, Office of the United Nations High Commissioner for Human Rights

U.S. Representative Barbara Lee
U.S. Representative John Conyers
U.S. Representative Nancy Pelosi
Louise Arbour, Office of the United Nations High Commissioner for Human Rights

UN Ambassador Susan Rice, United States Mission to the United Nations
League of California Cities
National League of Cities
California State Association of Counties
The Association of State Attorneys General (NAAG)

Such city reports help carry out the responsibility of all treaty signers to publicize the text of the treaties, which the U.S. has totally failed to do to date.

This city reporting process also shifts the reports from being made by the federal government in D.C. concerning enforcement at the local level to the federal government collecting the local reports and summarizing them for the federal report. Senators well know the difference between a report by a federal agent in D.C. based on information directly from local city officials and such a report made in D.C. based on a few statistics obtained from federal agents in the state.

MCLI has proposed that Rep. Barbara Lee (from Oakland) introduce a bill: requiring the federal government to publicize the text of the ratified human rights treaties throughout the federal government and the states (required in the treaties), training of

all employees of the federal government throughout the U.S. and its territories about the treaties, and federal funding of states to make their reports at the local level.

MCLI has received enthusiastic responses to descriptions of the Berkeley Council action in recent presentations in Spokane and Seattle, Washington and in Stockton and El Cerrito, California.

III. AMERICAN BAR ASSOCIATION, NATIONAL LAWYERS GUILD, AND LAW SCHOOLS ARE CONDUCTING CONTINUING EDUCATION OF THE BAR TRAINING SESSIONS ON U.N. HUMAN RIGHTS TREATIES

This hearing of the Subcommittee is coming at the very moment when a series of bar associations and law schools are conducting their first Continuing Legal Education programs on the U.N. human rights treaties and how lawyers can use them in their work.

I have recently made a 90-minute conference call presentation on U.N. human rights law for the Human Rights Committee of the International Law Section of the American Bar Association for 45 lawyers. The response was very affirmative.

I also participated in a series of Continuing Legal Education sessions at the national convention of the National Lawyers Guild in Seattle in October 2009 and for the Peace Through Law Section of the Washington State Bar, and law school meetings at Gonzaga University and Seattle University School of Law.

In 2008 MCLI prepared a tool kit for such presentations, including briefs of 49 cases won by counsel using U.S. law and U.N. treaties that lawyers and law students say is very informative.

In conclusion, I hope this information will be helpful in the very important work of the Subcommittee. I would be happy to answer any questions you may have, and to submit any further documents you might find useful.



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The Honorable John Conyers
 Chairman
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 2125 Rayburn House Office Building
 U.S. House of Representatives
 Washington, DC 20515

The Honorable Howard Berman
 Chairman
 Committee on Foreign Affairs
 2170 Rayburn House Office Building
 U.S. House of Representatives
 Washington, DC 20515

The Honorable Lamar Smith
 Ranking Member
 Committee on the Judiciary
 2322A Rayburn House Office Building
 U.S. House of Representatives
 Washington, DC 20515

The Honorable Illeana Ros-Lehtinen
 Ranking Member
 Committee on Foreign Affairs
 B360 Rayburn House Office Building
 U.S. House of Representatives
 Washington, DC 20515

Dear Chairman Conyers, Chairman Berman, Ranking Member Smith and Ranking Member Ros-Lehtinen:

United States citizens arrested abroad are guaranteed timely notice of their rights to communicate with a U.S. consular official by Article 36 of the Vienna Convention on Consular Relations (VCCR), a treaty the U.S. ratified without reservation in 1969. These rights help provide legal fairness in a foreign land and are critical to the safety and security of Americans who travel, live and work in other countries around the world: missionaries, Peace Corps volunteers, tourists, business travelers, foreign exchange students, members of the military, U.S. diplomats, and countless others. U.S. consular officials assist detained U.S. nationals in their efforts to navigate an unfamiliar legal system, bridge cultural or language barriers that may exist between the U.S. national and the foreign detaining authority, arrange or recommend competent local legal representation, and coordinate communications to friends and family back in the States.

Americans rely on these rights every day, and the U.S. government routinely insists that other governments provide consular access consistent with their treaty obligations. For example, in 2001 when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding consular visits to the plane's crew. Chinese authorities granted consular visits to the crew members, who were detained in China for 11 days. Throughout the tense standoff, State Department officials repeatedly cited the Convention as the basis for immediate and unobstructed access to the American citizens.

Our ability to insist that other countries provide U.S. nationals with Article 36 consular access is strengthened by our good faith efforts to do the same for arrested foreign nationals. Problematically, the U.S. has failed to comply with the International Court of Justice's (ICJ) determination that the United States must provide judicial review and reconsideration of the cases of certain Mexican nationals who did not receive their rights under Article 36 of the VCCR.

See Case Concerning Avena and Other Mexican Nationals, 2004 I.C.J. 128 (March 31). It is imperative that we comply with the ICJ's decision so that we may ensure that American citizens detained abroad may also receive their VCCR rights.

The United States and 171 other countries are parties to the VCCR. Like all treaties, the VCCR is binding federal law. Simply put, Article 36 ensures the rights of foreign nationals to have access to consular assistance without delay and of consulates to assist their citizens abroad. In addition to ratifying the VCCR, the U.S. also ratified the VCCR Optional Protocol, thereby designating the ICJ as the court with jurisdiction to resolve disputes regarding the VCCR.

President Bush, understanding the implications that noncompliance with the ICJ's decision would have for our own citizens and for our relationship with Mexico, attempted to enforce the *Avena* decision through a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision . . ." (Memorandum from President Bush to the Attorney General, 28 February 2005). However, the U.S. Supreme Court decided that the President did not have the authority to enforce ICJ decisions. The Court held that the "responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Medellin v. Texas*, 552 U.S. _____ (2008).

It is imperative that Congress enact legislation implementing the *Avena* judgment so that other governments do not invoke our non-compliance as justification for ignoring their obligations under the same treaty. Make no mistake; I hold no candle for Mexican nationals who have been convicted of heinous crimes and believe that justice should be swiftly served. That justice, however, must be served in compliance with law, including our unambiguous international agreements. The rule of law dictates that we abide by our undisputed treaty obligations, and I firmly believe doing so will help protect the American abroad detained by foreign authorities.

The minor inconvenience of providing federal judicial review of the remaining *Avena* cases pales in comparison to the threat to the security of American citizens abroad and the potential damage to our standing as a world leader that would result if the United States breaks its promise to provide consular notification and access. I appreciate your attention to this important issue and wish you the best.

Sincerely,



Lee H. Hamilton

cc: The Honorable Hillary Clinton,
Secretary of State

The Honorable Eric Holder
Attorney General
The Honorable John Kerry, Chairman
Senate Committee on Foreign Relations
The Honorable Richard Lugar, Ranking Member
Senate Committee on Foreign Relations
The Honorable Patrick Leahy, Chairman
Senate Committee on the Judiciary
The Honorable Jeff Sessions, Ranking Member
Senate Committee on the Judiciary



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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO
LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

“THE LAW OF THE LAND: U.S. IMPLEMENTATION
OF HUMAN RIGHTS TREATIES”

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

UNITED STATES SENATE
WEDNESDAY, DECEMBER 16, 2009

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil and Human Rights. I am also the Joseph L. Rauh, Jr. Professor of Public Interest Law at the University of the District of Columbia. I appreciate the opportunity to speak before you today on the incorporation of the principles of human rights treaties into our system of law and justice.

The Leadership Conference is the oldest, largest, and most diverse civil and human rights coalition in the United States. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. The Leadership Conference consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

The Leadership Conference is committed to building an America that is as good as its ideals. We strongly believe that civil and human rights should be measured by a single yardstick. Ensuring that we as a nation live up to the provisions of the U.S. Constitution and to our international human rights obligations has long been a matter of profound importance both to me, as well as to The Leadership Conference. In 1988, I was part of the civil and human rights coalition's effort to enact the Civil Liberties Act,¹ which helped to remedy the terrible mistreatment of Japanese-Americans during World War II – one of the injustices that spurred the adoption of the Universal Declaration of Human Rights (UDHR). In 1994, I testified before the Committee on Foreign Relations on behalf of the NAACP, to urge the Senate to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). At The Leadership Conference, we have monitored our nation's compliance with CERD, and have submitted “shadow reports” in response to the reports the U.S. government filed in both 2000 and 2007.² The Leadership Conference has also joined the Campaign for a New Domestic

¹ Pub. L. 100-383 (Aug. 10, 1988).

² See, e.g., Leadership Conference on Civil Rights Education Fund, *American Dream? American Reality! A Report on Race, Ethnicity, and the Law in the United States*, Jan. 2008, available at <http://www.civilrights.org/publications/american-dream/>. See also *Hearing on the Civil Rights Division of the*



Human Rights Agenda, a 50-member coalition of organizations that is urging the Obama administration to strengthen our nation's own mechanisms for protecting human rights both at home and abroad, including asking President Obama to issue an Executive Order that would strengthen and revitalize the Interagency Working Group on Human Rights.³

As a coalition, we understand that human rights instruments like UDHR and CERD are not only a set of universal ethical standards and global norms embodying the aspirations of people all over the world, but also potentially effective tools useful in illuminating and addressing persistent inequities here at home. Indeed, while it may have gone by a slightly different name, our nation's civil rights movement in the 1950s and 1960s was very much at its heart a human rights movement.

The Leadership Conference itself was founded at the dawn of the modern civil and human rights movement, just two years after the adoption of the UDHR and only five years after the Holocaust, a cataclysmic violation of human rights, and the internment of Japanese Americans on U.S. soil. And its leaders – including the founders of The Leadership Conference – were very much inspired and motivated by the principles set forth not only in our nation's founding documents, but by those articulated in UDHR as well. The great Hubert H. Humphrey, Senator, Vice President and the visionary whom we celebrate annually with a dinner in his honor, made the connection between civil rights and human rights in a 1948 speech to the Democratic National Convention. Castigating civil rights opponents for clinging to “the shadow of states' rights,” Humphrey told the convention that the time had come “to walk forthrightly into the bright sunshine of human rights.”

With that in mind, and as you may have already noticed from the introduction, we have chosen to honor the legacy and the foresight of our founders by fully incorporating the term “human rights” into our name. Beginning in January, as we approach our 60th Anniversary, the Leadership Conference on Civil Rights will become *The Leadership Conference on Civil and Human Rights*. In truth, though, when it comes to “civil rights” and “human rights,” there really is not much of a distinction.

Traditionally, international treaties bear a presumption of judicial enforceability in the United States. The Supremacy Clause establishes treaties as judicially enforceable and supreme over state law.⁴ While the Supreme Court in *Foster v. Neilson*⁵ acknowledged the possibility that

Department of Justice, House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 111th Cong. (Dec. 3, 2009) (statement of Eileen R. Larenc, on behalf of the U.S. Government Accountability Office), which provides troubling data on the DOJ Civil Rights Division's enforcement efforts in recent years.

³ See Professor Catherine Powell, *Human Rights At Home: A Domestic Policy Blueprint for the New Administration*, Oct. 2008 (available at <http://www.aclaw.org/files/C%20Powell%20Blueprint.pdf>).

⁴ “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. See also Human Rights Institute at Columbia Law School & Leitner International Law and the Constitution Initiative at Fordham Law School, *Continuing Relevance of International Law in U.S. Legal System*, July 8, 2009 (available upon request).

⁵ 27 U.S. 253 (1829).



some treaties would not be judicially enforceable, it also recognized the presumption that treaties will generally be judicially enforceable as domestic law where they address private rights.

Moving more directly to today's subject, I want to thank you for this hearing, and for your efforts in general to step up Congress' oversight and enforcement of our human rights commitments. The fact that this subcommittee did not even exist prior to 2007 points to a troubling fact: Congress simply has not been ensuring that the United States lives up to its human rights treaty obligations – which, as you and others here in this room have pointed out, represent not just mere ideals but the law of the land. Today's hearing represents a turning point, and one that I find very encouraging.

I am also encouraged by the fact that the United States has joined the Human Rights Council at the United Nations, has recently signed the International Convention on the Rights of Persons with Disabilities (CRPD) and will soon present it to the Senate for ratification, and that the Obama administration has listed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as one of its top priorities for ratification. The Leadership Conference is committed to the ratification of the new CRPD and of CEDAW, which is long overdue. We will be leading a major new effort on CEDAW, in particular, where the United States is only one of seven countries that have not ratified the treaty – leaving us in the unlikely company of Iran, Somalia, and Sudan.

We, along with many other organizations, stand ready to collaborate closely with the Senate and the Obama administration to secure ratification of both treaties next year. We are indeed hopeful that this renewed commitment to human rights will lead to greater progress, both domestically and around the globe.

As our nation takes on these new commitments, however, it is critically important that we not lose sight of the ones that we have already made. Over the past half-century, our nation has made tremendous progress in fulfilling the ideals that both our founders and the international community have set out for us. But I would not be doing my job, as a civil and human rights advocate, if I did not point to some areas where there is continued room for improvement. As we reclaim our leadership on the global human rights stage, our shortcomings at home are harmful enough in their own right. But they also undermine our ability to serve as role models to other friendly nations, and as they have in the past, they continue to serve as convenient fodder for opponents of ours who want to divert attention from their own wrongdoing. This point was made forcefully and eloquently by Secretary of State Hillary Clinton in a speech on the Obama Administration's human rights policy delivered recently at Georgetown University.

With that in mind, we would strongly encourage Congress to look at civil and human rights issues, such as the following, through the lens of our international treaty obligations:

Racial Disparities in the Criminal Justice System

One civil and human rights issue that very clearly implicates our international treaty obligations is that of racial disparities in our criminal justice system. In particular, I would point to the disparity in sentencing for the possession of crack and powder cocaine.



Under current law, offenders convicted of possessing five grams of crack cocaine, or the weight of two pennies, receive the same minimum sentence as those caught dealing 500 grams of powder cocaine, which is about a pound. A person convicted of distributing 50 grams of crack, or 1.7 ounces, is subject to a ten-year mandatory minimum sentence, while it takes 5,000 grams, or 11 lbs, of powder cocaine to receive the same sentence. Created by the Anti-Drug Abuse Act of 1986,⁶ this 100 to 1 disparity was the result of several flawed assumptions. Congress not only thought that crack cocaine caused users to become more violent than powder cocaine users, but also believed that crack was more addictive as well. As we now know, however, both of those assumptions have been proven false.

Meanwhile, the 100 to 1 disparity has had a disproportionately adverse affect on African Americans. While 80 percent of crack cocaine defendants are black, less than 30 percent of crack users are African-American—over two thirds of crack users are white or Latino. Current cocaine sentencing laws also tend to target low-level offenders rather than the kingpins that the original legislation was intended to nab. In 2006, crack defendants were prosecuted on average for possession of 51 grams of crack—the weight of a candy bar. In fact, more than 60 percent of federal crack cocaine convictions involve low-level activity, while less than two percent of federal crack defendants are high-level suppliers of cocaine. Furthermore, low-level retail sellers and users are punished more severely than wholesale traffickers of the powder form because of the quantity triggers for mandatory minimums for crack.⁷

This sentencing disparity has helped the United States earn the dubious distinction of being home to the largest prison population in the world. According to the Sentencing Project, African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).⁸ Additionally, the American Bar Association, a group that has opposed mandatory minimums since 1995, also found that since the advent of such laws the average length of incarceration has increased threefold.⁹ These kinds of disparities and high incarceration rates reinforce the perception among African Americans and other minorities that the criminal justice system itself is illegitimate and undermines the fundamental belief in fairness and equal treatment under the law.

To be sure, the sale of cocaine in whatever form it is sold should be punished, but I think we can all agree that it should not be done in a disproportionately harsh and racially discriminatory manner. The UN Special Rapporteur on Racism, for one, echoed this sentiment when he recommended that “mandatory minimum sentences should be reviewed to assess disproportionate impact on racial or ethnic minorities. In particular, the different minimum sentences for crack and powder cocaine should be reassessed.”¹⁰ To that end, I am encouraged

⁶ Pub. L. 99-570 (Oct. 27, 1986).

⁷ The Sentencing Project, *Federal Crack Cocaine Sentencing* (Issue Brief), May 2009 (available at http://www.sentencingproject.org/doc/publications/dp_crack_sentencing.pdf).

⁸ *Id.*

⁹ *Federal Cocaine Sentencing Laws: Reforming the 100:1 Crack Powder Disparity*, Hearing before the Senate Judiciary Subcommittee on Crime and Drugs, 111th Cong. (Apr. 29, 2009) (statement of Thomas M. Susman, on behalf of the American Bar Association, at 6).

¹⁰ United Nations Human Rights Council, *Racism, Racial Discrimination, Xenophobia And Related Forms Of Intolerance, Follow-Up To And Implementation Of The Durban Declaration And Programme Of Action*;



by ongoing efforts¹¹ to abolish the crack and powder cocaine sentencing disparity in the name of human rights, and I would strongly encourage members of both parties to support them.

Voting Rights in the District of Columbia

As you may know, the struggle for equal justice in the United States is filled with numerous hard-won victories, along with countless setbacks. However, few areas have been as contentious in our turbulent history as the struggle for voting rights, a right that many have protested for, fought for, and died to protect.

For more than 200 years, the residents of our nation's capital have been denied voting representation in Congress. From a civil and human rights perspective, the continued disenfranchisement of nearly 600,000 D.C. residents stands out as one of the most blatant violations of the most important right that citizens in a democracy possess.

Lack of voting rights has real problems inconsistent with our values and human rights standards. Taxation without representation is the first consequence; and second, Congress can unilaterally overturn laws passed by Washington's elected city council, all the actions of its elected mayor, and even all the interpretations of its laws by D.C. judges. Congress must also approve Washington, D.C.'s annual budget, including spending of the residents' own local tax dollars, on such programs as a needle exchange program to combat the AIDS epidemic, which has reached catastrophic levels in the District of Columbia.

The ongoing status of D.C. residents will continue to undermine our nation's moral high ground in promoting democracy and respect for human rights in other parts of the world. Indeed, the international community has taken notice. In December of 2003, for example, a body of the Organization of American States (OAS) declared the United States in violation of provisions of the American Declaration of the Rights and Duties of Man, a statement of human rights principles to which the U.S. subscribed in 1948.¹² In 2005, the Organization for Security and Cooperation in Europe, of which the United States is a member, also weighed in, urging the United States to "adopt such legislation as may be necessary" to provide DC residents with equal voting rights.¹³

Many in Congress have been working to right this longstanding wrong. Legislation to grant District residents voting rights in the House of Representatives passed the Senate in February, and we are still pushing for action in the House.¹⁴ Extending voting rights to DC residents is one of the highest legislative priorities of The Leadership Conference this year, and will remain so every year, until it is achieved. Our nation's credibility depends on it.

Addendum: Mission to the United States of America, April 29, 2009 at 28 (available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.36.Add.3.pdf>).

¹¹ See, e.g., S. 1789 ("Fair Sentencing Act of 2009"), 111th Cong. (2009) (sponsored by Chairman Durbin); H.R. 3245 ("Fairness in Cocaine Sentencing Act of 2009"), 111th Cong. (2009).

¹² Inter-American Commission on Human Rights, *Statehood Solidarity Committee/United States*, Report No. 98/03, Case 11.204 (Dec. 29, 2003).

¹³ OSCE Parliamentary Authority, Washington, *DC Declaration and Resolutions Adopted at the Fourteenth Annual Session*, July 1-5, 2005.

¹⁴ S. 160 ("District of Columbia House Voting Rights Act of 2009"), 111th Cong.



Reform of the U.S. Commission on Civil Rights

For many years, the U.S. Commission on Civil Rights (USCCR) was known as the “conscience of the nation,” and it helped make the case for landmark legislation such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. Over time, however, the Commission has been weakened by partisan manipulation to the point that it is ineffective and a hollow shell of its former self.

As presently constituted, it is more of an obstacle than a constructive partner in solving many of our nation’s problems. For example, the Commission opposed both the “Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act”¹⁵ and the “Lilly Ledbetter Fair Pay Act.”¹⁶ Four years after the devastation of Hurricane Katrina, the Commission has yet to undertake a thorough and credible investigation of the civil and human rights issues left unresolved in the aftermath of the largely man-made disaster that occurred as the storm subsided.

While the USCCR has been derelict in its duty to fully investigate the aftermath of Hurricane Katrina, the international community has certainly been paying attention. In its “Concluding Observations” filed in response to the United States’ 2007 report, the U.N. Committee on the Elimination of Racial Discrimination recommended that the U.S. government “facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence.” It added that the U.S. government should make “every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them.”¹⁷ The UN Special Rapporteur on Racism echoed those same sentiments in an April 2009 report that also recommended a “robust and targeted governmental response to ensure that racial disparities are addressed” for internally displaced people living in the Gulf Coast Region.¹⁸

The tragedy and devastation experienced by residents of the Gulf Coast region exposed the glaring inequalities that continue to afflict other parts of the country. The magnitude and scope of discrimination in housing, education, employment, and access to quality health care merits the kind of sustained examination that only a truly independent national human rights institution can provide, as recommended to the United States by the U.N. CERD committee last¹⁹ year.

For these reasons, The Leadership Conference has joined forces with the American Civil Liberties Union, the Rights Working Group, and other organizations to form the Campaign for a

¹⁵ Division E, “National Defense Authorization Act for Fiscal Year 2010,” Pub. L. 111-84 (Oct. 28, 2009).

¹⁶ Pub. L. 111-2 (Jan. 29, 2009).

¹⁷ United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, adopted March 5, 2008, at 10 (available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf>).

¹⁸ United Nations Human Rights Council, *Racism, Racial Discrimination, Xenophobia And Related Forms Of Intolerance, Follow-Up To And Implementation Of The Durban Declaration And Programme Of Action: Addendum: Mission to the United States of America*, April 29, 2009 at 26 (available at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.36.Add.3.pdf>).

¹⁹ *Supra* note 17, at 3.



New Domestic Human Rights Agenda, which has called for reconstituting the current USCCR as the U.S. Commission on Civil and Human Rights. As described by our March 2009 report entitled, "Restoring the Conscience of a Nation,"²⁰ this new body would have an expanded mandate to include the framework of human rights and discrimination, including that based on sexual orientation and gender identity. We also recommend that commissioners be subject to Senate confirmation proceedings, in order to weed out potentially partisan nominees with little or no prior experience in civil or human rights policy issues.

The Right of Workers to Form Unions

Article 23(4) of the Universal Declaration of Human Rights states that "everyone has the right to form and to join trade unions for the protection of his interests."²¹ Article 5(c)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) contains similar language.²²

Throughout the history of our nation's civil rights movement, this right to form unions was recognized as essential to promoting racial equality in our nation. Indeed, Leadership Conference co-founder A. Philip Randolph, longtime leader of the African-American Sleeping Car Porters Union, championed a broad pro-worker agenda as a vital part of our coalition's efforts. Following in Randolph's footsteps, Dr. Martin Luther King, Jr., when he marched in support of striking Memphis sanitation workers, recognized that it was not racial prejudice alone, but the joint effects of racial discrimination and economic privation that denied economic opportunity to poor African-American workers.

As Randolph and King wisely recognized, unions hold forth the promise of bringing us closer to a society where all Americans enjoy economic opportunity. Unions markedly improve wages and benefits for women and minorities, particularly those trapped at the bottom of the economic ladder. They also make workplaces fairer and more humane through the enforcement of contract provisions addressing issues like sick leave and workplace safety.

Women and minorities need unions now more than ever, as the current economic downturn is a particularly strong threat to low wage workers. Indeed, whatever modest economic gains women and minority workers have garnered in recent decades may be wiped out if they are unable to push back against wage and benefit cuts and to fight for better job security.

In spite of this need, our nation's labor laws are failing to keep up with changing circumstances that have dramatically weakened the labor movement. As we pointed out in a recent report,²³

²⁰ Leadership Conference on Civil Rights Education Fund, *Restoring the Conscience of a Nation: A Report on the U.S. Commission on Civil Rights*, March 2009 (available at <http://www.civilrights.org/publications/reports/commission/>).

²¹ United Nations, *Universal Declaration of Human Rights* (1948) (available at <http://www.udhr.org/UDHR/default.htm>).

²² United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) (available at <http://www2.ohchr.org/english/law/cerd.htm>).

²³ Leadership Conference on Civil Rights Education Fund, *Let All Voices Be Heard - Restoring the Right of Workers to Form Unions: A National Priority and Civil and Human Rights Imperative*, Sept. 2009 (available at <http://www.civilrights.org/publications/voices-2009/>).



employers routinely push the boundaries of our laws by delaying elections, coercing their workers to oppose unions, retaliating against union supporters, and refusing to agree to first contracts. Even when they overstep the law's boundaries, penalties are weak – nothing more than a slap on the wrist – so employers routinely decide they would rather risk the law's meager penalties in order to keep a union away.

In addition to aggressive employer resistance to the right to organize, the changing characteristics of the American workplace have also made it extremely difficult to organize women and minorities. Not only has our workforce shifted from manufacturing to low-skill service-sector jobs, but women and minority workers are most likely to be concentrated within these service jobs. Unlike manufacturing, the service industry presents unique obstacles to union organizing. The kind of shop-floor solidarity that often occurs in factories where workers toil side by side is less likely to take root. In contrast to large factories with many workers at a single site, smaller service industry locations, like retail stores or restaurants, require enormous investments by unions just to unionize a handful of workers. Without a change in our laws, it is difficult to imagine how unions will be able to organize widely in the service sector.

As a result of these factors, the decline of America's unions has reached a crisis point. One out of every three workers in the private sector was a union member in the late 1950s, a time when America enjoyed a growing middle class. Today, fewer than one in twelve workers in the private sector are union members.²⁴ Unions, more than ever before, stand ready to organize professions with large concentrations of minority workers. However, weaknesses in our labor laws and an all-out attack by the business community on labor unions have prevented unions from being a far greater force for economic opportunity than they might otherwise be.

For these reasons, The Leadership Conference views the Employee Free Choice Act (EFCA)²⁵ as a profoundly important step in fulfilling our nation's obligations under the UDHR, CERD, and other international human rights instruments. EFCA will prevent employers from using the many unfair tactics currently at their disposal to frustrate the desire of their workers to join unions. Among other things, it will provide for union representation as soon as a majority of workers express their desire to do so, rather than allowing employers to use tactics of delay and intimidation during the lengthy NLRB election process to coerce workers into rejecting a union. It will also enhance penalties for anti-union retaliation and will prevent employers from dragging their feet on first contract negotiations – a tactic frequently used to erode confidence and support for the union. Restoring fairness to the process by which workers choose a union is one of the most important steps we as a nation can take to address the remaining hurdles we face on our path to becoming a society where all our people enjoy the same opportunity to succeed.

Rights of Indigenous Peoples

Indigenous peoples are the original inhabitants of this country: Indian and Alaska Native nations and Natives of Hawai'i. These indigenous peoples hold inherent human rights, many of which

²⁴ Barry T. Hirsch and Jeffrey M. Hirsch, Remarks for Allied Social Science Association Meetings: *The Rise and Fall of Private Sector Unionism: What Comes Next?*, Dec. 2005.

²⁵ S. 560/H.R. 1409, 111th Cong. (2009).



are embodied in treaties and agreements with the United States, including the right to self-government, land rights, and the federal trust responsibility.

Sadly, the United States has not taken seriously its human rights obligations toward Indian and Alaska Native nations and individuals, nor toward Natives of Hawai'i. The indigenous peoples of this country continue to be denied many ordinary constitutional rights and human rights, especially the right to equality before the law. For example, the federal government claims the power to take aboriginally-held Native lands and resources without any compensation or due process of law, and Congress frequently deals with Native property and money with legislation that would be forbidden by the Constitution if it affected anyone else's property. Native nations are frequently denied any legal remedy for these wrongs, including federal violations of treaty obligations. This legal framework is inconsistent with our Constitution and with this country's human rights obligations.

Native women suffer horrendous levels of sexual violence, three times greater than that suffered by others. The cause is the dysfunctional and unfair law concerning criminal jurisdiction in Indian Country and the failure to adequately police and prosecute these crimes. This has been brought to the attention of the U.N. Committee on the Elimination of Racial Discrimination (CERD), but there has been no adequate response by the United States.

The United States was condemned by the Inter-American Commission on Human Rights for its discriminatory laws dealing Indian nations and individuals, particularly for the unfair procedures applied to Indian land rights and land claims, and for the United States' failure to accord Indian peoples equality before the law – particularly with respect to the protection of constitutional rights. This case was *United States v. Mary and Carrie Dann*.²⁶ The Inter-American Commission made a number of recommendations for correcting these human rights violations, but the United States has openly flouted the decision and refused to take any corrective action whatever.

These discriminatory laws and procedures affecting Native nations and individuals have been repeatedly noted and condemned by CERD as well over a period of many years. Again, the United States has done nothing to respond to CERD's recommendations and observations.

In recent years, we note that the United States was one of only four countries to vote against the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly in 2007. The United States' reasons for voting "no" appeared to be pretextual rather than truly substantive. At the same time, the United States has refused to participate in negotiating and preparing the American Declaration on the Rights of Indigenous Peoples in the Organization of American States. The refusal of the United States to participate has had a severe adverse effect on the process and on indigenous rights, though practically all other countries are moving forward in a productive way in negotiations.

²⁶ Case 11,140, Report No. 75/02, Inter-Am. C.H.R. (2002) (affirming rights of indigenous peoples to their lands under international law and finding that the United States deprived Mary and Carrie Dann of their lands held under aboriginal title through procedures that did not accord due process and which denied the Danns equality before the law).



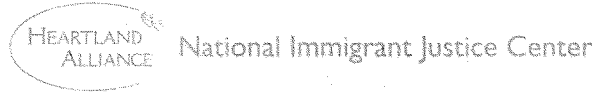
The failure of the United States to comply with its human rights obligations is widespread and complex. The consequences for the victims of abuse are terrible, and the consequences for this country, its character, and its reputation are very serious as well.

Conclusion

Less than a week ago, the world celebrated the 61st Anniversary of the Universal Declaration of Human Rights. The UDHR is a truly transformative document because it was the first attempt to hold all governments to a common standard of conduct, serving as a single yardstick that U.N. bodies and non-governmental organizations alike could use to measure governmental performance. With former First Lady Eleanor Roosevelt at the helm, the United States played a critical role in its adoption, on December 10, 1948.

Since then, the United States has often used the standards of UDHR and other instruments to criticize other governments, sometimes strongly, and rightfully so. Yet when it comes to conduct at home, those same international standards often get short shrift. I hope that will change. Indeed, as President Barack Obama aptly noted in his Nobel acceptance speech on Human Rights Day, "America cannot insist that others follow the rules of the road if we refuse to follow them ourselves." At the same time that we take our human rights ideals abroad, we must ensure that we bring them back home as well.

Thank you for both the opportunity to speak today and for your leadership on this issue. I look forward to answering any questions you may have.



**Statement of
Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center**

Senate Judiciary Subcommittee on Human Rights and the Law

**Hearing on the Law of the Land: U.S. Implementation of Human Rights Treaties
December 16, 2009**

I. Introduction

Heartland Alliance's National Immigrant Justice Center (NIJC) commends Senator Durbin and the members of the Senate Judiciary Subcommittee on Human Rights and the Law for holding this first-ever Congressional hearing on U.S. implementation of human rights treaties. We appreciate the opportunity to submit a statement on this important issue.

The United States was founded on human rights principles. Recognizing the right to life, liberty, and the pursuit of happiness has made the United States a beacon for people fleeing oppression throughout our history. Sixty-one years ago, in the wake of a devastating war and in the middle of the greatest refugee crisis in world history, the United States played a leading role in drafting the Universal Declaration of Human Rights, a document designed to protect all individuals, regardless of their citizenship status. The Declaration laid the foundation for all subsequent international human rights law.

The International Covenant on Civil and Political Rights (ICCPR) implemented much of the Declaration in a binding treaty in 1976. In language that echoes the U.S. Constitution, the ICCPR addresses basic rights such as freedom of religion, freedom of speech, and freedom of assembly. The United States signed and ratified the ICCPR with reservations in 1992, but has failed to live up to its obligations, particularly when it comes to the treatment of non-citizens. The current U.S. immigration system violates both the letter and spirit of the ICCPR and demands the immediate attention of Congress.

NIJC is a non-governmental organization based in Chicago and dedicated to safeguarding the rights of noncitizens. NIJC advocates for immigrants, refugees, and asylum-seekers through direct legal representation, policy reform, impact litigation, and public education. NIJC and its *pro bono* partners provide legal representation to approximately 8,000 individuals annually, including low-income immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. Since its founding 25 years ago, NIJC has developed the largest *pro bono* network in the United States, totaling more than 1,000 attorneys from the nation's leading law firms.

NIJC has played a major role in advocating for reform of the immigration system through impact litigation, advocacy, and public education. As the co-convenor of the Department of Homeland Security (DHS)/NGO Enforcement Working Group, NIJC facilitates advocacy and open communication between DHS and human rights organizations, legal aid providers, and immigrant rights groups. With a national membership of more than three dozen organizations,

the Working Group advocates for full protection of internationally recognized human rights, constitutional and statutory due process rights, and humane treatment of noncitizens. The Working Group's unique vantage point gives it valuable insights into national concerns while supporting efforts to reform the immigration system.

Our statement will focus on the United States' obligations under the ICCPR and the treatment of noncitizens in the United States with respect to due process and arbitrary detention. The statement also sets forth recommendations to ensure fair treatment of noncitizens and humane detention conditions. NIJC's years of experience serving the immigrant population and working with colleagues throughout the country and internationally give us a unique perspective on the inner workings of the immigration system and its relationship to U.S. obligations under the ICCPR.

II. The United States has Failed to Implement the ICCPR's Due Process Protections for Noncitizens

Under the ICCPR, prior to expelling a noncitizen a signatory country must provide the individual with an opportunity to present evidence and to have their case reviewed by a "competent authority."¹ The noncitizen must also be allowed to be represented by counsel in the proceeding. In addition, signatory countries must provide detained individuals with timely judicial review of the lawfulness of their detention and must release individuals whose detention is found to be unlawful.² Current U.S. laws and policies violate these provisions of the ICCPR.

A. Lack of Review by a Competent Authority

During the past few years, serious concerns have been raised about the ability of the immigration court system to adjudicate cases competently. Several U.S. Circuit Courts of Appeals have found that current immigration court practice has "fallen below the minimum standards of legal justice."³ The circuit courts have similarly criticized the Board of Immigration Appeals (Board), the administrative appellate agency, for affirming the erroneous decisions of immigration judges with no opinion or with a "very short, unhelpful, boilerplate opinion."⁴ The reversal rate of immigration court decisions by circuit courts is as high as 40 percent, showing that the government and immigration courts are making frequent errors at the cost of the due process rights of noncitizens.⁵ This pattern of errors is the result of a system that is chronically

¹ "An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." International Covenant on Civil and Political Rights [hereinafter ICCPR] art. 13, Dec. 19, 1966, 999 U.N.T.S. 171.

² "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4).

³ *Benslimane v. Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (citing to decisions by the Third, Second, and Ninth Circuit Courts of Appeals, which criticized the Board of Immigration Appeals and the immigration courts).

⁴ *Iao v. Gonzales*, 400 F.3d 530, 534-35 (7th Cir. 2005).

⁵ *Benslimane v. Gonzales*, 430 F.3d at 830.

overburdened and underfunded.⁶ Immigration judges typically handle more than 1,500 cases per year without the assistance of law clerks.

The lack of adequate review within the immigration court system is compounded by laws that limit federal courts' review of immigration decisions. For example, the Immigration & Nationality Act creates significant obstacles to judicial review for individuals denied relief by DHS, even asylum seekers. NIJC, with allies at the American Civil Liberties Union, is currently litigating two cases before the U.S. Supreme Court regarding the jurisdiction of federal courts to review denials of asylum.⁷

The failure of the government to ensure competent adjudications of immigration cases and the obstacles individuals face to appeal unjust decisions violate the U.S. obligations under the ICCPR.

B. Barriers to Access to Representation

Legal representation is critical to the ability of noncitizens to obtain immigration relief. Immigration law and the process are complex and difficult to navigate without competent legal representation. This is particularly true with respect to asylum-seekers, who are almost three times more likely to be granted asylum if they are represented by counsel than if they appear *pro se* in immigration hearings.⁸

Under U.S. law, however, noncitizens do not have a right to counsel at government expense. The U.S. Immigration and Nationality Act (INA) provides noncitizens with merely the "privilege" of counsel.⁹ The United States does not provide counsel for any noncitizens in immigration proceedings, including vulnerable populations such as unaccompanied minors, asylum seekers, torture survivors, or victims of trafficking. By allowing noncitizens only the mere "privilege" of representation at no government expense, the United States effectively limits representation to noncitizens who are capable of locating and have the financial means to secure counsel on their own.

For many noncitizens the barriers to finding legal representation are compounded by their isolation in immigrant detention facilities. Noncitizens apprehended by immigration authorities are often moved to facilities that are far from the location of their arrest, even if they have well-established family and community ties in that area. Most immigration detention facilities are located in remote areas, prohibitively far from urban centers where most *pro bono* attorneys or even private attorneys are found.¹⁰ Even if a detained

⁶ Transactional Records Access Clearinghouse, Syracuse University, Immigration Courts: Still a Troubled Institution, June 2009, available on line at <http://trac.syr.edu/immigration/reports/210>.

⁷ *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), petition for cert. filed, (Aug. 11, 2009) (No. 09-194) and *Khan v. Filip*, 554 F.3d 681 (7th Cir. 2009), petition for cert. filed, (Aug. 20, 2009) (09-229).

⁸ Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295, 340 (2007).

⁹ INA § 240(b)(4)(A).

¹⁰ National Immigration Law Center, ACLU of Southern California, and Holland & Night, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers, July 2009, available on line at <http://nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States, December 2009, page 4 and pp. 46-

noncitizen manages to obtain representation, the individual may then be transferred to another immigration detention facility located so far away from their attorney that the representation must be terminated. In some cases, the rapid transfer of detainees between facilities creates situations in which attorneys cannot locate their own clients.¹¹ The effect of detaining noncitizens in remote locations thus effectively restricts their right to counsel in violation of the United States' treaty obligations under Articles 3 and 26 of the ICCPR.

C. Lack of Review of Detention

The United States currently provides different categories of noncitizens with differing levels of review over detention decisions. For example, arriving asylum seekers do not have the ability to petition an immigration judge for release from detention. DHS has the exclusive discretionary authority to decide whether an asylum seeker should be detained and its decision is not subject to review. The unreviewable detention of arriving asylum seekers violates the ICCPR's requirement that individuals who are detained be provided with timely judicial review of the lawfulness of their detention.

III. The United States has Failed to Implement the ICCPR's Prohibition Against Arbitrary Detention

Under the ICCPR, "no one shall be subjected to arbitrary arrest or detention" or "deprived of his liberty except . . . in accordance with such procedures as are established by law."¹² Again, echoing the U.S. Constitution, the treaty also provides that "all persons deprived of their liberty shall be treated with humanity."¹³ In our experience, the U.S. immigration detention system does not meet its obligations under the ICCPR's provisions protecting detained individuals.

A. Arbitrary Detention

Over the past several years, the number of noncitizens held in the immigration detention system has increased dramatically. The United States currently detains approximately 33,000 noncitizens on a given day, a 60 percent increase from just four years ago.¹⁴ Most detained noncitizens do not have any criminal convictions; they are held in custody while their case is pending in the immigration court system. A recent study found that noncitizens without criminal convictions typically spend more than two months in detention, although hundreds have been held in custody for more than a year.¹⁵

51, available on line at <http://www.hrw.org/en/node/86789> [hereinafter Human Rights Watch Report].

¹¹ Human Rights Watch Report, pp. 43-46

¹² "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." ICCPR, art. 9(1)

¹³ "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." ICCPR, art. 10(1)

¹⁴ Dr. Dora Schirio, special advisor on ICE Detention and Removal, Immigration Detention Overview and Recommendations, Department of Homeland Security Immigration and Customs Enforcement, October 6, 2009, available online at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

¹⁵ *Id.*

The United States does not provide its immigration officers with clear guidance regarding which noncitizens should be detained and which should be released. Therefore, the population of detained immigrants in the United States includes individuals who recently entered the country without authorization as well as long-time lawful permanent residents who committed a minor infraction more than a decade ago. It includes vulnerable populations such as asylum seekers, torture survivors, pregnant women, and individuals with chronic and serious illnesses, including mental illness.

As noted above, the United States detains arriving asylum seekers who have been found by immigration officers to have a credible fear of persecution. While current asylum parole guidelines suggest that immigration officers have the authority to release such asylum seekers from detention, asylum seekers must meet strict requirements to win release or parole, including demonstrating to ICE that their release is in the "public interest," an undefined term that does not encourage immigration officials to grant release. As a result of the lack of clarity, immigration officers inconsistently apply the parole guidelines. Factors as arbitrary as geography, rather than the merits of the case, often determine whether an asylum seeker will be released.¹⁶

The United Nations Human Rights Committee has found that detention is arbitrary when imposed without consideration of the totality of the individual's circumstances.¹⁷ Under this finding, the United States' policy of detaining noncitizens regardless of their particular situation violates the ICCPR's prohibition against arbitrary detention.

B. Inhumane Detention Conditions

For noncitizens held in immigrant detention, daily life is often fraught with isolation. As noted above, the immigrant detention system expanded rapidly over the past four years. Although the increase in detainees was a result of an increase in enforcement activity by immigration officials, the United States did not plan for the corresponding increase in detainees. Due to this failure, the United States relies on state and local jails and private contractors to house more than 70 percent of immigration detainees. Decisions about where to detain an individual and whether to transfer an individual to another facility often are based on the capacity of facility contractors, rather than on the needs of a detained individual attempting to prove her eligibility for relief from removal. The use of local and private contractors also means that immigrants—who are detained under civil authority—face the same conditions as convicted criminals, such as confinement in cells, transportation in shackles, lack of contact visits (even with young children), and lack of privacy when using the bathroom or shower.¹⁸ Additionally, many detainees are held within the general population of criminal inmates.¹⁹

¹⁶ For example, in fiscal year 2003, only 0.5% of arriving asylum-seekers in New Orleans were released prior to a decision in their case while in Harlingen, Texas, 98% of arriving asylum-seekers were paroled. UICRF Report, *supra* note 10, Executive Summary at page 8, available online at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/execsum.pdf.

¹⁷ See *A. v. Australia*, UN Human Rights Committee, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, April 30, 1997, available online at www.unhcr.ch/tbs/doc.nsf/. See also Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, March 2008, page 10, available online at <http://www2.ohchr.org/english/issues/migration/rapporteur/visits.htm>.

¹⁸ Human Rights First, U.S. Detention of Asylum Seekers Seeking Protection, Finding Prison, June 2009, page 23, available online at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

¹⁹ Department of Homeland Security, Immigration Detention Overview and Recommendations, October 2009, page

Individuals held in immigrant detention often also lack access to basic medical care, such that the conditions of their detention fail to meet the standards for humane treatment. Since 2003, more than 106 immigrants have died in detention.²⁰ DHS has admitted that it lost track of some of these individuals until advocates and the media brought the deaths to their attention.²¹ The conditions of immigration detention facilities are particularly inhumane for vulnerable populations such as asylum seekers, most of whom have fled brutal persecution in their home countries. Many detained asylum-seekers have physical injuries, as well as significant psychological issues, that frequently go untreated while they remain in detention for long periods, waiting to have a full hearing on their asylum case.

The practice of arbitrarily detaining noncitizens in remote, penal detention facilities violates the United States' obligations under the ICCPR.

IV. Recommendations for Ensuring Compliance

In order for the U.S. government to comply with its international treaty obligations under the ICCPR, NIJC recommends the following:

- The United States must ensure that the immigration court system is independent and accountable, with adequate court staffing, immigration judges who have authority to control their own dockets and courtrooms, DHS attorneys who are assigned to cases from start to finish, an electronic case management system, and an effective appellate system.
- Noncitizens should have the right to seek meaningful judicial review of decisions issued by the immigration courts.
- The United States must ensure that every detained asylum seeker be afforded a timely opportunity to have his or her detention reviewed by an immigration judge, according to clear standards.
- The United States must provide noncitizens with full access to legal counsel.
- DHS must end the practice of arbitrarily transferring noncitizens between detention facilities. DHS also must ensure that detention facilities are located in

²⁰ 21, available on-line at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. See also Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, March 2009, page 37, available online at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

²⁰ Nina Bernstein, Ill and in Pain, Detainee Dies in U.S. Hands, *New York Times*, August 12, 2008, available online at <http://www.nytimes.com/2008/08/13/nyregion/13detain.html>; Dana Priest and Amy Goldstein, System of Neglect, *Washington Post*, May 11, 2008, available online at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html; Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, March 2009, available online at <http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed>. See also Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody*, February 2009, available online at <http://www.fiaca.org/reports/DyingForDecentCare.pdf>; and links to all *New York Times* articles on in-custody immigrant deaths at http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

²¹ Nina Bernstein, Officials Say Detainee Fatalities Were Missed, *New York Times*, August 17, 2009, available online at <http://www.nytimes.com/2009/08/18/us/18immig.html>.

areas where detained noncitizens have an opportunity to access *pro bono* representation.

- DHS should exercise prosecutorial discretion when it carries out its detention mandates and should create a risk assessment tool, in order to determine if an individual poses a threat to the community or a flight risk. DHS must release noncitizens who do not pose a risk. In addition, DHS should create a national secure alternatives to detention program for noncitizens who DHS determines must be detained.
- DHS should establish a presumption of parole for asylum -seekers who pass a credible fear interview, with straightforward standards for rebutting the presumption in light of flight or security risks.
- DHS should ensure that detention facilities provide adequate space for family visitation, confidential meetings with attorneys and health care practitioners, and indoor and outdoor recreation. DHS must not detain noncitizens with the general population of criminal inmates.
- Congress should also enact legislation to protect the rights and ensure the health and safety of detained noncitizens. Furthermore, Congress and independent investigators must exercise rigorous and ongoing oversight to measure the impact of these reforms to ensure that the United States' obligations under the ICCPR are upheld.

V. Conclusion

The ICCPR, like the U.S. Constitution, recognizes the rights of all individuals to due process. As a nation committed to the rule of law, we must restore our human rights reputation and ensure that we are complying with our international obligations to defend the inherent human dignity of every person, regardless of citizenship status.



**Statement of
Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center**

Senate Judiciary Subcommittee on Human Rights and the Law

**Hearing on the Law of the Land: U.S. Implementation of Human Rights Treaties
December 16, 2009**

U.S. Obligations Under the Refugee Protocol

I. Introduction and Background

Heartland Alliance's National Immigrant Justice Center (NIJC) commends Senator Durbin and the members of the Senate Judiciary Subcommittee on Human Rights and the Law for holding this first-ever Congressional hearing on U.S. implementation of human rights treaties. We appreciate the opportunity to submit a statement for the record on this important issue.

The United States was founded on human rights principles. Throughout our history, recognizing the right to life, liberty, and the pursuit of happiness has made the United States a beacon for people fleeing oppression. Sixty-one years ago, in the wake of a devastating war and unimaginable human rights violations, the United States played a leading role in drafting the Universal Declaration of Human Rights (Declaration), a document designed to protect all individuals, regardless of their citizenship status. The Declaration laid the foundation for all subsequent international human rights law. Article 14 of the Declaration recognizes refugee rights as fundamental human rights, stating that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

The primary instruments through which States assumed legal duties towards refugees are the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol). Among other provisions, these instruments require States to recognize as refugees anyone with a "well-founded fear" of persecution in their home countries, to accord refugees certain legal rights, and to refrain from returning them to countries where their safety would be threatened.¹ Although the United States did not sign the Refugee Convention, it did sign and ratify the Refugee Protocol.² In 1980, the United States enacted the Refugee Act to ensure compliance with the Refugee Protocol.³

¹ "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"], art. 33-1, 189 UNTS 150.

² Although the United States did not sign the Convention, the Protocol includes by reference the rights and duties set forth in the Convention. Refugee Protocol art. 2 ("The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to Refugees as hereinafter defined.") The

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This statement focuses on the United States' obligations under the Refugee Protocol. To the extent that violations of refugees' rights overlap with other human rights violations, this statement will reference a companion statement submitted by NIJC for this hearing addressing the United States' compliance with the International Covenant on Civil and Political Rights (ICCPR).⁴

NIJC is a non-governmental organization based in Chicago and dedicated to safeguarding the rights of noncitizens in the U.S. NIJC advocates for immigrants, refugees, and asylum seekers through direct legal representation, policy reform, impact litigation, and public education. NIJC and its *pro bono attorneys* provide legal representation to approximately 8,000 individuals annually, including low-income immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. Since its founding 25 years ago, NIJC has developed a network of 1,000 *pro bono* attorneys from the nation's leading law firms – the largest such network of its kind in the United States, NIJC's vast experience with asylum seekers, from both a policy and direct services perspective, gives us a unique perspective on how our immigration system fails to protect refugees.

II. The United States Has Failed to Adequately Implement the Refugee Protocol's Prohibition on *Refoulement*

The bedrock right recognized by the Protocol is the prohibition on *refoulement* – the return of refugees to countries where their "life or freedom would be threatened."⁵ Under the Protocol, refugees can be returned *only* if they are a "danger to security" or if they have been convicted of a "particularly serious crime."⁶ Yet the United States violates the prohibition on *refoulement* by imposing an arbitrary deadline for asylum applications and by failing to provide adequate due process protections to asylum seekers.

A. The Arbitrary One-Year Deadline For Filing An Asylum Application

Asylum seekers in the United States must prove that they have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁷ In 1996, the United States restricted this definition by requiring asylum seekers to apply within one year of arriving in the country.⁸ Individuals applying for asylum more than one year after arrival are denied asylum protection unless

Protocol expanded these rights and duties to all refugees, whereas the Convention only applied to those displaced by the Second World War and its aftermath. Hereinafter, this statement cites to specific articles of the Convention when discussing the Protocol.

³ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (citing "the abundant evidence of an intent to conform the definition of "refugee" and our asylum law to the United Nation's Protocol to which the United States has been bound since 1968).

⁴ See Statement of Mary Meg McCarthy, Executive Director, Heartland Alliance's National Immigrant Justice Center, December 16, 2009 [hereinafter "NIJC ICCPR Statement"].

⁵ Refugee Protocol, art. 33-1.

⁶ *Id.*, art. 33-2.

⁷ 8 U.S.C. § 1101(a)(42). This statutory definition mirrors the definition of refugee in the Protocol.

⁸ 8 U.S.C. § 1158(a)(2).

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they demonstrate that they meet one of the narrow exceptions to the one-year deadline.⁹ In NIJC's experience, the United States rarely finds that an individual meets an exception to the deadline. As a result, this restriction on asylum applications frequently prevents *bona fide* asylum seekers from enjoying the protection of the Refugee Protocol.

NIJC's experience is supported by a number of scholarly articles and studies that have shown that the deadline precludes *bona fide* refugees from asylum benefits.¹⁰ In addition, an upcoming study that NIJC initiated with Human Rights First and the Penn State Dickinson School of Law indicates that during the years 2005-2008, the Board of Immigration Appeals was approximately ten times more likely to find that the deadline barred asylum eligibility than it was to find that the applicant met the deadline or was eligible for an exception.¹¹

The one-year deadline particularly affects individuals who have a well-founded fear of persecution but were unaware that asylum protections extended to them. The United States does not consider ignorance of refugee law to be "good cause" for missing the deadline. This has a particular impact on lesbian, gay, bisexual, and transgender (LGBT) asylum applicants who are unaware of the relatively recent protections granted to those who fear persecution based on their sexual minority status.

Although an individual denied asylum under the one-year deadline may apply for "withholding of removal," this fact does not bring the United States into compliance with the Refugee Protocol. The eligibility standard for withholding of removal is a higher bar than the asylum standard; to be eligible for withholding an individual must show that more likely than not that she will be persecuted. The United Nations High Commissioner for Refugees has found that this standard is impermissibly high.¹²

The United States' requirement that an asylum application be filed within one year of arrival is arbitrary and may lead to the deportation of *bona fide* asylum seekers. Therefore, the United States has not adequately implemented the Refugee Protocol's prohibition on *refoulement*.

B. The Lack of Adequate Due Process Protections

Immigration advocates have expressed deep concerns about the lack of due process protections for individuals in the asylum adjudication system. One federal appellate court judge wrote that current immigration court practice has "fallen below the minimum

⁹ 8 U.S.C. § 1158(a)(2)(D)

¹⁰ See, e.g., Karen Musalo and Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int'l & Comp. L. Rev.* 693, 711 (2008); Leena Khandwala et. al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 *ImmigBrief* 1 (2005).

¹¹ Data on file with NIJC, study results forthcoming in early 2010.

¹² See, e.g., Guy S. Goodwin-Gill and Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW*, THIRD ED., 53-58, Oxford University Press (2007).

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standards of legal justice.”¹³ A detailed study of decision-making in asylum offices and immigration courts found such grave inconsistencies that it termed the asylum system “refugee roulette.”¹⁴ We discuss these deficiencies in greater detail in our companion statement to this Subcommittee on the ICCPR.¹⁵ Despite these well-documented deficiencies, the United States has failed to institute the reforms required to adequately protect the due process rights of asylum-seekers.

III. Recommendations for Ensuring Compliance

To comply with its obligations under the Refugee Protocol, the United States must implement the following reforms:

- Repeal the arbitrary one year deadline
- Reform the immigration adjudication system to ensure that it is independent and provides due process protections
- Provide noncitizens with the right to seek meaningful judicial review of decisions issued by the immigration courts
- Provide noncitizens with full access to legal representation

IV. Conclusion

The Refugee Protocol provides critical due process protections for individuals fleeing persecution. As a nation committed to the rule of law, the United States must restore our human rights reputation and ensure that we are complying with our international obligations to defend the inherent dignity of every person.

¹³ *Benslimane v. Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (citing to decisions by the Third, Second, and Ninth Circuit Courts of Appeals, which criticized the Board of Immigration Appeals and the immigration courts).

¹⁴ See Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” 60 *Stanford Law Review* 295 (2007).

¹⁵ See NIJC ICCPR Statement at 2-3.

Backgrounder

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The Inequities of the U.N. Committee on the Elimination of Racial Discrimination

Steven Groves

The United States of America has done more than almost any other country to eliminate racial and ethnic discrimination within its borders. In the 1860s, an agonizing Civil War ended the institution of slavery at the cost of over 600,000 American lives. The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee equal protection and due process under the law to all persons, regardless of race or ethnicity. Other constitutional protections prohibit discrimination in voting and elsewhere, and Congress and the courts have been particularly active in the past 50 years in ensuring that the ideal of equality of opportunity is realized in fact.

In a series of landmark decisions in the 1950s and 1960s, the U.S. Supreme Court held that racial segregation in public schools and other government facilities was unconstitutional, and the Court has a strong history of protecting the rights of racial minorities since then. The Civil Rights Acts of 1964 and 1965 were among the watershed laws that helped to enforce the prohibition against racial discrimination in public places and schools, public and private employment, voting, housing, government contracting, and government programs.

These laws created a number of specialized civil rights enforcement agencies and new divisions within the Justice, Housing and Urban Development, Education, and other departments, with thousands of employees dedicated to enforcing these non-discrimination guarantees. Each of the 50 states and the territories have enacted similar prohibitions and created

Talking Points

- The U.N. Committee on the Elimination of Racial Discrimination is attempting to erode American sovereignty by imposing on the U.S. its own brand of morality in legal, social, and cultural matters.
- Rather than engaging the U.S. delegation regarding measures taken to eliminate racial disparities, the CERD Committee has pursued an agenda unrelated to discrimination that includes restoring voting rights to convicted felons, promoting multiculturalism, and restricting the activities of transnational corporations.
- The committee largely ignored official U.S. reports during its latest review and instead embraced dubious allegations made in a report submitted by a non-governmental organization that condemned the celebration of Columbus Day as a "historically racist event" and characterized America as a "racist society."
- Barring a major improvement in the CERD Committee's process for reviewing the U.S. record on racial discrimination, the U.S. must seriously reconsider the level of its future engagement with the committee.

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civil rights agencies. Though the need for vigilance remains, over the past several decades, minorities have risen to the top of public life in the United States, including government, business, academia, the law, sports, and entertainment.

The United Nations, however, has found U.S. efforts regarding racial discrimination to be seriously deficient. The U.N.'s opinion of the U.S. record on racial discrimination—as pronounced by the Committee on the Elimination of Racial Discrimination (CERD Committee)—is the result of a skewed and biased review process and demonstrates that the U.N. is not a legitimate partner for improving the state of race relations in the U.S. The CERD Committee has breached the obligations it owes to the U.S. by ignoring the reports submitted to it by the U.S. and by repeatedly attempting to erode American sovereignty by imposing on the U.S. its own brand of morality with respect to legal and social issues.

Barring a major improvement in the CERD Committee's process for reviewing the U.S. record on racial discrimination, the U.S. must seriously reconsider the level of its future engagement with the committee.

The U.N. System and Racial Discrimination

Most nations with sizable minority populations have had recurring periods of tribal, ethnic, or racial strife, and ending racial discrimination has long been a part of the United Nations' official human rights mission. The Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948, enumerated the civil and political rights and

fundamental freedoms held universally by mankind.¹ Together with the Declaration, two other multilateral human rights treaties—the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966)—constitute the “International Bill of Rights,” which collectively guarantees the enjoyment of all human rights regardless of one's race, color, or national origin.²

In 1965, the General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³ CERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁴

Parties to CERD make specific commitments to review government policies, rescind those that create or perpetuate racial discrimination, encourage integrationist multiracial organizations, and condemn racial segregation and apartheid.⁵ Parties also make a sweeping, general commitment to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”⁶ Affirmative action measures are specifically permitted under the terms of the treaty.⁷

For the purpose of reviewing each party's compliance with its treaty obligations under CERD, the

1. Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), December 10, 1948, at <http://www.un.org/Overview/rights.html> (July 25, 2008).
2. International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), Art. 2(1), December 16, 1966, and International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI), Art. 2(2), December 16, 1966.
3. International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), December 21, 1965, at <http://www2.ohchr.org/english/law/cerd.htm> (July 25, 2008) (hereinafter cited as CERD).
4. CERD, Art. 1(1).
5. CERD, Art. 2(1), 3.
6. CERD, Art. 2(d).
7. CERD, Art. 1(4). “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination....”

treaty established a committee composed of “eighteen experts of high moral standing and acknowledged impartiality.” Any country that is a party to CERD may nominate one of its citizens to sit on the CERD Committee. Committee members need not come from free countries or countries with a record of striving to attain racial equality. Indeed, five of the 18 countries represented on the committee—Algeria, China, Egypt, Pakistan, and Russia—are classified as “not free” by Freedom House⁸ and are sorely lacking when it comes to human rights. Over half of the committee’s members are classified as “not free” or “partly free.”

The CERD Committee’s Biased Review of the U.S. Record

The U.S. Senate ratified CERD in 1994, and since that time, the U.S. has undergone two reviews by the CERD Committee, one in 2001 and one in 2008. The committee’s reviews of the U.S. record have bordered on the farcical. Rather than pursuing the noble goal of ending racial discrimination, the committee’s members have used their position as a platform to dictate social policy to the U.S.—while ignoring evidence of U.S. compliance with the treaty.

In May 2007, the United States went to great pains to report to the CERD Committee regarding its compliance with the terms of the treaty. The U.S. report was more than a hundred pages long and detailed—article by article—U.S. compliance with each of the substantive provisions of the treaty.⁹ The U.S. report described executive decisions, judicial

opinions, and legislative and administrative enactments that furthered the cause of racial equality. Actions to combat discrimination taken by the Equal Employment Opportunity Commission, the Civil Rights Division of the Department of Justice, the Department of Labor’s Office of Federal Contract Compliance Programs, the Department of Housing and Urban Development, and various state agencies were set forth in great detail.

After the initial U.S. report was submitted, a committee country expert (who serves as an interlocutor and is responsible for presenting draft comments and recommendations to the CERD Committee) submitted 32 additional written questions to the U.S. inquiring on a wide range of matters, many of which are wholly unrelated to racial discrimination. Included were questions related to sexual and reproductive health, the enemy combatants held at Guantanamo Bay, the protection of “undocumented migrants crossing the borders between Mexico and the United States,” and violence against women.¹⁰ Despite the dubious nature of these questions, the U.S. dutifully replied to each one, again at great length (the response was more than 110 pages long).¹¹ Then, in February 2008, the U.S. sent a delegation of 25 officials to appear before the committee, which questioned members of the delegation at length regarding the U.S. report.¹²

Yet when the CERD Committee issued its report on U.S. compliance, only a fraction of the report (one-half of a page of a 13-page report) took note of the lengthy and detailed U.S. submissions.¹³ The

8. Freedom House, *Freedom in the World: 2008*, at <http://www.freedomhouse.org/template.cfm?page=363&year=2008> (July 29, 2008). Pierre-Richard Prosper of the United States currently sits on the CERD Committee.

9. “Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination,” CERD/C/USA/6, May 1, 2007.

10. Committee on the Elimination of Racial Discrimination, “Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America,” 72nd Sess., February 18–March 7, 2008, ¶¶ 18, 19, 25, and 29, at http://www2.ohchr.org/english/bodies/cerd/docs/72LOI_USA.pdf (July 25, 2008). CERD Committee expert Linos-Alexandre Sicilianos served as the country rapporteur to the U.S. for purposes of the 2008 CERD review and was responsible for providing draft comments and recommendations to the committee.

11. U.S. Responses to “Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America,” 72nd Sess., February 18–March 7, 2008, at <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/urusa72.pdf> (July 25, 2008).

12. Press release, “Committee on Elimination of Racial Discrimination Considers Report of United States,” United Nations, February 22, 2008, at <http://www.unhcr.ch/hurricane/hurricane.nsf/view018A5C79433152120AC12573F7005B68FC?opendocument> (July 25, 2008).

original U.S. report, the U.S.'s answers to the committee's 32 additional written questions, and the U.S. delegation's responses to the committee's oral inquiries were entirely ignored.

Instead, most of the text of the committee report is taken directly from a "shadow report" submitted to the CERD Committee by the U.S. Human Rights Network (HRN), a nongovernmental organization (NGO) that coordinated the reports of multiple NGOs in connection with the 2008 CERD review of the U.S. record.¹⁴ Of the 36 substantive "concerns and recommendations" made in the CERD Committee report, at least 19 echo statements or recommendations made in the HRN report. Indeed, it appears that many of the allegations made in the committee's report were lifted directly from the HRN report. (See Table 1.)

Such heavy reliance by the CERD Committee on an NGO "shadow report" deserves scrutiny, especially since the HRN report is laced with allegations, claims, and characterizations that do not reflect reality and are well outside the mainstream of U.S. public opinion regarding the current state of race relations in the United States. For example:

- The HRN report characterizes the U.S. as a "racist society" that "is experiencing unprecedented levels of intolerance, racism, xenophobia, anti-Semitism, nationalism, bigotry and homophobia as the ideologies of white supremacists gain greater public acceptance" and further claims that "white supremacist ideologies of racial hate

and intolerance have moved into the mainstream of the body politic, furthering a climate of hate in America."¹⁵

- Moreover, "there remains an insidious form of racism tearing at the core of the fabric of this nation. An ideology espousing hatred of non-whites belies a dangerous undercurrent ready to rise and destroy our common goal of 'life, liberty and the pursuit of happiness.'"¹⁶
- The HRN report condemns the celebration of Columbus Day, which it characterizes as a "historically racist event" (meaning that the discovery of America was a racist event, which in turn implies that the founding of the United States was a racist event).¹⁷
- The U.S. criminal justice system is characterized as "central to perpetuating" the ongoing effects of "colonialism, chattel slavery, racial segregation, racialized gender and sexual norms, and selective immigration policies." Additionally, the U.S. has established so-called supermax security prisons for the purpose of incarcerating "Black militants and Muslims."¹⁸
- The report decries the under-representation of racial minorities in the legal profession and blames this disparity on the requirements that law school applicants take an entrance examination and that law school graduates take a bar examination in order to be licensed as attorneys.¹⁹
- Hurricane Katrina is characterized as a "racialized disaster."²⁰

13. "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," CERD/C/USA/CO/6, February 2008. The committee's concluding observations in 2008 in many respects mirror its concluding observations in 2001 in regard to the U.S.'s initial report, including the committee's opinions on prohibiting hate speech, placing a moratorium on the death penalty, and restoring voting rights to convicted felons. See "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," A/56/18, August 14, 2001, ¶¶ 391, 396, and 397, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.380-407.En?Opndocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.380-407.En?Opndocument) (July 25, 2008).

14. U.S. Human Rights Network, "Executive Summary: A Summary of U.S. NGO Responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination," February 2008, at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/0_Executive%20Summary.pdf (July 25, 2008).

15. *Ibid.*, ¶¶ 48, 49, and 87.

16. *Ibid.*, ¶ 45.

17. *Ibid.*, ¶ 50.

18. *Ibid.*, ¶¶ 51 and 87.

19. *Ibid.*, ¶ 23.

Carbon-Copied Allegations

In several instances, allegations made against the U.S. by the Committee on the Elimination of Racial Discrimination closely match allegations from a 2008 report by the Human Rights Network.

Human Rights Network Allegation	CERD Committee Allegation
"While the U.S. Constitution has been construed to provide a right to counsel at state expense for those accused of a crime, there is currently no such federal constitutional right for litigants in civil cases, even when the litigant is indigent and even when the case involves critical needs such as child custody, housing, food or health." (Paragraph 58)	"The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake." (Paragraph 22)
"In fact, because the practice of disenfranchising persons convicted of a felony has a well-documented racially disparate impact, the U.S. government is in violation of its obligations under Article 1 to review and eliminate all laws and policies that result in racially discriminatory impact." (Paragraph 80)	"The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system." (Paragraph 27)
"Moreover, youth of color are disproportionately tried and sentenced as adults and held in adult detention facilities, in violation of international norms. Additionally, youth of color represent the vast majority of juveniles condemned to die in prison under sentences of life without the possibility of parole." (Paragraph 52)	"The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole." (Paragraph 21)
"Despite its illegality, the practice of 'steering,' in which real estate agents direct people towards homes in buildings or neighborhoods in which their presence will not disturb the prevailing racial pattern, is becoming more rather than less, common." (Paragraph 40)	"[E]nsure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of 'steering' and other discriminatory practices carried out private actors." (Paragraph 16)
"A particularly egregious example of this type of rights violation is experienced by Native people. They are subject to disproportionate impacts of toxic industries, including gold and uranium mines, sited near or on reservation lands." (Paragraph 124)	"The Committee is concerned about reports relating to activities—such as nuclear testing, toxic and dangerous waste storage, mining or logging—carried out or planned in areas of spiritual and cultural significance to Native Americans." (Paragraph 29)
"Indeed, the continued racial inequities and segregation of U.S. schools is evidenced in large gaps in achievement and access, high rates of suspension, expulsion, and criminal sanctions, and low graduation rates for minority and English Language Learner ('ELL') students." (Paragraph 135)	"[T]he Committee remains concerned about the persistent 'achievement gap' between students belonging to racial, ethnic or national minorities, including English Language Learner ('ELL') students, and white students" (Paragraph 34)
"The efforts cited by the U.S. government as evidence of its compliance with its obligations under the Convention in the arena of health care are grossly under resourced, and focus on almost exclusively on individual behaviors while failing to address systemic factors driving health disparities, including obstacles to access to health care such as lack of health insurance, unequal distribution of health care resources, and poor quality public health care." (Paragraph 121)	"The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services." (Paragraph 32)

Sources: Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6, February 2008, at <http://access.unhcr.org/doc/UNDOC/GEN/G08H419182/PDF/G08H41982.pdf?OpenElement>; U.S. Human Rights Network, "Executive Summary: A Summary of U.S. NGO responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination," February 2008, at <http://www.ushrnetwork.org/files/ushr/images/linkfiles/CERD%20Executive%20Summary.pdf>.

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It is disturbing, to say the least, that the CERD Committee relied on—and in many cases adopted wholesale—an NGO report that makes such outrageous accusations, not one of which is backed by any evidence whatsoever. The committee accepted the claims made in the HRN shadow report seemingly without deliberation or scrutiny, while the report submitted by the U.S.—all of which was verifiable and supported by documentation—was mostly dismissed.

The CERD Committee's reliance on information provided by an NGO is not necessarily improper. Many parties to CERD submit incomplete or evasive submissions to the committee or fail to provide any report at all. In such cases, it is necessary for the committee to rely on NGO submissions as its primary or even sole source of information. In the case of the 2008 review of the U.S. record, however, the CERD Committee ignored the detailed submissions made by the U.S. and based a substantial portion of its report on allegations made in the HRN report.²¹

By becoming a party to CERD, the United States agreed to report periodically to the CERD Committee on U.S. compliance with the terms of the treaty. It stands to reason that the CERD Committee is concomitantly obligated to review the U.S. submissions fully and to base its comments and recommendations regarding U.S. compliance with the treaty primarily on those submissions. By failing to act as contemplated by the terms of the treaty, the committee has breached its obligations to the U.S. as a state party.

Undermining U.S. Sovereignty

The CERD Committee has also breached its obligations to the U.S. by repeatedly attempting to erode U.S. sovereignty. The U.S., by becoming a party to CERD, invited the CERD Committee to comment on the state of racial equality in the U.S. It did *not*, however, invite the U.N. to interfere with aspects of American social and legal traditions unrelated to racial discrimination.

The committee has demonstrated a clear effort to impose its own specific views of social values and individual rights on the American people. These views are based not on social traditions in America or the U.S. Constitution and Bill of Rights, but on criteria formulated in Geneva by international jurists, NGOs, various U.N. human rights experts, and other unelected individuals and organizations completely unaccountable to the American people.

Imposing a Far-Left Agenda. Instead of using the CERD review as an opportunity to engage U.S. officials regarding what may be accomplished to further the cause of racial equality, the CERD Committee has repeatedly used the process to force its own views on various social and legal causes unrelated to racial discrimination on the U.S. The comments and recommendations made by the committee reflect the agenda of liberal international human rights NGOs, various U.N. special rapporteurs, and other special U.N. causes that are only tangentially related or utterly unrelated to racial discrimination.

Specifically, the 2008 Committee report urges the United States government to do the following:

- Ensure that enemy combatants held in Guantanamo Bay, Cuba, have the right to judicial review to challenge the lawfulness and conditions of their detention;
- Prevent U.S. corporations from negatively affecting the rights of indigenous people living outside of the United States;
- Place a moratorium on the imposition of the death penalty;
- Restore voting rights to all convicted felons, regardless of the heinousness of their crimes;
- Promote multiculturalism by providing information to the committee on the extent to which grade school and high school textbooks and curricula "reflect the multiethnic nature" of the U.S. and whether the texts "provide sufficient information on the history and culture of the different racial, ethnic, and national groups";

20. *Ibid.*, ¶ 28.

21. Only seven paragraphs of the committee's report mention any "positive aspects" of the U.S. record. "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," February 2008, ¶¶ 3–9.

- Protect “undocumented migrant workers” from discrimination in the workplace;
- Prohibit the practice of sentencing criminal defendants who committed a crime while under the age of 18 to life without the possibility of parole, regardless of the heinousness of the crime; and
- Provide free legal counsel to indigent minorities not only in criminal cases, but in all civil legal proceedings as well. (Why these benefits should not extend to non-minority indigents is left unexplained.)²²

In each of these examples, the CERD Committee has rendered judgment on a series of highly complex and controversial issues and has found the U.S. record to be wanting. The committee’s recommendations stray into areas of American life that are far outside the committee’s mandate and supposed competence. The following examples are illustrative of the committee’s attempt to encroach upon U.S. constitutional, legal, and social policy.

Free Speech. The CERD Committee continually disregards the U.S. definition of free speech under the U.S. Constitution and has attempted to impose its own notion of “hate speech” on the U.S. legal system. Article Four of CERD expressly prohibits “the dissemination of ideas based on racial superiority” and requires treaty parties to make such acts punishable by law.²³ That requirement, however, runs directly counter to the broad protection of free speech guaranteed in the U.S. Constitution—specifically, the First Amendment in the Bill of Rights. While U.S. law provides protection against the most brazen forms of racial intimidation,²⁴ statements of racial superiority—as well as other repugnant proclamations—are protected under the First Amendment.

At the time of ratification in 1994, the U.S. Senate recognized that Article Four of CERD was in direct conflict with the Constitution and took an affirmative step to file a reservation to the treaty indicating that the U.S. would take no steps to restrict free speech. Specifically, the Senate stated that its ratification was subject to the recognition by all parties to the treaty:

That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.²⁵

The CERD Committee, however, has repeatedly ignored the U.S. reservation to Article Four and has emphatically expressed its discontent with the U.S.’s refusal to agree with the committee’s interpretation of free speech. The committee has reviewed U.S. compliance twice and has criticized the U.S. for its broad interpretation of free speech rights on both occasions.

- In 2001, the committee directed the U.S. to “review its legislation in view of the new requirements of preventing and combating racial discrimination, and adopt regulations extending the protection against acts of racial discrimination, in accordance with article 4 of the Convention.”²⁶
- In 2008, it requested that the U.S. “consider withdrawing or narrowing the scope of its reservations to article 4 of the Convention.”²⁷

22. *Ibid.*, ¶¶ 21, 22, 23, 24, 27, 28, 30, 33, and 38.

23. CERD, Art. 4(a). Article 4 also declares illegal all organizations “which promote and incite racial discrimination.”

24. See *Virginia v. Black*, 538 U.S. 343 (2003) (Court-upheld statute banning cross burning where there is a specific intent to intimidate).

25. International Convention on the Elimination of All Forms of Racial Discrimination, “Declarations and Reservations: United States of America,” March 7, 1966, at <http://www2.ohchr.org/english/bodies/ratification/2.htm> (July 25, 1966). Article Seven of CERD requires states parties to “adopt immediate and effective measures” to propagate the purposes of the convention.

26. “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” August 14, 2001, ¶ 391.

Indeed, the CERD Committee has its own interpretation of free speech, formulated by a panel of international experts in Geneva in 1993: A "citizen's exercise of [the right to freedom of opinion and expression] carries special duties and responsibilities...among which the obligation not to disseminate racist ideas is of particular importance."²⁸

While hate speech is a complex subject about which there is honest disagreement, the CERD Committee's disregard of the U.S. reservation and its repeated attempts to impose its own judgment on the U.S. as to what is and is not acceptable speech is presumptuous. The U.S. is an independent and sovereign nation with a long (and thoroughly litigated) legal tradition illuminating the First Amendment and demarcating the constitutional boundaries of free speech. The CERD Committee is not a democratically elected body and is accountable to no constituency, much less the American people. It is not empowered by the terms of the CERD treaty to formulate its own definition and interpretation of free speech, but it has chosen to do just that. The committee's stated agenda to erode free speech protection in the U.S. constitutes a violation of national sovereignty. Furthermore, the committee's disregard for the reservation expressed by the U.S. Senate in 1994 regarding Article Four demonstrates that it is acting outside the bounds of the treaty in clear breach of its obligations to the U.S.

The Death Penalty. In both 2001 and 2008, the CERD Committee criticized the U.S. for allowing the imposition of the death penalty, which it alleges—baselessly—is imposed as a result of racial biases. On both occasions, the committee has called

on the U.S. to place a moratorium on the death penalty. However, the committee's displeasure with the U.S. because of its tolerance of the death penalty has nothing to do with any alleged racial disparity in its application.

The U.N. as an organization has long been opposed to the death penalty in any form. Indeed, in 1989, the U.N. General Assembly enacted a Second Optional Protocol to the International Covenant on Civil and Political Rights aimed specifically at abolishing the death penalty (the U.S. is not a party to the Second Optional Protocol).²⁹ As recently as December 2007, the General Assembly passed a resolution calling for a worldwide moratorium on the death penalty (the U.S. voted against the resolution).³⁰

The CERD Committee's criticism of the U.S. record on the death penalty is a rather transparent attempt to impose its and the U.N.'s own brand of morality upon America. In the committee's opinion, it is apparently not up to the citizens of California, Florida, or Texas to decide whether the death penalty is moral, but up to a committee of U.N. experts. The committee's collective conscience also does not reflect U.S. public opinion: Fully 63 percent of Americans polled in February 2008 support the use of the death penalty.³¹ Moreover, the committee's opinion conflicts with the opinions of the U.S. Supreme Court, which has repeatedly upheld the constitutionality of the death penalty.

Finally, multiple studies indicate that racial disparities in death row populations at both the federal and state levels are caused by the heinousness of the murders committed by the offenders and are not the result of systemic racial discrimination.³² The

27. "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," February 2008, ¶ 18.

28. Office of the High Commissioner for Human Rights, "General Recommendation No. 15: Organized Violence Based on Ethnic Origin (Art. 4)," A/48/18, 1993, ¶ 4, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496cb2cc12563ec004b9768?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e51277010496cb2cc12563ec004b9768?OpenDocument) (July 25, 2008). Participation in organizations that promote racial discrimination "is, of itself, to be punished." *Ibid.*, ¶ 6.

29. "Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty," General Assembly Resolution 44/128, December 15, 1989, at <http://www2.ohchr.org/english/law/ccpr-death.htm> (July 25, 2008).

30. General Assembly, Department of Public Information, "General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty," December 17, 2007.

31. "Over Three in Five Americans Believe in Death Penalty," The Harris Poll, March 18, 2008, at http://www.harrisinteractive.com/harris_poll/index.asp?PID=882 (July 25, 2008).

CERD Committee is apparently not to be dissuaded by facts that do not fit its views of the death penalty or the U.N.'s broader anti-death penalty agenda.

Guantanamo Bay. Another subject on which the U.N. has formed a "consensus" ideological position is its opposition to the U.S. prosecution of the war on terrorism. The CERD Committee perpetuates the U.N. agenda by expressing its disapproval of the treatment of enemy combatants detained at Guantanamo Bay in Cuba. The detention of suspected Taliban and al-Qaeda terrorists, however, is entirely irrelevant and inconsequential to U.S. compliance with its obligations under CERD.

However immaterial it may be with respect to the U.S. record on race relations, Guantanamo Bay is a well-established plank in the U.N.'s human rights platform. Indeed, in February 2006, a committee of U.N. special rapporteurs called on the U.S. to provide enemy combatants with legal rights equivalent to those held by U.S. citizens (and called for the closure of the detention facility altogether), citing numerous "violations" of international law.³³ Their call for additional legal rights for detainees was echoed in July 2006 by the U.N. Committee Against Torture, which also called on the U.S. to close the detention facility.³⁴

The CERD Committee's attempt to inject itself into the situation at Guantanamo Bay is clear evidence that it is pursuing an agenda unrelated to racial discrimination and outside the terms of CERD. Perhaps if there were a scintilla of evidence that U.S. forces captured and detained enemy combatants in Afghanistan based on their race, the committee would be justified in broaching the subject. There is, however, no hint of such evidence. The enemy combatants at Guantanamo Bay were detained for attacking U.S. armed forces and for aiding the Taliban or

al-Qaeda, not because of their race or ethnicity, but that did not prevent the committee from exhorting the U.S. to provide special, unprecedented legal rights to the enemy combatants.

By deciding—in by far the largest portion of its report—to stray from an impartial review of racial equality in the U.S. and instead pursue an agenda completely unrelated to that important goal, the CERD Committee has attempted to affect U.S. legal policy and social norms and thereby has infringed on American sovereignty.

What the U.S. Should Do

Notwithstanding a change in the CERD Committee's behavior, the U.S. has little or nothing to gain from continued involvement in the CERD review process. The committee has failed in the execution of its mandate and has overreached the treaty's essential terms of reference, effectively breaching its part of the mutual obligations that exist between the committee and the U.S.

While CERD does not constitute a binding contract between the U.S. and the CERD Committee, it is reasonable to hold that treaty members and the committee have concomitant obligations to one another. The U.S. is obligated to submit a comprehensive and accurate report on its compliance with the treaty, and the committee is obligated to exercise due diligence in its review of racial discrimination in the U.S. and to report fairly on the U.S. record.

The committee has failed to meet that obligation. It has ignored U.S. efforts to comply with the actual—not imagined or newly crafted—terms of CERD and has instead adopted wholesale spurious allegations made by an unaccountable NGO. Moreover, the committee has demonstrated disdain for U.S. law, settled Supreme Court civil rights jurispru-

32. Stephen P. Klein, Richard A. Berk, and Laura J. Hickman, eds., "Race and the Decision to Seek the Death Penalty in Federal Cases," RAND Corporation, 2006, at http://www.rand.org/pubs/technical_reports/TR389 (July 25, 2008), and John Blume, Theodore Eisenberg, and Martin T. Wells, "Explaining Death Row's Population and Racial Composition," *Journal of Empirical Legal Studies*, March 2004.

33. U.N. Commission on Human Rights, "Situation of Detainees at Guantanamo Bay," February 27, 2006. The U.S. Supreme Court recently (and mistakenly) extended *habeas corpus* rights to the Guantanamo detainees. *Boumediene v. Bush*, 553 U.S. (2008).

34. U.N. Committee Against Torture, "Conclusions and Recommendations of the Committee Against Torture: United States of America," July 25, 2006.

dence, the U.S. Constitution, the First Amendment, U.S. public opinion, the war on terrorism, and the U.S. criminal justice system. In so doing, it has attempted to impose its own values on U.S. citizens in areas that are wholly outside CERD's purview in a blatant infringement on American sovereignty.

Based on the actions of the CERD Committee, the U.S. should carefully rethink its future cooperation with the next treaty review process. Prior to the next CERD review in 2012:

- The next Administration should file a protest with the U.N. High Commissioner of Human Rights to communicate its displeasure with the inequitable treatment that the U.S. received during both the 2001 and 2008 review process and remind the commissioner and the CERD Committee that the statements of NGOs should supplement the reports of treaty members, not the other way around.
- The U.S. Senate Foreign Relations Committee should hold a hearing to explore whether the CERD Committee is acting within the bounds of the treaty as contemplated by the Senate at the time of ratification, the effect that actions by the CERD Committee could have on American sovereignty in legal and social matters if left unchecked, the nature of the relationship between the CERD Committee and U.S. NGOs, and the utility of future cooperation with the CERD review process to further the elimination of racial discrimination in the U.S.
- The next Administration should treat the 2012 CERD review—the next U.S. periodic report is due by November 20, 2011—as a “last best chance” for the CERD Committee to conduct a fair and impartial review of the U.S. record on racial discrimination. The U.S. Department of State should heavily lobby the members of the CERD Committee and the committee's country expert to thoroughly vet all NGO submissions rather than taking them at face value.
- If the CERD Committee's behavior at the U.S.'s 2012 review repeats the committee's past performances, the U.S. should heavily scrutinize the qualifications and impartiality of the indi-

vidual committee members and voice its objections regarding members who have shown a clear bias against the U.S. Future delegations to the CERD Committee should be scaled back, and treaty compliance should be limited to the bare reporting requirements, since U.S. resources need not be spent to engage in a wholly inequitable process.

- In the event that all efforts to attain a fair review from the CERD Committee fail, the U.S. should consider its rights under Article 21 of CERD, which permits treaty members to “denounce” the treaty by written notification to the U.N. Secretary General.

Conclusion

The noble goals set forth in the International Convention on the Elimination of All Forms of Racial Discrimination are not being advanced in the United States by the U.N. Committee on the Elimination of Racial Discrimination. It is the behavior of the CERD Committee—and not the terms of the treaty—where the problems lie. By ignoring the reports and submissions of the U.S. in favor of adopting the baseless accusations of a highly ideological NGO, the CERD Committee has demonstrated that it is not a legitimate partner in the effort to address racial discrimination in the U.S.

If the CERD Committee continues to insist that the U.S. accept the committee's interpretation of free speech, repeats its denunciation of the death penalty, promotes its view of multiculturalism, unjustifiably criticizes the U.S. justice system, or persists in pursuing any other cultural, social or legal agenda unrelated to racial discrimination, the next Administration should forge and follow its own path to attaining racial equality in America without the “assistance” of an unaccountable U.N. panel of international experts.

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Backgrounder

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The U.N. Human Rights Council: No Better for Obama's Engagement

Brett D. Schaefer and Steven Groves

Abstract: *The record of the U.N. Commission on Human Rights was a disgrace. Three years ago, the commission was replaced by the Human Rights Council, and its record has been equally dismal. The Obama Administration sought a seat at the council in an attempt to reform the council from within. Evidence from the first council sessions with the U.S. as a member demonstrates that the Obama Administration has failed to improve the human rights body. "Defamation of religions" resolutions continue to threaten free speech around the world. Brutal regimes continue to influence council deliberations. Israel remains unfairly targeted. The Heritage Foundation's Brett Schaefer and Steven Groves discuss recent developments at the council and urge President Obama to stand up for human rights in the U.N. and pursue fundamental changes that would improve the performance of the U.N.'s premier human rights body.*

The United Nations Human Rights Council was created in 2006 to replace the U.N. Commission on Human Rights that had failed to hold governments to account for violating basic human rights and fundamental freedoms. During negotiations to establish the Human Rights Council, many basic reforms and standards to ensure that the council would not simply be a repeat of the commission did not receive sufficient support in the General Assembly. As a result, the council has been no better—and in some ways, worse—than the commission it replaced.

Talking Points

- The United Nations created the Human Rights Council in 2006 to replace the Commission on Human Rights.
- The Bush Administration distanced the U.S. from the council and eschewed a seat on the body because it feared that the council lacked protections to prevent it from being misused by governments that violate human rights. This decision has been vindicated by the dismal performance of the council.
- The Obama Administration's decision to reverse Bush policy and seek to improve the council from within as a member appears unlikely to succeed based on actions in recent council sessions.
- Fundamental reform of the council, particularly establishing strong membership criteria, should be the principal objective of the Obama Administration's agenda.
- Failure to achieve these reforms in the mandatory 2011 review would serve as a stark reminder of the necessity of creating an alternative human rights body outside the U.N.

This paper, in its entirety, can be found at:
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Anticipating this outcome, the Bush Administration voted against the resolution creating the council and decided not to seek a seat at the Geneva-based council in 2006. Based on its subsequent disappointing record, the U.S. again declined to seek a seat in 2007 and 2008. The Bush Administration also withheld a portion of its contribution to the U.N. regular budget (equivalent to the part of the U.S. contribution allocated to the council), and distanced itself from the council's proceedings except in instances of "deep national interest."¹

Instead of trying to improve the Human Rights Council at the margins by working behind the scenes and compromising on critical human-rights issues, the U.S. should be a vocal, unapologetic defender of human rights.

Once in office, the Obama Administration quickly reversed Bush Administration policy by participating in council deliberations and seeking a council seat. Several Obama Administration officials argued that the Bush policy of distancing the U.S. from the council had not improved its performance, and that as a member, the United States would be able to improve it from within. It is now apparent, following the conclusion of the first regular session and the first special session with the U.S. as a voting member, that the performance of the council with the U.S. as a member will be virtually indistinguishable from its performance absent U.S. membership. One significant aspect has changed, however: Now the council can claim added legitimacy for its decisions and resolutions because the U.S. supports the institution and is included among its membership.

Instead of seeking to improve the council at the margins by working behind the scenes and compromising on critical human-rights issues, the U.S. should be a vocal, unapologetic defender of human rights and focus its efforts on garnering support for the reforms necessary to make the body more effective, particularly on establishing serious membership criteria, in the mandatory 2011 review of the council to be conducted by the U.N. General Assembly.

The United States must continue to lead the international community in working with the U.N. when it can be effective, but the U.S. must also be a leader in establishing alternative mechanisms, coalitions, partnerships, alliances, and organizations to act when the U.N. proves unable or unwilling.

The Human Rights Council's record over its first three years of existence is gravely disappointing. Short of drastic reform, there is little prospect that its performance will improve. If reform efforts fall short in 2011, the Administration should be prepared to sever its relations with the council and explore options for an alternative human-rights organization composed of governments that respect and observe human rights and are willing to promote them.

The Obama Administration and the Human Rights Council

The Obama Administration re-engaged with the Human Rights Council and participated in its 10th session in March 2009. On March 31, U.S. Secretary of State Hillary Clinton and U.S. Permanent Representative to the U.N. Susan Rice announced that the U.S. would seek a seat on the council to "make it a more effective body to promote and protect human rights."² The United States was elected to a seat on the council with support from 167 of 192 member countries in the U.N. General Assem-

1. Daily Press Briefing, Sean McCormack, Spokesman, U.S. Department of State, June 6, 2008, at <http://2001-2009.state.gov/r/pa/prs/dpb/2008/jun/105716.htm> (October 27, 2009), and "Statement by Zalmay Khalilzad, U.S. Permanent Representative, on the Durban II Conference and the Human Rights Council," April 8, 2008. (The original statement by Ambassador Khalilzad is no longer available at the U.S. Mission to the United Nations Web site. A copy is available at <http://www.eycontheun.org/assets/attachments/documents/6581.doc> (October 27, 2009).) For a summary of Bush Administration policy regarding the Council, see Luisa Blanchfield, "The United Nations Human Rights Council: Issues for Congress," Congressional Research Service Report for Congress RL33608, June 1, 2009, pp. 11-12, at <http://www.fas.org/spp/crs/row/RL33608.pdf> (October 27, 2009).
2. Press release, "U.S. to Run for Election to the UN Human Rights Council," U.S. Department of State, March 31, 2009, at <http://www.state.gov/r/pa/prs/ps/2009/03/121049.htm> (October 27, 2009).

bly on May 12, 2009.³ Afterwards, Ambassador Rice stated that:

We ran for the Human Rights Council because this Administration and indeed, the American people, are deeply committed to upholding and respecting the human rights of every individual. While we recognize that the Human Rights Council has been a flawed body that has not lived up to its potential, we are looking forward to working from within with a broad cross section of member states to strengthen and reform the Human Rights Council and enable it to live up to the vision that was crafted when it was created.⁴

Although America's term on the council officially started in late June 2009, the first session during which the U.S. was present as a voting member (as opposed to an observer) was the 12th regular session held from September 14 to October 2, 2009. At the outset of that session, U.S. Assistant Secretary of State for International Organization Affairs Esther Brimmer stated that:

We cannot pick and choose which of these rights we embrace, nor select who among us are entitled to them. We are all endowed at birth with the right to live in dignity, to follow our consciences and speak our minds without fear, to choose those who govern us, to hold our leaders accountable, and to enjoy equal justice under the law. These rights extend to all, and the United States cannot accept that any among us would be condemned to live without them....

Make no mistake; the United States will not look the other way in the face of serious human rights abuses. The truth must be told, the facts brought to light and the con-

sequences faced. While we will aim for common ground, we will call things as we see them and we will stand our ground when the truth is at stake.⁵

The recent actions of the U.S. at the council—with the U.S. delegation standing silent in the face of injustice or supporting actions that eroded basic human rights—do not match that inspirational rhetoric.

The U.S. Stood Silent on Expulsion of Honduras

Honduras does not currently hold a seat on the 47-member Human Rights Council, but attends council sessions as an observer. On the first day of the 12th Session, the Honduran ambassador to the United Nations in Geneva was prohibited from participating as an observer and was *ejected* from the council chamber at the behest of Cuba, Argentina, Brazil, and Mexico.⁶ Representatives of these countries objected to his presence because he supported Honduras's *de facto* ruler Roberto Micheletti rather than ousted President Manuel Zelaya.

The evidence indicates that Zelaya acted illegally in attempting to hold a popular referendum on changing the Honduran constitution to allow him to seek another term in office. The non-partisan Law Library of Congress issued a report concluding that Zelaya was removed from office through legal and constitutional measures:

Available sources indicate that the judicial and legislative branches applied constitutional and statutory law in the case against President Zelaya in a manner that was judged by the Honduran authorities from both branches of the government to be in accordance with the Honduran legal system.⁷

3. Press release, "United States Elected to Human Rights Council for First Time..." United Nations General Assembly, May 12, 2009, at <http://www.un.org/News/Press/docs/2009/ga10826.doc.htm> (October 27, 2009).
4. U.S. Mission to the United Nations, "Remarks by Ambassador Susan E. Rice, Permanent Representative to the United Nations, Regarding the Election of the U.S. to the Human Rights Council, at the General Assembly Stakeout," May 12, 2009, at <http://usun.state.gov/briefing/statements/2009/may/128514.htm> (October 27, 2009).
5. Press release, "U.S. Assumes Seat on the UN Human Rights Council," U.S. Department of State, September 14, 2009, at <http://www.state.gov/p/oir/rls/rm/2009/129168.htm> (October 27, 2009).
6. Robert Evans, "Honduras Envoy Says 'Ordered Out' of U.N. Rights Body," Reuters, September 14, 2009, at <http://www.reuters.com/article/latestCrisis/idUSLE66094> (October 27, 2009).

Despite claims to the contrary, Zelaya was not removed from office by a coup d'état. He was removed lawfully. Regardless, ejecting an ambassador from the council chamber for such a reason flies in the face of U.N. practice. Leaving aside the fact that the council includes authoritarian and repressive regimes like China, Cuba, Saudi Arabia, and Russia, the U.N. includes at least 13 governments as member states in good standing that were established through a coup.⁸ All of these governments are allowed to send representatives as observers to the council, and three—Burkina Faso, Qatar, and Madagascar—are currently members of the council.

A principled position by the U.S. would have been to demand that the Honduran ambassador be permitted to take his seat, while demanding that all representatives of governments that actually had been established through a coup be ejected. Instead, the U.S. looked the other way.

Moreover, it appears that Zelaya was no friend of the United States. After his narrow election victory in 2006, Zelaya soon joined the Bolivarian Alternative of the Americas, a political and economic bloc controlled by Venezuela and Cuba. Zelaya also sought and received assistance from Venezuela through the Venezuelan government's oil-financing facility Petrocaribe and tightened his ties with Fidel Castro.⁹ Throughout all of this, the Obama Administration has supported Zelaya¹⁰ and has pressed the interim government to accept a deal to restore Zelaya to power.¹¹

The U.S. should rectify its shameful silence by calling on the U.N. to deny recognition of govern-

ments established through coups d'état and suspend their credentials until they hold a credible election.

Supporting "Defamation of Religions"?

For the past several years, the U.N. Human Rights Council has adopted resolutions recognizing and promoting the concept known as "defamation of religions." The proponents of resolutions banning "defamation of religions" seek to ban all criticism of religion regardless of context or setting. According to the Organization of the Islamic Conference (OIC)—the major proponent of such resolutions—criticism of Islam is in and of itself an incitement to violence and discrimination and therefore must be banned as "Islamophobic." According to the OIC's definition, any speech, book, film, or other form of expression that depicts Islam, Mohammed, or Muslims in an unflattering light constitutes "defamation."

For many years, the United States was at the forefront of opposing the OIC's "defamation of religions" resolutions at the council and at the General Assembly.¹² This no longer appears to be the case. The Obama Administration's delegation to the 12th session of the council and OIC-member Egypt co-sponsored a resolution on freedom of opinion and expression that contains the essential elements of the resolutions on "defamation of religions" that the U.S. opposed in the past.

Many references in the U.S.—Egyptian resolution are very similar to those in the most recent "defamation of religions" resolution that the council passed in March 2009. That resolution expressed "deep

7. The Law Library of Congress, "Honduras: Constitutional Law Issues," *Report for Congress*, August 2009, at <http://www2.nationalreview.com/dest/2009/09/28/8519c78c6ca6f1fff432ee9aa0c5dd82.pdf> (October 27, 2009).
8. For details on U.N. member states governed by coup leaders, see Patrick Goodenough, "Regimes Arising from Coups Should Be Barred From U.N. Institutions, African Official Says," *CNSNews*, September 29, 2009, at <http://www.cnsnews.com/news/article/54694> (October 27, 2009).
9. Ray Walser, "Honduras Fires Its Runaway President: Constitutional Order Is Preserved," *Heritage Foundation WebMemo* No. 2511, June 29, 2009, at <http://www.heritage.org/Research/LatinAmerica/wm2511.cfm>.
10. Ray Walser, "Honduras's Conservative Awakening," *Heritage Foundation WebMemo* No. 2566, July 27, 2009, at <http://www.heritage.org/Research/LatinAmerica/wm2566.cfm>.
11. Ray Walser, "Return of the Honduran Prodigal," *National Review Online*, October 30, 2009, at <http://cornetnationalreview.com/post/?q=NDdmNDliMmRiMmM3ZDE4NTllYTVmNGZjZDU4N2RhMwI=> (November 3, 2009).
12. Steven Groves, "Why the U.S. Should Oppose 'Defamation of Religions' Resolutions at the United Nations," *Heritage Foundation Backgrounder* No. 2206, November 10, 2008, at <http://www.heritage.org/Research/LegalIssues/bg2206.cfm>.

concern at the negative stereotyping and defamation of religions and manifestations of intolerance and discrimination in matters of religion or belief still evident in the world" and concern over "the continued serious instances of deliberate stereotyping of religions, their adherents and sacred persons in the media."¹³

The U.S.–Egyptian resolution on freedom of expression echoes these sentiments, stating that the council is concerned "that incidents...of negative racial and religious stereotyping continue to rise around the world...and urges States to take effective measures...to address and combat such incidents." The resolution further states that the council "expresses regret at the promotion by certain media of false images and negative stereotypes of vulnerable individuals or groups of individuals."¹⁴

The U.S.–Egyptian resolution also refers repeatedly to Article 19 of the International Covenant on Civil and Political Rights (ICCPR),¹⁵ which permits restrictions on freedom of expression for the purpose of "respect of the rights or reputations of others." When it ratified the ICCPR in 1992, the U.S. specifically included a reservation about Article 19 because it was deemed inconsistent with the First Amendment to the U.S. Constitution on freedom of speech and freedom of the press. By including these references to Article 19 in the resolution, the U.S. is effectively acceding to the notion that constraints on freedom of expression are acceptable under certain circumstances.

The resolution does include language that strongly supports freedom of expression. The res-

olution states, for instance, that the "special duties and responsibilities" linked to the exercise of the right to freedom of expression do not permit constraints on political debate, peaceful demonstrations, reporting on human rights, or "expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups."¹⁶

A few bright spots do not mitigate the damage done by the U.S.–Egyptian resolution's support for the "defamations of religions" concept.

But these bright spots do not mitigate the damage done by the resolution's provisions supporting the "defamation of religions" concept. On the contrary, while the resolution seems to bolster freedom of expression, in reality it weakens it by allowing advocates of "defamation of religions" to point to the provisions in the resolution that back their position. In essence, the resolution confuses rather than clarifies the debate over freedom of expression by allowing each side to interpret it to fit its position.

What was needed was a clear, unambiguous defense of freedom of expression. Historically, the U.S. has been the strongest advocate for freedom of expression in the U.N. system. By co-sponsoring this resolution, the U.S. signaled that its support for freedom of speech is no longer as robust, thereby undermining support for freedom of expression among the rest of the council members.

13. Resolution 10/22, "Combating Defamation of Religions," U.N. Human Rights Council, 10th session, A/HRC/10/L.11, May 12, 2009, p. 78, at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/edited_versionL11Revised.pdf (October 28, 2009).

14. Resolution 12/16, "Freedom of Opinion and Expression," Human Rights Council, 12th session, A/HRC/RES/12/16, October 12, 2009, at <http://daccessdds.un.org/doc/RESOLUTION/LTD/G09/166/89/PDF/G0916689.pdf?OpenElement> (November 3, 2009).

15. *Ibid.* For instance, the opening paragraphs of Resolution 12/16 state: "Recalling that the exercise of the right to freedom of expression carries with it special duties and responsibilities, in accordance with article 19 (3) of the International Covenant on Civil and Political Rights" and "Recalling also that States should encourage free, responsible and mutually respectful dialogue." Article 5(i) of the resolution states, "To adopt and implement laws and policies that provide for a general right of public access to information held by public authorities, which may be restricted only in accordance with article 19 of the International Covenant on Civil and Political Rights."

16. Resolution 12/16, Article 5(p)(i).

Israel and the Goldstone Report

The Obama Administration was correct to vote against a resolution adopting a report on the "United Nations Fact Finding Mission on the Gaza Conflict to the Human Rights Council" (also known as the Goldstone Report) in the 12th special session of the Human Rights Council. That report falsely accuses Israel of "deliberate attacks" against civilians during its January 2009 military response to Hamas rocket attacks, and of other actions that "might justify a competent court finding that crimes against humanity have been committed."¹⁷ As noted by Colonel Richard Kemp, former commander of British forces in Afghanistan,

The truth is that the IDF [Israeli Defense Forces] took extraordinary measures to give Gaza civilians notice of targeted areas, dropping over 2 million leaflets, and making over 100,000 phone calls. Many missions that could have taken out Hamas military capability were aborted to prevent civilian casualties. During the conflict, the IDF allowed huge amounts of humanitarian aid into Gaza. To deliver aid virtually into your enemy's hands is, to the military tactician, normally quite unthinkable. But the IDF took on those risks.

Despite all of this, *of course* innocent civilians were killed. War is chaos and full of mistakes. There have been mistakes by the British, American and other forces in

Afghanistan and in Iraq, many of which can be put down to human error. But mistakes are not war crimes.

More than anything, the civilian casualties were a consequence of Hamas's way of fighting. Hamas deliberately tried to sacrifice their own civilians.... [T]he IDF did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare.¹⁸

The council's adoption of the Goldstone Report was an even more one-sided action than the report itself.¹⁹ Specifically, the resolution condemned Israel in detailed fashion while failing to mention—even once—Hamas's indiscriminate firing of rockets and mortars at Israeli civilian settlements that, according to the Goldstone Report, "constitute war crimes and may amount to crimes against humanity."²⁰ Illustrated here, is the central flaw of U.S. "re-engagement" with the council based on the assumption that the U.S. can work from within to "make the council a more effective forum to promote and protect human rights."²¹

The final vote on adopting the Goldstone Report easily passed with 25 in favor, 6 against, 11 abstentions, and 5 "no show" votes.²² The 25 votes in favor of the resolution included Israel's perennial enemies and major human rights abusers China, Cuba, Egypt, Pakistan, Qatar, and Saudi Arabia. The abstentions included nations that should have voted with the U.S.—Belgium, Bosnia, Japan, Nor-

17. "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict," Human Rights Council document A/HRC/12/48, September 25, 2009, p. 26, at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (October 28, 2009).
18. Statement by Colonel Richard Kemp to the U.N. Human Rights Council, 12th Special Session on the Goldstone Report, October 16, 2009, at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409> (October 28, 2009).
19. "Richard Goldstone Slams UN for Failing to Censure Hamas," *Haaretz*, October 16, 2009, at <http://www.haaretz.com/hasen/spages/1121620.html> (October 28, 2009).
20. Resolution A/HRC/12/48, p. 32.
21. Acting Deputy Department Spokesman Gordon Duguid, "U.S. to Run for Election to the UN Human Rights Council," U.S. Department of State Bureau of Public Affairs, Office of the Spokesman, March 31, 2009, at <http://www.state.gov/r/pa/prs/ps/2009/03/121049.htm> (November 3, 2009).
22. Resolution A/HRC/RES/S-12/1, "The Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem," 12th Special Session of the U.N. Human Rights Council, October 15–16, 2009, at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/12/docs/A-HRC-RES-S-12-1.pdf> (November 3, 2009).

way, and Slovenia—especially in light of the Obama Administration's new commitment to the council. Only five other nations—Hungary, Italy, the Netherlands, Slovakia, and Ukraine—stood with the U.S. and voted against the shameful resolution. Inexplicably, the United Kingdom and France were among the countries that skipped the vote entirely. This vote illustrates the limits of U.S. influence in the council.

What the U.S. Should Do

The Human Rights Council seems destined to repeat the gravely disappointing record of its first three years, even with a U.S. seat at the table. The majority of the council is simply uninterested in having the council be an objective advocate of basic human rights and fundamental freedoms. Rather than focusing its efforts on a futile attempt to overcome the voting dynamics of the council, the Obama Administration should:

- **Act as a vocal, unapologetic defender of human rights at the council.** The Obama Administration announced that it wanted to run for a seat on the council to act as a principled advocate of human rights—and to challenge the rest of the world to help the council live up to its mandate to champion human rights. The refusal of the U.S. to object to the biased decision to eject the ambassador of Honduras from the council, and U.S. willingness to compromise long-standing U.S. principles in an effort to secure a resolution that is acceptable to the OIC falls far short of that standard. The United States should unequivocally reject agendas like “defamation of religions” that constrain basic human rights and fundamental freedoms. The U.S. should call for special sessions on the Iranian regime's crackdown on election protesters earlier this year, and on the ongoing human rights violations in China and Cuba. The U.S. should demand that the council condemn state-sponsored atrocities, such as the genocide in Darfur, and recommend that the U.N. Security Council place tough sanctions on such regimes. Going along to get along—as the Obama Administra-

tion is doing—serves the interests of human rights abusers, not their victims.

- **Oppose future resolutions on “defamation of religions.”** The resolution sponsored at the council by the U.S. and Egypt regarding the freedom of expression was tarnished with language reminiscent of past “defamation of religions” resolutions that had been regularly and rightly opposed by the United States. The U.S. should not give the impression that it supports the “defamation of religions” agenda in whole or part, and should vote against any resolution that vests human rights in concepts like religion rather than in the individual. A “defamation of religions” resolution will likely be introduced at the current session of the U.N. General Assembly. The U.S. should oppose it.
- **Oppose U.N. recognition of illegitimate regimes.** It was a shameful failure on the part of the U.S. not to defend the Honduran ambassador as he was being ejected from the council proceedings. The Obama Administration should consider this failure a “teachable moment” and consider a proposal by Namibian Foreign Minister Marco Hausiku, which urges the U.N. to “not recogniz[e] governments that come to power through military coups.”²³ While this rule would undoubtedly be abused to target governments like Honduras (where the government was established irregularly with the intent of upholding the rule of law), a clear rule barring governments established through coups from being recognized by the U.N. would be desirable in the vast majority, if not all, cases. Indeed, the consequences for situations like those in Honduras would be of short duration because such governments would quickly arrange for new elections rather than maintain their hold on power. The most severe impact of such rules would focus on governments established through an actual coup d'état under leaders who seek to maintain their illegitimate grip on power.
- **Focus on the mandatory 2011 review of the council and seek support for the reforms nec-**

23. Goodenough, “Regimes Arising from Coups Should Be Barred From U.N. Institutions, African Official Says.”

essary to make the body more effective, particularly improving membership standards. When it created the Human Rights Council in a 2006 resolution, the U.N. General Assembly included a provision requiring a review of the performance of the council by 2011. The past few weeks should have driven home the lesson that U.S. membership on the council is not sufficient to improve the body. Making the council effective will require a dramatic change in the quality of the membership. The human rights abusers must be denied council membership—and they must be replaced by governments that respect and abide by fundamental human rights standards and have demonstrated a willingness to promote them in the council and the U.N. more broadly. If the Obama Administration truly wants to make the council effective, it should immediately turn its focus to reforming the council membership during the upcoming council review.

- **Consider establishing an alternative human rights body outside of the U.N. system.** The U.N. human rights system is so complex and politicized that making a clear assessment of specific human rights situations is often impossible. A mentality of moral equivalence pervades the system to the point that exemplary states such as Sweden are dutifully considered on a par with genocidal states like Sudan. The message is: Neither state is perfect, both need to improve, no one state is worse than the other. This absurd equivalence is driven by political motivations and has helped contribute to the council's disproportionate focus on the Israeli–Palestinian conflict to the neglect of other grave human rights situations. The system is focused on claiming ever more tenuous norms and asserting new “rights.” This may serve the purposes of international diplomats and human rights professionals, but it is an insult to those around the world who have been deprived of their dignity and liberty. The U.S. and other countries interested in promoting fundamental human rights should not tolerate institutionalized mediocrity or ineffectiveness. There remains a slim hope that the Human Rights Council could be improved

through the mandatory General Assembly review by 2011. However, given the U.N.'s record, the Administration should be prepared for disappointment and explore alternative means for promoting fundamental human rights.

Congress also has an important role to play in determining the efficacy of the Human Rights Council, and should:

- **Hold hearings on the council's behavior and the role of the U.S. as a current member.** Congress has a responsibility to ensure that U.S. taxpayer dollars are being spent in an effective and meaningful manner. Recent actions at the council, such as the denigration of U.S.-ally Israel, the erosion of freedom of opinion and expression, and the expulsion of the Honduran ambassador should give Congress pause that the council is a wise investment of those dollars. The relevant oversight committees in the House and Senate should each hold hearings on the council's recent actions—and on what role the Obama Administration had in those proceedings.
- **Withhold the U.S. share of the council's budget from U.S. contributions to the U.N.'s regular budget.** Congress and the Bush Administration concluded rightly that its infrequent positive actions do not outweigh the many shortcomings of the council. Since the council's budget is funded through the U.N.'s regular budget, Congress and the Administration worked together to withhold an amount equivalent to the U.S. share of the Human Rights Council budget from its 2008 funding for the United Nations. Based on its lack of commitment to confront human rights violations in Burma, China, Cuba, Iran, North Korea, Venezuela, Zimbabwe, and many other countries, and its ongoing biased treatment of Israel, Congress should again withhold the U.S. portion of the council's budget from its contribution to the U.N. regular budget for 2010.

U.S. Weak on Human Rights

The failure of the U.S. delegation to the Human Rights Council to defend American values is consistent with the Obama Administration's seeming lack

of commitment to human rights and freedom as a major component of its foreign policy.

Secretary of State Hillary Clinton stated earlier this year that, "We believe every nation must live by and help shape global rules that ensure people enjoy the right to live freely and participate fully in their societies."²⁴ Yet over the course of its first nine months, the Obama Administration has downplayed or simply ignored human rights concerns in its discussions with China and Russia.²⁵ The President refused to meet with the Dalai Lama in deference to the Chinese regime. He also failed to back Iranian citizens who protested fraudulent election results earlier this summer, and recently cut funds that had been dedicated to promoting democracy in Iran.²⁶

The disappointing actions of the U.S. at the council paint an alarming record of indifference toward human rights. If it is truly dedicated to improving human rights around the world, the Obama Administration must do more than compromise and work behind the scenes. Hopes to improve the council through persuasion are futile in the face of the many countries determined to undermine its mission and twist its agenda. The best

course of action is for the U.S. to be a vocal, unapologetic defender of human rights at the council and focus on garnering support for the reforms necessary to make the body more effective in the mandatory 2011 review of the Council.²⁷

The past few weeks should be a wake-up call for anyone who believed that the mere presence of the United States on the council would result in any improvements.²⁸ Quite simply, fundamental reform of the council, particularly establishing strong membership criteria, should be the principal objective of the Obama Administration's agenda for the U.N. Human Rights Council. Failure to achieve these reforms in the upcoming review would serve as a stark reminder of the necessity of creating an alternative arbiter of international human rights outside the U.N. system.

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24. Esther Brimmer, "On Fundamental Human Rights, Our Pledge," *The Caribbean News*, May 8, 2000, at <http://www.state.gov/pha/rls/rm/2009/1123157.htm> (October 28, 2009).
25. "Not So Obvious: The Secretary of State Underestimates the Power of Her Words," *The Washington Post*, February 24, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/23/AR2009022302412.html> (October 28, 2009), and Andrew Osborn, "Washington to Tone Down Criticism of Russian Human Rights Record," *The Telegraph*, October 13, 2009, at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barachobama/6318943/Washington-to-tone-down-criticism-of-Russian-human-rights-record.html> (October 28, 2009).
26. Kenneth R. Timmerman, "Obama Cuts Pro-Democracy Funds for Iran," *Newsmax.com*, October 14, 2009, at http://www.newsmax.com/headlines/obama_iran_human_rights/2009/10/14/272402.html (October 28, 2009).
27. For reform recommendations, see Brett D. Schaefer, "U.N. Human Rights Council Whitewash Argues Against U.S. Participation," *Heritage Foundation Background*er No. 2255, April 2, 2009, at <http://www.heritage.org/Research/InternationalOrganizations/hg2255.cfm>.
28. The reasons for this failing are discussed in Brett D. Schaefer, "The Obama Administration Will Not Make the U.N. Human Rights Council Effective," *Heritage Foundation WebMemo* No. 2432, May 11, 2009, at <http://www.heritage.org/Research/InternationalOrganizations/wm2432.cfm>.





“THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES”

SENATE JUDICIARY COMMITTEE
 SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
 DECEMBER 16, 2009

The World Organization for Human Rights USA (“Human Rights USA” for short) respectfully submits this statement to the Senate Judiciary Committee, Subcommittee on Human Rights and the Law. As an organization dedicated to incorporating international human rights norms in U.S. law, we are grateful to the Subcommittee for holding this hearing on the topic of implementing human rights treaties, which is central to so many aspects of our work.

Alongside customary law, treaties are an essential component of the international legal framework protecting human rights. Treaties are tools for articulating the definitions of specific human rights and for creating enforcement mechanisms. Some treaties create international bodies to monitor implementation and compliance by governments; others may give jurisdiction to international courts or quasi-judicial bodies to hear complaints against states parties. However, the framers of human rights treaties recognized that domestic laws, enforceable by a nation’s own judicial system, have the greatest potential efficacy for protecting individual rights. For this reason, most treaties require states parties to enact laws that (1) prohibit violations of the treaty, (2) provide domestic legal remedies to victims of violations, and (3) punish violators, as a deterrent to future violations.

Shamefully, none of the human rights treaties ratified by the United States has been given full domestic legal effect.¹ For each treaty, appropriate implementing legislation is still needed.

Article VI of the U.S. Constitution incorporates international treaties as part of “the supreme Law of the Land,” binding on all local, state and federal authorities. However, on each human rights treaty the U.S. has ratified, it has entered an understanding that the treaty was “non-self-

¹ For a list of human rights treaties ratified by the United States, as well as those signed but not ratified, see University of Minnesota Human Rights Library, RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES - EAT, available at, <http://www1.umn.edu/humanrts/research/ratification-USA.html> (Last Accessed December 13, 2009).

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executing.” As a result, victims of treaty violations cannot directly invoke the treaties’ provisions in court to seek legal remedies.²

Direct legal effect can be given to the provisions of “non-self-executing” treaties only through independent implementing legislation understood to cover the terms of each treaty.³ Were this action taken, the “non-self-executing” status of the treaty would not present the same problems for treaty implementation. For example, Congress has expressly adopted statutes allowing prosecution for torture, war crimes, and genocide to implement treaty provisions.⁴ By contrast, however, in over fifteen years since ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the U.S. has not adopted any implementing legislation.⁵ Furthermore, even when statutes are adopted, Congress often constructs the statutes more narrowly than the treaties’ provisions.

When international treaty monitoring bodies have criticized the U.S. for failing to adopt implementing legislation, the U.S. response typically points to laws implementing the U.S. constitutional provisions that prohibit certain types of rights violations.⁶ This view undermines the concept of domestic treaty enforcement. While U.S. constitutional guarantees provide important safeguards against rights violations, they do not protect against all forms of discrimination prohibited by the human rights treaties the U.S. has ratified. As a result, there are legal gaps between the U.S. Constitution – intended to provide minimum protections for individual rights – and the more expansive international treaty guarantees. So long as these gaps remain unaddressed, the U.S. falls short in its treaty obligations, and more importantly, fails to adequately provide victims of human rights violations access to the remedies they deserve.

² *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). See generally, Restatement (Third) Foreign Relations Law of the United States §111 (1987).

³ U.S. courts may give a treaty indirect effect by interpreting independent statutory or common law causes of action for consistency with the treaty, applying the *Charming Betsy* doctrine. However, this possible indirect application does not satisfy the specific requirements for causes of action called for in several human rights treaties.

⁴ See e.g., The Torture Convention Implementation Act, 18 U.S.C. § 2340A, The Genocide Implementation Act, 18 U.S.C. § 1091, and The War Crimes Act of 1998, 18 U.S.C. § 2441.

⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001), ¶ 11, noting “the absence of specific legislation implementing the provisions of the Convention in domestic laws,” and recommending that the U.S. take the necessary steps “to ensure the consistent application of the provisions of the Convention at all levels of government.” The most recent Concluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/CO/6 (2008), noted at least nine specific areas of existing U.S. law that fall short of the CERD’s protections and called on the U.S. government to address the shortcomings with implementing legislation.

⁶ For example, see United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, January 2009, wherein the United States responds to a recommendation for implementing legislation by describing enforcement efforts under existing laws, holding them out as evidence that the U.S. already has a “robust framework” for addressing racial discrimination.

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Places where U.S. law falls short of treaty obligations include (but are not limited to) the following examples, cited in recent Concluding Observations by UN human rights treaty monitoring committees:

- The CERD requires states parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but which have a discriminatory impact nonetheless. U.S. federal and state laws typically require plaintiffs to prove intent in order to seek Constitutional protections from discrimination.⁷
- U.S. laws currently allow sentencing juvenile offenders to life without parole, despite substantial evidence that courts apply this severe punishment disproportionately to youths belonging to racial, ethnic, and national minorities.⁸
- Federal laws and policies are needed to prevent “extraordinary” rendition to torture, a violation of both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT), and to provide compensation to victims.⁹
- Federal laws that should prevent prison rape fall short of the ICCPR’s requirements.¹⁰
- The CAT requires criminal statutes and civil causes of action for all torture, and yet federal laws prohibiting torture limit jurisdiction to extraterritorial acts.¹¹

The “non-self-executing” declaration that fosters these and other discrepancies between existing U.S. laws and the human rights protections treaties were intended to provide is but one of the reservations, understandings, and declarations (RUDs) the Senate has attached when ratifying human rights treaties. Not all RUDs present challenges to effective implementation. To the contrary, some of them have positively contributed to evolving interpretations of rights under international law. States parties commonly use RUDs to clarify how a treaty’s articles will take effect in domestic law, but RUDs that contradict a treaty’s object and purpose are not permitted.¹² In order to determine whether U.S. RUDs are supporting progressively sophisticated international human rights law or, as in the case of the “non-self-executing” understanding, are actually undermining domestic treaty enforcement, periodic review is needed.

President Clinton’s Executive Order 13107 tasked the Inter-agency Working Group on Human Rights Treaties—now the PCC on Democracy, Human Rights, and International Operations — with overseeing an annual review of U.S. reservations, declarations, and

⁷ CERD Concluding Observations (2008) ¶ 10.

⁸ *Id.*, ¶ 21.

⁹ Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, UN Doc. CCPR/C/USA/CO/3 (2006), ¶ 16.

¹⁰ *Id.*, 33.¶

¹¹ Conclusions and Recommendations of the Committee against Torture: United States of America, U.N. Doc.

CAT/C/USA/CO/2 (2006), ¶ 13.

¹² Vienna Convention on the Law of Treaties.

understandings (RUDs) to human rights treaties to determine their continuing relevance. However, if any such review by the U.S. government has taken place, it has never been publicized domestically or reported to the United Nations treaty monitoring bodies. Given that the treaty monitoring bodies have gone so far as to highlight certain RUDs as problematic, this apparent failure to review the RUDs is particularly concerning.¹³

In summary, the U.S. has stated that human rights treaties are not self-executing, and yet has also failed to adopt implementing legislation granting courts jurisdiction to hear claims concerning treaty violations. As a result, no court or institution in the United States has jurisdiction to directly resolve individual or group complaints alleging violations of the treaty obligations. This leaves some individuals whose rights have been violated with no recourse, even though international treaties have been adopted to protect those rights, only because they reside in the United States. The shortcomings in U.S. domestic implementation also impede the preventative impact these human rights treaties should have all over the world.

RECOMMENDATIONS

To address these failures and to comply with the obligations the U.S. assumed upon ratification of human rights treaties, the U.S. should adopt specific implementing legislation that would allow victims of human rights violations to claim violation of their protected rights before state and federal courts. The failure to give legal effect to these treaties – including through the adoption of appropriate implementing legislation and recognition of causes of action for breach of treaty guarantees – allows abuses for which there is no Constitutional or other domestic remedy to continue, without appropriate judicial redress. The U.S. legal system is not adequately responding to remedy the multitude of violations documented by civil society because the U.S. has not taken the steps necessary to ensure domestic enforcement of the treaties.

The following steps should be taken in order to close the gaps and implement human rights protections enumerated in treaties more fully:

1. Fully evaluate each of the RUDs the U.S. has entered in ratified human rights treaties to determine whether they are still necessary, and rescind those that are no longer needed.
2. If the RUDs declaring human rights treaties non-self-executing are to remain in place, adopt specific implementing legislation that would close the gaps between the treaty protections and U.S. laws.
3. Adopt implementing legislation that allows victims to seek remedies for violation of their treaty-protected rights before state and federal courts or other appropriate authorities.

¹³ See, e.g., CERD Concluding Observations ¶ 11, ¶ 18. UPDATE

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4. Build on the record created by this hearing by holding public hearings on U.S. reports to international treaty-monitoring bodies before submitting the report. These hearings would promote public discussion of the content of the report and an increasingly informed understanding of the relationships between human rights treaties and U.S. laws. Congress should hold similar hearings after UN Committees release their Concluding Observations on U.S. human rights protections, to ensure the legislative branch has the opportunity to examine the Observations and assess the necessity for new legislation to promote compliance.

**The Law of the Land: U.S. Implementation of Human Rights Treaties
Statement by The Illinois Coalition for the Fair Sentencing of Children at the Children and Family Justice Center,
Bluhm Legal Clinic, Northwestern University School of Law
Chicago, Illinois**

**Prepared for submission in conjunction with the hearing before the United States Senate Judiciary Committee
Subcommittee on Human Rights and the Law, 16 December 2009**

Introduction

The Illinois Coalition for the Fair Sentencing of Children is grateful to have the opportunity to address the Senate Judiciary Committee Subcommittee on Human Rights and the Law in conjunction with the Subcommittee's hearing on the implementation of the ratified human rights treaties to which the United States is a party. The Illinois Coalition is comprised of human rights organizations, legal and professional groups, community and youth advocates and faith-based organizations, working to ensure the fair sentencing of youth in the criminal justice system and particularly, to eliminate the sentence of juvenile life without the possibility of parole (JLWOP). In discussing this crucial issue, we believe that the United States Senate must not forget that the United States' treatment of youth in its criminal justice system, and particularly, the practice of sentencing youth to life without the possibility of parole, places the United States squarely outside of its obligations under human rights treaties and principles, as well as international norms.

The sentencing of youth in Illinois exemplifies the situation nationwide. For over a century since founding the first juvenile court in the United States, Illinois' justice system has recognized children's special needs and capacity for rehabilitation. Yet sentencing children to life imprisonment without the possibility of parole flouts the logic of the juvenile court system and abandons certain children as irreparable and irredeemable for the rest of their lives. To date, Illinois has sentenced at least 103 children to die in prison – the sixth highest number in the country.¹ More than 2,500 youthful offenders in the United States are serving life sentences without the possibility of parole for crimes committed before their eighteenth birthday. There are no such cases in the rest of the world.

To argue that Illinois' sentencing scheme is unduly harsh without addressing the need to curtail and end violence would be to ignore the harsh realities facing many communities. Likewise, to assume that harsh sentencing furthers the proposed aim of protecting the public would be to ignore objective data. Any discussion of the sentence of juvenile life without the possibility of parole must involve re-examination of the multiple aims of our justice system – to protect our communities and exact individual responsibility – and whether the means by which we further those aims are fair, humane and effective.

Research on the application of JLWOP sentences around the country continues to document evidence of systemic racial disparities, gross failures in legal representation, and examples of children being sentenced more harshly than adults convicted of the same crimes. Surely it is time for the United States to fall in step with its treaty obligations and its moral responsibility to its children and replace JLWOP with a system that accords with the reality of youth and violence, while investing in other solutions to crime and rehabilitation.

A Human Right to Rehabilitation and Second Chances

Sentencing practices in other countries demonstrate that the United States is far out of step with an overwhelming global consensus against life without parole for young offenders. In 2005, only twelve people in three other countries – Israel, South Africa, and Tanzania – were serving life without parole sentences for crimes

¹ In Illinois, juvenile court jurisdiction ends at the age of 17, compared to the majority of states where juvenile court jurisdiction extends to the age of 18. For the purposes of Illinois' data collection, the Illinois Coalition for Fair Sentencing of Children defined the term "juvenile" to be anyone under the age of 18, in accordance with international law, federal law forbidding the death penalty for children under the age of 18, and the majority state rule for juvenile court jurisdiction.

they committed as juveniles. Human Rights Watch and Amnesty Int'l, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, 100-01 (2005). Today, even these countries have now abandoned the practice of sentencing children to life without parole, leaving the United States entirely alone in its sentencing children to die in prison. Illinois Coalition for the Fair Sentencing of Children, Connie de la Vega & Michelle Leighton, Sentencing our Children to Die in Prison, 42 U.S.F. L. Rev. 983, 989-1007 (2008). In fact, only thirteen countries outside of the United States currently have laws that even theoretically permit life sentences for youth offenders and most of the United States' closest allies – including Australia and Canada – expressly bar the practice. The Rest of Their Lives: Life without Parole for Child Offenders in the United States at 106. Moreover, in Canada, all children under the age of sixteen convicted of first-degree murder are eligible for parole after no more than seven years, and sixteen and seventeen-year-old youth are eligible for parole after ten years. Canada Criminal Code, R.S.C. 1985, ch. C-46, s. 745.1 (2001). Australia takes a similar approach to sentencing its youth. Regina v. Robinson, 2000 NSW LEXIS 636, at 34 (Supreme Court of New South Wales Oct. 19, 2000).

The Convention on the Rights of the Child (CRC) also explicitly prohibits the sentence of life without parole for juveniles, stating that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” Convention on the Rights of the Child, Article 37(a), G.A. res. 44/25 annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. The Convention has been signed and ratified by every country except for the United States and Somalia.² Although the United States Senate has not ratified the CRC, it is arguably binding on this country as a matter of customary international law (see generally Mark Villiger, Customary International Law and Treaties (Martinus Neihoff Publishers 1985)). Aside from the CRC, other international instruments protecting the human rights of children prohibit LWOP or recommend its elimination:

- The Human Rights Committee, the oversight and enforcement body for the International Covenant on Civil and Political Rights (ICCPR), has instructed the United States that “sentencing children to life sentences without parole is of itself not in compliance with Article 24(l) of the Covenant.
- The Committee on the Elimination of All Forms of Racial Discrimination (CERD) found in 2008 that, in light of the racial disparities in applying LWOP in the United States, the sentence is “incompatible with Article 5(a) of the Convention.”
- The Committee Against Torture, the governing body for the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), urged the U.S. in 2006 to reconsider the practice of imposing LWOP on youths under the age of 18, observing that it “could constitute cruel, inhuman or degrading treatment or punishment.”
- In a 2009 report to the United Nations General Assembly, Doudou Diene, the United Nations’ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, recommended that the United States cease the imposition of LWOP on children under the age of eighteen at the time of the offense.

Furthermore, the European Court of Human Rights has declared the practice of assigning juveniles life sentences to be illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which forbids “inhuman or degrading treatment or punishment.” Hussain v. United Kingdom, 22 EHRR 1, 53 (1996) (citing The Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www.conventions.coe.int> (last visited December 15, 2007)). In addition, in April 2004, the Commission on Human Rights adopted a resolution urging States to abolish the sentence for anyone under the age of eighteen. Illinois Coalition for the Fair Sentencing of Children, Categorically Less Culpable: Children

² United Nations High Commission on Human Rights, online at www.unhcr.ch/tbs/doc/nsf. The United States signed the CRC in 1995, but has not ratified it.

Sentenced to Life Without Parole in Illinois (2008); Human Rights Watch & Amnesty Int'l, The Rest of Their Lives: Life without Parole for Child Offenders in the United States 107 (2005).

Youth are Different from Adults

The sentence of JLWOP disregards the fundamental differences between youth and adults. Our legal system, scientific and behavioral studies and own experience attest to these differences:

- The founding of our country's juvenile justice system was premised on the belief that children, even those who commit grave acts, are fundamentally different from adults and more amenable to treatment and rehabilitation.
- Other areas of our law recognize that developmental immaturity justifies age-based restrictions on rights and privileges such as voting, marriage, jury service and drinking.
- Behavioral and scientific studies confirm youths' capacity for judgment, impulse control or risk assessment are less developed than that of adults.
- The U.S. Supreme Court agreed in *Roper v. Simmons*, explaining, "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."
- The American Bar Association recommends that sentences for youth should recognize mitigating factors particular to their "youthful status," and juveniles "should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter."³

Racial Disparity

The disproportionate imposition of JLWOP sentences on racial minorities begs re-consideration of its fairness. It was this precise concern that led the CERD and Special Rapporteur Doudou Diene to condemn the use of JLWOP in the United States. Even before sentencing, minority children in the United States are over-selected at every stage of the criminal justice process from arrest to detention to conviction; accordingly, later stages such as sentencing may reflect racial differences accumulated over earlier stages of processing.⁴

- 82% of youth offenders serving LWOP sentences in Illinois are racial minorities—72% are Black, 10% are Latino, even though Blacks comprise only 14.7 percent of the state population and Latinos comprise 14.6 percent.⁵
- Cook County, Illinois (home to the City of Chicago)⁶ sees even higher disparities – 64 of the 73 JLWOP sentences, or approximately 88 percent, are being served by Black and Latino men and women.⁷

³ American Bar Association Criminal Justice Section, *Report to the House of Delegates, Resolution and Report* (2008) (citing *Roper*, 543 U.S. at 567-70).

⁴ See Donna M. Bishop, *Race Effects in Juvenile Justice Decision-Making: Findings of A Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 394 (1996) (arguing that "[i]f disparities occur at early decision points that are not examined, analyses of late-stage outcomes are likely to produce findings of no discrimination").

⁵ U.S. Census Bureau, 2005-2007 American Community Survey 3-Year Estimates, available at http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US17&_state=04000US17.

⁶ Cook County comprises approximately 41 percent of Illinois' overall population. U.S. Census Bureau, *State and County Quick facts* (2008).

⁷ In contrast, Blacks and Latinos comprise only 26 and 22.8 percent, respectively, of the overall population in Cook County. U.S. Census Bureau, 2008 US Census Data, available at <http://quickfacts.census.gov/qfd/states/17/17031.html>.

- Illinois far exceeds the national average of Black youth sentenced to LWOP (60%).
- The majority of people serving JLWOP in the country are Black males.⁸ On average across the United States, Black youth are sentenced to LWOP at a per capita rate that is 10 times that of White youth.⁹ A 2005 study conducted by Human Rights Watch found that, in the 25 states for which data was available, Black youth arrested for murder were 1.59 times more likely to be sentenced to LWOP than White youth arrested for the very same crime.¹⁰
- Children of color are generally more likely to end up in prehearing detention, which may be the best predictor of sentences with restrictive and longer dispositions.¹¹ In Illinois, Black children were six times more likely to be arrested and eight times more likely to be committed to detention, compared to White children, in 2005.¹² For children between the ages of 10 and 16 in Illinois, Blacks comprised over 60 percent of arrests, and almost 60 percent of those admitted to secure detention, compared to 27.7 percent for White children.¹³
- In Cook County, Black and Latino children make up 60 percent of those under 17 years of age, but 86 percent of those charged in juvenile court.¹⁴
- Studies regularly show that patterns of offending—that is, categories and levels of crime by various demographics—fail to sufficiently explain the rate at which Black children are arrested.¹⁵
- Transfers of children from juvenile to adult court have also shown racial differences; from October 1999 through September 2000, virtually all of the 393 transferred children in Cook County were racial minorities (87 percent were Black, 13 percent were Latino and less than one percent was White).¹⁶

Lack of Discretion – Mandatory Transfer and Sentencing

Mandatory life without parole sentences disable judges from considering age, background and individual circumstances in sentencing. Where Illinois' mandatory life without parole statute combines with automatic transfer law, children are denied consideration of their age, background and individual circumstances twice. In many cases from start to finish then, Illinois law has based its LWOP sentences entirely on the nature of the offense, to the exclusion of considering the person behind that offense.

- Over 95% of youth offenders serving LWOP sentences in IL were automatically transferred from juvenile court to adult criminal court with no opportunity for a judge to review the appropriateness of the transfer.

⁸ Nellis, Ashley and King, Ryan S., *No Exit: The Expanding Use of Life Sentences in America*. The Sentencing Project, Washington, D.C.: July 2009.

⁹ "The Rest of Their Lives," *supra*.

¹⁰ "The Rest of Their Lives," *supra*.

¹¹ See Kimberly Kempt-Leonard and Darnell F. Hawkins, *OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE* (2005), at 435; see also *supra* note 4.

¹² Illinois Criminal Justice Information Authority, *Trends and Issues 2008: A Profile of Criminal and Juvenile Justice in Illinois*, 125 (2008), available at <http://www.icjia.state.il.us/public/pdffiles/2008/Juvenile%20justice.pdf>.

¹³ *Id.*

¹⁴ Sarah Karp and Mick Dumke, *Arbitrary Lines*, CHICAGO REPORTER

http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Arbitrary_Lines (last visited August 21, 2009) (citing to census data, the Illinois Criminal Justice Information Authority and the Illinois Juvenile Justice Initiative).

¹⁵ Barbara I. Williams, *What Do the Numbers Tell Us about Crime and Children?*, 71 *The Journal of Negro Education* 3, 127 (2002). One 2002 study, for instance, finds, "The numbers tell us, rather emphatically, that the prevalence of drug/alcohol use and violent behavior does not determine the rate at which Black children are arrested."

¹⁶ Juvenile Justice Initiative, http://www.justice.org/template.cfm?page_id=50.

- The overwhelming majority—79 percent—of JLWOP sentences have been mandatory.
- 57 percent of the children who received LWOP sentences in Illinois had no prior record.
- Most of the children who received LWOP grew up in distressed environments—subjecting them to poverty, physical and sexual abuse, abandonment, gang violence, and drug and alcohol abuse.
- At least 19 children have received life without parole sentences as accomplices—never having actually hurt or killed anyone.

Judges have gone on record to oppose the mandatory nature of life without parole sentences for juveniles. In People v. Miller, Judge James B. Linn, Circuit Court of Cook County, eschewed the law and instead imposed a determinate sentence of 40 years, calling mandatory life without parole “blatantly unfair and highly unconscionable” for a fifteen-year old who stood as a look-out and ran from the scene immediately upon two co-defendants’ shooting and killing two people.¹⁷ In People v. Allen, Associate Judge Thomas Dwyer, Circuit Court of Cook County, also recorded his opposition: “on the verdict of guilty of first degree murder... I sentence you to a term of natural life in the Illinois Department of Corrections... That is the sentence that I am mandated by law to impose. If I had my discretion, I would impose another sentence, but that is mandated by law.”¹⁸

Only a few rogue cases in Illinois have succeeded in reversing and reducing life without parole sentences for juveniles. In 2002, the Illinois Supreme Court affirmed the lesser sentence in Miller. Since 2002, state courts have found that People v. Miller does not apply to circumstances deviating from its specific facts.¹⁹ Only two of the 19 prisoners serving JLWOP as accomplices have successfully applied Miller to obtain new sentencing hearings.²⁰

Investing in Safe Communities

Replacing JLWOP with an alternative system would not mean that violent people will simply be released to the streets. Instead, careful, periodic reviews of the sentences would determine whether, years later, people sentenced to JLWOP continue to pose a threat to the community. At the same time, the move to abolish JLWOP should consider more effective measures to decrease violence and rehabilitate and reintegrate youthful offenders.

- According to a recent Center for Disease Control and Prevention report, “transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth.”
- It costs \$24,655.75 to incarcerate a person in prison for one year, or nearly \$1.5 million dollars for 60 years.²¹

¹⁷ People v. Miller, 781 N.E.2d 300, 332 (2002) (finding the application of a mandatory sentence of life without parole for a child who played a passive look-out role in the offense unconstitutional).

¹⁸ Brief of Petitioner at 10, People v. Allen, No. 92 CR 08607-02 (Dec. 13, 2002) (quoting trial judge).

¹⁹ People v. Smolley, 374 Ill. App. 3d 167, 171 (1st Dist. 2007) (finding that Miller is fact specific and did not apply to a juvenile principal); People v. Griffin, 368 Ill. App. 3d 369, 379-80 (1st Dist. 2006) (concluding that Miller did not apply to a 17 year-old convicted under accomplice liability); People v. Zapata, 347 Ill. App. 3d 956, 972 (1st Dist. 2004) (concluding that Miller did not apply to a juvenile principal).

²⁰ See People v. Allen (1-07-3472, March 20, 2009, unpublished order pursuant to Supreme Court Rule 23); See People v. Green (Circuit Court of Cook County, 85 c. 2456/02, August 15, 2007); see in contrast People v. Davis (1-07-0398, February 25, 2009, unpublished order pursuant to Supreme Court Rule 23) (affirming lower court’s dismissal of defendant’s post-conviction petition, where defendant held but never used a gun that was promptly knocked out of his hand, but was with two other co-defendants who shot and killed two people).

²¹ American Correctional Association, *2006 Directory of Adult and Juvenile Correctional Departments, Institutions, Agencies and Probation and Parole Authorities*, 67th Edition (Alexandria, VA: American Correctional Association, 2006).

Rehabilitation and Capacity for Change

With most having served over 10 to 15 years already, many inmates attest to the significant growth and learning they have experienced since their childhood. For example, John H. received his GED in county jail, became a tutor there, and after two years in prison secured a job that he has worked consistently since; he notes, "Nothing I've shown since being here shows or says that I cannot be rehabilitated, returned to useful citizenship."²² Anthony S. has taken correspondence courses; received a paralegal certificate, with a specialization in civil litigation; worked towards a degree in bible theology for the past six years; and written a book giving advice to parents concerning children.²³ Despite the limited education and supports offered in prison, many more inmates serving JLWOP have charted their own growth and learning opportunities to become changed people.

Conclusion

At its core, a nation's commitment to human dignity is reflected in the way in which that nation treats its children – particularly those who are impoverished, disenfranchised and subject to racial discrimination. The harsh sentencing of children in the United States, as exemplified by the sentence of life without the possibility of parole for a juvenile, demonstrates that the United States is an outlier and serves to undermine this country's place in the world as an arbiter of democracy and human rights. We hope that this hearing is a stepping stone for the United States Senate to urge the effective implementation of the United States' obligations under human rights treaties, as well as a renewed commitment by the United States to demonstrate its leadership with regard to safeguarding the rights and well-being of its children.

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²² See Illinois Coalition for Fair Sentencing of Children, Interview with John H. (November 8, 2007).

²³ See Illinois Coalition for Fair Sentencing of Children, Interview with Anthony S. (July 27, 2006).

INDIAN LAW RESOURCE CENTER

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Written Submission of the Indian Law Resource Center

The Law of the Land: U.S. Implementation of Human Rights Treaties

Hearing before the Senate Committee on the Judiciary Subcommittee on Human Rights and the Law

December 16, 2009

Founded in 1978 by American Indians, the Indian Law Resource Center is a 501(c)(3) non-profit legal organization. The Center assists indigenous peoples combat racism and oppression, realize their human rights, protect their lands and environment, and achieve sustainable economic development and genuine self-government. We work throughout the Americas to overcome the devastating problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by providing legal assistance without charge to indigenous peoples fighting to protect their lands and ways of life.

One of our overall goals is to promote and protect the human rights of indigenous peoples, especially those human rights recognized in international law. We believe that it is especially important to encourage the recognition of these human rights at the country level in order to preserve indigenous cultures and lives, and also to protect the environments where indigenous peoples live.

We commend the Subcommittee on Human Rights and the Law for holding this historic hearing on the United States' implementation of human rights treaties. We also thank Wade Henderson for his very helpful statement calling attention to the human rights of indigenous peoples. We submit this statement to the Subcommittee to provide additional information on the failure of the United States to comply with its human rights obligations to Indian and Alaska Natives in the United States and to make recommendations to improve the United States' commitment to the human rights of indigenous peoples.

I. United States Compliance with its Human Rights Obligations Towards American Indians and Alaska Natives

The United States' failure to comply with its human rights obligations towards American Indians and Alaska Natives is widespread and has terrible consequences for the victims of these abuses and the country generally. Today, Indian and Alaska Natives endure poverty and marginalization throughout the United States due largely to the denial of their basic human rights to equal treatment, rights to control their own lands and resources, and rights to fair and reasonable law enforcement and prosecution of violent crimes committed against them. By every measure, American Indian and Alaska Natives in the United States continue to rank at the bottom of every scale of economic and social well-being. They fare worse than the national average in terms of income, education, and unemployment, making them the most impoverished group in the nation.¹ Indian and Alaska Natives have the poorest health of any population in the US with above average rates of chronic problems such as alcoholism, diabetes, smoking, and obesity.² They experience violent crimes more than twice as often as any other population in the United States with the average rate of rape and sexual assault among Natives 3.5 times higher than for all other races.³

The domestic laws and policies of the United States perpetuate a legal system that has blatant and significant discriminatory impacts on Indian and Alaska Native peoples, particularly with regard to rights to property, religious freedom, cultural activities, public safety, health, education, and political rights. Because the federal government asserts essentially limitless power over Indians and engages in constant intrusion in the affairs of Indian and Alaska Native peoples under the plenary power doctrine, Indian governments are prevented from effectively governing their own lands and carrying out much-needed economic development. This denial of simple justice has long served to deprive Indian and Alaska Native nations of a fair opportunity to advance the interests of their communities.

The untenable and insecure position of Indian and Alaska Native peoples vis-a-vis the federal government in the United States is unique, and gives rise to multiple violations of their rights under international human rights documents, including the

¹ US Census Bureau, *We the People: American Indians and Alaska Natives in the United States* 8-12 (February 2006).

² United States Indian Health Service, *Facts on Indian Health Disparities* (January 2006), available at [<http://info.ihs.gov/Files/DisparitiesFacts-Jan2006.pdf>].

³ Stephanie Wahab, *Intimate Partner Violence and Sexual Assault in Native American Communities* 40-41, in *Intentional Injuries in American Indian Communities: A Report with Recommendations*, submitted to The National Injury Prevention Tribal Steering Committee, June 6, 2003.

International Convention on the Elimination of All Forms of Racial Discrimination (ratified by the United States in 1994), the International Covenant on Civil and Political Rights (ratified by the United States in 1992), and the American Declaration on the Rights and Duties of Man. The United States agreed to each of these but has yet to comply fully with its human rights obligations under them. Despite repeated condemnation by the United Nations Committee on the Elimination of Racial Discrimination, the United Nations Human Rights Committee, and the Inter-American Commission on Human Rights for its failure to protect the human rights of Indian and Alaska Native peoples under international law, the United States has done little to fulfill its human rights obligations to Indian and Alaska Native peoples and nations in the United States. We draw the Subcommittee's attention to two examples of the United States' failure to comply with its human rights obligations to Indian and Alaska Native peoples and nations.

A. Violence Against Indian and Alaska Native Women

American Indian and Alaska Native women experience a per capita rate of interracial violence that is almost three times higher than the general population.⁴ One in three Indian women will be raped in her lifetime.⁵ Six out of ten Indian women will experience domestic violence.⁶ Non-Indians commit 88% of all violent crimes against Indian women.⁷ Yet, unlike other local communities in the United States, Indian nations and Alaska Native villages cannot investigate and prosecute most violent offenses occurring in their local communities. United States laws have stripped tribes of much of the ability to protect their own citizens. Tribes cannot effectively protect Indian women from violence by providing adequate policing and effective judicial recourse against violent crimes in their local communities, because they cannot prosecute non-Indian offenders⁸ and can only prosecute Indians for

⁴ See Steven W. Perry, U.S. Dep't of Justice, American Indians and Crime 8 (2004).

⁵ See Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7 (2000).

⁶ See *id.*

⁷ See *id.*; A. Greenfield & Steven K. Smith, U.S. Dep't of Justice, American Indians and Crime 8 (1999) (noting that among American Indian victims, "75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race," a much higher percentage than among victims of all races as a whole.).

⁸ *Oliphant v. v. Suquamish Tribe*, 435 U.S. 191 (1978) (holding that Indian nations lack the authority to impose criminal sanctions on non-Indian citizens of the

misdemeanors.⁹ Unlike other women in the United States, Indian women often do not have a choice to pursue criminal relief against their perpetrators, because the United States has greatly diminished the ability of tribes to adequately respond to violent crimes. United States law has made criminal relief often unavailable by limiting tribal jurisdiction.

The inadequate response of the United States government to violence against Indian women further undermines their human rights. Because of the limited criminal authority of tribes, tribes and Indian women must rely on the federal government to investigate and prosecute violent felonies. Yet more often than not, the United States government fails to investigate and prosecute violent felonies committed on Indian lands. A recent university study found that federal prosecutors failed to prosecute 62% of all criminal cases, 75% of rape and sexual assault cases, and 72% of child sexual assault cases occurring on Indian lands.¹⁰

In 2008, the United Nations Committee on the Elimination of Racial Discrimination (CERD) condemned the United States for its inadequate response to violence against Indian women. In its Concluding Observations and Report concerning the United States, the Committee stated,

The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered. (Articles 5(b) and 6).¹¹

It also recommended that the United States increase its efforts to prevent and

United States that commit crimes on Indian lands).

⁹ 18 U.S.C. §§ 1152, 1153, 1162 (providing for federal jurisdiction over major crimes in Indian country).

¹⁰ Tribal Law and Order Act of 2008, S. 3320, 110th Cong. (2008); Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at [http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33].

¹¹ UN Committee on the Elimination of Racial Discrimination, Concluding Observations United States of America, CERD/C/USA/CO/6 (February 2008) at para. 26, available at [<http://www.indianlaw.org/sites/indianlaw.org/files/CERD-recommendations.pdf>].

prosecute perpetrators of violence against Indian women. The United States has yet to comply with the Committee's recommendations.

B. Discrimination Against Indian Land and Treaty Rights

The federal government claims the power to confiscate aboriginally held Native lands and resources in violation of the Fifth Amendment's guarantees of just compensation and due process of law. Congress regularly passes legislation dealing with Native property and money that would be forbidden by the Constitution if it affected anyone else's property. Federal courts frequently deny Native nations any legal remedy for these wrongs, including federal violations of treaty obligations. This legal framework is inconsistent with our Constitution and with this country's human rights obligations under international law.

The Inter-American Commission on Human Rights has condemned the United States for these discriminatory laws dealing with Indian nations and individuals, particularly for the unfair procedures applied to Indian land rights and land claims, and for the United States' failure to accord Indian peoples equality before the law – particularly with respect to the protection of constitutional rights. In *United States v. Mary and Carrie Dann*,¹² the Commission affirmed the rights of indigenous peoples to their lands under international law. It found that the United States had denied Mary and Carrie Dann equality before the law under the American Declaration on the Rights and Duties of Man by depriving them of their lands held under aboriginal title through procedures that did not accord due process. The Inter-American Commission strongly recommended that the United States provide the Dann sisters with an effective remedy, including adopting legislative or other necessary measures to ensure respect for the their right to property under the American Declaration in connection with their claims to property rights in Western Shoshone ancestral lands. It also urged the United States to

Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II [right to equality before the law], XVIII [right to a fair trial] and XXIII [right to property] of the Declaration.¹³

The United States has refused to take any corrective action or to prevent further violations of the Dannes' human rights, and has claimed on several occasions that it is not bound by the American Declaration even though both the Inter-American

¹² Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002).

¹³ *Id.* at para. 173.

Commission and the Inter-American Court on Human Rights consider the American Declaration binding on all OAS member states.

CERD and the United Nations Human Rights Committee have also repeatedly noted and condemned the United States for its discriminatory laws and procedures affecting Native nations and individuals over a period of many years. CERD initially condemned the United States for its discriminatory policies towards aboriginal land and treaty rights in 2001 when it stated,

The Committee notes with concern that treaties signed by the Government and Indian tribes . . . can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government . . . The Committee recommends that the State party ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention
...¹⁴

In 2006, for the first time ever, CERD issued early warning procedures against the United States to prevent it from further violating the human rights of the Western Shoshone peoples. Again, it urged the United States to respect and protect the human rights of the Western Shoshone peoples and to pay particular attention to their cultural rights, which “may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands.”¹⁵ CERD reiterated its concerns about the land rights of indigenous peoples in the United States in its 2008 Concluding Observations, recommending that the UN Declaration on the Rights of Indigenous Peoples “be used as a guide to interpret the [US’] obligations under the Convention relating to indigenous peoples.”¹⁶

Similarly, in 2006, the UN Human Rights Committee criticized the United States for its failure to protect aboriginal land rights in accordance with the International Covenant on Civil and Political Rights, stating,

The State party should review its policy towards indigenous peoples as

¹⁴ UN Committee on the Elimination of Racial Discrimination, Concluding Observations United States of America, CERD/A/56/18 (August 15, 2001), at para. 400.

¹⁵ UN Committee on the Elimination of Racial Discrimination, Decision I(68): United States, CERD/C/USA/DEC/I (March 11, 2006), at para. 9.

¹⁶ UN Committee on the Elimination of Racial Discrimination, Concluding Observations United States of America, CERD/C/USA/CO/6 (February 2008), at para. 29.

regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their culture.¹⁷

The United States has done nothing to respond either to CERD's or the Human Rights Committee's recommendations and observations.

II. United States Support of International Human Rights Standards for Indigenous Peoples

The failure of the United States government to support the development of international human rights standards protecting the rights of indigenous peoples has badly damaged the United States' reputation as a human rights leader. In September 2007, the United Nations General Assembly overwhelmingly adopted the United Nations Declaration on the Rights of Indigenous Peoples. Unfortunately, the United States was one of only four countries to vote against the UN Declaration. The United States' reasons for voting "no," appeared to be insubstantial excuses. The United States' representatives at the UN had earlier publically agreed to most of the provisions of the UN Declaration. In open negotiations, the US delegation repeatedly voiced its support for most of the rights in the UN Declaration, because almost all of these rights are already a part of United States law or are required by the United States Constitution. The United States' vote against the UN Declaration was dictated by the Bush Administration policy of rejecting all new human rights commitments, not because of principled opposition to the provisions of the UN Declaration. The United States' vote against the UN Declaration seriously undermined its' reputation as a human rights leader, and the failure of the Obama Administration to reverse this position, especially in light of Australia's recent endorsement of the UN Declaration, continues to harm the United States' credibility in the world community. To reaffirm its commitment to human rights, the United States must reverse its position on the UN Declaration.

At the same time, in recent years, the United States has refused to participate in negotiating the American Declaration on the Rights of Indigenous Peoples in the Organization of American States. A strong American Declaration is much needed to recognize and secure indigenous rights, including the right of self-determination,

¹⁷ UN Human Rights Committee, Concluding Observations, CCPR/C/USA/CO/3 (Sept. 15, 2006), at para. 41.

treaty rights, rights to education, cultural and religious rights, rights to lands and resources, and more. It will address the particular regional issues in the Americas that are not dealt with in the UN Declaration on the Rights of Indigenous Peoples. The draft American Declaration already includes provisions on gender equality, violence against Native women, and indigenous peoples under internal armed conflict that are not in the UN Declaration and are of particular importance to indigenous peoples in the Americas. It will help stop and guard against human rights violations occurring in the United States and throughout the Americas. The United States has historically played an important leadership role in this hemisphere, and its refusal to participate in the OAS process has had a severe adverse effect on the process, on indigenous rights, and on its credibility as a human rights leader. The United States must actively engage in the negotiations and commit to the adoption of a strong American Declaration to restore its legitimacy as a global human rights leader.

III. Conclusion and Recommendations

Indian and Alaska Native nations and individuals still do not have many of the constitutional and human rights enjoyed by all other citizens in the United States, especially the right to equality before the law. The United States has never had a reform of federal Indian law comparable to the changes that eliminated the separate-but-equal doctrine justifying segregation. Nor has the United States taken its international human rights obligations towards Indian and Alaska Native nations or individuals seriously. As noted legal scholar Felix Cohen once said, "Our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." The vulnerability of democracy, justice, and the rule of law in this hemisphere and throughout the world is evident in the widespread and gross human rights violations now occurring against indigenous peoples. To renew our faith in democracy, the rule of law, and justice, the United States must renew its commitment to human rights by upholding, promoting, and protecting the fundamental rights of America's first peoples.

We recommend that Congress take affirmative actions to implement its human rights obligations to Indian and Alaska Native peoples, including:

- Congress should hold oversight hearings as soon as possible to examine in detail the failure of the United States to comply with its obligations. The scope of the problem must be determined: clearly it affects many groups and categories of individuals, women, Native Americans, racial minorities, and many others. Information must be sought from the Administration and particularly from the State Department. Congress must become fully informed about this problem, because it is one that seriously damages the moral and legal character of this country. Congress must consider what can be done to reverse the very un-American policy of ignoring and refusing to comply with human rights obligations.

- The United States should ratify the American Convention on the Human Rights. The United States' ratification of the American Convention on Human Rights would reaffirm the United States' commitment to human rights and democracy within the Americas.
- The United States should endorse the United Nations' Declaration on the Rights of Indigenous Peoples and commit to the negotiation of a strong American Declaration on the Rights of Indigenous Peoples in the Organization of American States.

Statement by International Commission for Labor Rights

U.S. Senate Judiciary Subcommittee on Human Rights and the Law

Hearing: "The Law of the Land: U.S. Implementation of Human Rights Treaties"

Introduction

The International Commission for Labor Rights commends the Senate Judiciary Subcommittee on Human Rights and the Law for holding this hearing on an issue of seminal importance: United States implementation of human rights treaties to which it is a signatory.

The International Commission for Labor Rights, ICLR, is a 501(c)(3) non-profit that is based in New York, and coordinates the pro bono work of a global network of lawyers committed to advancing workers' rights through legal research, advocacy, cross-border collaboration, and the cutting-edge use of international and domestic legal mechanisms. On occasion, ICLR's legal network also responds to urgent appeals for independent reporting on gross labor rights violations.

The network was founded in 2001 at the request of more than 50 national trade unions and global federations, and the coordinating secretariat in New York was set up in 2005. The network aspires to be a resource for trade unions and workers around the world.

This statement will discuss the need for further acknowledgment and implementation of our treaty obligations by both the federal and state governments. ICLR believes that urgent action needs to be taken specifically to address the United States' compliance with the International Covenant on Civil and Political Rights' (ICCPR's) protection of freedom of association.

Freedom of Association – An Overview

Article 22 of the ICCPR states that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." This right is articulated in a number of other instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.¹ A further understanding of all these references reveals that the intended benefit of this right to associate goes beyond simply being able to join a union. The undeniable interdependence of the right of freedom of association and the right to engage in collective bargaining is most clearly articulated by the International Labor Organization (ILO) Committee on Freedom (CFA) of Association, "the right to bargain freely with employers with respect to conditions or work constitutes an essential element in freedom of association." The following submission presupposes that the freedom of association espoused by numerous international agreements includes associational activity, most notably the right to engage in collective bargaining, as part and parcel of the right to join unions.

¹ UDHR Art 23 (4); ICESCR Art. 8

Additionally, the ICCPR recognizes no exceptions to the freedom of association other than in narrow circumstances relating to “the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

The ICCPR’s protection of the freedom of association must be read in conjunction with the obligations of membership in the ILO. The ILO has carried out extensive interpretation of the right to associate, which has included highlighting particular conventions, in this case 87 and 98, as Core Conventions to which all member states must accord particular weight.² Any measure of meaningful compliance with ICCPR Article 22’s protection of freedom of association must be in line with that of the ILO and its jurisprudence.

Categorical Exceptions

The National Labor Relations Act (NLRA) does in fact grant U.S. workers the right to bargain collectively with their employers over wages, hours, and other terms and conditions of employment. However, several mechanisms at the state and federal level deny categories of workers this critical workplace protection. Major groups excluded from NLRA coverage, whether in the Act itself or via amendments and judicial interpretation, are:

1. agricultural workers
2. domestic workers
3. small business employees
4. independent contractors
5. supervisors and managers
6. public employees³

These categorical exclusions, coupled with other government practices and legislation that allow for a disproportionate power structure to emerge in favor of employers, contribute to a systemic denial of the right to associate.

Public Employees

ICLR has analyzed extensively one category of workers who fall outside the protection of the NLRA: public employees. State legislation does provide exceptions, in some instances, to the NLRA exclusion of public employees. North Carolina exemplifies one state in which no such exception exists, and all public employees are denied the right to collectively bargain through General Statute §95-98 (NCGS 95-98).

In 2006, the United Electrical, Radio, and Machine Workers of America Local 150 submitted a complaint to the ILO CFA with regard to this prohibition on public employees. ICLR conducted independent fact-finding and legal analysis on the issue, and our report, “The Denial of Public

² See ILO’s Declaration on Fundamental Principles and Rights at Work (1998).

³ *The Haves and the Have-Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Rights*, American Rights at Work, Nov 2008.

Sector Bargaining Rights in the State of North Carolina (US): Assessment and Report” was submitted to the ILO as additional evidence in support of the claim. The ILO CFA concluded, as it did in a prior decision in 1993, that “the right to bargain freely with employers, including the government in its quality of employer, with respect to conditions of work of public employees who are not engaged in the administration of the State, constitutes an essential element in freedom of association.”⁴ The CFA went on to recommend the repeal of NCGS 95-98 and the establishment of a collective bargaining framework in the public sector in North Carolina.

The decision by the ILO CFA with regard to North Carolina’s public employees not only highlights a specific occurrence of US law being incompatible with international norms, but indicates a widespread disconnect. Thirteen other US States deny outright collective bargaining rights to public employees, while twelve others grant the right to only some public employees. Furthermore, the fact that North Carolina, in the face of the ILO’s decision, has done nothing to alter the law with regard to public employees based upon the ILO’s recommendation, exemplifies the current lack of incorporation of international law that this sub-committee aims to change.

The experience of public employees is indicative of only one of many ways in which the rights of workers, under countless international agreements including the ICCPR, are not fully implemented in the US.

Other Trends – Private Sector and the Lack of Effective Remedies

Classifying employees as groups that do not fall under national legislation is only one of many ways in which workers are systematically denied rights embodied by international law. For employees who do come within the framework of the NLRA, advocacy groups have found repeatedly that the law itself is inadequate in several respects in protecting workers rights. Financial disincentives for violating labor law are minimal under the NLRA, giving employers little reason to abide by it. In other words, employers who fire, demote, or retaliate against workers for their support of unions cannot be subjected to fines nor will they be required to pay compensatory or punitive damages. A cursory comparison reveals that such penalties do apply to employers who violate other employment laws, providing evidence of an institutional disregard for the right to associate. It is important to note that the ICCPR not only contains the explicit language of Article 22, but also constrains ratifying states in Article 2 “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”

The lack of effective remedy leading to employer misconduct has been documented with hard evidence. Threats, interrogations, harassment, surveillance, and retaliation for union activity have been found in very large percentages in unfair labor practice charge documents held by the NLRB.⁵

⁴ 344th Report of the Committee on Freedom of Association, paragraph 995 (reiterating Case No. 1557, Complaints Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Services International (PSI), 76 (Series B) ILO Official Bull., No. 3 at 99, 110-11 (1993)).

⁵ Kate Bonfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute, May 2009 (“finding employers to have threatened to close plants in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections.”).

Undoubtedly a contributing factor to this is the NLRA's explicit grant of interference to employers in employees' freedom of association. Section 8 (c) states that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." Interference with movements to associate by workers is therefore sanctioned, and the line between expression that includes threats or force and actions that do not is indeed a fine one.

Together, the above-referenced legal exclusions, inaction on the part of government enforcement divisions, judicial interpretations, and legislative phrasing have created a systemic frustration of the very purpose for which workers organizations are created, therefore interfering with the right to organize.

Recommendations

ICLR urges the Senate to encourage the US government to take the following steps:

1. to pass legislation with more effective remedies against employer coercion, like injunctive relief and monetary penalties. The Employee Free Choice Act embodies many of these principles;
2. amend the NLRA to include excluded groups within its parameters;
3. ratify ILO Conventions 87 and 98.

We would like to sincerely thank the subcommittee once again for holding this hearing. ICLR looks forward to working with the subcommittee to achieve these recommendations and ultimately ensure full compliance with U.S. treaty obligations.

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On behalf of ICLR
December 21, 2009

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International Indian Treaty Council

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December 14th, 2009

Senate Judiciary Subcommittee on Human Rights and the Law
Senator Richard Durbin, Chairman
Via Email: HeLoisa_Griggs@Judiciary-dem.senate.gov

RE: United States Compliance with Human Rights Treaty Obligations
Hearing: Wednesday, December 16, 2009
Time: 10:30 a.m.
Location: Dirksen Senate Office Building Room 226

Esteemed Chairman Durbin and Members of the Subcommittee,

Please receive our respectful greetings. The International Indian Treaty Council (IITC) is an organization of Indigenous Peoples working for the Sovereignty and Self Determination of Indigenous Peoples and the recognition and protection of Indigenous Rights, Treaties, Traditional Cultures and Sacred Lands. The IITC was founded on the Standing Rock Reservation in South Dakota in 1974, and has offices in California and Alaska.

In 1977 the United Nations Economic and Social Council (ECOSOC) recognized the IITC as the first Indigenous Non-Governmental Organization (NGO) with UN Consultative Status. In this capacity, reflecting on the experience of over 35 years of work in the international human rights arena, we welcome the opportunity to address the question of the United States' compliance with its obligations for the implementation of international Human Rights Treaties to which is it a party, before the Senate Judiciary Subcommittee on Human Rights and the Law.

In this regard, the IITC respectfully calls the attention of the distinguished Senate Subcommittee members to the following matters of concern:

A. Non-self executing treaties

The United States recognizes that under article VI, cl. 2, of the United States Constitution, duly ratified Treaties become part of the "Supreme Law of the Land", equivalent in legal stature to enacted federal statutes. Duly ratified Treaties are internationally binding obligations of the United States. But because they are not "self executing" they are not considered enforceable within the United States. As the Department of State explained to the Committee Against Torture:

In United States practice, provisions of a treaty may be denominated "non-self-executing", in which case they may not be invoked or relied upon as a cause of action by private parties in litigation. Only those treaties denominated as "self-executing" may be directly applied or enforced by the judiciary when

asserted by private parties in the absence of implementing legislation. This distinction derives from the U.S. Supreme Court's interpretation of article VI, cl. 2, of the Constitution. See Foster v. Neilson, 27 Pet. 253, 314 (1829). The distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law.¹

The end result is that in the United States, persons and peoples have internationally recognized human rights but cannot enforce them directly or complain domestically if they are violated. For every recognized right, there must be a remedy. The IITC believes that for human rights to be truly upheld, they must be observed, respected, *protected and enforced* domestically as well as internationally.

B. Individual Complaints Procedures

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) contain optional individual complaints procedures: the ICCPR under Optional Protocol 1; and the ICERD under Article 14. However, both require affirmative State Party action, the ratification of the ICCPR Optional Protocol or the making of a Declaration recognizing the competence of the CERD to receive and consider individual complaints of violations of its provisions. The US has not taken these affirmative actions provided in the ICCPR and ICERD. Again, there is no opportunity provided to individuals, groups or Peoples to seek redress or remedy in the US for violations of the human rights obligations protected under these Treaties.

C. Compliance with Treaty Monitoring Body Recommendations

Under the provisions of every major human rights convention the State Party is required to file Periodic Reports to the Treaty Monitoring Body detailing its compliance with provisions of the Treaty. "Civil Society" including individuals, NGOs, organizations and Tribal governments can also file "parallel" or "shadow reports." The State Party is examined on the basis of all relevant reports at a face-to-face session between the Committee and the State, and a series of recommendations are issued to the State as to necessary actions and steps to ensure better compliance with its Treaty obligations.

The United States recently became a member of the United Nations Human Rights Council, and for many years was a member of its predecessor, the UN Commission on Human Rights. Over the years, the US has been critical of other State members of these bodies for their failure to respect and observe their international human rights obligations. In our view, failure to implement the recommendations of Treaty Monitoring Bodies undermines the international human rights systems and constitutes a failure of compliance with the Covenant or Convention itself. These are legally binding obligations that the United States and other State Parties have accepted voluntarily and multilaterally and are an essential aspect of a national and global

¹ Committee Against Torture, Consideration of Reports Submitted by States Parties under article 19 of the Convention, Initial Reports of States Parties due in 1995, Addendum, United States of America, UN Doc. CAT/C/28/add.5, 9 February 2000.

commitment to ensure that human rights are upheld and respected for “all members of the human family” as affirmed by the Universal Declaration on Human Rights.

Of particular interest and concern to IITC at this time are any steps which have been or will be undertaken by the United States in response to the *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008)* including those recommendations which specifically address the rights of Indigenous Peoples in paragraphs 19 and 29 as follows:

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision I(68) of 2006 (CERD/C/USA/DEC/1). (Article 5).²

The Committee reiterates its Decision I (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (c) (vi)).

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's

² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008)* at para. 19.

obligations under the Convention relating to indigenous peoples.³

The US, in its ratification of the ICERD and other international Human Rights Treaties has given its sacred word that it will treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights, and to work within the United Nations to ensure that other States Parties act as well in accordance to those same provisions. Failure by the US to comply with Treaty body recommendations can be used to justify a failure of compliance by other State Parties. Non-compliance by States also undermines a core commitment required by the Charter of the United Nations of all Member States, "to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," by pledging "to take joint and separate action in co-operation with the [United Nations] Organization for the achievement of the purposes set forth in Article 55."⁴

A. The United States' Nation-to-Nation Treaty Obligations with Indigenous Peoples

The US federal government entered into and ratified more than 400 treaties with Indian Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships including mutual recognition of sovereignty, peace and friendship, land rights, right of transit, health, housing, education and subsistence rights (hunting, fishing and gathering) among others. Even though Congress ended US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding upon the United States today. The US Constitution's reference to Treaties as "the Supreme Law of the Land" certainly includes and encompasses the US obligations in accordance with Treaties entered into in good faith with the original Indigenous Nations of this land.

The US Supreme Court has confirmed the lack of good faith by the US in addressing its Treaty obligations with Indian Nation Treaty Parties. In 1980, regarding violations of the 1868 Ft. Laramie Treaty with the "Great Sioux Nation" (Lakota, Dakota and Nakota), the Supreme Court affirmed a statement by the Court of Claims that "a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation."⁵ However, despite this clear acknowledgement of wrongdoing by the US Supreme Court, the Treaty lands which were illegally-confiscated, including the sacred Black Hills, have never been returned. A just, fair process in the US to address, adjudicate and correct these and other Treaty violations with the full participation and agreement of *all* Treaty Parties has never, to date, been established.

³ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

⁴ United Nations Charter, Articles 55 and 56.

⁵ *United States v. Sioux Nation*, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).

The denial of due process has been addressed by the CERD. In its recommendations to the US in 2006 in response to a submission by the Western Shoshone National Council et al under the CERD's Early Warning and Urgent Action Procedure⁶, the CERD identified the process established by the US for addressing violations of Treaties with Indigenous Nations, the Indian Claims Commission established in 1946 and dissolved in 1978, as a denial of due process which did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of "gradual encroachment" and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.⁷

Establishing a fair, transparent and fully participatory process to ensure that the mutual obligations established under these Treaties are fully honored, upheld and respected is an essential aspect of US' compliance with its obligations under international Treaties. It is our fervent hope and request that the process currently being undertaken by the US Senate Subcommittee on Human Rights and the Law will take this historic opportunity to include due consideration of the ongoing need to establish such a process with the full participation of both Indian Nation and US Treaty Parties in accordance with international human rights norms and standards, taking into consideration the recommendations of the UN Treaty Monitoring Bodies.

In conclusion, we offer the following recommendations for consideration by the US Senate Judiciary Subcommittee on Human Rights and the Law:

1. That the Congress of the United States implement through appropriate national legislation, the provisions of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination;
2. That the United States ratify the Optional Protocol 1 of the ICCPR;
3. That the United States make the Declaration under article 14 of the ICERD;
4. That the United States accept and implement the recommendations of Treaty Monitoring Bodies including the 2008 recommendations to the US by the CERD.
5. That the US Senate take steps to begin implementation of a fair and transparent process with direct participation by the Indian Nations which entered into Treaties with the United States to address and resolve any outstanding issues relating to implementation of these Treaties and the rights they affirm.

⁶ CERD/C/USA/DEC/11 April 2006

⁷ "The Committee is concerned by the State party's position that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party's position is made on the basis of processes before the Indian Claims Commission, "which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests", as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)". Ibid para 6.

The IITC looks forward to submitting any additional information requested by the Subcommittee and we will be honoured to provide any other assistance we can offer in the important work you have undertaken.

Respectfully,

A handwritten signature in cursive script that reads "Andrea Carmen".

Andrea Carmen, Executive Director
International Indian Treaty Council



**Submission from the
Jacob Blaustein Institute for the Advancement of Human Rights
of the
American Jewish Committee**

“The Law of the Land: U.S. Implementation of Human Rights Treaties”

**Hearing before the Subcommittee on Human Rights and the Law,
Committee on the Judiciary, United States Senate
Wednesday, December 16, 2009**

The Jacob Blaustein Institute for the Advancement of Human Rights (JBI) of the American Jewish Committee is grateful for the opportunity to submit information at this hearing. JBI strives to narrow the gap between the promise of the Universal Declaration of Human Rights (UDHR) and the realization of those rights in practice, and we welcome this hearing organized to discuss US implementation of its obligations under human rights treaties, arguably the most important aspect of the enjoyment of human rights by all. US ratification of international human rights instruments and support for the rights enshrined in the UDHR are notable and commendable, but the real test of the US commitment to upholding and protecting human rights will be in the effective implementation of these instruments.

While the US has had many successes in ensuring in practice that individuals within its jurisdiction enjoy the rights and freedoms contained in the international instruments to which it is a state party, and the US has presented extensive reports and documentation to the treaty committees, outlining its efforts to implement the treaties, there have been some serious shortcomings, as identified by the treaty monitoring bodies themselves. For example, in ratifying the UN Convention Against Torture, the US solemnly undertook to prevent and punish torture and cruel, inhuman, and degrading treatment. Since 2001 however, more and more allegations of the use of coercive interrogation in the context of the ‘war on terror’ have emerged. According to many accounts including from US government sources, US intelligence and military officials employed coercive interrogation techniques on detainees, reportedly amounting to cruel, inhuman and degrading treatment and in some cases torture, in breach of its obligations under CAT. It has been reported that the US has breached its obligations under CAT in its failure to carry out prompt, effective and impartial investigations into the allegations of torture made by a number of detainees and former detainees, including making the findings of

such investigations public. JBI reiterates that it encourages the US Senate and House of Representatives and the Obama Administration to establish an independent and impartial body to investigate the serious allegations made over the course of the last five years, and make the findings public. Failure of competent authorities to investigate, when there is reasonable ground to believe that an act of torture has been committed, would itself represent failure to adhere to the US's international obligations.

Assessing US implementation of human rights treaties has been impeded by the lack of any oversight mechanism to monitor US compliance with its international human rights obligations. Such a body would help ensure that all branches of the US Government act to uphold, protect and promote individual rights and freedoms. JBI calls on the US Congress to establish a domestic mechanism mandated to monitor on a permanent basis US compliance with international human rights obligations. While such monitoring could be carried out by a body established under this Subcommittee of the Senate Judiciary Committee, another possibility would be to expand the mandate of the Tom Lantos Commission on Human Rights of the House of Representatives Foreign Affairs Committee to include a monitoring function, or to create a new body under that Commission or as a freestanding body. In this regard, it is useful to study relevant examples in other countries that have bodies such as Ombudspersons or National Human Rights Institutions tasked with monitoring adherence to human rights standards and norms. When they have the requisite amount of independence, such bodies have proven to be effective in monitoring, as well as ensuring, implementation of human rights obligations.

JBI would also like to take this opportunity to commend the US on recent developments in terms of human rights—2009 saw some significant steps forward for the US, most notably in its joining the UN Human Rights Council, and in the signing of the Convention on the Rights of Persons with Disabilities, signaling an important commitment to upholding the rights ensured by that instrument. However, JBI notes with regret that a number of core international human rights instruments have yet to be ratified by the US, most notably including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) signed in 1980, and the Convention on the Rights of the Child signed in 1995. Both these instruments have nearly universal ratification, and the absence of the US on the list of states parties is noticeable and should be quickly remedied. JBI calls on the US Senate to ratify the CEDAW promptly, as a matter of priority, and without overbroad reservations, understandings and declarations which may be incompatible with the object and purpose of the treaty. Similarly, the US should begin the process of reviewing the CRC for ratification, as well as the other core human rights treaties, such as the Convention on the Rights of Persons with Disabilities.

The US has long been a world leader in promoting and protecting human rights. Fairness and respect for equal human rights for all are core principles this country has promoted worldwide. Enhanced US monitoring of its human rights obligations, and ratification of international human rights instruments would not only advance US compliance but also set an outstanding example for the rest of the world.



**Written Statement for the Record
Hearing on U.S. Treaty Compliance
Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law**

**Testimony of Alan Jenkins
Executive Director
The Opportunity Agenda**

December 16, 2009

Thank you for the opportunity to submit our thoughts on U.S. implementation of international treaty obligations.

My name is Alan Jenkins. I am the Executive Director of The Opportunity Agenda, a communications, research, and policy organization with the mission of building the national will to expand opportunity in America. The Opportunity Agenda is a national organization headquartered in New York City. Over the course of the last four years, our organization has conducted substantial and continuing research on Americans' views on human rights as applied in the United States, on the integration of human rights principles into American state court decisions, on the challenges to opportunity and human rights in our country, and on effective solutions for protecting the opportunity and rights of everyone in our country.

The Opportunity Agenda applauds the Subcommittee for taking this important step towards promoting and applying human rights at home.

Human rights represent, at once, a set of values, a system of laws and enforcement mechanisms, and a dynamic, growing movement. They embody the values of dignity, fairness, equality, and opportunity necessary to a just society and an empowered populace. The United States was founded on these ideals; they are the cornerstone of our Declaration of Independence and Bill of Rights, and formed the inspiration for the abolitionist movement, women's suffrage, and other building blocks of our democracy.¹ Franklin Roosevelt emphasized the importance of ensuring the full range of civil, political, economic, and social rights in his Four Freedoms Speech to Congress in 1941, and the United States, under the leadership of Eleanor Roosevelt, played a

¹ COLUMBIA LAW SCHOOL, HUMAN RIGHTS INSTITUTE, STATE AND LOCAL HUMAN RIGHTS AGENCIES: RECOMMENDATIONS FOR ADVANCING OPPORTUNITY AND EQUALITY THROUGH AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK 1 (2009), available at http://www.law.columbia.edu/center_program/human_rights.

critical role in developing and drafting the Universal Declaration of Human Rights (“UDHR”), the foundational human rights document.²

Human Rights and American Public Opinion

The vast majority of Americans embrace human rights as fully applicable to the United States and core to our national principles. According to a national public opinion survey conducted by The Opportunity Agenda, in partnership with the respected polling firm of Belden, Russonello & Stewart, an overwhelming number of Americans (80%) endorse the notion of human rights.³ Eight in ten Americans agree that “we should strive to uphold human rights in the U.S. because there are people being denied their human rights in our country.”⁴ And, three-quarters of the public want the U.S. to work on making regular progress on human rights.⁵ Only two in ten Americans say the U.S. should move “slowly” or allow solutions to human rights problems to “evolve naturally.”⁶

In the view of most Americans, moreover, the Constitution and Bill of Rights alone do not guarantee that human rights will be protected for everyone. Eight in ten (81%) disagree with the statement that because of these documents “we do not need to strive to uphold human rights here in America” (61% “strongly disagree”). Fewer than two in ten (18%) agree with the statement.

Although most Americans are not intimately familiar with specific human rights treaties, the opinion research shows that they see a range of American freedoms and protections as human rights. For example, when asked to evaluate fifteen different proposed protections and determine whether they should be considered human rights, large majorities “strongly” acknowledge human rights that have to do with equality, fairness, and freedom from mistreatment. More than eight in ten Americans “strongly agree” that the following are human rights that should be upheld:

- Equal opportunities regardless of whether you are male or female (86% “strongly should be considered a human right”);
- Equal opportunities regardless of race (85%);
- Being treated fairly in the criminal justice system if accused of a crime (83%);
- Freedom from discrimination (83%);
- Freedom from torture or abuse by law enforcement (83%); and
- Equal access to quality public education (82%).

Majorities of the public also “strongly” believe that a number of basic economic opportunities and privacy protections contained in the Universal Declaration of Human Rights should be considered human rights in the United States:

² *Id.*

³ THE OPPORTUNITY AGENDA/BELDEN, RUSSONELLO & STEWART, HUMAN RIGHTS IN THE U.S.: FINDINGS FROM A NATIONAL SURVEY 12 (2007), available at http://opportunityagenda.org/human_rights_report_2007.

⁴ *Id.* at 21.

⁵ *Id.* at 29.

⁶ *Id.*

- Fair pay for workers to meet the basic needs for food and housing (68%);
- Keeping personal behavior and choices private (60%).
- Equal opportunities regardless of whether you are gay or lesbian (57% “strongly should be considered a human right”; 19% “should not be considered a human right”).
- Living in a clean environment (68%);
- Access to healthcare (72% “strongly should be considered a human right”);

Conversely, the American people see a variety of practices that contravene those principles as violations of human rights. Asked what constitutes a human rights violation in the U.S., Americans overwhelmingly agree, for example, that racial profiling is a violation of human rights (84% “agree”; 70% “strongly”). Americans also believe that torture of terrorism suspects (67% agree; 43% “strongly”) and the treatment of residents of New Orleans after Hurricane Katrina were human rights violations (60% “agree”; 41% “strongly”).

In sum, applying human rights in the United States is consistent not only with American values, but also with American beliefs and public opinion.

The Need for Human Rights Treaty Implementation

Full implementation of treaties that the United States has signed and ratified is crucial to our commitment to the rule of law, and to the Constitution’s promise that treaties are part of “the supreme Law of the Land.”⁷ In the case of human rights treaties, implementation is also key to fulfilling our national values of fairness, justice, dignity, and equal opportunity. Research and experience on the ground make clear, moreover, that there exist specific human rights problems in our country that our existing laws cannot fully address, and which effective treaty implementation could tackle effectively.

Protection of the human right against discrimination is an example of this concern. Despite the progress that we’ve made as a nation, equal opportunity with respect to race remains a significant problem in America. And in two areas in particular, health care and criminal justice, current U.S. laws and mechanisms are inadequate in ways that implementing human rights treaties could address.

Racial Inequality in Health Care

The Convention Against Racial Discrimination prohibits discrimination in the provision of health care.⁸ Yet ample research at the national level, and in New York City where The Opportunity Agenda is headquartered, demonstrates racial barriers to equal health care access. In New York City for example:

⁷ U.S. CONST. art. VI, para. 2.

⁸ See Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Dec. 12, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

- Areas with high concentrations of African Americans, Latinos, and Asian Americans are most likely to have serious shortages of primary care physicians.⁹
- Hospital closures and downsizing have disproportionately affected communities of color. Two-thirds of the twelve hospitals that closed between 1995 and 2005—each with the approval of the New York State Department of Health—served predominantly people of color. In some cases, the patient populations served by those hospitals were more than 90% African American, Latino, and Asian American.¹⁰

These inequalities reflect nationwide challenges regarding unequal opportunity in health care that implicate human rights laws and principles. Even after adjusting for socioeconomic differences and other healthcare access-related factors, research finds starkly disparate treatment based on race in cardiovascular care, cancer treatment, HIV care, end-stage renal disease and kidney transplantation, pediatric care and maternal and child health, mental health, rehabilitative and nursing home services, and many surgical procedures.¹¹ Specifically, the following persistent inequalities have been found in comparing black Americans with white Americans of similar socio-economic, educational, insurance, and health status:

- Black patients with a heart attack are less likely to receive thrombolytic therapy and bypass surgery than are white patients.¹²
- Blacks are diagnosed at later stages of cancer progression than whites.¹³
- When being treated for HIV/AIDS, blacks are less likely to receive anti-retroviral therapy, prophylaxis for pneumocystic pneumonia, and protease inhibitors.¹⁴
- Black non-insulin dependent diabetes patients are more likely to be treated with insulin.¹⁵
- Blacks are less likely to be assessed as appropriate candidates for surgery for cerebrovascular disease.¹⁶
- Black patients with end stage renal disease are less likely to receive a kidney transplant.¹⁷

Racial Inequality in the Criminal Justice System

In New York City and around the country, a growing body of research documents racial bias in the criminal justice system that implicates human rights treaties, as well as American values:

- Although New York City's own statistics show that white youth are *more* likely to use illegal substances—such as marijuana—than black youth, the majority of youth arrested

⁹ THE OPPORTUNITY AGENDA, DANGEROUS AND UNLAWFUL: WHY OUR HEALTH CARE SYSTEM IS FAILING NEW YORK COMMUNITIES AND HOW TO FIX IT 3 (2007), available at http://opportunityagenda.org/dangerous_and_unlawful_report_why_our_health_care_system_failing_new_york_communities_and_how_fix_it.

¹⁰ *Id.*

¹¹ INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTHCARE 5-6 (2003).

¹² VERNELLIA RANDALL, DYING WHILE BLACK: AN INDEPTH LOOK AT A CRISIS IN THE AMERICAN HEALTHCARE SYSTEM 86 (2006).

¹³ *Id.*

¹⁴ *Id.* at 87.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

for marijuana possession are black and Latino and over 92% of those serving drug-related sentences are black and Latino as well.¹⁸

- Similarly, in 2006, even though white suspects were 70% more likely than black suspects to have a weapon, over half of police stops involved black suspects, 29% involved Latinos, while only 11% involved whites. When stopped, 45% of blacks and Latinos were frisked compared to 29% of white suspects.¹⁹

Research has found similar patterns of racial inequality in criminal justice systems around the country. For example, a two-year study of 13,566 officer-initiated traffic stops in a Midwestern city revealed that minority drivers were stopped at a higher rate than whites and were also searched for contraband at a higher rate than their white counterparts, even though officers were no more likely to find contraband on minority motorists than white motorists.²⁰ This racial inequality in police procedures leads to inequalities in sentencing and imprisonment. In 2005, even though African Americans represented only 14% of drug users, they constituted 33.9% of persons arrested for a drug offense and 53% of persons sentenced to prison for a drug offense.²¹ These racial disparities at each juncture of the criminal justice process have disastrous effects on the life chances of people of color—a black male born in 2001 has a 32% chance of spending time in prison at some point in his life, a Latino male has a 17% chance, and white male has a 6% chance.²²

The Inadequacy of Current Protections

A half century of experience shows that our existing civil rights laws are necessary, but not sufficient, to address these problems. Discrimination in health care and in our criminal justice system have proven particularly difficult to address through existing law, due to a lack of specific legislative protections or enforcement bodies, a lack of individual remedial systems (especially in the judicial context), and a body of applicable laws that inadequately address covert, implicit, and institutional forms of racial bias that surface in the health care and criminal justice sectors. By contrast, the Convention Against Racial Discrimination and other international laws that the U.S. helped craft make clear that these sectors and situations are covered, and that discrimination in practice, as well as in policy, must be addressed through concrete remedies.²³ In Connecticut, the state recently passed legislation declaring that “[c]qual enjoyment of the highest attainable standard of health is a human right and a priority for the

¹⁸ URBAN JUSTICE CENTER, RACE REALITIES IN NEW YORK CITY 56, 105, 61 (2007), available at <http://www.urbanjustice.org/pdf/publications/racerealities.pdf>.

¹⁹ *Id.* at 57.

²⁰ THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 2 (2008), available at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

²¹ Marc Mauer, Executive Director, The Sentencing Project, Testimony Prepared for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security 3-4 (October 29, 2009), available at http://www.sentencingproject.org/doc/publications/rd_mmhousetestimonyonRD.pdf.

²² THE SENTENCING PROJECT, *supra* fn 20, at 2.

²³ See, e.g., Alan Jenkins & Sabrineh Ardalan, Positive Health: the Human Right to Health Care Under the New York State Constitution, 35 Fordham Urb. L. J. 479, 520 (2008).

state”²⁴ and establishing a state-wide commission to investigate and address barriers to health based on race and ethnicity.

Bias in health care and criminal justice, then, are two of several areas in which the integration of existing treaties into our domestic laws will advance American values and priorities as well as American constitutional principles that are, as yet, unfulfilled.

Recommendations

To advance American values and interests more effectively through the implementation of human rights treaties, we recommend the development of more effective federal approaches to human rights monitoring and implementation.²⁵ Specifically:

- To Ensure Accurate Monitoring of Human Rights Compliance, Congress create a human rights *monitoring* body that would be established and supported by the government, but would operate as an independent, nonpartisan entity. This new body would provide expertise and oversight to ensure human rights progress in the United States. Congress could create legislation to establish such a body by restructuring and strengthening the existing U.S. Commission on Civil Rights, and converting it into an effective U.S. Commission on Civil and *Human Rights*. The Commission should be empowered to: issue reports and recommendations to the executive branch and Congress; contribute to the reports the United States submits to international bodies; develop programs for teaching and training on human rights issues; and conduct investigations and hearings into human rights complaints.
- To Ensure Adequate Implementation of Human Rights Protections, *An Interagency Working Group on Human Rights should be reconstituted and revitalized, which will serve as a coordinating body among federal agencies and departments for the promotion and respect of human rights and the implementation of human rights obligations in U.S. domestic policy.* Such a working group was created by Executive Order 13107 issued by President Bill Clinton on Human Rights Day in December 1998, but it was effectively disbanded during the administration of President George W. Bush. While it was nominally replaced by a new policy coordination committee, the program of action laid out in the Executive Order was never implemented. The President should issue a new Executive Order modeled on E.O. 13107, but containing an expanded list of relevant agencies as well as other refinements to ensure the success of the new Working Group. The Interagency Working Group on Human Rights should become an effective focal point for *implementing* human rights domestically. With high-level leadership from Congress and the Executive Branch, the Working Group should play a proactive role, crossing the domestic-international divide by ensuring that U.S. international human

²⁴ An Act Establishing a Commission on Health Equity, CONN. PUB. ACT. NO. 08-171, § 1 (2008), available at http://opportunityagenda.org/connecticut_act_establishing_commission_health_equity_2008.

²⁵ For more information on these (and additional) recommendations to support domestic human rights, see AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION (2008), available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>.

rights responsibilities are implemented and coordinated among all relevant executive branch agencies and departments.

Thank you again for the opportunity to submit our comments.²⁶ The staff of The Opportunity Agenda, along with several of our colleague public interest organizations, are available to answer questions, offer additional research, or to provide such additional assistance as may be useful to your efforts to domestically implement our human rights obligations.

²⁶ In terms of immediate action, The Opportunity Agenda also recommends that the U.S. adhere to the judgment of the International Court of Justice in *Avena and Other Mexican Nationals*, which established that the United States had violated the consular rights of certain Mexican nationals on death row, and directed U.S. courts to review their convictions and sentences to determine if they were prejudiced by the violations. *Avena and Other Mexican Nationals (Mex v. U.S.)* 2004 I.C.J. 128 (Mar. 31).



Federal to Local Implementation of Human Rights Treaties

Report to the Honorable Senator Richard Durbin and the Subcommittee on Human
Rights and the Law

Introduction:

The purpose of this document is to provide background and recommendations relating to how the federal government can collaborate with local and state government to implement human rights treaties, particularly the International Convention for the Elimination of all forms of Racial Discrimination (ICERD).

On the level of local government, there appears to be minimal compliance or recognition of international human rights treaties to which the United States is a signatory. Nor is there much collaboration between federal and local governments to facilitate local compliance with such treaties. It may be argued that, consistent with a general lack of coordination between federal/local governments and a history of deferring responsibility between the levels of government, local governments consider international treaties and related affairs to be outside of their purview, and consequently that they are not accountable for any obligations the United States has assumed on the world stage.

Despite that, many local municipalities across the country are attempting to incorporate human rights treaties into their local laws and governmental policies through the creation of human rights councils and human rights commissions. Chicago, for instance, has a regulated governmental department, The Chicago Commission for Human Relations, whose function is to document, monitor and investigate human rights abuses and discrimination cases.

However, the challenge that many of these regulated governmental departments typically experience in their attempt to interpret and implement human rights treaties is three-fold:

- Insufficient *funding* to carry out its full mandate of documentation, monitoring and investigation
- Insufficient *monitoring of the full spectrum of rights* covered in any given international treaty. Many local governments create regulations that focus primarily on civil and political rights, with little attention paid to economic and social rights. This often means that some of the most egregious violations of citizens' rights go on unabated.
- Insufficient *authority to monitor governmental actors* who commit rights violations. For instance, Chicago Commission on Human Relations carries out the mandate of one of its regulatory ordinance – Chicago Human Rights Ordinance – in such a way that is primarily targeted at non-governmental actors who discriminate against Chicago residents, either in housing, employment or in general business practices¹. The Commission has no specified authority to monitor or investigate governmental actors or governmental *policies* that have been documented to discriminate against individuals or groups. And while Chicago does have an Inspector General's Office whose purpose is to monitor and investigate governmental discrimination and corruption, its authority is tenuous and limited, at best. Furthermore, there is no mechanism in place that allows for the collaboration between the Commission on Human Relations and the

¹ Jewish Council on Urban Affairs, ICERD Implementation Coalition Report. *Environmental Scan of the City, County and State's Human Rights Laws and Non-Government Organizations*. Chicago, IL: 2009, p. 16.



Inspector General's Office in order to ensure full monitoring and investigation of governmental and non-governmental violators of citizens' rights.

United States Obligations to Eliminate Racial Discrimination (under ICERD)

Under Article 2, ICERD calls upon state parties to review national and local policies that *have the effect*, in addition to the purpose, of creating or perpetuating racial discrimination. It also requires state parties to end racial discrimination.² Accordingly, under ICERD racial discrimination is perpetrated when it fails to ensure that all public authorities and public institutions, national and local act in conformity with its obligations under ICERD.³

Article 5 of ICERD calls on state parties to prohibit and eliminate racial discrimination with respect (though not exclusively) to a list of enumerated areas including justice, civil and political rights, housing, health care and training.

Background on the reports

The Committee on the Elimination of Racial Discrimination (CERD), which is the body of human rights experts entrusted with the responsibility of reporting on implementation of ICERD, conducts routine investigations and enquiries into the status of each member states' compliance with the treaty. The investigations are based on state and non-government-organization reports on racial discrimination in their country. In preparation for the United States' 2008 report to CERD on its compliance with ICERD, the Jewish Council on Urban Affairs (JCUA) worked in coalition with a number of Chicago-based human rights organizations to develop a "shadow" report on Chicago's compliance with ICERD (herein **Chicago Shadow Report**). In February 2008, CERD released its concluding observations (**Concluding Observations**) on the United States' compliance with its obligations under ICERD.

Racial Discrimination in Chicago

Both the Chicago Shadow Report and CERD identified government policies that perpetuate racial discrimination in violation of ICERD in a range of areas including housing, education, employment, health, and law enforcement. The Chicago Shadow Report in particular identified widespread racial discrimination that is a result of government policies in the Chicago area. In particular, the following problematic areas were identified:

- **Housing:** racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterized by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence.⁴ The Chicago Shadow Report found a strong causal relationship between Chicago's housing policies and these patterns of racial discrimination. In particular, the Chicago Housing Authority's Plan for Transformation has seen to the demolition of existing affordable housing in favor of mixed income developments however there has been no significant redevelopment of the low-density mixed income units as promised under the Plan.⁵ Furthermore, under the Transformation Plan there will be substantially fewer affordable housing units built than the number demolished, and the ensuing homelessness disproportionately affects persons from racial and ethnic minorities.⁶
- **Education:** Chicago's achievement gap between minorities in poorer neighborhoods and the

² *Chicago Shadow Report (2007)*, p. 3.

³ ICERD, Article 2, at <http://www2.ohchr.org/law/doc/ice.htm>.

⁴ CERD Concluding Observations (2008) p. 4.

⁵ *Chicago Shadow Report (2007)*, p. 10.

⁶ Nathalie P. Vanhees Center for Neighborhood Community Improvement, University of Illinois, "CHA Plan for Transformation Year 11: Still we Ask: What about the People?" 2009.



rest of the population continues to grow. Schools in minority neighborhoods have less access to honors and Advanced Placement classes. The Chicago Public School system's Renaissance 2010 Plan, whose mission was to close 60 public schools (predominantly in low-income communities mainly populated by ethnic minorities) to create smaller, elite contract or charter schools has served to strip communities of critical communal spaces.⁷ Traditionally, public schools are governed by elected parent-majority local school councils (LSCs), however the new model centralizes decision making power, undermining community and parent involvement.

- **Health:** CERD noted that a disproportionately large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care, education and services.⁸
- **Criminal Justice:** Long observed patterns of police abuse and lack of accountability continue unabated with disproportionate impact in minority communities.⁹ Sharp disparities in service and inadequate efforts to establish better community relations reinforce the distressing reality of unequal treatment in those communities.¹⁰ Further, the racial breakdown of defendants facing the death penalty indicates that the vast majority (over 70%) are African American.¹¹ CERD noted the disproportionate number of persons belonging to racial, ethnic or national minorities in the prison populations.
- **Poverty and workers rights:** Workers belonging to racial, ethnic and national minorities, in particular undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and "to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work." CERD noted that the recent US Supreme Court decisions have further eroded the ability "of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses".¹² Finally, wage disparities in Illinois exist along racial and ethnic lines. In particular, African American males earn 72 cents on the dollar of full time, year-round white non-Hispanic males and for every dollar a white non-Hispanic woman earns, an African woman earned 90 cents and an Hispanic woman earns 60 cents.¹³

Recommendations for Local and State ICERD Compliance

The Chicago Shadow Report contains a number of key policy recommendations directed at Chicago local government that we consider to be necessary to ensure compliance with ICERD. Most of these recommendations are echoed in CERD's recommendations in its Concluding Observations of the United States.

- With respect to housing, the Chicago Shadow Report recommends the Chicago local government make greater investments in the development of more affordable housing and homelessness prevention, and that the demolition of existing affordable housing units be ceased until the housing plan is properly investigated. The Chicago Shadow Report further recommends that the local government increases the amount of affordable housing units available, creates affordable housing guidelines at levels determined by the

⁷ Chicago *Shadow Report* (2007), p 17.

⁸ CERD Concluding Observations (2008), p 11-12.

⁹ CERD Concluding Observations (2008), p 8.

¹⁰ Chicago *Shadow Report* (2007), p 19.

¹¹ Chicago *Shadow Report* (2007), p21-2.

¹² CERD concluding Observations (2008), p9.

¹³ U.S. Census Bureau, American Community Survey 2006, calculation conducted by Mid-America Institute on Poverty of Heald and Alliance, cited in Jewish Council on Urban Affairs, *Chicago Submission to Committee overseeing ICERD – Shadow Report* (2007), p 6-7.



neighborhood family median income so that housing is more accessible. This is reflected in CERD's recommendations, which call for an increase in support and resources for public housing outside poor, racially segregated areas, and an increase in accessibility for Section 8 Housing Choice Voucher program.

- With respect to education, the Chicago Shadow Report recommends that the local government implements a moratorium on all school closings under the Renaissance 2010 plan until further evaluation of the effects can be completed, redistribution of funds to the most disadvantaged students in the city and greater investment in the Local School Councils in underprivileged areas. CERD recommends that the United States government identifies the underlying causes of de facto segregation and racial inequality and to promote policies that encourage reintegration, which would be a part of the further evaluation of the Renaissance Plan and the state of education in Chicago.¹⁴
- With respect to health, the Chicago Shadow Report recommends that Cook County Health Clinics be reinstated, to increase access to care measures for preventable diseases, and to increase health education in underprivileged and under-resourced areas.¹⁵ This is consistent with CERD's recommendations, which recommends the United States government addresses "the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services."¹⁶
- With respect to criminal justice, the Chicago Shadow Report recommends that measures are put in place to prevent and discipline police brutality, including greater follow up of complaints and whistle-blower immunity. This reflects CERD recommendations that parties states take steps to eliminate police brutality and excessive use of force against racial, ethnic or national minorities, including undocumented migrants by establishing adequate systems for monitoring police abuses and developing further requests for independent reporting and investigations and to prosecute and appropriately punish
- Further, the Chicago Shadow Report promotes greater openness in the process of seeking death penalties and the Chicago local government work to reduce arbitrariness of the application of capital punishment.¹⁷ This echoes CERD's calls for further studies to determine the nature and scope of the problem of structural racial discrimination perpetuated by law enforcers through to the judiciary and the implementation of national strategies to address this structural racial discrimination.¹⁸
- With respect to employment and poverty, the Chicago Shadow Report recommends an increase in public benefits programs to alleviate poverty, and to assist with asset building and child care services to enable greater employment and wealth building.¹⁹ CERD's recommendation that the State party take all appropriate measures to combat de facto discrimination in the workplace and ensure the equal and effective enjoyment by persons

¹⁴ CERD *Concluding Observations (2008)*, p 4

¹⁵ *Chicago Shadow Report (2007)*, p 15.

¹⁶ CERD *Concluding Observations (2008)*, p 11

¹⁷ *Chicago Shadow Report (2007)*, p 23.

¹⁸ CERD *Concluding Observations (2008)*, p 8

¹⁹ *Chicago Shadow Report (2007)* p6-7



belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention.

Recommendations for Federal Government Assistance with Local and State ICERD Compliance

- For the Federal Government to effectively implement CERD's recommendations, JCUA recommend that the government provide educational opportunities for local and state government departments to better understand of: human rights definition of "racial discrimination," federal/state/local obligations to treaties, and the full spectrum of rights fulfillment.
- CERD recommends the establishment of an independent national human rights institution.²⁰ On the local level, the Chicago Commission on Human Relations (CCHR), which serves to monitor and investigate human rights violations, has the capacity to satisfy this recommendation. However, due to a lack of resources its activities are limited to responding to discrimination complains and does not fully exercise its monitoring and investigation mandate. We recommend an increase in the CCHR's budget so that this body can be more effective and proactive – for example, it may increase education programs to prevent discrimination, make recommendations to the mayor and the city council, conduct research and file its own discrimination complains rather than having its traditional reactive role.²¹
- JCUA recommends that the federal government assist Chicago in the development of a collaborative relationship between the Commission on Human Relations and the Inspector General's office to ensure comprehensive monitoring and investigation of both non-state and state violators of human rights.
- CERD recommends that the State party take effective measures – including the enactment of legislation, such as the proposed Civil Rights Act of 2008 – to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.²²
- More broadly, we recommend economic incentives to local and state governments to encourage comprehensive monitoring and investigation of state and non-state violators of rights.

²⁰ CERD *Concluding Observations (2008)*, p3.

²¹ JCUA CERD Fellowship: Environmental Scan, (2009), p 16.

²² CERD *Concluding Observations (2008)*, p 12

**Testimony to the Senate Judiciary Subcommittee
on Human Rights & the Law:**
The Law of the Land: U.S. Implementation of Human Rights Treaties

Douglas A. Johnson, Executive Director
Center for Victims of Torture
Minneapolis, Minnesota
December 16, 2009

Testimony to Senate Judiciary Subcommittee on Human Rights & the Law*The Law of the Land: U.S. Implementation of Human Rights Treaties*

Douglas A. Johnson, Executive Director

Center for Victims of Torture

Minneapolis, Minnesota

December 16, 2009

Thank you for the opportunity to submit testimony to the Subcommittee about our legal obligation and the public policy imperative to fully implement the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.¹

I applaud Senator Durbin for holding the first hearing on U.S. implementation of its human rights treaty obligations. By creating an opportunity for witnesses to persuade his colleagues and their constituents that these treaties are practical and effective steps toward creating a more stable and predictable world, Senator Durbin is demonstrating true leadership and vision.

Though they often bear unwieldy, incomprehensibly long names, treaties are simply a means to an end. In an interconnected world, they form one piece of a larger strategy for reducing risk and creating a more manageable global community.

U.S. support for the Convention against Torture (CAT) has a rich bipartisan history. Following negotiations by the Reagan Administration, Deputy Secretary of State John C. Whitehead signed the treaty in 1988. In one of the shortest international treaty ratifications in U.S. history, in 1990, President George H. W. Bush successfully persuaded the Senate to ratify the CAT. In 1994, President Clinton developed the framework for legislation to implement the CAT.

In this context, history should classify the consciously planned and implemented policy of using torture and cruelty in the U.S. anti-terrorism campaign following September 11, 2001, as an anomaly—an uncharacteristic break with long-standing American commitments. The values embodied in the CAT are indeed American values.

Today's hearing is an opportunity to emphasize the U.S.' historical commitment to supporting the international ban on torture and cruelty and scrutinize our recent record in preventing torture and upholding the law when statutes banning torture and cruelty are violated. In so doing, I will call attention to gaps that remain in fulfilling our pledge to implement the CAT.

To draw attention to an area of implementation that has met with more success, I will discuss the U.S.' strong record in allocating resources to heal torture survivors around the world. Lastly, I will urge a reinvigorated effort, using innovative tactics and sound strategy coupled with U.S. leadership, to prevent torture around the world.

¹ The CAT entered into force on June 26, 1987. There are 76 signatories and 146 parties.

Fortuitously, this hearing coincides with the December 4 introduction of the *Torture Victims Relief Act* (S. 2839)² in the Senate. The legislation reauthorizes a comprehensive U.S. program to address the rehabilitation needs of torture victims. We are grateful to Senators Klobuchar, Graham and Franken for their leadership in introducing this legislation. To strengthen U.S. support for the torture rehabilitation movement around the world, Congress and the Administration should adopt a unified approach and increase our investment in proven methods for helping survivors rebuild their lives.

THE CENTER FOR VICTIMS OF TORTURE

Founded in Minnesota³ in 1985, CVT was the first organized program of care and rehabilitation for torture survivors in the U.S. and one of the very first in the world. We approach our 25th anniversary with tremendous pride in the number of lives we have touched. To date, we have healed the wounds of torture on more than 18,000 individuals from 67 countries, persons living in this country and abroad.

We provide direct and comprehensive treatment to victims of government sponsored torture and undertake research on effective treatment methods. Moreover, we provide professional training and technical assistance to over 50 centers throughout the world, from US programs to Kosovo to Pakistan to Peru and Guatemala. Through public education campaigns, public policy initiatives and cooperative efforts with national and international human right organizations, we contribute to the prevention and ultimate elimination of torture.

Last year, our centers in Liberia, Sierra Leone and the Democratic Republic of Congo extended care to 1,900 individuals. Today, CVT operates rehabilitation centers in Sierra Leone, the Democratic Republic of the Congo and Jordan. Next year, our overseas treatment programs will expand to Uganda, Zimbabwe and Syria.⁴

In the 1980s, creating a torture treatment center in the U.S. was an untested and somewhat unusual proposal. Former Minnesota Governor Rudy Perpich boldly advanced this idea. After being lobbied by his son, an Amnesty International volunteer, to identify a means to advance human rights, Governor Perpich assembled a list of ideas for how he might affect human rights promotion.

² The legislation has been referred to the Committee on Foreign Relations.

³ Minnesota is home to approximately 30,000 to 40,000 torture survivors. In 2008, CVT provided care for 243 clients in the Twin Cities. Approximately 60 percent of our clients are seeking asylum; 20 percent are refugees. The majority of our clients (85 percent) are from Africa. On average, clients had two other family members killed or disappeared and two members of her/his family imprisoned and tortured. The average length of longest detention and torture for new clients was 293 days.

⁴ The State Department's Bureau of Population, Refugees and Migration granted CVT support for treating Iraqi refugees in Syria. The Counseling Services Unit in Harare, Zimbabwe awarded CVT funding via USAID to provide direct services through two CVT clinicians, self care training for providers and community level training to build networks of support. The International Criminal Court Trust Fund for Victims awarded CVT funding for a clinician to provide services and training in Gulu, Uganda.

In selecting the creation of a treatment center for torture survivors, the Governor chose the most ambitious proposal on the list. The Governor and his staff quickly learned that Minnesotans had to be educated on why a torture treatment center was needed in the U.S. and, more specifically, in Minnesota. The challenge to improve public understanding continues today.

As government officials and the public develop a deeper understanding of why the U.S. has chosen to invest in treating torture survivors, U.S. interest in supporting robust and expansive torture treatment services—both on our shores and in overseas refugee camps, urban centers and villages—becomes clear. Equipping survivors with tools for rebuilding their shattered lives allows for the re-emergence of civil society leadership targeted by repressive regimes. This incontrovertible connection renders resources channeled to torture rehabilitation centers a strategic investment in a more just and stable world.

CULTURES OF FEAR

Torture persists across the globe. Amnesty International reported evidence of torture and ill-treatment perpetrated by state agents in more than 150 countries.⁵ We are often asked why states continue to use torture. The answer is straight-forward: It is an incredibly effective weapon for shaping cultures through fear and repressing rights. Torture is wielded to destroy leaders and maintain complete control over free speech and actions. In the face of this terror, families and communities become too frightened to engage in public life; a profound lack of trust in public institutions, the police, and the courts takes root. When generations are raised believing that social activism and reform result in arrest and torture, few are willing to speak out.

Torture succeeds in instilling terror across broad swaths of societies. One senior Turkish human rights official noted that in a country of 60 million people, only 1 million were involved in any type of civic engagement—including management of the mosques. *“The reason is fear,”* the Turkish official observed. *“We have learned to be fearful, and we have withdrawn from public life.”*

According to CVT research, almost 70 percent of our clients lived in hiding or underground at some point. Eighty percent reported that they had either lost their job/right to education or were unable to find work due to persecution, and 98 percent reported a loss of socioeconomic status due to persecution and/or exile.

While the physical and psychological wounds of torture are profound, we know that people can heal, rebuild their lives and again contribute to their communities.

⁵ *“Take a Step to Stamp Out Torture”*, Amnesty International, (October 18, 2000). In surveying its research files on 195 countries and territories from 1997 to mid-2000, Amnesty International found in more than 70 “torture or ill-treatment by state officials was widespread and in over 80 countries people reportedly died as a result.”

U.S. RECORD ON TORTURE

As I outlined above, historically, U.S. Presidential leadership—from the Reagan Administration to the George H. W. Bush and Clinton Administrations—shared a harmonized record of U.S. support for the CAT. Later deviations from our obligations should not eclipse the bipartisan support that led to CAT's adoption and implementation by the U.S.

When the nation's attention became gripped by counterterrorism concerns, the obligations to which we committed ourselves in decades past may have faded into the background of our leaders' consciousness. All the same, the duties to which we pledged ourselves did not vanish. Departure from these obligations—during moments of supposed convenience—is not permitted. Analysis of the precise nature of our duties under the CAT and how U.S. government policies and practices failed to conform to those responsibilities is required.

In transmitting the CAT to the Senate for ratification on May 20, 1988, President Reagan stated:

The United States participated actively and effectively in the negotiation of the Convention. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.

The prohibition on torture and cruelty in Article 2 of the CAT could not be more rigid. There are no exceptions. Article 2 reads:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Addressing the U.S. record on torture in recent years is a challenging task. Though the U.S. has, through the *Torture Victims Relief Act* and other programs, provided healing to victims worldwide, the legacy of U.S. counterterrorism tactics has muddied America's once unified opposition to torture and cruelty.

The U.S. government adopted, in secret, an illegal intelligence gathering program predicated on the use of torture and cruelty. The U.S. government established secret prisons and engaged in extraordinary rendition. The impartial International Committee of

the Red Cross, charged with monitoring conditions of detention and treatment, documented evidence of U.S. torture while being excluded from the secretive prisons.

The results, as we have experienced, were costly. Our actions damaged relationships with close allies. Our standing with world leaders and with citizens of strategically important nations plummeted. Furthermore, allegations of abuse have demonstrably complicated the prosecution of admitted terrorists. In January, the Bush Administration military commissions official responsible for deciding whether Guantanamo Bay detainees should stand trial, Susan J. Crawford, publicly divulged her staggering conclusion about detainee Mohammed al-Qahtani. Ms. Crawford stated: "*We tortured Qahtani. ... His treatment met the legal definition of torture. And that's why I did not refer the case*" for prosecution.

The U.S. government openly violated its international legal obligations. In so doing, we set a dangerous precedent not only on the issue of torture, but for the broader notion that those duties are optional. U.S. government policies and practices weakened international human rights instruments designed to end torture (the CAT and the Geneva Conventions). Flagrant disregard for treaties and conventions that we ratified has profound implications for the global community's efforts to secure support for international norms. By flouting these obligations, we also delivered an implicit message that torture, once seen as the tool of despotic regimes, could be shaped to look like a legitimate component of a democratic government's national defense.

On January 22 of this year, the U.S. turned a page. President Obama signed an Executive Order banning torture and cruelty.⁶ We took a step away from the brutal tactics that had marked our nation's counterterrorism practices over the previous eight years. CVT worked with allied organizations to build broad-based support for an Executive Order. We invited the National Religious Campaign Against Torture and Evangelicals for Human Rights to join an ultimately successful campaign to secure the directive. More than 200 senior leaders endorsed this effort, including three former Secretaries of Defense; three former National Security Advisors; three former Secretaries of Defense; and four former members of the Joint Chiefs of Staff.⁷ We are grateful for President Obama's leadership and the new era he ushered in.

Nevertheless, important work remains to be done. Our national consensus against torture has been eroded. In a climate of extreme fear and deep anxiety about our national security, the need for, efficacy of and moral justifications for torture and cruelty were distorted. Many Americans have been led to believe that we must abide by torture and cruelty to keep our families safe.

The U.S. government, in agreeing to the CAT, committed itself to the obligations contained therein. If we fail to meet these clearly defined duties, we must hold ourselves accountable. Efforts to establish accountability mechanisms for U.S. agents' use of torture have been unsuccessful. Accountability has been inaccurately framed as a divisive

⁶ Entitled "Ensuring Lawful Interrogations", available at http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations.

⁷ For the complete list of signatories, please see <http://www.campaigntobantorture.org/>.

partisan battle. From the perspective of those who provide care to torture survivors, this is not a political question. We see both the compelling public policy reasons—ending impunity is a powerful deterrent—as well as the profound, far-reaching effects on the lives of our clients.

Most of our clients suffered at the hands of foreign governments for whom there will never be accountability. The state actors who violated their inherent human dignity were unconstrained by fear of punishment. Most of our clients' perpetrators, years and decades later, can walk down the street in their country without fear that justice will catch up with them.

On October 6, 2009, this Subcommittee held a hearing entitled, "*No Safe Haven: Accountability for Human Rights Violators, Part II*" as part of an initiative to intensify U.S. government efforts to hold human rights violators accountable. In my written testimony, I discussed at length how preventing human rights abusers from entering the U.S., removing those who unlawfully enter and holding accountable those we can prosecute in the U.S. go hand-in-hand with our healing efforts.

Our clients ask, "*What's the point of even telling my story if that person will not come to justice? Nothing's going to happen to them. Why should I relive it all?*" Or say, "*He's still walking around. He still has his job. I'm left to feel bad about it for the rest of my life.*"

Whenever laws banning torture are upheld, a message is transmitted to repressive governments and victims seeking an end to impunity wherever it exists. Leaders and ordinary citizens learn that, in some places, those who violate human rights are held responsible.

Any crack in the culture of impunity can bring victims tremendous strength. One CVT client told us about her reaction when she learned of the arrest in Atlanta of an Ethiopian man accused of murder and torture during a dictatorship in the 1970s. Despite the fact that this man was not her perpetrator, she felt empowered, remarking, "*Now I know what to do should I come across the man who raped me.*"

For additional discussion of how efforts to hold perpetrators of human rights abuses impact the survivors whom we treat, I refer you to the testimony I formerly submitted to the Subcommittee.

The U.S. government has not, to date, conducted a thorough investigation into sound evidence of torture and cruelty as required by the CAT. Article 12 of the CAT states:

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

It is, the as yet unmet, legal and moral obligation of the U.S. to fully investigate credible allegations of abuse. Attorney General Holder's appointment in August of a prosecutor to launch a narrow investigation into violations of U.S. anti-torture laws during interrogation of terrorist suspects was a small step towards deterrence of future crimes.

The scope of the investigation should be broadened. Irrespective of the identify of the perpetrator, when credible evidence of violations of the CAT surfaces, the allegations must be investigated. The International Committee of the Red Cross classified U.S. treatment of some detainees as torture. Reconciling the U.S.' lack of investigation with this disquieting truth is not possible legally or morally.

CVT has called for an independent, non-partisan investigation into U.S. use of torture and cruelty. Assessing how serious errors in judgment became U.S. policy will better position us, in the future, to firmly avoid this ignoble path.

REHABILITATION

As we grapple with the consequences of these policies and continue to seek a path to accountability for torture, this moment also presents an opportunity to address other unmet obligations under the CAT. One way to begin recommitting ourselves to these duties is by addressing the rehabilitation needs of torture survivors around the world.

Article 14 of the CAT carves out a right to health care for survivors.⁸ The treatment and rights of torture victims are also addressed in several other international instruments, including the Rome Statute of the International Criminal Court. Article 14 of CAT reads:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

Contributions from the U.N. Voluntary Fund for Victims of Torture, the *Torture Victims Relief Act*, the European Union and other national contributions are insufficient to meet the treatment needs of the growing number of survivors. To fulfill our obligations under Article 14, we must expand our investment in rehabilitation.

⁸ For a fuller discussion of this right, see the chapter *As Full Rehabilitation as Possible: Torture Survivors and the Right to Care*, Steven H. Miles and Douglas A. Johnson, pp. 213-223, in *Realizing the Right to Health*, Andrew Clapham and Mary Robinson, Claire Mahon and Scott Jerbi, Swiss Human Rights Book Vol. 3, (2009).

The U.S. government is a key supporter of torture survivor rehabilitation programs domestically and internationally through funding provided by the Office of Refugee Resettlement (ORR) and USAID, as well as contributions to the U.N. Voluntary Fund for Victims of Torture.

The *Torture Victims Relief Act* (TVRA) authorizes ORR to fund U.S.-based treatment programs for survivors of politically motivated torture. Currently, there are 27 federally funded treatment programs.⁹ These centers bridge the gap between survivors and their communities by providing culturally sensitive and holistic healing services.

To leverage limited dollars and reach more survivors, many treatment centers train health care, education and social service providers to care for torture victims. With the increase in the number of highly traumatized refugees the U.S. is committed to accept from Iraq, the need has become even greater.

TVRA also authorizes USAID to provide funds to assist rehabilitation centers in other countries. In some cases, direct investment by the U.S. in torture rehabilitation centers provides important political support and protection. Often the services foreign treatment centers provide extend beyond rehabilitation to support prevention of torture and advocacy for the rights of brutalized religious, ethnic or minority groups.

Lastly, TVRA authorizes the Department of State to contribute funds to the U.N. Voluntary Fund for Victims of Torture, which supports rehabilitation centers worldwide, including the U.S. In certain regions of the world, U.N. funds enable many centers to feel more secure in the dangerous work of aiding victims that a regime has identified as its enemies. The U.N. Voluntary Fund often provides resources in the heart of the conflict—areas where international NGOs cannot operate. For example, in Darfur, the U.N. Voluntary Fund supports the Amel Centre for Treatment and Rehabilitation of Torture Victims.

⁹ The 2009-2012 funded projects are: Advocates for Survivors of Torture and Trauma (Baltimore, MD); Asian Americans for Community Involvement (San Jose, CA); Behavior Therapy and Psychotherapy Center (Burlington, VT); Bethany Christian Services (Grand Rapids, MI); Boat People SOS (Houston, TX); Boston Center for Refugee Health and Human Rights (Boston, MA); Program for Survivors of Torture and Severe Trauma (Falls Church, VA); Center for Survivors of Torture (Dallas, TX); Center for Survivors of Torture and War Trauma (St. Louis, MO); Center for Victims of Torture (Minneapolis, MN); Chaldean and Middle Eastern Social Services (El Cajon, CA); City of Portland (Portland, ME); Florida Center for Survivors of Torture (Clearwater, FL); Healthright International (New York, NY); Marjorie Kovler Center for the Treatment of Survivors of Torture (Chicago, IL) HHC Elmhurst Hospital Center (Elmhurst, NY); Khmer Health Advocates (West Hartford, CT); Legal Aid Foundation of Los Angeles (Los Angeles, CA); Lowell Community Health Center (Lowell, MA); Lutheran Immigration and Refugee Services (Baltimore, MD); Harvard Program in Refugee Trauma (Cambridge, MA); Bellevue/NYU Program for Survivors of Torture (New York, NY); Torture Treatment Center of Oregon (Portland, OR); Program for Torture Victims (Los Angeles, CA); Utah Health and Human Rights Projects (Salt Lake City, UT); Wayne State University (Detroit, MI).

Funding has remained woefully stagnant. The U.S. commitment to treating survivors has not kept pace with the need for rehabilitation services. To meet our international obligations under the CAT and to serve a population of individuals whose lives would be transformed by treatment, we urge your support for full authorization amounts for TVRA

In the last four years, treatment centers in the U.S. and around the world have had to close their doors. Unfortunately, these closures were not because their services were no longer necessary. In fact, the number of survivors continues to grow. These centers had to close simply because of insufficient funding. Therefore, it is important not only for the Senate to allocate more funds through TVRA, but for the Department of State to actively encourage European and other governments to increase their financial commitments to the U.N. Voluntary Fund.

Rehabilitation centers concentrate experience and research in rehabilitation, creating the knowledge and skills needed to improve care and influence mainstream health care organizations. They help establish the base line standards for effective care. By sharing effective treatment models and training mainstream health providers, these centers, in turn, help U.S. government resources reach more survivors in need of treatment.

Beyond the humanitarian mission, rehabilitation centers contribute to efforts to prevent torture and build democratic societies. First, rehabilitation programs reclaim civic leadership lost to repressive governments. Torture is most often directed at health care providers, teachers, journalists, religious and civil society leaders, business owners. Restoring these people to health helps the community to regain key leadership. Second, rehabilitation programs document evidence of torture. Their expertise in treating the wounds of torture enables them to testify to the scale and scope of political brutality.

Third, rehabilitation programs, which have a different strategic position than traditional human rights advocacy groups, can rally communities to combat political brutality. Rehabilitation centers engage new constituencies, such as donors or volunteers; health care professionals—in particular—who are respected in every culture; and policy makers. As one Argentine survivor succinctly stated: *“The purpose of torture is to sever the bonds of solidarity. The purpose of providing care to survivors is to restore these links.”*

PREVENTING TORTURE

We have seen strikingly similar patterns worldwide among different leaders—left and right—who rationalize the use of torture by dehumanizing the victim, citing national emergencies and security as justification, and assuming an ability to produce a desired outcome through fear and violence. When crises arise that prove beyond the scope of leaders’ imaginations and/or resources, desperate measures are often supposed necessary.

On June 26, International Day in Support of Victims of Torture, President Obama directed the State Department to solicit information from our diplomatic missions overseas about effective policies and programs for stopping torture and assisting its victims. CVT will continue to monitor this directive and other promising efforts and to look for ways to continue advancing our shared commitment to end torture worldwide.

Since 1996, CVT's New Tactics in Human Rights Project¹⁰ has collected such efforts from around the world, helping share those lessons with governments and human rights practitioners globally. The President's directive can expand what we know in this area. At the same time, this step signals a willingness by the U.S. to recommit itself to global leadership against torture.

Looking at global efforts to prevent torture reveals that there is a systemic lack of cooperation and collaboration among groups. Each organization tends to shape its strategy based upon its own isolated capacities rather than on what is needed to affect the whole. Employing a wider array of tactics--using a comprehensive and collaborative approach--and engaging actors where their particular tactic can make the most difference are needed. As part of our renewed commitment to end torture, the U.S. can serve as a strategic convener of human rights, civil society and governmental units--combining their capacities and strengths into a more comprehensive, cohesive approach.

CONCLUSION

It is crucial that America reinvigorates global efforts to end torture. After U.S. use of torture and cruelty in counterterrorism became widely known, our nation's credibility as a human rights promoter was damaged. Government officials and human rights advocates who were part of the international movement to end torture felt that they lost a critical ally. To re-forge our alliances, it is critical that the U.S. make clear that we erred, but that we are prepared to lead again in this effort.

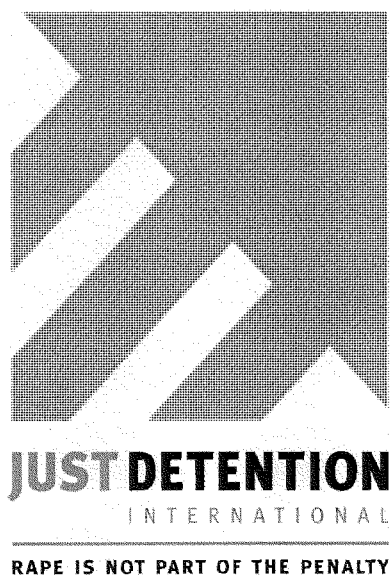
Thank you again Senator Durbin and Subcommittee members for bringing us one step closer to meeting our international, legal obligations and upholding the U.S. commitment to the universal principle of basic human dignity.

We will continue to be guided not only by the knowledge that research shows effective treatment of torture survivors yields extraordinary results, but also by the strength and perseverance of our clients.

With these courageous men and women in mind, I recall the signatories' expression in Preamble to the Convention against Torture "*to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.*"

Let us recommit ourselves to that struggle and to the duties required of us by this Convention and by our own moral principles.

¹⁰ See www.newtactics.org.



Just Detention International

Prepared for the United States Senate Judiciary Committee
Subcommittee on Human Rights and the Law

Hearing on U.S. Implementation of
International Human Rights Treaties

December 16, 2009

Just Detention International (JDI) would like to thank Chairman Durbin and members of the Senate Subcommittee on Human Rights and the Law for holding this hearing and for taking into consideration this submission, focusing on the U.S. implementation of international human rights treaties with respect to the sexual abuse of detainees.

Formerly known as Stop Prisoner Rape, JDI is an international human rights organization that seeks to end sexual abuse in detention. JDI is the only U.S.-based organization exclusively dedicated to ending this type of violence. Specifically, JDI works to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to promote access to resources for those who have survived this form of abuse.¹ All of JDI's efforts are guided by the expertise of men, women, and children who have endured sexual violence behind bars and who have been brave enough to share their experiences.

I. Sexual Abuse in U.S. Detention Facilities: A Human Rights Crisis

The sexual assault of prisoners, whether perpetrated by corrections officials or by inmates with the acquiescence of corrections staff, is a crime and an internationally recognized form of torture.² The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides a definition of torture, stating that: the act must result in severe mental and/or physical suffering; it must be inflicted intentionally; and, it must be committed by or with the consent or acquiescence of a public official or other person acting in an official capacity. (Pain and suffering resulting from lawful actions are excluded).³

Sexual violence behind bars meets each of the conditions specified under the CAT. Victims of prisoner rape are left beaten and bloodied, contract HIV and other sexually transmitted diseases, and suffer severe psychological harm. Sexual violence has been used as a tool to punish inmates for misbehavior, or to further marginalize vulnerable populations. Even when corrections staff are not the perpetrators, some officials have set up inmate-on-inmate rape by intentionally housing vulnerable inmates with known predators. Furthermore, the failure of corrections officials to take appropriate steps to prevent and address prisoner rape amounts to state acquiescence in this type of abuse.

The U.S. has ratified the CAT and the International Covenant on Civil and Political Rights (ICCPR)⁴, both of which protect the fundamental human right to be free from sexual abuse. Nevertheless, sexual violence is a pervasive problem in all types of detention throughout the U.S.

In a 2007 survey of prisoners across the country, the U.S. Department of Justice's Bureau of Justice Statistics (BJS) found that 4.5 percent (or 60,500) of the more than 1.3 million inmates held in federal and state prisons had been sexually abused at their current facility in the previous year alone.⁵ A 2008 BJS survey in county jails was just as troubling; nearly 25,000 jail detainees reported having been sexually abused at the jail in the past six months.⁶

The results of the first-ever survey of detained youth is due to be released in early January 2010; a pre-test of this survey found that almost 20 percent of detained youth had been sexually abused in the past year.⁷ Shockingly, the BJS has confirmed that juvenile detention officials are rarely held accountable. In substantiated cases of staff-on-youth sexual abuse, only 39 percent of officials were arrested and/or referred for prosecution.⁸ Even more disturbing, 25 percent of confirmed staff perpetrators in state-run youth facilities were allowed to keep their jobs.

To date, no similar data has been compiled to assess sexual violence in immigration detention. However, the risk of sexual abuse faced by immigration detainees is often heightened due to linguistic and cultural barriers, a lack of legal assistance, and the ever-present threat of deportation.⁹

While anyone can become the victim of sexual violence, the most marginalized members of society at-large also tend to be the most vulnerable behind bars. In particular, inmates who are gay, transgender, young, mentally ill, or incarcerated for the first time and for non-violent offenses tend to be victimized. Despite the widespread nature of sexual violence behind bars, relatively few cases of this abuse are reported. Due to the fear of retaliation and the often well-founded perception that reporting sexual abuse is futile, many survivors suffer in silence, often enduring sexual abuse over long periods of time. Those who do file a complaint often find that they are denied assistance and accused of fabricating reports in order to manipulate the system to their benefit.

The widespread failure of corrections officials to take seriously reports of sexual abuse, and to put into place simple preventive measures, contribute to a corrections environment in which perpetrators of sexual abuse act with impunity. This in turn, compromises the safety of inmates and staff. Once released - and 95 percent of inmates do return home - survivors bring their emotional trauma and medical conditions back to their communities.¹⁰

II. U.S. Implementation of the ICCPR and the CAT

The CAT Committee and the Human Rights Committee have identified sexual violence as a serious problem in the U.S. When they reviewed U.S. compliance with the CAT and the ICCPR respectively in 2006, the CAT Committee and the Human Rights Committee commended certain U.S. initiatives, while detailing numerous concerns with U.S. policy and practice.

In commendation, the committees recognized the enactment of the Prison Rape Elimination Act of 2003 (PREA).¹¹ PREA calls for a “zero-tolerance” standard for rape in U.S. detention facilities, the gathering of information about the problem, and the development of binding national standards to guide corrections officials in how to prevent, detect, and respond to sexual violence in their facilities.¹²

Each Committee's report explicitly noted the need to improve protections for those vulnerable to sexual abuse. The CAT Committee pointed to the failure to prevent sexual abuse of gay and transgender inmates, to separate consistently detained children from adult inmates, and to investigate instances of prisoner rape in a prompt and transparent manner.¹³ The Human Rights Committee expressed concern that male officers continue to have full access to women's detention quarters, and noted its concern about widespread hate crimes committed against lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, including by law enforcement.¹⁴

Similarly, the Standard Minimum Rules for the Treatment of Prisoners (SMR), though not binding, also provide important guidance in this regard. The SMR state that young prisoners shall be kept separate from adults.¹⁵ Despite the CAT and SMR provisions, more than 10,000 detainees under the age of 18 are currently held in U.S. adult prisons and jails, where they are at heightened risk for abuse by adult inmates and corrections staff.¹⁶ The SMR also advise that where dormitories are used to house prisoners, prisoners housed together must be "carefully selected as being suitable to associate with one another in those conditions."¹⁷ Such deliberate planning is especially important with respect to those categories of inmates most vulnerable to sexual abuse, including gay men and transgender women incarcerated in men's prisons. In a 2007 academic study, funded by the California Department of Corrections and Rehabilitation, and conducted at six California men's prisons, 67 percent of inmates who identified as gay, bisexual or transgender reported having been sexually assaulted by another inmate during their incarceration, a rate that was 15 times higher than for the inmate population overall.¹⁸

The full implementation of PREA, particularly the ratification of national binding standards to prevent and address sexual abuse in detention, would address many of the concerns highlighted by the CAT Committee and the Human Rights Committee. The National Prison Rape Elimination Commission, created under PREA in part to draft these standards, released its final report and recommended national standards on June 23, 2009.¹⁹ The standards are premised upon the four pillars of preventing, detecting, responding to and monitoring sexual abuse, address core safety issues. They include: inmate screening and classification; staff training and inmate education; investigations; and the provision of medical and mental health care in the aftermath of a sexual assault.

The U.S. Attorney General has one year from the Commission's release (or until June 23, 2010) to publish a final rule adopting national standards. The standards will then be immediately binding on federal facilities; states will have one year to certify their compliance or they risk losing five percent of their federal corrections-related funding. By ensuring that the standards ultimately adopted by the Attorney General maintain their rigor - and that they are promulgated without delay - the U.S. would significantly further its compliance with the CAT and the ICCPR.

III. External Oversight of U.S. Detention Facilities

There is growing recognition internationally that prisons and jails must be transparent, and - in addition to establishing strong internal accountability mechanisms - must be open for external monitoring. In the corrections context, few U.S. jurisdictions empower an external entity, such as an Inspector General or ombudsperson, to respond to inmate complaints and/or to audit facilities. Private accreditation organizations, such as the American Correctional Association, have their own standards but only review prisons at request of the corrections administrators and generally charge a fee for this service.

The historical lack of transparency of U.S. detention systems has been a major contributing factor to human rights abuses, such as rape and other forms of sexual violence; the kinds of abuses that international monitoring systems are put in place to eliminate. For example, without external monitoring, officials who participate or acquiesce in sexual violence behind bars wield tremendous unchecked power over detainees. Even the most well-intentioned officials often cannot identify problems within their own systems - shortcomings that a neutral outsider frequently is able to recognize - and may not be aware of best practices from other jurisdictions.

The U.S. has declined to participate in two mechanisms already in place through the CAT that would significantly enhance external oversight of detention facilities. In particular, the U.S. has not signed the Optional Protocol to the Convention Against Torture (OPCAT)²⁰, and refuses to recognize Article 22 of the CAT.

The OPCAT does not impose new obligations on signatory states, but creates a system for monitoring compliance with the requirements already in place through the CAT. It also establishes a collaborative approach to monitoring whereby international and domestic entities visit detention facilities and confidentially propose recommendations to prevent torture, without the public shaming component common in human rights instruments. Specifically, the OPCAT requires signatory governments to establish an independent, national body that conducts regular visits to prisons and other detention settings with the aim of preventing torture and ill-treatment. As sexual violence in detention rarely is reported, the additional oversight provided through the OPCAT is urgently needed in the U.S., to ensure a zero-tolerance approach to prisoner rape.²¹

In addition, the U.S. should recognize the competence of the CAT Committee to consider communications from or on behalf of detainees under Article 22 of the CAT. Thus far, the U.S. has refused to permit victims of abuse to communicate with the CAT Committee once they have exhausted available avenues of relief within the U.S. legal system. In countless cases, U.S. prisoner rape survivors are virtually barred from the courthouse due to the complex procedural requirements and substantive demands of the Prison Litigation Reform Act (PLRA). According to the PLRA, prisoner rape survivors who were unable to file and appeal a grievance within deadlines imposed by their facilities are unable to have a judge review the merits of their claims.²² The PLRA also requires a "physical injury" in order for damages to be awarded - and, shockingly, some courts have found that some forms of sexual assault do not constitute a physical injury.²³ Permitting Article

22 communications - which would require the U.S. to report in writing the steps it has taken in response to individual communications to the CAT Committee - would help address abuse that often remains unresolved by the U.S. legal system.

IV. Next Steps

In December 2010, the human rights record of the U.S. will be reviewed during a Universal Periodic Review (UPR), at which point the Office of the High Commissioner on Human Rights will call upon the U.S. to specify what actions it has taken to improve the human rights situation and to overcome challenges to the universal enjoyment of human rights.²⁴ With the UPR examination approaching, JDI calls on the U.S. to fulfill its international treaty obligations by complying fully with the mandates of the CAT and the ICCPR, ratifying the OPCAT and recognizing Article 22 communications with the CAT Committee. These actions will help restore U.S. standing as a human rights leader and significantly improve safety for the incarcerated adults and children at risk of sexual violence.

¹ To learn more about Just Detention International, please visit <http://www.justdetention.org>.

² For more information, see Just Detention International, Fact Sheet, Prisoner Rape is Torture Under International Law (2009).

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987 and ratified by the U.S. Oct. 14, 1994).

⁴ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976 and ratified by the U.S. June 8, 1992).

⁵ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007).

⁶ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 (2008).

⁷ ALLEN J. BECK, DEVON B. ADAMS & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-06 (2008) (calculating that the estimated total number of sexual violence allegations was 2,047 in 2005 and 2,025 in 2006).

⁸ *Id.*, at 8.

⁹ For more information, see Just Detention International, Fact Sheet, Sexual Abuse in U.S. Immigration Detention (2009).

¹⁰ For more information, see Just Detention International, Fact Sheet, Mental Health Consequences of Sexual Abuse in Detention (2009); Just Detention International, Fact Sheet, Sexual Abuse in Detention is a Public Health Issue (2009).

¹¹ Committee Against Torture, 36th Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, CAT/C/USA/CO/2, at ¶ 9; Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1, at ¶ 33.

¹² *The Prison Rape Elimination Act of 2003*, 42 U.S.C. § 15601, *et seq.* For more information about PREA, see Just Detention International, Fact Sheet, The Prison Rape Elimination Act (2009).

¹³ Committee Against Torture, *supra* note 10, at ¶¶ 32, 34.

¹⁴ Human Rights Committee, *supra* note 10, at ¶¶ 25, 33.

¹⁵ Standard Minimum Rules for the Treatment of Prisoners (SMR), E.S.C. Res. 663C (XXIV), 24 UN ESCOR, Supp. (No. 1) at 11 (1957), Rule 8(d).

¹⁶ SARAH LIVSEY, MELISSA SICKMUND & ANTHONY SLADKY, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2004: SELECTED FINDINGS 2 (2009); WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR, 2007 9 (2008) (calculating that more than 2,600 juveniles under the age of 18 were incarcerated in adult state prisons in 2007); WILLIAM J. SABOL & TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR, 2007 10 (2008) (estimating the average daily population of people under 18 years old in local jails at more than 7,600).

¹⁷ SMR, *supra* note 14, Rule 9(2).

¹⁸ See Valerie Jenness, et al., Center for Evidence Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007).

¹⁹ The NPREC report and the recommended national standards are available at:

<http://www.cybercenter.vmi.edu/archive/nprec/20090820154816/http://nprec.us/publication> (last visited Dec. 10, 2009).

²⁰ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT"), G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002). See also Just Detention International, Fact Sheet, U.N. Optional Protocol to the Convention Against Torture (OPCAT) (2009).

²¹ Similarly, Rule 55 of the SMR calls for regular inspections of detention facilities by qualified inspectors appointed by a competent authority.

²² 42 U.S.C. §1997e(a); for more information, see Just Detention International, Fact Sheet, The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention (2009).

²³ 42 U.S.C. §1997e(e).

²⁴ For more information, visit: http://www.ushrnetwork.org/campaign_upr (last visited Dec. 10, 2009).



**Statement of Justice Now
Presented to the
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
December 17, 2009**

Justice Now commends the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law for undertaking this important hearing on treaty implementation in the United States. It demonstrates a critical recognition of the federal government's responsibility to implement ratified human rights treaties. We would like to especially thank the Subcommittee for its attention to human rights abuses in the U.S. prison system, including racial disparities in rates of incarceration¹, and for encouraging active U.S. government participation in the Universal Periodic Review process of the Human Rights Council.

Justice Now is a human rights organization based in California that supports the rights of people in women's prisons.² Since 2003, Justice Now has been documenting abuses in California women's prisons using an international human rights framework. Significantly, this framework highlights the role of governments in committing and remedying human rights abuses, a factor that often is obscured.

Of primary concern regarding people in California women's prisons are the legal commitments enshrined in the International Covenant on Civil and Political Rights³ (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁴ both ratified by the United States in the early 1990s. Although we welcome the U.S. government's

¹ There are approximately 11,033 people in California women's prison according to recent figures, whereas these prisons are only designed to incarcerate approximately 5,234 people or roughly 50% of their actual capacity. Together, people of color comprise fifty-nine percent of people inside California women's prisons – a distinct majority. Approximately twenty-nine percent of the overall population in California Department of Corrections (CDCR) and Rehabilitation women's facilities are black, thirty percent are Latino/a, and thirty-six are white. See California Department of Corrections and Rehabilitation Visitor's information, available at <http://www.cdcr.ca.gov/Visitors/Facilities/index.html> and CDCR June 2009 Prison Census Data Report available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENS_USd0906.pdf.

² The term "people inside women's prison" refers to women and transgender, gender non-conforming, and intersex individuals identified by the prison system as biological females and incarcerated in women's prisons.

³ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR), available at <http://www2.ohchr.org/english/law/ccpr.htm>.

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (CERD), available at <http://www2.ohchr.org/english/law/cerd.htm>.

ratification of these treaties and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵ (CAT), as well as the government's recent efforts to comply with treaty reporting requirements, actual implementation of said treaties has been slow and inadequate, especially at the state and local levels. Insufficient domestic monitoring and compliance of human rights obligations is a direct result of the way that the U.S. ratifies international treaties, and its approach to informing the general public about human rights.

Justice Now has documented many abuses in women's prisons, including but not limited to, egregious pre and postnatal care, shackling during labor, abusive strip searches, performance of sterilization procedures without informed consent, and death due to medical neglect. All of these abuses are prohibited by the human rights treaties thus far ratified by the United States. Together, these human rights abuses constitute respective violations of ICCPR Articles 6, 7, 9, 17, and 19 and CERD Article 5. Unfortunately, it has been difficult to end and provide redress for these human rights violations because of the inadequate implementation of such treaties, especially at the state and local level.

Non-Self-Executing Declaration Provisions

The United States' practice of ratifying international treaties with declarations that render article provisions "non-self-executing," places a critical barrier in the way of complete treaty implementation. According to the U.S. Constitution, Article VI, all ratified treaties are the "Supreme Law of the Land."⁶ When a ratified treaty has a non-self-executing declaration attached to it, individuals in the United States have no private right to action and cannot access the rights contained within those treaties without further implementing legislation. Congress has passed only a few pieces of implementing legislation to give effect to limited treaty obligations.

Furthermore, non-self-executing declarations contradict the "object and purpose" of ratified treaties because they impede the immediate enforcement of treaty provisions, without the enactment of implementing legislation because treaties were designed to be implemented upon ratification. Thus, non-self-executing declarations are null and void under the Vienna Convention on the Law of Treaties, Article 18.⁷ We implore the Subcommittee to reverse this trend of using such declarations, setting a positive example in the international community for the need to respect, protect, and fulfill human rights obligations.

Restrictive Reservations and Understandings

We are also concerned about the occasional use of RUDs to restrict rights contained in ratified treaties to those already available under U.S. law. For example, the U.S. government attached an understanding to Article 7 of the ICCPR limiting its scope to only those acts already prohibited under the cruel and unusual clause of the 8th Amendment of the United States

⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (CAT), available at <http://www2.ohchr.org/english/law/cat.htm>.

⁶ U.S. Const. art. VI, para. 2, wherein it is stated that, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

⁷ Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, U.N.T.S. 1155. Article 18 requires state parties to refrain from acts that would defeat the object and purpose of a treaty when it has, "signed the treaty...until it shall have made its intention clear not to become a party to the treaty, or it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." The U.S. has signed and ratified the ICCPR, CERD, and CAT. It is therefore obligated not to take any acts that would defeat the object and purpose of any of said treaties.

Constitution⁸. This restriction is not only inaccurate, as Article 7 actually prohibits a far greater range in behavior, including inhuman and degrading treatment, but it also leads people in the United States to view ratification of treaties as meaningless if the rights available to them do not change upon ratification.

Federalism Understandings

Although the United States has a federal system that provides jurisdiction under certain areas of law to the states, the U.S. Senate has recognized the importance of encouraging state and local implementation of human rights obligations. It has also noted that the federal government is ultimately accountable for ensuring our adherence to international obligations and reporting to treaty monitoring bodies on progress made. This suggests the need for a nation-wide governmental body, such as the U.S. Civil and Human Rights Commission, charged with the task of monitoring and enforcing human rights laws in the U.S. Ensuring that human rights are promoted at all levels throughout the country is an indispensable part of treaty compliance.

Recommendations for Change

1. If treaties are to be meaningfully implemented, the United States must withdraw all non-self-executing declarations to treaties that it has ratified, and cease use of declarations in the future. This would enable courts to utilize international human rights treaties as fully justiciable instruments of law with complete domestic application.
2. The U.S. must interpret rights contained within ratified treaties in line with international human rights jurisprudence. This means recognizing that treaties are "Supreme Law of the Land" under U.S. Constitution Article VI, and using treaty interpretation as a guiding beacon for which human rights abuses are prohibited.
3. Establish mechanisms to ensure state and local compliance with international human rights obligations. This would include supporting periodic reporting to treaty monitoring bodies on compliance with the ICCPR, CERD, and CAT at the city, county, and state-wide levels.
4. Ratify remaining human rights treaties that the U.S. has signed, including the Convention on the Elimination of All Forms of Discrimination Against Women⁹ (CEDAW), The Convention on the Rights of the Child¹⁰ (CRC), and the International the Convention on Economic, Social and Cultural Rights¹¹ (ICESCR).

Thank you for taking the time to consider our testimony. I look forward to answering your questions on any of the above, and to continuing to work with the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law in this regard.

With appreciation,

Robin S. Levi
Director - Human Rights Documentation Program

⁸ U.S. Const. amend. VIII.

⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 513.

¹⁰ Convention on the Rights of the Child art., Nov. 20, 1989, 1577 U.N.T.S. 3

¹¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

Testimony by Allen S. Keller, M.D.
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Director, Bellevue/NYU Program for Survivors of Torture
Submitted for
The Law of the Land: U.S. Implementation of Human Rights Treaties
United States Senate Judiciary Subcommittee on Human Rights and the Law
December 16 2009

Thank you for holding this important and timely hearing. I want to comment on U.S. obligations with regards to the Convention Against Torture and Other Cruel, Inhuman or degrading treatment and Punishment. In order to fulfill our obligations under this Convention, it is essential that there be a comprehensive investigation into prior acts of torture committed by the United States as part of "The War on Terror." Furthermore, we must ensure that Appendix M of the Army Field Manual, which condones acts of torture and cruel, inhuman and degrading treatment be omitted or extensively modified.

My perspective on this is based on over 15 years experience examining and caring for victims of torture and mistreatment from around the world and studying the health consequences of such trauma. I am an Associate Professor of Medicine at New York University School of Medicine. I am Director of the Bellevue/NYU Program for Survivors of Torture (PSOT) in New York City and the NYU School of Medicine Center for Health and Human Rights. Since our Program began in 1995, we have cared for approximately 3,000 men, women and children from more than 80 countries. Our Program is a member of the National Consortium of Treatment Programs (NCTTP) and the International Rehabilitation Council of Torture Victims (IRCT).

I am a member of Physicians for Human Rights (PHR) Advisory Council. I have participated in PHR's asylum network examining victims of torture and mistreatment applying for political asylum in the U.S. I have also participated in several PHR investigations and studies documenting torture and mistreatment, and training health

professionals in conducting such documentation. I have also served as a member of the American College of Physicians Ethics and Human Rights Committee.

I have examined several former detainees from Abu Ghraib and Guantanamo. I coauthored a 2007 study "Broken Laws, Broken Lives" conducted by Physicians for Human Rights (PHR) in which I worked with a group of highly skilled colleagues with substantial experience in evaluating individuals alleging torture and mistreatment. My colleagues and I conducted detailed medical evaluations of former Abu Ghraib and Guantanamo detainees and found clear physical and psychological evidence of torture and abuse, often causing lasting suffering to the individuals and their families and communities. Based on my many years of experience evaluating and caring for torture victims from all over the world, I can tell you the torture and abuse these men endured while in U.S. custody are sadly and tragically second to none.

I will briefly discuss two individuals I evaluated for PHR's report-one from Guantanamo and one from Abu Ghraib. They put human faces to the horrific abuse these former detainees experienced and the devastating health consequences from which they continue to suffer. These 2 individuals also provide chilling descriptions of medical complicity in their torture and abuse. It is a gross breach of professional ethics for health professionals in any way to countenance, condone or participate in the practice of torture, or other cruel, inhuman or degrading treatment or punishment of prisoners.

The individuals evaluated for this study were subjected to a variety of dangerous and harmful forms of abuse and interrogation techniques, (often simultaneously) several of which have been referred to as seemingly benign "enhanced interrogation techniques." This includes methods such as stress positions, beatings, temperature manipulation, threats of harm to person or loved ones, prolonged isolation, sleep deprivation, sensory overload, sensory deprivation, sexual humiliation, exploitation of fears and phobias, and cultural or religious humiliation. From a medical, scientific and health perspective, there is nothing benign about these methods. Such techniques are gruesome, dehumanizing and

dangerous. They should be called for what they are: torture. Clinical experience and data from the medical literature are clear. These techniques can cause significant and long lasting psychological and often physical pain and harm.

Many forms of torture and abuse, including the “enhanced interrogation techniques,” may leave no physical scars but can nonetheless cause severe physical and psychological suffering. For example, if someone is subjected to the sexual humiliation of forced nakedness, or a gun is held to their head and the trigger pulled in a mock execution, there may be no physical scars, but the nightmares, the terrors can persist for years after the trauma. According to one recent study published in the medical literature, the significance of harm caused by non-physical psychological abuse is virtually identical to the significance of the harm caused by physical abuse. In a study conducted by our own program, we found that psychological symptoms were significantly higher among those who experienced death threats.

It is important to note that any one form of torture or mistreatment rarely occurs in isolation, but in combination with several abusive methods. The harm caused by the combination is greater than the additive effect of individual techniques. Prolonged isolation, for example, combined with sleep deprivation, exposure to loud noises, and exposure to cold, compound their devastating psychological impact. Furthermore the potential of these techniques to cause harm is intimately related to the context and setting in which they are used. Fear of harm or even death is real, not imagined. Cultural and religious humiliations, and language barriers heighten stress. Such methods are potentially harmful to even individuals who were previously healthy. When used on individuals with underlying health problems, such as heart disease which may or may not be known, they can be potentially lethal for example by causing heart attacks or strokes.

Youseff (Former Guantanamo Detainee)

One individual, whom I evaluated with Dr. Barry Rosenfeld, a forensic psychologist at Fordham University who has worked extensively with the Bellevue/NYU Program for Survivors of Torture, is a former Guantanamo detainee identified in the

report as Youseff. It is important to note that Youseff, as with all of the individuals we evaluated, was never formally charged.

Youseff was first in U.S. custody in Kandahar Afghanistan beginning around late 2001. Youseff was interrogated, beaten and stripped naked. He also was subjected to intimidation by dogs, hooding, thrown against a wall, and sustained electric shocks from a generator. Six weeks later he was transferred to Guantanamo. During the flight, he was blindfolded, forced to wear headphones, and shackled to the floor of the plane, causing pain in his wrists, which was later exacerbated by prolonged cuffing and having his handcuffs tugged on while at Guantanamo.

Initially, he was kept at Camp X ray in cages, where guards would come and beat him and other detainees for small infractions such as speaking to other detainees. Someone, whom he believed was a physician was present during these beatings, and did nothing to stop them.

After 3 months, he was transferred to Camp Delta, where conditions were better. He was subjected to frequent interrogations. While being held in the interrogation room, he was shackled for extended periods and subjected to extremes of heat and cold. Someone whom he believed was a physician periodically checked his vital signs- a clear violation of medical ethics.

Youseff was also subjected to sexual humiliations including forced nakedness and being forced to watch pornography. He also described an incident where a naked woman entered the interrogation room and smeared what he believed to be menstrual blood on him.

At one point, Youseff asked to speak with a psychologist because of sadness from being separated from his family. In subsequent interrogations, this information was exploited. He was threatened with staying in Guantanamo the rest of his life. Youseff believed the psychologist shared information with his interrogators. Again, a clear violation of medical ethics.

Youseff was released in Nov. 2003 after signing a false statement that he fought for the Taliban. He explained that he agreed to sign because "I was already under so much pressure." He was released without any charges brought against him as were

other detainees who signed confessions. He was chained to the floor of an airplane, and returned to his home country.

Following his release Youseff continued to suffer from significant physical and psychological symptoms including persistent wrist pain, and experiencing great feelings of sadness, and symptoms of post traumatic stress including nightmares, recurrent intrusive memories, avoiding anything that reminds him of his imprisonment. He described becoming extremely anxious if he sees individuals dressed in orange, reminding him of his prison uniform, or if he sees police. He described shortness of breath and heart problems, likely manifestations of anxiety. He reported difficult functioning since his release including difficulty finding steady employment.

Physical examination revealed scars consistent with his report of undergoing wrist surgery following his release, and a scar on the back of his wrist consistent with handcuffing. He had tenderness in the muscles of his right wrist. His nose was slightly deviated to the left, though he acknowledged uncertainty about the etiology of this. A bone scan showed increased focal activity of both shoulders consistent with degenerative arthritis.

In sum, the available evidence provides strong support for the validity of Youssef's reports of abusive treatment while in US custody. In turn, this abusive treatment appears to have resulted in lasting physical and psychological symptoms that far exceed the mild level of distress Youssef reported experiencing prior to his arrest and detention by the United States.

Amir (Former Abu Ghraib Detainee)

Another individual I evaluated with Dr. Leanh Nguyen, a psychologist with the Bellevue/NYU Program for Survivors of Torture, is a former Abu Ghraib detainee identified in the report as Amir. He is in his late twenties and grew up in a Middle Eastern country. He was a salesman before being arrested by US forces in August 2003 in Iraq.

After his arrest, he was brought to another location where, while shackled, he was forced to stand naked for at least five hours. When the detainees asked the soldiers for permission to sit down, they were told, "Now, we will make you dance." The soldiers played "a very frightening voice" loudly over a stereo and forced the detainees to run

around in a narrow room. This forced running continued for the next three days. The detainees were denied rest or sleep.

During this time, Amir's left foot was injured: "I noticed my blood everywhere." Nonetheless, he was forced to continue running. He described that he leaned against a stretcher, and reported his foot injury to the soldiers. One of the soldiers raised the stretcher sharply and he was thrown against a wall, hitting his head and losing consciousness. After regaining consciousness, Amir recalled that an interpreter hit him on his nose with a plastic water bottle, causing it to bleed. Amir believed that his nose was broken. Subsequently, he was forced to stand and was questioned along with the other detainees. After this incident Amir noted marked difficulty walking, and there was swelling in his knees and foot. He recalled that forced running and sitting on knees continued for about ten days.

Amir was then taken to another location. In the course of being transferred, plastic handcuffs placed on him were tightened to the point of causing his hands to swell and turn blue. Amir was held at this facility for twenty-seven days in a small dark room, where he was fed only twice daily and had to use a bucket as a toilet. He added, "You make your toilet in this bucket and you eat right next to it." During one of the many interrogation sessions, interrogators pushed his head against the wall. He recalled the soldiers humiliated him for having swollen knees. In one interrogation, while blindfolded and with his hands bound behind his back, he was forced to bend over and "walk zig zag and sometimes pushed into the wall."

In September 2003, Amir was taken to Abu Ghraib prison. Except for abuses he experienced on arrival, Amir recalled that he was generally treated well during his first month at Abu Ghraib. The food was better than before, and he was allowed to help soldiers distribute food to other detainees. However, he remembered that his situation changed when a new group of soldiers arrived at Abu Ghraib. He recalled that a soldier mistakenly suspected him of throwing a piece of food to a prisoner in another cell. The soldier yelled at him, "Bullshit, fuck you, fuck you." Amir recounted, "I can never forget these words because I knew he was insulting me." He was denied food that day, and that night soldiers took him to another room, restrained one of his hands to the wall, and put a bag over his head. A soldier lit a cigar and blew smoke into the bag over

Amir's head. Amir recalled having a gun run up his body, poking at him, and pressed against his face. He was then taken back to his regular cell and told to sleep but, after fifteen minutes, the soldier returned screaming at him, took him back to the other cell, and tied him to the wall. Over the next two days the procedure was repeated four to five times. Amir described being deprived of sleep because the soldiers would hit a barrel or the doors of a cell with a hammer. "Because of this we could never sleep. Even if they permit you to sleep you could not because of this."

During the course of detention, Amir experienced several other abuses. On one occasion, Amir was playing with a broken toothbrush while sitting in front of his cell. When the soldiers saw this, they confiscated the broken tooth brush and accused him of manufacturing a dangerous weapon. They told him to take off his clothes. Amir recalled that he pleaded that his religion forbids nakedness. He was nevertheless restrained naked to the bars of his cell's door for two to three hours. He was then returned to his cell naked and without a blanket. The soldiers would come to his cell and humiliate him because of his nakedness.

Amir recounted remaining naked and being forced to pray in that condition. During that time, he recalled that a soldier came to his cell and started shouting. Amir was praying, so he did not answer. The soldier entered the cell, and pushed Amir's head to the floor. He was then suspended with his arms up and behind his back for several hours, with only his toes touching the ground. During this time, Amir also heard increasingly high-pitched screaming from, in his words, "others who were tortured. The screaming was getting higher and higher."

Subsequently, Amir was taken to a small foul-smelling room and was forced to lay face down in urine and feces. He noted, "You can't even breathe because of that smell... [The soldier] pushed me to lie down. They brought a loudspeaker and started shouting in my ear. I thought my head would explode." Amir subsequently described being sodomized with a broomstick that was forcibly inserted into his anus. He was pulled by a leather dog leash and was ordered to "howl like dogs do." When he refused to do so he was repeatedly hit and kicked on his back and side. Amir felt a hot liquid on his back and guessed that someone was urinating on him. At this point, he was bleeding from his feet and shoulders, and the urine exacerbated the pain from these wounds.

He received more kicks on his left side and in the groin, and one of the men stepped on his genitals, causing him to faint. Amir subsequently woke up to cold water being poured on his head. He recalled hurting all over his body, particularly on the left lateral side of his chest, his right middle finger, and his groin and genitals. He noticed that his genitals were swollen and had wounds.

When asked about his internal responses to this episode of abuse, Amir described, "My soul was flying away. Like my body was not there. I started to think about my family ... When I woke up [from the beating], I felt like I was not of this life. But my body was there, the pains in my body were there."

Following this episode, Amir was kept naked in his cell for about four days. During that period, representatives of the International Committee of the Red Cross (ICRC) visited him and he told them about his mistreatment. The ICRC personnel provided him with clothing and blankets, which were confiscated after they left. Amir noted, "After four days, they gave me back my clothes and blankets and I went back to normal prison routine. By normal I mean they stopped hitting and torturing me." Amir reported that the soldiers started calling him "Tarzan." That nickname was written on a piece of paper and pasted on his cell door for six days. Explained Amir, "They called me this, because I had the toothbrush in my hand and I was naked like Tarzan, who held a knife and was naked. The interpreter explained this to me in detail."

When asked "Did any doctor help you with your injuries?," Amir uncharacteristically interrupted the interviewer and cried out, "Did I need to ask for help? I was there naked and bleeding. They were supposed to help.... These were not real doctors. They had no compassion. They were not there to practice medicine but to make war."

Amir remained in that cell, alone, for another two months and then was transferred first to the communal tents at Abu Ghraib, and then to Bucca prison. In November 2004 he was released without charge.

In addition to the abusive treatment Amir reported directly experiencing, he also reported witnessing other prisoners being tortured and humiliated. Once, he saw naked prisoners being forced into a pile that formed a human pyramid. On another occasion,

he was forced to watch two prisoners appearing to enact anal intercourse. Amir stated, “[The prisoners] were begging ‘This is a sin against our religion, please show mercy.’ The soldiers were pushing them into each other, and these guys were trying to [push] away, and this [lasted] more than half an hour and this was in front of our eyes.”

Amir reported feeling extremely weak, losing a great deal of weight, and experiencing severe headaches during his detention. While the headaches have improved, they persistently occur approximately once every one to two weeks. The headaches can be induced by feelings of nervousness, hunger, or anger; are often associated with vomiting and sensitivity to light; and can last from one hour to several hours or even an entire day. Amir also experiences periods of dizziness since his detention.

After being sodomized, Amir described having rectal bleeding and painful bowel movements that lasted approximately two weeks. The injuries to his genitals caused him chronic penile pain (lasting more than two months); blood in the urine (for about two weeks); and significant scrotal pain that gradually improved. He continues to have chronic discomfort in his left testicle, including during sexual intercourse.

Following the beatings, Amir described having pain all over his body. He continues to experience pain in his back and knees (particularly when walking) and discomfort in his right middle finger and his left big toe while walking. Moreover, since the trauma to his nose while in prison, Amir has had difficulty breathing. He continues to experience discomfort when sleeping on his left side, which worsens when he takes a deep breath.

Amir described experiencing palpitations (irregular heartbeats) multiple times a day, which he attributed to his memories of abuse. “These are the memories I can never forget...I want to forget, but it is impossible.”

Many of the beatings Amir described would likely have resulted in bruises and soft tissue injuries that would not leave lasting physical marks. However, his physical symptoms and findings on physical examination strongly support Amir’s reports of torture and mistreatment. Physical examination revealed a slightly curved and depressed scar on the left lower side of the nose, a slight bony prominence on the top left side of his nasal ridge, and a faint crackling sound on palpation at the tip of the

nose. Several scars noted on his head are consistent with the kicks or other blunt trauma injuries he sustained during detention. Further, several scars were noted on his hands. Thickening of skin and prominent linear scars on the knees is consistent with Amir's reports. The two-centimeter raised hypo-pigmented (i.e., lighter than the surrounding skin), slightly angled, fibrotic band at the base of his left big toe is highly consistent with a scar resulting from a significant laceration as Amir described.

Musculoskeletal examination was significant for some slight tenderness over his scapular regions bilaterally, and tenderness over the area of the left lateral sixth rib with a slight prominence noted on palpation. The genital examination showed there was tenderness to palpation of the left testicle and a fibrous band between the base of the head of the penis and the shaft of the penis that Amir reported did not exist before. This is highly consistent with the events Amir described, including a traumatic injury and subsequent scarring process. Examination of the peri-anal area showed signs of rectal tearing that are highly consistent with his report of having been sodomized with a broomstick. The continued scrotal discomfort that he described is likely as a result of the injuries to this area that he reported sustaining.

Chronic headaches and dizziness are common among torture survivors who have experienced head trauma. The headaches and dizziness that Amir described, which he did not have prior to his imprisonment, are likely to be a result of the head trauma. Moreover, his continued psychological symptoms and distress likely contribute to these headaches as well.

Bone scan findings are consistent with a history of trauma to his ribs. Further, accumulation of the nuclear materials in both feet and ankles are consistent with a history of trauma to these areas.

Prior to his arrest, Amir described himself as a "calm and gentle person", who was "good" to his family, and "smooth" and "patient" with everyone. In contrast, he described feeling that his family has been shattered and that much calamity had fallen on them because of him, and he spoke at length about feeling helpless to protect or provide for his family.

Following his release, Amir found himself constantly being "nervous" and "on edge". He described a high level of stress caused by bombings, nightly raids,

uncertainty about personal safety, frequent funerals of neighbors and acquaintances due to the war, and ongoing sadness about the losses that his family had sustained. Moreover, as a result of war conditions, Amir was unemployed at the time of evaluation. Nevertheless, Amir emphasized that his post-prison, war-related stressors are not the primary reason for his emotional “disturbances.” He stated, “No sorrow can be compared to my torture experience in jail. That is the top reason for my sadness. I cannot forget it.”

Amir’s reported symptoms and behaviors conform to all three clusters of PTSD symptoms including intrusive recollections of the trauma, hyperarousal, and avoidance. These symptoms are directly traceable to the traumatic experience that he reported. Amir described suffering from flashbacks and nightmares about his imprisonment. His days are preoccupied with images and thoughts of his imprisonment. He added, “It is like in my head I have never left Abu Ghraib.” He experiences fear and outrage, and exhibits physiological reactivity (i.e., startle response, throat constriction, chest pain, heart palpitations) when exposed to cues that are reminiscent of the trauma, such as the sight of US soldiers or the recollection of his torture.

Amir reported numerous symptoms of hyperarousal including suffering from severely disturbed sleep, often sleeping approximately two hours a night; moodiness; outbursts of anger; and exaggerated startled response.. Furthermore, he described symptoms of avoidance and emotional numbing, including avoiding open space, people, and social activities; and feeling flat or constricted in his emotions. He also confirmed feeling isolated, and detached or disinterested in forming social relations after his release from prison.

Amir described feeling helpless and having a “dark” sense of the future. Moreover, he articulated a sense of wounded pride and stolen honor. He explained that the dissemination of photographs from Abu Ghraib on the Internet had exposed his humiliation to the world. He is concerned that this public knowledge has ensured that his children will suffer the blame and dishonor of his reputation as a former detainee and will thus be at risk for a life of shame.

Amir disclosed that he constantly harbors suicidal ideation, although he adheres to Islam’s teachings which prohibit suicide. While in prison he tried to kill himself by

banging his head against a hard surface. He reported frequent thoughts of revenge and homicidal fantasies.

The symptoms of sexual dysfunction are consistent with a previous history of sexual violation. He reported having trouble being naked in front of his wife. Flashbacks of his torture, especially the sexual aspects, often intruded during sex with his wife. In such instances, he would then "lose all strength." Along with erectile dysfunction, he also reported low sexual drive and minimal interest in sex. Amir specifically described triggers, context, and time frame that connect the sexual dysfunction to the traumatic violation of his experiences at Abu Ghraib. The impairment is likely linked to post-traumatic re-experiencing of the sexual violation.

Amir demonstrated historical, physical, and psychological evidence strongly supporting his allegations of torture. He provided substantial detail regarding many components of his abuse. He was forthcoming about what he does and does not recall. The manner in which Amir described his detention experience, both in content and in style, as well as the clinical findings lead us to conclude with high confidence that he is credible. Amir continues to suffer from physical and psychological symptoms since his release from Abu Ghraib, and described subsequent marked impairments in his social, sexual, and emotional functioning.

Conclusion and Recommendations

In summary, the evaluations of both of these men revealed clear historical, physical, psychological, and radiographic evidence corroborating their allegations of torture and abuse. Both continued to suffer from severe symptoms long after their release. In fact all 11 men evaluated for this study had findings consistent with their reports of torture and abuse.

Historically, the United States is a leader in fighting against torture and in aiding torture survivors. Sadly, the actions authorized by the prior Administration were wholly inconsistent with our proud tradition and our obligations under the Convention Against Torture. In short, we committed acts of torture. We did so in the name of national security. We did so by calling it things other than torture-such as "enhanced" interrogation techniques. But it was torture nonetheless. The information to date

strongly supports the contention that these were not the acts of a few bad apples on the night shift, but were part of a concerted and methodical policy of torture and abuse. While it is noteworthy that the Obama Administration has condemned torture and acted to prevent torture, including issuing an Executive Order to this effect, much more is needed.

In particular there remains a crucial need for a comprehensive investigation into prior practices of torture. Such an investigation must clarify exactly what happened, how it happened and who was responsible, and most importantly, what specific measures need to be in place to prevent this from happening again. Such an investigation cannot nor should not be the responsibility of one committee. Such an investigation must examine violations of medical ethics by health professionals.

We need to get to the bottom of what happened. As a physician and scientist who has spent much of his professional career evaluating and caring for victims of torture and abuse, I want to clearly state that torture and inhuman interrogation techniques are cruel, ineffective and can have devastating health consequences. As a health professional, these abuses and the harm they cause deeply offend medical ethics and values. As an American, they offend the traditions and principles we have long shared and cherished as a nation, including a ban on torture and cruel, inhuman or degrading treatment or punishment.

This is a matter of moral necessity, and it is also a matter of national and international security. We have undermined our capacity to speak out against torture. We have enabled the actions of despots and dictators around the world, who invoke "national security" as a reason to torture. In order to restore our capacity to effectively advocate against torture, we must account for our own country's actions. Simply stated we cannot have it both ways.

I am very concerned that our actions have put our soldiers and others U.S. citizens living around the world at risk. Furthermore, practicing or condoning torture by our country in any way runs the risk of increasing what is already a world wide public health epidemic of torture-documented to occur in more than 100 countries. Torture is frequently invoked in the name of national security, whether the victim is a Tibetan monk calling for independence or an African student advocate protesting for democracy. While

torture is not effective in eliciting accurate information, it is effective in undermining community, trust, safety and the rule of law. I am concerned that the previous Administration's approval of torture and mistreatment by our country has put innocent civilians in harm's way who are attempting to promote democracy and freedom under despotism around the world.

Another issue that merits attention is the Army Field manual, which is now recognized as the uniform standard for all U.S. personnel conducting interrogations. While the AFM as a uniform standard will eliminate many of the prior abuses, the current language and in particular Appendix M still allows for potential abuse. The Army Field Manual must be revised to ensure that neither the torture or mistreatment of detainees are in any way condoned or allowed.

The United States must commit itself to repairing the damage done and restore our credibility. The United States must ensure that the very serious allegations of torture and administration which occurred are appropriately investigated. We must ensure that torture and mistreatment, no matter what you call it, are neither condoned nor occur under our great country's watch. Though perhaps invoked, misguidedly in the name of national security, the abuses committed by the United States have undermined our integrity and made the world a much more dangerous place. We must take responsibility for what has happened, and see that it never happens again.

Thank you.

LATINOJustice
PRLDEF

December 16, 2009

Senate Judiciary Subcommittee on Human Rights and the Law

Re: Hearing – The Law of the Land: U.S. Implementation of Human Rights Treaties

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Members of the Senate Judiciary Subcommittee on Human Rights and the Law:

LatinoJustice PRLDEF welcomes this opportunity to present you with concerns that have emerged in our ongoing work through our civil rights litigation - meant to promote justice for Latinos. A central issue in our recent work is the rising pattern of ill treatment of Latino migrants in the United States and the government's failure, both at the national and local levels, to ensure the safety of this ever-growing segment of the US population. In fact, it is becoming increasingly clear that the United States is encouraging a climate that fosters anti-Latino sentiment, as the government itself has instituted policies and practices that target the Latino population in its enforcement efforts, particularly in the areas of immigration policy. The United States has existing obligations under international human rights instruments, including the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of Racial Discrimination*, to ensure the life and safety to all of its residents, protections that extend to its newest residents and recent arrivals from the Americas and the rest of the world. As a beacon of democracy and human rights, the United States is supposed to be an exemplar of justice and a safe haven for recent arrivals that seek to be part of the fabric of this country. As workers, families, and children – Latino immigrants are contributors to the well being of this society. They are the farmers, the factory workers, the nannies, the domestic workers, the landscapers and maintenance workers. They are professionals and skilled workers that bring innovation to our economy. Unfortunately, whether unintentionally or not, the policies and practices undertaken by agencies like the Department of Homeland Security have often had the consequence of encouraging private citizens predisposed to violence to target Latino immigrants for attack.

As a result of the rhetoric from the highest echelons of our national government to local politicians, Latino immigrants are increasingly perceived as invaders that require expulsion or whose culture is perceived as dangerous, even in day-to-day interactions. Often we have heard of individuals attacking others because they are speaking Spanish in public or employers harassing their employees for speaking Spanish on the job. Increasingly we are witnessing teenagers attacking Latino day laborers on their way home from work. Latino workers are seen as a threat or are perceived as not valued members of society, meriting harsh treatment – whether in just how they are thought of or in actual treatment. In the wake of steeped up efforts to enforce immigration law, we have witnessed an

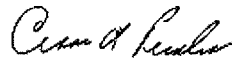
increasing number of incidents across the country of violence against Latino migrant residents. This phenomena is of particular concern, as these incidents appear to be intensifying, rather than dissipating. Of note, immigration enforcement policies are being intensified as well, without enough oversight or concern for the consequences of sending a message to society that it is acceptable to discriminate against Latinos.

Considering the foregoing backdrop, this is a perfect time in this nation's history to reevaluate the government's interpretations of human rights laws and recommit itself to its obligations under these laws. It should also afford the opportunity to see how to best achieve in practice and in our public policy ways to ensure the protection of minimal human rights guarantees that all residents are entitled to – whether in this country with permission or not. We are a nation of laws and a nation that strives to achieve freedom for all. As a nation that strives to embrace the notions of fairness and equality, it is important that we revise the conversation about immigration.

LatinoJustice PRLDEF urges this committee to consider making recommendations to all national agencies charged with enforcing immigration laws so that they come in line with the international obligations that we already have under the instruments we have ratified. Even with reservations, understandings and declarations (commonly referred to as RUD's), which our Congress has added to such ratifications, our obligations under such instruments require our government to seek ways to enhance human rights protections, not derogate from them.

We thank you for your attention and your special consideration of these matters.

Sincerely,



Cesar Perales, Esq.
President and General Counsel
LatinoJustice PRLDEF



A nonprofit, nonpartisan legal organization founded at the request of President Kennedy in 1963

**STATEMENT OF
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
December 16, 2009**

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") applauds the Senate Judiciary Subcommittee on Human Rights and the Law on this hearing on U.S. implementation of human rights treaties to which it is a signatory. The Lawyers' Committee has long worked to ensure that the United States fulfills both its domestic and international obligations in our continued pursuit of a nation where our minority populations have full civil and political rights and live free from discrimination. In the past we worked in the international arena to end apartheid in South Africa through our Southern African Project and with the United Nations in major conferences such as the Fourth World Conference on Women in Beijing and the 2001 U.N. World Conference Against Racism.

In recent years, we have been actively involved in monitoring and responding to reports written by the United States in response to the requirements of both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Our review and reporting have documented that while the U.S. has moved beyond its dark past of state sponsored discrimination against its minority population, racial discrimination and inequities persist. The concluding observations issued by the monitoring bodies of both ICCPR and CERD offer avenues through which we can continue our path to building a society where all are truly equal and discrimination is a relic of our past.

Ratified by the U.S. in 1992, the ICCPR requires the United States "to respect and to ensure" that all persons have a wide range of civil and political rights.¹ The treaty states:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²

Thus, the ICCPR not only prohibits state sponsored discrimination, but creates an affirmative obligation to ensure "effective protection against discrimination."

Ratified by the United States in 1994, CERD also prohibits racial discrimination and requires that state parties "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."³ In ratifying the treaty each state commits, among other steps, to "ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."⁴ CERD prohibits racial discrimination in matters of justice, personal security, voting and political rights, movement, marriage, property, inheritance, religion, expression, assembly and association, employment, housing, health and medical care, education and cultural activities.⁵

Article VI of the U.S. Constitution provides that treaties, along with the Constitution and federal laws, "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. Absent implementing legislation, these treaties cannot form a basis for a domestic cause of action in U.S. courts, however, the U.S. is still obligated to fulfill its obligations under the treaties it has ratified. A review of the concluding observations from recent treaty reviews of compliance with both ICCPR and CERD show that the U.S. still has much to do in order to meet its treaty obligations under ICCPR and CERD. The deficiencies of the United States in meeting its obligations are shown by both continued racial disparities in a wide range of economic, civil, and political rights and by the failure of the federal government to adequately commit resources to these obligations.

This statement will discuss the need for more awareness and implementation of our treaty obligations by both the federal and state governments and the areas in which we are deficient in the areas of voting, education, employment, environmental justice, housing and community development and criminal justice generally.

I. The Need for Proper Implementation

Both the concluding observations from the recent treaty compliance reviews for the ICCPR and CERD note the lack of implementation at the state level. The CERD Committee expressed its "concern [with] the lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels."⁶ The Lawyers' Committee joins the chorus of calls for both an inter-agency working group in the federal government that would, among other tasks, ensure that proposed legislation from the executive branch meets U.S. human rights obligations and monitor all actions of the government to ensure conformity with human rights treaty obligations. We also support proposals to transform the U.S. Civil Rights Commission to the U.S. Commission on Civil and Human Rights. Such mechanisms would put the U.S. on the path to "fully [] respect and implement its treaty obligations under international human rights treaties to which it is a party" and "to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the protection of human rights ..."⁷

II. Lack of Treaty Compliance

Voting Rights

Under articles 2, 5(c), and 6 of the CERD Convention, a State Party must undertake to pursue by all appropriate means a policy of elimination of racial discrimination and eliminate racial discrimination in all its forms. Specifically, a State party must take actions to guarantee the right of everyone to equality before the law, notably in the enjoyment of political rights, and to ensure effective protections and remedies against racially discriminatory acts that violate human rights and fundamental freedoms.

Article 25 of ICCPR calls for every citizen to have the right and opportunity to take part in "the conduct of public affairs directly or through freely elected representatives" and "to vote

and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . .

Today, although advances have been made, equal participation is far from reality. Discrimination against minority voters is evidenced by lawsuits and studies concerning, among other things, inadequate and unequal election administration, voter intimidation aimed at minority voters, and felony disenfranchisement laws that disparately impact racial minorities. In recent years, the Department of Justice (DOJ) has failed to both enforce the nation's voting rights laws and protect the rights of minority voters. Under the past administration, DOJ brought fewer Section 2 cases, and at a significantly lower rate than any other administration since 1982.⁸ Only two cases were filed on behalf of Blacks and none on behalf of Native Americans.⁹ Partisan political concerns were placed ahead of international obligations to protect the rights of minority voters in several pre-clearance determinations under Section 5 of the Voting Rights Act. In 2003, despite the fact that career staff at the Voting Section determined that a Texas redistricting plan resulted in retrogression of minority electoral opportunity, the DOJ's political appointees nonetheless pre-cleared the plan.¹⁰ One of the districts approved by the DOJ's political appointees was subsequently held to violate Section 2 of the Voting Rights Act. Similarly, despite recommendation by career staff at the DOJ to object to a Georgia law requiring voters to present government-issued photo identification in order to vote, the DOJ pre-cleared the plan only to have it later invalidated as an unconstitutional poll tax violating the Fourteenth Amendment.¹¹ Recently, the constitutionality of one of the most important provisions of the Voting Rights Act, Section 5 was challenged in our courts. While the Supreme Court upheld its constitutionality, it continued the trend of narrowly construing the protections of voting rights laws by noting "serious misgivings about the constitutionality of section 5."¹²

The U.S. disenfranchises more incarcerated persons than any other country for which data is available by any measure, whether it is categories of persons disenfranchised, percentage of total population or total number of persons in prison.¹³ Although racially neutral on their face, felon disenfranchisement laws are clearly tied to criminal punishment in the United States where Black imprisonment rates have consistently exceeded White rates since at least the Civil War era and remain approximately seven times higher than rates among Whites today.¹⁴ The racial impact of felon disenfranchisement laws is clear -- two million Blacks cannot vote due to a felony conviction, which is a disenfranchisement rate nearly five times that for non-Blacks.¹⁵ In five states that deny the right to vote to ex-offenders, one in four Black men is permanently disenfranchised.¹⁶ In fourteen states, more than one in ten Americans have lost the right to vote by virtue of a felony conviction and five of these states disqualify over 20 percent of the Black voting age population.¹⁷ Blacks are not only disproportionately disenfranchised, but are also less likely to have their voting rights restored.¹⁸

The U.N. Committee on Human Rights in its review of compliance under ICCPR noted that it "is of the view that general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of [the ICCPR]."¹⁹ The CERD concluding observations also noted with concern "about the disparate impact that that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system."²⁰

Education

Article 5 of CERD requires a State Party to undertake to prohibit and to eliminate racial discrimination and to guarantee the right of everyone to equality before the law, including in the right to education and training. A Party must take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights, and fundamental freedoms.” Similarly, each State Party shall amend or nullify laws that have the effect of creating or perpetuating racial discrimination; and undertake to encourage “appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races,” and to discourage that which tends to strengthen racial division.

The U.S. has failed to prevent apartheid conditions in public schools and to promote access to quality educational opportunities for racial and ethnic minority groups historically and presently prone to discrimination—leading to large achievement gaps, high rates of suspension, expulsion, and criminal sanctions for minority students, and low graduation rates for minority and English Language Learner (“ELL”) students. All of these circumstances diminish opportunities for the full and equal enjoyment of economic opportunities, human rights, and fundamental freedoms.

Major factors contributing to current levels of racial inequality in educational opportunities in the United States include school attendance zones that promote segregation and racial isolation; systems of ability grouping and tracking that consistently retain or place minority students in lower level classes; and a failure to counteract differences in parental income and educational attainment, which correlate with race.²¹ Lower expectations held by teachers and administrators for minority students and underperforming, poorly financed schools perpetuate minority students’ underachievement.²²

The de facto racial segregation in public schools is a key concern under CERD.²³ Additionally, CERD is concerned that the Supreme Court’s recent decisions have “rolled back the progress made since [] *Brown v. Board of Education* (1954), and limited the ability of public school districts to address de facto segregation by prohibiting the use of race-conscious measures as a tool to promote integration (arts. (2), 3 and 5 (e) (v)).”²⁴ De facto racial segregation is also a concern under the ICCPR as the Human Rights Committee recently noted its concern about the “de facto racial segregation in public schools.”²⁵

The disparate quality of education in the United States demonstrates a failure under both CERD and the ICCPR. The CERD Committee recently stated its concern about the continued “achievement gap” between white and minority students and is concerned that the “alleged racial disparities in suspension, expulsion and arrest rates in schools contribute to exacerbate the high dropout rate and the referral to the justice system of students belonging to racial, ethnic or national minorities (art. 5 (e)(v)).”²⁶ The Human Rights Committee in its ICCPR Review also stated that it was “concerned that the [United States] . . . has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students. [The Committee] also notes

with concern the [United States'] position that federal government authorities cannot take legal action if there is no indication of discriminatory intent by state or local authorities."²⁷

Employment

Under Article 5 of CERD, a State Party must undertake to guarantee the right of everyone to equality before the law in the enjoyment of the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.

The United States has an affirmative obligation under CERD to take "special and concrete measures" in social, economic, cultural and other fields to ensure adequate development and protection of certain racial and ethnic groups (and individuals belonging to them) to guarantee the full and equal right to and enjoyment of economic, social and cultural rights.²⁸

Article 2 of the ICCPR guarantees the enjoyment of the rights enumerated in the Covenant to all individuals within the United States without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In 1995, the Human Rights Committee suggested that, in order to fulfill its obligations under Article 2, the United States Government should "increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action."²⁹

The United States has fallen short in its obligations to eliminate racial discrimination and racial disparity in employment. In November 2009, the unemployment rate for Blacks was 15.6%, whereas Whites were unemployed during the same period at 9.3%,³⁰ and the poverty rates for Blacks (24.7%) and Hispanics (23.2%) were almost three times the rate for Whites (8.6%).³¹ Blacks and Hispanics were employed at significantly lower levels in management, professions, and related occupations, where Blacks constituted 25.2 percent and Hispanics 18.1 percent, as compared to non-Hispanic whites at 36.6 percent.³² The same disparities exist in wage rates between minorities and Whites.³³

The United States has failed to vigorously enforce Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. Governmental agencies, including the DOJ, have recently brought fewer "disparate impact" cases³⁴ and cases that allege that Blacks are the victims of racial discrimination. Discrimination in the workplace continues to have a pervasive effect on the experience of U.S. workers. Pronounced disparities in unemployment, earnings and poverty rates lead to the conclusion that discrimination is preventing minorities from receiving equal employment opportunities. While efforts have been made to address discrimination in the U.S. workplace, there remains much room for improvement.

A predominant theme of the past several years has been the lack of enforcement of federal laws designed to remedy discrimination in employment for minorities by the government agencies tasked with this responsibility. The types of cases pursued reflect a marked reduction in the number of disparate impact cases, which seek broad reform of employment selection practices that adversely affect the employment opportunities for a minority group. A significant number of cases filed by the federal agency charged with enforcement of these laws have been

“reverse discrimination” cases, alleging discrimination against Whites. Recent judicial interpretations of federal labor laws have resulted in the strengthening of immigration enforcement by weakening worker protections, leading to employment discrimination at the intersections of race and national origin. National security and fears of terrorism justifications also have been used to limit protections against discrimination, or even fuel discrimination, based on national origin, religion, race, and color. These realities show that while efforts have been made to address discrimination in the U.S. workplace, there remains much room for improvement.

The CERD Committee expressed concern that “workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work.”³⁵

Affirmative Action

Unfortunately, the United States has recently curtailed its use of affirmative action programs to meet its treaty obligations. The states of Washington, California and Michigan have enacted laws that effectively ban all forms of affirmative action in public education, public employment and public contracting.³⁶ The CERD Committee noted “with concern that recent case law [] and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms (art. 2(2)).”³⁷

The United States has failed to adequately address laws and policies that have a discriminatory impact on racial minorities, but that are not accompanied by evidence of intentional discrimination. The CERD Committee remains concerned that “claims of racial discrimination under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment must be accompanied by proof of intentional discrimination (arts. 1(1) and 6).”³⁸ Furthermore, the “definition of racial discrimination used in federal and state legislation and in court practice is not always in line with the Convention, which requires States to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”³⁹

Environmental Justice and Health Disparities

Article 2 of CERD obligates a State Party to take measures to review its law and policy and amend or rescind laws that have the effect of creating or perpetuating racial discrimination where it exists.

Environmental racism and health care disparities persist in the United States. Low-income communities and people of color are disproportionately burdened by environmental pollution and myriad health problems associated with poor air and water quality and toxic

exposure. Such disparities in the United States primarily impact the poor, uninsured, and other vulnerable and high risk populations.

Environmental Justice: The United States is failing to adequately address the problems of environmental racism. Despite a Clinton Era executive order requiring them to do so, federal agencies have routinely failed to incorporate environmental justice principles into their work. In October 2003, the U.S. Commission on Civil Rights reported on the “failure” of the EPA and the Departments of the Interior, Housing and Urban Development and Transportation “to fully incorporate environmental justice into agency core missions,” citing “the absence of accountability and critical assessments for environmental justice programs and activities, and the lack of top-down leadership on environmental justice issues.”⁴⁰ More recently, in July 2005, the Government Accounting Office (“GAO”) found that the EPA continued to fail to address environmental justice.⁴¹ Specifically, the GAO found with respect to development of clean air rules, the EPA did not initially address environmental justice, did not provide guidance and training to identify potential environmental justice concerns, and its economic reviews did not consistently provide decision makers with an environmental justice analysis.⁴² As recently as September 2009, the Ninth Circuit Court of Appeals found that the EPA failed to investigate claims of discrimination in use of EPA grant funds in 2006 or 2007.⁴³ In that case the Rosemere community in Washington state was challenging the city’s use of federal funds to improve affluent white communities but neglected the minority communities that were in desperate need of improved water, sewer and other basic municipal services.

Health Care Disparities: In 2000, the U.S. Government reported that “[p]ersons belonging to minority groups tend to have less adequate access to health insurance and health care,” and that “[h]istorically, ethnic and racial minorities were excluded from obtaining private insurance...[A]lthough such discriminatory practices are now prohibited by law, statistics continue to reflect that persons belonging to minority groups, particularly the poor, are less likely to have adequate health insurance than White persons.”⁴⁴ The 2007 report to the CERD states that “despite progress in overall health in the nation, continuing disparities exist in the burden of illness and death experienced by some minority groups, compared to the United States population as a whole.”⁴⁵ It also notes that “minorities are less likely than Whites to receive needed care, including clinically necessary procedures, in certain types of treatment areas.”⁴⁶ The United States’ failure to ensure equality in access to health care was noted by the CERD when it stated its “deep concern that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterized by . . . inadequate access to health care facilities. . . .”⁴⁷

Housing and Community Development

Article 5 of CERD requires that a State Party undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone to equality before the law in the enjoyment of economic, social and cultural rights, in particular, the right to housing.

The United States is failing to ensure that racial and ethnic minorities have equal access to housing. *De facto* segregation persists in many metropolitan and rural areas throughout the country. Discrimination in the private housing market remains prevalent. Public housing remains substandard and insufficient at both the state and federal levels. Additionally, in the recent foreclosure crisis, a major cause of which was predatory lending, minorities have been disproportionately affected resulting in the greatest loss of wealth in the African American community.

Sadly, African Americans and racial minorities are all too often the victims of housing discrimination. According to the National Law Center on Homelessness and Poverty, “every year in the United States, more than 1.7 million fair housing violations are committed solely against African Americans.”⁴⁸ The Department of Housing and Urban Development (HUD) indicated that housing complaints related to race and disability were the most common complaints handled by the agency in 2008.⁴⁹ In addition to purposeful discrimination, minorities are often impacted by substandard and insufficient public housing. As of 2005, there were only 67.6 affordable units for every 100 extremely low-income households in the U.S. – down from 78.2% in 2003.⁵⁰ And, of those 67.6 affordable units, only 35.4 units were both available and adequate.⁵¹

The United States is also failing to adequately utilize and fund existing programs to help address the disparities that exist in housing. For instance, Section 8 vouchers often contain too many restrictions such that recipients are concentrated into particular buildings or neighborhoods.⁵² Moreover, the DOJ has failed to adequately investigate and bring action against those individuals who engage in racial discrimination in housing laws. In fact, there has been a dramatic decrease in pursuing such investigations and cases in recent years.⁵³

The United States’ failure to ensure equal access to adequate housing was noted by CERD when it stated its “deep concern that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions”⁵⁴ Lastly, the Human Rights Committee has also expressed concern “with reports that some 50% of homeless people are African American although they constitute only 12% of the United States population.”⁵⁵

Criminal Justice

Article 5 of the Convention requires that States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee to everyone without distinction as to race, colour, or national or ethnic origin equality before law, notably in the enjoyment of the right to equal treatment before tribunals and other organs administering justice, in addition to other basic, enumerated rights.

In the area of equal justice and access to justice, racial minorities continue to suffer a higher incarceration rate than non-minorities. Widespread disparities on account of race continue to persist. At least three-fifths of all state court criminal defendants are minorities. Blacks in particular comprise 44 percent of state court criminal defendants, while only 13 percent of the general population.⁵⁶ Black men are 6.5 times as likely to be incarcerated as

White men. Approximately one in nine Black males between the ages of 25 and 29 are incarcerated, and one in three can expect to go to prison in their lifetime.⁵⁷

One particularly troubling aspect of the United States' failure to eliminate racial discrimination in the justice system is the application of the death penalty. The CERD noted in 2001 the disturbing correlation between race and imposition of the death penalty in the United States. The disproportionate numbers of racial minorities subject to the death penalty has not improved. Blacks comprise just 13 percent of the population, but were 40 percent of the individuals executed in 2006, and 42 percent of the inmates on death row in 2005.⁵⁸ Illinois imposed a moratorium on the death penalty, and other states have considered such measures, but the majority of states, as well as the federal government, continue to wield the power to execute the convicted. The American Bar Association and other organizations, have urged a moratorium.⁵⁹ The Human Rights Committee, in its 2006 reports, "remain[ed] concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party."⁶⁰

The CERD concluding observations recently "reiterate[d] concern regarding the persistent racial disparities in the criminal justice system of the [United States], including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African American persons, receive at various stages of criminal proceedings (art. 5(a))."⁶¹

III. Conclusion

The Lawyers' Committee commends the subcommittee for holding this historic hearing. For years, we have supported a more comprehensive approach toward combating discrimination and racial disparities in the United States and have encouraged adherence to our treaty obligations under CERD and ICCPR. We hope that this hearing is one of many steps by this Congress to address the failures of the U.S. system to adequately address the racial disparities in this country. The Lawyers' Committee looks forward to working with the subcommittee to achieve these goals and ultimately ensure full compliance with U.S. treaty obligations.

ENDNOTES

- ¹ International Covenant on Civil and Political Rights art. 2.1, *available at* <http://www2.ohchr.org/english/law/ccpr.htm>.
- ² *Id.* at art. 26.
- ³ International Convention on the Elimination of All Forms of Racial Discrimination art. 2.1, *available at* <http://www2.ohchr.org/english/law/cerd.htm>
- ⁴ *Id.*
- ⁵ *Id.* at art. 5.
- ⁶ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination –United States of America*, CERD/C/USA/CO/6, paragraph 13.
- ⁷ Exec. Order No. 13, 107, 63 Fed. Reg. 68, 991 (1998), 38 I.L.M. 493 (1999)
- ⁸ Joseph Rich, Mark Posner, and Robert Kengle, *The Voting Section, in THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS* 38 (W. Taylor et al. eds., 2007)
- ⁹ *Id.* at 41.
- ¹⁰ *Id.* at 37.
- ¹¹ *Id.* at 37; *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Common Cause v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). A Georgia state trial court also invalidated the law on state constitutional grounds.
- ¹² *Northwest Austin Municipal District No. 1 v. Holder*, 557 U.S. ____ (2009)
- ¹³ Lawyers' Committee for Civil Rights Under Law, The Sentencing Project, and American Civil Liberties Union, *Request for a Thematic Hearing on the Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices in the Americas*, at 119 (September 9, 2009), *available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/Request-for-a-Thematic-Hearing-on-the-Discriminatory-Effects-of-Felony-Disenfranchisement-Laws-Policies-and-Practices-in-the-Americas_090809.pdf.
- ¹⁴ Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, AJS VOL. 109, NO. 3, 559, 560 (Nov. 2003).
- ¹⁵ The Sentencing Project and the International Human Rights Law Clinic, *Barriers to Democracy*, *supra* note 13, at 1.
- ¹⁶ *Id.*
- ¹⁷ Angela Behrens, *Chapter 2, The Racial Origins of Felon Disenfranchisement*, at 67 in J. MANZA & C. UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).
- ¹⁸ *Id.* at 92.
- ¹⁹ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 35, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006)
- ²⁰ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 27, CERD/C/USA/CO/6 (May 8, 2008).
- ²¹ Roslyn Arlin Michelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS C. R. 1062 (2003).
- ²² George Farkas, *Racial Disparities and Discrimination in Education: What Do We Know, How Do We Know It, and What Do We Need to Know?*, 105 TCHRS C. R. 1128, 1135 (2003).
- ²³ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 17.
- ²⁴ *Id.*
- ²⁵ Human Rights Committee, *supra* note 19, at ¶ 23.
- ²⁶ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 34.
- ²⁷ Human Rights Committee, *supra* note 19, at ¶ 23.
- ²⁸ International Convention on the Elimination of all Forms of Racial Discrimination arts. 1, 4, 2.2, 5 (e)(i), and 5(e)(iv).
- ²⁹ 1995 Human Rights Committee Observations, ¶ 295.

³⁰ Bureau of Labor Statistics, *Seasonally Adjusted Data*, available at <http://www.bls.gov/web/epseea4.pdf>.

³¹ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, at 13 (Sept. 2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>.

³² Periodic Report of the United States of America Submitted under Article IX of the International Convention on the Elimination of all Forms of Racial Discrimination to the Committee on the Elimination of Racial Discrimination, ¶ 221, U.N. Doc. CERD/C/USA/6 (May 1, 2007) (discussing poverty rates in 2005).

³³ *Id.* at ¶ 222.

³⁴ Disparate impact cases are those that seek broad systemic reform of employment selection practices that adversely affect the employment opportunities for a minority group, such as Blacks or women. See Richard S. Ugelow, *Employment Litigation Section*, in *THE EROSION OF RIGHTS – DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS WITH THE ASSISTANCE OF THE CENTER FOR AMERICAN PROGRESS* 26, 26 (W. Taylor et al. eds., 2007), <http://www.americanprogress.org>.

³⁵ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 28.

³⁶ See, e.g., Cal. Const., Art. I § 31(a); Washington State Civil Rights Initiative; Michigan Civil Rights Initiative.

³⁷ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 15.

³⁸ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 35.

³⁹ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 10.

⁴⁰ U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools For Achieving Environmental Justice*, at 9 (Oct. 2003), <http://www.law.umaryland.edu/Marshall/usccr/documents/cr2003X100.pdf>.

⁴¹ Government Accounting Office, Attention to Environmental Justice When Developing Clean Air Rules (July 2005), <http://www.gao.gov/new.items/d05289.pdf>.

⁴² *Id.* at 3-5.

⁴³ *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169 (9th Cir. 2009).

⁴⁴ Initial Report of the United States of America Submitted under Article IX of the International Convention on the Elimination of all Forms of Racial Discrimination to the Committee on the Elimination of Racial Discrimination, at 19, U.N. doc. CERD/C/351/Add.1 (Sept. 21, 2000)

⁴⁵ Periodic Report of the United States of America Submitted under Article IX of the International Convention on the Elimination of all Forms of Racial Discrimination to the Committee on the Elimination of Racial Discrimination, at 39-40, U.N. Doc. CERD/C/USA/6 (May 1, 2007).

⁴⁶ *Id.* at 87.

⁴⁷ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 16.

⁴⁸ National Law Center on Homelessness & Poverty, *Housing Rights for All: Promoting and Defending Housing Rights in the United States*, at 58 (2005) (citing National Fair Housing Alliance, *2004 Fair Housing Trends Report*, at 2 (2004)). Note that this figure does not include discrimination in lending, insurance, racial and sexual harassment, planning and zoning.

⁴⁹ U.S. Dept of Housing and Urban Development, *FY 2008 Annual Report on Fair Housing*, at 3 (2009), available at <http://www.hud.gov/content/releases/fy2008annual-rpt.pdf>

⁵⁰ U.S. Dept of Housing and Urban Development, Office of Policy Development and Research, *Affordable Housing Needs 2005: Report to Congress*, at 37 (2007), available at <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>.

⁵¹ *Id.*

⁵² Susan J. Popkin & Mary K. Cunningham, *CHAC Section 8 Program: Barriers to Successful Leasing Up*, URBAN INSTITUTE, at 4-5 (1999) (citing Stephen D. Kennedy & Meryl Finkel, U.S. Dep't of Hous. & Urban Dev., *Section 8 Rental Voucher and Rental Certificate Utilization Study: Final Report* (1994)). See also Manny Fernandez, *Bias is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007 (chronicling recent struggles for Section 8 recipients to find willing landlords in New York City).

⁵³ National Fair Housing Alliance (NFHA), *The Crisis of Housing Segregation: 2007 Fair Housing Trends Report*, at 3 (Apr. 30, 2007), www.nationalfairhousing.org.

⁵⁴ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 16.

⁵⁵ Human Rights Committee, *supra* note 19, at ¶ 22.

⁵⁶ Lawyers' Committee for Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity*, REPORT OF THE JUDICIAL

INDEPENDENCE AND ACCESS TO THE COURTS PROJECT, at 7 (June 2005).

⁵⁷ William J. Sabol et al., *Prison and Jail Inmates at Midyear 2006*, BUREAU OF JUSTICE STATISTICS, at 9 (June 2007); Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, BUREAU OF JUSTICE STATISTICS, at 8 (2003).

⁵⁸ Bureau of Justice Statistics, *Capital Punishment Statistics*, <http://www.ojp.usdoj.gov/bjs/cp.htm>.

⁵⁹ *See, e.g.*, American Bar Association Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/>.

⁶⁰ Human Rights Committee, *supra* note 19, at ¶ 29.

⁶¹ Committee on the Elimination of Racial Discrimination, *supra* note 20, at ¶ 20.

United States Senate

WASHINGTON, DC 20510

October 15, 2009

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hillary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We respectfully request the administration's input on what steps may be taken, including by Congress, to respond to the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and *Medellin v. Texas*, 552 U.S. 491 (2008), and what additional measures may be taken to ensure that state and local officials are aware of the United States' obligations under the Vienna Convention on Consular Relations.

In 1969, the United States ratified the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR grants individual foreign nationals a right of access to his or her consulate, and ensures that consular officials can visit their nationals and arrange for their legal representation. The receiving state bears the burden of facilitating such access by informing "the person concerned without delay of his rights [under Article 36]." United States citizens rely on the protections of the VCCR every day, and the U.S. Government frequently demands that other countries comply with the VCCR to ensure our citizens receive fair treatment when detained abroad.

In 2004, the International Court of Justice (ICJ) determined that the United States had violated Article 36(1)(b) of the VCCR by failing to inform 51 foreign nationals of their VCCR rights, and by failing to notify consular authorities of the detention of 49 foreign nationals. The United States had voluntarily consented to the ICJ's jurisdiction to hear such complaints when it ratified in 1969 an Optional Protocol Concerning the Compulsory Settlement of Disputes, which accompanies the VCCR.

On February 28, 2005, President Bush, in recognition that the United States was required to comply with the ICJ's decision and that doing so would continue to preserve these rights for American citizens abroad, issued a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principles of comity." The Supreme Court, however, in *Medellin v. Texas* held that the Optional Protocol is not a self-executing treaty and that the president did not have the authority unilaterally to enforce the decision of the ICJ. Chief Justice Roberts, writing for the Court, noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." Nevertheless, the Court held that the *Avena* judgment did not have automatic domestic legal effect and that, to give it effect, congressional action is required. We believe that the United States should

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fulfill its international treaty obligations. As former Bush Administration State Department Legal Adviser John Bellinger emphasized in a recent op-ed published in *The New York Times* (attached), it is critical to the rights of U.S. citizens abroad that all nations fully comply with the VCCR.

We would appreciate receiving your recommendations about what steps may be taken, including by Congress, to address the *Avena* judgment and the subsequent Supreme Court decision in *Medellin v. Texas*. We would also appreciate any recommendations you may propose for additional efforts to ensure that state and local officials are aware of our responsibilities under the VCCR.

Thank you for your attention to this important matter.

Sincerely,



PATRICK J. LEAHY
United States Senator



JOHN F. KERRY
United States Senator



RUSSELL D. FEINGOLD
United States Senator



BENJAMIN L. CARDIN
United States Senator



AL FRANKEN
United States Senator

The New York Times
July 18, 2009
OP-ED CONTRIBUTOR
Lawlessness North of the Border

By JOHN B. BELLINGER III

PRESIDENT OBAMA has rightly emphasized America's commitment to complying with international law. It is surprising, then, that he has so far taken no steps to comply with decisions of the International Court of Justice requiring the United States to review the cases of 51 Mexicans convicted of murder in state courts who had been denied access to Mexican consular officials, in violation of American treaty obligations.

In contrast to its mishandling of detainees, the Bush administration worked conscientiously in its second term to comply with these rulings, even taking the step of ordering the states to revisit the Mexican cases, a move the Supreme Court invalidated last year. The Obama administration should support federal legislation that would enable the president to ensure that the United States lives up to its international obligations.

The international court's decisions arise from the arrest, conviction and death sentences of more than 50 Mexicans. As a party to the 1963 Vienna Convention on Consular Relations, the United States is required to inform foreigners arrested here of their right to have a consular official from their country notified of their arrest.

Unfortunately, it has proven all but impossible to guarantee that state law enforcement officials observe this obligation in all cases, and nearly all of the Mexicans at issue were never told of their Vienna Convention rights.

In 2003, Mexico filed suit against the United States in The Hague, demanding that the Mexicans' convictions be reviewed to determine whether the absence of consular notice had prejudiced the defendants' ability to hire qualified counsel. The international court sided with Mexico, ruling that the United States had violated the Vienna Convention, and ordered us to reconsider all of the convictions and death sentences.

This decision presented a serious legal and diplomatic challenge for President George W. Bush early in his second term. But Texas strongly opposed acquiescing to an international court, especially in the prominent case of José Medellín, who had been convicted of the rape and murder of two teenage girls.

Secretary of State Condoleezza Rice argued, however, that the United States was legally obligated by the United Nations Charter to follow the international court's decisions, and she emphasized the importance of complying to ensure reciprocal Vienna Convention protections for Americans arrested overseas. (The United States, for example, took Iran to the international court for violating the Vienna Convention by denying American hostages consular access during the 1979 embassy takeover.) President Bush ultimately issued an order in February 2005 directing state courts to follow the international court's decision.

But Texas challenged the president's order and, in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the president lacked inherent constitutional authority to supersede state criminal law rules limiting appeals and that Congress had never enacted legislation authorizing him to do so.

President Bush's advisers concluded that, in an election year, Congress could not be persuaded to pass legislation extending additional rights to convicted murderers. So instead Secretary Rice and Attorney General Michael Mukasey wrote to Gov. Rick Perry of Texas reminding him of the United States' treaty obligations. Although Governor Perry agreed to support limited review in certain cases, Texas nevertheless proceeded with the execution of José Medellín.

In the meantime, after the Medellín decision, Mexico sought a new ruling from the International Court of Justice that the United States had misinterpreted the court's earlier judgment. In January — in a case I argued — the international court concluded that although the United States clearly accepted its obligation to comply with the decision, our nation had violated international law by allowing Mr. Medellín to be executed. The court reaffirmed that the remaining cases must be reviewed.

President Obama now faces the same challenges as Mr. Bush in 2005: an international obligation to review the cases of those Mexicans remaining on death rows across the country; state governments that are politically unwilling or legally unable to provide this review; and a Congress that often fails to appreciate that compliance with treaty obligations is in our national interest, not an infringement of our sovereignty.

The Obama administration's best option would be to seek narrowly tailored legislation that would authorize the president to order review of these cases and override, if necessary, any state criminal laws limiting further appeals, in order to comply with the United Nations Charter.

From closing Guantánamo to engaging with the International Criminal Court to seeking Senate approval of the Law of the Sea Convention, President Obama is confronting the recurring tension between our international interests and domestic politics. But reviewing the Mexican cases as the international court demands is not insincere global theater. On the contrary, complying with the Vienna Convention is legally required and smart foreign policy. It protects Americans abroad and confirms this country's commitment to international law.

John B. Bellinger III, a lawyer, was the legal adviser to the State Department from April 2005 to January 2009.

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Subcommittee Hearing On
“The Law Of The Land: U.S. Implementation Of Human Rights Treaties”
December 16, 2009**

I scheduled this hearing for the Subcommittee on Human Rights and the Law to consider U.S. implementation of human rights treaty obligations.

President Obama and Secretary Clinton have begun to restore the image of America around the world, and through their work and that of others, we are beginning to reassume our historic role as a beacon to the world on human rights issues. Just last week, a measure of the world’s renewed belief in that role was evident as our President was awarded the Nobel Peace Prize. On that occasion he spoke of “our highest aspirations—that for all the cruelty and hardship of our world, we are not mere prisoners of fate.” He spoke to the nature of the peace that we seek, “a just peace based on the inherent rights and dignity of every individual.”

I applaud the Obama administration’s progress in taking steps to fulfill our obligations under the Geneva Conventions and the United Nations Convention Against Torture. I hope today to encourage the Obama administration to fully implement the human rights treaties we have ratified and to consider signing treaties that the previous administration blocked. Under the Supremacy Clause of our Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” Furthermore, for more than 100 years, we have upheld the Supreme Court’s decision in 1900 of *The Paquete Habana*, which stated that “international law is part of our law.”

Just last year, in *Medellin v. Texas*, the Supreme Court introduced additional hurdles to the implementation of international treaties by the United States and hollowed America’s commitment to its treaty obligations. That case involved a Mexican national who was denied the right to access his consulate after arrest in the United States. Although the International Court of Justice ruled that the failure to honor consular rights violated the United States’ obligations under the Vienna Convention on Consular Relations, the Supreme Court held that “while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”

In order to protect the rights of Americans abroad, we must uphold our treaty obligations here at home. I joined four other Senators in writing to the administration to request its views on the most effective way to implement our treaty obligations under the Vienna Convention. This is an important matter and we eagerly await a timely response.

I would hope that our courts would resolve any ambiguities in existing implementing statutes in favor of an interpretation that is in compliance with international law, and that they would not undermine the object and purpose of the underlying treaty. We have enacted implementing

legislation for several treaties, including the Convention Against Torture, the Genocide Convention, and the 1951 Refugee Convention and its 1967 Protocol. I would hope those would not be undercut by judicial interpretation.

The courts' interpretation of the 1980 Refugee Act, which was meant to implement our obligations under the 1951 Refugee Convention and its 1967 Protocol, underscores how Congress must remain vigilant to ensure that we fulfill our international commitments. The 1980 Refugee Act was exceptionally clear. Congress chose language that closely tracked that of the Convention. The legislative history stated that our purpose was to "to bring United States refugee law into conformance" with our obligations under international law. Yet the Board of Immigration Appeals and reviewing courts have too often interpreted provisions of the 1980 Refugee Act in ways that are inconsistent with international law. I am hopeful now that the Obama administration is taking corrective action. I stand ready to support congressional action as needed to bring us into compliance with our treaty obligations on human rights.

I hope that this administration will also consider signing long overdue treaties. For example, the Convention on the Rights of the Child entered into force in 1990, and has been ratified by every country in the world except the United States and Somalia. Our failure to ratify the Convention on the Elimination of All Forms of Discrimination Against Women, which entered into force in 1981, places us in the company of Iran, Somalia, and Sudan. Finally, I am encouraged that the administration has undertaken a comprehensive review of its policy on landmines. This review should identify any remaining obstacles to joining the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, so the administration can develop a plan to overcome them as soon as possible and send the Convention to the Senate for its advice and consent.

I look forward to working with members of this subcommittee and other Senators to ensure that the United States lives up to its human rights obligations.

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December 14, 2009

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

As a part of the international human rights law academic community, I commend you for considering the issues regarding U.S. Implementation of Human Rights Treaties at the subcommittee hearing. This review is crucial to U.S.'s advancement of human rights and is extremely overdue. As outlined in the attached chart, the U.S. has delayed executive signature and submission to the Senate of various human rights treaties.

In addition to reviewing the important human rights treaties that the United States has already signed, I urge the Subcommittee to consider assessment of the U.N. Convention Concerning the Protection of All Migrant Workers and Members of Their Families (ICMW),¹ which has remained largely ignored. I believe that the Senate should urge the Administration to sign this treaty, thereby demonstrating to the world the firm commitment of the United States to recognize the human rights of all humans, including migrant workers and their families.

After a decade of deep U.S. involvement in the negotiations of the Migrant Worker Convention, the U.S. has never signed the treaty. While the ICMW superficially appears politically controversial due to its content as granting human rights to immigrants, many of the provisions already underscore U.S. law,² in addition to other international standards already ratified in other human rights conventions.³

¹ G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* 1 July 2003, available at <http://www2.ohchr.org/english/law/cmw.htm>.

² Many of the basic provisions already overlap U.S. domestic law, such as terminology, the requirement for migrants to comply with U.S. law, and no right to enter or legalize. *See id*

³ Most migrant worker rights simply restate international standards already ratified in the Convention on the

As I outline in my forthcoming article, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migrant Paradigm*,⁴ the advantages of signing the treaty greatly outweigh any disadvantages. Signature – and, ultimately, ratification – would advance many U.S. foreign policy goals, such as improving relations with Mexico, increase world leadership vis-à-vis the global South, and also enable the U.S. to lead in shaping the interpretation of the ICMW. Engaging with the ICMW also provides a valuable opportunity for U.S. officials to identify foreign best practices on labor migration. Lastly, such consideration would benefit civil society greatly by creating a monitoring process and thus an avenue for frank and detailed discussion of the rights of migrants

Many countries of employment are reassessing the Migrant Worker Convention. As a country built by immigrants, the United States should do no less.

Sincerely,

Beth Lyon, Associate Professor of Law
Villanova University School of Law

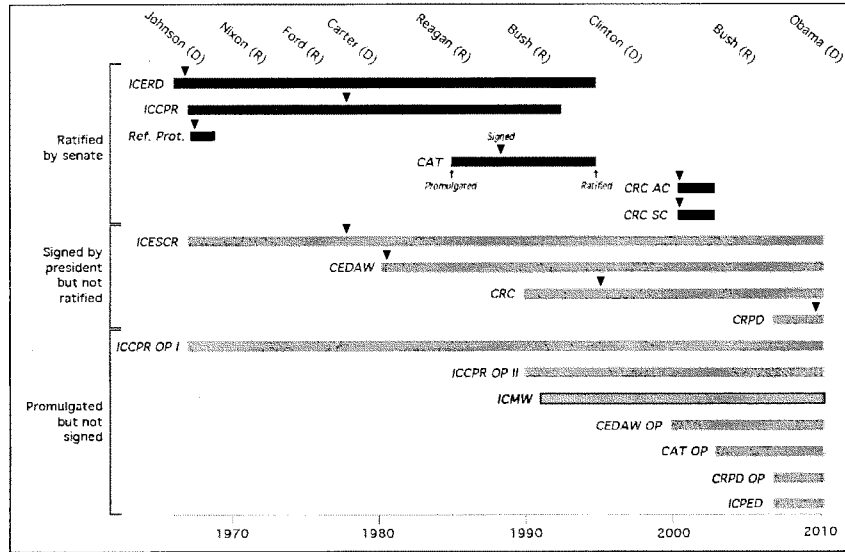
cc: The Honorable Tom Coburn
Ranking Republican Member

299 NORTH SPRING MILL ROAD VILLANOVA, PENNSYLVANIA 19085-1682

Elimination of Racial Discrimination (CERD) or the Convention Against Torture (CAT).

⁴ Forthcoming in the NYU JILP Vol. 42, 2009.

Delayed Executive Signature and Submission to Senate of Human Rights Treaties



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TESTIMONY OF
ELISA MASSIMINO
PRESIDENT AND CEO
HUMAN RIGHTS FIRST

HEARING ON
THE LAW OF THE LAND:
U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
DECEMBER 16, 2009

Introduction

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee, thank you for convening this important hearing. I appreciate the opportunity to be here today to share our perspective on the human rights implementation agenda. We are profoundly grateful to you, Mr. Chairman, for your leadership on so many key human rights issues and, in particular, for the central role you played in creating this Subcommittee on Human Rights and the Law. We believe the Subcommittee's work signals an important new attitude towards human rights enforcement in the United States and will help educate Americans about the rights to which they are entitled and ensure that the United States Government views its human rights treaty commitments as a regular part of domestic law. This is what our Constitution requires, and so it is particularly fitting that the Judiciary Committee is able to exercise jurisdiction over these issues. In the many years since the United States began ratifying human rights treaties, this is the first hearing explicitly focused on implementation and enforcement of those obligations. We hope it is the first of many.

I also want to welcome the attention of the government witnesses to these issues as well. Congress could have no better partners in this implementation effort than Assistant Attorney General Tom Perez and Assistant Secretary Mike Posner. Each has a deep understanding of the importance of these issues and an extraordinary commitment to making human rights a reality. We look forward to continuing to work together with them and with you Mr. Chairman, to advance this agenda.

Eleanor Roosevelt, the mother of the international human rights movement, famously said: "Where do universal human rights begin? In small places, close to home. So close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works." The human rights treaties to which the United States is a party—on civil and political rights, torture, and racial discrimination—are intended to protect people "close to home" against government abuses of their rights. They are, under our Constitution, part of "the supreme law of the land." But most Americans have never heard of them, nor have the executive agencies that have—or ought to have—protection of these rights as part of their mandate. Historically, the United States Government has confined the examination of human rights issues to the State Department, where they have been treated as a matter of foreign policy. For many years, Congress largely took the same approach, limiting jurisdiction over these issues—as human rights issues—to the committees which oversee the State Department and foreign relations.

That approach misses Eleanor Roosevelt's point. Human Rights First has long argued that all three branches of the United States Government must understand human rights laws as part of our domestic law, and that Congress and the Executive Branch should work together to bring these obligations into the mainstream of the domestic agencies with primary jurisdiction over their subject matter. President Clinton broke new ground in this direction with a 1998 Executive Order 13107 on the Implementation of Human

Rights Treaties, issued on the 50th anniversary of the Universal Declaration of Human Rights. The Executive Order created an inter-agency working group that brought together the domestic agencies charged with implementing human rights treaty obligations and charged them with ensuring that executive branch policies comported with those obligations. The working group continued under President Bush, coordinating efforts to report on U.S. compliance with various treaty obligations.

This Subcommittee is an important congressional piece of the effort to bring human rights home. The Subcommittee has brought much-needed attention to the legal framework on key issues such as human trafficking, the use of child soldiers, corporate responsibility, the use of rape as a weapon of war, and accountability for genocide and crimes against humanity. In the tradition of human rights treaty ratification in the United States, which has had broad bipartisan support over many years, the Subcommittee has brought together Senators from both sides of the aisle to achieve concrete results in human rights enforcement. With strong bipartisan support, the Subcommittee successfully shepherded into law two important pieces of legislation—the Child Soldiers Accountability Act and the Genocide Accountability Act—that will enable the U.S. government to prosecute perpetrators of some of the most egregious human rights violations. And thanks to Senator Durbin’s leadership, this accountability agenda will now have an institutional home and funding to implement these enforcement responsibilities.

A Practical Implementation Agenda

Last week we celebrated the 61st anniversary of the Universal Declaration of Human Rights. Drafted under the leadership of Eleanor Roosevelt, the Declaration is the foundation document setting out the principles that the human rights treaties are intended to operationalize as the standards by which to judge governments. As a human rights organization based in the United States, and in recognition of the leadership role the United States plays on these issues internationally, we have focused particular attention on ensuring that the United States lives up to these obligations. Ensuring compliance with human rights treaty obligations will strengthen U.S. efforts to advance human rights abroad. As Secretary Clinton said in her human rights speech at Georgetown on Monday, we must lead by example. There is no substitute for U.S. global leadership on human rights. Without it, the human rights agenda falters, repressive governments operate with greater impunity, and the very fabric of the norms enshrined in the Universal Declaration frays. When the United States violates these norms—or sets them aside for expediency’s sake—the global consensus erodes. And, as President Obama said in Oslo last week, “we honor those ideals by upholding them not when it’s easy, but when it is hard.”

My objective today is not to measure the distance between those ideals and our current reality but rather to offer a framework for ensuring greater fidelity to them in the future. Our 30-year history of working on these issues tells us that U.S. adherence to these standards would be significantly enhanced by three things: first, an active and transparent structure within the Administration to evaluate implementation of these obligations and advance changes designed to improve compliance; second, robust congressional

oversight of that process; and third, a strategy, based on interagency cooperation, for deploying U.S. experience and expertise to advance solutions to shared human rights problems abroad. In addition, there is an important education agenda to correct misinformation and misunderstanding among the various stakeholders—the different administrative agencies, state and local governments, civil society organizations, and the media—about the status of international human rights treaties as domestic law and the obligation of the United States to implement and abide by them.

I. Executive Branch Structures to Enhance Compliance

While the previous two administrations have made important strides in greater interagency coordination around human rights treaties, these efforts have largely focused on information gathering and reporting to UN treaty bodies and answering international inquiries about U.S. policies and practices. This work is clearly important; we need to demonstrate responsiveness to the bodies charged with overseeing state compliance with international treaty obligations, both to reinforce the importance of these mechanisms themselves and the norms behind them, and because we must have an honest assessment of our progress towards implementation of human rights obligations in order to move forward.

But an agenda of real change requires much more than reporting on past compliance. In order to operationalize the constitutional vision that these treaty obligations are truly the law of the land—and to make progress towards full implementation—we need a structure in place to educate, monitor and advance progressive realization of these rights.

In particular, we recommend that the administration develop interagency structures and mechanisms designed to:

- Ensure that legislation proposed by the administration and legislation on which the administration takes a position is vetted for conformity with human rights treaty obligations.
- Educate state and local government officials and the broader public about their rights and responsibilities under human rights treaties.
- Develop and execute a plan to monitor law, policy, and practice at the state level to assess conformity with human rights obligations.
- Conduct an annual review of all reservations, understandings, and declarations associated with U.S. ratification of human rights treaties with an eye towards their eventual elimination.
- Ensure that the domestic agencies with jurisdiction over human rights issues have a point person who understands the content and legal standing of the treaty requirements and can engage meaningfully in an interagency process to achieve these objectives.

One early test of the efficacy of such a structure will be the Universal Periodic Review (UPR) of the United States conducted next year in the UN Human Rights Council. Because the UPR considers the records of all states and encourages consultation between the government and civil society groups as a part of the process, the UPR is one of the few activities of the Human Rights Council that has the potential to advance protections for human rights in a practical and meaningful way. In practice, the record has so far been mixed, with some states taking the process more seriously than others.

The UPR of the United States provides an excellent opportunity to demonstrate the commitment of the United States to uphold its international treaty obligations and to advance a better understanding of those obligations by domestic government agencies and the broader public. It also will enable the United States to set the bar high for other states in relation to how they conduct themselves in their own reviews. In order to accomplish this, the process should be transparent and inclusive, including consultations open to civil society groups in regions throughout the country. Although the Department of State is taking the lead, it should bring other government stakeholders—including federal, state, and local agencies as well as Members of Congress—into the consultation process. State and local human rights commissions and similar bodies across the country could be effective partners in this effort, which should include consultations in the UPR preparation as well as the follow-up and implementation of recommendations coming out of the process. Most importantly, the consultations must be more than just talk and should result in concrete actions to demonstrate that the United States—as promised by Secretary Clinton in her speech earlier this week—is holding itself accountable to universal standards.

II. Robust Congressional Involvement

While the treaty ratification process has traditionally been the province of the Senate Foreign Relations Committee, this subcommittee can add an important perspective in that process. Indeed, the manner in which human rights treaties have been ratified in the past has undermined the concept that these rights are intended to apply—and be enforced—here at home. When the Executive Branch asks the Senate ratify a human rights treaty, it sends along a companion package of reservations, understandings, and declarations designed to ensure that the treaty effects virtually no change in domestic law and practice. Lawyers at the State Department, with some help from the Department of Justice, go through the treaty's provisions with a fine tooth comb, comparing its requirements to state and federal law and practice. If there is any conceivable contradiction, the United States exempts itself from compliance. For provisions where there's no outright contradiction, the United States complies only to the extent that the treaty is congruent with, but not broader than, existing U.S. law. Then, as added insurance, the United States declares that the treaty is "non-self-executing," to avoid having the treaty create private rights enforceable in U.S. courts.¹

¹ In the rare instance when a treaty absolutely requires changing domestic law, the United States has found ways to limit and pervert that implementation. In the case of the Convention against Torture (CAT), for example, signatories are required to explicitly outlaw torture. But the law Congress eventually passed to

There are other models of treaty ratification and implementation that seek to weave these obligations into the fabric of domestic law and practice, through the political process and by public education. When Canada considers a treaty, for example, it engages in a lengthy process of consultation; provinces are invited to identify possible reservations to the treaty where it conflicts with local law. The process is used both to get buy-in from the provinces and to educate local officials about the treaty's requirements. Once ratified, jurisdiction over the treaty's implementation and monitoring shifts to Canada's department of justice, which deals with individual complaints about violations and vets proposed legislation for conformity with the treaty's requirements. Australia, meanwhile, reaches out to its states through its Human Rights Working Group of the Standing Committee of Attorneys General, and the Parliamentary Standing Joint Committee on Treaties in the federal parliament holds public hearings.

Today's hearing is an important beginning to raise awareness about the content and legal status of our human rights treaty requirements. We urge this committee to play an active role going forward. This Subcommittee should consider holding regular oversight hearings on the interagency agenda we set forth in this testimony. In particular, we urge this subcommittee and other relevant committees of the Congress to:

- Conduct oversight hearings in which the administration can report back on its efforts to engage a broad range of stakeholders in the UPR process.
- Participate in the U.S. UPR consultations and on the delegation to the Human Rights Commission.
- Hold a hearing on the recommendations coming out of the UPR process.
- Oversee the administration's progress in implementing mechanisms for future compliance outlined above.
- Meet with parliamentarians from other countries—in particular those that have a federalism structure—to share their experiences and best practices for advancing human rights implementation.

These efforts should not be limited to this Subcommittee. A robust implementation effort in the Congress will include a wide range of actors and committees with jurisdiction over the subject matter of the human rights treaties to which the United States is a party. For

prohibit torture applies only to conduct outside the United States. Ironically, the previous administration relied on this extraterritorial-only provision to argue that the abuses at Abu Ghraib, because they took place in U.S.-occupied territory in Iraq, were exempt from prosecution under the federal anti-torture statute. Similarly, the declaration attached to the CAT, limiting the scope of the prohibition on cruel, inhuman and degrading treatment to conduct that violates the ban on cruel and unusual punishment under our Constitution was perversely interpreted by the previous administration to assert that the U.S. was not bound by the ban when it acted against non-U.S. nationals abroad.

example, the Committee on Armed Services should evaluate U.S. compliance with the protocol on children in armed conflict; the Subcommittee on Immigration should conduct hearings into U.S. compliance with the requirements of the refugee convention's protocol, particularly in the areas of detention and access to asylum.

III. Strengthen U.S. Leadership and Effectiveness to Advance Human Rights Abroad

Upholding international treaty obligations at home also strengthens U.S. efforts to advance universal human rights protections globally, by making it clear that the United States holds itself to the same standards to which it holds other governments. The failure to do this in the past has weakened U.S. influence in several foreign countries, in particular those countries like China, Russia, and Egypt that assert a strong security imperative to justify the curtailment of rights. Failure to respect human rights in these countries has not contributed to the resolution of conflicts or strengthened national security, but it has created human suffering, sometimes on a massive scale. We need to reverse this trend of diminished U.S. ability to combat violations of human rights abroad and one way to do that is to be seen to implement our international obligations at home.

An active and transparent structure within the Administration to evaluate implementation of international human rights treaty obligations – along with robust congressional oversight of that process – will set a positive precedent for other countries. The United States could advocate such an arrangement with other states to encourage greater efforts to bring their policies and practices into compliance with international treaty obligations. Civil society participation in such a U.S. structure could also serve as a model of the type of interaction between government and civil society that the United States has long advocated in other countries.

Interagency cooperation to uphold international obligations at home has an additional impact on U.S. effectiveness to promote human rights abroad. The United States has extensive experience and expertise in many areas of human rights protection. Interagency cooperation on implementing international obligations at home can provide a framework to deploy fully that expertise abroad, both through bilateral and multilateral relationships.

An example of this is bias motivated violence, a problem shared by many countries throughout the globe, including the United States.

Since 2002, Human Rights First has sought to reverse the tide of racist, antisemitic, xenophobic, anti-Muslim, homophobic, and other violent bias crimes internationally, in particular in Europe and the former Soviet Union. During this period, the United States has led efforts to confront hate violence through its foreign policy and through engagement in multilateral institutions such as the Organization for Security and Cooperation in Europe (OSCE).

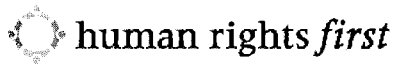
Now, following passage of the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, the United States has a renewed authority to encourage other nations to

toughen their own laws and policies in response to violent hate crime. In addition, the United States can offer technical and other forms of assistance to promote training and sharing best practices in the areas of hate crime data collection, investigation and prosecution of hate crime incidents, and strengthening cooperation between local law enforcement, targeted communities and civil society leaders.

We recommend that the Departments of State and Justice, as part of their joint efforts to implement human rights treaty obligations at home, establish a mechanism to share abroad U.S. best practices and expertise on strategies to guarantee civil and political rights, including combating violent hate crime.

Conclusion

We welcome the Subcommittee's attention to these issues and pledge to work with you to ensure that respect for human rights is a conscious agenda in all branches of our government. Success will ensure not only a deeper understanding of the rights inherent in all people but presents an opportunity for the United States to view human rights as Eleanor Roosevelt did—close to home, and relevant to all Americans. Thank you.



APPENDIX TO THE TESTIMONY OF
ELISA MASSIMINO
PRESIDENT AND CEO
HUMAN RIGHTS FIRST

HEARING ON
THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS
TREATIES
BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
DECEMBER 16, 2009¹

I. Introduction.

In this appendix to the testimony by Human Rights First President and CEO, Elisa Massimino, before the Senate Judiciary Subcommittee on Human Rights and the Law at its December 16, 2009 hearing entitled “The Law of the Land: U.S. Implementation of Human Rights Treaties,” we wish to draw the Subcommittee’s attention to some of the ways in which current U.S. immigration laws and policies are inconsistent with this country’s obligations under the 1967 United Nations Protocol Relating to the Status of Refugees (the “Refugee Protocol”) and the International Covenant on Civil and Political Rights (ICCPR). We urge the United States Government to take the steps necessary – outlined below – toward bringing those laws and policies into compliance with U.S. international obligations. Many of these immediate reforms can be made in the run up to the 2010 Universal Periodic Review (UPR) of the United States at the UN Human Rights Council. The Council and the UN High Commissioner for Human Rights have in the last year paid particular attention to the issue of detention and other areas of treatment of migrants.

The UPR presents an excellent opportunity for the United States to demonstrate its commitment to upholding its treaty obligations with respect to refugees and asylum seekers. We urge that these issues be addressed in the context that the State Department has put forward for interagency and civil society consultation for the UPR. Assistant Secretary of State for Democracy, Human Rights, and Labor, Michael H. Posner indicated, in response to questioning from the Subcommittee on December 16, 2009, that the detention of asylum seekers would be considered as part of the UPR process and that immigration issues may comprise the subject matter of one of the regional civil society

¹ Appendix submitted December 22, 2009.

consultations. We recommend that the Subcommittee ensure that the detention and other issues mentioned below are so addressed, and that one or more of your Members consider participating in those consultations. In addition to and beyond the UPR, these issues are also matters for the Interagency Working Group on Human Rights Treaties and would benefit more generally from increased attention by this Subcommittee and others in the Congress, both to provide rigorous oversight of the Administration and to pass legislation addressing the areas that require statutory change.

The United States has a long tradition of providing refuge to those who have fled from political, religious and other forms of persecution. This country led efforts to create an international refugee protection regime in the wake of World War II.² Since that time, the United States has continued to play a leading role to ensure the protection of vulnerable refugees around the world, and is an active member of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR). U.S. asylum law derives directly from international law, principally from the 1951 United Nations Convention Relating to the Status of Refugees (the “Refugee Convention”) and the 1967 Refugee Protocol, which incorporated the key elements of the Refugee Convention by reference while eliminating the convention’s geographic and temporal limitations. The United States acceded to the Refugee Protocol in 1968, and in doing so bound itself to comply with the substantive provisions of the Refugee Convention. The United States incorporated those provisions into domestic law through the Refugee Act of 1980.³ As the Supreme Court has repeatedly noted, a primary purpose of Congress in passing the Refugee Act “was to bring the United States refugee law into conformance with the 1967 United Nations Protocol.”⁴ The ICCPR was adopted by the United Nations General Assembly in 1966. It entered into force 10 years later and was ratified by the United States on June 8, 1992.⁵ The core principles of the ICCPR are based on fundamental notions of individual rights and liberties – the rights to physical integrity, security, procedural fairness, the rights of the accused, and rights against non-discrimination. As a party to the ICCPR, the United States assumed the obligation to take administrative, judicial and legislative measures in order to protect the rights enshrined in the treaty.

Despite these strong commitments, the United States has fallen short on its obligations to refugees who seek asylum in this country and the responsibilities it assumed when ratifying the Refugee Protocol and ICCPR. Over the years, new laws, policies and practices have created hurdles so great that many genuine refugees have been prevented from receiving asylum protection. The specific flawed policies outlined in this annex represent three discrete categories of U.S. noncompliance with the Refugee Protocol and the ICCPR, though we emphasize this list is not an exhaustive one:

² See, e.g., Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva 14 August to 25 August 1950.

³ Pub.L. No. 96-212, 94 Stat. 102 (1980).

⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). See also *Neguisse v. Holder*, 129 S. Ct. 1159 (2009); *INS v. Stevic*, 467 U.S. 407, 416-24 (1984).

⁵ International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, vol 999 (1976), p. 171.

- Mandatory detention for “arriving” asylum seekers and a failure to provide for prompt and independent court review of the decision to detain asylum seekers as required under the ICCPR;
- An overly expansive approach to exclusion that has barred legitimate refugees from protection, including by mislabeling victims of violence as “supporters of terrorism” and peaceful pro-democracy groups as “terrorist organizations;” and
- An arbitrary filing deadline on asylum claims that has led this country to deny protection to genuine refugees.

These and other deficiencies have put the United States at odds with its commitments under the Refugee Protocol, the ICCPR and other human rights instruments. The United States can make significant strides toward bringing U.S. asylum laws and policies into compliance with international human rights law by addressing these and other problems. We describe below a series of short-term reforms that will not compromise legitimate U.S. goals related to border regulation, national security, or fraud prevention in the immigration or asylum system.

II. U.S. Detention of Asylum Seekers: Inconsistent with Article 9 of the ICCPR and Article 31 of the Refugee Convention and Protocol.

The U.S. immigration detention system is inconsistent with U.S. obligations under various conventions including the ICCPR and the Refugee Protocol. Under this system, asylum seekers and immigrants are detained in jails and immigration detention centers that are essentially jails. They are handcuffed, made to wear prison uniforms, guarded by officers who wear prison-guard uniforms, and only allowed to visit with their families through plexi-glass barriers. Many groups have submitted testimony detailing some of the ways in which the U.S. immigration detention system broadly does not meet international human rights standards. Given Human Rights First’s long history of partnering with pro bono attorneys to represent refugees in the U.S. asylum system, this appendix focuses specifically upon U.S. detention procedures relating to asylum seekers.

Under the “expedited removal” provisions of U.S. immigration law, the initial determination to detain an asylum seeker at a U.S. airport or border point is not based on an individualized assessment; rather it is a blanket “mandatory” determination based on whether a person possesses valid documents or expresses an intention to apply for asylum at a port of entry.⁶ After an Asylum Officer from U.S. Citizenship and Immigration Service (USCIS) makes a finding that the asylum seeker has a credible fear of persecution and a significant possibility of establishing eligibility for asylum, U.S. Immigration and Customs Enforcement (ICE), the detaining entity, has the discretion to release the asylum seeker on parole.⁷ If ICE denies parole, the decision cannot be

⁶ In the last six years, U.S. immigration authorities have detained asylum seekers who arrive on valid passports and visas.

⁷ 8 C.F.R. § 212.5.

appealed to a judge – even an Immigration Judge. While Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points.⁸

Refugees who have been held in U.S. immigration detention for prolonged periods of time, without the right to custody review by a court, even an Immigration Court, include:⁹

- A Baptist Chin woman from Burma who was detained in an El Paso, Texas immigration jail for over two years. ICE denied several parole requests even though she had proof of her identity and family in the U.S. – only paroling her after 25 months in detention. She was subsequently granted asylum in 2008.
- An Afghan teacher who was threatened by the Taliban spent 20 months in detention at three county jails in Illinois and Wisconsin. The teacher was denied release on parole by ICE despite having letters of support from U.S. government officials who knew him because he taught at an educational institution sponsored by U.S. and NATO forces in Afghanistan. After a U.S. federal court found him eligible for asylum, he was finally released from detention on an electronic monitoring bracelet until a final decision granting asylum was made by an Immigration Judge in early 2009.
- A Tibetan man, who was detained for more than a year and tortured by Chinese authorities after putting up posters in support of Tibetan independence, was detained for 11 months in a New Jersey immigration detention facility before being granted asylum by a U.S. Immigration Court.

The U.S. detention system for asylum seekers lacks the kinds of safeguards that prevent the detention from being arbitrary within the meaning of the ICCPR. The ICCPR, to which the United States is a party, provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”¹⁰ In 2009, the U.N. Working Group on Arbitrary Detention reminded States, “The legality of detention must be open for challenge before a court.”¹¹ In 2008, the Working Group reminded states of “the right to be brought *promptly* before a judicial or other authority after having been taken into custody” and that the judicial authority “shall decide *promptly* on the lawfulness of the measure and be competent to

⁸ These provisions are located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3.

⁹ These and several other examples of refugees who have been detained by the U.S. can be found in Human Rights First’s April 2009 report, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

¹⁰ See *supra* note 5 at Art. 9(4).

¹¹ Hum. Rts. Council, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21, (Feb. 16, 2009).

order the release of the person concerned, if appropriate.”¹² The U.N. Human Rights Committee, in examining the detention of a Cambodian asylum seeker in Australia, concluded that detention should be considered arbitrary “if it is not necessary in all the circumstances of the case.”¹³ After a 2007 mission to the United States, the U.N. Special Rapporteur on the Human Rights of Migrants concluded that the U.S. detention system lacks safeguards that prevent detention from being arbitrary within the meaning of the ICCPR and, among other things, recommended that the Departments of Homeland Security and Justice “revise regulations to make clear that asylum-seekers can request [their] custody determinations from Immigration Judges.”¹⁴

The practice of detaining asylum seekers without adequate due process protections is also inconsistent with this country’s responsibilities under the Refugee Protocol. Article 31 of the Refugee Convention (incorporated and made binding on the United States by the Refugee Protocol) exempts refugees from being punished because of their illegal entry or presence and also provides that states shall not restrict the movements of entering refugees more than is “necessary.”¹⁵ The UNHCR Executive Committee, of which the United States is a member, has “[r]ecommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review,” and also stressed that “detention should normally be avoided.”¹⁶ The 1999 UNHCR Guidelines on the Detention of Asylum Seekers state that “as a general principle, asylum-seekers should not be detained.” When a decision to detain is made, the UNHCR guidelines call for procedural safeguards including “automatic review before a judicial or administrative body independent of the detaining authorities.” In addition to this automatic independent review, the decision should be subject to subsequent “regular periodic reviews of the necessity for the continuance of detention.”¹⁷

DHS and ICE have recently announced plans to “overhaul” the immigration detention system, including a commitment to move away from a “penal” model of detention, to improve medical care for immigrant detainees, and to expand the use of alternatives to detention.¹⁸ ICE has also recently announced an overdue revision to the criteria and processes guiding their Field Offices on an asylum seeker’s eligibility for release on parole.¹⁹ Human Rights First welcomes the positive steps being made by the Administration; however, these efforts to date lack any commitment to institute the specific reforms necessary to ensure that this country’s use of immigration detention is not arbitrary under the ICCPR or impermissible under the Refugee Protocol. In order to

¹² Hum. Rts. Council, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4, (Jan. 10, 2008) (emphasis added).

¹³ U.N. Hum. Rts. Comm., *A. v. Australia*, ¶ 9.2, U.N. Doc. CCPR/C/59/D/560/1993, (Apr. 30, 1997).

¹⁴ U.N. Hum. Rts. Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America*, ¶ 123, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

¹⁵ Refugee Convention, 1989 U.N.T.S. 150, Art. 31 (1951).

¹⁶ UNCHR, Exec. Comm., *Detention of Refugees and Asylum-Seekers, Conclusion No. 44*, (Oct. 13, 1986).

¹⁷ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

¹⁸ ICE Factsheet, “2009 Immigration Detention Reform,” August 6, 2009, available at http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

¹⁹ ICE, “Revised Parole Policy for Arriving Aliens with Credible Fear Claims,” December 16, 2009.

bring this country's detention practices into compliance with the ICCPR and the Refugee Protocol, ICE's decisions to continue to detain arriving asylum seekers must be subject to prompt independent administrative or judicial review.

Recommended Reforms:²⁰

- **The Departments of Justice and Homeland Security** should revise current regulatory language to provide arriving asylum seekers with the chance to have their custody reviewed in a hearing before an Immigration Court, a safeguard afforded other immigrant detainees. In revising these provisions, the regulations should make clear that any bond requirements should be appropriate to the circumstances and means of the asylum seeker, and that the Immigration Courts can direct that an individual be released into an alternatives to detention program.
- **DHS** should issue regulations providing for the release of an asylum seeker who can establish identity, has ties to the community, satisfies the credible fear standard, and does not pose a danger to the community. These regulations, as set out by the recently revised ICE directive on “Parole of Asylum Seekers Found to have a Credible Fear of Persecution or Torture,” should require that *all* arriving asylum seekers be assessed for parole eligibility after passing through the credible fear process.
- **Congress** should enact legislation providing these asylum seekers with access to Immigration Court custody hearings. Two bills currently pending before the Senate – The Secure and Safe Detention and Asylum Act (S. 1594) and The Protect U.S. Citizens and Residents from Unlawful Detention Act (S. 1549) – include provisions that would provide arriving asylum seekers with much needed due process safeguards.
- **DHS** should expand secure alternatives to detention programs, such as release on recognizance, supervised release, or programs run by private, faith-based or other non-governmental groups for those asylum seekers who cannot be released on parole.
- **DHS** should continue its efforts to implement a truly non-penal detention system for those limited circumstances in which asylum seekers and immigrants are not eligible for release on parole or bond and cannot be enrolled into an alternative to detention program. Because the jail and jail-like conditions of the current immigration detention system exacerbate the arbitrariness of the detention, proper implementation of these reforms is crucial. “Non-penal” detention facilities should, amongst other reforms, allow detainees to wear their own clothes, provide

²⁰ Human Rights First's comprehensive recommendations on this issue are detailed in our recent report, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, *See supra* note 9; The Constitution Project, a bi-partisan think-tank, echoed these recommendations in its December 2009 publication, *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, available at <http://www.constitutionproject.org/manage/file/359.pdf>.

freedom of movement within the facility, ensure privacy, allow for “contact visitation” with family members, prohibit the shackling of detainees, and offer outdoor recreation space. These facilities should be in locations close to resources such as legal counsel, adequate medical and mental health services, and an immigration court.

- **Congress** should exercise rigorous oversight over DHS’s efforts to implement the detention reforms above.
- **Congress** should expand nationwide the Legal Orientation Program (LOP) for detained immigrants to provide basic information about their legal rights and the availability of relief, if any. LOP saves money and increases the efficiency of the immigration courts.
- **Congress** should establish statutory mandates for each of the areas where detention conditions must be improved, and require DHS to conduct a negotiated rulemaking before promulgating regulations implementing the mandates.

III. The Terrorism Bars: Overly Broad Definitions and Expansive Interpretations Denying Protection to Bona Fide Refugees.

U.S. immigration laws bar from the United States people who pose a danger to our communities or threaten our national security, even if they have a well-founded fear of persecution and otherwise qualify as refugees under INA §101(a)(42). These bars also penalize people who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law. These important and legitimate goals are consistent with the United States’ commitment under the Refugee Convention and its Protocol, which exclude from refugee protection perpetrators of heinous acts and serious crimes, and provide that refugees who threaten the safety of the community in their host countries can be removed. All of the exclusion clauses in the Refugee Convention involve crimes – very grave crimes – that make a person who has committed them deemed “unworthy of international protection.”²¹ However, given that the exclusion clauses are exceptions to human rights protections, they should be interpreted restrictively, especially because exclusion can result in returning a refugee to a place s/he faces persecution, torture, or death.²²

Congress, however, has written several of these provisions so broadly, and the Departments of Homeland Security and Justice have interpreted and applied these provisions so expansively, that in recent years thousands of refugees – who do not pose a danger to the United States and have not committed any acts violence that are inherently

²¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 147-148 (Geneva, 1992).

²² See Gilbert, *Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law* 427-429, 445 (Feller et al., eds., 2003); UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶ 4.

wrongful – have had their applications for asylum, permanent residence, and family reunification denied or delayed. Thousands of refugees who were victimized by armed groups, including by groups the U.S. has officially designated as terrorist organizations, have been treated as “supporters of terrorism.”²³ Any refugee who ever fought against the military forces of an established government is being deemed a “terrorist,” even when these refugees were actually fighting alongside U.S. forces. Refugees who voluntarily helped any group that used armed force are suffering the same fate – regardless of who or what the group’s targets were and regardless of whether the assistance the refugee provided had any logical connection to violence. Examples of refugees who have been characterized as “terrorists” under these legal definitions include:

- A refugee from Burundi, who was detained for 20 months in a succession of county jails because ICE and the Immigration Judge, who would otherwise have granted him asylum, took the position that he had provided “material support” to a rebel group because armed rebels robbed him of four dollars and his lunch. This man was only released after the Board of Immigration Appeals (BIA) ruled in his favor.
- A young girl who was kidnapped at age 12 by a rebel group in the Democratic Republic of the Congo, used as a child soldier, and later threatened for advocating against the use of children in armed conflict, who has been unable to receive a grant of asylum, as her application has been on hold for over a year because she was forced to take part in armed conflict as a child.

The provisions of the Refugee Convention relevant to criminal and terrorist activities are contained in Article 1F and Article 33(2). The provisions of Article 1F apply to persons being considered for refugee status and exclude those who have committed serious international crimes (a crime against peace, a war crime, or a crime against humanity) and serious non-political crimes.²⁴ Article 33(2) of the Refugee Convention codified the principle of *non-refoulement* of refugees, prohibiting a Contracting State from expelling or returning a refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.”²⁵ This principle, which is considered the cornerstone of international refugee protection, allows for an exception in only two situations: (1) where there are “reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is,” or (2) where the refugee “having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²⁶

The underlying rationale for Article 1F makes clear that the focus in determining whether or not a person’s actions have made him undeserving of refugee protection is on the

²³ Human Rights First, *Denied and Delayed: The Impact of the “Terrorism Bars” on Asylum Seekers and Refugees in the United States*, November 2009, available at: <http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

²⁴ See *supra* note 15 at Art. 1F.

²⁵ *Id.* at Art. 33(1).

²⁶ *Id.*

person's individual culpability in the commission of criminal or wrongful acts. As the UNHCR has explained, "[i]n general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act in the knowledge that his or her act or omission would facilitate the criminal conduct."²⁷ The grounds of inadmissibility in U.S. immigration law based upon activities associated with "terrorism" – particularly the definition of "terrorist activity", the definition of a "Tier III" or "non-designated" "terrorist organization" under 8 U.S.C. 1182(a)(3)(B)(vi)(III), and the other statutory provisions that reference those definitions – are far more expansive than grounds of exclusion contemplated by the Refugee Convention. These provisions, and the other terrorism-related provisions of the Immigration & Nationality Act, also continue to be interpreted by the Administration in a way that exacerbates the conflict with U.S. treaty obligations.

Recommended Reforms:²⁸

- **The Departments of Homeland Security, Justice, and State** should support the necessary changes to the immigration law's definitions outlined below.
- **The Departments of Homeland Security, Justice, and State** should interpret existing law consistently with its text and purpose, to target those who advance terrorist activity.
- **The Departments of Homeland Security, Justice, and State** should adopt a more effective and fair approach to granting "waivers," one that allows people initially applying for asylum, refugee status, or other relief to be considered for waivers based on an individualized assessment of their actions, that permits prompt adjudication of the large mass of applications for permanent residence and family reunification of people already granted asylum or refugee status, and that ensures that no refugee is deported without being considered for a waiver if eligible for one under the law.
- **Congress** should revise the overly broad definitions in INA §212(a)(3)(B) that are excluding legitimate refugees from asylum (and refugee resettlement) and mislabeling them as supporters of "terrorist organizations." Specific statutory amendments include:
 - Eliminate the statutory definition of a "Tier III" undesignated terrorist organization, which has led to numerous unintended consequences but is not needed as an enforcement tool against its intended targets;

²⁷ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶ 2.

²⁸ Human Rights First's comprehensive recommendations on this issue are detailed in our recent report, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*. See *supra* note 23.

- Amend the immigration law's definition of "terrorist activity" so that it (a) targets only the use of violence for purposes of intimidation or coercion (of a civilian population or of a government or an international organization), and (b) no longer applies to uses of armed force that would not be unlawful under international humanitarian law;
- Amend the immigration law's definition of "material support" to make clear that it does not apply to acts done under coercion;
- Eliminate the provision that makes a person inadmissible simply for being the spouse or child of a person inadmissible under the immigration law's "terrorism"-related grounds; and
- Give waiver authority to the Attorney General for cases pending before the Department of Justice, with the provision that the Attorney General delegate this authority to the immigration courts.

IV. The One-Year Asylum Filing Deadline: An Arbitrary Procedural Barrier That Is Contrary the Refugee Protocol.

UNHCR has specified that failure to comply with technical requirements such as filing deadlines "should not lead to an asylum request being excluded from consideration."²⁹ Nevertheless, in direct contravention of the United States' commitment under the Refugee Protocol, in 1996 the United States introduced a requirement that asylum seekers must apply for asylum within one year of entering the United States.³⁰ Applicants who cannot prove their date of entrance, or who do not timely file and cannot meet one of two statutory exceptions, are permanently barred from asylum protection.³¹ An applicant may remain in the United States only if she is able to meet the significantly higher burden of proof for withholding of removal, but may not petition for her family members to join her and is not able to adjust to permanent residency. An applicant who fails to meet this higher burden is deported, even if the Immigration Judge found her asylum claim to be credible.³² For example:

- An Eritrean woman, who had been tortured and sexually assaulted due to her Christian religion, was denied asylum by an Immigration Judge under the one-year filing deadline, even though he found her testimony credible and compelling.

²⁹ UNHCR Executive Committee, Conclusion No. 15 (XXX), Refugees Without an Asylum Country (1979) at (i).

³⁰ INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B); *See also* 8 CFR 208.4(a).

³¹ Exceptions to the filing deadline include "changed circumstances" and "extraordinary circumstances" related to the delay. Non-exhaustive lists of examples for each exception are included in the Regulations. *See* 8 CFR 208.4(a)(4)-(5).

³² A recent article provided numerous case examples of this very scenario. *See* Karen Musalo and Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int'l & Comp. L. Rev.* 693, 699-703 (2008).

Since the deadline was implemented immigration adjudicators have applied the exceptions to the deadline narrowly, resulting in the rejection of tens of thousands of asylum applications.³³ More disturbingly, the number of applications rejected because of the deadline has increased throughout the years.³⁴ The practical effect has been to allow the return of refugees to countries where they are in danger of persecution, or to grant them a status providing significantly less protection.

Recommended Reform:

- **Congress** should eliminate, and the Administration should support, the elimination of, the one-year filing deadline on asylum claims.

V. Conclusion.

In March, the United States will celebrate the 30th anniversary of the passage of the Refugee Act of 1980. Human Rights First urges Congress and the Administration to work together to advance prompt reforms to the asylum system so that the United States can truly renew its commitment to comply with the Refugee Protocol, as well as to restore itself as a leader in the international community in providing refuge to victims of persecution and oppression around the world.

How the United States treats the victims of human rights abuses who seek protection in the United States – under the U.S. asylum system – matters. In the words of one of Human Rights First's pro bono clients – a Burmese school teacher who was beaten and jailed for two years by the Burmese government, only to be detained by U.S. immigration authorities for seven months – "*When I was back home I was in prison [for speaking out for human rights]. I thought that when I got to America I'd be free, but then I was in prison again. I was surprised by that.*" Human rights activists abroad understandably expect the United States to live up to its own human rights commitments at home. We welcome the Subcommittee's attention to these issues and pledge to work with you to ensure that respect for universal human rights is a conscious agenda in all branches of our government.

³³ Between 1999 and 2005, the Asylum Office rejected at least 35,429 claims on account of the filing deadline. *Id.* at 698-99. The Executive Office of Immigration Review does not provide similar statistics.

³⁴ In 1998, 37% of untimely asylum applications were excused by an exception. By 2001, this number had grown to 51%. Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 15 GEO. IMMIGR. L.J. 1, 31 (2001).

Midwest Coalition for Human Rights

Advocating for fairness and human dignity

WRITTEN STATEMENT OF THE
MIDWEST COALITION FOR HUMAN RIGHTS
Submitted to
THE UNITED STATES SENATE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

For the Hearing on
"The Law of the Land: U.S. Implementation of Human Rights Treaties"
Wednesday, December 16, 2009

I. Introduction

Thank you, members of the Senate Judiciary Subcommittee on Human Rights and the Law, for this opportunity to provide a written statement on the implementation of human rights treaties in the United States. The Coalition welcomes the Subcommittee's hearing on this issue and urges Subcommittee and other Congressional members to continue the dialogue on human rights issues of concern in the United States.

The Midwest Coalition for Human Rights is a network of 50 advocacy organizations, service providers, and university-based centers collaborating to promote and protect human rights in the United States and abroad. Since 1995, the Coalition has served as an information-sharing network and an operational network for its member organizations to jointly address human rights violations in a nine-state area in the Heartland. Substantively, the Coalition has diverse expertise on broad-based international human rights, housing rights, immigrant rights, prisoner rights, torture, poverty, workers rights, police accountability, and minority rights. The Coalition has done extensive work on the issues of immigrant detention, torture at the hands of U.S. officials, and the rights of workers in the meatpacking industry.

In this statement, the Coalition addresses its concerns about the shortcomings of U.S. implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Specifically, the Coalition describes the inadequacy of current federal and state law in ensuring U.S. compliance with CAT. Further, the Coalition illustrates human rights violations through the unregulated misuse of electro-shock weapons by U.S. officials.

The Coalition's recommendations are as follows:

- To comply with its obligations under CAT, the U.S. Government should enact federal legislation specifically banning the use of torture by all local, state, or federal law enforcement officers or agents or any other person acting under the color of law.

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- With respect to the use of electro-shock weapons, the U.S. Government should adopt use of force standards based on relevant international standards; mandate training programs that include international human rights standards; and require uniform and public reporting on the use of electro-shock weapons by government officials.

II. The Chicago Police (Burge) Torture Cases

From 1972 to 1993, Jon Burge, Commander of the Area Two Chicago Police Department, and his subordinates tortured at least 135 African-American males in order to obtain confessions. The torture included the administration of electric shocks to the ears and/or to the exposed genitalia of the victims; conducting mock executions using unloaded revolvers and shotguns; suffocating victims with plastic typewriter covers; and burning victims by holding them against hot radiators. In most of these cases, the States Attorney's Office was aware of the allegations and nonetheless used the coerced evidence in hearings and criminal trials to convict the victims and send them to prison – several went to death row.

Despite civil judgments acknowledging the torture and Chicago police investigators admitting to the systemic nature of the practice, none of the perpetrators was ever charged or convicted for carrying out acts of torture. The responsible local authority for the initiation of criminal charges in these cases is the Cook County States Attorney, which never initiated criminal prosecutions against officials in the Chicago Police Department responsible for the torture.

Federal criminal jurisdiction provided no assistance either. Current federal criminal jurisdiction over acts of torture is limited to extraterritorial cases – those in which a member of the military or other U.S. official commits an act of torture outside U.S. borders. While there are current federal and state laws that criminally proscribe *acts* of torture inside the U.S., the acts themselves are not referred to as torture, but rather are specified as acts of armed violence, assault, kidnapping, etc. Further, the laws that are in place have very limited statutes of limitations – five years under federal law and three years under state law. The Committee Against Torture recommended in 2000 and 2006 that the U.S. Government enact a federal criminal statute against torture, as required by Article 2 of the Convention. The lack of a federal statute expressly for acts of torture and the limited statutes of limitations for torturous acts have led to impunity for some of the countries' most notorious torturers, including Jon Burge.

There have been minimal attempts at local and federal levels to deliver justice or to uphold the provisions of the Convention Against Torture in the Chicago torture cases. In 2002, Cook County officials appointed special prosecutors to investigate the cases. Not until 2006, after a four-year \$7 million investigation, did Special Prosecutors Edward J. Egan and Robert D. Boyle state that although torture occurred at the hands of Burge and his subordinates, no charges could be brought because the statute of limitations had expired. Egan and Boyle also concluded that there was no basis to claim conspiracy and no evidence of obstruction of justice. Ample evidence

has been documented to indicate that Egan's and Boyle's investigation was significantly flawed and fell far short of being the type of thorough investigation required by CAT.¹

In 2003, then Governor George Ryan commuted the sentences of ten known torture victims sent to death row on their tortured confessions. Four of the ten subsequently filed suits against the City of Chicago, Cook County, and various police officers and States Attorneys. A settlement for nearly \$20 million was reached in December 2007. Several victims of the torture by Chicago police continue to languish in prison as a result of their coerced confessions.

Meanwhile, the perpetrators continue to enjoy impunity with regard to their torturous acts. Until very recently, Jon Burge lived in comfortable retirement in Florida collecting his police pension, despite having been fired in 1993 after the Chicago Police Office of Professional Standards ruled that Burge had indeed committed torture and recommended his dismissal. In October 2008, Burge was finally arrested by federal agents, after an investigation by US Attorney for the Northern District of Illinois Patrick Fitzgerald. Burge was indicted, not on charges relating to his torturous acts, but on charges of obstruction of justice and perjury related to his testimony in a civil suit regarding the torture allegations against him. Burge's trial was recently postponed for a third time and is now set to begin in May 2010.

While the Coalition welcomes the Burge indictment on federal charges of obstruction of justice and perjury, the very fact that he was only charged on these grounds is a testament to the need for federal torture legislation with no statute of limitations.

III. Unregulated Use of Electro-shock Stun Weapons

Problems arising out of the use of stun weapons – also commonly referred to as TASERS or CEDs (“conducted energy devices”) – has been well documented by Amnesty International since 2004.² These weapons include stun shields, stun belts, stun guns capable of being used either in the “probe” or the “drive-stun” mode, and shock sticks. More than 351 individuals in the U.S. have died since June 2001 after being shocked with a CED. Most of those individuals were not carrying a weapon. Hundreds more non-fatal cases of inappropriate and excessive CED use, including incidents involving use of CEDs against non-violent and unarmed children, elderly persons, and pregnant women, have been reported across the country. To be specific, a “shock” indicates a 50,000 volt jolt; the voltage is the same whether administered to an average-size adult, a child, or an elderly women.

The Coalition acknowledges the importance of developing non-lethal force options to decrease the risk of death or injury; however, the Coalition is concerned that CEDs are being used as tools of routine force to subdue non-compliant or disturbed individuals who do not pose a significant threat rather than as an alternative to firearms. The use of CEDs in circumstances where it is not

¹ *A Report on The Failure of Special Prosecutors Edward J. Egan and Robert D. Boyle to Fairly Investigate Police Torture in Chicago*, April 24, 2007.

<http://www.law.northwestern.edu/cwec/issues/causesandremedies/PoliceMisconduct/Torture/TortureReport.pdf>

² See *Excessive and Lethal Force? Amnesty International's Concerns About Deaths and Ill-treatment Involving Police Use of Tasers*, November 2004; *Amnesty International's Continuing Concerns About Taser Use*, March 2006; and *Less than Lethal*, December 2008. All available at <http://www.amnestynusa.org/us-human-rights/taser-abuse/page.do?id=1021202>

necessary or proportionate to the threat is inconsistent with international standards on the use of force; and in many cases, police actions violate the international prohibition against torture or other cruelty.

More than 11,000 law enforcement and correctional agencies are deploying or testing CEDs.³ Most are used in local and state police forces and jails, but they are also being used by federal agencies such as the US Marshall's Service and have been purchased by the US military for use in Iraq and Afghanistan.⁴

There are currently no binding federal standards on the use of CEDs or state standards that limit how and when and how CEDs can be used. Further, individual law enforcement policies vary widely from city to city, county to county, and state to state. Many departments permit the use of TASERs at a level of threat well below that at which officers would be authorized to use lethal force.⁵ There are also no federal or state regulations prohibiting or limiting the use of CEDs against children, the elderly, pregnant women, or other individuals for whom a 50,000 volt shock may be medically contraindicated.

The National Institute of Justice (NIJ) undertook a study in 2008 which found that there is serious concern about the effects of CEDs on vulnerable groups (small children, persons of small stature, people with diseased hearts, the elderly, pregnant women, "and other at-risk individuals." Other independent studies undertaken in the past couple of years show that the mode of deployment can increase the risk of death or injury. Most inquiries to date have noted the need for further studies into the effects of CEDs, something that the Coalition fully supports. Various research studies are now underway, including studies sponsored by the US Justice Department. The Coalition supports this work in general, but emphasizes significant ethical problems in testing the devices on vulnerable groups.

IV. Failure to Meet CAT Obligations

The U.S. Government has failed to enact a federal criminal statute to prohibit torture as required under Article 2 of the Convention. The U.S. Government's reports to the Committee Against Torture acknowledge ongoing allegations of police brutality, but it maintains that it is in compliance with the Convention because all acts constituting torture or CID as defined by the Convention are crimes subject to prosecution by federal or state authorities. The U.S. cites cases in which law enforcement officers were indeed successfully prosecuted, but there are many more cases in which charges against police officers whose conduct clearly amounted to torture or cruel, inhuman or degrading treatment under the convention were never brought or dropped by

³ *Study of Deaths Following Electro-Muscular Disruption: Interim Report*, US Department of Justice, Office of Justice Programs, June 2008. <http://www.ojp.usdoj.gov/nij/pubs-sum/222981.htm>

⁴ There have been reports of ill-treatment of detainees by Iraq by US soldiers involving the use of TASERs (see Amnesty International report: *Iraq: Beyond Abu Ghraib: detention and torture in Iraq*, March 2006, www.amnesty.org/en/library/info/MDE14/001/2006).

⁵ *"Less than Lethal"? The Use of Stun Weapons in US Law Enforcement*, Amnesty International, December 2008. <http://www.amnestyusa.org/uploads/LessThanLethal.pdf>

local and federal prosecutors.⁶ The U.S. Government also cites to provisions allowing individuals to seek civil damages against officers – yet such remedies are neither universally accessible nor consistently effective.

The U.S. Department of Justice, limited by the high standard of intent imposed by the legislation cited by the U.S. in its second periodic report to CAT in 2005,⁷ as well as the limited resources devoted to investigation and prosecution of law enforcement misconduct, is often unable or unwilling to bring federal charges against law enforcement officers who commit torture, or to initiate pattern and practice investigations of police departments with high numbers of complaints of police abuse.

The U.S.'s failure to meet its obligations with regard to domestic torture cases has not gone unnoticed. In its 2006 Concluding Observations, the Committee Against Torture noted concern at the impunity of individuals who perpetrated torture in the Chicago Police cases. The Committee cited particularly the limited investigation and the lack of prosecution, and called for a prompt, thorough, and impartial investigation of all allegations of acts of torture and the bringing of perpetrators to justice.⁸

The U.S. Government has failed to require anti-torture training for law enforcement personnel as required by Article 10 of the Convention. This lack of training is especially apparent with regard to the increasing misuse of electro-shock weapons by law enforcement. The Committee Against Torture has specifically raised concerns about the use of stun weapons, which it recognizes as potential instruments of torture and CID. In 2000 and 2006, the Committee noted the “extensive use” of electro-shock devices by US law enforcement personnel, recommending that they be used only as a substitute for lethal weapons, and eliminated as a device used to restrain persons in custody.⁹ A second treaty body, the UN Human Rights Committee, also expressed concern about the use of electro-shock weapons in situations where lethal or other serious force would not otherwise have been used. Recommendations of the Human Rights Committee included restrictions on the use of CEDs only in situations where greater or lethal force would otherwise have been justified and that the devices should “never [be] used against vulnerable persons.”¹⁰

The U.S. Government itself has acknowledged inappropriate use of devices such as TASERS¹¹ and the Civil Rights Division of the Department of Justice recommended limitations on the use

⁶ See U.S. Commission on Civil Rights, *Revisiting Who is Guarding the Guardians?: A Report on Police Practices and Civil Rights in America*, November 2000; Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, HRW Index No.: 1-56432-183-5, 1998.

⁷ For instance, in a November 2000 meeting with Howard University students in Washington, D.C., Bill Lann Lee, former Assistant Attorney General for Civil Rights, cited to 18 U.S.C. § 242's requirement that a law enforcement officer “willfully” deprive an individual of their constitutional rights in order for liability to attach as a barrier to prosecution of an officer responsible for the death of Howard University student Prince Jones. See also U.S. Commission on Civil Rights, *Revisiting Who is Guarding the Guardians?: A Report on Police Practices and Civil Rights in America*, November 2000.

⁸ *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 25 July 2006.

CAT/C/USA/CO/2, para. 25.

⁹ CAT/C/USA/C/2 25 July 2006.

¹⁰ *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 25 July 2006.

CAT/C/USA/CO/2, para. 35.

¹¹ *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Initial Reports of States Parties due in 1995*, Addendum, United States of America, 9 February 2000, CAT/C/28/Add.5., para. 70.

of electro-shock weapons by law enforcement agencies, as well as increased training for officers using such weapons. These recommendations have not yet been implemented through federal regulations regarding the training or use of CEDs.¹² Further, the US government says it is doing everything it can to prevent police torture, but does not keep national statistics on the use of excessive force by police officers.

V. Recommendations

To meet its obligations under the Convention Against Torture, Article 2, the U.S. must enact federal legislation criminalizing the act of torture by law enforcement officers without a statute of limitations. Additionally, Convention Article 7 requires that there must be criminal prosecution when an act of torture has been committed. As a State Party, the U.S. therefore should ensure that sufficient and impartial resources are allocated to allow for the documentation, investigation, and prosecution of alleged acts of torture by local, state, and federal law enforcement officers. This includes adequate funding to the Department of Justice to compile, publish, and regularly analyze national data on police use of excessive force and to provide them the resources to more comprehensively pursue and enforce "pattern and practice" actions against police departments engaging in widespread or systematic abuses.

To meet its obligations under CAT, Article 10, the U.S. should enact federal standards requiring rigorous training and accountability systems for the use of electro-shock weapons by any U.S. official. All use of force standards should be consistent with international standards set out under the UN Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms, which require that force should be used only where "strictly necessary" and in proportion to the threat posed. All use of force training programs should include regular conceptual and operational training on international human rights standards, including the absolute prohibition against torture and other cruel, inhuman, or degrading treatment. Finally, under Articles 7 and 10 of the Convention, the arbitrary or abusive use of CEDs should be prohibited by law, and investigated, prosecuted and punished as a criminal offense.

Thank you, members of the Senate Judiciary Subcommittee on Human Rights and the Law, for this opportunity to provide a written statement on the implementation of human rights treaties in the United States. The Coalition welcomes the Subcommittee's hearing on this issue and urges Subcommittee and other Congressional members to continue the dialogue on human rights issues of concern in the United States.

¹² *Second Periodic Report of the United States of America to the Committee Against Torture*, submitted to the Committee Against Torture, May 6, 2005 at ¶89.

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Comments
submitted by the
Minnesota Tenants Union

in connection with a

**Hearing before the Senate Judiciary
Subcommittee on Human Rights and the Law
entitled
The Law of the Land:
U.S. Implementation of Human Rights Treaties**

Wednesday, December 16, 2009

10:30 a.m.

Dirksen Senate Office Building Room 226

Good morning Committee Members:

This is indeed an historic moment. We are pleased to be participating with you and so many other grass-roots voices for human rights in this, the first Senate hearing on the implementation of the ratified human rights treaties. At the same time, we would be remiss not to register our regret that years after their ratification by this Senate, that this is, in fact, the first Senate hearing to examine the level of implementation of those treaties and the barriers to that implementation that remain.

As a grass-roots housing organization dedicated to working with and for low-income tenants and communities to advance the human right of all persons to housing safe, decent, and affordable housing, we recognize in our bones the urgency of our society adopting and internalizing the proactive human rights perspective reflected, for example, in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

I. Key Barrier to Implementation of the Ratified Human Rights Treaties

In our work, we have found that the very existence of the ratified human rights treaties, let alone their practical implementation as a source of hope for progress, is unknown to the vast majority of our fellow Americans, including virtually all state and local officials, educators at all levels, journalists, and even among our peers in the faith and social action communities.

To underscore the extent of the general ignorance regarding the ratified human rights treaties, we are attaching a survey we conducted in Fall 2007. We surveyed all the local Human Rights Commissions in Minnesota, focusing on awareness of the ICERD.

Since Minnesota's local Human Rights Committees are publicly identified as interested in the protection and promotion of human rights, it is reasonable that federal efforts to propagate awareness of the ICERD would have been directed to them or come to their attention. The survey documented that the federal government had provided no information to the local authorities in Minnesota most likely to have a keen interest in eliminating all forms of racial discrimination. On a positive note, the survey also documented that Minnesota's local human rights commissions are, in fact, overwhelmingly interested in receiving information about the ICERD to determine how it fits into their mission.

II. Absence of Federal Leadership

The general ignorance regarding the ratified human rights treaties is the direct result of failure of federal leadership to carry out primary obligations undertaken when the Senate ratified these treaties: 1) the obligation to make the ratified human rights treaties known throughout the United States at all governmental levels (federal, state, and local) and 2) to see to it that these various levels of government (federal, state, and local) having with responsibility to implement these treaties understand their obligations and fulfill them.

For the record, the source of those key federal obligations deserves particular mention, as follows.

III. Review of Federal Obligations to Implement the Ratified Human Rights Treaties

A. Regarding the federal government's obligation to make the ratified human rights treaties known

Each of the Big Three ratified human rights treaties (the International Convention on the Elimination of All Forms of Racial Discrimination (the ICERD), the Convention Against Torture (the CAT), and the International Civil and Political Rights (the ICCPR) contain language taking on this obligation. For example, Part I, Section VII of the ICERD states:

"States Parties undertake to adopt immediate and effective measures, . . . with a view . . . to propagating the purposes and principles of . . . this Convention [on the Elimination of All Forms of Racial Discrimination]."

B. Regarding the federal government's obligation to see to it that these various levels of government (federal, state, and local) having with responsibility to implement these treaties understand their obligations and fulfill them

When, for example, the US Senate ratified the ICERD in 1994, it stated:

The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments.

To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.¹

¹ Declaration of the United States Senate when it ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)B October 21, 1994. See <http://www1.umn.edu/humanrts/usdocs/racialres.html>.

When it ratified the other two of the BIG THREE human rights treaties (the CAT and the ICCPR), the Senate used similar language, undertaking similar obligations.²

IV. Glimmer of Federal Leadership Quashed by Security Directive 1(February 13, 2001)

On December 10, 1998, on the anniversary of the signing of the Declaration of Human Rights, then President Bill Clinton issued Executive Order 13107 entitled "Implementation of Human Rights Treaties."³ Executive Order 13107 formally recognized the federal obligation under the ratified human rights treaties and directed all federal agencies to incorporate the treaties' human rights obligations into their operations and established an Interagency Working Group on Human Rights Treaties to coordinate federal implementation of these treaties. Of special relevance to the barrier to treaty implementation identified in our testimony (general ignorance of the treaties' existence and usefulness), EO 13107 charged the Interagency Working Group on Human Rights Treaties with responsibility for

- (vi) developing plans for public outreach and education concerning the provisions of the ICCPR, CAT, CERD, and other relevant treaties, and human rights-related provisions of domestic law;

Unfortunately, on February 13, 2001, President Bush issued National Security Presidential Directive #1 (NSPD-1) abolishing all the existing interagency work groups and transferring the responsibilities of the interagency work group to the National Security Council System's Policy Coordinating Committee (PCC) on Democracy, Human Rights, and International Operations. Based on the record to date, it appears that the PCC on Democracy, Human Rights, and International Operations has done nothing to carry on the responsibilities of the Interagency Working Group on Human Rights Treaties created by EO 13107. Specific indicators of such inaction are that in two formal reports to the UN committee charged with the responsibility to monitor US compliance with the ICERD, the State Department has been unable to point to one step taken by the PCC on Democracy, Human Rights, and International Operations that is consistent with the charge given the Interagency Working Group on Human Rights Treaties created by EO 13107.

² Statement of the United States Senate when it ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) B 21 Oct 1994 and Statement of the United States Senate when it ratified the International Covenant on Civil and Political Rights (ICCPR) B June 8, 1992.

³ See complete document at <http://www.fas.org/irp/offdocs/eo13107.htm>.

For example: despite the interest in the impact of EO 13107 expressed by the UN committee charged with reviewing US implementation of the ICERD in its 2001 Concluding Comments and specific request for further information on the powers of the Working Group and the **impact** of its activities, the US State Department's May 2007 report to the UN regarding implementation of the ICERD stated (incorrectly since it was abolished by SD-1) that the Interagency Working Group established by EO 13107 continued to function but did not list one step taken by the IWG (or the PPC) to implement EO 13107 or, more specifically, to coordinate and stimulate implementation the ICERD at the federal level and the other ratified human rights treaties domestically throughout the federal government.

Second: when asked by the UN committee charged with reviewing US implementation of the ICERD in its 2008 Concluding Comments to provide, within a year, information on (among other things) its public awareness and education programs on the Convention and its efforts to make government and the public in general aware about the responsibilities of the State party under the Convention, the State Department's one-year report again cited no activity by the Interagency Work Group or the PCC to implement the responsibilities given the Interagency Work Group by EO 13107 or, more generally, to implement the ICERD and the other ratified human rights treaties domestically throughout the federal government. Instead, it listed a series of actions not initiate by the IWG or PCC and irrelevant to the objectives established in EO 13107.

V. Conclusion and Recommendations

First: we recognize the promise of positive developments that this hearing holds. However, in the context of the human rights treaty obligation formally undertaken over 15 years ago, we also express concern that this has been so late in coming and can only stand as a beginning in the work of fulfilling the Senate's obligations to monitor implementation of the human rights treaties.

Recommendation 1: As a means to fulfill the Senate's role in monitoring, educating, and implementing these treaties, therefore, we call upon you to continue this hearing, at the regional as well as in Washington, D.C., expanding it to sponsorship by the full Judiciary Committee to address the subjects (implementation of the ratified human rights treaties) broached in this hearing

Second: we recognize, as the Senate stated when ratifying these treaties, the Senate's responsibility with respect to activity subject to its jurisdiction and its further responsibility to advance the implementation by state and local governments with respect to activities under their respective jurisdictions.

Recommendation 2: As a means to advance the federal role in implementing the human rights treaties, we urge this Committee to recommend to the

President of the United States to issue a new and improved Executive Order, rescuing human rights treaty implementation from the PCC in which it has languished since 2001, restoring an interagency mechanism begun under EO 13107, and designing and charging it to robustly carry forth the federal government's proper role, as recognized for in the Senate signatory statements, to advance recognition of the implementation of the ratified human right treaties at the state and local level.

Respectfully Submitted,

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Written Testimony of Maria McFarland,
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Human Rights Watch

United States Senate
Committee on the Judiciary,
Subcommittee on Human Rights and the Law
December 16, 2009

**“The Law of the Land: U.S. Implementation of
Human Rights Treaties”**



Mr. Chairman, Subcommittee members:

Thank you for inviting Human Rights Watch to comment on the United States' implementation of international human rights treaties to which it is a party.

Human Rights Watch regularly monitors and reports on the human rights situation in about 80 countries around the world, including the United States. There are several areas in which the United States is failing to meet its obligations under international human rights treaties to which it is a party. Below, we describe some of our most serious concerns in this respect.

Implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Closing Secret Prisons

On January 22, 2009, his second full day in office, President Barack Obama issued an executive order to close the Central Intelligence Agency's secret detention program. CIA Director Leon Panetta confirmed that the president's order had been implemented in an April 9, 2009 memorandum to all CIA staff that stated unequivocally: "The CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites."¹ The CIA's prisons, which are thought to have held some 100 detainees since 2002, were the sites of some of the Bush administration's most egregious human rights violations. Yet recent allegations concerning the existence of secret prisons, hidden from the International Committee of the Red Cross and operated by US Special Operations forces at Bagram Air Force Base in Afghanistan, emphasize the need for a government-wide commitment to transparent detention policies that comply with US treaty obligations.

¹ See "Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts," April 9, 2009, available at: <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>.

Ban on the Use of Evidence Obtained by Torture or Cruel, Inhuman or Degrading Treatment

The Military Commissions Act of 2009 (MCA), which was largely supported by the Obama administration, expressly bans the use of statements obtained by torture or cruel, inhuman or degrading treatment. However, several other provisions of the MCA continue to be problematic. These include the retroactive nature of the legislation and provisions singling out non-US nationals for trial in a special court deemed inappropriate for US citizens. The law includes offenses that are not violations of the law of war and even though it includes improvements with respect to access to counsel and defense resources, the law continues to provide inferior process to defendants compared to that offered in civilian courts and courts-martial. Finally, the MCA permits the trial of child soldiers for war crimes without taking into account their status as alleged child offenders. These fundamental flaws suggest that the military commissions are not “regularly constituted courts” within the meaning of the Geneva Conventions² and otherwise fail to comply with US treaty obligations.³

Renditions Based on “Diplomatic Assurances”

In August 2009, the Obama administration announced that it would continue the Bush administration’s practice of carrying out detainee transfers based on “diplomatic assurances”—non-binding promises from the receiving country that detainees will be treated humanely. Human Rights Watch’s research has found that such assurances are ineffective at preventing torture, as exemplified by the cases of Maher Arar, Ahmed Agiza, and Mohammed al-Zari. We are concerned that continued reliance on diplomatic assurances to facilitate detainee transfers will result in the violation of US obligations under the Convention against Torture.⁴

² Common article 3 to the Geneva Conventions of 1949 (prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

³ International Covenant on Civil and Political Rights (ICCPR), 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 Mar. 23, 1976, article 14.

⁴ According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, article 3:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Accountability for Past Abuses

The Obama administration has shown little enthusiasm for establishing a commission of inquiry or for initiating criminal investigations of senior officials implicated in serious crimes against detainees at Guantanamo and elsewhere. President Obama initially signaled a willingness to set up a non-partisan commission to investigate these abuses, but his office quickly backed away from the idea.

In August 2009, the Obama administration released the 2004 CIA Inspector General Report. That report documented in unprecedented detail US government officials' approval of illegal and brutal interrogation methods in the post-9/11 fight against terrorism. With the release of the Inspector General's report, Attorney General Eric Holder announced that he had asked a federal prosecutor to conduct a preliminary review of post-9/11 interrogation abuses to determine whether federal laws were violated. It is critical that the prosecutor's investigation cover those who planned and authorized torture and other abuses, not just lower-level CIA operatives who used "unauthorized" techniques. Crimes such as "waterboarding" (near drowning) have for over a century been prosecuted and punished in the United States. Yet no senior government official has been held to account for these crimes, which violate both US and international law. Any investigation that failed to reach those at the center of the policy, while pinning responsibility on line officers, would lack credibility both domestically and internationally. The attorney general's investigation should be a full-scale and open-ended criminal investigation.

Denying Redress to Victims of Torture

The United States has continued to oppose redress for victims of torture by or with complicity of US officials. The US Court of Appeals for the Second Circuit recently threw out a suit brought by Maher Arar, the Canadian national of Syrian origin who was rendered to Syria by US officials and brutally tortured. (The Canadian government's inquiry into Arar's treatment resulted in a public apology and a settlement of \$10 million.) The Second Circuit concluded, on the basis of US arguments, that permitting a civil suit against government officials responsible for torture and rendition would damage national security and force the disclosure of state secrets. The ruling left Arar unable to obtain public acknowledgment or redress for his ordeal. The administration's continued opposition to civil suits filed by alleged victims of torture is contrary to its obligation under international law to provide

victims of human rights violations with an effective remedy, including that of obtaining redress and compensation from a competent tribunal.⁵

Extraterritorial Application of Human Rights Law

The administration of President George W. Bush long asserted that international human rights treaties, notably the ICCPR and the Convention against Torture, do not prohibit US officials abroad from using coercive interrogation techniques short of torture against non-US citizens.

During the confirmation process for attorney general in January 2005, Alberto Gonzales responded to queries by Senate committee members on the treatment of foreign detainees abroad by claiming that US officials were not bound by the prohibition against cruel, inhuman or degrading treatment.⁶ While asserting in written responses that torture by all US officials was unlawful, Gonzales indicated that no law would prohibit the CIA from engaging in cruel, inhuman or degrading treatment when interrogating non-citizens outside of the United States. Gonzales argued that when the US Senate gave its advice and consent to ratify the Convention against Torture in 1994, it made a reservation by which the United States defined the prohibited "cruel, inhuman or degrading treatment" as meaning the ill-treatment prohibited by the Fifth, Eighth or Fourteenth Amendments to the US Constitution.⁷

The administration claimed that because the Constitution does not apply to US citizens outside the United States,⁸ the Convention against Torture's prohibition against ill-treatment does not apply either. Under this interpretation, US officials interrogating or detaining non-US nationals abroad would be free to engage in cruel and inhuman treatment short of torture without violating the Convention against Torture.

⁵ See ICCPR, article 2(3)(a) ("Each State Party to the present Covenant undertakes: ... To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."); Convention against Torture, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.")

⁶ See "Senate Judiciary Committee Confirmation Hearing" on the nomination of Alberto R. Gonzales to be attorney general, January 6, 2005, available at: <http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ei=5070&en=31a4f50c78ff7e20&ex=1186977600&adxnnl=1&adxnnlx=1186844794-hxi4ru4f/rDg6r7qSpVagA&pagewanted=all&position=>

⁷ United States of America Reservation I (1) to the Convention against Torture, available at: <http://www.ohchr.org/english/countries/ratification/9.htm#reservations>.

⁸ See *Reid v. Covert*, 354 US 1 (1957) (US constitutional rights apply abroad only to US citizens).

Abraham Sofaer, legal advisor at the State Department during the Reagan administration, disagreed publicly with Gonzales' analysis of the reservation's meaning. In a letter to the Judiciary Committee, Sofaer stated:

the purpose of the reservation [to the Convention] was to prevent any tribunal or state from claiming that the US would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. The words of the reservation support this understanding, in that they related to the meaning of the terms involved, *not to their geographic application* (emphasis added).⁹

Yet the Bush administration reiterated its position in State Department legal advisor John Bellinger III's May 5, 2006 statement to the Committee against Torture. Bellinger said that the Convention against Torture did not apply to detainees in the "war on terror" held abroad because "[i]t is the view of the United States that these detention operations [in Afghanistan, Guantanamo and Iraq] are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations."¹⁰

Such an interpretation undermines the aim of the Convention against Torture, which calls on governments to eliminate torture and ill-treatment to the fullest extent of their authority.¹¹ It would also give the green light to the CIA to commit abuses in its secret detention facilities abroad. Thus, while claiming it was rejecting torture, the Bush administration was effectively seeking a loophole in international law that would allow US intelligence operatives abroad leeway to conduct abusive interrogations.

The UN Human Rights Committee and the Committee against Torture, as well as UN special rapporteurs, rightly criticized the Bush administration for claiming that the human rights

⁹ Letter from Abraham Sofaer, Hoover Institution, to Senator Patrick Leahy, Judiciary Committee, January 21, 2005. Sofaer's letter emphasizes the words of the reservation: "the United States considers itself bound by the obligation under article 16 ... only insofar as the term 'cruel, inhuman or degrading treatment or punishment means the cruel, unusual and inhumane treatment' under the Eighth Amendment" (emphasis in original).

¹⁰ Department of State, US Meeting with UN Committee Against Torture, Opening Remarks of John B. Bellinger, III, Geneva, May 5, 2006, available at: <http://www.us-mission.ch/Press2006/0505BellingerOpenCAT.html>.

¹¹ As the UN Human Rights Committee states in its General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. ... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

treaties did not apply to US personnel (military and intelligence) operating outside the United States. The treaty bodies have been clear that the treaties extend to places where the US has either formal jurisdiction or "effective control," and that the human rights treaties still apply even where the law of armed conflict is applicable.

The same issues also apply to US implementation of the ICCPR.

Implementation of the Optional Protocol on the Involvement of Children in Armed Conflict

With one exception, US implementation of the Optional Protocol on the Involvement of Children in Armed Conflict, which the United States ratified in 2002, has been generally positive. In January 2003 each branch of the US armed services adopted new policies designed to keep soldiers under the age of 18 out of combat areas. After a couple of years, the Marines discovered their policy was inadequate, so they issued a new one. Now, none of the services even allow 17-year-olds into conflict areas and the Army will not deploy them outside the United States. In 2003 Human Rights Watch discovered that 70 underage troops had been deployed (apparently accidentally) to Iraq and Afghanistan, but the Department of Defense took fairly quick corrective action to pull them out.

Where US implementation has been far from adequate is in fulfilling the Protocol's requirements for rehabilitation and reintegration of former child soldiers in its jurisdiction.¹² In particular, the United States has failed to live up to these requirements with its treatment of Omar Khadr, a Canadian citizen who was detained at age 15, at Guantanamo. Although most juvenile detainees have now been released from Guantanamo, Khadr has been detained for nearly seven years and now faces charges before a military commission.

Sentencing children to life in prison without possibility of parole

The United States is the only country in the world to sentence children to life in prison without possibility of parole. Currently there are more than 2,500 people in US prisons serving sentences of life without parole for crimes committed before they were 18 years old.

¹² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002, art. 7 ("States Parties shall cooperate in the ... in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol").

The treaty bodies for the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination have both found this practice to be in violation of those treaties.¹³

The Committee against Torture has also stated that sentencing children to life in prison without possibility of parole may constitute cruel, inhuman or degrading treatment or punishment prohibited by the Convention against Torture.¹⁴

Prison Litigation Reform Act

The federal Prison Litigation Reform Act (PLRA) creates a separate and unequal legal system for the more than 2.3 million incarcerated persons in the United States. The PLRA singles out lawsuits brought by prisoners in federal courts for a host of burdens and restrictions that apply to no other persons.¹⁵ For example, one provision of the PLRA provides that prisoners may not recover compensation for “mental or emotional injury” unless physical injury is also

¹³ See Concluding Observations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3, 15 September 2006 (“The Committee notes with concern reports that forty-two states and the Federal government have laws allowing persons under the age of eighteen at the time the offence was committed, to receive life sentences, without parole, and that about 2,225 youth offenders are currently serving life sentences in United States prisons. The Committee, while noting the State party’s reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10 (2) (b) and (3) and 14 (4) of the Covenant, remains concerned by information that treatment of children as adults is not only applied in exceptional circumstances. The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24). The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.”). See also Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD/C/USA/CO/6, 8 May 2008 (“The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole (art. 5 (a)). The Committee recalls the concerns expressed by the Human Rights Committee (CCPR/C/USA/CO/3/Rev.1, para. 34) and the Committee against Torture (CAT/C/USA/CO/2, para. 34) with regard to federal and state legislation allowing the use of life imprisonment without parole against young offenders, including children. In light of the disproportionate imposition of life imprisonment without parole on young offenders, including children, belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.”).

¹⁴ Concluding recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006 (“The Committee reiterates the concern expressed in its previous recommendations about the conditions of the detention of children, in particular the fact that they may not be completely segregated from adults during pretrial detention and after sentencing. The Committee is also concerned at the large number of children sentenced to life imprisonment in the State party (art. 16). The State party should ensure that detained children are kept in facilities separate from those for adults in conformity with international standards. The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment.”).

¹⁵ See generally Human Rights Watch, “No Equal Justice: The Prison Litigation Reform Act in the United States” (2009), available at <http://www.hrw.org/en/reports/2009/06/16/no-equal-justice-o>.

present. As one federal judge pointed out, this provision would bar compensation even in cases of deliberate mental torture:

Imagine a sadistic prison guard who tortures inmates by carrying out fake executions--holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable [under the PLRA].¹⁶

The Convention against Torture defines torture as either "physical" or "mental."¹⁷ The Committee against Torture has called for repeal of this "physical injury" provision, citing article 14 of the Convention against Torture, which requires that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."¹⁸

Execution by Lethal Injection

Executions carried out by lethal injection continue to be plagued by mishaps, some of which cause extreme suffering on the part of the condemned prisoner. Most recently, on September 15, 2009, the state of Ohio tried unsuccessfully to execute Romell Broom by lethal injection. Prison staff struggled for more than two hours to find a vein for the needle that would deliver the deadly chemicals to stop his heart. They stuck him at least 18 times, painfully striking muscle and bone. At one point Broom covered his face with his hands and cried. Ohio Governor Ted Strickland finally ordered the execution postponed, and a federal appeals court later stayed another Ohio execution pending investigation of what it called the "disturbing issues" raised by this incident.

¹⁶ *Siggers-El v. Barlow*, 433 F.Supp.2d 811, 816 (E.D. Mich. 2006) (quoting with approval a hypothetical set forth in plaintiff's brief).

¹⁷ Convention against Torture, art. 1 ("'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person....").

¹⁸ Concluding recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, July 25, 2006 ("The Committee is concerned at section 1997 e (e) of the 1995 Prison Litigation Reform Act which provides 'that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury' (art. 14). The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.")

The Committee against Torture has expressed concern over the pain and suffering that sometimes accompany executions in the United States, and urged the United States to review its execution methods, including in particular its use of lethal injection, accordingly.¹⁹

Human Rights Watch opposes the death penalty in all circumstances because of its inherent cruelty and irreversibility.

Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination and Racial Disparities in the Prevalence of HIV/AIDS

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States ratified in 1994, requires states parties, when the circumstances so warrant, to take "special and concrete measures" to ensure the development and protection of racial groups "for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."²⁰ Article 5(e)(iv) of ICERD requires the United States to eliminate racial discrimination and guarantee to everyone, without distinction, the right to public health.²¹

Yet the United States has failed to develop legislative or policy responses adequate to address the HIV/AIDS epidemic in the African-American community. In some instances, the United States promotes laws and policies that deny services and care to many African-Americans with HIV/AIDS. These US government actions exacerbate the disproportionate effect of HIV/AIDS upon the minority community in violation of the ICERD.

Marked racial disparities in the prevalence of HIV/AIDS in the United States are well documented.²² The African-American experience is the most dramatic. Black Americans make up 45 percent of newly infected people, despite constituting only 13 percent of the US

¹⁹ Concluding recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, July 25, 2006 ("The Committee is concerned at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering (arts. 16, 1 and 2). The State party should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.")

²⁰ International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), 660 U.N.T.S. 195, entered into force Jan. 4, 1969, article 2(2).

²¹ ICERD, article 5(e) iv.

²² See, e.g., Hall HI, Song R, Rhodes P, et al, "Estimation of HIV incidence in the United States," *Journal of the American Medical Association*, vol. 300 (2008), p. 520-529. CDC, "HIV/AIDS Surveillance Report, 2007," vol. 19 (2009), <http://www.cdc.gov/hiv>. Black AIDS Institute, "Making Change Real: AIDS in Black America 2009," February 2009. Center for HIV Law and Policy, "Racial Disparities in HIV Care and Outcome: A Call for an Evidence-Based Response," May 2006.

population. African-American men are diagnosed at a rate seven times higher than that of white men.²³ HIV/AIDS is the leading cause of death of African-American women ages 25-34, and African-American women in all age groups have a 13 times greater risk of dying of HIV/AIDS than do white women.²⁴ African-American children constitute 71 percent of all pediatric AIDS cases in the US.²⁵

As HIV/AIDS rages through African-American communities, the response of the US government ranges from neglect to undermining potential solutions. African-Americans with HIV—more than 500,000—outnumber those in 7 of the 15 countries targeted by the US PEPFAR program for financial assistance. Yet there is still no national HIV/AIDS plan and no comprehensive plan to address the epidemic in minority communities. Federal funding for the Minority AIDS Initiative has, in real terms, declined over the last eight years.²⁶ Under the present system, Medicaid, which offers health insurance to low-income persons, denies eligibility until applicants are disabled from full-blown AIDS. The Ryan White CARE Act and the AIDS Drug Assistance Program (ADAP), designed to be "safety nets" for HIV/AIDS patients denied Medicaid eligibility, are chronically under-funded. And Ryan White funding formulas fail to account for the rapidly rising HIV infection in the southern United States, where most new infections occur among the African-American population.²⁷

One in five new HIV infections among African-Americans is a result of injection drug use. In Washington, D.C., for example, 3 percent of the population and 7 percent of black men are HIV-positive, with injection drug use a leading, and increasing, mode of transmission.²⁸ Yet until recently, the US government prohibited the use of federal funds for proven harm reduction programs such as needle exchange.²⁹ Fortunately, the Congress recently took a critically important first step by repealing the ban. Now the federal government must take the next necessary steps, by supporting locally funded programs such as those in

²³ National Alliance of State and Territorial AIDS Directors (NASTAD), "A Turning Point: Confronting HIV/AIDS in African-American Communities," December 2005, p. 1.

²⁴ R. Levine et al., "Black-White Mortality from HIV in the United States Before and After the Introduction of HAART Therapy in 1996," *Journal of American Public Health* (October 2007), 97: 1884-1892.

²⁵ National Institutes of Health (NIH), "HIV Infection in Minority Populations," April 2005, <http://www.niaid.nih.gov/factsheets/Minor.htm>.

²⁶ Statement from Rep. Maxine Waters to the House Appropriations Committee, March 18, 2009; Black AIDS Institute, "Making Change Real: AIDS in Black America 2009," February 2009.

²⁷ Southern AIDS Coalition, "2009-2010 HIV/AIDS Health Care Policy Brief and Recommendations," available at www.southernaidscoalition.org.

²⁸ Daryl Fears, "HIV/AIDS Rate in DC Hits 3 percent," *Washington Post*, March 15, 2009.

²⁹ Failure to promote and permit harm reduction programs shown to prevent disease implicates other treaty obligations on the part of the United States, including the rights to life and to access life-saving information under the ICCPR, articles 17 and 19.

Washington, D.C. Promoting needle exchange without unreasonable restrictions is an example of a public health measure that would reduce transmission of HIV among African-Americans.

Child Labor in US Agriculture

Hundreds of thousands of children work on US farms yet are exempt from the legal protections granted to all other working children in the United States. The 1938 Fair Labor Standards Act (FLSA) specifically exempts farmworker youth from minimum age and maximum hour requirements, allowing children to work at younger ages, for longer hours, and under more hazardous conditions than children in other jobs. What protections children do have are often not enforced. State child labor laws also vary in strength and enforcement. As a result, child farmworkers often work for poor pay for 12- and 14-hour days, and risk pesticide poisoning, heat illness, injuries, and life-long disabilities. The work interferes with their education and many drop out of school. Girls may be subject to sexual harassment.

The FLSA's two-tiered scheme of protection—one for farmworker children, one for all other working children—corresponds closely with race and ethnicity, as most child farmworkers are Latino. In that respect, it is inconsistent with the ICCPR, which states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law," including on the basis of race, color, language, or national or social origin.³⁰

The present practice of child farmwork, including both that which occurs legally and that which results from the failure to enforce existing law, in many cases also constitutes a "worst form of child labor," prohibited by International Labour Organisation (ILO) Convention No. 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labor Convention). The convention, which the United States ratified in 1999, calls for all ratifying member states "to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." It calls on member states to prevent children from engaging in the worst forms of child labor, provide direct assistance for the removal of children already engaged in the worst forms of child labor, identify and reach out to children at risk, and take account of the special situation of girls.³¹

³⁰ ICCPR, article 26.

³¹ Worst Forms of Child Labour Convention, article 7.

Under the convention, “the worst forms of child labour” include, among others, “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”³² Exactly what constitutes such types of work is left to be determined by member states, in consultation with employer and worker organizations and in consideration of international standards,³³ particularly the 1999 ILO Worst Forms of Child Labour Recommendation.³⁴ Children working in agriculture in the United States face the risks outlined in the Recommendation. These include: work with dangerous machinery, equipment, and tools (rec. c); work in an unhealthy environment, which includes exposure to hazardous substances (rec. d), notably pesticides; and work for long hours, during the night, or without the possibility of returning home each day (rec. e). Child farmworkers may also be exposed to sexual abuse (rec. a).

The US government, in response to the ILO Committee of Experts 2008 Observations on the Application of Conventions and Recommendations, acknowledged in 2009 that the FLSA allows children ages 16 and 17 “to perform all work” and that it excludes certain farmworker children from minimum age provisions and hours of work limitations.³⁵ The government noted that “[t]here are currently no separate health and safety standards under federal law for child farm workers ages 16 or 17 engaging in hazardous work,” and that it “has no special training or instructional requirements at the federal level specifically for 16- and 17-year-old agricultural workers engaged in hazardous labor.” Regarding enforcement of existing laws and regulations, the government reported that in 2008 the Department of Labor found 4,737 children employed in violation of FLSA provisions, of whom 52 (1.2 percent) were employed in agriculture.³⁶

³² *Ibid.*, article 3(d).

³³ *Ibid.*, article 4.

³⁴ International Labour Organization Recommendation Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, paragraph 3.

³⁵ “Report for the period of September 1, 2007 to August 30, 2009, made by the Government of the United States of America, in accordance with Article 22 of the Constitution of the International Labor Organization, on the measures taken to give effect to the provisions of the Worst Forms of Child Labor Convention, 1999 (No. 182) ratification of which was registered on December 2, 1999,” sec. III.

³⁶ *Ibid.*, secs. II, III.

Summary Returns of Interdicted Boat Migrants without Adequate Screening, in Violation of the Protocol Relating to the Status of Refugees

The Refugee Convention³⁷ and Protocol³⁸ prohibit the return of refugees “in any manner whatsoever” to a place where their lives or freedom would be threatened.³⁹ Yet the United States maintains a policy of interdicting boats in the Caribbean and summarily returning migrants—who may well include refugees—without adequately screening them to determine if they are seeking asylum or are otherwise vulnerable and without adequately monitoring what happens after they are returned directly to their countries of origin. The United States also applies discriminatory procedures to interdicted migrants depending on their country of nationality or habitual residence, such that “Cubans and Chinese migrants intercepted by the US Coast Guard are subject to special rules which automatically give them the opportunity to express any fears of persecution....However, all other migrants, including Haitians as the largest group, are only given a credible fear interview if they spontaneously show or state a fear of return.”⁴⁰ The US Coast Guard’s method of screening Haitian and other non-Cuban and non-Chinese boat migrants is commonly known as the “shout test.” Only those who jump up and down, wave their hands, and shout the loudest are accorded, even in theory, a shipboard pre-screening interview to determine if they might have a credible fear of return.

In *Sale v. Haitian Centers Council, Inc.*,⁴¹ the US Supreme Court in 1993 countenanced this summary return of interdicted boat people by saying that the Immigration and Nationality Act, which transposes the *nonrefoulement* (non-return) principle from article 33(1) of the Refugee Convention into national law, does not extend beyond US borders and certain designated territories. Human Rights Watch agrees with Justice Blackmun’s dissent, which characterized article 33(1) of the Refugee Convention as “unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry.”⁴² Writing as part of the UN High Commissioner for Refugees’ Global Consultations on International Protection, and citing international case law,

³⁷ Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150.

³⁸ Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267. The United States acceded to the Protocol on November 1, 1968. The Protocol incorporates articles 2 through 34 of the Refugee Convention.

³⁹ Refugee Convention, Article 33(1).

⁴⁰ Joanne van Selm and Betsy Cooper, “The New ‘Boat People’: Ensuring Safety and Determining Status,” Migration Policy Institute, January 2006.

⁴¹ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

⁴² *ibid.*, at 190.

Sir Elihu Lauterpracht and Daniel Bethlehem wrote that “the principle of nonrefoulement will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts, or other points of entry, in international zones, at transit points, etc.”⁴³

* * *

Human Rights Watch urges the Senate and the Obama administration to take appropriate action to address these failures and inadequacies in US implementation of human rights treaties.

Thank you very much.

⁴³ Elihu Lauterpracht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, p. 111.

Statement of Kate Nahapetian
Government Affairs Director of the Armenian National Committee of America

Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law

“The Law of the Land: U.S. Implementation of Human Rights Treaties”

December 16, 2009

I would like to first thank Chairman Dick Durbin, Ranking Member Tom Coburn, and all the distinguished members of this vital Subcommittee – and to share the appreciation of the Armenian National Committee of America and all Armenian Americans for your leadership in promoting the implementation of human rights treaties.

Today, I will, in the interest in helping the panel explore how we can better live up to our ideals and our international obligations, focus on an unfortunate chapter in the history of U.S. human rights policy, namely our federal government’s ongoing policy of complicity in Turkey’s state-sponsored denial of the Armenian Genocide, and the implications of this policy on the implementation, in both spirit and letter, of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).

As you know, the United States was the first nation to sign the Genocide Convention in 1948, but failed to ratify this landmark treaty until 1988. The Genocide Convention Implementation Act of 1987 (“Proxmire Act”) amended the United States code to enumerate criminal penalties for committing genocide, which now include death or imprisonment for life and a fine of not more than \$1,000,000.¹ The most recent amendment to this code by the Genocide Accountability Act of 2007 extended criminal liability for genocide to non-U.S. citizens, who are found in the United States.

Although the Genocide Convention has two main objectives, which are to prevent and punish genocide, the United States’ implementation of the Convention has focused more on the duty to punish, rather than on the duty to prevent genocide.

The duty to prevent genocide is a very real duty, however. As International Court of Justice Judge Lauterpacht wrote in his separate opinion in *Bosnia v. Serbia II*, “The duty to ‘prevent’ genocide is a duty that rests upon all parties and is a duty owed by each party to every other”² Furthermore, when considering the recent Genocide Accountability Act of 2007, the House

¹ 19 U.S.C. § 1091.

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 I.C.J. 325, 436.

Judiciary Committee report stated, “[T]he states’ duty to prevent genocide does not stop at their own borders.”³

The United States’ understanding of that duty was illuminated early on through its 1951 filing with the International Court of Justice, which had been tasked by the United Nation’s General Assembly to issue an advisory opinion on the Genocide Convention. The United States wrote, “the Convention is a very clear expression of the will of the United Nations that every responsible State give its **undertaking to prevent** the recurrence of those heinous offenses against mankind that condemned whole groups, in the twentieth century, to mass destruction.”⁴ (emphasis added). Earlier in this filing, the United States noted that such “outstanding examples of the crime of genocide” included the “Turkish massacres of Armenians.”⁵

Considering this filing and the moral and legal obligations we have undertaken as parties to the Genocide Convention, it is truly astonishing that the United States has more recently pursued a policy of complicity in Turkey’s state-sponsored denial of the Armenian Genocide and has even gone to the lengths of assisting Turkey in covering up a crime that was publicly cited by Raphael Lemkin as one of the major motivating factors in the very drafting of the Genocide Convention.

Instead of preventing genocide, the United States complicity in covering up a past genocide actually emboldens other states to commit genocide and undermines one of the two pillars of the Genocide Convention.

In 2003, when the House Judiciary Committee was considering H. Res. 193, a resolution to mark the 15th anniversary of the Genocide Convention Implementation Act of 1987 (“the Proxmire Act”), Congressman John Conyers emphasized that the United States’ ability to prevent genocide would be compromised by its inability to recognize past genocides. He noted, “If we intend to prevent genocide, we must begin by identifying genocide for what it is. If we fail to recognize historical genocidal events, we not only do a disservice to those who died and the survivors, but we also create conditions where genocide can continue with impunity.” Congressman Conyers was specifically referring to efforts to oppose the resolution, including from the U.S. State Department, because it merely mentioned the Armenian Genocide. In part as a result of this pressure, a resolution to rededicate the United States to preventing genocide, which enjoyed strong bipartisan support, did not reach the House floor.

Although the United States worked valiantly to protest the Armenian Genocide, as it occurred, sustained Turkish government pressure over the decades has resulted in 180 degree reversal in U.S. policy, with successive Administrations failing to properly recognize this crime and opposing Congressional resolutions that discuss the Armenian Genocide. In both 2005 and 2007, in response to the Turkish government’s threats to retaliate against the United States, the U.S. Executive Branch opposed the Congressional Armenian Genocide resolutions, although

³ Report of the House Committee on the Judiciary, Genocide Accountability Act of 2007, H. Rpt. 110-468 (2007).

⁴ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 23, 42 (May 28, 1951 Written Statement of the U.S.A.). <http://www.icj-cij.org/docst/files/12/11767.pdf>

⁵ Id. at 25.

they both had been adopted by the House Foreign Affairs Committee and enjoyed strong bipartisan support.

Furthermore, instead of exhibiting remorse for undermining the principles and spirit of the Genocide Convention through its opposition to the Armenian Genocide resolution, Undersecretary of Defense Eric Edelman and Assistant Secretary of State Dan Fried traveled to Turkey in October 2007 to "express regret" to the Turkish government that the resolution had passed the House Foreign Affairs Committee.⁶

The United States' complicity in Turkey's state-sponsored denial of the Armenian Genocide has not been limited to opposition to Congressional resolutions. One of the most disturbing manifestations of this policy was the retaliation against former U.S. Ambassador to Armenia John Evans in 2005 for speaking honestly about the Armenian Genocide. Turkish foreign agents protested, after Ambassador Evans honestly spoke about the Armenian Genocide before an American audience in California.⁷ Ambassador Evans was eventually forced out of office, after over 30 years of exemplary service to his country and an American Foreign Service Association award for constructive dissent was stripped from him, because "very serious people from the State Department" objected.⁸

Turkey's success in silencing one of the most powerful countries in the world on one of the best documented cases of genocide emboldens other states to commit genocide and undermines the ability of the U.S. and the international community to prevent crimes against humanity. The starkest example of this consequence is Sudan's mimicking of Turkish genocide denial tactics and the growing alliance between these two countries.

As the rest of the world is trying to isolate the genocidal regime of Sudan, Ankara is increasing its military and economic ties to Khartoum and Turkish Prime Minister Recep Tayyip Erdogan has broadcast his denial of the genocide in Darfur, claiming, most recently, that there is no genocide in Darfur, because "a Muslim can never commit genocide."⁹

Sudanese President Omar Hassan al-Bashir has followed in Turkey's genocide denial footsteps, claiming, like Turkey, that the killing of innocent women and children was justified to put down a supposed rebellion, which was instigated by foreign countries. In 2007, Prime Minister

⁶ Statements by U.S. Officials, Undersecretary of Defense Eric Edelman and Assistant Secretary of State Daniel Fried at Ministry of Foreign Affairs, Ankara, October 12, 2007, http://turkey.usembassy.gov/statement_101207.html.

⁷ "Double Genocide Correction from US Yerevan Ambassador," *Anadolu News Agency*, March 4, 2005; "US Envoy Fired Over 'Genocide' Claims," *Turkish Daily News*, May 27, 2006.

⁸ "Association Withdraws Award to U.S. Envoy: Ambassador Was to Be Honored for Dissent," *Washington Post*, June 9, 2005.

⁹ "Slipping in Turkey," *Washington Post*, November 23, 2009.

Erdogan denied the Armenian Genocide and claimed, "There was rebellion in different part of the empire. But given the context of the time and the events that took place at that time, there was provocation by some other countries and the Armenians became part of the rebellion in those years."¹⁰ Likewise, al-Bashir claimed, "There is a rebellion problem in Darfur, and it is the duty of a government in any state to fight the rebellion. When war takes place, civilian victims fall, and this has been exaggerated."¹¹ Al-Bashir alleged, "The people who really commit murders in Darfur are receiving help from Europe and others."¹²

The Turkish-Sudanese alliance illustrates how the enabling of the denial of a past genocide undermines the prevention of future genocide. As the United States wrote in 1951 in its brief to the International Court of Justice, the Genocide Convention's "basic purpose and major commitment is to put an end to genocide."¹³ In order to realize this goal, the United States must end its complicity in the denial of the Armenian Genocide.

Thank you very much for this opportunity to share our thoughts with the Subcommittee. We look forward to working with you to fully realize the noble and necessary aims of the Genocide Convention and its implementation in the United States.

¹⁰ Turkish Prime Minister Erdogan Delivers Remarks at the National Press Club About his Meeting with President Bush, November 5, 2007.

¹¹ Asharq Alawsat Interview, February 17, 2007.

¹² "Sudan promotes militia leader in Darfur violence," *Los Angeles Times*, January 22, 2008.

¹³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 23, 42 (May 28, 1951 Written Statement of the U.S.A.).

NATIONAL ALLIANCE OF HUD TENANTS

Statement by the National Alliance of HUD Tenants

**Prepared for the hearing before the
United States Senate Judiciary Subcommittee on
Human Rights and the Law, December 16, 2009**

Submitted December 22, 2009

Introduction

The National Alliance of HUD Tenants (NAHT) thanks the United States Senate Judiciary Subcommittee on Human Rights and the Law for hosting what we hope will be the first of many hearings on human rights treaty implementation in the United States. We welcome the opportunity to submit a statement for your consideration.

Our organization was founded in 1991 with a mission to preserve and improve affordable housing, protect tenants' rights, develop tenant empowerment, promote resident control and ownership, improve the quality of life in HUD-assisted housing, and to make HUD accountable to its constituents, HUD tenants. We are a diverse, tenant-controlled alliance of tenant organizations in privately owned multifamily HUD-assisted housing.

In our statement we would like to take the opportunity to outline how the current U.S. implementation of ratified human rights treaties falls short of fully protecting tenants' housing rights. Moreover, we wish to draw special attention to the challenges NAHT faces when economic rights such as a right to housing are not given equal weight in domestic discussions due to the United States' persistent failure to ratify the International Covenant on Economic Social and Cultural Rights.

On Treaty Implementation

NAHT, in solidarity with various other human rights organizations and advocates, requests that the federal government create an inter-agency working group on human rights, to oversee and ensure that Executive Orders, Administrative Regulations and all other government actions comply with international human rights standards. In addition, NAHT supports transforming the U.S. Commission on Civil Rights to a Commission on Civil and Human Rights. Furthermore, NAHT requests that treaty reporting - historically relegated to the State Department - include broad national input from advocacy organizations so that when treaty bodies raise particular concerns through their observations, government agencies can utilize those same relationships to create human rights solutions.

The International Convention on the Elimination of Racial Discrimination

The International Convention on the Elimination of Racial Discrimination (ICERD) acknowledges that racially discriminatory policies include policies that not only *intend* to discriminate, but also those that have a discriminatory *effect*.¹ This includes housing policies under Article 5 of ICERD, which states that parties to the Convention like the United States must "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...(iii) the right to housing."²

By choosing not to address housing policies that have a discriminatory effect, the U.S. federal government permits purchasers that buy or choose to provide privately-owned HUD housing to create housing with racially discriminatory effects. Buyers or developers of privately-owned HUD housing units are more likely to invest in predominantly white suburbs or areas without a large population of minorities. However, even when there is HUD housing in minority communities, the units tend to be more poorly maintained than buildings inhabited by white tenants. These trends disadvantage low-income minority tenants, clearly a violation of ICERD, but something not addressed by U.S. law.

The ability to make full use of this particular treaty is hampered by the United States' tendency to use reservations, declarations and understandings that water down the strength of human rights implementation at home. The United States declaration for ICERD has rendered it a non-self executing treaty. Without implementing legislation, this declaration robs tenants of a private right of action. HUD tenants may have a right not to be discriminated against for housing, but if such a violation occurs they have no domestic recourse that would lead them to a remedy.

¹ International Convention on the Elimination of All Forms of Racial Discrimination art. 1.1., available at <http://www2.ohchr.org/english/law/cerd.htm>.

² International Convention on the Elimination of All Forms of Racial Discrimination. art. 5.iii., available at <http://www2.ohchr.org/english/law/cerd.htm>.

Ratification of Outstanding Treaties

The International Covenant on Economic Social and Cultural Rights

As advocates of affordable housing, the National Alliance encourages the ratification of the International Covenant on Economic Social and Cultural Rights (ICESCR). The combination of this treaty and the International Covenant on Civil and Political Rights (ICCPR) is considered the "International Bill of Human Rights." These two treaties are detailed codifications of the Universal Declaration of Human Rights. To date, the U.S. has signed and ratified the ICCPR, and has signed, but has yet to ratify ICESCR.

By becoming a party to ICESCR, the U.S. will at long last recognize that fundamental economic needs like housing, health and food are human rights and that the U.S. will take steps to protect, promote and fulfill such rights. One of the benefits of being a party to such a treaty is participating in periodic reviews where experts on protecting economic rights can engage the U.S. in useful, productive dialogue that produces strategies for protecting these rights. The various aspects of these rights are detailed in international treaties, giving guidance to parties on how to fully protect, any single right.

For instance, the right to housing is expounded upon through General Comment No. 4 of the ICESCR that outlines seven key aspects of the right to housing: legal security of tenure, availability of services, materials, facilities and infrastructures, affordability, habitability, accessibility, location and cultural adequacy.³ This ensures that housing is not merely a roof over one's head, but a safe and secure home in which one can thrive.

More than 360,000 affordable apartments have been lost since Congress dismantled the Title VI Preservation Program in 1996. NAHT has been advocating for Congress to enact a National Right of First Purchase that would give local governments, tenant organizations and nonprofits working with them the right to purchase at-risk buildings from current owners, if they can assemble funds to buy them at market value and refinance with affordable housing subsidies. A federal inter-agency on human rights, operating within a human rights framework that prioritizes economic rights, could have prevented the loss of those units in the first place.

³ CESCR, General Comment No. 4, U.N. Doc. E/1992/23 (Dec. 13, 1991).

Furthermore, NAHT affiliates in high market areas like New York, San Francisco and Boston are reporting a disturbing trend of "predatory equity" investors buying up low-income rental housing and saddling them with excessive debt. As many as 70,000 affordable apartments in New York City are at risk of disinvestment and foreclosure due to over-leveraging and irresponsible lending practices. The majority of apartments are occupied by lower income families who are extremely vulnerable and at risk of massive displacement. As a result, NAHT has been urging Congress to consider legislation establishing government trusteeship of at-risk multifamily residential housing in the event of a market collapse, similar to the Resolution Trust Corporation created by Congress in response to the collapse of the Savings and Loan industry in the 1980's. Advocates of economic rights need the federal government to recognize economic rights as a human right to fulfill our goals and ultimately the needs of HUD tenants across the nation.

**Convention for the Elimination of Discrimination Against Women,
Convention on the Rights of the Child, Convention for Persons with Disabilities**

NAHT also requests the ratification of other treaties that would ensure that historically vulnerable populations in the United States are able to fully enjoy a right to housing. These treaties include, but are not limited to the Convention for the Elimination of Discrimination Against Women, the Convention on the Rights of the Child and the Convention for Persons with Disabilities.

Recommendations

The National Alliance applauds the United States Senate Judiciary Subcommittee on Human Rights and the Law for taking this important step in securing human rights in the United States. The National Alliance looks forward to working with the Subcommittee on the following recommendations:

1. Remove reservations, declarations and understandings that impede the effectiveness of human rights treaties the U.S. is currently a party to, particularly RUDS that make a treaty "non-self executing."
2. Ratify the International Covenant on Economic Social and Cultural Rights, the Convention for the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with

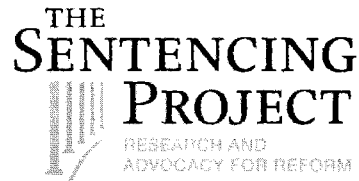
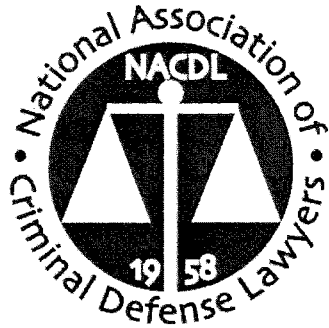
Disabilities among others, so the United States can engage in international dialogue and take steps to fully protect the rights outlined in these treaties.

3. Encourage and continue participation in the periodic treaty review processes with U.N. treaty bodies with greater inclusion on the front end of non-governmental agencies as well as greater follow up on treaty bodies' concerns/observations.

4. Create and encourage a federal human rights inter-agency working group that would monitor and ensure that government policies and procedures comply with human rights obligations.

5. Transform the U.S. Civil Rights Commission into a U.S. Commission on Civil and Human Rights.

The National Alliance again thanks you for hosting this hearing and for your attention.



United States Compliance
with the
United Nations Convention on the
Elimination of All Forms of Racial Discrimination

Prepared for the
Senate Judiciary Subcommittee on Human Rights and the Law
Hearing on the
“Law of the Land: U.S. Implementation of Human Rights Treaties”

By
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
and
THE SENTENCING PROJECT

December 16, 2009

About NACDL and The Sentencing Project

The National Association of Criminal Defense Lawyers (“NACDL”), a professional bar association founded in 1958, is the preeminent organization in the United States advancing the mission of the criminal defense bar and criminal justice reform. NACDL’s direct membership and network of more than 90 local, state and international affiliates comprise tens of thousands of practicing criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law faculty, and judges. NACDL embraces a public service agenda, with an institutional mission to ensure due process, safeguard fundamental constitutional principles, and advocate for rational and humane criminal justice policies.

The Sentencing Project is a national nonprofit organization engaged in research and policy analysis on criminal justice issues. The Sentencing Project’s influential studies update the public, policy makers and the media on the challenges confronting the American justice system, and promote effective and fair strategies for reform. Founded in 1986, the Sentencing Project has become a leader in the effort to bring national attention to disturbing trends and inequities in the criminal justice system, including that this country is the world’s leader in incarceration, that one in three young black men is under control of the criminal justice system, that five million Americans cannot vote because of felony convictions, and that thousands of people have lost welfare, education and housing benefits as the result of convictions for minor drug offenses.

EXECUTIVE SUMMARY

The United States signed the United Nations Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) on September 28, 1966, and ratified it on October 21, 1994. Article 2 of CERD requires the state party “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination.” CERD also calls on the government to “take effective measures to review governmental, national, and local policies” that have a racially discriminatory effect.¹ More specifically, in Article 5, CERD requires the state party “to prohibit and eliminate racial discrimination in all its

¹ U.N. Convention on the Elimination of All Forms of Racial Discrimination, Article 2(c), March 7, 1966, available at <http://www2.ohchr.org/english/law/cerd.htm>.

forms” and to ensure “[t]he right to equal treatment before the tribunals and all other organs administering justice.”²

In practice, the United States frequently falls short of its obligations under Article 2 and Article 5 in the criminal justice arena. Members of minority communities are disproportionately present at all stages of the American criminal justice system. Because of the disparity, any showing of procedural or substantive unfairness in policing, courts, or corrections can be presumed *a priori* to disproportionately impact communities of color.

This statement will address the United States’ failure to comply with its obligations under Article 2 and 5(a) of CERD in the criminal justice area, addressing the longstanding racial disparities in indigent defense and sentencing, as well as racial disparities in emerging areas of the criminal justice system, particularly zero tolerance policies and drug courts. The statement concludes with specific recommendations on steps the federal government can take to eliminate racial disparities in the criminal justice system and improve compliance with CERD.

INDIGENT DEFENSE

The Committee on the Elimination of Racial Discrimination (the “Committee”) is a group of independent experts that monitors implementation of CERD by its State parties. The Committee issued General Recommendations to provide State parties with guidance on how to comply with CERD. General Recommendation XXXI³ on the prevention of racial discrimination in the administration and functioning of the criminal justice system equates the “guarantees of a fair trial and equality before the law” with, among other things, the establishment of a “system under which counsel . . . will be assigned free of charge.”

Notwithstanding the well-established constitutional protections ensuring the right to counsel for criminal defendants at trial, the actual application of the right to counsel in criminal cases across the country routinely fails to meet even the most rudimentary requirements of “a fair trial and equality before the law.” America’s public defense systems are inadequately monitored and overseen, and egregiously underfunded. Criminal defendants of color are more likely to utilize publicly funded defense services than white defendants in light of racial disparities in income, wealth, and access to opportunity. As a result, the crisis in America’s public defense system has a disproportionate impact on communities of color. General Recommendation XXXI, ¶ 4(b), *supra*, notes that “potential indirect discriminatory effects” can be regarded as an indicator of racial discrimination for the purposes of determining whether the State party is complying with CERD.

Members of minority communities utilize indigent defense services more than any other racial group because they are more likely to live in poverty as a result of multiple

² *Id.* Article 5(a).

³ General Recommendation XXXI is available at http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf.

factors articulated in other sections of this statement. In 2002, the percentage of non-Hispanic whites living in poverty was 8%, while the percentage of non-Hispanic blacks living in poverty was 23.3% and the percentage of Hispanics living in poverty was 21.8%.⁴ With respect to the utilization of indigent defense services, these disparities only increase. For example, in Alabama in 2001, just under 60% of defendants using the indigent defense system were black, despite the fact that African-Americans only make up 26% of the state's population.⁵ Overall, 77% of black inmates in state prisons reported having had lawyers appointed for them by the court, whereas only 69% of white inmates report having utilized public defense services.⁶ Disparities are similar in the federal system; 65% of black inmates report using public defense services compared with only 57% of white inmates.⁷

NACDL recently completed a comprehensive study of misdemeanor courts, which involved site visits to courts in numerous jurisdictions, as well as interviews and surveys with public defenders across the country. This research supports the notion that those served by public defenders are disproportionately people of color. For example, during a site visit in Lynwood, Washington, "four out of seven men (57 percent) on the in-custody calendar were observably men of color," whereas in Lynnwood, only 26 percent of the population is non-White.⁸

As noted above, General Comment XXXI, *supra*, states that "[e]ffectively guaranteeing these rights implies that *States parties* must set up a system under which counsel and interpreters will be assigned free of charge." Contrary to this requirement, public defense services in the United States are not governed by any national, governmental standards. Indeed, frequently even state governments fail to provide any oversight for indigent defense services. Many states, including Pennsylvania, Michigan, California, Arizona and New York, simply delegate responsibilities for providing indigent defense services, particularly trial level services, to the multitude of counties within the state, with no guidance or standards to govern the nature or provision of services.⁹ In essence, there is nothing that requires that the indigent defense system appoint an attorney with appropriate knowledge, skill and training, nor anything that directs the attorney to undertake the minimal basic activities necessary for a defense, such as an investigation, a client interview, and motions practice. As a result, most of the systems are in disarray. A recent report of the National Right to Counsel Committee observed that, because of a lack of standards and oversight, in many places inexperienced

⁴ Mark Levitan, *Poverty in 2002: One-Fifth of the City Lives below the Federal Poverty Line*, September 30, 2003, available at www.cssny.org/pubs/special/2003_09poverty.pdf.

⁵ David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Toward Change*, 52 Ala. L. Rev 975, 994 (2001).

⁶ Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov 2000), at 3.

⁷ *Id.*

⁸ R. Boruchowitz, M. Brink & M. Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (April 2009), at 47, available at <http://www.nacdl.org/misdemeanor>.

⁹ The Spangenberg Group, *State Indigent Defense Commissions* (Dec 2006), at 3, available at http://www.abanet.org/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf.

attorneys are assigned felony and even homicide cases.¹⁰ For example, in one location, an attorney right out of law school was immediately assigned 270 felony drug cases.¹¹

Public defense services in most parts of the United States are also dramatically under-funded. The National Right to Counsel Report observed that even before the current economic crisis, “many indigent defense systems across the country were already facing serious budget shortfalls and cutbacks.”¹² The economic crisis has worsened this situation and “37 states [faced] mid-year budget shortfalls for fiscal year 2009.”

The federal government provides minimal to no financial support for indigent defense in state courts. An ABA study similarly concluded that funding for public defense services is “shamefully inadequate.”¹³ In the study, one witness illuminated the problem on a national scale by comparing the United States to England. The witness stated, “The expenditures per capita are \$34 per person in England and Wales. In the United States, the comparable figure is about \$10 per person, and in 29 states the expenditures are less than \$10 per capita. England is outspending the United States by more than three to one.”¹⁴

The impact of the public defense crisis on communities of color is also demonstrable. As Janet Reno, former United States Attorney General, once said, “a good lawyer is the best defense against a wrongful conviction.”¹⁵ Because the people who use underfunded and inadequate public defense services are disproportionately people of color, they make up a disproportionate number of the wrongfully convicted. For example, 64% of the people who have been wrongfully convicted of rape (and then exonerated through DNA) are black, even though African-Americans make up only 12% of the United States population.¹⁶ As current United States Attorney General Eric Holder recently observed, despite the efforts made previously, “it is clear . . . that the crisis in indigent defense has not ended.”¹⁷

¹⁰ See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, National Right to Counsel (April 2009), at 91, available at http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf.

¹¹ *Id.*

¹² *Id.* at 59.

¹³ *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association Standing Committee on Legal Aid and Indigent Defense (Dec 2004), at V, available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/>.

¹⁴ *Id.* at 8.

¹⁵ Janet Reno, Remarks at the 2000 Indigent Defense Summit, available at http://www.sado.org/publicdefense/reno_competent.pdf; see also Janet Reno, *Legal Services for the Poor Need Vigilance*, USA Today (Mar 18, 1998), available at <http://www.criminaljustice.org/INDIGENT/ind00011.htm>.

¹⁶ *200 Exonerated, Too Many Wrongfully Convicted*, Innocence Project, available at <http://www.innocenceproject.org/Content/530.php>.

¹⁷ Eric Holder, Remarks at the American Council of Chief Defenders Conference, June 24, 2009, available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090624.html>.

The dramatic under-funding and lack of national standards governing America's indigent defense services has made people of color second class citizens in the American criminal justice system. The failure of the federal government to take any steps to combat this crisis constitutes a violation of the U.S. Government's obligation under articles 2 and 5 of the CERD to guarantee "equal treatment" before the courts.

SENTENCING

The United States has also failed to comply with CERD in the area of criminal sentencing by largely ignoring the problems inherent in mandatory minimum sentencing and the crack and powder cocaine disparity, both of which continue to have racially disparate impacts on people of color.

Mandatory minimum sentences are statutorily prescribed terms of imprisonment that automatically attach upon conviction of certain criminal conduct, usually pertaining to drug or firearm offenses. Absent very narrow criteria for relief (such as certain categories of first-time offenders or persons who have provided assistance to the prosecution in an ongoing investigation), a sentencing judge is powerless to impose a term of imprisonment below the mandatory minimum. In the realm of drug offenses, by relying exclusively upon quantity as the indicator of a defendant's involvement in a drug enterprise, Congress had sought to establish generalized equivalencies in punishment across drug types by controlling for the risk of the drug by adjusting the quantity threshold. Sentences are disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences for drug offenses rely solely upon the weight of the substance as a proxy for the defendant's role and culpability. This is tantamount to a "one size fits all" sentencing scheme.

Since its inception more than a quarter-century ago, no single policy has so impacted the racial dynamics of law enforcement, sentencing, and corrections in the United States as the "war on drugs." Between 1980 and 2005, the racially disparate law enforcement practices in the "war on drugs" were the most important factors contributing to the rapidly widening ratio of African American and white incarceration rates. Michael Tonry, in his landmark book on American sentencing, *Malign Neglect*, concluded, "[u]rban black Americans have borne the brunt of the War on Drugs. They have been arrested, prosecuted, convicted, and imprisoned at increasing rates since the early 1980s, and grossly out of proportion to their numbers in the general population or among drug users. By every standard, the war has been harder on blacks than on whites; that this was predictable makes it no less regrettable."¹⁸

African Americans comprise 13% of the United States population and 14% of monthly drug users, but represent 37% of those persons arrested for a drug offense and 56% of persons in state prison for a drug conviction.¹⁹ Because African Americans use

¹⁸ Tonry, M. (1996). *Malign Neglect: Race, Crime, and Punishment in America*. Oxford University Press, USA, at 105.

¹⁹ Drug use data from Substance Abuse and Mental Health Services Administration, *Results from the 2006 National Survey on Drug Use and Health: National Findings*, 2007, at Table 1.19A; arrest data from

controlled substances at the same rate as their representation in the general population, there is nothing in the patterns of drug use to explain the disproportionalities in arrests, sentencing, and incarceration rates.

Mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the United States Sentencing Commission found that African Americans were 21% more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge.²⁰ A separate study by the Federal Judicial Center also concluded that African Americans face an elevated likelihood of receiving a mandatory minimum sentence relative to whites.²¹ More recently, the Commission, in a 15-year overview of the federal sentencing system since the full implementation of the Sentencing Reform Act of 1984, concluded that “mandatory penalty statutes are used inconsistently” and disproportionately affect African American defendants.²² As a result, African American drug defendants are 20% more likely to be sentenced to prison than white drug defendants.²³

Higher arrest rates of African Americans generally reflect a law enforcement emphasis on inner city areas, where drug sales are more likely to take place in open-air drug markets and fewer treatment resources are available.²⁴ However, the research suggests that visible manifestations of drug selling activity are not accurate indicators of drug use and dependency in neighborhoods and fuel widely held misperceptions about patterns of drug abuse in American society.²⁵ Despite average rates of drug use among the general population, African Americans who use drugs are more likely to be arrested than other groups. This disparity extends throughout the criminal justice system. In fact, simply relying upon visible drug sales as a means of measuring the level of drug distribution in a neighborhood greatly overestimates the degree to which African Americans are involved in the drug trade and discounts the active drug selling economy in majority white communities that tends to take place behind closed doors and out of public view.

The broad range of mandatory minimum sentences for drug offenses ushered in by the Anti-Drug Abuse Act of 1986 included substantially different penalty structures for crack and powder cocaine. The voiced rationale at that time was that the smokeable form of cocaine was far more addictive, presented more dangerous long-term consequences of use, and its distribution markets had a greater association with

Federal Bureau of Investigation, File UCR91300, March 2002; Ryan S. King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prison*, The Sentencing Project, September 2002.

²⁰ United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 1991.

²¹ Barbara S. Meierhoefer, *General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed*, Federal Justice Center, 1992.

²² United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 2003, at 89.

²³ *Id.* at 122.

²⁴ Leonard Saxe, Charles Kadushin, Andrew Beveridge, David Livert, Elizabeth Tighe, David Rindskopf, Julie Ford, and Archie Brodsky, “The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies,” *American Journal of Public Health*, Vol. 91, (12), pp. 1987-1994, 2001.

²⁵ *Id.* at 1990.

violence.²⁶ The sub-text was that crack cocaine was perceived as a drug of the Black inner-city urban poor, while powder cocaine, with its higher costs, was a drug of wealthy whites. Crack and powder cocaine share the same pharmacological roots, but crack cocaine is cooked with water and baking soda to create a hard, rock-like substance that can be smoked. Crack cocaine is sold in small quantities and is a cheaper alternative to powder cocaine, thereby making it affordable to people who had not traditionally used cocaine. Its advent in the 1980s in a number of major urban areas in the United States was accompanied by massive media attention of the drug's meteoric rise and its associated dangers. A core component of the media coverage was the thinly-veiled (and unfounded) link between the drug's use and low-income, communities of color. In a matter of weeks, crack cocaine was widely held by the American public to be a drug that was sold and used by poor African Americans. This framing of the drug in class and race-based terms provides important context when evaluating the legislative response.

The resulting legislation punished crack cocaine with historically punitive sanctions. Crack cocaine is the only drug in which simple possession can result in a five-year mandatory sentence. A defendant convicted with five grams of crack cocaine – between 10 and 50 doses – will receive a five-year mandatory sentence.²⁷ To receive the same sentence for a powder cocaine violation, a defendant would have to have been involved in an offense involving 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the “100-to-1 sentencing disparity.” In order to trigger a ten-year mandatory sentence, a defendant would need to be charged with 50 grams of crack cocaine – between 100 and 500 doses – or 5,000 grams of powder cocaine – up to 50,000 doses.

The impact of this policy in the African American community has been nothing less than devastating. While two-thirds of regular crack cocaine users in the United States are either white or Latino, 82% of those persons sentenced in federal court for a crack cocaine offense are African American.²⁸ Thus, African Americans disproportionately face the most severe drug penalties in the federal system. The average sentence for less than 25 grams of crack cocaine is 65 months, compared to 14 months for the same quantity range of powder cocaine.²⁹

On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5%) of defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1%. Although the distribution of offender roles is similar between the two substances, the median quantity and applicable mandatory minimum is vastly different. The median quantity for a crack cocaine street-level dealer is 52 grams, which triggers a 10-year

²⁶ As has been documented repeatedly, history has proven all of these concerns unfounded. See The Sentencing Project, *Federal Crack Cocaine Sentencing*, 2007.

²⁷ 21 U.S.C. 844

²⁸ Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health: Detailed Table J*, 2006, at Table 1.43a; and, United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, at 15.

²⁹ United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 2002.

mandatory minimum sentence. For a powder cocaine street-level dealer, the median quantity is 340 grams, which would not even expose a defendant to a five-year mandatory minimum. This has led the United States Sentencing Commission to conclude that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”³⁰ Moreover, regarding the racial disparity that has been exacerbated by federal crack cocaine sentencing, the Commission reported that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”³¹

Due in large part to the racially disparate application of mandatory sentences, African Americans, on average, now serve almost as much time in federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).³² Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62%, compared with a 17% increase among white drug defendants.³³ Much of this disparity is attributable to the severe penalties associated with crack cocaine.

EMERGING AREAS OF CONCERN

The criminal justice system in the United States is changing and evolving. New policing strategies and court procedures are constantly being introduced, and when viewed as successful, these strategies and procedures can spread quickly. Unfortunately, many of these new developments increase, rather than ameliorate, concerns about racial disparities, and thus concern about compliance with CERD.

Policing and Broken Windows Strategies

In the area of policing, one of the most significant changes of the past 30 years has been an increased focus on enforcement of petty crimes, typically called “broken windows” enforcement or “zero tolerance.” Strictly enforcing low-level criminal laws, or quality-of-life crimes, such as laws against vandalism, panhandling, and minor theft, is believed by some to deter further low-level criminal activity and prevent more serious crimes from occurring.³⁴ However, numerous scholars have noted that these policies encourage broad police discretion and that, as a result, they can have enormous and

³⁰ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, at 100.

³¹ United States Sentencing Commission, *supra* note 22, at 132.

³² Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, NCJ 210299, October 2005, at 112.

³³ *Id.*; Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994*, NCJ 163063, April 1998, at 85.

³⁴ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. The underlying thesis concerning the impact of expanded enforcement of minor crimes has recently been subject to significant challenge by social scientists as well. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City & a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271 (2006).

problematic impact on minority communities.³⁵ Indeed, the first proponents of broken windows enforcement even conceded that this approach to policing lends itself to the police's becoming "the agents of neighborhood bigotry."³⁶ A number of subsequent studies have demonstrated that the group most affected by broken windows enforcement strategies is the poor, which as observed above, means disproportionately people of color.³⁷ "The Baltimore City Council acknowledged as much in a report on arrest rates, stating that the 'unintended consequence' of vigorous policing in the city is 'the disproportionate arrest of both African Americans and the poor.'"³⁸

General Recommendation XXXI states that state parties should "eliminate laws that have an impact in terms of racial discrimination." Given the clear evidence of disproportionate impact, the federal government's failure to curtail broken windows police practices, or, at a minimum, take steps to eliminate their disparate racial impact, is a violation of CERD.

Drug Courts

In the area of court procedures, one of the largest developments over the past 30 years is the formation and proliferation of drug courts. The first drug court opened in Miami in 1989, and today there are more than 2,000 drug courts in operation across the country.³⁹ Intended to address the problems of drug addiction and its impact on the criminal justice system, drug courts provide court administered treatment. If successful, the defendant frequently can have the criminal case dismissed, but if unsuccessful, the defendant frequently faces jail time as punishment.⁴⁰ While the advent of drug courts is widely viewed as a positive development, their administration raises considerable concerns about impact on minority communities.

Drug court admissions procedures frequently create opportunities for discrimination. Frequently, admissions criteria are not objective, but ad hoc. Judges, or even prosecutors, often have the unfettered power to determine whether a defendant will be permitted to go to drug court.⁴¹ Also, drug courts often have a policy of not permitting repeat offenders to access the program.⁴² As a result, drug courts are significantly less accessible to defendants of color. Studies regarding the population admitted to drug courts bear this out. For example, in a study of four counties within California, drug

³⁵ See, e.g., Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *Yale L. J.* 2249, 2254 (1998).

³⁶ *Id.* (citing Wilson & Kelling, *supra* n. 34, at 35).

³⁷ Ralph Taylor, *Breaking Away From Broken Windows: Baltimore Neighborhoods and the Fight Against Crime, Grime, Fear, and Decline* (2001), at 371-74.

³⁸ Reed Collins, *Strolling While Poor: How Broken-Windows Policing Creates a New Crime in Baltimore*, 14 *GEO. J. ON POVERTY L. & POL'Y* 419, 426 (2007) (citing Balt. City Council Pub. Safety Subcommittee, *Report on the Police Performance Enhancement Program and Recommendations to Improve the Process for Expungement of Arrest When No Charges Are Filed* (Sept. 2005), at 12).

³⁹ *America's Problem Solving Courts: The Criminal Cost of Treatment and the Case for Reform*, National Association of Criminal Defense Lawyers (Sept. 2009), at 16.

⁴⁰ *Id.* at 16-17.

⁴¹ *Id.* at 22-23.

⁴² *Id.*

courts admitted a proportionately greater number of Caucasian offenders, "even though persons of color comprise a disproportionately large percentage of the low-level drug offender population eligible for drug court services."⁴³ For example, in Alameda County in 1997, African Americans comprised 18.8% of the residents and 78.5% of the county's adult felony drug defendants. Yet, the drug court in Alameda County reported that the vast majority - 65% - of their participants were Caucasian.⁴⁴

NACDL recently completed a nationwide study of drug courts.⁴⁵ An NACDL Task Force heard testimony from prosecutors, judges, defense lawyers and defendants involved with drug courts across the country. The testimony at these hearings confirmed the findings of the California study, that admission to drug court is frequently denied to defendants of color. As a public defender from Utah explained about adult clients,

Minority clients rarely get accepted in the first place. For whatever reason, they are more apt to have prior criminal history that keeps them out of drug court. The problem I've seen is that for whatever reason, I have been able to get to waive the admissions rules for some clients and those clients are always white. In one case, I didn't even refer a guy because of his problematic record and the drug court cop called me and asked why I hadn't referred him and said since my client's mom was a cop, my client would get into drug court if I would only refer him.⁴⁶

Because of the enormous discretion granted to judges, the disparity, intended or not, may continue throughout the case, including sanctions and termination. As another Utah lawyer noted, "I have seen white defendants who re-offend offered second and third chances, while members of minority groups are treated immediately as being in violation."⁴⁷ Perhaps as a result, African Americans have a high failure rate in drug courts, as much as 30 percentage points higher in some courts.⁴⁸

At a minimum, the data that exists regarding drug courts is cause for significant concern regarding disparate racial impact, and, under CERD, the situation must be monitored, evaluated, and corrected as necessary.

⁴³ Gary Uleman, et. al., *Substance Abuse and Crime Prevention Act of 2000, Progress Report* (March 2002), at fn. 30 (citing National Association of Drug Court Professionals *Law Enforcement/Drug Court Partnerships: Possibilities and Limitations, A Case Study of Partnerships in Four California Counties* (June 2000) (noting that "the majority of drug court participants in all programs were identified as Caucasian or non-Hispanic white.")).

⁴⁴ *Id.* (citing National Association of Drug Court Professionals *Law Enforcement/Drug Court Partnerships: Possibilities and Limitations, A Case Study of Partnerships in Four California Counties* (June 2000)).

⁴⁵ *America's Problem Solving Courts*, *supra* n. 39.

⁴⁶ *Id.* at 43 (citing Questionnaire response 95, question 15).

⁴⁷ *Id.* (citing Questionnaire Response 321, question 17).

⁴⁸ *Id.* (citing Michael M. O'Hear, *Rethinking Drug Courts: Restorative justice as a Response to Racial Injustice*, 20 *Stan. L. & Pol'y Rev.* 463, 480 (2009)).

RECOMMENDATIONS:

By failing to appropriately address racial disparities in the criminal justice system, the United States falls far short of compliance with its obligations under CERD to ensure “[t]he right to equal treatment before the tribunals and all other organs administering justice,”⁴⁹ and to “take effective measures to review governmental, national, and local policies” that have a racially discriminatory effect.⁵⁰ However, there are immediate steps that Congress can take to improve compliance with CERD.

Research

- The United States government should mandate, or at least encourage, all indigent defense systems, state and federal, to maintain accurate data on the race of the defendants utilizing indigent defense services, as well as the caseloads of each defender annually, the salary of the public defenders and/or payment structure for court appointed counsel, the number of open cases carried over annually by defender, the percentage of cases plea bargained and the percentage of cases tried in each case category, the average time from arraignment to sentencing or acquittal for each case category, and the amounts spent on investigative and expert services by all means necessary including by conditioning of funding. These statistics would facilitate proper evaluation of the indigent defense system and its particular impact of the system on communities of color.
- Congress should coordinate and fund a study to determine whether zero tolerance policies contribute to racial disparities within the criminal justice systems. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.
- The United States should evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. An analysis of prosecutorial decision making should disclose whether and to what extent (a) racial and ethnic disparities are attributable to criminal justice policies and practice; (b) any policies and practices that do produce disparities are fully justified as appropriate responses to criminal behavior; and (c) disparities may be attributable in whole or in part to discrimination or unconscious bias.

Policy

- Congress should adopt the recommendation of the American Bar Association (“ABA”) that it establish and fund a National Center for Public Defense Services to serve as an independent, national oversight authority that would strengthen

⁴⁹ U.N. Convention on the Elimination of All Forms of Racial Discrimination, Article 5(a).

⁵⁰ *Id.* at Article 2(c).

state public defense services by conducting and hosting public defense programs and by administering federal funds for state public defense programs.

- Congress should provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government's support for the prosecution function.
- The United States government should take steps to end all mandatory sentencing practices, returning judicial discretion to judges.
- The United States government should amend penalties for crack cocaine to be equivalent with those for powder cocaine, at the current quantity threshold of powder cocaine, as well as eliminate similar egregious sentencing disparities.
- The United States government should mandate the preparation of racial/ethnic impact statements to be submitted in conjunction with proposed sentencing and corrections legislation to project measurable change and any unwarranted disparity on the incarcerated population.

Funding and Funding Conditions

- Congress should provide sufficient financial support as applicable to the states, local government, and territories for the provision of public defense services in state criminal and juvenile delinquency proceedings comparable to the federal government's support for the prosecution function.
- As a condition of receiving federal criminal justice funding, state criminal justice systems should be required to: (1) promulgate and adhere to public defense standards that are consistent with the ABA's *Ten Principles of a Public Defense Delivery System*; the National Juvenile Defender Center/National Legal Aid & Defender Association's ("NLADA") *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*; and NLADA's *Performance Guidelines for Criminal Defense Representation*; and (2) include public defense systems in state and local justice planning.
- The United States government should establish incentives for states to evaluate the effectiveness of mandatory sentences.
- As a condition of receiving federal criminal justice funding, state and county drug courts should be required (1) to adopt objective, public admission criteria; (2) to eliminate any bar for admission relating to past criminal conduct; and (3) to gather comprehensive racial statistics.

**Testimony of the National Association of Social Workers
on
U.S. Implementation of Human Rights Treaties**

**for the Senate Judiciary Subcommittee on Human Rights and the Law Hearing
December 16, 2009**

The United States has been a leader in the defense and support of human rights. As a country we strongly believe in justice and equality. Implementing human rights measures is a means to achieving and sustaining justice and equality. Treaties can and do set standards that ensure human rights for all persons - children and adults, individuals and communities. Support of human rights as basic entitlements is central to the profession of social work and is a necessary part of creating and sustaining healthy communities. Discrimination and social exclusion based on racial and religious intolerance; gender inequality and violence; denial of the rights of women and children, refugees and older people – all are social justice issues of concern to social work.

The National Association of Social Workers (NASW) thanks the Senate Judiciary Subcommittee on Human Rights and the Law for creating this important opportunity to address human rights. We commend the U.S. government's implementation of human rights treaties, yet gaps remain. NASW supports four primary ways in which the U.S. government can fulfill its obligations under the treaties being discussed: eliminating the practice of torture; implementing comprehensive immigration reform; combating all forms of discrimination; and promoting services to victims of human rights violations. The failure to address these areas has a particularly profound effect on certain groups of people: unaccompanied children arriving in the U.S. who are often victims of gang violence, sexual abuse, abandonment and human trafficking; asylum seekers and undocumented immigrants in U.S. immigration detention; detainees held in U.S.-operated overseas facilities; people of color and the poor who are incarcerated by our criminal justice system in disproportionate numbers and at increasing rates; victims of human rights violations based on sexual orientation; and children affected by armed conflict around the world.

Social workers recognize the importance of national security and ensuring that the country is protected from those who intend to conduct violent acts. The challenge is to determine the reasonable balance between human rights and security.

Our recommendations are as follows:

1. Eliminate the practice of torture

NASW policies advocate against torture and for the support of international human rights. Specifically, NASW's position is to: support the right not to be subjected to dehumanizing treatment and punishment; advocate for the elimination of the practice of torture; protect individuals from being detained and held indefinitely in secret. In addition, we advocate for U.S.

government implementation of practices and methods of providing homeland security and combating terrorism that are consistent with human rights values and ethics, as well as observing the obligation to prosecute violations of the Geneva Conventions and the Convention against Torture.

We applaud the U.S. government's concern about these matters but more must be done to eliminate the practice of torture. The United States must not condone or permit torture, nor deny due process to victims. The international conventions against torture cannot be ignored without further damage to the international standing of the United States. We call for:

- Conditions in U.S. detention facilities and the treatment of detainees that comply with human rights standards
- Detentions conducted with transparent and legal processes
- Holding perpetrators of prisoner abuse accountable
- Rejecting testimony extracted under torture or ill-treatment in any criminal prosecution
- Access by all detainees in U.S. custody and facilities operated overseas to the International Committee of the Red Cross
- Access by all detainees in U.S. custody and facilities operated overseas to appropriate medical care

2. *Replace the current patchwork of immigration laws and procedures with a fair, equitable, and comprehensive national plan*

Throughout history, social workers have been instrumental in helping newcomers of all descriptions make the transition into American society. Social workers have also worked with communities that receive immigrants, preparing them to address complexities of new cultural dynamics. NASW promotes policy that provides for fair and humane U.S. immigration law in accordance with international human rights treaties.

NASW applauds U.S. efforts to uphold the Refugee Protocol and the Covenant on Civil and Political Rights. However, there is much to be done to ensure that U.S. policies support equity and human rights while at the same time recognizing the importance of national security. NASW is deeply concerned about the escalation of arbitrary detention of immigrants and asylum seekers in U.S. facilities typically used for punishment of criminal violations. Article 9 of the International Covenant on Civil and Political Rights states: "No one shall be subjected to arbitrary arrest or detention." However, over 350,000 men, women, and children are detained by U.S. Immigration and Customs Enforcement each year.¹ Most do not have a criminal history and yet are sent to criminal detention facilities that lack the capacity to address their particular needs.² Immigration detention procedures must be reformed to be consistent with international human rights standards. In order to fully comply with international human rights treaties, NASW recommends that the U.S. government:

¹ "Immigration Detention Overview and Recommendations," by Dr. Dora Schriro, Immigration and Customs Enforcement, Department of Homeland Security, October 6, 2009.

² Ibid

- End the use of arbitrary arrest and detention of undocumented immigrants
- Ensure fair treatment and due process in accordance with international human rights for all asylum seekers and immigration detainees
- Ensure adequate conditions of care for unaccompanied immigrant children (inclusive of health care and education) in the custody of the U.S. government
- Address the root causes and conditions that force people to flee their home countries

3. Combat all forms of discrimination

Social workers around the globe are committed to ending discrimination in all forms. The United States government has worked to address our own country's history of racial discrimination through legislation, policy, and regulation. U.S. ratification of the Convention on the Elimination of Racial Discrimination was a critical step in confirming our commitment to recognizing the equality and rights of all persons, without distinction as to race, color, or national or ethnic origin.

Discrimination is often based on more than race, nationality and ethnicity, but also on age, disability, health status, and sexual orientation. The U.S. has made strides in recognizing the full range of bases for discrimination, such as by lifting the travel ban that discriminated against persons with HIV/AIDS. We applaud our government for these positive steps and recommend that the U.S. government:

- Implement policy and legislation that acknowledges, maintains, or enhances the sovereign rights and religious freedom of indigenous populations
- Address practices of discrimination and exclusion based on sexual orientation
- Address policies and practices that allow racial profiling as an acceptable component to homeland security
- Address policies and practices that have led to our nation having the highest incarceration rate in the world with disproportionate incarceration rates of people of color and those who are poor
- Ratify the Convention on the Elimination of All Forms of Discrimination Against Women

4. Promote services to child victims of human rights violations

A component of the social work profession for over a century has been combating child maltreatment and coordinating services for victims of maltreatment. Concepts of working with people in their environments and of the primacy of family help social work professionals understand that when dealing with child maltreatment, helping the child means working with the whole family and with other environmental factors in a culturally competent way. This especially applies when working across cultures with children from other countries.

When reviewing compliance with human rights treaties such as the two Optional Protocols to the Convention on the Rights of the Child, several gaps come into view in the U.S. government's provision of services to child victims of human rights violations.

First, we must do more to address the multi-faceted needs faced by former child soldiers once they return home to their communities, where they are too often victims of stigma,

discrimination and maltreatment. Article 7 of the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict obliges nations to contribute to the demobilization, rehabilitation, and social reintegration of persons who are victims of acts contrary to the Protocol. The U.S. has supported extensive international programs for the disarmament, demobilization, and reintegration of children associated with the armed forces. However, much more focused attention on reintegration assistance and psychosocial support to children, their families and communities is greatly needed.

Second, each year, children around the world are at increased risk of being trafficked, often into or through the U.S. More must be done to ensure the protection and care of child victims as well as to address the root causes of trafficking. Systems in place to protect children should be adequately staffed and funded, and they should provide services that reflect evidence-based practice and comply with general child welfare practices.

NASW strongly supports the U.S. ratification of the Convention on the Rights of the Child. Supporting the two optional protocols to the CRC is not enough. Child soldiers, child prostitution and trafficking are only a few of the many violations of children's human rights that need to be fully recognized and addressed by the U.S.

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Submission of the National Lawyers Guild

The Law of the Land: U.S. Implementation of Human Rights Treaties
Hearing before the Senate Judiciary Subcommittee on
Human Rights and the Law

December 16, 2009

THE UNITED STATES SHOULD LIFT ITS "UNDERSTANDING" THAT
NARROWS THE DEFINITION OF TORTURE AND AMEND THE U.S. TORTURE
STATUTE

The National Lawyers Guild (NLG) was founded in 1937 and is the oldest and largest public interest/human rights bar organization in the United States. Its headquarters are in New York and it has chapters in every state. The NLG congratulates Senators Dick Durbin and Tom Coburn for convening this historic hearing to fully implement the U.S. obligations under our ratified treaties. The NLG is hopeful that this will be the first of several hearings that lead to full implementation of these treaties.

Ratified Treaties are Part of U.S. Law

The United States ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1994.

Article VI of the U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., Art. VI; § I, cl. 2).

Thus CAT is part of U.S. law.

RUDs That Violate the Object and Purpose of CAT are Void

The United States, upon ratification of the CAT, registered some Reservations, Understandings and Declarations (RUDs), indicating that it would refuse to follow certain provisions of the CAT. It is well established that RUDs which violate the object and purpose of a treaty are void. (See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 19, 1155 U.N.T.S. 331, 336; Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations*, 43 VA. J. INT'L L. 249, 252-253 (2002)). The United States has not ratified the Vienna Convention; but the U.S. considers the object and purpose principle to be customary law. (See See Jordan J. Paust (1996), *International Law as Law of the United States*, Durham, NC: Carolina University Press, especially pp. 286-87; Laurence Tribe (2000), *American Constitutional Law*, 3rd ed., New York, NY: Foundation Press, pp. 644-45).

Congress Should Lift the "Understanding" that Narrows the Definition of Torture

Article I of CAT defines torture as the intentional infliction of severe physical or mental pain or suffering. The U.S. attached an "understanding" to its ratification of CAT, which added the requirement that the torturer "specifically" intend to inflict the severe physical or mental pain or suffering.¹ This is a distinction without a difference for three reasons.

¹ That understanding reads: "That with reference to Article I, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or

First, under well-established principles of criminal law, a person specifically intends to cause a result when he either consciously desires that result or when he knows the result is practically certain to follow. Second, unlike a "reservation" to a treaty provision, an "understanding" cannot change an international legal obligation. Third, under the Vienna Convention on the Law of Treaties, an "understanding" that violates the object and purpose of a treaty is void. The claim that treatment of prisoners which would amount to torture under CAT does not constitute torture under the U.S. "understanding" violates the object and purpose of CAT, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Congress should lift the understanding that narrows the definition of torture.

Three U.S. Statutes Provide Redress for Torture

The Torture Victim Protection Act of 1991 (TVPA) (Pub. L. No. 102-256, 106 Stat. 73) provides a civil cause of action against individuals who, acting in an official capacity for any *foreign* nation, committed torture and/or extrajudicial killing. (emphasis added).

The Alien Tort Claims Act of 1789 (ATCA) (28 USC sec. 1350) grants jurisdiction to US Federal Courts over "any civil action *by an alien* for a tort only, committed in violation of the law of nations or a treaty of the United States." (emphasis added).

The 1996 Torture Statute (18 USC sec. 2441) provides for life in prison, or even the death penalty if the victim dies, for anyone who commits, attempts, or conspires to commit torture *outside* the United States. The U.S. "understanding" that adds the specific intent requirement is embodied in the Torture Statute. The Torture Statute does not punish torture committed inside the United States. (emphasis added).

Congress Should Amend these Statutes to Punish and Redress Torture Committed Against U.S. Citizens Inside the United States by U.S. Officials

Unfortunately, it is not uncommon for prisoners inside the United States to be subjected to torture. Neither the TVPA nor the ATCA provide a civil cause of action for a U.S. citizen who is tortured inside the United States. The Torture Statute provides for criminal punishment only for torture committed outside the United States.

mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

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CAT requires that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." On December 15, 1998, President William Clinton, in Executive Order No. 13107, Implementation of Human Rights Treaties, declared: "It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD."

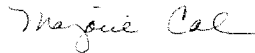
In 2000, the Committee Against Torture, the administrative body of CAT, expressed concern over "[t]he failure of the State party [United States] to enact a federal crime of torture in terms consistent with article 1 of the Convention."

Congress should amend these statutes to punish and redress torture committed against U.S. citizens inside the United States by U.S. officials.

Congress Should Amend the Torture Statute to Conform to CAT's Definition of Torture

As stated above, the U.S. "understanding" in its ratification of CAT - also embodied in the Torture Statute - that purports to narrow the definition of torture violates the object and purpose of CAT. Congress should amend the Torture Statute to conform to CAT's definition of torture.

Respectfully submitted,



Professor Marjorie Cohn, Thomas Jefferson School of Law
for the National Lawyers Guild

**TESTIMONY BEFORE THE SENATE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW ON
IMPLEMENTATION OF HUMAN RIGHTS TREATIES**

Submitted by

**Program on Human Rights and the Global Economy
Northeastern University School of Law**

We welcome the opportunity to submit testimony on the critical issue of the United States' implementation of ratified treaties, and commend the Subcommittee for engaging in this important oversight.

This testimony is submitted by the Program on Human Rights and the Global Economy (PHRGE) of the Northeastern University School of Law. Founded in 2005, PHRGE is a law-school based human rights program that engages in the study, promotion, and implementation of rights-based approaches to economic development and social transformation in the U.S. and worldwide.

Our testimony focuses on U.S. implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).¹ We first set out the interplay between national and subnational obligations under these treaties, then examine a specific issue, the right to counsel in civil litigation, through the prism of these ratified human rights treaties.

¹ Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, entered into force Jan. 4, 1969; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. DAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 2.

Human Rights Treaty Implementation Under Our Federal System

Treaty ratification clearly obligates the federal government to take progressive steps to implement provisions of the ratified treaty. However, our federal system also necessitates interplay between federal and subnational implementation. Put simply, when the U.S. assents to a treaty or other international agreement, implementation must occur on the state and local levels as well as the federal level. Our federal system is categorical: local governments have primary regulatory responsibility for, among other things, social welfare and health, family law matters and criminal law, while the federal government primarily regulates, among other things, immigration and international relations. Since international human rights agreements often address health and welfare, federal implementation alone is doomed to fall short of international standards. Thus, the categorical nature of U.S. federalism necessitates implementation of human rights standards at every level of government.

The federal government has acknowledged these layers of implementation and, through the treaty ratification process and other public representations, has recognized the obligations of subnational states and local governments to meet U.S. human rights commitments. For example, when the U.S. Senate gave its advice and consent to the ratification of the ICCPR, it did so with the following understanding:

the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the

Federal system to the end that the competent authorities of the states or local governments may take appropriate measures for the fulfillment of the Covenant.²

Similar understandings have been attached to other human rights treaties ratified by the U.S., including CERD.³ Thus, the federal system necessitates – and the U.S. government has itself acknowledged – shared responsibility for human rights implementation by federal, state and local authorities.

At the same time, under international law, the federal government continues to have an obligation to promote (and achieve) treaty implementation and compliance at every level. While this might be viewed as creating tension within a federal system that accords some autonomy to subnational governments, in fact, this principle serves as the impetus and motivator for action and leadership. In areas where subnational states exercise considerable discretion, strong federal leadership may be critical to ensuring implementation of human rights obligations.

Human Rights and the Right to Counsel in Civil Cases

The issue of the right to counsel in civil cases – known as the “Civil Gideon” right -- illustrates the ways in which federal and subnational governments can coordinate to meet treaty obligations and implement human rights norms.

² U.S. reservations, declarations, and understandings, ICCPR, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

³ See U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

In recent decades, many states have passed statutes providing for a right to counsel in a bounded categories of cases.⁴ For example, almost all states provide some form of representation to children in child abuse and neglect cases.⁵ In contrast, the right to counsel in housing eviction matters, if it exists at all in a particular jurisdiction, simply accords judicial discretion to appoint counsel to the tenant.⁶ Unlike criminal cases governed by the Eighth Amendment to the Constitution, the Supreme Court has ruled that there is no generalized constitutional right to counsel in civil matters under federal law.⁷ The absence of this right, and the patchwork approach to civil counsel that has arisen from the lack of federal leadership in the area, raises important human rights concerns.

Both the ICCPR and CERD speak to the issue of fairness in judicial proceedings, an issue that is directly implicated when, for example, an unrepresented litigant seeking to avoid eviction faces a represented party in court. For example, ICCPR has been interpreted by its treaty-monitoring body, the U.N. Human Rights Committee, to encompass procedural fairness in civil adjudication, including the right to counsel in civil matters.⁸ The Human Rights Committee has frequently suggested that legal assistance

⁴ See, e.g., Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*,

CLEARINGHOUSE REV. 245 (July-Aug. 2006).

⁵ *Id.* at 246.

⁶ *Id.* at 247.

⁷ *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981).

⁸ Article 14 of the ICCPR generally addresses fairness before domestic tribunals in both civil and criminal

matters, and has been applied to issues of civil counsel. See, e.g., Human Rights Committee,

General Comment 13, art. 14 (21st sess. 1984) para. 8, *Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 14 (1994)

(noting that Art. 14 of the ICCPR applies to civil as well as criminal proceedings); Annual Report of the

Committee to the General Assembly: 9th Report, Spain, para. 419, U.N. Doc. A/40/40 (1985)

(Human Rights Committee requesting information on availability of legal aid in civil cases); List of Issues: Trinidad and Tobago. 16/08/2000, 70th Sess., U.N.Doc. CCPR/C/SR. 1879 (2000). See generally

may be required to ensure fairness in civil cases in legal systems based on both common law and civil law traditions.⁹

Similarly, the lack of a more comprehensive civil counsel right in the U.S. implicates CERD. Since racial minorities in the U.S. are disproportionately poor, they are also disproportionately harmed by the lack of government-funded civil counsel. Empirical studies confirm this racially disparate impact.¹⁰

This civil justice issue is within the scope of CERD Articles 5 and 6, which address fair procedure and adjudication through the lens of equality and non-discrimination. Both articles include civil matters and explicitly require that nations take positive steps to ensure effective access to the apparatus of the civil justice system. Indeed, in 2008, the CERD Committee specifically applied these provisions to the U.S. context, recommending that in order to further compliance with its obligations under CERD, the U.S. should allocate “sufficient resources to ensure legal representation to indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs – such as housing, health care and child custody – are at stake.”¹¹

Northeastern Law School Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (Dec. 2006), available at <http://www.slaw.neu.edu/clinics/RightToCounsel.pdf>.

⁹ *Id.* at 11.

¹⁰ See Access to Justice, in ICERD Shadow Report (2008), available at

http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/14_Access_to_Civil_Justice.pdf. See also Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in*

Civil

Cases, 25 TOURO L.REV. 147 (2009).

¹¹ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States

of America, UN Doc. CERD/C/USA/CO/6 (May 8, 2008), at <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm>.

This standard of procedural fairness may be high, but it is clearly an achievable goal. In fact, the European Convention on Human Rights and Fundamental Freedoms has been construed to require provision of civil counsel to the indigent; this ruling governs all forty-nine nations that are members of the Council of Europe.¹² Even before this standard was enshrined by the European Court of Human Rights, many European nations already had longstanding practices of providing civil counsel. For example, by at least 1495, England required courts to appoint lawyers for indigent civil plaintiffs.¹³ Other European countries also have programs extending back centuries. Norway's program can be traced to the 1600's; Austria's since 1781; and, France, Germany, Italy, Portugal, and Spain since the 1800's.¹⁴

The Need for Federal Leadership in Implementing Civil Gideon Rights in the U.S.

On one hand, as the CERD Committee articulated in its 2008 review of U.S. practices, the federal government bears responsibility for failing to exercise leadership to address the lack of systematic access to civil counsel, particularly in cases involving basic human rights. On the other hand, our federal system cautions against federal mandates on state governments when, as here, the U.S. Constitution has been construed to stop short of such a requirement.

¹² *Airey v. Ireland*, 2 Eur. Ct. HR Rep. 305 (1979).

¹³ An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1494, 11 Hen. 7, c. 12 (Eng.).

¹⁴ Earl Johnson, Jr., et. al., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975) [Justice Earl Johnson, Jr., Associate Justice of the California Court of Appeals]; Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT'L L.J. S83 (2000).

Some states have taken recent action to comply with the ICCPR and CERD, particularly in the wake of the CERD Committee's explicit admonition to the U.S. in 2008. Most prominently, in October 2009, the state of California approved initiation of pilot projects to appoint counsel for indigent litigants in cases involving basic human needs.¹⁵ Across the country, local bar associations are working to develop similar programs in their states.

However, the federal government has not taken the same progressive steps to comply with the treaty obligations articulated by the CERD Committee and addressed in CERD and the ICCPR. As set out below, there are a number of ways for the national U.S. government to address the government's human rights obligations under the ICCPR and CERD, providing leadership without unduly interfering with the delicate domestic federal-state balance. We recommend that each of these measures be pursued vigorously, in partnership with state and local governments where appropriate, in order to ensure the human right to fundamental fairness guaranteed under the ICCPR and CERD.

First, the immigration area is within the exclusive purview of the federal government. This area provides an opportunity for the U.S. to exercise leadership in providing fair procedures consistent with its human rights obligations. In particular, removal (deportation) proceedings are an appropriate area for provision of government-appointed counsel. According to Amnesty International, 84 percent of detained immigrants are unrepresented.¹⁶ For these non-citizens and their families, the stakes

¹⁵ See *CA Pilot Project is Now Law*, in NEWSLETTER: NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, available at http://www.civilrighttocounsel.org/news/recent_developments/32.

¹⁶ Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.A.* (2008), available at <http://www.amnestyusa.org/immigration-detention/immigrant-detention-report/page.do?id=1641033>.

involved in removal proceedings are extremely high. Further, studies reveal that the availability of legal counsel has a significant impact on case outcomes – with legal representation yielding a fivefold increase in the likelihood of a successful claim for asylum.¹⁷ The ideal of “equality of arms” can only be satisfied by a system that equalizes access to lawyers, since the current approach often pits government lawyers against unrepresented and “unarmed” litigants. Further, as set out in the many writings on this issue, there are many benefits to the government of providing appointed counsel in such proceedings, ranging from better outcomes to greater faith in the system of immigration adjudication.¹⁸ Provision of appointed counsel in removal proceedings would be an important step toward human rights implementation.

Second, the federal government should provide leadership in implementing our human rights obligations through funding and implementing a broader system for providing a right to counsel in civil cases, particularly in matters of fundamental human needs as recommended by the American Bar Association in 2006.¹⁹ Specific implementation measures might include providing additional funding for federal legal services to provide more comprehensive civil legal representation to indigents as well greater coordination and training for pro bono representation;

Third, in furtherance of its obligations under CERD and to provide leadership in a federal context, the national government should engage in further data collection, assessment and public reporting on the discriminatory impact of the current system of

¹⁷ Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute, April 2005;

Amnesty International, *supra* n. 15.

¹⁸ Kerwin, *supra*, n. 17.

¹⁹ ABA Resolution, Aug. 7, 2006, *available at* <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>

providing civil counsel, including collection of data documenting the intersection of race and gender in these impacts.

In conclusion, as the Civil Gideon example illustrates, federalism concerns should not and need not undermine federal government leadership in implementation of human rights obligations. Both states and the federal government have a role to play in implementation. When the federal government relies exclusively on states for implementation of human rights standards, without providing leadership in the areas in which the federal government exercises jurisdiction, it shirks its international obligations. Indeed, by engaging both federal and state actors in human rights implementation – as in the example of Civil Gideon -- our nation's record of treaty compliance and human rights leadership will only be enhanced.

Respectfully submitted,

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December 14, 2009

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

As professors in the fields of international human rights and public international law, we commend you for scheduling a hearing regarding U.S. Implementation of Human Rights Treaties. In our opinion, this examination of the United States' commitment to treaty implementation is both timely and necessary; indeed, it is long overdue.

As part of this important review, we urge the Subcommittee to consider the United States' continued breach of its obligations under the U.N. Charter to implement the *Avena* Judgment of the International Court of Justice (ICJ).¹ We believe that Congress should promptly enact legislation that would give full effect to the *Avena* Judgment, thereby demonstrating to the world the firm commitment of the United States to implement its treaty obligations.

Respect for human rights is one of the core principles of the United Nations Charter, and the U.S. record of compliance with this instrument will be evaluated by the United Nations Human Rights Council in its Universal Periodic Review process in 2010. And, although not a human rights treaty *per se*, the Vienna Convention on Consular Relations (VCCR) serves to protect the basic human rights of detained foreign nationals worldwide—including American citizens arrested abroad. When the United States ratified this crucially important treaty in 1969, it also consented to the compulsory jurisdiction of the ICJ to resolve disputes over the interpretation or application of the VCCR. And when it ratified the U.N. Charter, the United States undertook "to comply with the decision of the International Court of Justice in any case to which it is a party."²

In 2004, the ICJ determined in *Avena* that the United States had violated Article 36 of the VCCR by failing to inform 51 arrested Mexican nationals without delay of their right to consular

¹ *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

² U.N. CHARTER, art. 94(1).

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notification, and by failing to notify consular authorities of their detention. To remedy these violations, the ICJ determined that the United States was required to provide judicial review and reconsideration of the convictions and sentences of these nationals to determine if they were prejudiced by the denial of timely access to consular assistance. Recognizing that the rule of law required the United States to comply with *Avena*, President Bush issued a determination in 2005 that “the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ] decision in accordance with general principles of comity.”³

In 2008, the U.S. Supreme Court issued its decision on the constitutionality of the presidential determination and on the judicial enforceability of *Avena*.⁴ The Court noted that “[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States.”⁵ While recognizing the “plainly compelling” national interest in complying with the ICJ decision, the Court nevertheless held that the decision did not constitute binding federal law in the absence of Congressional action: “[T]he responsibility for transforming an international obligation . . . into domestic law falls to Congress, not the Executive.”⁶

Nearly five years after *Avena*, it is unconscionable that the United States has still failed to comply with its treaty commitments to implement the ICJ decision. We must lead by example if we expect other nations to rely on binding international adjudication for the peaceful settlement of disputes. We urge you and the other Subcommittee members to rectify this failure by enacting legislation that will implement the *Avena* requirement of “review and reconsideration” in the cases addressed by the ICJ decision. Only by those means can the United States give effect to the “supreme Law of the Land” and at the same time safeguard the consular rights of the millions of American citizens who live, work or travel abroad.

Sincerely,

cc: The Honorable Tom Coburn
Ranking Republican Member

³ *Medellin v. Dretke*, 544 U.S. 660, 663 (2005) (quoting George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005)).

⁴ *Medellin v. Texas*, 128 S.Ct. 1346 (2008).

⁵ *Id.* at 1356.

⁶ *Id.* at 1351.

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STATEMENT OF
THE OPEN SOCIETY INSTITUTE

Before the

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

HEARING ON THE LAW OF THE LAND: U.S. IMPLEMENTATION
OF HUMAN RIGHTS TREATIES

Submitted for the Record

December 16, 2009

1

Introduction

The Open Society Institute is grateful for the opportunity to submit this statement on human rights treaty implementation to the Senate Judiciary Subcommittee on Human Rights and the Law. We commend Chairman Durbin, Ranking Member Coburn, and the members of the Subcommittee for holding this important hearing today. We are especially grateful to Chairman Durbin for his leadership and his dedication to full implementation of human rights laws in the United States.

The Importance of Human Rights Implementation at Home

This hearing provides an important opportunity to examine domestic implementation of U.S. human rights treaty obligations. It conveys the importance of promoting respect for human rights at home and ensuring that ratified human rights treaties are part of U.S. domestic law.

Full implementation of U.S. human rights treaty obligations is important for several reasons. First, respect for the rule of law demands that we implement our human rights treaty obligations. A core component of the work of the Subcommittee is to ensure enforcement and implementation of human rights laws in the United States. Ratified human rights treaties form part of that body of law. When the United States government ratifies a treaty, following the advice and consent of the Senate, the treaty becomes part of U.S. law under the supremacy clause of Article VI of the U.S. Constitution, which states that the Constitution, laws, and treaties of the United States shall be the supreme law of the land.

Second, honoring U.S. human rights commitments is a crucial part of U.S. efforts to promote respect for human rights around the world. As President Obama has said on numerous occasions, the United States should lead in the world through the example it sets at home. The United States should stand up for human rights "by example at home and by effort abroad," which unites us with "men and women around the world who struggle for [their] right[s]... and strengthen[s] our security and well-being" by promoting a more just and peaceful world.¹ Some of the earliest actions taken by the Obama Administration, such as reaffirming the absolute prohibition against torture, underscore that the protection of basic human rights begins at home. The United States can more effectively press other governments to respect human rights when it upholds its human rights obligations at home.

¹ Statement of President-Elect Obama on International Human Rights Day, Dec. 10, 2008 (available at http://voices.washingtonpost.com/44/2008/12/10/obama_marks_human_rights_day.html).

Third, implementation of U.S. human rights treaty obligations reflects the fact that human rights are deeply rooted in U.S. history and culture. Human rights are often seen in this country as an issue of foreign policy, concerning other people in other countries. Yet the idea of human rights in many ways defines who we are as Americans. Human rights are truths that Americans hold to be self-evident. Although the language of human rights is not always used to describe the rights guaranteed by U.S. laws, those rights principles are reflected in international human rights standards, including the human rights treaties that the United States has ratified – principles such as freedom of speech and religion, the right to liberty and security of the person, protections against torture and cruel treatment, freedom from discrimination, and equality before the law.

Human rights are central to the founding ideals of the United States. As President Obama stated in his Human Rights Day Proclamation earlier this month:

[F]undamental rights are the core of our Declaration of Independence, our Constitution, and our Bill of Rights. They are the values that define us as a people, the ideals that challenge us to perfect our union, and the liberties that generations of Americans have fought to preserve at home and abroad. Indeed, fidelity to our fundamental values is one of America's greatest strengths and the reason we stand in solidarity with those who seek these rights, wherever they live.²

Ensuring that U.S. human rights treaty obligations are fully implemented thus involves recognizing the connection between international human rights standards and fundamental rights here at home. In keeping with the long history of basic rights in the United States, Americans have played a significant role in the development of the international human rights standards. In 1941, President Franklin D. Roosevelt spoke of four freedoms that should be enjoyed by people “everywhere in the world” -- freedom of speech, freedom of religion, freedom from want, and freedom from fear. In emphasizing human freedom and economic security in a time of great insecurity in the world, his human rights vision for the world helped set the stage for the development of international human rights norms later in the same decade. President Roosevelt urged a global vision of basic rights and freedoms that would serve as a bulwark against tyranny:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. ... That is no vision of a distant

² Presidential Proclamation – Human Rights Day, Bill of Rights Day, and Human Rights Week, Dec. 9, 2009 (available at <http://www.whitehouse.gov/the-press-office/presidential-proclamation-human-rights-day-bill-rights-day-and-human-rights-week>)

millennium. It is a definite basis for a kind of world attainable in our own time and generation. ... The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society. ... Freedom means the supremacy of human rights everywhere.³

In 1948, with the active involvement of former first lady Eleanor Roosevelt, the newly-established United Nations proclaimed the centrality of human rights to a just and peaceful world through the Universal Declaration of Human Rights (UDHR). The principles contained in the UDHR have set the standard for human rights throughout the world for the past 61 years. In her remarks earlier this week on a 21st century human rights agenda, Secretary of State Clinton reflected on this history, describing the UDHR as a powerful global expression of the principle that all people should be able to exercise their rights and realize their potential.

As Secretary Clinton rightly noted, for human rights to have meaning in people's daily lives, governments must engage in serious efforts to implement human rights: "Believing in human rights means committing ourselves to action, and when we sign up for the promise of rights that apply everywhere, to everyone, ... we also sign up for the hard work of making that promise a reality."⁴ As part of this vital effort to make human rights real, the United States should fully implement its human rights treaty obligations and ensure that human rights are integrated into domestic law and the work of government institutions.

Recommendations for Effective Implementation

While there are many specific issues worthy of examination in terms of implementation efforts, we wish to focus on mechanisms for ensuring effective implementation of human rights treaties in general:

1. Reinvigorated Interagency Coordination -- The Administration should put in place an effective and transparent mechanism for interagency coordination of implementation of U.S. human rights obligations. Such a mechanism is needed to ensure that treaty obligations are being implemented fully, consistently, and effectively throughout the government.

An interagency working group has existed in different forms since it was first created pursuant to Executive Order 13107 in 1998. A robust interagency coordinating body is a

³ Franklin D. Roosevelt, Address to Congress, Jan. 6, 1941.

⁴ Secretary of State Hillary Rodham Clinton, Remarks on the Human Rights Agenda for the 21st Century, Georgetown University, Washington, DC, Dec. 14, 2009.

smart measure that will help realize U.S. human rights commitments by integrating them into the regular work of government agencies. Such an interagency mechanism will enable the executive branch to monitor implementation of human rights treaties domestically, develop strategies to improve implementation, and promote awareness of human rights treaty obligations across federal agencies and at the state and local level. An interagency working group, chaired by the National Security Council, should be revitalized and improved in various ways, including ensuring the active participation of all relevant agencies within their respective areas.

2. Active Congressional Oversight – Congress also has an important role to play. Through its oversight function, Congress can help ensure effective implementation of U.S. human rights treaties. The Committee on the Judiciary Subcommittee on Human Rights and the Law has already accomplished much in its almost three years of existence. The Subcommittee has examined the legal framework on important issues such as human trafficking, child soldiers, corporate responsibility, the use of rape as a weapon of war, and accountability for genocide and crimes against humanity. With strong bipartisan support, the Subcommittee led an effort that resulted in the enactment of the Child Soldiers Accountability Act and the Genocide Accountability Act. These two new laws will allow the U.S. government to prosecute some of the most egregious human rights violators. Just recently, the Subcommittee helped secure funding for the Department of Justice and the FBI to investigate and prosecute human rights violators from foreign countries who are found in the United States.

The Subcommittee should continue and expand its oversight work on these important issues. Given its mandate to focus on the enforcement and implementation of human rights laws, the Subcommittee is well suited to conduct oversight to help ensure that the U.S. government fulfills its human rights obligations here at home. Today's hearing is an important step in this process. We hope it will be the first of many such hearings to examine U.S. human rights implementation on a wide range of issues. We look forward to working with members of the Subcommittee in carrying out this important work.

Conclusion

This hearing provides an opportunity to renew the U.S. commitment to make human rights real by fully implementing its human rights treaty obligations. Doing so demonstrates respect for the law of the land and a commitment to uphold the universal standards of human dignity that the United States seeks to promote around the world.

The words of Eleanor Roosevelt in 1958 are a powerful reminder that promoting respect for human rights around the world begins at home:

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.⁵

⁵ Remarks of Eleanor Roosevelt, Presentation of "*IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights*," United Nations, New York, NY, Mar. 27, 1958 (available at <http://www.udhr.org/history/inyour.htm>)



Department of Justice

STATEMENT OF

THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

“THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES”

PRESENTED

DECEMBER 16, 2009

Statement of Thomas E. Perez
Assistant Attorney General
Department of Justice
Before the Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate
At a Hearing Entitled
“The Law of the Land: U.S. Implementation of Human Rights Treaties”
December 16, 2009

Chairman Durbin, Ranking Member Coburn, and members of the Subcommittee, thank you for this opportunity to testify here this morning on the critical topic of the role of the Justice Department’s Civil Rights Division in the domestic implementation of our nation’s human rights treaty obligations.

The Universal Declaration of Human Rights, adopted on December 10, 1948, proclaims that “All human beings are born free and equal in dignity and rights...Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status.”

These are words that had great meaning then, just three years after the end of the Second World War, and they still resonate today.

From the time our nation was founded, in every generation, there are Americans who have sought and struggled to realize the promise of our Constitution to ensure equality, equal opportunity and fundamental fairness for all people, regardless of race, national origin, ancestry, gender, religion or disability. In recent years, Americans have also worked in earnest to combat discrimination against individuals based on sexual orientation or gender identity. All of this ongoing work – our civil rights work – is firmly rooted in the human rights movement of the 1940s and 1950s. In fact, our civil rights movement began as a human rights movement, with giants such as W.E.B. DuBois testifying, in 1947, before the United Nations General Assembly on the denial of the right to vote for African-Americans, the continued pervasive discrimination in educational opportunity, and the need for recognition of human rights for African Americans. And as President Obama has made clear on many occasions, the only way we can promote our values is by living them at home.

Since its founding in 1957, the Civil Rights Division has served as a primary force for realizing that promise, having the responsibility to fully and fairly enforce the civil rights laws within its jurisdiction, and to coordinate domestic civil rights enforcement across the Federal Government. Our national commitment to meeting our international human rights obligations is manifested by our enforcement of our nation’s civil rights laws and by our recognition that civil rights, non-discrimination, and equal opportunity are human rights.

Today, the United States is party to three critical human rights treaties whose subject-matters coincide with the work of the Civil Rights Division authorized under the Constitution and U.S. laws.

The International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly in 1966, and ratified by the United States Government in 1992, proclaims that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." This recognition is at the heart of the civil rights movement and of the civil rights law enforcement program headed by the Department of Justice.

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), adopted by the UN General Assembly in 1965, and ratified by the United States Government in 1994 commits States Parties to specific obligations regarding the elimination of racial discrimination.

Under Article 2 of the Convention, States Parties condemn racial discrimination and "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms..." Article 5 creates a specific obligation to guarantee the right of everyone to equality before the law regardless of race, color, or national or ethnic origin. Article 6 obliges States Parties to provide "effective protection and remedies" through the courts or other institutions for any act of racial discrimination. This includes a right to a legal remedy and damages for injury suffered due to discrimination.

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the General Assembly in 1984 and ratified by the United States Government in 1994 is a treaty that obliges States Parties, *inter alia*, to prevent torture and to establish criminal jurisdiction over U.S. nationals for acts of torture wherever they may occur and over any alleged perpetrator in territory under the jurisdiction of the United States.

Finally, in addition to the three treaties mentioned above, the United States became party in 2002 to the two Optional Protocols to the Convention on the Rights of the Child – one on the involvement of children and armed conflict, and the other on the sale of children, child prostitution, and child pornography. These protocols require parties to take certain measures to protect children with regards to these topics.

In recent years, the United States Government has come into compliance with our reporting requirements under the three important treaties and Optional Protocols mentioned above. Under President Clinton, the United States filed its first report on compliance with the ICCPR in 1994 and its first report on compliance with the CERD in 2000. During the Bush Administration, our government came into compliance with our additional reporting obligations. Under President Obama's leadership, we plan to work with our colleagues at the State Department and elsewhere in the Federal government to ensure that our reports are done in a timely and thorough fashion and that they accurately reflect both the strengths and areas of improvement in our civil and human rights enforcement program. Indeed, we aim to make these reports models for what we hope other countries will do in their own reports. We are

also actively participating in the newly revitalized interagency policy committee led by the National Security Council to explore ways in which we can enhance our compliance with and implementation of those international human rights norms by which we are bound.

At the same time that the United States works to meet its international obligations, the Civil Rights Division at the Department of Justice is committed to pursuing a more robust approach to civil rights enforcement and accomplishment. Using all of our available enforcement tools, our mission in the coming months and years is one of restoration – recommitting to the Division's core mission – and transformation – equipping ourselves to address effectively the challenges of the 21st Century.

To give a few examples, we are committed to ensuring full political participation by qualified voters in our democratic process through enforcement of our voting rights laws, including the recently reauthorized Voting Rights Act. Our voting rights work includes Federal preclearance of voting changes in jurisdictions covered by section 5 of the Voting Rights Act, challenges to practices that discriminate against minority voters, and enforcement of the Act's minority language provisions. In addition, we are actively supporting the 2010 Census, which will provide the data that is used to draw the political map that governs elections for the next decade. This support is vital, given the importance that we have accurate data on which to premise representation.

The Civil Rights Division is engaged in an affirmative program to reinvigorate our enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin by recipients of Federal financial assistance.

We help protect the civil rights of institutionalized persons in prisons, mental health facilities, hospitals, and juvenile facilities, and have opened investigations, filed lawsuits, and entered into settlements with those institutions to ensure that institutions provide humane conditions of confinement, adequate mental health treatment services and health care, and protection from harm.

In addition, we are actively enforcing the requirements of the United States Supreme Court's decision in *Olmstead v. United States*, a ruling requiring States to eliminate unnecessary segregation of persons with disabilities and to move persons who can function in the community out of segregated facilities.

In enforcing our criminal civil rights laws, we have vigorously prosecuted those who threaten or harm others out of hate. Our Federal authority to prosecute hate crimes – and to assist State and local law enforcement to enforce their respective hate crimes laws – recently was strengthened significantly with the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Not only have unnecessary jurisdictional impediments been removed in cases involving hate crimes motivated by animus towards others on the basis of race, color, religion or national origin, the new law enables us to prosecute hate crimes against people when the crime is motivated by animus towards others based on sexual orientation, gender identity, or disability.

Protection from abuse of official authority is fundamental in a society governed by the rule of law and democratic principles. Using our criminal civil rights laws, we are vigorously prosecuting significant cases involving official misconduct by law enforcement officials, including Federal and State corrections officers, local police, and sheriff's deputies. We also have opened a number of investigations to determine whether there is evidence of a pattern or practice of discriminatory policing in violation of section 14141 of the Violent Crime Control and Law Enforcement Act of 1994.

We are also building on the important work of the last 10 years to continue to prosecute those who engage in human trafficking, a form of modern-day slavery that deprives its victims of their fundamental rights guaranteed by the Thirteenth Amendment. The Civil Rights Division has been a leader in Federal anti-trafficking efforts, and we have continued to bring unprecedented numbers of involuntary servitude and slavery prosecutions, restoring the Constitutional rights and dignity of human trafficking victims and bringing traffickers to justice.

In the employment area, because ensuring equal opportunity in the workplace is one of our top priorities, the Division has returned to vigorously enforcing Title VII, including pattern or practice cases. In pattern or practice cases, we seek, and have recently obtained, significant prospective and remedial relief to ensure equal employment opportunities for African Americans, Latinos, and women. We also are seeking to ensure that fundamental protections from workplace discrimination are extended to lesbian, gay, bisexual and transgender persons through passage of the Employment Non-Discrimination Act.

In other areas of our enforcement activities, we are reinvigorating enforcement of our laws ensuring equal access to housing, non-discriminatory lending and credit, educational opportunities, and environmental justice, to name a few. Overall, through an aggressive program of restoration and transformation, our commitment to solving today's civil rights challenges has never been stronger.

We are committed to continuing to work in close partnership with the State Department in carrying out government's first ever participation in the United Nations' Universal Periodic Review process. This effort, led by the Bureau of Democracy Human Rights and Labor at State, will begin by canvassing various Federal, State, and local agencies and stakeholders on the state of human rights in the United States and collecting that information in the report. In order to make sure that our report is adequately informed by input from a wide range of stakeholders, we plan to conduct a series of "listening sessions" around the country, in partnership with State and a number of crucial Federal agency partners. The report and its subsequent review promises to provide a useful snapshot of where we are and where we need to go to meet our constitutional promise of equality and equal opportunity for all and our compliance with the human rights treaties mentioned above.

I also note that within the Department of Justice, the Criminal Division and the National Security Division share the commitment of the Civil Rights Division to conduct our activities in a manner that is consistent with the human rights treaties discussed above.

Mr. Chairman, I look forward to working with you and the Human Rights Subcommittee in the coming months and years to ensure that our domestic civil rights program continues to meet the goals of both our domestic law and our international obligations.

For more than 50 years, the United States has been a leader in the fight for human rights around the globe. Now, more than ever, the world needs the United States to once again be a human rights beacon. In the Civil Rights Division and in the Department of Justice generally, we are prepared to work with our colleagues at the State Department and across the Federal agencies to make sure that, consistent with the approach outlined by President Obama, we model at home the very human rights we seek to promote around the world. Thank you.

PHR Advancing health, dignity and justice

**Physicians for
Human Rights**

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Chief Executive Officer

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Statement for the Record from Physicians for Human Rights

U.S. Senate Committee on the Judiciary

Subcommittee on Human Rights and the Law

Senator Richard Durbin, Illinois, Presiding

“The Law of the Land: U.S. Implementation of Human Rights Treaties”

December 16, 2009

Physicians for Human Rights (PHR) commends Senator Durbin for his initiative in holding this hearing. The process of re-establishing U.S. credibility and leadership on human rights requires a rigorous national examination of our shortcomings in meeting our obligations under international human rights treaties and ensuring greater adherence in the future.

Physicians for Human Rights (PHR), founded in 1986, is a national organization that mobilizes health professionals to advance health, dignity, and justice and promotes the right to health for all. PHR has documented the use of torture by the United States during its interrogation of detainees at U.S. detention facilities, including those at Guantanamo Bay, in Iraq and Afghanistan, and elsewhere. PHR has published several reports on the human impact and the legality of abusive interrogation tactics authorized by the Bush Administration and repeatedly called for an end to the use of the “enhanced” interrogation techniques by all US personnel. PHR has also pushed for an end to all health professional participation in interrogations, a full investigation of the use of psychological torture by the US government, and accountability for the perpetrators.

VIOLATIONS BY THE UNITED STATES OF THE UN CONVENTION AGAINST TORTURE

The United States Senate ratified the UN Convention Against Torture (UNCAT) in 1994, making us responsible to hold perpetrators under United States jurisdiction accountable, provide reparations to victims of the use of torture by the United States, and prohibit the use of any interrogation tactics which constitute torture.

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According to the UNCAT, “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹

The Authorization of “Enhanced” Interrogation Techniques Violates UNCAT

The Bush Administration’s authorization of “enhanced” interrogation techniques permitted the use of physical and psychological torture of detainees in US military and CIA custody. These so-called “enhanced” techniques included, but were not limited to, the use of stress positions, beating, temperature manipulation, waterboarding, threats of harm, sleep deprivation, sensory bombardment, violent shaking, sexual humiliation, prolonged isolation, and sensory deprivation. Physicians for Human Rights (PHR) and Human Rights First’s 2007 report, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, shows that these techniques, whether used alone or in combination, rise to the level of violations of both US and international anti-torture law, including UNCAT.²

Currently authorized techniques may also lead to violations of UNCAT

President Obama’s Executive Order, *Ensuring Lawful Interrogations*, which was issued January 22, 2009, prohibits most of the aforementioned techniques.³ The order required that all U.S. personnel follow the Army Field Manual for Human Intelligence Collector Operations No. 2-22.3 (AFM) which provides detailed guidance that should effectively prevent abusive techniques. However, Appendix M of AFM 2-22.3, provides guidance of the use of a problematic practice, the “Restricted Interrogation Technique – Separation.” Physicians for Human Rights (PHR) believes that methods used to implement this technique under the guidance of Appendix M can amount to torture and abuse. Specifically, the guidance allows isolation, sensory deprivation, and sleep deprivation. PHR has documented the severe harm and lasting physical and psychological effects of these techniques, and has called publicly for repeal of Appendix M since the current version of the AFM was issued in September 2006.⁴

According to Appendix M, separation “involves removing the detainee from other detainees and their environment” and is permitted for an initial period up to 30 days, with a possibility of extension for an unspecified period. The profound harmful health effects of separation (an

¹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess. Supp. No. 51, entered into force June 26, 1987, U.N. Doc. A/Res/39/46, available at <http://www.un.org/documents/ga/res/39/a39r046.htm> [hereinafter UN Convention Against Torture].

² PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS (2007), available at <http://physiciansforhumanrights.org/library/report-2007-08-02.html> [hereinafter PHR LEAVE NO MARKS].

³ See Barack Obama, *Executive Order – Ensuring Lawful Interrogations*, Jan. 22, 2009, available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

⁴ “PHR Calls on Congress to Reject White House Military Commissions Bill and Amendments to War Crimes Act Bush Administration Seeking to Legalize Torture by CIA and Grant Immunity for Abusive Interrogations: For Immediate Release, Sep. 12, 2006.” *PHR Library* (2006), PHYSICIANS FOR HUMAN RIGHTS, Sep. 12, 2006 available at <http://physiciansforhumanrights.org/library/news-2006-09-12a.html>.

alternative term for isolation) include hallucinations, severe anxiety and a significantly higher risk of developing psychiatric disorders. page 3

The tactics described in Appendix M, both individually as well as in combination, can constitute torture and/or cruel, inhuman and degrading treatment as defined by UNCAT and US anti-torture law.^{5,6}

Failure to Pursue Accountability is, Itself, a Violation of UNCAT

The United States' failure to prosecute those who ordered, justified, and implemented this regime of physical and psychological torture is, in itself, a violation of our nation's obligations under UNCAT.⁷ All states party to UNCAT are required to prosecute those in violation of any of the treaty's provisions under universal jurisdiction when the country in violation fails to do so domestically.⁸ Those who authorized, justified, supervised, and implemented the Bush Administration's regime of torture must be held accountable in order for the United States' obligation under the Convention. All health professionals involved in torture must additionally face ethical sanction by their professional associations and governing licensing boards for any violations of their profession's codes of ethics.

The United States' UNCAT obligation to pursue accountability for abuses committed by the Bush Administration extend beyond simply prosecuting alleged perpetrators. As described below, the UNCAT makes provision for reparations and victim assistance for those who suffered as a result of the United States' violations.

APPLICABILITY OF THE LAW TO ACTS COMMITTED BY US PERSONNEL AGAINST DETAINEES

In 2008, PHR published *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, the first study of its kind and size based on medical evaluations of former detainees held by US forces at Guantanamo Bay, Cuba, Bagram Air Base, Afghanistan, and Abu Ghraib Prison in Iraq.⁹ PHR researchers found repeated physical and psychological evidence which corroborates the accounts of torture by former detainees. All eleven former detainees interviewed and medically evaluated by PHR experts reported being subjected to lengthy periods of isolation. The physical and psychological effects of separation and sensory deprivation are documented in PHR's report *Leave No Marks* (with Human Rights First) at pages 30-33 and in PHR's *Break Them Down* at pages 59-69 (These reports are available online at <http://physiciansforhumanrights.org>).

It is critical to recognize that multiple abusive techniques were usually used in combination presumably for the intended effect of amplifying physical and psychological pain. Nevertheless, as is demonstrated below, even when used individually, according to courts and entities responsible for interpreting the Convention Against Torture, including the UN Special

⁵ UN Convention Against Torture.

⁶ Torture Convention Implementation Act of 1994, 18 U.S.C.A. § 2340 (2004).

⁷ See UN Convention Against Torture, *supra* note 4.

⁸ *Id.*, at art. 21.

⁹ PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, *BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT* (2008), available at <http://brokenlives.info>. [Hereinafter PHR BROKEN LAWS, BROKEN LIVES].

Rapporteur on Torture and the UN Committee Against Torture, each technique constitutes prohibited conduct in the form of torture or cruel, inhuman or degrading treatment or punishment.

The US State Department, which is charged by Congress to assess the human rights record of other governments, and in doing so relies on international human rights treaties including the Convention Against Torture, in innumerable instances, specifically has identified these practices as torture or cruel, inhuman or degrading treatment or punishment when carried out by other nations.

STRESS POSITIONS: FORCED-STANDING, HANDCUFFING, AND SHACKLING

All of the detainees evaluated by PHR for the study were subjected to stress positions such as suspensions, forced standing and various awkward poses, often while shackled. Stress positions such as tying detainees' hands behind their backs and pulling their arms backwards, or shackling their hands or both hands and feet for days at a time have been prohibited by the Convention Against Torture.¹⁰ The UN Committee against Torture has determined that restraining detainees in very painful positions is by itself an act of both torture and cruel, inhuman or degrading treatment.¹¹ In a review of US practices, the UN Special Rapporteur on Torture has condemned the use of stress positions on detainees by the United States as violating the Convention Against Torture.¹²

HOODING /BLINDFOLDING

All individuals evaluated by PHR were hooded or blindfolded for long periods of time. Hooding, blindfolding, or otherwise depriving a detainee of sight – like prolonged isolation, is a form of sensory deprivation and is prohibited under international law. The UN Committee against Torture has determined that “hooding under special conditions” constitutes both torture and cruel, inhuman or degrading treatment or punishment.¹³ It noted that this finding would be “particularly evident” when hooding is used in combination with other coercive interrogation methods.¹⁴ The Committee against Torture has subsequently reaffirmed that blindfolding

¹⁰ UN Comm. against Torture, Report on Mexico Produced by the Committee Under Article 20 of the Convention, and Reply from the Government of Mexico, U.N. Comm. Against Torture, 30th Sess., ¶¶ 143, 165, U.N. Doc. CAT/C/75 (2003), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/t2950e0f6a5560f1c1256d5500535b97?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/t2950e0f6a5560f1c1256d5500535b97?Opendocument) [hereinafter UN Report on Mexico].

¹¹ *Concluding Observations of the Committee against Torture: Israel*, Sept. 5, 1997, Comm. against Torture, ¶ 257, U.N. Doc. A/52/44, available at www.unhcr.ch/tbs/doc.nsf/0/69b6685c93d9f25180256498005063da?Opendocument. [Hereinafter *UN Israel Report*].

¹² *Human Rights Questions: Implementation of Human Rights Instruments: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment - Note by the Secretary-General*, U.N. GAOR, 59th Sess., Agenda Item 107(a), ¶ 17, U.N. Doc. A/59/324 (2004), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/59/324&Lang=E> [hereinafter *Torture Note by the Secretary-General*]; see also PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: THE SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES (2005), available at <http://physiciansforhumanrights.org/library/report-2005-may.html>. [Hereinafter PHR Break Them Down].

¹³ *UN Israel Report*, supra note 10, ¶ 257.

¹⁴ *Id.*

constitutes torture.¹⁵ The UN Special Rapporteur on Torture has determined that “blindfolding and hooding should be forbidden.”¹⁶

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SENSORY BOMBARDMENT

Seven of the former detainees evaluated for *Broken Laws, Broken Lives* reported being subjected to sound and light bombardment. Sound and light bombardment is used to disorient, cause anxiety, and even contribute to personality disintegration, as well as to deprive the person of sleep. It is often combined with other tactics. The UN Committee against Torture has determined that “sounding of loud music for prolonged periods” constitutes torture and cruel, inhuman or degrading treatment or punishment both when it is used in combination with other methods of interrogation and when it is used by itself.¹⁷ The UN Special Rapporteur on Torture has similarly determined that depriving a detainee of, or exposing him to, light for a prolonged period constitutes torture and ill-treatment.¹⁸

USE OF EXTREME TEMPERATURES

All of the individuals whom PHR evaluated reported being subjected to temperature extremes. The UN Committee against Torture has found that exposure to extreme temperatures, even in the absence of other forms of abusive interrogation or detention techniques, constitutes both torture and cruel, inhuman and degrading treatment.¹⁹ The UN Committee against Torture reaffirmed this position in finding that placing a naked inmate in a freezing, air-conditioned room for extended periods constitutes torture and is prohibited.²⁰ The UN Special Rapporteur on Torture has similarly determined that depriving detainees of clothing and exposing them to extremes of heat or cold constitutes torture and ill-treatment.²¹

THREATS OF HARM TO DETAINEES AND THEIR FAMILIES

The use of various forms of threats were reported by all the former detainees evaluated by PHR. Threats against a detainee or a detainee’s family or friends can lead to severe or serious prolonged mental suffering, and have accordingly been prohibited under international law as either cruel and inhuman treatment or torture. The UN Committee against Torture determined that threats, including but not limited to death threats, constitute both torture and cruel, inhuman or degrading treatment.²² In its Report on Mexico, the UN Committee described death threats as well as threats of harm to family members as “torture methods.”²³ The use of threats has also been described as torture by the US Department of State in its Country Reports for Bangladesh and Iran.²⁴

¹⁵ *UN Report on Mexico*, *supra* note 9.

¹⁶ See PHR *BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 115.

¹⁷ *UN Israel Report*, *supra* note 10 at ¶ 257.

¹⁸ PHR *BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 103.

¹⁹ *UN Israel Report*, *supra* note 10 ¶ 257.

²⁰ *UN Report on Mexico*, *supra* note 9, ¶ 165.

²¹ PHR *BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 103.

²² *UN Israel Report*, *supra* note 10, ¶ 257.

²³ *UN Report on Mexico*, *supra* note 9, ¶¶ 143-44.

²⁴ PHR *BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 105.

INSTILLING FEAR THROUGH USE OF MILITARY DOGS

The use of dogs to instill fear was reported by more than half of the participants in this investigation. Dogs have been used in combination with nakedness, hooding and other techniques to exploit detainees' fears and as a means of degrading them. Both the UN Committee against Torture and the Special Rapporteur have held that the use of dogs by US personnel during interrogations constitutes torture or cruel, inhuman or degrading treatment.²⁵ The US Department of State has included the threat of dog attacks as a reported method of torture used against prisoners in Libya.²⁶

ELECTRIC SHOCKS, SEXUAL ASSAULT, AND PHYSICAL ASSAULT

All of the former detainees evaluated by PHR reported being subjected to some form of physical assault. International jurisprudence condemns all forms of beatings. The UN Committee against Torture has held that physical beatings such as "blows to various parts of the body, including the ears, with fists, police weapons or truncheons" constitute methods of torture.²⁷ The US State Department has determined that beatings and other varied forms of physical abuse constitute torture, finding that beatings with hands or fists, sticks, police batons or metal rods,²⁸ burning with cigarettes,²⁹ applying electric shocks,³⁰ and systematic beatings to obtain a confession during interrogations all constitute torture.³¹

Four former detainees reported being sodomized, subjected to anal probing, or threatened with rape. Rape not only is an unspeakable infringement of human rights, but often leaves deep and lasting psychological scars. The international human rights, criminal justice, and humanitarian law communities, including the International Criminal Court (ICC), the ad hoc international criminal tribunals, regional human rights courts, and the UN human rights bodies, are uniform in their designation of rape as a violation of human rights and a crime. Incidents of penetration with a foreign object clearly constitute rape under domestic law such as the War Crimes Act.³²

FORCED NAKEDNESS AND SEXUAL HUMILIATION

All except one of the former detainees evaluated by PHR described being subjected to forced nakedness and other forms of sexual humiliation. Sexually degrading acts have historically been used in combination with other methods to break down a detainee. Forced nakedness and sexual humiliation violate human dignity and can lead to long-term psychological harm.³³ Sexual humiliation and stripping

²⁵ *Id.* at 100.

²⁶ *Id.* at 106.

²⁷ *UN Report on Mexico*, *supra* note 9, ¶ 143.

²⁸ *PHR BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 106.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Rape is defined in the MCA as:

The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (amending 18 U.S.C. § 2441) (2006).

³³ *PHR BROKEN LAWS, BROKEN LIVES* *supra* note 8 at 108.

a detainee of his clothes adds to his sense of vulnerability³⁴ and are “intended to cause . . . feelings of humiliation and inferiority.”³⁵ The use of sexually humiliating acts at Abu Ghraib, Guantánamo, and other US overseas detention facilities exploited the cultural values of detainees and has left detainees with deep, prolonged feelings of shame and humiliation. Partially in response to the detainee abuse uncovered in Iraq and at Guantánamo, sexual humiliation is now categorically prohibited by the new Army Field Manual.³⁶

The severe mental pain and suffering of those who have been subjected to sexually humiliating acts constitute cruel or inhuman treatment and can also be considered a psychological form of torture.

Techniques still authorized under Appendix M of the Army Field Manual

PROLONGED ISOLATION

All of the former detainees evaluated by PHR as part of this investigation reported having been put in prolonged isolation. Isolation, also referred to as “solitary confinement” and “separation,” is a method whereby a detainee is removed from other prisoners and has contact with only guards or interrogators. The negative psychological impacts of extended solitary confinement, a form of sensory deprivation, have been well-documented, and an international legal consensus has emerged to prohibit prolonged solitary confinement, even when it is applied for administrative and security reasons.³⁷ In interrogation, this technique is used to disrupt profoundly the senses or personality, and, therefore, could be prosecuted as an act of psychological torture.

The UN Committee against Torture has encouraged states to abolish the practice, noting that, outside the interrogation context, solitary confinement “should be applied only in exceptional cases and not for prolonged periods of time”³⁸ and has determined that prolonged solitary confinement could constitute cruel, inhuman or degrading treatment or punishment.³⁹ Furthermore, according to the UN Special Rapporteur on Torture, solitary confinement may impact the psychological “integrity of the prisoner.”⁴⁰

SLEEP DEPRIVATION

All except two of the participants evaluated by PHR have reported prolonged sleep deprivation, usually in combination with other abusive interrogation methods. Courts and other bodies responsible for interpreting the UNCAT have noted that sleep deprivation is used primarily to

³⁴ *Id.*

³⁵ *Id.*

³⁶ The new Army Field Manual prohibits “forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior” under any circumstances; and “forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner” in conjunction with intelligence interrogations. HEADQUARTERS, DEPARTMENT OF THE ARMY, FM 2-22.3 (FM 34-52) HUMAN INTELLIGENCE COLLECTOR OPERATIONS, ¶ 5-20, [hereinafter ARMY FIELD MANUAL 2-22.3] available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

³⁷ See *Id.* PHR BREAK THEM DOWN.

³⁸ *Decisions of the Committee Against Torture Under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Communication No. 202/2002: Denmark*, U.N. Comm. against Torture, 32nd Sess., ¶ 5.6, U.N. Doc. CAT/C/32/D/202/2002 (2004), available at U.N. Doc. CAT/C/32/D/202/2002.

³⁹ *Consideration of Reports Submitted by States Parties under Article 18 of the Convention: Conclusions and Recommendations of the Committee against Torture: New Zealand*, U.N. Comm. against Torture, 32nd Sess., ¶ 5(d), U.N. Doc. CAT/C/CR/32/4 (2004).

⁴⁰ PHR BROKEN LAWS, BROKEN LIVES, 101.

break down the will of the detainee and is clearly prohibited under international anti-torture law when it is not a mere side effect of a lengthy interrogation. The UN Committee against Torture has noted that sleep deprivation used to extract confessions from suspects is impermissible,⁴¹ and that “sleep deprivation for prolonged periods” constitutes torture.⁴² The UN Special Rapporteur on Torture has opined that sleep deprivation, “condoned and used to secure information from suspected terrorists” by the United States, violates the UNCAT.⁴³

Reparations and Justice for Victims of Torture

The United States has a responsibility under the Convention against Torture to ensure that victims of the Bush Administration’s use of torture receive reparations for their suffering. Article 14 of the Convention stresses that: “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”⁴⁴

Reparations by the US government for the unlawful arrest and detention, torture and/or cruel, inhuman or degrading treatment that these former detainees endured is a necessary step toward re-establishing the historic US commitment to the rule of law. Redressing the damage caused to these individuals should include, as required by individual circumstances, a variety of reparations, such as clearing the detainee’s name, restoring social status, citizenship, employment and place of residence, and returning property. Monetary compensation is warranted for damage resulting from the physical and mental harm, emotional distress, and loss of earnings, harm to dignity, medical, psychological and social services as well as legal fees. Further reparations could include public acknowledgement of the facts, apology, and acceptance of responsibility and guarantees of non-repetition.⁴⁵

In any form it might take, reparation would send a clear message that torture cannot be perpetrated with impunity. Although reparation alone can never be a substitute for accountability,⁴⁶ it is an element of justice for these former detainees as well as a way of enabling those who are in precarious living situations as a result of the abuses they endured to return to normal life. Monetary compensation, in particular, is needed to ensure recovery and rehabilitation for the long-term health consequences caused by being subjected to torture or other cruel, inhuman or degrading treatment. Both international and domestic instruments make provision for such reparations.

RECOMMENDATIONS

In accordance with the United States Government’s treaty obligations, the Obama Administration must immediately take the following actions to ensure compliance with international law:

⁴¹ *Concluding Observations of the Committee against Torture: Republic of Korea*, Nov. 13, 1996, Comm. against Torture, ¶ 56, U.N. Doc. A/52/44.

⁴² *UN Israel Report*, *supra* note 10.; *see also UN Report on Mexico*, *supra* note 8, ¶ 143.

⁴³ PHR BROKEN LAWS, BROKEN LIVES *supra* note 8 at 104.

⁴⁴ UN Convention Against Torture, *supra* note 1, art. 14.1.

⁴⁵ For a comprehensive summary of types of reparation, see Redress, *What is Reparation*, at www.redress.org/what_is_reparation.html.

⁴⁶ *See* PHR BROKEN LAWS, BROKEN LIVES *supra* note 8 at 110.

- 1) **Eliminate Appendix M:** The Obama Administration should complete the process started by the issuance of Executive Order 13491, "Ensuring Lawful Interrogations on January 22, 2009, which made the Army Field Manual the standard guidance for interrogation for all U.S. personnel by eliminating Appendix M, "Restricted Interrogation Technique-Separation." As discussed above, the application of this restricted technique can result in torture or cruel, inhuman and degrading treatment. Appendix M states that interrogators using the separation techniques must be "acutely sensitive to the application of the technique to ensure that the line between permissible or lawful actions and impermissible actions is distinct and maintained." This recognition that the line into torture and cruel, inhuman, and degrading treatment can so easily be crossed demonstrates that the technique is too risky to be used on detainees. It should be eliminated.
- 2) **Establish an Independent Commission:** The executive branch and Congress should establish an independent commission to fully investigate and publicly report on the circumstances of detention and interrogation in Bagram, Kandahar and elsewhere in Afghanistan, Iraq, and Guantánamo Bay since 2001. This independent commission should have subpoena power to compel witnesses and declassify documents concerning interrogation techniques and conditions of detention including medical records and documentation by behavioral science consultant teams (BSCT) personnel in order to establish a full public record. The investigation should extend to individuals in the position of making policy as well as those who carried those policies out, including all healthcare professionals who were in the position of providing care or supporting the interrogation of detainees.
- 3) **Hold Perpetrators Accountable:** All individuals who played any role in the torture or ill-treatment of detainees, including those who authorized the use of methods amounting to torture or exercised command authority over them, should be held to account through criminal and civil processes (such as disciplinary action). Officials at every level should be held accountable for crimes they committed or for the acts of officials subordinate to them. Health professionals who engaged in or facilitated the abuse of detainees, and/or failed to report torture and ill-treatment should be investigated and appropriately sanctioned, and disciplined via Department of Defense and state licensing boards.
- 4) **Make Reparations:** The government should issue a formal apology to detainees who were subjected to torture and/or ill-treatment as part of US military and intelligence operations since fall 2001 in Afghanistan, Iraq, Guantánamo Bay, Cuba, and elsewhere. The government should establish a fair process for compensation and victim assistance, including access to rehabilitation and re-integration services, for individuals subjected to torture or ill-treatment in U.S custody.



**SHRIVER
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Sargent Shriver National Center on Poverty Law

Taking action to end poverty

Testimony of Wendy Pollack
Director, Women's Law and Policy Project
Sargent Shriver National Center on Poverty Law

Senate Judiciary Committee
Subcommittee on Human Rights and the Law

December 16, 2009

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Thank you, Chairman Durbin and members of the subcommittee for the opportunity to present this testimony. I am Wendy Pollack, the director of the Women's Law and Policy Project of the Sargent Shriver National Center on Poverty Law located in Chicago, Illinois. The Shriver Center works to identify, develop, and support creative and collaborative approaches to achieve social and economic justice for low-income people. Social and economic justice is integral to the international human rights framework. International declarations and treaties set a human rights standard that countries are obligated to meet. Through the Declaration of Human Rights, the United States was one of the first countries to commit to protecting social and economic rights under the human rights framework. However, the United States has only signed but not ratified most of the social and economic human rights treaties. The signing obligates the United States not to violate the spirit and purpose of the treaties, but does not fully commit itself to the standards in those treaties. This includes the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. The United States has signed and ratified the Convention on the Elimination of All Forms of Racial Discrimination and it is the impact in Illinois of the implementation of this treaty, or lack thereof, that I will focus my comments today.

Poverty and who is or is not poor should not be measured by money alone as does the federal poverty guidelines,¹ but by well-being and the ability to sustain a life of value and dignity—the capabilities one has to function and transform opportunities into positive outcomes. The basic capabilities that most people value are physical and psychological health, access to knowledge, and a decent material standard of living. For too many people in the United States the lack of income precludes access to these basic capabilities—the inequalities of incomes predetermine the inequalities of outcomes. And this lack of access disproportionately affects people of color—in the State of Illinois and in the United States. The information that follows is a snapshot of some of the disparities in social and economic justice experienced by people of color in Illinois and some recommendations to alleviate the persistent poverty they endure.

1. Minorities in Illinois are experiencing poverty at significantly higher rates and in need of income support programs to move from poverty to economic stability and independence; however, the unavailability and inadequacy of the current public benefit programs only serve to perpetuate the racial disparities in the United States. Over three-quarters of eligible Illinois households are not receiving Temporary Assistance for Needy Families (TANF). Those who are fortunate enough to receive income support from TANF do not receive enough cash assistance to pull them above the poverty line.² A family of three receiving the average monthly benefit from Illinois TANF receives cash assistance of only \$ 3,192 a year. This is well below half the poverty line and insufficient in stabilizing a family as they work toward economic independence.³

A decrease in the number of TANF recipients moving to the work force leads to an increase in food-insecure households because the lack of living wage jobs for low-skilled workers. Unfortunately, not all eligible for the Food Stamps program are receiving them. Of the eligible households in Illinois, 25.5 percent are not receiving food stamps.⁴

2. The inequity gap among American seniors has grown over the past two decades. White non-Hispanic Illinois households have a median net worth that is nearly eleven times as great as the net worth of minority households. In Illinois 22 percent of black and 14.9 percent of Hispanic seniors are living in poverty compared to 7 percent of white non-Hispanic seniors.⁵ The disparity in the median net worth reflects the vulnerability of minorities to survive economic downturns and personal crisis.

3. Everyone should have an equal opportunity to establish economic security for themselves and their families through asset building. Yet the vast majority of housing and saving tax subsidies, which encourage and reward asset building, accrue to households making over \$50,000 annually.⁶ Among white Illinoisans, 14.3 percent are living in asset poverty compared to 40.9 percent of minority Illinoisans.⁷

4. In Illinois, 44.3 percent of black and 43.5 percent of Hispanic single female-headed households with children are living in poverty compared to 28.9 percent of white non-Hispanic single female-headed household with children. The poverty rate for children is equally as disparate. Among white non-Hispanic children, 8.6 percent live in poverty compared to 38.3 percent of black and 23.4 percent of Hispanic children in Illinois.⁸ In October 2009, only 30,167 families received TANF in Illinois.⁹ With the effects of the recession increasing the number of families eligible for TANF, neither the states nor the federal government have done enough to meet this increasing demand. In addition, the work requirements for TANF participants combined with the general increase in demand for affordable child care among low-income workers currently exceeds existing resources.¹⁰

5. The Illinois poverty rate for people with disabilities varies depending on race. African Americans with disabilities experience poverty at a rate of 38.3 percent and Hispanics 23.4 percent, compared to white non-Hispanics 8.6%.¹¹ Supplemental Security Income (SSI) is the main government program for people with disabilities with little or no income to meet basic needs. However, Illinois' average annual SSI income is \$8,319—less than the poverty line for one person and not enough to meet basic needs.¹² Minorities with disabilities are disproportionately affected by poverty and SSI is not providing enough assistance to keep these individuals out of poverty and is therefore contributing to prolonged racial disparities.

6. Extreme poverty is designated by the Federal Poverty Level (FPL) as income of approximately \$10,600 per year for a family of four. While 14.5 percent of African Americans live in extreme poverty, only 3.3 percent of white non-Hispanics in Illinois are living in extreme poverty.¹³ The emphasis on time-limited assistance in combination with less than adequate services and programs that meet the needs of this population has only exacerbated this situation. Yet, there is no comprehensive government strategy to reduce this disparity and lift these families out of extreme poverty.

7. Wage disparities in Illinois persist. Full-time, year-round African American male workers earn 72.8 cents on the dollar of full-time, year-round white non-Hispanic males. Full-time, year-round Hispanic males earned only 55.6 cents on the dollar of full-time, year-round white non-Hispanic males. The gender wage gap is well documented.¹⁴ In Illinois, women make just 73 cents for every dollar that Illinois men earn.¹⁵ Women of color fair even worse. For every dollar a white non-Hispanic woman earned, an African American woman earned 87.9 cents and a Hispanic woman earned 65.4 cents.¹⁶

8. The inequities in annual personal income extend to young Illinois adults. The average annual personal earnings for white non-Hispanic youth is \$18,721, while the annual earnings for African American youth is \$11,464 and \$15,655 for Hispanic youth.¹⁷

9. The Illinois Department of Human Rights (IDHR) reported 3,522 of 3,949 discrimination charges were docketed by jurisdiction in fiscal year 2008 were employment related. Of the 3,522 employment-related charges, 1,008 were based on racial discrimination. Of the 12,173 discrimination inquiries received by the IDHR in fiscal year 2008, only 3,552 were investigated (housing is excluded from these figures). Down from its peak in 2003 of 3,733 completed investigations.¹⁸

10. Movement into the labor force is not a guaranteed escape from poverty. Among Illinoisans that work full-time, year-round, 102,579 fall below the poverty line. And 363,013 Illinoisans work part-time, year-round yet fall below the poverty line.¹⁹

These disparities are in direct contradiction to the United States' commitment under the Convention on the Elimination of All Forms of Racial Discrimination. Some remedies that will move the United States towards compliance with the social and economic human rights standards follow.

1. Policy recommendation: Everyone, regardless of age or ability to work, must be guaranteed the means necessary to procure basic needs and services to ensure a decent standard of living by the federal government and the states. More must be

done to improve both the amount of and accessibility to public benefits and other programs and services for low-income people.

2. Policy recommendation: Public benefits programs like the Temporary Assistance for Needy Families (TANF) program, which provides cash assistance to needy families with dependent children, must measure their success in terms of alleviating and ending poverty, not caseload reduction. The federal government must step up and work with the administrators of the programs to this end. In Illinois, it is the State of Illinois administers most of the public benefits programs in Illinois, and it is the City of Chicago where the majority of public benefits recipients, former recipients, and those low-income people eligible for but have never received public benefits, reside.) It is imperative that every person who is eligible for public benefits actually receive them in the amount and for the duration necessary, and be provided the social services and work supports needed to increase individual capabilities.

As an initial step, the federal government should adopt these four measures which are both meaningful and beneficial for all low-income people to measure the success of all public benefit programs: (a) the percent of people in a state at or below 200 percent of the federal poverty guidelines that receive all the public benefits they are eligible for; (b) the percent of recipients, former recipients and those never receiving public benefits who are employed, their increases in income over time, and those earning at least 200 percent of the federal poverty level; (c) the percent of applicants, recipients, former recipients and those never receiving benefits enrolled in education and training programs and those who have completed education and training programs which leads to a job with a median income of at least 200 percent of the federal poverty level; and (d) the percent of applicants, recipients, former recipients, and those never receiving benefits engaged in barrier reduction services, such as domestic violence counseling, mental health counseling, treatment for drugs and alcohol abuse, and vocational rehabilitation services. Once an assessment is made of the need, government must act to provide the education, training, barrier reduction and other necessary services.

3. Policy recommendation: Public benefits, whether cash or in-kind, must be increased to rise to the level that provides an adequate amount and duration so that everyone has the functional capacity to realize their rights to a decent standard of living²⁰. This includes substantial increases in the current benefit amounts each year until an optimal level is reached, then index all benefits for inflation.

4. Policy recommendation: Strengthen national food programs to better address hunger. Food Stamp benefits should be increased to address the real costs of food and outreach should be expanded to improve access for those eligible for the programs.²¹

5. Policy recommendation: In addition to increasing funding for child care to provide critical supports for working parents and their children,²² child care must be assessed from a child well-being point of view, not only as a work support with eligibility connected to the employment of a parent or caregiver.

6. Policy recommendation: Increase family asset building by developing a plan for universal children's savings accounts, ensuring every child can save for a more secure financial future.²³ Incentives are also needed to encourage low-income workers, those eligible for the Earned Income Tax Credit (EITC) as well as childless workers, to save a portion of their tax refund combined with public matching funds. This will help increase the financial stability of vulnerable populations who are working hard to make ends meet and get ahead.²⁴

7. Policy recommendation: Remove barriers to education and training for public benefits recipients and other low-income people. Given the strong link between educational attainment and earnings, low-income people must be afforded the opportunity to participate in education and training that will improve their earning capacity. This includes Adult Basic Education (ABE), English as a Second Language (ESL), high school and general education development (GED) certificate programs, vocational training and higher education. Policies and programs that discourage access to quality education and training for low-income people must end. Those eligible for public benefits programs must be seen as integral to our economy. They must be seamlessly folded into the larger workforce, education, and economic development systems and not treated as just an afterthought. The Obama Administration and Congress have made great strides in this direction, but more must be done to invest in policies and programs that target low-income people and move them out of poverty and into career path employment, such as Transitional Jobs, bridge programs, a guarantee of at least two years of post-secondary education or training, financial aid policies that support working adults and other nontraditional students, and helping two- and four-year colleges play an increasing role in workforce development by promoting innovation in program content and delivery, including partnerships with community based organizations that serve minorities.

9. Policy recommendation: Increase the number and retention of women and people of color in nontraditional employment. This includes jobs in the construction industry, manufacturing, and the green economy. An upward revision of the goals and improved policies and enforcement by the Office of Federal Contracts (goals for women and minorities in construction), HUD (hiring goals for public housing residents and other low-income people) and other federal agencies in regards to the hiring and retention of women and minorities whenever federal funds are involved.

10. Policy recommendation: Integrate economic development and workforce development not only to ensure economic competitiveness in a global economy, but to produce skilled workers, in strong businesses, with good jobs that foster thriving

communities. To do this the federal government must ensure that people develop the skills businesses demand in a modern economy; create career paths and job opportunities for all working-age people, from the least skilled and most disadvantaged to middle income workers whose skills have become obsolete. As a first step, the federal government should set an example by creating a pipeline toward career path employment for low-income people for its own workforce and that of its contractors, setting minimum standards for wages, health coverage, and retirement security. Then, take the lead in moving private employers forward to do the same. And third, ensure that the needs of low-income people are an integral part of workforce and economic development plans at all levels of government.

11. Policy recommendation: As stated at the beginning, money alone should not be the measure of poverty. The Shriver Center had the pleasure of contributing our expertise to the report, "The Measure of America: American Human Development Report 2008-2009". The report advocates, and we recommend, a shift away from a sole focus on economic growth as an end in itself and income as the final measure of a person's well being. The report considers both income and growth as important means for human progress, but also looks at other things people value that do not show up in growth figures such as a quality education, a long and healthy life, personal safety, a secure livelihood, and a say in decisions that affect one's life. The report presents human development rankings for U.S. states, congressional districts, and ethnic groups. For more information, the report is available at <http://www.measureofamerica.org/>.

Thank you for the opportunity to address these important issues. I would be happy to follow up with you on any of these issues. I can be reached at 312-368-3303 or wendypollack@povertylaw.org.

¹ The U.S. Department of Health and Human Services poverty guidelines is the most commonly used indicator of economic well-being for low-income people and the most commonly used basis for determining financial eligibility for need-based social security programs. The 2009 guidelines put a family of four with an annual household income at or below \$22,050 in poverty. 74 Fed. Reg. 14, 4199-4201 (Jan. 23, 2009). The federal guidelines themselves are a point of controversy, with most critics arguing that they do not accurately reflect the material well-being of low-income people.

² Heartland Alliance for Human Needs and Human Rights (2008). 2008 Report on Illinois Poverty. Chicago: Author.

³ Heartland Alliance for Human Needs and Human Rights. (2007). 2007 Report on Illinois Poverty. Chicago: Author.

⁴ Heartland Alliance for Human Needs and Human Rights (2008). 2008 Report on Illinois Poverty. Chicago: Author.

⁵ U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

⁶ Heartland Alliance for Human Needs and Human Rights. (2007). 2007 Report on Illinois Poverty. Chicago: Author.

⁷ CFED 2009-2010 Assets & Opportunity Scorecard. Citing *Survey of Income and Program Participation* (2004 Panel, Wave 6). Washington, D.C.: U.S. Department of Commerce, Census Bureau. Calculations by Beacon Economics.

⁸ U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

⁹ Illinois Department of Human Services, Bureau of Research and Analysis. On file with Social IMPACT Research Center of Heartland Alliance.

¹⁰ Heartland Alliance for Human Needs and Human Rights. (2007). *Freedom from Poverty in America: A National Agenda*. Chicago: Author.

¹¹ U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

¹² U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

¹³ U.S. Census Bureau, American Community Survey Public Use Microdata Sample 2007. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

¹⁴ Institute for Women's Policy Research. (updated Sept. 2009). *The Gender Wage Gap: 2008*. Washington, D.C.: Author.

¹⁵ National Women's Law Center, *Falling Short in Every State: The Wage Gap and Harsh Economic Realities for Women Persist*. (2009). Washington, D.C.: Author.

¹⁶ U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

¹⁷ U.S. Census Bureau, Current Population Survey 2005-2007 Annual Social and Economic Supplement, Microdata, calculation by the Mid-America Institute on Poverty of Heartland Alliance.

¹⁸ Illinois Department of Human Rights 2008 Annual Report (<http://www.state.il.us/dhr/Publications/Annual%20Report%20FY2008.pdf>).

¹⁹ U.S. Census Bureau, American Community Survey 2008. Calculation conducted by Social IMPACT Research Center of Heartland Alliance.

²⁰ Heartland Alliance for Human Needs and Human Rights. (2007). 2007 Report on Illinois Poverty. Chicago: Author.

²¹ Heartland Alliance for Human Needs and Human Rights. (2007). *Freedom from Poverty in America: A National Agenda*. Chicago: Author.

²² Heartland Alliance for Human Needs and Human Rights. (2007). *Freedom from Poverty in America: A National Agenda*. Chicago: Author.

²³ Heartland Alliance for Human Needs and Human Rights. (2007). 2007 Report on Illinois Poverty. Chicago: Author.

²⁴ Heartland Alliance for Human Needs and Human Rights. (2007). Freedom from Poverty in America: A National Agenda. Chicago: Author

** Access to reports referenced herein and others can be found at <http://www.heartlandalliance.org/whatwedo/advocacy/reports/>.*

Testimony of Michael H. Posner
Assistant Secretary of State for Democracy, Human Rights and Labor
Senate Judiciary Human Rights and the Law Subcommittee
“The Law of the Land: U.S. Implementation of Human Rights Treaties”
December 16, 2009

Chairman Durbin, Senator Coburn, and Members of the Committee, thank you for holding this important hearing. I am pleased to be here with you today to discuss U.S. implementation of international human rights treaties, including our upcoming participation in the Human Rights Council’s Universal Periodic Review. As President Obama made clear in his speech before the UN General Assembly this fall, and again most recently in Oslo, this administration is committed -- in word and deed -- to a new era of principled engagement with the world.

Our decision earlier this year to join the UN Human Rights Council is one element of that engagement. But we fully realize the challenges we face in engaging with the UN on human rights issues. All too often in dealing with these issues the United Nations has been a venue for governments to play politics and exploit grievances. In deciding to join the Human Rights Council, our intention is to challenge these practices and to make the Council a venue for advancing the interests of vulnerable people whose human rights and fundamental freedoms are being violated.

Our engagement at the UN and elsewhere is guided by our own history. The founders of this country drafted a Constitution that was predicated on a commitment to human rights and fundamental freedoms. Because of our historic commitment to these principles, we see the protection of human rights as universal. In advancing human rights, in this country and around the world, we can and should draw from our own domestic experience and lead by example, providing a model for the advancement of human rights that other countries can emulate.

In his Four Freedoms speech in 1941, President Franklin Roosevelt built on this vision, and articulated a world-view based on human rights, advancing these values as an anchor as the country went to war.

Immediately following World War Two, as the devastation and human degradation of the Holocaust became clear, the United States played a lead role in establishing the United Nations and in making human rights a cornerstone of the UN Charter. As the first chair of the UN’s Commission on Human Rights,

Eleanor Roosevelt led the effort to draft the Universal Declaration of Human Rights.

The Universal Declaration broke new ground in two important ways. First, it established the principle of universal application of human rights, the idea that every human being is entitled to live in dignity and to be treated fairly because of their humanity. Secondly, the Universal Declaration internationalized these concerns, making them an important aspect of diplomatic relations between states.

Over the past 60 years, human rights has been a crucial element of this country's leadership role in the world. The U.S. commitment to advancing a global human rights agenda is longstanding, broad-based and bi-partisan.

Recalling Jefferson's words, in 1986 President Reagan reminded us at the signing ceremony for a Human Rights Week proclamation that "freedom of religion, freedom of the press, freedom of the person under the protection of habeas corpus and trial by juries impartially selected -- these principles form the bright constellation which has guided our steps through an age of revolution and transformation."

And on the international stage, President Reagan firmly challenged the repressive policies of the former Soviet Union, and pursued a robust foreign policy, based on a vision of freedom. This bi-partisan commitment to human rights has been an essential element of our foreign policy and remains so today.

Today our challenge of advancing human rights in the international community will be guided by three tenets: a commitment to principled engagement; a determination to apply universal human rights standards to every government, including our own; and a belief that sustainable change in any society must be rooted from within and therefore necessitates our support of civil society and other internal agents of change.

An essential aspect of this commitment is that we apply these same international human rights law principles to ourselves, which is the focus of today's important hearing. As President Obama has stated repeatedly, this must be a cornerstone of our human rights policy. We can and should lead by example, meeting our own obligations under both domestic and international law and not shying away from self-reflection and debate about our own record. As Secretary Clinton said this week, holding ourselves accountable does not make us weaker but

instead reaffirms the strength of our principles and institutions.

And President Reagan also reminded us, "Our country does not have an unblemished record. We've had to overcome our shortcomings and ensure equal justice for all. And yet we can be proud that respect for the rights of the individual has been an essential element, a basic principle, if you will, of American Government."

Under the U.S. Constitution, international human rights treaties, as ratified by the United States, are part of the "supreme law of the land." Key human rights treaties ratified by the U.S. government include the International Covenant on Civil and Political Rights, the Convention Against Torture and All Forms of Cruel Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of all Forms of Racial Discrimination, the Optional Protocols to the Convention on the Rights of the Child, and the Convention on the Prevention and Punishment of the Crime of Genocide.

These treaties require all States Parties to write periodic reports on their implementation of these instruments. In addition to taking stock of their implementation through the writing of the report, States Parties' public presentations of these reports to the relevant treaty bodies created pursuant to the human right treaties provides a further opportunity to consider and publicly discuss their domestic treaty implementation. The United States has been actively participating in this process since the mid 1990s when we first submitted a report to the UN addressing our compliance with the International Covenant on Civil and Political Rights. In the past, U.S. reporting was sometimes delayed but over the last eight years the Bush Administration brought the United States up-to-date on our treaty body reporting. The Bush Administration also sent substantial interagency teams to present these U.S. reports to the United Nations on the five UN human rights treaties to which the United States is a party.

I am committed to continuing and building on this effort. As part of this engagement with the international community on human rights implementation, in November 2010, we take our turn like every other country in the world to submit our report to the UN Human Rights Council through its new Universal Periodic Review (UPR) process. This will be the first report by the United States under the UPR, a comprehensive process through which, for the first time, every member state of the United Nations must submit similar reports on its own human rights record. During each UPR session, 16 countries undergo this type of review.

Because of the universal nature of the UPR, each country will undergo a review of its complete human rights record roughly every four years. The UPR has already proven to be a useful – though still very imperfect and uneven – mechanism in the Council for monitoring adherence to human rights obligations. Countries have had to defend their records in an international forum and, in many cases, have committed themselves to taking positive steps to improve their human rights implementation. The very act of presenting their records to an international forum has led some countries to take positive steps to ensure progress on human rights.

We look forward to participating in the UPR process and hope to demonstrate how an open, orderly and serious review can and should take place. We aim to seek input from the very active and effective non-governmental community in this country, including the wide range of human rights and public interest advocacy groups, community organizations, religious leaders and others. Our robust civil society is one of the hallmarks of our democracy and an essential ingredient of the success of this country over 230 years. Over the coming months we will set up public meetings in various parts of this country to allow these groups and community leaders to voice their concerns and to help us shape our own thinking as we prepare the UPR for the United States.

We also will consult with other relevant agencies to coordinate outreach, report drafting and approval, and responses to the UPR Working Group session in 2010 and follow-up for approval of the Working Group report at the Council Plenary in March 2011.

In the near future, we plan to also present our treaty reports under the Optional Protocols to the Convention on the Rights of the Child in January 2010 and our report under the International Covenant on Civil and Political Rights to the Human Rights Committee in August 2010. This reporting process can similarly help us reflect on our strengths and challenges, and provide an additional opportunity for us to review our own domestic compliance with these international obligations, which largely mirror our own domestic requirements under the US constitution and our laws. We will also participate in the newly revitalized interagency process on human rights implementation led by the National Security Council to explore ways that we can enhance our compliance with and implementation of our human rights commitments. While our domestic record is certainly not perfect, we have a powerful story to tell about how we have worked to address these issues and to improve over the last two centuries, and what we are doing today to further advance this important agenda.

We also will continue to respond to specific complaints against the United States from various UN experts and bodies and the Organization of American States' Inter-American Commission on Human Rights. This does not mean that we will agree with the substance of these complaints, because often we will not. But we must stand ready to defend these institutions' ability to receive human rights complaints, independently examine allegations, and to provide their recommendations about those situations. Part of our commitment to lead by example means that we will respond to the mechanisms, and in so doing demonstrate that democratic nations need not fear a discussion of their own record.

Mr. Chairman, I want to thank you again for convening this hearing and for the very important work of this Committee and for your leadership in establishing it. I will be happy to consult with the Committee throughout the UPR process, and I am happy to answer your questions.

PRRAC

Poverty & Race Research Action Council

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**Testimony of the Poverty & Race Research Action Council
presented to the
Human Rights and the Law Subcommittee
United States Senate
December 16, 2009**

**STRENGTHENING U.S. COMPLIANCE WITH THE CERD COMMITTEE'S
2008 CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ON
HOUSING, EDUCATION AND HEALTH**

Thank you for the opportunity to present testimony today about the status of U.S. human rights treaty implementation. The Poverty and Race Research Action Council (PRRAC) is a non-governmental organization based in Washington D.C. whose primary mission is to help connect advocates with social scientists working on race and poverty issues, and to promote a research-based advocacy strategy on structural inequality issues. At the present time, PRRAC is pursuing work in the areas of housing, education, and health, focusing on the importance of “place” and the continuing consequences of historical patterns of housing segregation and development for low income families in the areas of health, education, employment and incarceration.

For the past several years, PRRAC has been working with civil rights advocates across the country to call for the full implementation of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in the United States. CERD was ratified by the U.S. Senate in 1994. CERD requires state parties to examine and reform their own policies that create racial disparities and segregation – and it also requires states to monitor and take affirmative steps to address general societal discrimination and segregation, including the continuing legacy of historical discrimination.

In 2008, PRRAC, along with many other civil rights advocates, submitted “shadow reports” to the U.N. Committee on the Elimination of Racial Discrimination. These shadow reports outline our position on key issues where we believe the U.S. has failed to fully implement CERD, particularly in the areas of housing, education and health. Pursuant to the U.N. Human Rights Council’s Universal Periodic Review (UPR), the United States is in the process of undergoing a full review of its compliance with international human rights obligations. UPR review expressly includes CERD and the other human rights treaties that the U.S. has ratified.

In March 2008, after reviewing statements submitted by the U.S. government, foreign governments and non-governmental organizations, the Committee on the Elimination of

Racial Discrimination issued its Concluding Observations which highlighted areas in which the U.S. has failed to comply with the provisions of CERD. In paragraphs 16, 17 and 32 of the Concluding Observations, the Committee specifically referred to areas of U.S. non-compliance in housing, education and health, and made specific recommendations for U.S. action.

Housing:

In early 2008, along with a large number of housing scholars and research and advocacy organizations, PRRAC submitted a shadow report titled *Residential Segregation and Housing Discrimination in the United States* to the CERD Committee. The Report describes the longstanding racial discrimination which continues to pervade the housing market in the United States.¹ This report also demonstrated how various government policies including public housing, the Section 8 Housing Choice Voucher Program, the Low Income Housing Tax Credit and zoning practices throughout the country continue to contribute to and promote residential segregation.² The report included specific recommendations for compliance with CERD.

Following its review, the CERD Committee issued the following observations and recommendations with regards to housing in the U.S. in paragraph 16 of its Concluding Observations:

16. The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. (Article 3)

The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:

- (i) **support the development of public housing complexes outside poor, racially segregated areas;**
- (ii) **eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and**
- (iii) **ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of “steering” and other discriminatory practices carried out by private actors.**

¹ *Residential Segregation and Housing Discrimination in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 2008, available at: <http://www.prrac.org/pdf/FinalCERDHousingDiscriminationReport.pdf>

² *Id.*

Education:

In the area of education, a shadow report prepared by a group of experts in the field highlighted the fact that “public schools today are more segregated than they were in 1970, as federal court decisions and government inaction have contributed to the persistence of apartheid conditions in schools. Indeed, the continued racial inequities and segregation of US schools is evidenced in large gaps in achievement and access, high rates of suspension, expulsion, and criminal sanctions, and low graduation rates for minority and English Language Learner (“ELL”) students.”³ The report found that certain factors contributed to racial inequality in educational opportunities, including:

underperforming, poorly financed schools that perpetuate minority students’ underachievement due to lower teacher quality, larger class size, and inadequate facilities; student assignment policies that promote segregation; setting of school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; systems of ability grouping and tracking that consistently retain or place minority students in lower level classes where they learn less than their White peers in higher level tracks; failures to counteract differences in parental income and educational attainment, which correlate with race; and lower teacher and administrator expectations of minority students. Research shows that laws and policies have systematically placed the poorest minority children within inadequate educational environments, further perpetuating and increasing the overall racial disparity here.⁴

In March 2008, the CERD Committee concurred in its assessment of the harms of racial and economic school segregation, and issued their recommendations in paragraph 17 of the Concluding Observations:

17. The Committee remains concerned about the persistence of *de facto* racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address *de facto* segregation by prohibiting the use of race-conscious measures as a tool to promote integration. (Articles 2 (2), 3 and 5 (c) (v))

The Committee recommends that the State party undertake further studies to identify the underlying causes of *de facto* segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school de-segregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures –

³ *Racial Disparities in Educational Opportunities in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination*, A Report of the Lawyers’ Committee for Civil Rights under Law, 6 SEATTLE JOURNAL FOR SOCIAL JUSTICE 2 (Spring/Summer 2008), 591-647.

⁴ *Id.*

including the enactment of legislation – to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

Health:

In the area of health care treatment and access and environmental justice, the CERD Working Group on Health and Environmental Health submitted a shadow report entitled *Unequal Health Outcomes in the United States* (January 2008), which outlined the racial and ethnic disparities in U.S. health care and highlighted the fact that such disparities in health outcomes “are caused not only by structural inequities in our health care systems, but also by a wide range of social and environmental determinants of health.”⁵ The report found that many government policies continue to create and perpetuate health disparities and have failed to address the problems both through the health care system and through environmental justice. Key problems in government policy exist in the areas of monitoring and enforcement of racial disparities; failure to protect racial and ethnic minorities from disproportionate environmental burdens; ongoing government policies that restrict health care access; including the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Deficit Reduction Act of 2005; unequal access to sexual and reproductive rights for women of color; and genetic discrimination.⁶ Paragraph 32 of the CERD Committee’s Concluding Observations included the following recommendations with regard to the state of health care in the United States:

32. While noting the wide range of measures and policies adopted by the State party to improve access to health insurance and adequate health care and services, the Committee is concerned that a large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services. (Article 5 (e) (iv))

The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services. The Committee requests the State party to collect statistical data on health disparities affecting persons belonging to racial, ethnic and national minorities, disaggregated by age, gender, race, ethnic or national origin, and to include it in its next periodic report.⁷

⁵ *Unequal Health Outcomes in the United States: Racial and Ethnic Disparities in Health Care Treatment and Access, the Role of Social and Environmental Determinants of Health, and the Responsibility of the State*, Jan. 2008, available at: <http://www.prrac.org/pdf/CERDhealthEnvironmentReport.pdf>

⁶ *Id.*

⁷ UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of All Forms of Racial Discrimination : Concluding Observations of the Committee on the Elimination of Racial*

STRENGTHENING U.S. COMPLIANCE WITH CERD:

In order to comply with CERD, Congress should act promptly upon the CERD Committee's Concluding Observations and take steps to improve the U.S. framework for approaching all forms of discrimination. Since the CERD Committee's concluding report, civil rights groups have laid out a roadmap that, if implemented, would greatly improve the United States' compliance with its human rights obligations. The following outlines some of the key points and recommendations that would greatly assist in implementing CERD and the Concluding Observations in the areas discussed above.

Housing:

In the area of housing, the National Commission on Fair Housing and Equal Opportunity⁸ explored the issues raised by the CERD Committee in five regional hearings during 2008. The Commission's December 2008 final report clearly outlines the current problems and potential solutions to racial discrimination in the housing market. The following recommendations would, if implemented, improve compliance with CERD and help to address the CERD Committee's concerns expressed in paragraph 16.

(i) Implement civil rights requirements in the Low Income Housing Tax Credit Program

The Low Income Housing Tax Credit Program (LIHTC) is the nation's largest low-income housing production program, but it has failed to promote racial and economic integration. It is necessary that Congress take steps to ensure that racial segregation and poverty concentration are avoided in the siting of LIHTC developments. In addition, further steps are necessary to fully implement civil rights in the program. Such steps should include: providing explicit fair housing guidance including clear explanations of the civil rights obligations applicable to LIHTC; affirmative marketing; data collection including racial and ethnic data, and language preference reporting; and guidance regarding disability requirements including provisions of the Fair Housing Act regarding reasonable accommodation.

(ii) Strengthen the Fair Housing Initiatives Program and develop a coordinated Fair Housing Assistance Program

The Fair Housing Initiatives Program (FHIP) was created in the late 1980s to support and fund fair housing enforcement and education across the country. Funding restrictions have limited its usefulness and thus funding for FHIP must be

Discrimination : United States of America, 8 May 2008, CERD/C/USA/CO/6, available at: <http://www.unhcr.org/refworld/docid/4885cfa70.html> [accessed 10 December 2009]

⁸ The National Commission on Fair Housing and Equal Opportunity was a bi-partisan body co-chaired by former HUD Secretaries Jack Kemp and Henry Cisneros and convened by the Leadership Conference on Civil Rights, the NAACP Legal Defense Fund, the Lawyers' Committee for Civil Rights under Law and the National Fair Housing Alliance.

increased, to a minimum in the first year of \$52 million, in order to fully implement the program. Congress should pass H.R. 476, which increases funding for FHIP to \$52 million yearly through FY 2014. Additionally, reform is needed in FHIP management. Such management reform could include, among other things, rewriting eligibility standards so that they “include compliance with statutorily required standards, confirmation of a full range of services to be provided, establishment of service areas and office locations, and maintenance of financial accountability standards.”⁹ Improvement in the coordination of the related FHAP program is necessary “to ensure that the rights and remedies available through state and local fair housing enforcement are consistent with the leadership in a reformed federal enforcement initiative and equivalent in practice to the Fair Housing Act.”¹⁰ To do so, FHAP agencies must be provided with training, binding guidance, and technical assistance.

(iii) Make changes to the Section 8 Housing Choice Voucher program to comply with the “affirmatively furthering fair housing” obligation in federal housing programs

As was explained in the Fair Housing Commission Report, “administrative changes to the Section 8 Housing Choice Voucher program that would increase access of eligible families to high opportunity communities should be adopted, including expanding authorization of higher rents where necessary, improving portability of vouchers across jurisdictional lines, re-establishing housing mobility programs to assist voucher-holders seeking to move to higher opportunity areas, creating strong incentives and performance goals for administering agencies, and providing incentives to recruit landlords in high opportunity areas into the program.”¹¹ These changes would directly address the specific concerns and recommendations laid out in paragraph 16(ii) of the Concluding Observations. Some of these improvements are included in the pending “Section 8 Voucher Reform Act” but Congress should also provide targeted housing mobility counseling to make housing choice a reality.

Education:

In the area of education, a recent policy statement of the National Coalition on School Diversity sets out a policy agenda for full compliance with CERD. The statement, *Reaffirming the Role of School Integration in K-12 Education Policy*, issued following a November 2009 conference in Washington D.C., highlights some of the most important steps required to improve racial integration of the public school system.¹² These suggestions would aid in the implementation of CERD and would comply with the

⁹ *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity*, at 28 (Dec. 2008), available at

http://www.nationalfairhousing.org/Portals/33/reports/Future_of_Fair_Housing.PDF

¹⁰ *Id.* at 30.

¹¹ *Id.* at 42.

¹² *Reaffirming the Role of School Integration in K-12 Education Policy: A Conversation Among Policymakers, Advocates and Educators*, <http://www.prrac.org/pdf/schooldiversitystatement.pdf>.

Committee's recommendations that the United States "take all appropriate measures . . . to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures. . ."¹³ The National Coalition on School Diversity statement provides suggestions that would help to further implement CERD including the following:

(i) Expand funding for integrative programs

Innovative and voluntary school integration programs require increased federal funding and support. The Magnet Schools Assistance Program has been flat funded since FY08. The program requires increased funding and should include stronger integration goals in the funding application process. The "Race to the Top Fund" and the "Investing in Innovation Fund" adopted pursuant to the American Recovery and Reinvestment Act of 2009 are positive steps toward improving educational options for low income children in low performing schools and should include strong integration guidelines.

(ii) Promote school integration through federal housing policy

Research has shown that segregated housing patterns lead to segregated schools and that "school desegregation programs have had a positive impact on residential integration."¹⁴ In order to implement CERD and comply with the Concluding Observations, it is important that Congress ensure that agencies and departments such as HUD, the Treasury Department and the Department of Education collaborate to "better link federal housing and school policy, including civil rights siting requirements . . . strong affirmative marketing of all federally-funded housing assets in high performing school districts and expansion of mobility counseling in the portable Housing Choice Voucher Program to allow families with young children to move into higher performing schools."¹⁵

(iii) Provide support and incentives for Interdistrict Transfer Programs

To further comply with the Concluding Observations recommendation that the government allow for the voluntary promotion of school integration, Congress should support and develop programs for the furthering of interdistrict transfer programs. Such support should include "support for parent education and organizing, transportation support, and staff development and training to ensure that incoming students receive the best possible education when they arrive. Additional efforts should be made to avoid in-school segregation and address the needs of low income Latino students, students with disabilities, and students with limited English proficiency."¹⁶ Further support of these successful school

¹³ *CERD Concluding Observations*, supra Note 7 at paragraph 17.

¹⁴ *Residential Segregation and Housing Discrimination in the United States*, supra Note 1 at 11.

¹⁵ *Reaffirming the Role of School Integration in K-12 Education Policy*, supra note 12.

¹⁶ *Id.*

integration programs would improve compliance with the United States' treaty obligations.

Health:

Paragraph 32 of the Concluding Observations was framed broadly and recommends that the U.S. "continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities . . ." In furtherance of goals, the Leadership Conference on Civil Rights Health Task Force made recommendations to the current administration which include the following:

(i) Promoting access to high quality, affordable health care for all individuals without regard to race, ethnicity, gender, age or primary language

New legislation in this area would help to comply with CERD and the Concluding Observations. Such legislation could include the insertion of a requirement for language access in specific health programs; the restoration of eligibility for federal programs for lawfully residing immigrants to the same as citizens; and expanding the public insurance programs to cover people regardless of immigration status, citizenship status, and documentation status.

(ii) Eliminating health disparities in access or quality, based on race, ethnicity, gender, age or primary language

Along with overall health care reform that promotes a system of universal insurance coverage, other steps are needed to eliminate disparities in access to health care. Steps in this area could include strengthening civil rights agencies' investigative capacities in the area of racial or ethnic disparities in health and applying Title VI to those parts of Medicare not currently covered. Additionally, data collection on race, ethnicity, gender and primary language in all federal health programs and the implementation of the OMB standard in this regard is necessary to track racial disparities in access and quality of health care. All of these actions would further aid in compliance with CERD and the Concluding Observations.

(iii) Combating environmental and other socioeconomic factors that affect the health and well-being of underserved communities and communities of color

It has been shown that "race continues to be an independent predictor of where hazardous wastes are located, and it is a stronger predictor than income, education and other socioeconomic indicators."¹⁷ In order to comply with CERD and the Concluding Observations, Congress needs to address environmental justice

¹⁷ ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007 (2007) (report prepared for the United Church of Christ Justice and Witness Ministries).

concerns. Specifically, Congress should enact the Environmental Justice Act of 2007, H.R. 1103 which would improve low-income and minority communities' involvement in the implementation and enforcement of environmental laws. Additionally, Congress should support EPA and other agencies' efforts in working to reduce health disparities.

The implementation of international human rights treaties in the United States is an important area of policy which requires Congress' attention. The United Nations Committee on the Elimination of Racial Discrimination's Concluding Observations highlight areas where the U.S. has thus far failed to meet its obligations. By addressing these concerns and implementing the suggestions presented above, the U.S. would take an important first step on its path to compliance with its international human rights obligations.



**Written Testimony of Mary Price,
Vice President and General Counsel
Families Against Mandatory Minimums**

**On
“The Law of the Land: U.S. Implementation of Human Rights Treaties”**

**Submitted to the
Senate Judiciary Committee
Subcommittee on Human Rights and the Law**

December 16, 2009

Among the obligations established by the International Convention on the Elimination of All Forms of Racial Discrimination is the duty to “review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”¹ Among the rights accorded individuals under the treaty is “[t]he right to equal treatment before the tribunals and all other organs administering justice.”² The United States of America is a signatory of the Convention.³

On behalf of the over 20,000 members of Families Against Mandatory Minimums (FAMM), I would like to thank Subcommittee Chairman Durbin, Ranking Member Coburn, and the members of the Senate Judiciary Committee Subcommittee on Human Rights and the Law for holding this important hearing and for the opportunity to submit written testimony.

FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not. Instead, mandatory minimums result in unduly harsh punishment while masking, and not adequately reducing, unwarranted sentencing disparities, including racial disparity.

Research has shown that certain policies and procedures in the criminal and juvenile justice system have a disparate impact on both the African American and Latino communities in the United States. Contrary to the obligations laid out in the International Convention which was ratified by the United States in 1994, the use of mandatory minimums in the American criminal justice system systematically and disproportionately affects minority groups. Because mandatory minimum sentencing policies result in race-based disparity in sentencing, they violate the treaty-protected right to equal treatment in the criminal justice system. The United States is therefore obliged by the Convention to review and nullify mandatory minimums as they result in racial disparity in sentencing.

Mandatory Minimums: An Overview

The United States Congress adopted the Sentencing Reform Act of 1984⁴(SRA), which established the United States Sentencing Commission and charged it with the task of creating guidelines for judges to use when imposing sentence on defendants convicted of federal crimes.

¹ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, 220.

² *Id.* at art. 5(a), 220.

³ *Id.* at 303 (showing United States’ entrance into the treaty on Sept. 28, 1966).

⁴ Pub. L. No. 98-473, 98 Stat. 1837 (1984).

The SRA was motivated in part by concerns about unbridled judicial discretion and its contribution to what appeared to be unwarranted sentencing disparities. Guidelines would, in Congress' view, channel judicial discretion, eliminate unwarranted disparity, encourage uniformity, and correct undue leniency and harshness. The Guidelines are a calibrated, factor-sensitive means of locating a sentence based on the crime, offense and offender characteristics and criminal history. Built into the system was an escape valve – departure authority – by which a judge could credit circumstances or characteristics not adequately accounted for in the Guidelines.

While the Commission was drafting the federal Sentencing Guidelines, Congress responded to high profile criminal cases by passing a set of drug and gun crime statutes containing mandatory minimum penalties. Mandatory minimums were heralded by some as the best way to ensure that crime would be prevented, wrongdoers would be incapacitated, criminals would be induced to assist the government, and the most culpable would not escape appropriate punishment by virtue of the judge or prosecutor they happened to draw. For example, in the Anti-Drug Abuse Act of 1986,⁵ drug kingpins were intended to receive sentences of at least ten years for first and twenty years for second offenses. In 1988, Congress extended mandatory minimum penalties to reach conspirators as well as principals, ensuring that minimum penalties would apply with equal force to peripheral players.⁶

The mandatory minimum penalties differ from the guidelines in that they take a charge-centered approach to sentencing. That is, conviction of a given charge will result in a pre-determined and for the most part, inescapable sentence. While the guidelines (either in their former mandatory or current advisory state) permit Courts certain latitude to individualize sentences in appropriate circumstances, mandatory minimums do not. This rigidity is cause for a great deal of criticism.⁷

Mandatory minimums are, in part responsible for the prison crisis currently plaguing the United States. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.⁸ A major cause is the increase in sentence length for drug trafficking from 23 months⁹ before mandatory minimums to

⁵ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

⁶ Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (1988).

⁷ See, e.g., AMERICAN BAR ASSOCIATION, REPORT OF THE ABA JUSTICE KENNEDY COMMISSION (June 23, 2004) *Judicial Conference of the United States Resolution*, contained in *Report and Proceedings of the Judicial Conference of the United States*, March 13, 1990, reprinted in U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM App. G (August 1991) [hereinafter MANDATORY MINIMUM REPORT]; see also, resolutions of the twelve circuit courts of appeals reprinted in MANDATORY MINIMUM REPORT, App. G; FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY PRISON TERMS (1994); LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL (2000).

⁸ U.S. BUREAU OF PRISONS, A BRIEF HISTORY OF THE BUREAU OF PRISONS, available at <http://www.bop.gov/about/history.jsp>

⁹ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 48 (Nov. 2004), available at http://www.uscc.gov/15_year/15year.htm [hereinafter Fifteen Year Study]; U.S. Sentencing Commission, Supplementary Report on the Initial Guidelines and Policy Statements 69-70 (June 18, 1987).

83.2 months in 2008.¹⁰ About 75 percent of the increase was due to mandatory minimums, and 25 percent is due to guideline increases above mandatory minimums.¹¹

Mandatory Minimums and Racial Disparity

Some of the criticism of mandatory minimums derives from their observed relationship to racial disparity in sentencing. While they may have been designed to apply the same sentencing law to all, their effect has been nearly the opposite. As early as 1991, in its groundbreaking report on Mandatory Minimum Penalties in the Federal Criminal Justice System¹² (Mandatory Minimum Report) the U.S. Sentencing Commission concluded that some of “[t]he disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.”¹³ The report observed that:

- Defendants involved in cocaine and cocaine base offenses were more frequently charged and convicted under mandatory minimum statutes than were their marijuana and methamphetamine defendant counterparts.¹⁴
- 67.7% of Black and 57.1% of Hispanic defendants received sentences at or above the mandatory minimum compared with 54% of White defendants.¹⁵
- A greater proportion of Hispanic and a lesser proportion of Whites were initially indicted at the mandatory minimum level and Whites were more likely to plead guilty and avoid conviction at the mandatory threshold.¹⁶
- Downward departures from mandatory minimum sentences (available to defendants who provide “substantial assistance” to the government in the investigation or prosecution of others) were most frequently granted to Whites and least frequently to Hispanics.¹⁷

The Federal Judicial Center published a report showing that in 1990, Blacks were 21% and Hispanics 28% more likely than Whites to receive a mandatory minimum penalty for offenses that were punished by such penalties.¹⁸ Today, Blacks continue to receive mandatory minimums at disproportionate rates to Whites. U.S. Sentencing Commission data from 2008 reveals that while Blacks were defendants in only 24% of all federal cases, they made up almost 36% of the defendants who received mandatory minimums. Comparatively, Whites were defendants in almost 30% of all federal cases, but comprised only 26% of the defendants receiving mandatory minimums.¹⁹

¹⁰ U.S. SENTENCING COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS TABLE 14 (2008), available at <http://www.uscc.gov/ANNRPT/2008/SBTOC08.htm> [hereinafter 2008 SOURCEBOOK].

¹¹ FIFTEEN YEAR STUDY, at 54.

¹² The report was commissioned by Congress in Pub. L. No. 101-647, § 1703, 104 Stat. 4846.

¹³ MANDATORY MINIMUM REPORT, at ii.

¹⁴ *Id.* at 69. The majority of crack cocaine defendants are Black while the majority of powder cocaine defendants are Hispanic, *infra* page 3.

¹⁵ *Id.* at 76.

¹⁶ *Id.* at 81-82.

¹⁷ *Id.* at 82.

¹⁸ BARBARA S. MEIERHOEFER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS 20 (Federal Judicial Center, 1992).

¹⁹ U.S. SENTENCING COMMISSION, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING 2 (July 10, 2009), available at http://www.uscc.gov/MANMIN/man_min.pdf.

Subsequent reports on the design and impact of federal cocaine penalties demonstrated how one mandatory minimum sentencing structure leads to racially disparate outcomes. The Sentencing Commission published reports in 1995, 1997, 2002 and 2007 demonstrating that the severe penalties for crack cocaine possession and possession with intent to distribute were unwarranted in light of the fact that crack cocaine is, in most significant respects, indistinguishable from powder cocaine.²⁰ Despite the lack of any meaningful difference between the two forms of the drug, crack defendants are subject to the same five- and ten-year mandatory minimum sentences reserved for powder cocaine defendants even though it takes 100 times more powder cocaine to trigger the minimums.

In its most recent report on the subject, the United States Sentencing Commission found that:

[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders” than any other factor and revising it will “better reduce the gap than any other single policy change.” Doing so, the Commission points out, “would dramatically improve the fairness of the federal sentencing system.”²¹

As of 2008, Blacks comprised 79.8% of all defendants convicted of crack cocaine offenses compared to White defendants who made up only 10.4%.²² The majority of defendants convicted of crack cocaine offenses receive the mandatory five (31.7%) and ten-year (47.6%) mandatory minimum sentences.²³

Contrary to popular belief, that African-Americans and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes or use drugs at a higher rate than Whites. In fact, according to federal health statistics in 2008, drug use rates per capita among minorities and White Americans are fairly similar.²⁴

In 2008, the average length of imprisonment was 114.5 months for crack cocaine, compared to 91 months for powder cocaine, 99.4 months for methamphetamine and 75.8 months for heroin.²⁵ Crack cocaine’s mandatory minimum penalties appear largely responsible for ensuring that

²⁰ See U.S. SENTENCING COMMISSION (USSC), 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (February 1995); USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (April 1997); USSC, 2002 REPORT TO CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereinafter 2002 COCAINE REPORT].

²¹ See U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 132 (Nov. 2004).

²² *Id.* at 101, Table 34.

²³ *Id.* at 110, Table 43.

²⁴ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICE NATIONAL ADMINISTRATION, RESULTS FROM THE 2008 NATIONAL HOUSEHOLD SURVEY ON DRUG USE AND HEALTH (2008), available at <http://www.oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.cfm#2.7> (showing past-month drug use by 8.2% of Whites, 10.1% of Blacks, and 6.2% of Hispanics).

²⁵ *Id.* at 114, Figure J.

African American drug offenders serve much longer sentences than White drug offenders.²⁶ It is no surprise that this disparity leads to a deleterious perception of race-based unfairness in our criminal justice system.

Other Factors that Contribute to the Racial Disparities

Other mandatory minimums and particularly decisions about when to invoke them continue to promote sentencing disparity based on race in the United States. For example, the statute penalizing use of a gun during a drug trafficking offense carries severe, consecutive mandatory minimum sentences.²⁷ As an alternative, the Sentencing Guidelines contain an “enhancement” for use of a firearm during a drug trafficking offense that can be invoked at sentencing when a prosecutor has chosen to not charge under section 924(c), the gun statute. The enhancement results in a much lower sentence than the mandatory minimum. The choice to charge a § 924(c) offense is in the hands of the prosecutor. In 1995, 34% of defendants who qualified for the statutory consecutive sentence received it; 30% received the much smaller guideline enhancement, and 35% of gun-involved defendants received no enhancement whatsoever. “Notably, Blacks accounted for 48% of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56% of those who were charged under the statute and 64% of those convicted under it.”²⁸ Data from 2000 reflected similar, disproportionate results for Black defendants.²⁹

Similarly, choices about charging under a mandatory minimum statute affect the racial composition of defendants sentenced for otherwise similar conduct. The decision to not seek a conviction under a mandatory minimum bearing statute can promote proportionality in sentencing “because statutory penalties . . . often trump the otherwise applicable guideline range and prevent mitigating adjustments contained in the guidelines from being taken into account.”³⁰ The decision whether or not to charge conduct under a mandatory minimum bearing statute is in the hands of the government. In 2002, 10% of federal defendants received a mandatory minimum sentence that was greater than the sentence they would have received under the Sentencing Guidelines. Hispanic defendants, 40% of all defendants, were 49% of those sentenced to mandatory minimum penalties that exceeded what would have been the guideline sentence.³¹ Data from 2008 showed that while Blacks comprised 24% of all federal offenders, they made up 31% of those who received mandatory minimum sentences that were longer than the suggested guideline range.³²

²⁶ FIFTEEN YEAR STUDY, at 131-32, 141.

²⁷ 18 U.S.C. § 924(c) (2008). Five years for possession, 7 years for brandishing, 10 years for discharging and 25 years for second and subsequent offenses, all consecutive to the underlying drug offense and each other.

²⁸ FIFTEEN YEAR STUDY, at 90.

²⁹ *Id.* at 91.

³⁰ 2002 COCAINE REPORT, at viii.

³¹ *Id.* The Commission notes that more research needs to take place about the contribution of charging decisions on the disproportionate disadvantage to minority defendants.

³² Testimony of Michael S. Nachmanoff before the U.S. Sentencing Commission, Public Hearing held at New York City, New York, July 9, 2009, at 9, available at http://www.uscc.gov/AGENDAS/20090709/Nachmanoff_testimony.pdf.

Once a mandatory minimum offense is charged, defendants have two ways to escape its operation. Low-level, first-time, non-violent, truthful drug defendants may qualify for the Safety Valve which directs the judge to use the Sentencing Guidelines without regard for the mandatory minimum sentence.³³ Otherwise, the defendant may be able to cooperate with the government in the investigation and/or prosecution of others and earn a “substantial assistance” motion to depart below the mandatory minimum from the government.³⁴ Only the government can seek a substantial assistance motion. African Americans are less likely to be eligible for the safety valve because they have a higher rate of prosecution than similarly situated White defendants.³⁵ Blacks have consistently received a lower rate of substantial assistance departures.³⁶ It is unclear why this occurs.

Conclusion

Federal sentencing laws in the United States impose heavy burdens on defendants of color. The impact of mandatory minimum sentencing, both directly by its operation and indirectly, in its effect of trumping and driving up guideline sentences, has fallen heavily on minority communities. The percentage of minorities charged in federal court has grown since the imposition of the guidelines and crime bills of the 1980s. The proportion of Hispanic defendants has doubled. The majority of federal defendants prior to that time were White while today they are Black and Hispanic. While the difference in average sentences between Whites and minorities was relatively small before, it began to widen with the dawn of mandatory and guideline sentencing.³⁷

Sentencing rules and practices, such as the crack cocaine mandatory minimum penalties and charging decisions, result in a disparity in the sentencing of defendants of color.

The United States should comply with its obligations under the Convention on the Elimination of All Forms of Racial Discrimination and undertake to review and eliminate sentencing laws, including mandatory minimum laws that have the effect of promoting disparity based on race.

³³ 18 U.S.C. § 3553(f).

³⁴ 18 U.S.C. § 3553(e).

³⁵ FIFTEEN YEAR STUDY at 134.

³⁶ *Id.* at 105.

³⁷ *Id.* at xiv.

Written Testimony

Vernellia R. Randall
The University of Dayton School of Law

Hearing Before the
Senate Judiciary Subcommittee on Human Rights and the Law

The Law of the Land: U.S. Implementation of Human Rights Treaties
Wednesday, December 16, 2009

Chairman Senator Leahy and distinguished members of the Committee, my name is Vernellia Randall, and I am a law professor who has taught health care law and racism and the law for the past 20 years. Also, I was a nurse practitioner for 13 years before attending law school. My research area has been racial discrimination in health care including the International Convention on Elimination of Racial Discrimination (ICERD).¹

Thank you for the opportunity to share my perspective on implementing human rights treaties as the law of the land. I appreciate the time and attention the Committee will be giving to this critical issue. I make the following recommendations to assure that the U.S. human rights treaties, particularly ICERD are the law of the land and implement fully:

1. Review all federal laws to assure their compliance with human rights obligations particularly ICERD's requirement of prohibiting both purposeful and effect discrimination and allowing for "special measures". Such review should include the opportunity for input from civil society.
2. Develop a mechanism for assuring compliance of all proposed federal legislation with human rights treaty obligations, particularly ICERD's requirement of prohibiting both purposeful and effect discrimination and allowing for "special measures". Such review should include the opportunity for input from civil society.

DISCUSSION

With regard to the International Convention on the Elimination of Racial Discrimination (ICERD) health care and racial discrimination is a excellent example of the United States's failure to (1) review and correct existing law and (2) assure compliance of proposed legislation.

Federal law related to eliminating racial discrimination in health care delivery is limited to Title

¹ See e.g., Vernellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 *University of Florida Journal of Law and Public Policy* 45 (2002); Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet The Needs of African-Americans*, 3 *HEALTH MATRIX* 127 (1993).

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VI of the Civil Rights Act.² Racial inequality in health care persists in the United States despite laws against racial discrimination, in significant part because of the inadequacy of Title VI.³

There are enforcement and data collection problems but the most significant problem is that it is inadequate for the particular difficulties present in the health care system. That is, the legal system has had particular difficulty addressing issues of effect discrimination which is specifically prohibited by ICERD.

While legal standards for discrimination have not always centered on intent, they do so now.⁴ Thus, to prove a disparate treatment claim an individual must show that the defendant intentionally discriminated.⁵ Such a standard means that few of the discriminatory acts that occur in the health care system can be successfully litigated, since most occur from unthinking or unconscious biases. As long as the law requires a conscious discriminatory purpose for disparate treatment liability, individual discrimination claims cannot address the issue of unconscious prejudice and biases or individuals and organizations who adopt policies and practices that have the effect of discriminating.⁶

Furthermore, the health care system presents several additional problems. First, similar to the situation that arises when racial minorities use housing and lending institutions, individuals can be totally unaware that the provider or institution has discriminated against them. Second, because of the very specialized knowledge required in medical care, individuals can be totally unaware that they have been injured by the provider. Third, the health care system, through managed care, has actually built-in

²See, e.g., Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination - It Shouldn't Be So Easy*, 58 *FORDHAM L. REV.* 939, 941-42 (1990); DAVID BARTON SMITH, *HEALTH CARE DIVIDED: RACE AND HEALING A NATION* (1999); David Barton Smith, *Addressing Racial Inequities In Health Care: Civil Rights Monitoring And Report Cards*, 23 *J. HEALTH POL. POL'Y & L.* 75 (1998);

³See, e.g., Daniel K. Hampton, *Title VI Challenges By Private Parties To The Location Of Health Care Facilities: Toward A Just And Effective Action*, 37 *B.C. L. REV.* 517 (1996); Marianne L. Engelman Laodo, *Breaking the Barriers of Access to Health Care: A Discussion of the Role of Civil Rights Litigation and the Relationship Between Burdens of Proof and the Experience of Denial*, 60 *BROOK. L. REV.* 239 (1994); Ruqaiyah Yearby, *STRIVING FOR EQUALITY, BUT SETTling FOR THE STATUS QUO IN HEALTH CARE: IS TITLE VI MORE ILLUSORY THAN REAL?*, 59 *Rutgers L. Rev.* 429 (Spring 2007); Gordon Bonnyman, *DYNAMIC CONSERVATISM AND THE DEMISE OF TITLE VI*, 48 *St. Louis U. L.J.* 61 (Fall 2003); Brietta R. Clark, *HOSPITAL FLIGHT FROM MINORITY COMMUNITIES: HOW OUR EXISTING CIVIL RIGHTS FRAMEWORK FOSTERS RACIAL INEQUALITY IN HEALTHCARE*, 9 *DePaul J. Health Care L.* 1023 (2005); Sidney D. Watson, *REINVIGORATING TITLE VI: DEFENDING HEALTH CARE DISCRIMINATION--IT SHOULDN'T BE SO EASY*, 58 *Fordham L. Rev.* 939 (April, 1990),

⁴See, e.g., Jessie Allen, *A Possible Remedy for Unthinking Discrimination*, 61 *BROOK. L. REV.* 1299 (1995).

⁵See, e.g., *id.*

⁶See, e.g., *id.*

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incentives that encourage unconscious discrimination.⁷ There has been no attempt to revise civil rights law to address these weakness. Consequently, there should be no surprise that there has been no racial discrimination case against a provider in over 30 years.

In an effective public health policy, appropriate state and federal laws must be available to eliminate discriminatory practices in health care. The crux of the problem, given managed care, the historical disparity in health care, and unthinking discrimination, is that the law does not address the current barriers faced by minorities, and the executive branch, the legislatures and the courts are all reluctant to hold health care institutions and providers responsible for institutional racism. The U.S. Commission on Civil Rights found:

There is substantial evidence that discrimination in health care delivery, financing and research continues to exist. Such evidence suggests that Federal laws designed to address inequality in health care have not been adequately enforced by federal agencies ... [Such failure has] ... resulted in a failure to remove the historical barriers to access to quality health care for women and minorities, which, in turn has perpetuated these barriers.⁸

If human rights treaties are the law of the land, than all proposed legislation should be vetted for how well they comply with the treaties. If such a discussion had occurred we would not currently be in the position of passing a health care reform law that fails to meet our obligation under ICERD. In particular, Senate Bill 3590 fails (1) prohibit both intentional and disparate impact discrimination; (2) authorize individuals to sue on both the law and the implementing regulations; and (3) Must assure that all health care providers are responsible for non-discrimination

In *Alexander v. Sandoval*, the Supreme Court reaffirmed its longstanding position that Title VI addresses only intentional discrimination.⁹ This is disastrous since most discrimination in health care is not intentional. Most physicians, hospitals and other providers, don't set out to purposefully

⁷See, e.g., Derrick A. Bell, Jr., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993)

⁸U.S. COMMISSION ON CIVIL RIGHTS, ACKNOWLEDGING DISPARITY, CONFRONTING DISCRIMINATION, AND ENSURING EQUALITY, VOLUME II: THE ROLE OF FEDERAL CIVIL RIGHTS ENFORCEMENT 275-76 (1999); U.S. COMMISSION ON CIVIL RIGHTS, THE HEALTH CARE CHALLENGE: ACKNOWLEDGING DISPARITY, CONFRONTING DISCRIMINATION, AND ENSURING EQUALITY, VOLUME I, THE ROLE OF GOVERNMENTAL AND PRIVATE HEALTH CARE PROGRAMS AND INITIATIVES 287 (1999).

⁹*Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (holding that a cause of action under Title VI exists only for intentional discrimination).

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discriminate. Rather, they adopt policies and practices or they rely on stereotypes and bias to make decision and the net effect (the disparate impact) is to discriminate based on race.

While effect discrimination (also called disparate impact) is prohibited by Title VI through implementing regulation, it is essentially unenforceable. In *Alexander v. Sandoval*, the Supreme court has held that an individual cannot sue (that is does not have a private right of action) on effect discrimination that only an agency can enforce the regulation.¹⁰ Thus, a person who knows that they have been discriminated against based on effect, can only file a complaint with the Department of Health and Human Services and hope they follow through. The result has been that litigation based on racial discrimination in medical treatment is non-existent even though it is clear that it exists. The private right of action on implementing regulations must be clearly articulated in the law.

Finally, Title VI has been curiously interpreted as exempting physicians and other health care providers from anti-discrimination law, unless they take any federal financial assistance, such as Medicaid, CHIP or Community Health Center funding for any of their patients. While this is actually a broad net, since most physicians see some publicly funded patients, it appears to exempt physicians who serve Medicare patients. Not only do the overwhelming majority of physicians take some Medicare patients, but in fact, 75% of Medicare Part B payments consist of federal revenues, while only 25% are actually Medicare beneficiary premiums. No health care providers in a health care system that largely depends on public funding, should be allowed to discriminate without impunity.

It is unfortunate that the Senate in its efforts to reform health care and make it more accessible and improve quality has failed to effectively address racial discrimination in medical treatment. This is unacceptable - you can't improve the quality of health for all Americans and ignore racial discrimination in medical treatment. Thus, the current health care reform debates highlight a significant problem with the US Implementation of the treaty - that is a failure to assure that laws conform to the requirements of the treaty. Federal agencies have repeatedly found discrimination and bias in health care but have consistently failed to address these problems. Disparities and bias range from treatment and diagnosis to access, funding, training, and representation of racial minorities in the health care system. Millions suffer and thousands lose their lives each year as a result of discrimination in health. Current trends toward managed care only exacerbate disparities. Clearly, effective laws is only one piece of the puzzle for eliminating racial discrimination and meeting our responsibility under the human rights treaties that we have signed; but is a necessary piece.

¹⁰ Commission on Civil Rights II, *supra* 8 at 288-89, 291 ("[W]e have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.").

RIGHTS working group

Statement of the Rights Working Group Hearing on "The Law of the Land: U.S. Implementation of Human Rights Treaties" Of the Senate Subcommittee on Human Rights and the Law December 16, 2009

In 2007, the Rights Working Group welcomed the establishment of the Human Rights Subcommittee of the Senate Judiciary Committee. This committee recognizes the critical importance of international law and human rights in the protection of civil rights and civil liberties. Under the guidance of Senators Durbin and Coburn, this committee sits at the critical nexus between U.S. and international law as it applies to situations of human rights violations both in the U.S. and around the world. This hearing focusing on the U.S. implementation of human rights treaties shines a necessary spotlight on the areas in which U.S. laws and policies do not conform with their international legal obligations.

Formed in the aftermath of September 11th, the Rights Working Group (RWG) is a national coalition of more than 265 organizations representing civil liberties, national security, immigrant rights and human rights advocates. RWG seeks to restore due process and human rights protections that have eroded since 9/11, ensuring that the rights of all people in the U.S. are respected regardless of citizenship or immigration status, race, national origin, religion or ethnicity. RWG is particularly concerned about the impact of post 9-11 policies that affect the civil liberties and human rights of communities of color. This statement will focus on implementation of U.S. obligations under the International Convention to Eliminate All Forms of Racial Discrimination (or ICERD).

Article 2 of the ICERD states: "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." In reviewing the U.S. record of implementation of its obligations under ICERD, the UN Committee on the Elimination of Racial Discrimination (UN Committee) adopted several Concluding Observations (attached), some of which were re-emphasized in a September 2009 letter written after its follow up review of the U.S. in August 2009.

The September letter (attached) referred to paragraph 14 of the Concluding Observations which addressed a number of U.S. laws and policies that need immediate attention. In the follow up letter, the UN Committee specifically called on the U.S. to pass the End Racial Profiling Act (ERPA), to strengthen the June 2003 Department of Justice Guidance on the Use of Race in Law Enforcement, to end the National Entry / Exit Registration System (NSEERS) and repeal §287(g) of the Immigration and Nationality Act passed in 1996.

ERPA

Congress first introduced the End Racial Profiling Act in 2001, but the support and momentum that the bill enjoyed when first introduced evaporated after the attacks on September 11, 2001. Since then, a number of state laws and local ordinances have been passed affording different levels of protection from racial profiling by law enforcement. This patchwork approach to

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protecting communities from discriminatory application of the law is not sufficient to meet the internationally recognized standards of ICERD.

2003 DOJ Guidance on the Use of Race in Law Enforcement

Issued in June 2003, the Guidance marked a significant step forward in the federal government's recognition of racial profiling as an illegal and ineffective tool for law enforcement. However, the Guidance has significant loopholes that allow law enforcement agencies to continue the use of illegal profiling. Specifically, the Guidance does not cover profiling based on religion or national origin, leaves loopholes for profiling in the name of "national security" and at the borders, does not address profiling in surveillance activities, and is not enforceable.

NSEERS

The NSEERS program was a program that required non-immigrant men aged 16-45 from mainly Muslim majority countries to register themselves at local immigration offices and ports of entry. NSEERS was pitched as a counterterrorism program but mainly resulted in the detention and deportation of thousands of men for minor immigration violations. Components of the program remain in place today and continue to affect men with strong equities in the U.S. who are trying to access immigration benefits.

287(g)

The 287(g) program is based in section 287(g) of the Immigration and Nationality Act. It was a law passed in 1996 that allowed the federal government to enter into formal contracts with state and local law enforcement agencies, deputizing law enforcement agents to engage in civil immigration enforcement. There is a large body of evidence that the program has resulted in rampant racial profiling. Other federal programs that use state and local criminal justice systems to identify people who have violated civil immigration law, such as the Criminal Alien Program (CAP) and Secure Communities, are also showing evidence of pre-textual arrests being used as a proxy to check immigration status.

Recommendations to implement the recommendations of the UN Committee

- Introduce and pass the "End Racial Profiling Act"
- Strengthen the 2003 DOJ guidance to ban profiling based on religion and national origin, eliminate the loopholes that allow for the use of race and ethnicity in the name of national security and border security, and make the guidance enforceable
- Terminate the NSEERS program
- Repeal 287(g) and eliminate all programs that devolve the responsibility for the enforcement of federal immigration law to state and local law enforcement agencies.

These steps will go a long way towards implementing some of the key recommendations made by the UN Committee to ensure that the U.S. is properly implementing its obligations under ICERD.

The Rights Working Group requests that the Subcommittee on Human Rights and the Law convene a hearing to review U.S. implementation of its obligations under the ICERD and address

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the specific recommendations made by the UN Committee on combating racial and religious profiling.

We thank the Subcommittee for having this important hearing and hope that it is the first in a series that studies how the U.S. can fully and effectively implement the human rights treaties that it has signed and ratified.

Appendices:

1. UN Committee's Concluding Observations on U.S. compliance with the ICERD:
<http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>
2. ACLU / RWG CERD report:
http://www.aclu.org/files/pdfs/humanrights/ccrd_finalreport.pdf
3. UN Committee's September 2009 letter on the follow-up review of the U.S.:
http://www.aclu.org/human-rights_racial-justice/un-committee-elimination-racial-discrimination-response-us-government-pr
4. RWG letter to Holder on DOJ Guidance (below)
5. "The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program" The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity:
http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf
6. "Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement" Justice Strategies:
<http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf>
7. "NSEERS: The Consequences of America's Efforts to Secure Its Borders" American-Arab Anti-Discrimination Committee (ADC), the Center for Immigrants' Rights (Center) at the Pennsylvania State University's Dickinson School of Law:
<http://www.adc.org/PDF/nseerspaper.pdf>
8. LCCR-RWG testimony for House Judiciary Hearing "The Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws"
http://www.rightsworkinggroup.org/sites/default/files/RWGLCCR_EnforcementHearingStatement_040209.pdf

**RIGHTS** working group**RWG Letter to Holder on DOJ Guidance**

October 20, 2009

Dear Attorney General Holder:

We are a group of civil rights, human rights, immigrant rights and faith-based organizations concerned that the Department of Justice's June 2003 Racial Profiling Guidance (hereinafter "Guidance") includes many loopholes that severely undermine its stated intentions. We are writing to ask you to strengthen the Guidance to address profiling by religion and national origin, to close the loopholes for the border and national security, and to make the guidance enforceable.

The Guidance was a significant step forward in clarifying the executive branch's position on biased policing, particularly racial profiling. We were heartened to see that the Guidance clearly identified racial profiling as an issue of national importance, framing it as a growing moral, legal, and safety concern among all communities across the country. No person should bear unwarranted law enforcement scrutiny or disparate treatment for his or her race or ethnicity.

As instances of racial profiling are still widespread and visible, the Department of Justice's commitment is a critical element in achieving the elimination of this practice. The undersigned groups support the spirit of the Guidance and some of its provisions. For example, we value the strong, unequivocal language in the Guidance that describes racial profiling as a moral and social problem that threatens our shared value of humane treatment of all people under the law. We agree that inhumane treatment, such as racial profiling, leads to individual indignity and suffering, as well as undermines the integrity of our criminal justice system, community trust in law enforcement, and law enforcement professionalism.

On the other hand, we have serious reservations about the efficacy of the Guidance. In a September 2009 letter to the U.S. government regarding its compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, the U.N. treaty body urged the United States "to review its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, with a view to avoiding any ambiguous language that may provide a loophole allowing for actions that constitute racial profiling." We would make five recommendations to address specifically these concerns.

First, the Guidance does not address profiling on the basis of national origin or religion. Even though national origin and religion are classes subject to heightened scrutiny under the Constitution, only "race" and "ethnicity" are referred to in the Guidance. We believe that the omission of national origin and religion is a signal that these are legitimate grounds upon which to discriminate in law enforcement activities. We recommend the application of the Guidance to these classifications to fully and meaningfully protect all people from discriminatory law enforcement.

Second, the Guidance permits broad national and border security exceptions. It creates ambiguity when it refers to racial profiling being authorized in these contexts to "the extent permitted by

R¹IGHTS working group

our laws and the Constitution.” While the Guidance permits race and ethnicity to be used without a specific suspect description, the use of race or ethnicity as a pretext for invidious discrimination is banned. However, the Guidance fails to describe what conduct constitutes pretextual discrimination, and it does not provide sufficient parameters to guide law enforcement officers’ actions. Even more significantly, the Guidance may be interpreted to allow the use of race or ethnicity as a basis for suspicion in these contexts. Law enforcement practices since 2003 seem to confirm this reading. We believe that these exceptions undermine the overall intent of the Guidance and send an unfortunate message that such discrimination is legal. To the contrary, discrimination in national and border security law enforcement is as invidious and wrong as discrimination in any other law enforcement activity.

Third, the Guidance should explicitly state that the ban on profiling applies to intelligence activities carried out by law enforcement agencies subject to the Guidance. This clarification is necessary because a substantial portion of the FBI’s current domestic activities may be labeled intelligence rather than law enforcement. The rules and guidelines for such activities, like the Guidance itself, appear to allow the pervasive use of race, ethnicity or religion as a basis for information-gathering and investigation.

Fourth, the Guidance does not contain enforceable standards. We believe that the Guidance could be a useful tool for federal law enforcement agencies to determine their legal limitations, but as written, it contributes little to the administrative mandate to end racial profiling. We believe that any serious effort to address racial profiling must be attached to enforceable standards that include accountability mechanisms for noncompliance. Without an incentive for law enforcement agencies to commit time or resources to addressing a complex issue like racial profiling, it is unlikely that we will see an end to racial profiling in the future.

Fifth, there are many law enforcement missions where the federal government partners with state and local law enforcement agencies, such as Joint Terrorism Taskforces, Fusion Centers and 287(g) agreements. Federal law enforcement agencies should not be able to “opt out” of their obligations by delegating activities that may violate the Guidance to state or local officials. We believe that the Guidance should prohibit federal law enforcement officials from participating in joint activities, including investigations and intelligence activities, with state or local law enforcement agencies that do not have policies and practices that prohibit racial profiling to at least the extent the Guidance does. In addition, the guidance should extend to all state and local agencies that accept federal funding in order to ensure compliance with Title VI of the Civil Rights Act of 1964. Finally, we would urge the Department to support passage of the “End Racial Profiling Act” once introduced, in order to ensure that similar behavior is regulated at the state and local level.

The undersigned organizations ask that you consider and implement these five recommendations to strengthen the existing Guidance. As organizations that support the administration’s commitment to equal protection and due process values, we look forward to working with the Department of Justice on revising the Guidance to ensure that racial profiling is banned in all forms of law enforcement activity.

RIGHTS working group

Sincerely,

Rights Working Group
American-Arab Anti-Discrimination Committee
American Civil Liberties Union
American Immigration Lawyers Association
Arab Community Center for Economic and Social Services
Asian American Justice Center
Bill of Rights Defense Committee
Breakthrough
Access California Services
Arab American Association of New York
Center for National Security Studies
Coalition for Humane Immigrant Rights of Los Angeles
Daya, Inc.
Illinois Coalition for Immigrant and Refugee Rights
Muslim Advocates
Muslim Public Affairs Council
National Council of La Raza
National Immigration Forum
National Immigration Law Center
National Network for Arab American Communities
New York Immigration Coalition
Philadelphia Arab American Community Development Corporation
South Asian Americans Leading Together
United Sikhs



Testimony of Liz Ryan
President and CEO
Campaign for Youth Justice

Submitted to the U.S. Senate Judiciary Committee
Subcommittee on Human Rights and the Law
Hearing on "The Law of the Land: U.S. Implementation of Human Rights Treaties"

December 16, 2009

Thank you Chairman Durbin, Ranking Member Coburn, and other members of the subcommittee for holding this hearing on the United States' compliance with international treaties focused on human rights. I appreciate your attention to this matter and the opportunity to submit testimony on this issue, particularly as it relates to youth under the age of 18 in the United States who are prosecuted in the adult criminal justice system and held in adult prisons and jails.

My name is Liz Ryan and I am the President and CEO of the Campaign for Youth Justice, a national organization working to end the practice of prosecuting youth in adult court and to promote more effective approaches in the juvenile justice system as an effective alternative for these youth.

In my testimony today, I will discuss transfer laws in the U.S., how U.S. transfer laws compare to the transfer laws of countries around the world, international treaties that address issues raised by prosecuting youth in the adult criminal justice system, and recommendations to Congress on these issues.

U.S. Laws on Transferring Youth to the Adult Court System

In order to understand U.S. compliance with international treaties on the issue of the prosecution of youth as adults, we must first examine transfer laws in the United States. Within the United States, each State and the District of Columbia have laws that allow children under the age of 18 to be prosecuted in the adult criminal justice system. These laws have led to an estimated approximately 200,000 youth being processed in adult criminal court in the United States each year. As a result of this increased prosecution of youth in adult criminal courts in the States, the number of youth in adult jails and prisons has increased so that, on any given day, an estimated 10,000 youth under the age of 18 are incarcerated in adult facilities - 7,500 in adult jails and an additional 2,500 in adult prisons.

Laws allowing the prosecution of children under the age of 18 in the U.S. criminal justice system have changed significantly in the past two decades. In 1989, a woman was brutally attacked and raped while jogging in New York City's Central Park. Five teenagers were originally accused of the attack. Although the ultimate perpetrator - a lone adult male - was later apprehended through DNA testing, the accusation of the teenagers fed into the public's fear of what some criminal justice experts were calling a coming generation of "super-predators" - youth who were beyond the help of society and were pre-programmed to commit more and more violent acts. Thankfully, this generation of youth never materialized and today youth delinquency in the United States remains near the lowest levels seen in the past three decades. However, in the meantime and in response to the "super predator" threat, many States passed laws that allowed more children to be prosecuted in the adult criminal justice system.

These sweeping laws have resulted in the United States having some of the most draconian laws on prosecuting children as adults in the world, despite the fact that most of the youth prosecuted in adult court are charged with non-violent offenses. First, in nearly half of the States

and the District of Columbia, children as young as seven can be prosecuted in adult courts. This policy means that in these States a 7-year-old child is considered to have the same moral culpability as a 40-year-old adult. Second, once a youth is prosecuted in adult court, the youth is subject to all the same penalties and sanctions as adults, including placement in adult jails and prison (which are discussed later in this testimony) and mandatory minimum sentences. These policies mean that, for example, a child as young as seven could be sentenced to a mandatory minimum sentence of LWOP in certain States. Finally, in many States, youth can be transferred directly to the adult criminal justice system by a prosecutor without the review of a judge either through prosecutorial discretion laws or statutory exclusion laws that mandate youth be transferred to the adult system if charged by a prosecutor with certain offenses.

These policies exist despite an overwhelming consensus of scientific evidence that prosecuting children in the adult criminal justice system not only causes incredible harm to these youth, but does not ultimately increase public safety. Various reports, including reports from the Office of Juvenile Justice and Delinquency Prevention (OJJDP)¹ and the Centers for Disease Control and Prevention (CDC)², led by a non-federal Task Force on Community Preventive Services, have shown that prosecuting youth in the adult criminal justice system significantly increases crime. The CDC report found that youth who have been previously tried as adults are, on average, 34% more likely to commit crimes than youth retained in the juvenile justice system and recommended against “laws or policies facilitating the transfer of juveniles from the juvenile to the adult judicial system.”

¹ Office of Justice Programs, OJJDP Juvenile Justice Bulletin, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* (August 2008). Available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

² Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MMWR 2007;56 (No. RR-9): 9 (April 13, 2007). Available at http://www.thecommunityguide.org/violence/Violence-YouthTransfer_rev.pdf.

The OJJDP report also found that transfer laws substantially increase recidivism and that youth transferred to the adult system are more likely to be rearrested and to reoffend than youth who committed similar crimes, but were retained in the juvenile justice system. The report attributed these higher recidivism rates to factors including stigmatization and negative labeling effects of being labeled as a convicted felon, a sense of resentment and injustice about being tried as an adult, a learning of criminal mores and behavior while incarcerated with adults, decreased access to rehabilitation and family support in the adult system, and decreased employment and community integration opportunities due to a felony conviction. The OJJDP report also found that laws to make it easier to transfer youth to the adult criminal court system have little or no general deterrent effect, meaning they do not prevent youth from engaging in criminal behavior. Due to these findings, OJJDP recommended changing laws to decrease the number of youth transferred to the adult criminal justice system, particularly for first-time, violent offenders.

In 2008, The Brookings Institution and The Woodrow Wilson School of Public and International Affairs at Princeton University, released a policy brief entitled "Keeping Adolescents Out of Prison." This brief discussed the history and purpose of the juvenile justice system which is to recognize the differences between youth and adults. These differences have been highlighted in recent years through research that has found major disparities between how youth and adults brains functions. On the topic of trying youth as adults, the report stated that "at a minimum the practice of harsh sentences for adolescents does not work; it may even be counterproductive." Indeed the report recommends that "[a]bove all, youth should be kept out of the adult criminal system unless they have committed repeat violent offenses. This course of action is especially recommended because most youth who commit criminal offenses will abandon illegal behavior at roughly the same age as they exit adolescence."

International Trends on Transferring Youth to the Adult Court System

Unfortunately, the approach taken by the United States on allowing children under the age of 18 to be prosecuted in the adult criminal court is not only ineffective, but it is completely out of step with the vast majority of countries around the world. In fact, the global consensus shows that the vast majority of countries do not prosecute children under the age of 18 as adults and, in the limited circumstances when it does happen in other countries, these nations typically have restrictions or additional safeguards in place. Indeed, the vast contrast between the treatment of children in the criminal justice system in the United States and nations around the world was highlighted in the U.S. Supreme Court case *Roper v. Simmons*,³ where the United States became the last country in the world to abolish the death penalty for youth under the age of 18.

When looking beyond the United States' borders, transfer laws in other countries differ from those in the United States in three key ways. First, countries typically have a higher minimum age of jurisdiction for children to be prosecuted in adult court. Second, many nations require that a judge - not a prosecutor - determine whether a youth can be prosecuted in adult court. Finally, for children who are tried in adult courts, many countries place restrictions on the sentencing of these youth. These restrictions come in several forms including limiting the number of years a child under the age of 18 can serve or allowing youth to only receive a fraction (such as half) of the sentence that an adult would receive for the same or a similar crime.

Although specific data is not available on the prosecution of children in adult criminal courts around the world, the United States has the dubious distinction of being a leader in this human rights violation. One study has found that the United States has the highest total number of youth incarcerated as well as the greatest rate of juvenile incarcerations per 1000 juveniles in the world and anecdotal data is available on youth around the world who are serving LWOP sentences. Since the

³ *Roper v. Simmons*, 543 U.S. 551 (2005)

Supreme Court's ruling in *Roper v. Simmons*, a LWOP sentence is the most severe punishment a youth under the age of 18 can receive. Nearly 2,500 individuals who committed their crimes when under the age of 18 are currently serving LWOP sentences in the United States. According to anecdotal sources, no youth is currently serving a LWOP sentence around the world except in the United States and the few countries that even contemplate LWOP sentences have recently stated publicly that they will allow parole for all youth.

International Treaties

Many international treaties to which the United States is a signatory have provisions that could specifically be applied to address the issue of youth transferred to adult court, including but not limited to the United Nations Convention Against Torture, the Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the UN Standard Minimum Rules for Juvenile Justice (the Beijing Rules), and the 1990 UN Rules for Juveniles Deprived of their Liberty (JDL Rules). A notable exception to this list is the UN Convention on the Rights of the Child (CRC), which has many provisions pertaining to youth involved in the criminal justice system and which the United States has not ratified. The United States and Somalia are the last two UN countries that have not ratified the CRC; Somalia announced its intent to ratify the treaty in November 2009.

Detailed analyses on the United States' compliance with the treaties listed above are available in several sources, many of which directly address the issue of children under the age of 18 prosecuted in the adult criminal justice system. Below are a few resources you may find useful for a more detailed discussion on these issues (full citations are included in the footnotes below):

- *International Human Rights: Law & Resources for Juvenile Defenders & Advocates*⁴ - An issue brief comparing our juvenile justice system to obligations under the American Declaration of the Rights and Duties of Man, the UN Declaration of the Rights of the Child, the American Convention on Human Rights, the Riyadh Guidelines, the Beijing Rules, the ICCPR, the CRC, the JDL rules, and the Tokyo Rules;
- *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*⁵ - A study by Professor Michele Deitch addressing the CRC, the ICCRP, the Beijing Rules, and the JDL Rules;
- *Children in Conflict with the Law: Juvenile Justice and the U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination: Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination*⁶ - A report by the U.S. Human Rights Network examining the CERD; and
- *The Rest of Their Lives*⁷ - A report on juveniles serving LWOP sentences covering the Declaration on the Rights of the Child, the ICCPR, the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment, and the CRC.

With regard to the specific issue of children under the age of 18 being prosecuted in the adult criminal justice system, below please find statistics for this population of youth as they apply to various treaties mentioned above.

⁴ National Juvenile Defenders Center (Spring 2006). *International Human Rights: Law & Resources for Juvenile Defenders & Advocates*. Available at: http://www.njdc.info/pdf/human_rights_factsheet.pdf.

⁵ Deitch, Michele, et.al. (2009). *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, Chapter 8 - Considering the Global Context: An International Consensus Against Treating Pre-Adolescent Children as Adults, Austin, TX: The University of Texas at Austin, LBJ School of Public Affairs. Available at:

http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time_revised%20final.pdf.

⁶ USHRN Working Group on Juvenile Justice (February 2008). *Children in Conflict with the Law: Juvenile Justice and the U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination: Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination*, US Human Rights Network. Available at: http://www.ushrn.org/files/ushrn/images/linkfiles/CERD/8_Juvenile%20Justice.pdf.

⁷ Human Rights Watch/Amnesty International (2005). *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Chapter VIII. Just Sentences for Youth: International Human Rights Law. Available at: <http://www.hrw.org/en/node/11578/section/9>.

United Nations Convention Against Torture:

The UN Convention Against Torture specifically prohibits any “cruel, inhuman or degrading treatment or punishment.” As various reports and research indicate, youth placed in adult jails and prisons face specific hardships, many of which are documented in a November 2007 by the Campaign entitled “Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America.” First, youth in adult jails and prisons are frequently the target of sexual violence and abuse. According to the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), 21% and 13% of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005 and 2006 respectively, were youth under the age of 18. These numbers are surprisingly high given that only 1% of jail inmates are juveniles. The National Prison Rape Elimination Commission also recently found that “more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse” and recommended that youth be housed separately from adults.

Second, youth in adult jails and prisons are frequently separated from adults for safety reasons. While separating children from adults in adult jails will reduce contact with adults that could result in physical or emotional harm to children, children are then often placed in isolation, which can also produce harmful consequences. Youth are frequently locked down 23 hours a day in small cells with no natural light. These conditions can cause anxiety, paranoia, and exacerbate existing mental disorders and put youth at risk of suicide. In fact, youth unfortunately have the highest suicide rates of all inmates in jails. Youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility, and 20 times more likely to commit suicide in an adult jail than youth in the general population.

The Convention on the Elimination of Racial Discrimination (CERD):

The CERD not only requires signatory nations to eliminate racial discrimination, but also to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating

racial discrimination wherever it exists.” Youth of color are significantly over-represented in the United States’ juvenile and adult criminal justice systems. Unfortunately, the disparities between White youth and youth of color become larger the more involved the youth becomes in the juvenile justice and adult criminal justice system, such that the transfer of children to the adult criminal justice system is the most disparate piece of the juvenile/adult criminal justice continuum. Below please find specific statistics on the racial and ethnic disparities for youth prosecuted in the adult criminal justice system:

- Latino youth: Compared to white youth, Latino youth in juvenile court are 4% more likely to be petitioned, 16% more likely to be adjudicated delinquent, 28% more likely to be detained, and 41% more likely to receive an out-of-home placement. However, the most severe disparities occur for Latino youth tried in the adult system, where Latino children are 43% more likely than white youth to be waived to the adult system and 40% more likely to be admitted to adult prison.
- African-American youth: Disparities start at the beginning of a youth’s involvement with the juvenile justice system, when a decision is made to arrest a child: African-American youth make up 30% of those arrested while they only represent 17% of the overall youth population. At the other extreme end of the system, African-American youth are 62% of the youth prosecuted in the adult criminal system and are nine times more likely than white youth to receive an adult prison sentence. These disparities exist despite the fact that, according to self-report surveys, African-American youth do not engage in more delinquent behavior overall than white youth.
- Native American youth: Native American youth are more likely to receive the most punitive sanctions, including out-of-home placements and transfer to the adult court system both of which are applied to Native American youth 1.5 times more than to White youth.

Additionally, Native American youth are only 1% of the national population, but 70% of youth committed to the federal Bureau of Prisons (BOP) as delinquents are American Indian youth, as are 31% of youth committed to BOP as adults.

The International Covenant on Civil and Political Rights (ICCPR):

The ICCPR contains several requirements relevant to youth prosecuted in the adult system, including the promotion of rehabilitation, such as education, rather than punishment.

Unfortunately, adult jails and prisons are much less focused on rehabilitation than juvenile justice facilities and typically do not offer age appropriate services for youth, including the provision of mental health services, the promotion of connections to families and communities, and the provision of education or vocational training. These differences mainly result from limited programming and staff not being trained to specifically address the needs of children under the age of 18. For example, with regard to access to education, the most recent survey of educational programs in adult jails found that 40 percent of jails provided no educational services at all, only 11 percent provided special education services, and just seven percent provided vocational training.

Recommendations:

As stated above, the United States' policy on the prosecution of children under the age of 18 is out of step both in terms of the international consensus of trying youth as adults and in terms of the United States' obligations under several international treaties to which we are a signatory. For these reasons, the States and the District of Columbia must modify their transfer laws by significantly reducing or eliminating the number of children prosecuted in the adult criminal justice system. Additionally, adult jails and prisons are simply not equipped to keep youth safe. Therefore, we recommend ending the placement of youth under the age of 18 in adult jails and prisons. Placing youth in these facilities actually may create more harm - both in terms of long-term negative or deadly consequences for youth and decreased public safety. Due to these and other considerations,

many States follow best practice and allow youth who are *convicted* in adult court to serve their sentence in juvenile facilities rather than adult prison.

In the interim, the Campaign urges Congress to take the following steps:

- Reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP A) to expand the jail removal and sight and sound protections to youth who are pre-trial in adult jails: The JJDP A - the main vehicle for juvenile justice reform at the federal level - is currently due for reauthorization. This past September marked the 35th anniversary of the JJDP A, which has provided meaningful protections for youth in the juvenile justice system. The JJDP A currently contains two provisions - the jail removal and sight and sound core requirements - that address youth in adult jails and prisons. The jail removal core protection protects youth who are under the jurisdiction of the juvenile justice system by prohibiting these youth from being held in adult jails and lock-ups except in very limited circumstances, such as while waiting for transport to appropriate juvenile facilities. In these limited circumstances where youth are placed in adult jails and lock-ups, the sight and sound core protection limits the contact these youth have with adult inmates.

While these core protections have worked to keep most children out of adult jails for 30 years, the JJDP A does not apply to youth under the jurisdiction of the adult criminal court. Therefore, we recommend that Congress amend the JJDP A to extend the jail removal and sight and sound protections of the Act to all youth, regardless of whether they are awaiting trial in juvenile or adult court. In the limited exceptions allowed under the JJDP A where youth can be held in adult facilities, they should have no sight or sound contact with adult inmates. We thank the Senate Judiciary Committee for including this expansion in S. 678, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, and we urge the Senate Judiciary Committee to pass S. 678 as quickly as possible.

- Oppose any legislation or amendment that increases the number of youth prosecuted in or transferred to the adult criminal justice system: Given the harmful effects of prosecuting youth in or transferring youth to the adult system, the Campaign urges Members of Congress to oppose any amendment or legislation that would allow more youth to be prosecuted in or transferred to State or federal adult courts.
- Ensure additional research is conducted on the issue of youth prosecuted as adults: While research has generally shown the effects of prosecuting youth in adult courts in terms of recidivism, many other issues facing this unique population of youth have little to no information. Potential areas of research for youth prosecuted in adult courts include the availability, quality, and utilization of age-appropriate services, such as educational, health and mental health, and substance abuse services, while a youth is placed in juvenile residential facilities or adult jails and prisons; the unique collateral consequences faced by youth who are prosecuted in adult courts, such as educational consequences; and the availability, quality, and utilization of discharge and re-entry planning.
- Reauthorize the JJDPDA to strengthen the Disproportionate Minority Contact (DMC) core requirement: As discussed above, the JJDPDA is currently due for reauthorization. The JJDPDA has a provision dealing with the disproportionate contact of youth of color with the juvenile justice system, which is called the DMC core requirement. The DMC core requirement currently requires States to “address” the issue of DMC, which has left state and local officials without clear guidance on how to reduce racial and ethnic disparities. Therefore, we support amending the JJDPDA to give additional guidance to States on reducing racial and ethnic disparities, including 1) establishing coordinating bodies to oversee efforts to reduce disparities; 2) creating systems to collect local data at every point of contact youth have with the juvenile justice system (disaggregated by descriptors such as

race, ethnicity and offense) to identify where disparities exist and the causes of those disparities; 3) developing and implementing plans to address disparities that include measurable objectives for change; 4) publicly reporting findings; and 5) evaluating progress toward reducing disparities. Again, we thank the Senate Judiciary Committee for including this expansion in S. 678 and we urge the Senate Judiciary Committee to pass S. 678 as quickly as possible.

- Enhance protections for youth who are currently placed in adult jails and prisons:

Currently, the JJDPA does not address conditions of confinement for youth in juvenile facilities, let alone conditions for youth in adult jails and prisons. For the first time, S. 678 would add language to the JJDPA that would expressly allow JJDPA funds to be utilized to monitor and improve conditions of confinement in juvenile facilities. We appreciate the inclusion of this language and attention to this issue in S. 678 and hope that similar language could be included in later reauthorizations to include the monitoring and improvement of conditions for youth placed in adult jails and prisons.

Again, thank you for holding this hearing and we look forward to continuing to work with you to ensure that, as international precedent and treaties dictate, children under the age of 18 are removed from the adult criminal justice system.

TESTIMONY OF WILLIAM F. SCHULZ, SENIOR FELLOW FOR HUMAN RIGHTS POLICY, CENTER FOR AMERICAN PROGRESS, December 9, 2009

As the former Executive Director of Amnesty International USA (1994-2006) now serving as a senior fellow for human rights policy at the Center for American Progress, I want to commend the Subcommittee for taking up the question of US ratification of international human rights instrumentalities and the need to track implementation of them after they are ratified.

While the United States has ratified several key human rights treaties, it lags well behind the rest of the leading countries in the world in the total number ratified. Indeed, a comparison with the nineteen other G20 nations reveals that the US has ratified or acceded to fewer key human rights instrumentalities than any other country, Argentina and Mexico having ratified or acceded to the largest number (10) and the US to only four (4).¹

This unfortunate record handicaps the US in a variety of ways. Or, to put it more positively, there are at least five general reasons why ratification of international human rights treaties and vigorous enforcement of them is in the United States' strategic interests.

It increases American security. The United States' lax record in ratification of human rights treaties, coupled with the extensive use of exceptions and reservations when treaties have been ratified, has done enormous damage to America's national standing. A more robust approach to treaty ratification and enforcement would reap a myriad of concrete dividends: by increasing respect for the country, its political system and its ideals; by removing taints on our reputation that our adversaries can exploit to their advantage; by positioning the United States as a model for others to emulate; by making it easier for our allies to cooperate with us; and by contributing to our capacity to compete economically. In these and other ways, abiding by human rights standards is

¹ See William F. Schulz, "The Power of Justice: Applying International Human Rights Standards to American Domestic Practices," June, 2009, The Center for American Progress, http://www.americanprogress.org/issues/2009/06/human_rights.html Key human rights treaties: Convention on the Prevention and Punishment of the Crime of Genocide, 1948; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1966; International Covenant on Economic, Social and Cultural Rights (CESCR), 1966; International Covenant on Civil and Political Rights (CCPR), 1966; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984; Convention on the Rights of the Child (CRC), 1989; International Convention on the Protection of the Rights of All Migrant Workers and members of their Families, 1990; Convention on the Rights of Persons with Disabilities, 2006; International Convention for the Protection of All Persons from Enforced Disappearance, 2006
Source: United Nations Treaty Body Database, Status by Country: <http://www.unhchr.ch/tbs/doc.nsf/Statusfscet?OpenFrameSet>; Status of Ratifications of the Principle International Human Rights Treaties: <http://www.unhchr.ch/pdf/report.pdf>

good for American security interests and always has been. An example from Civil War history is instructive.

Slavery and/or the slave trade was abolished in Lithuania and Japan in 1588; in Russia in 1723; followed by Portugal (1761); Denmark/Norway (1803); Lower Canada (1803); Haiti (1804); Prussia (1807); Argentina (1813); The Netherlands (1814); France (1818); Greece (1822); Mexico (1829); and the British Empire (1834), to name just a few. Even the United States forbade the importation of slaves – though not of course the institution of slavery itself – after 1808. By the time of the American Civil War, in other words, slavery had acquired the status of a broadly prohibited practice and abolition the equivalent of a widely-accepted international norm.

For the first year and a half of the Civil War, both Great Britain and France, despite themselves having abolished slavery years before, were far more kindly disposed to the Confederacy than they were to the Federal government. Both countries were dependent upon the trade in cotton with the South and the Confederate government had done a skillful job of wooing Europe's two greatest powers into seriously considering offering military assistance against the North. Moreover, the conflict had been presented by President Lincoln as a war to preserve the union, fearful as he was that Border States would opt to side with the Confederacy if the goal of Union victory was to free the slaves. To many Europeans, the Confederate cause was seen as a battle for self-determination – a cause that had far more appeal than a fight to maintain a union that represented a potentially competitive empire.

On January 1, 1863, however, all that changed with Lincoln's issuing of the Emancipation Proclamation. Now any possibility of a European alliance with slaveholders became unthinkable because the war ceased to be just an internal domestic squabble pitting one section of the United States against another. Now it was about a fundamental moral issue that had long been resolved in Europe. No European government that had to pay the least attention to the sentiment of its own people could take sides against an American government that was trying to destroy slavery. The only practical course for Britain and France was to stay militarily neutral—a decision that contributed to the South's ultimate demise. By acting in ways consistent with prevailing international rights standards, Lincoln had taken a giant step toward the saving of the union.²

It facilitates our credibility as a critic. The United States has long taken pride in its willingness, through the annual State Department Human Rights Reports, for example, or various diplomatic demarches, to speak out on behalf of dissidents or victims of human rights abuse. How can we maintain those claims without risking charges of hypocrisy if our own record is checkered, if we fail to ratify or fully implement human rights instrumentalities that have the support of broad swaths of the rest of the world? When we are radically out of step with the international community, as we are, for example, in our failure to ratify the Convention on the Rights of the Child, for example,

² See: Thomas A. Bailey, *A Diplomatic History of the American People* (New York: Meredith, 1964), pp. 317.

and by being the only nation to sentence children to life imprisonment without parole, we handicap our capacity to call others to account.

It is a fulfillment of our heritage. The United States as a nation was founded on a doctrine of natural rights and the conviction that everyone has the right to life, liberty and the pursuit of happiness. It has long seen itself as a haven for the oppressed, a land of unlimited opportunity, and, especially since the triumphs of the civil rights movement, a place where people are judged “on the contents of their character, not the color of their skins.” Even modern conceptions of economic and social rights, much as the country has shied away from embracing them, emerged out of an American President’s vision, namely Franklin Roosevelt’s commitment to “freedom from want,” as articulated in his Four Freedom’s speech, and the Atlantic Charter’s call for nations to cooperate in order to secure for all people “improved labor standards, economic advancement and social security.”³ Far from being of foreign origin, therefore, contemporary notions of human rights as manifest in international human rights instrumentalities were born of American roots and values and their fulfillment is therefore a fulfillment of our own heritage.

It benefits American society. Human rights are all about meeting basic human needs. The role of democratic government is to make it as easy as possible for people to be their best, most productive selves. When people feel they are being treated fairly by those in authority and when people’s basic needs are met – for food, education, health care – they can support themselves, achieve economic independence and contribute to the welfare of society. In this way, respect for human rights is not only a mark of good government; it is a benefit to the community as a whole and international human rights treaties point the way to fulfillment of those basic human needs.

It can help solve problems without resorting to blame and can therefore help avoid litigation. If, indeed, the point of a human rights analysis is to identify basic human needs and how to meet them – needs that may at the moment be going unfulfilled – then such an analysis can be a valuable tool for public officials. When we frame questions in terms of human needs, the focus shifts from “Why aren’t we providing universal access to health care?” or “Who is to blame for inequities in the educational system?” to “Are our health care and educational systems meeting our needs in a globalized world?” Such a pragmatic approach reduces defensiveness and poses a common problem for us all to help solve.

Moreover, human rights treaties and principles often contain within them the seeds of solutions to those common problems. The fact that Convention on the Elimination of Racial Discrimination (CERD), for example, defines racial discrimination in terms of impact requires impact analyses based on disaggregated data regarding who is and is not being served by a particular policy or set of programs. Such an analysis can anticipate ways to resolve issues proactively before they reach the level of litigation. It focuses attention not on who the “bad guys” are, not on who is intentionally committing

³ “Atlantic Charter,” available at <http://www.internetc-esq.com/ussaugusta/atlantic1.htm> (last accessed April 2009).

discriminatory acts, but on whether the system is working properly and, if not, whether we can collectively find a win-win solution for all.

Such an approach may be particularly appealing to authorities at the local and state level. After the City of San Francisco, for example, committed in 1998 to standards derived from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), local officials began examining whether conditions existed that implicitly prevented women from accessing work, e.g., lack of available child care, even though those conditions were not the result of intentional discrimination.

For all these reasons Congress should look with far greater openness and favor upon the ratification of treaties and insure greater responsibility is taken by the executive to see to their full implementation. Specifically,

Congress should ratify key human rights treaties. That the United States, along with Somalia, remains one of only two countries in the world not to have ratified the Convention on the Rights of the Child (CRC) reinforces the notion that the United States is badly out of step with the rest of the globe. Now that the Supreme Court has removed one of the main obstacles to ratification by ruling unconstitutional the execution of juveniles, there is even less reason not to ratify the treaty. Congress should make ratification of CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – another treaty with wide international support – a priority.

Congress should introduce reference to international human rights instrumentalities into legislation and conform U. S. law to treaty obligations. Whether the U. S. has or has not ratified an international human rights instrumentality, reference to such treaties in relevant legislation is one way to begin to acquaint policy makers with the norms and values such treaties contain. Moreover, given the non-self-executing nature of the treaties the United States *has* ratified, it becomes more important than ever that legislators meet their responsibility to see that American law and policy conform to the country's international obligations. (To do otherwise is to cede congressional authority entirely to the executive.) In 2008, for example, the Congress passed the Child Soldiers Accountability Act which gives the U. S. the power to deny admission to or deport individuals involved in recruiting, enlisting or conscripting child soldiers in accordance with American obligations under the Optional Protocol on the Involvement of Children in Armed Conflict, ratified in 2002.⁴

Congress should consider requiring human rights impact assessments of appropriate legislation and policies. Just as Congress regularly requires environmental impact assessments, so Congress and state legislatures should include human rights impact assessments in appropriate legislation and for appropriate proposed changes in

⁴ "Child Soldiers Accountability Act Passes," http://www.afjn.org/child_soldiers/news/child_soldiers_accountability_act_passes.html (last accessed May, 2009).

policy. Florida State University Law Professor Lesley Wexler has outlined how this might take place.⁵

Congress should require the executive to respond promptly to reporting requirements. U.S. treaty obligations include supplying regular reports on compliance with treaty provisions and responding promptly and thoroughly to treaty bodies' questions and concerns. The United States has often lagged in meeting both these requirements. The Administration should establish a clear locus of responsibility for meeting these obligations and Congress should monitor implementation in a consistent fashion.

Congress should encourage the executive to seek opportunities to conform policy to treaty obligations. Beyond reporting requirements, treaty bodies often make substantive recommendations to governments as to how to meet their treaty obligations. The American Civil Liberties Union has urged the Secretary of Education, for example, to use stimulus funds to fulfill recommendations of the Committee on Racial Discrimination regarding equitable education and affirmative action as well as broader education about human rights. Policy makers in all relevant departments should consult recommendations of treaty bodies to determine if they provide useful guidance for policy formation.

Congress should insist on the locus of responsibility for tracking implementation and enforcement of treaty obligations be clearly delineated and those responsible held accountable. In the Clinton Administration, this responsibility was located in the Interagency Working Group on Human Rights. The advantage of such a locus of responsibility was that it was cross-departmental and carried the imprimatur of the President. The President should reestablish such a Working Group for many reasons beyond the scope of this testimony but, whether responsibility lies there or elsewhere, Congress should insist that human rights treaties be more than words on paper.

As President Obama said in his Inaugural address, "...our power alone cannot protect us...our security emanates from the force of our example..." There is no better place to start manifesting that force than in the adoption of a more robust and proactive to the ratification and implementation of international human rights treaties.

⁵ Lesley Wexler, "Human Rights Impact Statements: An Immigration Case Study," *Georgetown Immigration Law Journal*, Vol. 22:285 (2008): 285-318.

**WRITTEN TESTIMONY OF
MORTON SKLAR, FOUNDING EXECUTIVE DIRECTOR
EMERITUS (RETIRED), WORLD ORGANIZATION FOR HUMAN
RIGHTS USA***

**THE RECORD OF U.S. REPORTING ON DOMESTIC
COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS
TREATY STANDARDS**

**SUBMITTED TO THE
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
JUDICIARY COMMITTEE OF THE U.S. SENATE
HEARING ON DECEMBER 16, 2009**

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(301) 946-4649. This testimony is submitted in a personal capacity, and
does not necessarily reflect the organizational views of Human Rights USA
on these issues.**

Senator Durbin and Members of the Subcommittee:

Human Rights USA, the human rights group that I founded and directed for fifteen years from 1995 to 2008, has led the way in making use of the international human rights monitoring and reporting process to bring attention to U.S. human rights compliance problems. Under grants we received from the Ford Foundation, we were the first U.S. group to organize and carry out comprehensive evaluation and reporting of U.S. compliance under each of the international human rights treaties. Each of these reports reviewed and assessed major areas of U.S. non-compliance, and provided "shadow" assessments of the adequacy of the reports submitted by the U.S. government on these issues. We prepared and submitted these comprehensive "shadow" reports concurrently with the issuance of the U.S. government's reports to the Human Rights Committee (under the Civil and Political Rights Covenant) in 1995, the Committee Against Torture (under the Convention Against Torture) in 1998, and the Committee on the Elimination of Racial Discrimination (under the Racial Discrimination Convention) in 2001. Previously, many of the same working group members that produced these three reporting efforts with us, had been part of the very first comprehensive assessment of U.S. human rights compliance done in this country. The report we prepared in 1979 and delivered to Congress' Helsinki Commission (the Commission on Security and Cooperation in Europe), chaired by Rep. Dante Fascell, was a ground breaking effort that applied international human rights standards to the U.S. for the first time in a comprehensive way. Our one hundred page report detailed U.S. problems with racial and ethnic discrimination, prison conditions, treatment of Native Americans, discrimination against women, and several other issue areas under the limited number of human rights standards applicable at that time under the Helsinki Accords. So our group has had a long history and considerable experience dealing with how international standards apply to the U.S., and how effectively the international standards and reporting mechanisms have been applied and observed by the U.S. government.

The record of how the United States Government has dealt with the international human rights standards and the associated monitoring and reporting requirements associated with the various international human rights treaty obligations, has been mixed at best, and often demonstrates a lack of understanding of the basic principle that the United States is equally bound by these standards. While our government works strenuously, as it properly should, to hold other governments around the world accountable for their human rights abuses, and to support the United Nations' and other international agencies' efforts to strengthen the monitoring and reporting mechanisms that are used to assure compliance, our government does not set a good example with respect to how we ourselves comply with these reporting requirements, and with the

substantive standards embodied in treaties like the Covenant on Civil and Political Rights and the Convention Against Torture.

Indeed, recent well-known policies and practices of the U.S. government regarding the use of torture as part of our country's anti-terrorism efforts, including the policy of "rendition to torture," the adoption of policies supporting the use of "harsh" interrogation techniques and indefinite detention of terrorism suspects in secret "black site" prisons and at Guantanamo Bay, avoidance of coverage and compliance with the Geneva Conventions, and the misuse of military trials, echo some of the practices that our government often condemns when they are committed by repressive regimes around the world. In a similar way, our government has been using some of the same techniques used by highly abusive governments like Burma, Somalia and Sudan to seek to avoid the reporting and monitoring efforts of the international agencies responsible for holding governments to account for their human rights violations. For example, the record of the U.S. government's past reporting to the United Nations' Committee Against Torture, the Human Rights Committee (under the Covenant on Civil and Political Rights), and the Committee on the Elimination of Racial Discrimination, indicates an unfortunate tendency to:

- fail to submit reports on time;
- attempt to justify and avoid accountability for major violations by invoking excuses related to national security, the threat of terrorism, and the existence of our federalist system that maintains major areas of responsibility with state governments, as reasons why the U.S. government should not be held accountable for major abuses; and,
- fail to adequately involve non-governmental human rights groups in the process of evaluating compliance, and preparing and assessing the required reports.

If the United States is going to be effective as the voice and conscience of the international community on human rights compliance matters, if we are to have any credibility when we condemn human rights abuses abroad, and when we press the international community to adopt and carry out more effective human rights reporting and monitoring systems, then we must provide a model for the type of actions we are seeking from other nations. We must lead the way, both in terms of how we ourselves deal with the reporting and monitoring requirements, and how we observe the substantive standards in the human rights treaties. What has been taking place in past years is very far from this standard. These hearings represent a welcome first step towards encouraging the U.S. government to take a more positive and effective approach to its own human rights compliance responsibilities, and to lead the way by example of how we expect the nations of the world do observe and support the international human rights monitoring and reporting system.

It is important to recognize that the international human rights monitoring systems are far from perfect. Even the best of the international human rights oversight agencies, like the United Nations' Human Rights Committee and the Committee Against Torture, and the Organization of American States' Inter-American Commission and Court, that are made up of supposedly impartial experts, tend to be more politicized and overly cautious and bureaucratic than they should be. Their criticism of human rights violations is measured and limited. But the way to improve these agencies and the monitoring processes they use is not to ignore or sidestep their requirements, as we have done too often in the past, mirroring the approach taken by repressive governments, but to lead the way by providing the international community with a model of how the system should work.

In the coming months we have a unique opportunity to reverse past deficiencies in the way our government has been dealing with the international human rights standards and reporting processes. Compliance reports from the U.S. are coming due to the newly established Human Rights Council (under what is called the "universal periodic reporting (UPR)" system), and subsequently through the regular reports due under the Convention Against Torture, the Covenant on Civil and Political Rights, and the Convention on the Elimination of Racial Discrimination, among others. The Congress and the Obama Administration have a unique opportunity to lead the United States on a new course in dealing with these reporting requirements that can help return us to a position where we have credibility as a powerful advocate for human rights in the international community of nations, and where we can have a positive influence in establishing an international monitoring system that works more effectively. It is important that we do not waste that opportunity.

As a first step, we encourage the U.S. government to involve our domestic non-governmental groups in the reporting process in a more meaningful way. When the government of the Peoples' Republic of China was preparing to submit its first report under the Civil and Political Rights Covenant to the Human Rights Committee we urged them to provide the human rights groups in Hong Kong and elsewhere with a more meaningful opportunity to participate in this process, in recognition that a full and fair compliance assessment could not be made without meaningful input from the domestic groups dealing with these issues. In the past, at best, the U.S. government has given only the barest lip service to the need to include human rights groups in its own reporting efforts. The Clinton Administration held general meetings with NGOs to discuss the reporting process, and solicited suggestions from them on issues to be covered. The current Obama Administration has announced a plan to conduct what they call "road show" meetings with NGOs to discuss and obtain input on the new UPR reporting process at six regional sites in this country. These are positive and useful steps. But they do not adequately meet the need. What we were recommending to China for their reporting process should provide the model of

what we do in our own country. That requires a more meaningful effort to include the U.S. human rights groups in the assessment and reporting process – not just a one-way solicitation of information from them that can easily be ignored, but a serious effort to:

- engage the non-governmental community in a dialogue on non-compliance issues;
- include, and respond to their views, as an integral part of the reports submitted to the U.N. monitoring bodies; and,
- provide the NGOs with a meaningful opportunity to see in advance, and to challenge, the content and positions that the government is considering taking in their compliance reports – in the past government officials studiously avoided offering the NGO community with any indication of their positions on key issues, and did not provide copies of the final reports to the NGOs in advance, so that no meaningful critique of the government's positions could be issued concurrently with the submissions of the official reports.

The goal we are seeking from other nations, and that we should be seeking for ourselves, is a process where human rights compliance can become an integral part of government policy making. That requires a grass-roots effort to help educate the public about what the human rights standards are, and how they relate to our domestic policies and practices. The international monitoring and reporting process can be one highly effective vehicle for helping this take place in a more meaningful way. Our government's goal should not be to avoid meaningful oversight on human rights matters from our citizens, our courts and the international community, as has been done too often in the past, but to support and promote efforts to make these processes more effective both in this country and worldwide. How we deal with this domestically for our own nation can and must be an important element in what we are able to achieve in the way of improved human rights reporting and observance internationally.

Securing effective accountability for major human rights abuses has been a main theme of U.S. foreign policy efforts for many years, and was a major reason why Congress and the U.S. Department of State adopted the approach of issuing annual reports on each nation's compliance with international human rights standards. Those country reports on human rights have become a standard bearer for monitoring and assessing the adequacy of each government's human rights compliance efforts. Now it is time for us to apply the same approach, and the same standards of accountability to our own nation. Especially in light of the serious abuses that have taken place in recent years with regard to our torture practices, our policies of rendition to torture and indefinite detention of suspected terrorists, and our efforts to avoid coverage by universal standards embodied in the Geneva Conventions, it is time for our government to step forward, to acknowledge that we are bound by the same

human rights standards and reporting procedures that we properly demand from all the other nations of the world, and to do a more effective job of assessing and reporting our own human rights shortcomings. This can start with the report that is due to the Human Rights Council of the United Nations early next year, and the reports due to the Committee Against Torture (under the Torture Convention) and the Human Rights Committee (under the International Covenant on Civil and Political Rights) shortly thereafter.

Our government has a long way to go to demonstrate our commitment to human rights observance, so that we can return to the position we have enjoyed in the past of being one of the strongest and staunchest advocates worldwide for effective human rights observance, and for securing accountability for major human rights abuses. Leading the way by example can be an effective first step in that direction.

STATEMENT OF MARK SOLER, EXECUTIVE DIRECTOR
 CENTER FOR CHILDREN'S LAW AND POLICY
 WASHINGTON, DC
 TO THE SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
 SENATE JUDICIARY COMMITTEE
 HEARING ON U.S. COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS
 TREATIES
 DECEMBER 16, 2009

Mr. Chairman and Members of the Committee:

I am the Executive Director of the Center for Children's Law and Policy (CCLP), and I would like to address the issue of disparate treatment of youth of color in the American juvenile justice system in light of the International Convention to Eliminate All Forms of Racial Discrimination (CERD).

By way of background, CCLP is a public interest law and policy organization that works to reform juvenile justice and other systems that affect troubled and at-risk children and to protect the rights of children in those systems. I have worked on behalf of children in juvenile justice and other systems for thirty-one years, first at the Youth Law Center, and now at CCLP. During that time, I have worked with judges, probation officers, police, prosecutors, juvenile justice agency administrators, public defenders, community leaders, parents, and other children's advocates in more than thirty states across the country. I have also litigated in more than a dozen states over conditions in jails and juvenile facilities that violated children's constitutional and human rights. I have written more than twenty articles and book chapters on civil rights issues and the rights of children, and have taught at Boston College Law School, the Washington College of Law at American University, Boston University School of Law, and the University of Nebraska Law School. I have received awards for my work from the American Psychological Association, American Bar Association, Alliance for Juvenile Justice, the Office of Juvenile Justice and Delinquency Prevention, and the National Juvenile Defender Center. I graduated from Yale University and Yale Law School.

I have worked intensively to reduce disparate treatment of youth of color in the juvenile justice system for the past eleven years. From 1998 to 2005, I coordinated Building Blocks for Youth, a multi-site, multi-strategy initiative to reduce racial and ethnic disparities affecting youth of color in the justice system through research, site-based work, litigation, media advocacy, and constituency-building among national, state, and local organizations.

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Building Blocks was supported by the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, as well as major foundations. Since 2004, I have been in charge of efforts to reduce racial and ethnic disparities in the John D. and Catherine T. MacArthur Foundation's Models for Change juvenile justice reform initiative. As part of that initiative, my colleagues at the Center for Children's Law and Policy and I work with juvenile justice stakeholders, including community representatives, in twenty-one counties and parishes in eight states.

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly of the United Nations on December 21, 1965. The Convention provides, in Article 2, that signatory states condemn racial discrimination and undertake to engage in "no act or practice of discrimination" and ensure that "public authorities and public institutions, national and local," act in conformity to these obligations.¹ Article 5 of the Convention sets out the specific rights protected. The very first right listed is "[t]he right to equal treatment before the tribunals and all other organs administering justice."²

The Convention was ratified by the United States Senate on October 21, 1994. In approving the Convention, the Senate specifically noted:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.³

America's juvenile justice system, however, falls far short of the principles set forth in the Convention. Inequities for youth of color in trouble with the law existed even before the creation of the first juvenile court in Illinois in 1899.⁴ As the W. Haywood Burns Institute has pointed out, in 1834 the New York House of Detention, the first juvenile detention facility in the country, established a "colored" section. The justification was that providing rehabilitation services to youth of color would be "a waste of resources."⁵

¹ International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Dec. 21, 1965, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, available at <http://www2.ohchr.org/english/law/cerd.htm> [hereinafter CERD].

² *Id.* at art. 5.

³ United Nations Treaty Collection - International Convention on the Elimination of All Forms of Racial Discrimination, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=1V-2&chapter=4&lang=en> (last visited Dec. 13, 2009).

⁴ Portions of the following in this statement are taken from Mark Soler, Dana Shoenberg, & Marc Schindler, *Juvenile Justice - Lessons for a New Era*, 16 Geo. J. on Poverty L. & Pol'y (forthcoming 2010).

⁵ James Bell & Laura John Ridolff, W. Hayward Burns Institute, *Adoration of the Question: Reflections on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System* 3 (2008).

A hundred and seventy-five years later, racial and ethnic disparities occur in all stages of the juvenile justice system. The most recent comprehensive review of the data was published by the National Council on Crime and Delinquency in 2007.⁶

Inequitable treatment of youth of color occurs in several ways in the juvenile justice system. First, there is an *over-representation of youth of color* throughout the system. Second, at some points in the system, there is *disparate and harsher treatment of youth of color* compared to White youth who are charged with similar offenses. Third, youth of color *disproportionately and unnecessarily enter and penetrate* the juvenile justice system. I will discuss each issue separately.

Over-representation of youth of color appears at successive phases of the juvenile justice system. Thus, in 2003 African-American youth were:

- 16% of the adolescent population in the United States;
- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of youth in secure detention;
- 34% of youth formally processed by the juvenile court;
- 35% of youth transferred to adult court by judicial waiver;
- 38% of youth in residential placement; and
- 58% of youth admitted to state adult prisons.⁷

This over-representation may be the result of many factors, some understandable and others inappropriate.⁸ A juvenile justice policy may be neutral on its face, but in practice it may disparately impact youth of color. For example, a policy that allows release of arrested youth only to biological parents is neutral on its face, but since many more youth of color live with extended families than White youth, the policy has a differential impact.⁹ Police may engage in law enforcement patterns that concentrate on low-income, high-crime neighborhoods, which are frequently communities of color, and those patterns may result in disproportionate arrests of youth of color.¹⁰ In addition, the locations where African-American youth commit crimes – e.g., selling drugs on the street vs. in their homes – may make them more likely to be arrested.¹¹ In some categories of offenses, youth of color may actually commit more crimes than White youth, although the differences do not explain the much more significant differences in arrests rates of African-American and White youth.¹² In addition, victims may respond differently to offenses committed by White youth and youth of color. For example, many people show a racial bias in

⁶ National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System 1* (2007).

⁷ *Id.* at 37.

⁸ *Id.* at 1. See also Chapin Hall Center for Children, *Understanding Racial and Ethnic Disparity in Child Welfare and Juvenile Justice* (2008); Christopher Hartney and Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* (National Council on Crime and Delinquency 2009).

⁹ National Council on Crime and Delinquency, *supra* note 6, at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² Eleanor Hinton Hoytt et al., *Reducing Racial Disparities in Juvenile Detention 8* (Annie E. Casey Foundation, *Pathways to Juvenile Detention Reform 2002*).

their ability to remember the race of the perpetrator of crime.¹³ Finally, key decision makers in the juvenile justice system may have unconscious stereotypes about youth of color, and in some cases may have conscious racial bias.¹⁴ Regardless of the cause or causes, the harsher impact on youth of color is clear.

Inequitable treatment also appears as *disparate and harsher treatment of youth of color* compared to White youth, even when they are charged with *the same category of offense*. For example, a review of admissions to state public facilities and length of incarceration indicates that African-American youth charged with offenses against persons, and having no prior admissions, were nine times as likely to be incarcerated as White youth charged with the same category of offense who also had no prior admissions. For those charged with property offenses and having no prior admissions, African-American youth were four times as likely as White youth to be incarcerated. For drug offenses, African-American youth were forty-eight times as likely to be incarcerated. For public order offenses, African-American youth were seven times as likely to be incarcerated. Comparable disparities were found for youth having one or two prior admissions.¹⁵

Researchers found the same pattern for mean lengths of stay in state facilities. For youth adjudicated for violent crimes, African-American youth spent 30% more time incarcerated (an average of 85 days) than White youth charged with the same category of offense. For property crimes, African-American youth spent 13 percent more time incarcerated (an average of 23 days). For drug crimes, African-American youth spent 39 percent more time incarcerated (an average of 91 days). For public order offenses, the difference was 23 percent (an average of 34 days).¹⁶

In addition, youth of color *disproportionately and unnecessarily enter and penetrate* the juvenile justice system. They are more likely than White youth to be arrested, even for the same offense, and more likely to go deeper into the system than White youth. Through successive stages of disproportionate treatment, they suffer a “cumulative disadvantage” in the system when compared with White counterparts.¹⁷

Moreover, in many jurisdictions there are no accurate data on the number of Latino youth in the juvenile justice system. “Latino” is an ethnicity, not a race – a combination of language, culture, history, and shared values. Many data systems do not disaggregate race from ethnicity and instead ask a single question at arrest or intake: “What race are you – White, Black, Latino, Asian, or Native American?” As a result, Latino youth are often counted as “White” or (to a lesser extent) “Black,” resulting in significant undercounting of Latino youth.¹⁸ This is important because, without accurate data on ethnicity, juvenile justice officials cannot know

¹³ Franklin D. Gilliam, Jr., & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 Am. J. Pol. Sci. 560-73 (2000).

¹⁴ Francisco A. Villarruel et al., *¿Dónde Esta La Justicia? A Call to Action on Behalf of Latino and Latina Youth in the U.S. Justice System 7-8* (Building Blocks for Youth 2002), available at <http://www.buildingblocksforyouth.org/Full%20English.pdf>.

¹⁵ National Council on Crime and Delinquency, *supra* note 6, at 28.

¹⁶ *Id.* at 29.

¹⁷ Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System 4* (Building Blocks for Youth 2000).

¹⁸ Villarruel et al., *supra* note 14, at 1.

when they need translators in court, documents in Spanish, bi-lingual and bi-cultural staff, and culturally appropriate services.

The data that do exist indicate that Latino youth, like African-American youth, are over-represented in the juvenile justice system. Latino youth are 16% more likely than White youth to be adjudicated delinquent, 28% more likely than White youth to be locked up after arrest, 41% more likely than White youth to be put in a placement outside of their home, 43% more likely than White youth to be waived to the adult criminal justice system, and 40% more likely to be admitted to adult prison.¹⁹

Latino youth also suffer from harsher penalties than White youth, even when charged with the same category of offense. Latino youth are more likely to be locked up than White youth for the same category of offense, and are incarcerated for substantially longer periods of time than similarly-charged White youth.²⁰

Although there are even less data for Native American and Alaska Native youth in the juvenile justice system, the available data indicate that these youth are also over-represented in the juvenile justice system.²¹

Attention to over-representation and disparate treatment of youth of color, sometimes referred to as Disproportionate Minority Contact, or DMC, has grown slowly. In 1988, the Coalition for Juvenile Justice brought this problem to the attention of the President, Congress, and the Administrator of the federal Office of Juvenile Justice and Delinquency Prevention in a report entitled *A Delicate Balance*.²² Subsequently, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDP) to include a requirement that states address "Disproportionate Minority Confinement" (*i.e.*, incarceration) in their juvenile justice systems. In 2002, Congress expanded the DMC requirement by broadening its application to "Disproportionate Minority Contact" (thereby including arrest and other points of contact with the system) and making the efforts to address DMC a condition for receipt of federal funds under the JJDP.

However, the DMC provision of the Juvenile Justice and Delinquency Prevention Act is very vague, requiring only that states "address" the problem. Some states have been very active in addressing racial and ethnic disparities. In 1990 the Juvenile Justice and Delinquency Prevention Committee of the Pennsylvania Commission on Crime and Delinquency established the Disproportionate Minority Contact Subcommittee to assess the overrepresentation of minority youth in Pennsylvania's juvenile justice system. Over the past 19 years, the Subcommittee has supported an array of initiatives in the Commonwealth to reduce disparities. Other states, however, have done little more than count the number of youth of color in their juvenile facilities.

¹⁹ Neelum Arya with Francisco Villarruel, Cassandra Villanueva, & Ian Augarten, *America's Invisible Children: Latino Youth And The Failure Of Justice* (Campaign for Youth Justice 2009).

²⁰ National Council on Crime and Delinquency, *supra* note 6, at 29.

²¹ Neelum Arya & Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems 7* (Campaign for Youth Justice, undated) (citing National Council on Crime and Delinquency, *Native American Youth and the Juvenile Justice System* (2008)).

²² National Coalition of State Juvenile Justice Advisory Groups, *A Delicate Balance* (1989).

Nevertheless, independent of the federal government, over the last 15 years a number of jurisdictions have made significant reforms to reduce over-representation of youth of color, disparate treatment, and unnecessary entry and penetration into their juvenile justice systems.²³ The Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) began in 1992, and reduction of over-representation and racial and ethnic disparities affecting youth of color quickly became one of its "core strategies." JDAI has stressed the collection and analysis of data at key points in the juvenile justice system, including disaggregation of data by race and ethnicity. JDAI employs other "core strategies" that have also been effective in reducing disparities affecting youth of color, including the use of objective screening instruments for secure detention, improvements in case processing, and development of graduated responses to probation violations.²⁴ Many JDAI sites have achieved significant reductions in racial and ethnic inequities.

Multnomah County, Oregon, one of the first JDAI sites, was a leader in reducing disparities in its juvenile justice system. When Multnomah County began working on JDAI in the mid-1990s, young people of color were significantly more likely to be held in detention than White youth (42 percent vs. 32 percent). By 2000, the county had achieved reductions across the board: the likelihood of detention for all youth, regardless of race or ethnicity, was 22 percent.²⁵

Santa Cruz, California, also made substantial progress. When Santa Cruz began as a JDAI site, length of stay in detention was considerably longer for Latino youth than for White youth. Local officials analyzed case processing data and concluded that the reason for delays was a shortage of culturally appropriate programs for Latino youth. Probation officials then developed partnerships with Latino organizations to provide the needed programming. As a result, the differences in detention time diminished, and the average number of Latino youth in secure detention was cut in half, from 34 in 1998 to 17 in 2007.²⁶

Another moving force for reform has been the W. Haywood Burns Institute for Juvenile Justice Fairness and Equity, which is based in San Francisco. Created by longtime advocate James Bell, the Burns Institute has worked in 30 sites across the country, sometimes in conjunction with JDAI efforts. Its approach mirrors the JDAI strategies, stressing careful analysis of data at key decisions points in the system, identification of underlying causes of disparities, and selection of concrete interventions to reduce inequities. The Burns Institute emphasizes the importance of including racial justice champions, community representatives, parents, and youth in reviewing site data and determining policy and practice reforms.²⁷

The Burns Institute has achieved measurable results in reducing racial and ethnic disparities across the nation. For example, in Baltimore County, Maryland, the Burns Institute

²³ There is still a need for more research in the field, particularly with respect to police contacts. Alex Piquero, *Disproportionate Minority Contact*, 18 *Future of Children* (Special Issue: Juvenile Justice) 59 (2008).

²⁴ Douglas W. Nelson, *A Road Map for Juvenile Justice Reform*, in *Kids Count 2008* 30 (Annie E. Casey Foundation 2008). See generally Annie E. Casey Foundation, JDAI Help Desk homepage, <http://www.jdaihelpdesk.org/Pages/Default.aspx> (last visited Dec. 13, 2009).

²⁵ *Id.* The Multnomah County effort is described in detail in Hoytt et al., *supra* note 12, at 8 and *Building Blocks for Youth, No Turning Back: Promising Approaches to Reducing Racial and Ethnic Disparities Affecting Youth of Color in the Juvenile Justice System* (2005), available at http://ecfp.org/media/documents/ntb_fullreport.pdf.

²⁶ See Nelson, *supra* note 24; Hoytt et al., *supra* note 12; *Building Blocks for Youth*, *supra* note 25.

²⁷ Nelson, *supra* note 24.

worked with system stakeholders to develop a policy to decrease the number of youth detained for failing to appear in court. The new policy stemmed from an analysis of admissions data, which revealed that 45 percent of admissions were the result of court-ordered writs issued for youths' failure to appear in court, and youth of color were significantly overrepresented within that population. The stakeholder collaborative developed a policy to call youth and families beforehand to remind them of their scheduled court date. The newly implemented strategy has reduced the use of secure detention for African-American youth failing to appear in court by nearly 50 percent, and the overall detention population has decreased by 28 percent.

In addition to facilitating and guiding stakeholder groups in local efforts to reduce disparities, the Burns Institute has conducted strategic and intensive trainings with several juvenile justice agencies and departments. The Burns Institute surveys staff in juvenile justice departments and agencies regarding their perceptions of disparities and their perceived role in reducing disparities. Using the results of these surveys along with local data, the Burns Institute develops racial and ethnic disparities training curricula that cater to the specific needs of that jurisdiction and engage the department or agency in local DMC reduction efforts. The result has been strong engagement in DMC reduction efforts from all levels of staff.

The John D. and Catherine T. MacArthur Foundation's "Models for Change" initiative has also focused on reduction of racial and ethnic disparities. MacArthur launched the initiative in 2004, with DMC reduction as one of the targeted areas for reform in the four Models for Change "core" states – Pennsylvania, Illinois, Louisiana, and Washington. In December 2007, the Foundation established the DMC Action Network, coordinated by the Center for Children's Law and Policy, to expand its DMC reduction work into four new states – Kansas, Maryland, North Carolina, and Wisconsin. Several of the Models for Change sites have been successful in reducing DMC. For example, in Berks County, Pennsylvania, a focused, well-led, data-driven effort reduced the number of youth in secure detention, most of whom are youth of color, by 67 percent. The county accomplished this through a combination of detention screening and development of an Evening Reporting Center as an alternative to detention. Rock County, Wisconsin, reduced the percentage of youth of color in secure detention from 71 percent upon joining the DMC Action Network to 30 percent by the end of its second year of participation, primarily through development of non-secure graduated sanctions and incentives for youth who violate probation. Union County, North Carolina, has reduced representation of youth of color in secure detention by 32 percent since joining the DMC Action Network, also through developing graduated sanctions for youth who violate probation.

Models for Change has been particularly interested in reforms to collect accurate information on the number of Latino youth in juvenile justice systems. In Pennsylvania, initiative grantees developed guidelines for capturing ethnicity separately from race, and, with leadership from the Juvenile Court Judges' Commission, those guidelines have been adopted throughout the Commonwealth.²⁸ Illinois followed suit with its own manual for collecting

²⁸ Patricia Torbet, Hunter Hurst, Jr., & Mark Soler, Guidelines for Collecting and Recording Race and Ethnicity of Juveniles in Conjunction with Juvenile Delinquency Disposition Reporting to the Juvenile Court Judges' Commission (National Center for Juvenile Justice 2006), available at <http://www.modelsforchange.net/publications/138>.

disaggregated data, based on the Pennsylvania model.²⁹ The “two-question format” distinguishing race from ethnicity has also been adopted in other Models for Change sites.³⁰

Some jurisdictions have achieved success without the support of a national reform initiative. For example, Travis County, Texas, reduced its disproportionate incarceration of youth of color who violated probation by establishing a Sanction Supervision Program. The program provides more intensive case management and probation services to youth who have violated probation and their families.

All of these jurisdictions used a core set of strategies to reduce racial and ethnic inequities:

1. Establishment of committees or coordinating bodies to oversee efforts to reduce disparities, with representation of system stakeholders (judges, prosecutors, defenders, probation, law enforcement) as well as the community (leaders of community organizations, parents, youth);
2. Identification of key decision points in the system (*e.g.*, arrest, referral, detention, adjudication, disposition, transfer to adult court, commitment to residential placement) and the criteria by which decisions are made at those points;
3. Creation of systems to collect and analyze local data at every point of contact youth have with the juvenile justice system (disaggregated by race, ethnicity, gender, age, offense, and geographical location) to identify where disparities exist and the causes of those disparities;
4. Development and implementation of plans to address disparities that include measurable objectives for change;
5. Public reporting of findings; and
6. Regular evaluation of progress toward reducing disparities.

To make real the principles of the International Convention on Eliminating All Forms of Racial Discrimination, these strategies should be a part of all reform efforts addressing overrepresentation of youth of color in the juvenile justice system, disparate treatment, and unnecessary entry and penetration into the system. To the extent that states have failed to act

²⁹ Illinois Juvenile Justice Commission, *Guidelines for Collecting and Recording the Race and Ethnicity of Youth in Illinois' Juvenile Justice System (2008)*, available at <http://www.modelsforchange.net/publications/185>.

³⁰ Models for Change works on a variety of juvenile justice reform issues in the four “core” states and in states involved with its Action Networks, including aftercare, community-based alternatives to incarceration, evidence-based practices, juvenile indigent defense, mental health, DMC, and right-sizing age of juvenile court jurisdiction. In addition to the DMC Action Network, there is a Mental Health/Juvenile Justice Action Network and a Juvenile Indigent Defense Action Network. Models for Change has a National Resource Bank (NRB) of leading organizations that provide expert advice, training, and technical assistance to the core states and Action Networks. Models for Change has an interactive website, www.modelsforchange.net, and hosts annual meetings for site representatives, NRB members, public officials, and advocates.

effectively to reduce DMC, the Convention and the special consideration adopted by the Senate place responsibility on the federal government to assist them in making measurable reductions.

Fortunately, the bill to reauthorize the Juvenile Justice and Delinquency Prevention Act, S. 678, which is currently before the Senate Judiciary Committee, includes amendments that incorporate these strategies and provide guidance to states on how to eliminate racial and ethnic disparities in the juvenile justice system.

S. 678 would amend the DMC provision of the JJDP Act to require states to:

(15) implement policy, practice, and system improvement strategies at the State, Territorial, local, and tribal levels, as applicable, to identify and reduce racial and ethnic Disparities among youth who come into contact with the juvenile justice system, without establishing or requiring numerical standards or quotas, by –

(A) establishing coordinating bodies, composed of juvenile justice stakeholders At the State, local, or tribal levels, to oversee and monitor efforts by State, units of local government, and Indian tribes to reduce racial and ethnic disparities;

(B) identifying and analyzing key decision points in State, local, or tribal juvenile Justice systems to determine which points create racial and ethnic disparities among youth who come into contact with the juvenile justice system;

(C) developing and implementing data collection and analysis systems to identify where racial and ethnic disparities exist in the juvenile justice system and to track and analyze such disparities;

(D) developing and implementing a work plan that includes measurable objectives for policy, practice, or other system changes, based on the needs identified in the data collection and analysis under subparagraphs (B) and (C); and

(E) publicly reporting, on an annual basis, the efforts made in accordance with subparagraphs (B), (C), and (D) . . .”

JDAI, the Burns Institute, and Models for Change have demonstrated that racial inequities may be difficult to excise from our system of justice, but the task is not impossible. Congress can make good on its promise in ratifying the International Convention on Eliminating All Forms of Racial Discrimination by enacting the DMC amendments to the Juvenile Justice and Delinquency Prevention Act and completing the task of reauthorizing the legislation.



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 Chad "Comtassel" Smith
 Principal Chief
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 Joe Grayson, Jr.
 Deputy Principal Chief

December 15, 2009

**Written Testimony of Chad Smith, Principal Chief, Cherokee Nation
 Senate Committee on the Judiciary
 Subcommittee on Human Rights and the Law**

My name is Chad Smith and I am the Principal Chief of the Cherokee Nation. Thank you for the opportunity to submit written testimony in regards to the U.S. Implementation of Human Rights Treaties. It is the Cherokee Nation's position that the status of American Indian nations, as communities of historical continuity that pre-exist the United States Constitution, bear numerous inherent and inalienable rights that purvey the ultimate human right of Indigenous peoples, the right to continued existence.

As you know, on September 7, 2007 the United Nations adopted the *U. N. Declaration on the Rights of Indigenous Peoples*. The Cherokee Nation is supportive of the Declaration as it promotes harmonious and cooperative relations between the United States and American Indian nations. In it, there are seven preambular paragraphsⁱ and seventeen articlesⁱⁱ that foster consultation, cooperation, partnership, treaties, agreements and other constructive arrangements. Furthermore, it is explicitly required that, in the exercise of all of the rights in the Declaration, the "human rights and fundamental freedoms of all shall be respected."ⁱⁱⁱ

The Cherokee Nation, as well as the U.N. Declaration, maintains that the essential human rights of Indigenous peoples include:

- the right to self-determination (*Article 3*)
- the right to autonomy and self government (*Article 4*)
- the right to not be subjected to forced assimilation or destruction of culture (*Article 8*)
- the right to full and effective participation in policy decisions (*Article 18*)
- the right to determine identity and citizenship (*Article 33*)

The Cherokee Nation finds these human rights to be fundamental to the continued existence of the United States Native American population. The United States was one of only four countries in the world to oppose the adoption of the U.N. Declaration in 2007. However, in 2008, the monitoring body for the *International Convention on the Elimination of Racial Discrimination* recommended that the United States use the Declaration "as a guide to its obligations under ICERD" which the U.S. has ratified. The Cherokee Nation commends the focus of this hearing and is encouraged that the U.S. Federal government will reconsider its position on the protection of human rights for First Americans.

Background and Historical Context

The Cherokees are an Indigenous nation that exercise a nation-to-nation relationship with the United States based on an elaborate system of treaties, legislative acts and executive orders dating back to the 1700's. The history of this relationship, however, has been wrought with numerous actions on behalf of the Federal government that have undermined or blatantly disregarded the human rights of the Cherokee people. To examine a brief chronology of these events, one will observe repetitions of coerced agreements, ill-conceived policies and procedures that have been implemented unilaterally and drastically altered the course of Cherokee history.

In 1835, a small, dissident group of unauthorized Cherokee tribal members signed the now infamous Treaty of New Echota which exchanged the southeastern homeland for land in the "Indian Territory" (now Oklahoma). Congress ratified the fraudulent treaty over the protests of the vast majority of the Cherokee people and the legitimate government of the Cherokee Nation. Subsequently, the Cherokee Nation was forcibly removed from its homeland in the southeastern United States resulting in the deaths of over 4,000 men, women, and children on what is known as "The Trail of Tears".

The 1860s and the American Civil War brought divisions within the polity of the Cherokee Nation. At the height of slavery, 296 Cherokee citizens owned slaves –less than 2% of the population.¹⁴ As a result of these and other divisions, Cherokees fought on both sides of the Civil War, with more than 70% fighting for the Union to end slavery. In 1863, the Cherokee Nation passed its own Act to voluntarily abolish slavery, almost three years before ratification of the Thirteenth Amendment to the U.S. Constitution. Nevertheless, at the end of the War, the Cherokee Nation was forced to sign a harsh "reconstruction" treaty with the United States, the Treaty of 1866, which ceded massive amounts of land, jurisdiction, and autonomy.

In 1887, the United States Congress passed the General Allotment Act, known as the Dawes Act. The ultimate purpose of the Dawes Act was to dismantle tribal governments, "to break up reservations, settle the Indian on his own allotment, and deal with him as a private citizen". Indian lands and territories were "allotted" first to individual Indians, and the rest, called "surplus land" was sold to non-Indians. The effect on the Cherokee Nation was catastrophic as the tribal government was effectively shut-down. In fact, from 1906 until 1971 the Cherokee "legal government" existed only in the Principal Chief, an individual who was unilaterally appointed by the President of the United States.

In 1971, a period of revitalization for the Cherokee government began. The United States government re-affirmed the authority of the Cherokee people to elect their own Principal Chief and a resurgence of culturally relevant governance emerged from Cherokee citizens. Since 1971, the Cherokee people have elected five Principal Chiefs and ratified two new Constitutions, superseding the Cherokee Constitution of 1839. The Nation strives to maintain their distinct cultural identity and autonomous government as the principles of self-determination and self-governance have prevailed over the injurious policies of the past.

The Collective Human Rights of the Cherokee Nation

The Cherokee Nation is currently the second largest Indian nation in the United States and is the contemporary manifestation of the original Cherokee Nation. Although recent years have been a testament to the permanence of our Nation's foundations, they have also demonstrated the continued existence of the antiquated and ill-conceived principle of "Plenary Power". Surviving misconceptions about the relationship between the United States and Indian nations have contributed to the continuation of culturally-genocidal policies such as assimilation and termination. The Cherokee Nation has found itself embroiled in a struggle to maintain its rights to a distinct cultural identity, to participate in decisions affecting the Nation and to **not** be subjected to forced assimilation or destruction of culture.

The Cherokee Nation holds that the right of Indigenous nations to maintain their distinct cultural identity is an integral component to the right of self-determination and the Nation's fundamental right to exist. The people of the Cherokee Nation possess the sovereign right to self-determination and the ability to freely decide the Nation's political status and freely pursue economic, social and cultural development.^v Pursuant to the right of self-determination, the Cherokee Nation has the right to autonomy or self-governance in matters relating to their internal and local affairs.^{vi}

The Cherokee Nation further asserts that the concept of the "Plenary Powers Doctrine" (*the Congressional Power to take Indigenous property, including land and money, without legal restriction and without compensation*) is not only an antiquated approach to legislating Indian Affairs, but furthermore it was a racist, misguided foundation to begin with.^{vii} The Cherokee Nation has an interest and a solemn right to participate in legislation that may affect the Nation or its inalienable rights. Without respect for the right to full and effective participation in decisions affecting Indian Nations, additional human rights of the Indigenous peoples will inevitably be violated as well.

The most abhorrent and reprehensible infraction upon Indigenous human rights is the forced assimilation or termination of the Indigenous peoples themselves. This has happened throughout history in various forms and methods of extermination, both intentionally and as matters of consequence. The Cherokee Nation itself has survived an onslaught of prejudicial and damaging policies that, on multiple occasions, have attempted to terminate the existence of the Nation. Unfortunately, these practices still exist among some members of Congress today. Worse yet, these practices are founded upon misconceptions and entail the forced compliance of an Indigenous nation to an external vision of tribal governance.

U.N. Declaration on the Rights of Indigenous Peoples

The Cherokee Nation calls on the United States Government to protect the collective and individual human rights of the Cherokee people, their Nation, and the rights of all Indigenous Indian tribes located within the boundaries of the United States. Specifically, the Cherokee Nation calls on the United States government to prohibit any legislation that seeks to punish Indigenous nations for exercising their inherent and inalienable rights to self-determination and self-governance.

The adoption of any policy or provision that undermines, intentionally or not, the ability of the Nation to determine its own destiny is an affront to the legacy of our people and their strong history of sovereign governance. We believe in our right, as an Indigenous nation, to maintain and strengthen our distinct political, legal, economic, social and cultural institutions. Furthermore, we believe it is imperative that we exercise these rights while retaining the essential right to participate fully in the political, economic, social and cultural life of the United States.^{viii}

The Federal government must recognize that the rights to existence as distinct peoples, self-determination and self-governance are essential to the very survival of Indian nations and Indian people in the United States. Many of the doctrines that continue to serve as the basis for the United States relationship to Native Americans are outdated and discriminatory in nature.^{ix} The Cherokee Nation believes that it is imperative that the United States establish and adhere to a doctrine that is respectful and mindful of the human rights entitled to the Indigenous peoples within its boundaries.

As Principal Chief of the Cherokee Nation, acting on behalf of the Nation, I respectfully request that the Committee examine the *U.N. Declaration on the Rights of Indigenous Peoples* as a necessary doctrine for addressing the human rights of Indigenous peoples. Though our legacy is strong, the human rights that Indigenous nations possess are susceptible to infringement by the Federal and other levels of government. The Nation strongly maintains that the provisions and standards enumerated in the U.N. Declaration are fundamental for our right to exist.

ⁱ See preambular paras. 8, 14, 15 (treaties, agreements and constructive arrangements; strengthened partnership with Indigenous peoples and States); 12 (friendly relations among nations and peoples); 18 (harmonious and cooperative relations between Indigenous peoples and States); 19 (implement all State obligations in international instruments, especially human rights, in consultation and cooperation with Indigenous peoples); and 24 (Declaration to be pursued as a standard of achievement, in a spirit of partnership and mutual respect).

ⁱⁱ See Arts. 5 (right to participate in political, economic, social and cultural life of the State); 10 (agreement on relocation); 11(2) (re cultural property mechanisms, in conjunction with Indigenous peoples); 12(2) (repatriation of ceremonial objects, human remains; mechanisms, in conjunction with Indigenous peoples); 14(3) (effective measures, in conjunction with Indigenous peoples, re education in own language and culture);

15(2) (measures in consultation and cooperation with Indigenous peoples, to combat prejudice, eliminate discrimination, etc.); 19 (consult and cooperate in good faith with Indigenous peoples re legislative or administrative measures); 22(2) (measures in conjunction with Indigenous peoples re violence against women and children); 23 (Indigenous peoples have the right to be actively involved in developing and determining socio-economic programmes); 27 (establish and implement process, in conjunction with Indigenous peoples, re issues relating to lands, territories and resources); 30 (prior consultation with Indigenous peoples re military activities on Indigenous lands, etc.); 31(2) (effective measures, in conjunction with Indigenous peoples, re protection of cultural heritage, intellectual property); 32(2) (consult and cooperate with Indigenous peoples re proposed development projects); 36(2) (effective measures, in consultation and cooperation with Indigenous peoples, re cross-border rights); 38 (measures to achieve ends of *Declaration*, in consultation and cooperation with Indigenous peoples); 39 (access to financial and technical assistance, through international cooperation); 46(2) (respect for human rights and fundamental freedoms of all, in the exercise of the rights in *Declaration*); and 46(3) (all provisions in *Declaration* to be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith).

ⁱⁱⁱ *UN Declaration, Art. 46, para. 2.*

"In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

^{iv} 1860 Slave Federal Census Cherokee Nation, Indian Territory

^v *U.N. Declaration, Art. 3*

"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

^{vi} Article IV: *U.N. Declaration on the Rights of Indigenous Peoples*

"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

^{vii} Preamble to *U.N. Declaration on the Rights of Indigenous Peoples Affirming* further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

^{viii} Article V: *U.N. Declaration on the Rights of Indigenous Peoples*

"Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."

^{ix} Remarks of Mr. Patrick Thornberry, CERD member, Summary record United States of America, August 22, 2001, para. 33

"Landmark Supreme Court cases in the nineteenth century [have] determined a broad doctrine of indigenous people as domestic dependent nations in a state of helpless inferiority that call[s] for guardianship and protection, and of the Government's plenary power over the tribes. The United States [has] yet to renounce that doctrine, despite its racist roots. ... It would be most welcome if ... the United States would repudiate its guardianship doctrine, which [is] out of step with contemporary legal developments in indigenous rights, **with the Government's own support for the concept of internal indigenous self-determination, and with [the *International Convention on the Elimination of All Forms of Racial Discrimination*].**"

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STATEMENT OF

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Senior Policy Analyst
The Open Society Institute

Before the

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

HEARING TO EXAMINE U.S. IMPLEMENTATION OF
HUMAN RIGHTS TREATIES

“The Crack/Powder Disparity:
Can the International Race Convention Provide a Basis for Relief?”

Submitted for the Record
December 16, 2009

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**The “Crack/Powder” Disparity
Can the International Race Convention Provide a Basis for Relief?**

Nkechi Taifa¹

Chairman Durbin, Ranking Member Coburn, and esteemed Members of the Subcommittee on Human Rights and the Law, I commend you for this very critical hearing on the importance of the implementation of international human rights treaties that have already been ratified in domestic U.S. law. One of those treaties is the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which has been described as “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races.” The Convention requires the elimination of discrimination not only when there is discriminatory intent, but also where there is unjustified discriminatory effect. Implementing legislation that would directly enforce this and other human rights treaties in U.S. law is critical, and this subcommittee is to be lauded for this first step in examining the issues.

I serve as a Senior Policy Analyst for the Open Society Institute and Open Society Policy Center, and convene the Justice Roundtable, a network of over fifty organizations working towards rational reform of the U.S. criminal justice system. The “Crack the Disparity” Working Group of the Justice Roundtable has been engaged since 2006 to have legislation enacted that would completely eliminate the disparity between crack and powder cocaine. Our first campaign was the organizing of an historic hearing before the Inter-American Commission on Human Rights on March 3, 2006, during the Commission’s 124th Period of Sessions, on the impact of mandatory minimum sentences and the crack cocaine disparity in the federal criminal system of the United States. The Inter-American Commission is an autonomous organ of the Organization of American States, whose members are elected by the OAS General Assembly. One of its main functions is to address the complaints or petitions received from individuals or organizations that allege human rights violations committed in OAS member countries. Its recommendations have led States to modify sentencing procedures, eliminate discriminatory laws, and strengthen protections of basic rights.

As convener of the Justice Roundtable, I moderated an illustrious panel comprised of the Honorable Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and judge on the International Criminal Tribunal for the Former Yugoslavia (1999-2001) who testified on behalf of the American Bar Association; Professor Charles Ogletree, Founder and Executive Director of Harvard Law School’s Charles Hamilton Houston Institute on Race and Justice, who testified on

¹ The author serves as Senior Policy Analyst for the Open Society Policy Center, and as an adjunct professor at Howard University School of Law. This Paper is based on testimony delivered on November 14, 2003 before the American Bar Association’s Justice Kennedy Commission, as well as two law review articles by the author, “Cracked Justice: A Critical Examination of Cocaine Sentencing,” 27 UWL A L. Rev. 107 (1996); and “Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System,” 40 How.L.J. 641 (1998).

behalf of the Justice Roundtable; Ms. Kemba Smith who, at age 24, was sentenced to nearly a quarter of a century for her minor role in a drug conspiracy; and Attorney Gay McDougal, former Executive Director of Global Rights and the first United Nations Independent Expert on Minority Issues. Witnesses cited the disparity between crack and powder cocaine sentencing as the most flagrant example of how mandatory minimums have a racially discriminatory impact, as harsh sentences for crack cocaine convictions often fall disproportionately on African Americans.

Perhaps the most poignant part of those proceedings were the closing words of the Honorable Patricia Wald, who stated,

Unduly long punitive sentences are counter-productive, and candidly, many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as to our own past practices. On a personal note, let me say that on the Yugoslavia War Crimes Tribunal I was saddened to see that the sentences imposed on war crimes perpetrators responsible for the deaths and suffering of hundreds of innocent civilians often did not come near those imposed in my own country for dealing in a few bags of illegal drugs. These are genuine human rights concerns that I believe merit your interest and attention.

As this Subcommittee examines the U.S. implementation of human rights treaties, I am honored to submit the below statement for the record in my personal capacity as an attorney with a long-standing interest in conforming domestic criminal justice policies to international human rights norms.

The paradigm of race as a key influence on the administration of criminal justice in the United States has yet to be appropriately remedied by the courts or Congress, despite the findings of eminent scholars, adept statisticians, and prestigious commissions detailing unwarranted racially disparate results.

Unequal treatment of people of color has been well established at each stage of the criminal justice continuum, from profiling to sentencing. Over the past twenty years voluminous statistics and analyses have outlined this predicament. In his 2003 seminal address before the American Bar Association, Justice Kennedy challenged the ABA to engage in public discourse that will help shape the political will to find more just solutions and humane policies to the inadequacies and injustices of our prison and correctional systems, finding "new ideas, new insights, and new inspiration."²

The purpose of this paper, therefore, is to advance new inspiration with which to stimulate the political will, through a discourse on the applicability of global human rights standards to domestic law; specifically, the application of Article 5(a) of the

² Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, "Speech at the American Bar Association Annual Meeting" (Aug. 9, 2003; revised Aug. 14, 2003).

International Convention to Eliminate All Forms of Racial Discrimination³ (ICERD) to the disparity in penalty structure between crack and powder cocaine.

Current interpretation of U.S. constitutional law in the prosecution and sentencing of crack cocaine defendants has proven inadequate in providing relief to charges of discrimination. Domestic recognition of global norms -- specifically provisions of the U.S.-ratified ICERD -- could eliminate a critical barrier to relief presented by current law and practice.

This article commences with the acknowledgement that domestic recognition of international law is a growing movement in the United States, recognizing that expanded protections found in many human rights treaties can be influential in advancing United States law. It then provides an overview of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), focusing on the elements most applicable to the eradication of racism in the U.S. criminal justice system.

Next, a dilemma is discussed which has plagued criminal defense attorneys and public policy advocates for twenty years -- the inability to establish racially discriminatory intent in the enactment of the mandatory minimum crack statutes, and the futility of proving discriminatory motive in decisions of drug charging and jurisdictional venue. These failures have led to inordinately harsh mandatory sentences disproportionately meted out to African American defendants that are far more severe than sentences for comparable activity by white defendants.

The requirement to prove intent ignores the subtle nature which characterizes much of 21st century racism, which manifests as not only conscious and intentional discrimination, but in institutional and structural arrangements, often unconscious, as well. The article recognizes that international jurisprudence is enlightened in this perspective, in that it understands that racism manifests in various forms, allowing intent to be gleaned through actions and impact. The international race convention, which the United States has ratified but not made self-executing, allows laws and practices that have an invidious discriminatory *impact* to be condemned, regardless of specific *intent*, reaching both conscious and unconscious forms of racism.

In conclusion, the paper shows how the deficiency with respect to proving intent in U.S. law relative to cocaine sentencing can be remedied by adopting the "effect" standard enunciated in the ICERD, recommends that judges and legislators embrace this augmented standard found within global norms already endorsed by the United States, and encourages the State Department in its next periodic report to the United Nations ICERD oversight committee to directly address the issue of the racial impact of U.S. drug law and enforcement, and provide comprehensive information for the international committee's review.

³ International Convention on the Elimination of All Forms of Racial Discrimination *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD]; 140 CONG. REC. S7634-35 (daily ed. June 24, 1994) U.S. Senate advice and consent (U.S. entered into force Nov. 20, 1994).

Domestic Recognition of International Law

Human rights organizations in the United States are increasingly including domestic U.S. scrutiny within their monitoring apparatuses, and issuing reports detailing abuses in American institutions.⁴ More recently, in the criminal justice and other arenas, traditional civil rights and civil liberties groups have also sought to extend their analyses to the international sphere as well, often in collaboration with traditional human rights organizations.⁵ Lawyers in capital cases are increasingly raising legal challenges pursuant to various international treaties and customary international law,⁶ and a myriad of human rights conventions and standards have likewise been analyzed in the context of children in the U.S. juvenile justice system.⁷ It is clear that there is a growing, distinct human rights movement in the U.S.⁸

Upon the U.S. ratification of the International Covenant on Civil and Political Rights, the former director of Human Rights Watch and current president of the Open Society Institute, Aryeh Neier, stated, "(t)he international human rights cause has achieved a legitimacy comparable to that of the movement for the promotion of rights and liberties domestically."⁹ He continued optimistically, "despite the Bush Administration's reservations, declarations, and understandings, the Covenant will, over time, prove valuable in civil liberties litigation in the United States and, conceivably, will also be helpful in shaping the decision making of the executive and legislative branches of government."¹⁰

The top echelon of the American judiciary has also been vocal in recognizing the importance of integrating international law into domestic jurisprudence. For example,

⁴ See e.g., reports of Human Rights Watch, International Human Rights Law Group (now Global Rights); Amnesty International USA; Penal Reform International; Lawyers Committee for Human Rights (now Human Rights First).

⁵ See American Civil Liberties Union conference proceedings, "Human Rights at Home: International Law in U.S. Courts," www.aclu.org (Oct. 9-11, 2003); Citizens United for the Rehabilitation of Errants (CURE), "Proceedings of International Conference on Human Rights & Prison Reform" (Oct. 6-11, 2001); Women's Institute for Leadership Development for Human Rights, "Making the Connections: Human Rights in the United States" (2000); Sentencing Project and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998); Human Rights Watch, International Human Rights Law Group & NAACP Legal Defense and Educational Fund, "Letter to the Honorable Warren Christopher" (Oct. 27, 1995); Statement of Wade Henderson, Director of the Washington Bureau of the NAACP, "International Convention on the Elimination of All Forms of Racial Discrimination: Hearings Before the Senate Comm. On Foreign Relations," 103d Cong. 47 (1994); Human Rights Watch & American Civil Liberties Union, "Human Rights Violations in the United States: A Report on U.S. Compliance with the International Covenant on Civil and Political Rights" (1993).

⁶ See Sandra L. Babcock, "International Law in Capital Cases" (Aug. 2003).

⁷ See Rosemary Sarri and Jeffrey Shook, "Human Rights and Juvenile Justice in the United States," (Univ. of Michigan).

⁸ For example, the U.S. Human Rights Network was formed in 2003 to promote U.S. accountability to universal human rights standards, by building linkages between organizations and individuals working on human rights issues in the United States. See www.ushrnetwork.org

⁹ Aryeh Neier, "Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights," 42 DePaul L. Rev. 1233, 1234. (1993).

¹⁰ *Id.* at 1235.

United States Supreme Court Justices Ginsburg, Breyer, Stevens, and Kennedy have cited positively to international law in recent years, whether in the context of the death penalty,¹¹ affirmative action,¹² or anti-sodomy laws,¹³ or in interviews and speeches stressing the importance of consultation and guidance regarding selected decisions of foreign courts and the need for comparative analysis in a growing global community.

Justice Breyer, in encouraging lawyers to be proactive in analyzing and referring “relevant comparative material” to the judiciary, clearly signaled the receptivity of the courts to international jurisprudence by acknowledging:

By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers ... so that the criminal law professor as well as the international law professor understands the international dimensions of the subject ...¹⁴

This clarion call for an openness to international precepts should be heeded, and the growing framework of human rights analyses should be considered in effectuating domestic reform. Indeed, a human rights approach to issues of domestic U.S. concern could very well mark the next frontier of advocacy.

Overview of the International Race Convention

The International Convention on the Elimination of All Forms of Racial Discrimination has been described as “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races.”¹⁵ Important to the analysis in this paper, the Convention requires the elimination of discrimination not only when there is discriminatory intent, but also where there is unjustified discriminatory effect. It prohibits racial discrimination, defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹⁶ (Emphasis added).

The Convention goes on to affirm that “(e)ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the *effect* of creating or perpetuating racial

¹¹ *Atkins v. Virginia*, 536 U.S. 304 (2002); 122 S. Ct. 2242 (prohibiting execution of the mentally retarded)

¹² *Grutter v. Bollinger*, 539 U.S. 306 (2003); 123 S. Ct. 2325 (upholding use of race in affirmative action)

¹³ *Lawrence v. Texas*, 539 U.S. 558 (2003); 123 S. Ct. 2472 (striking down anti-sodomy laws)

¹⁴ Stephen Breyer, “The Supreme Court and the New International Law,” *The American Society of International Law*, 97th Annual Meeting (April 4, 2003).

¹⁵ Egan Schwelb, “The International Convention on the Elimination of Racial Discrimination,” 15 *INT’L & COMP. L.Q.* 996, 1057 (1966).

¹⁶ ICERD, Part I, Art. 1, cl.1.

discrimination wherever it exists.”¹⁷ (Emphasis added). Finally, Parties to the Convention are legally obligated to eliminate racial discrimination within their borders and are required to enact whatever laws are necessary to ensure the exercise and enjoyment of fundamental human rights free from discrimination.¹⁸

The European Union’s Race Equality Directive¹⁹ incorporates anti-discrimination norms found in various European and international instruments, including ICERD. The Directive addresses the issue of disparate impact, by prohibiting “indirect discrimination,” which “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”²⁰ This Directive is yet another indication of the growing consensus of the need to concretize global norms domestically.

The provision within the International Convention on the Elimination of All Forms of Racial Discrimination relating to criminal justice concerns is subsumed within Article 5:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials, or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal suffrage, to take part in the Government, as well as in the conduct of public affairs at any level and to have equal access to public service²¹

Enumerating a panoply of other civil rights encompassing the civil, political, economic, social and cultural spheres, the Convention goes on to state the following:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State

¹⁷ ICERD, Part 2, Art. 1(c).

¹⁸ *Id.*

¹⁹ Council Directive 2000/43/EC, adopted by the Council of the European Union on 29 June 2000.

²⁰ *Id.* at Art. 2(2)(b).

²¹ ICERD, Part 1, Art. 5 (a-c).

institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.²²

To ensure that everyone has notice of these provisions: States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.²³

In 1994 the U.S. ratified the ICERD, following an unfortunate tradition of ratifying human rights treaties with limiting reservations, understandings and declarations. One limitation issued within the U.S. CERD ratification is a non-self-executing declaration that the Convention will not create rights directly enforceable in U.S. courts, absent implementation of specific legislation. One should not, however, be daunted by the strictures of that limitation. Analogous to the examination of the same declaration in another treaty, Neier states that although the International Covenant on Civil and Political Rights would provide a “stronger source of protection” if implementing legislation were adopted by Congress,²⁴ “(t)hat the United States has declared that the Covenant is non-self-executing will not prevent the courts or the other branches of government from shaping their decisions to conform to international standards to which the United States has now proclaimed its adherence.”²⁵

As noted above, one of the key standards within ICERD is the condemnation of invidious racially discriminatory effects or impact, regardless of intent. The disparity in penalty structure between crack and powder cocaine represents one of the most flagrant examples of a law that, on its face, is neutral, but whose impact is discriminatory. Although the U.S. judicial record is replete with a myriad of legal challenges to the racially disparate impact of the crack-powder cocaine distinction in federal sentencing statutes and guidelines, no federal appellate court has yet to hold the disparity unconstitutional, whether the challenge was equal protection or due process, cruel and unusual punishment or vagueness. This failure is due, in large part, to a rejection by the courts that Congress acted with racially discriminatory intent in differentiating between crack and powder cocaine when enacting the cocaine statutes in 1986 and 1988. The following quote is instructive:

‘I ain’t cheat’n, I’m just lucky.’ Spoken with sincerity, these incredulous words of the professional gambler as he takes the gullible mark’s last dollar are a

²² ICERD, Part 1, Art. 6.

²³ ICERD, Part 1, Art. 7.

²⁴ Neier, at 1239.

²⁵ *Id.* at. 1237.

most telling statement. If the cards are handled correctly, the mark is left stunned in disbelief. To him, the outcome undoubtedly seems unfair, but he cannot prove it. And so it is with the criminal defendant who first encounters the [mandatory minimum crack statutes].²⁶

This scenario aptly illustrates the quandary defense attorneys face in litigating crack cocaine cases -- although the disproportionate impact of the crack statute against African Americans is unmistakable, similar to the dilemma faced by the mark above, racially discriminatory intent has been virtually impossible to prove. The disparity in penalty structure between crack and powder cocaine represents just one manifestation of racial disparity in the U.S. criminal justice system that could benefit from a human rights construct. Other issues could equally be so examined, however this paper's focus is on the cocaine disparity. The following examination defines the scope of the issue and its racially disparate impact upon African Americans.

The 100-to-1 Quantity Ratio and Disproportionate Racial Impact

The federal criminal penalty structure for the possession and distribution of crack cocaine is one hundred times more severe than the penalty structure relating to powder cocaine.²⁷ Possession of five grams of crack cocaine carries the same penalty as distribution of 500 grams of powder cocaine. This is commonly referred to as a "100-to-1 quantity ratio." For example, if a first time offender tried in federal court is found in possession of five grams of crack cocaine, she would be subject to a mandatory felony sentence of at least five years in prison without parole. Possession of the same amount of powder cocaine, a misdemeanor, requires no prison time. A person convicted of fifty or even 499 grams of powder cocaine would face a maximum penalty of one year in prison. It takes trafficking in 500 grams of powder cocaine to receive the same sentence as one convicted of simple possession of five grams of crack cocaine.

In its Special Report to Congress, the United States Sentencing Commission²⁸ pronounced that "federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine."²⁹ Nationwide statistics compiled by the Commission revealed that blacks were more likely to be convicted of crack cocaine offenses, while whites were more likely to be convicted of powder cocaine offenses.³⁰ In 1994, 96.5% of those sentenced federally for crack cocaine offenses were non-white.³¹ The Commission's 2000 Source of Federal Sentencing Statistics revealed that 84.2% of blacks were convicted of crack cocaine

²⁶ Michael Lasley, "Disparate Treatment: Mandatory Minimums, the Federal Sentencing Guidelines and African Americans," reprinted in Taifa, "Cracked Justice: A Critical Examination of Cocaine Sentencing," 27 UWLAW.L.Rev. 107 at 144.

²⁷ 21 U.S.C. Sec. 841(b)(1)(A)(ii)(1994); 21 U.S.C. sec. 841(b)(1)(B)(ii)(1994).

²⁸ The U.S. Sentencing Commission is an independent agency in the judicial branch with responsibility for advising Congress on sentencing matters.

²⁹ U.S. Sentencing Comm'n Special Report to Congress: Cocaine and Federal Sentencing Policy xi (1995) (issued after a review of cocaine penalties as directed by Pub.L.No. 103-322, Sec. 280006).

³⁰ *Id.* at 156, 161.

³¹ See United States Sentencing Commission, 1994 Annual Rep. 107 (Table 45).

cases, as compared with 5.7% whites. Asserting that these statistics do “not mean ... that the penalties are racially motivated,”³² the Commission nevertheless found that the high percentage of blacks convicted of crack cocaine offenses is “a matter of great concern.”³³

This concern was accentuated by a study on federal sentencing policies which disclosed that “between 1986 and 1990 both the rate and average length of imprisonment for federal offenders increased for blacks in comparison to whites,” and that the higher proportion of blacks charged with crack offenses was “the single most important difference [accounting for] the overall longer sentences imposed on blacks, relative to [other groups].”³⁴ Its conclusion, “[i]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study’s analysis suggests that the black/white disparity in sentences for cocaine trafficking would not only evaporate but it would slightly reverse.”³⁵ The Sentencing Commission recently reported that revising this one sentencing rule would do more to reduce the sentencing gap between blacks and whites “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system.”³⁶

Disparate racial impact is not limited to mandatory sentences for crack cocaine, but extends to mandatory minimum sentences in general. Several years prior to its study on cocaine policy, the Sentencing Commission studied the impact of federal mandatory minimum sentencing provisions in general. The Commission found that 67.7% of black defendants received sentences at or above the mandatory minimum range while only 54% of whites received such a sentence.³⁷ The Commission concluded that the mandatory minimum penalties were being administered in a racially discriminatory manner.³⁸

The Federal Judicial Center published a study of federal sentences which found further disturbing evidence of racial disparities in the administration of mandatory minimum sentences.³⁹ The Center reported that in cases where a mandatory minimum could apply, black offenders were 21% more likely and Hispanic offenders 28% more likely, than whites to receive at least the mandatory minimum prison term.⁴⁰ Thus, although Congress’ stated intention was to reduce arbitrariness and unwarranted

³² *Id.* at xi.

³³ *Id.* at xii.

³⁴ Douglas C. McDonald & Kenneth E. Carlson, “Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90,” Summary, at 13 (1993).

³⁵ *Id.*, at 2.

³⁶ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (Nov. 2003), at 132.

³⁷ U.S. Sentencing Comm’n Special Report to the Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

³⁸ *Id.* at ii. The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, *where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum ... This differential application on the basis of race ... reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.* (emphasis added).

³⁹ Barbara S. Meierhoefer, “The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed” (1992).

⁴⁰ *Id.* at 20.

disparities in sentencing, the report concluded that mandatory minimums actually increase such problems.⁴¹

Despite the statistics on convictions and sentencing described above, there is evidence that African Americans are less involved in crack use than whites. Statistics from the National Institute on Drug Abuse (NIDA) reveal that the greatest number of documented crack users is white.⁴² Seventy-five percent of those reporting cocaine use in 1991 were white; 15% were black, and 10% Hispanic.⁴³ Of those reporting crack use in the same year, 52% were white, 38% were black and 10% Hispanic.⁴⁴

Although there are larger numbers of documented white cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the “war on drugs” being targeted almost exclusively at inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans.⁴⁵

Questionable Prosecutorial Discretion

Prosecutorial discretion in selection of jurisdictional venue have perpetuated racial disparities in the criminal justice system with respect to cocaine cases. An illustration is *U.S. v. Armstrong*, a case involving allegations that federal prosecutors in Los Angeles selectively pursued and charged blacks in crack cocaine cases.⁴⁶ Since the inception of mandatory minimum cocaine laws in 1986 to the advent of the *Armstrong* case, not a single white offender had been convicted of a crack cocaine offense in federal courts serving Los Angeles and its six surrounding counties.⁴⁷ Rather, virtually all white offenders were prosecuted in state court, where they were not subject to that drug’s lengthy mandatory minimum sentences.⁴⁸ The impact of the decision to prosecute the black defendants in federal court was significant. In federal court they faced a mandatory minimum sentence of at least ten years and a maximum of life without parole if convicted of selling more than fifty grams of crack. By contrast, if prosecuted in California state

⁴¹ *Id.*

⁴² See Special Report to Congress: Cocaine, at 38, citing National Institute on Drug Abuse, Overview of the 1991 National Household Survey on Drug Abuse (1991) (NIDA Capsules).

⁴³ *Id.* at 39.

⁴⁴ *Id.*

⁴⁵ Discriminatory enforcement of cocaine laws appears to be part of a pattern of discrimination in the enforcement of the nation’s drug laws in general. See Sam Meddis, *Is the Drug War Racist? Disparities Suggest the Answer is Yes*, USA TODAY, July 23, 1993, at 1A.

Although law enforcement officials say blacks and whites use drugs at nearly the same rate, a USA TODAY computer analysis of 1991 drug arrests found that the war on drugs has, in many places, been fought mainly against blacks ... USA TODAY first studied the issue four years ago and found blacks, about 12% of the population, made up almost 40% of those arrested on drug charges in 1988, up from 30% in 1984. The new analysis, which uses city-by-city racial breakdowns from the 1990 census and arrest data from police agencies that report to the FBI, found that by 1991 the proportion of blacks arrested for drugs increased to 42% *Id.*

⁴⁶ *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1995) (*Armstrong I*), *rev’d on reh’g en banc* 48 F.3d 1508 (9th Cir. 1995) (*Armstrong II*), *rev’d and remanded*, 116 S. Ct. 1480 (1996) (*Armstrong III*).

⁴⁷ Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at B1.

⁴⁸ *Id.*

court, the defendants would have received a minimum sentence of three years and a maximum of five years.⁴⁹

This selective prosecution pattern is not unique to Los Angeles. An investigative report by the *Los Angeles Times* revealed that:

Only minorities were prosecuted for crack offenses in more than half the federal court districts [handling] crack cases ... No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.⁵⁰

In an appeal to the Supreme Court on a discrete issue regarding the scope of discovery to be afforded a defendant, the *Armstrong* defendants did not prevail. The Court held that a defendant who alleges selective prosecution based on race must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races.⁵¹ Without access to the discovery necessary to demonstrate discriminatory intent, this represents a hollow criteria.

The Difficulty of Proving an Equal Protection Violation

One of the primary challenges to the constitutionality of the disparity in penalty structure between crack and powder cocaine has been the issue of equal protection. The 14th Amendment's Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."⁵² A "rational basis test" is applied where there is no indication of a suspect classification based on race, religion, or other constitutionally protected interest.⁵³ The "substantial interest test" is used when substantial interests of the state are involved and give rise "to recurring constitutional difficulties."⁵⁴ The "strict scrutiny test" involves classifications based on factors such as race, which are "constitutionally suspect."⁵⁵ Laws which purposely discriminate against people of color are easily invalidated under the strict scrutiny standard, which requires that classifications based on race must be narrowly drawn to promote a "compelling governmental purpose."⁵⁶

However, where litigants have brought equal protection challenges to laws codifying crack/powder sentencing disparities, appellate courts have almost universally applied rational basis review, a standard in which the government need only demonstrate

⁴⁹ *Armstrong II*, 48 F.3d 1511.

⁵⁰ Weikel, at B1.

⁵¹ *Armstrong III*, 116 S. Ct. at 1480 (1996).

⁵² *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted).

⁵³ See *Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1976).

⁵⁴ *Plyer v. Doe*, 457 U.S. at 217.

⁵⁵ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁵⁶ *Id.* at 4.

a legitimate reason for its action.⁵⁷ Thus, although the disproportionate impact against African Americans of the facially neutral cocaine legislation is evident, racially discriminatory intent has been virtually impossible to prove.

An equal protection violation, however, can also be established by showing that a facially neutral statute is applied in a racially discriminatory way.⁵⁸ Under appropriate circumstances, an inference of discriminatory purpose can be drawn from a statute's disproportionate impact upon a particular group⁵⁹ and, as argued in dissent by Justice Marshall, may also be inferred from the "inevitable or foreseeable impact of a statute."⁶⁰ In *Washington v. Davis*, a case involving race-based employment discrimination, the Supreme Court developed the principle that although the Fifth Amendment's Due Process Clause contains an equal protection component prohibiting the United States from invidious discrimination, it does not follow that a law is unconstitutional solely because it has a racially discriminatory purpose. The Court held, "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."⁶¹

The Court gave additional consideration to the necessity to prove discriminatory intent or purpose as opposed to disparate impact in an equal protection case. In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, the Court again ruled that a showing of discriminatory intent must first be shown in order to find a "race-neutral" law violative of the Equal Protection Clause when it results in a discriminatory impact.⁶² The Court went on to uphold a neutral law – a zoning restriction, which resulted in a disparate impact – racially segregated housing.⁶³ The Court, however, established several "circumstantial evidentiary sources" for judicial review of legislative or executive motivation to determine whether a racially discriminatory purpose exists,⁶⁴

⁵⁷ International Human Rights Law Group, "U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination: An Overview of United States Law with Analyses of Potential Reservations, Understandings, and Declarations to the Convention," at 3-4 (1994). See also Taifa, "Cracked Justice: A Critical Examination of Cocaine Sentencing, at 144-45; See e.g., *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994); *United States v. Maxwell*, 25 F.3d 1389, 1401 (8th Cir.), cert. denied, 115 S. Ct. 610 (1994) (racially disparate impact not a basis upon which a court may rely to impose a sentence outside of the applicable guidelines range); *United States v. Angulo-Lopez*, 7 F.3d 1506 (10th Cir. 1993) (following standard set by other circuit courts in rejecting defendant's equal protection challenge under rational basis review); *United States v. Bynum*, 3 F.d 769, 774 (4th Cir. 1993), cert. denied, 114 S. Ct. 1105 (1994) (explaining that discriminatory impact not proper basis for downward departure); *United States v. Lattimore*, 974 F. 2d 971, 975-76 (8th Cir. 1992) (disparate impact is not an aggravating or mitigating circumstance warranting downward departure from Sentencing Guidelines); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992).

⁵⁸ *Plyer v. Doc.* 457 U.S. 202, 216 (1982).

⁵⁹ See *Personal Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-81 (1979).

⁶⁰ *Id.* at 281 (Marshall, J., dissenting). See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁶¹ *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁶² *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

⁶³ *Id.*

⁶⁴ These subjects of inquiry include (1) adverse racial impact of the official action; (2) historical background of the decisions; (3) specific sequence of events leading up to the challenged decision; (4) departures from normal procedure sequence; (5) substantive departure from routine decisions; (6)

acknowledging that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face.”⁶⁵

The Supreme Court reaffirmed its position requiring proof of discriminatory purpose where a law is challenged on equal protection grounds in *Personal Adm’r of Mass. v. Feeney*. In this case of gender-based employment discrimination, the Court highlighted the importance of identifying the discriminatory intent of legislators in order to find a valid equal protection challenge to a law. The Court acknowledged the “objective factors” set forth in *Arlington Heights*, as a “practical” basis for proving discriminatory intent. Yet, the Court went on to hold, “[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern ... the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.”⁶⁶ The Court went on to uphold the gender-neutral law which disparately impacted women veterans.

The Role of Institutional and Structural Racism

The existence of institutional and structural racism is a key hurdle to remedying racial discrimination in the criminal justice system, given the restrictive manner in which U.S. courts construe the intent requirement in general equal protection analysis involving criminal justice issues. Policies and practices in the U.S. are often defined or “structured” by race and racism. Such structural racism has been defined as a system in which “public policies, institutional practices, cultural representations and other norms work in various, often reinforcing ways to perpetuate racial group inequities.”⁶⁷ Institutional racism, a subset of structural racism, is a theory wherein unwarranted racially disparate treatment is codified within the structural fabric of social institutions and manifests routinely without the need for a discrete actor to overtly perpetuate a discriminatory act.

The American Bar Association’s Summit on Racial and Ethnic Bias in the Justice System recognized institutional racism as “statutes, rules, policies, procedures, practices, events, conduct and other factors, operating alone or together, that have a disproportionate impact upon one or more persons/people of color.”⁶⁸ The Summit continues by stating, “(o)ur definition therefore rejects the limitations of ‘active’ bias to discrete and provable instances of intentional bigotry ... We view our challenge as extending also to passive bias where it has a systemic effect on the administrative of justice.”⁶⁹

contemporary statements made by the decision makers; and (7) the inevitability or foreseeability of the consequences of the law. See lower court decision in *United States v. Clary*, 846 F. Supp. at 783.

⁶⁵ *Arlington Heights*, 429 U.S. at 266.

⁶⁶ *Feeney*, 442 U.S. at 272.

⁶⁷ The Aspen Institute, “Structural Racism and Community Building,” (June 2004) at 11.

⁶⁸ American Bar Association, “Achieving Justice in a Diverse America: A Summit on Racial and Ethnic Bias in the Justice System, A Preliminary Report and Plan for Action 2 (1994).

⁶⁹ *Id.* at 3.

It is clear that few prosecutors, law enforcement officers, or legislators will affirmatively announce, 'I have the specific intent to discriminate against black people,' or 'I specifically targeted African Americans for federal court prosecution where I knew they would be subjected to long mandatory sentences,' or 'I specifically voted for penalties for crack cocaine that are 100 times more severe than penalties for powder cocaine because I wanted to insure lengthy incarceration periods for African Americans.' Yet that level of honest specificity appears to be what interpretation of current law requires.

Scholars have argued, therefore, that the current intent standard "ignores the way racism works"⁷⁰ and because racial inequality can manifest irrespective of the decision-maker's motive,⁷¹ the remedy to that inequality must likewise not be dependent upon provable intention conduct. "Sophisticated racists have learned to code their language and not leave behind a paper trail of racism."⁷² Although cognizable reasons may exist for the courts declining to extend an equal protection remedy beyond cases of provable intentional discrimination,⁷³ such arguments, no matter how colossal they may appear, should not continue to be allowed as justification to circumscribe justice. Novel analysis must be advanced which will, in time, trigger novel solutions. Current equal protection analysis must not be allowed to incapacitate receptivity to creative solutions. Encouragingly, the United States in its ratification process of the ICERD, did not make a direct reservation to the Convention's "effects" provisions, despite the fact that under current U.S. constitutional law analysis, there is no affirmative duty to remedy de facto discrimination pursuant to equal protection laws unless a party can establish discriminatory intent.

Conclusion

This article has demonstrated that current law provides no successful challenge to the disparate impact against African Americans in cocaine sentencing. Guidance from international norms, however, specifically provisions of the ICERD affirming the importance of recognizing discriminatory impact, could eliminate barriers presented by

⁷⁰ Charles R. Lawrence, "The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stan. L. Rev.* 317, (1987); The Justice Collective, "Redefining Discrimination: Using Social Cognition Theory to Challenge the Faulty Assumptions of the 'Intent Doctrine' in Anti-Discrimination Law;" Linda Hamilton Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 *Stan. L. Rev.* 1161 (1995); Ian Haney Lopez, "Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination," 109 *Yale L.R.* 1717 (2000).

⁷¹ Lawrence, "The Id, Ego and Equal Protection," at 319.

⁷² Richard Drorak, "Cracking the Code: Decoding Colorblind Clues," 5 *Mich. L. R.* 611 (2000).

⁷³ Reasons in *Washington v. Davis* include Court would be in the untenable position of having to address "serious questions . . . about a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white," 426 U.S. at 248; *See also McClesky v. Kemp*, Justice Powell warned that "if we accepted McClesky's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty, 481 U.S. 279 (1987); *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring – "In *Washington v. Davis* we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges."

current domestic law and practice with respect to racism in the criminal justice system in general, and the crack/powder cocaine differential in particular. Even absent implementing legislation which would directly enforce the treaty in U.S. law, one commentator asserts that if international law were used to assist in interpreting constitutional rights, "the right attains greater credence as one that has universal recognition."⁷⁴

Congress is urged to remedy the unwarranted racially discriminatory impact of cocaine sentencing by enacting legislation equalizing the penalty structures between crack and powder cocaine, at the current level set for powder cocaine. Judges are urged to interpret equal protection analysis in light of the ICERD's clause abrogating laws with an invidious discriminatory effect, irrespective of proof of intent, enabling the higher standard of strict scrutiny to apply. The State Department is encouraged, in its next periodic report to the United Nations Committee to Eliminate Racial Discrimination, to directly address the issue of the racial impact of United States drug laws and enforcement,⁷⁵ and provide detailed information for the Committee's review with respect to U.S. compliance with the "effect" provisions of the ICERD to insure that there is "equal treatment before the tribunals and all other organs administering justice."⁷⁶

In conclusion, the Race Convention embodies the world community's expression that a universal, international standard against race discrimination is necessary if racial and ethnic bias is to be eliminated. The executive, legislative and judicial branches of government must be challenged to take appropriate measures to ensure that U.S. laws, policies, and practices are in conformity with the dictates of this Convention.

Again, the Senate Subcommittee on Human Rights and the Law is to be commended for convening this critical hearing to examine the issue of U.S. implementation of human rights treaties. It is clear that current interpretation of U.S. constitutional law in the prosecution and sentencing of crack cocaine defendants has proven inadequate in providing relief to charges of discrimination. Congress must enact legislation that does not discriminate between the treatment of crack and powder cocaine defendants. Congress must also enact implementing legislation making the provisions of the already ratified CERD Convention applicable in U.S. law. These measures are important steps towards the eradication of discrimination in the federal criminal justice system.

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⁷⁴ Lisa Kline Arnett, Comment, "Death at an Early Age: International Law Arguments Against the Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles," 57 U. Cin. L. Rev. 245, 261 (1988).

⁷⁵ See specific recommendations contained within Human Rights Watch, International Human Rights Law Group, NAACP Legal Defense & Educational Fund, "Summary of Concerns about Race Discrimination in the U.S. Criminal Justice System" (1995).

⁷⁶ ICERD, Title I, Art. 5(a).

Testimony for the Record
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U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
Washington, D.C.

Hearing: "The Law of the Land: U.S. Implementation of Human Rights Treaties"
Hearing Date: December 16, 2009

**Reporting Requirements under Human Rights Treaties: U.S. Implementation of the
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children,
Child Prostitution, and Child Pornography**

Chairman Durbin, Ranking Member Coburn, and distinguished Members of the Subcommittee:

We would like to extend our sincere appreciation to the Subcommittee on Human Rights and the Law for holding this hearing on the U.S. human rights treaty implementation practices and for welcoming the input of non-governmental organizations and members of the public. We appreciate the Subcommittee's commitment to and thoughtful consideration of this important issue.

In our testimony, we would like share our experience working on implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, which the United States ratified in 2002.

Our views on human rights treaty implementation are informed also by our experience of working on these issues over the past decade. Professor Todres' research focuses on children's rights issues, in particular (1) trafficking and commercial sexual exploitation of children and (2) domestic interpretations of the U.N. Convention on the Rights of the Child. He is co-editor of the book, *U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (Brill Academic Publishers, 2006) and serves as Child Rights Advisor to ECPAT-USA. Carol Smolenski is Executive Director and Co-founder of ECPAT-USA and has worked in the field of children's rights for eighteen years.

As we understand that numerous organizations are submitting testimony for this hearing, we have aimed to keep our comments brief by focusing primarily on the reporting process under human rights treaties.

U.S. Implementation of, and report under, the Optional Protocol

In 2002, the United States ratified the two Optional Protocols to the Convention on the Rights of the Child (CRC)—the first on the involvement of children in armed conflict, and the other on the sale of children, child prostitution, and child pornography. Our work has focused on the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography (hereinafter the “Optional Protocol”), and our testimony focuses on the work under that Optional Protocol.

Much of the work of the U.S. government in protecting children from sale, prostitution and pornography flows from its passage of the Trafficking Victims Protection Act (TVPA) in 2000 and the three subsequent reauthorizations of the TVPA. Since then the United States has criminalized all forms of sexual exploitation of children and has been working to identify trafficked children, refer them to federally funded services, and develop new programs and policies to protect children. In addition, the U.S. support for the outcome documents of the three World Congresses Against Sexual Exploitation of Children, in 1996, 2001 and 2008, has led it to take proactive steps to protect children from commercial sexual exploitation.

Many children remain at risk and too many continue to be victimized. More work is needed, and the reporting process under the Optional Protocol serves an important function in this effort.

As is typical of most human rights treaties, the Optional Protocol requires periodic reporting of implementation progress and obstacles. The Optional Protocol requires a report by each State Party within two years of ratification and thereafter every five years.

In 2007, the U.S. government submitted its first report under the Optional Protocol to the U.N. Committee on the Rights of the Child.

We participated in the review by the U.N. Committee on the Rights of the Child of the U.S. government report on its implementation of the Optional Protocol. ECPAT-USA coordinated the development of a non-governmental organization report (or “Alternative Report”) to the U.N. Committee on the Rights of the Child, which it submitted under the name of 45 U.S. non-governmental organizations. In February 2008, Professor Todres and Ms. Smolenski were the two non-governmental representatives that participated in the Pre-Session Working Group with the Committee, which is the session the Committee holds in advance of official sessions with governments in order to gather information and ensure that the official session is as focused and effective as possible. Thereafter, Professor Todres attended and observed the Committee’s session with the official U.S. delegation in May 2008. This event marked the first time the U.N. Committee on the Rights of the Child reviewed the United States.

Overall, we believe that the reporting and review process was a very valuable experience. It is important to emphasize that the reporting and review process with the U.N. Committee on the Rights of the Child is designed as a collaborative process, whereby the government’s own review combined with input from the Committee, a group of independent experts who possess extensive knowledge of children’s rights and effective treaty implementation practices and whose aim is to facilitate good outcomes for children, and input from non-governmental organizations helps identify both progress and best practices as well as areas where improvement is needed. Our

participation in the first ever review by the U.N. Committee on the Rights of the Child of the U.S. government's implementation of the Optional Protocol confirmed the collaborative nature of the process and the opportunities it provides for identifying ways in which the U.S. government and non-governmental organizations together can further efforts to protect children from all forms of commercial sexual exploitation.

This experience also highlighted both the value of the reporting process and ways in which the United States could improve its implementation of human rights treaties.

Based on the experience of the Optional Protocol, we respectfully submit the following recommendations for how the United States could improve its implementation of this and other human rights treaties. Our experience leads us to conclude that the following steps would strengthen human rights treaty implementation. Successful treaty implementation practices in turn will improve U.S. standing in the world, position the United States to press more effectively for enforcement of human rights and the rule of law around the globe, and improve outcomes for people in the United States whose human rights are at risk of violation.

Recommendations:

1. *The U.S. government should engage civil society early in the process of developing reports to be submitted to human rights treaty bodies pursuant to U.S. obligations under those human rights treaties.*

We believe it would help significantly if in the early stages of developing a report the U.S. government would hold more public gatherings to solicit input and suggestions from civil society. This step will help the U.S. government with the data collection needed for its report, which could help ensure timely reporting (we note that the U.S. report submitted under the Optional Protocol in 2007 was actually three years overdue), and simultaneously educate civil society about the process and the opportunities for improved outcomes.

2. *As the U.S. government drafts its reports, it should maintain a dialogue with civil society and, to the extent possible, share drafts of reports with key non-governmental organizations with expertise in that particular area, to help ensure that the United States produces as comprehensive a report as possible.*

In addition to engaging civil society early in the reporting process, there is value in continuing an open dialogue to ensure that the reporting process produces a complete and accurate assessment of the human rights issues covered by the particular treaty.

For the Optional Protocol, the U.S. government held only two meetings: In advance of submitting the U.S. government report, the State Department held a small introductory meeting with select members of civil society to introduce them to those officials responsible for various reports to the human rights treaty bodies, including the Optional Protocol. The second meeting was held in May 2008, after the U.S. submitted its report and only days prior to the U.S. delegation's official session with the Committee. The U.S. report under the Optional Protocol had extensive information on federal government actions but only limited

information on actions by states. Increased communications with non-governmental organizations might have facilitated a more complete report.

We believe additional meetings and a more open dialogue between the U.S. government and civil society throughout the process would be beneficial first to the government in developing its reports and ultimately to ensuring more effective implementation of treaties.

3. *The U.S. government should hold public events in the United States following the conclusion of the reporting process with a human rights treaty body to discuss how the United States plans to follow up on the suggestions issued by that human rights treaty body or to address areas needing improvement that were identified by the U.S. government's own review or that of non-governmental organizations.*

An essential aspect of the human rights treaty implementation process is follow up after the conclusion of review by a human rights treaty body. After the U.N. Committee on the Rights of the Child issued its Concluding Observations to the United States on implementation of the Optional Protocol, ECPAT-USA publicized the results by distributing a press release about the review process and the Committee's Concluding Observations; organized Congressional staff briefings with the assistance of then-Senator Joseph Biden's office for the Senate and Congressman Howard Berman's office for the House; and held two public information sessions to publicize the results of the process, one each in New York City and Chicago.

We believe this is an essential step and should be expanded. The human rights reporting process typically identifies both strong points in U.S. government practices and select areas where improvements are needed. With respect to commercial sexual exploitation of children, the United States has taken a number of important steps to improve protections for children. We also know that many children still are victims of commercial sexual exploitation, and thus much work remains. The reporting process helped identify ways in which we can improve protections for children. For example, it identified weaknesses in data collection, which in turn makes it harder to identify victims and other vulnerable children.

We believe that it is vital that the U.S. government hold or support public forums following a review to share the knowledge learned with those around the country and identify next steps for improving protections of children or for ensuring the rights of other individuals covered by other treaties. Our experience shows that many Americans view the reporting process as an "international" event unrelated to the United States. Holding public forums will help educate civil society as to the relevance of the reporting process, will help explain that the process is a review of U.S. law, policy, and practices, and will foster community engagement in human rights treaty implementation at the local level.

4. *When the U.S. develops a new program or policy that complies with Concluding Observations issued by a human rights treaty body, it should identify that it has addressed an issue that emerged during the reporting process.*

The United States often takes steps that are in compliance with international obligations. We believe that the U.S. government would benefit from clearly identifying when it has addressed particular issues that emerged from human rights reporting processes. For

example, there have been improvements in U.S. policies toward trafficking and commercial sexual exploitation of children, in conformance with the U.N. Committee on the Rights of the Child's recommendations. The U.S. government has given a grant to one institute to gather data about the size and characteristics of child sexual exploitation in the United States, a very specific recommendation from the Committee. For another example, the U.S. government has amended the Trafficking Victims Protection Act to make it easier to identify child trafficking victims in the United States, again addressing a specific issue identified by the Committee.

The Committee also identified other areas where further work is needed, such as expanding training programs for those who come into regular contact with children, and developing prevention programs. Many of the recommendations of the Committee dovetail with recommendations made by U.S. non-governmental organizations working on these issues throughout this country. In short, the reporting process helps create a template for additional steps needed to strengthen efforts to ensure the rights and well-being of children.

When the U.S. government then takes steps in these areas, identifying these measures as responsive to recommendations will serve several purposes. It will highlight the importance of human rights, help situate individual steps in more comprehensive efforts to ensure the rights and well-being of all children, facilitate monitoring of progress on key domestic human rights issues, and enable the U.S. government to track progress as it occurs, reducing the burden of developing subsequent reports to human rights treaty bodies.

5. Establish and support human rights institutions, ombudsperson offices, and offices of the child advocate that are responsible both for the implementation of human rights treaties and for the ongoing monitoring of human rights treaty implementation practices in the United States, rather than rely on gathering information only every five years for reporting purposes.

In seeking to implement the Optional Protocol or any other human rights treaty to which the United States is now, or later becomes, a party, it is essential to have coordinating entities to facilitate implementation and monitoring of progress. We urge the U.S. government to establish and/or identify previously existing institutions or entities (e.g., the Interagency Working Group on Human Rights) that can serve to coordinate implementation and monitoring of human rights treaty obligations. We also urge the U.S. government to encourage the several States to establish and/or strengthen their own human rights institutions to help facilitate treaty implementation and monitoring for issues within the mandate of the States. We recognize that certain entities might be better positioned to monitor certain treaties, but we believe it is important that there be a central entity to coordinate implementation activities for each treaty and an independent, nonpartisan entity to monitor domestic implementation of human rights treaty obligations.

As mentioned previously, ongoing monitoring and coordination will facilitate implementation, improve the situations of children and others vulnerable to human rights violations, and facilitate reporting to human rights treaty bodies.

6. *Review and consider ratifying other human rights treaties, including the U.N. Convention on the Rights of the Child.*

Protecting children from all forms of commercial sexual exploitation requires a multi-sector comprehensive effort. Many vulnerable children are at risk because multiple rights of theirs are in jeopardy. For example, children who are abused, have limited access to health care, and who confront significant barriers to education are at greater risk. Protecting these children requires a holistic approach. The U.N. Convention on the Rights of the Child would help strengthen protections for children across a range of issues, reducing their vulnerability to all forms of exploitation. Currently, the United States is one of only two countries in the world (the other is Somalia) that is not a party to this treaty. We urge the U.S. government to give full consideration to the Convention on the Rights of the Child and move toward ratifying it.

As the U.S. experience under the Optional Protocol demonstrates, the process is one in which all parties—the U.S. government, the U.N. Committee on the Rights of the Child, and civil society—share the same goals, protecting the rights and well-being of children, and work together to identify the best means of achieving that important goal. We believe ratification of the CRC would produce a similar collaborative process that would help address the many hardships children face, not only in the context of commercial sexual exploitation.

Conclusion:

We would like to express our sincere appreciation again to the Subcommittee. We believe that this open dialogue with civil society is precisely what is needed. We hope that the U.S. government will follow the Subcommittee's lead and develop a process for reviewing human rights treaties and for reporting under human rights treaties that is more open and inclusive and employs a collaborative working model. Involving more sectors of civil society in the process offers opportunities to educate the public about the importance and relevance of international human rights treaties and treaty bodies, strengthens the U.S. government's profile as a human rights defender in the world, and leads to better human rights oriented programs and policies in the United States.

We welcome any questions and would be happy to provide additional information to Subcommittee members. Our contact information is provided below.

Thank you very much.

Jonathan Todres and Carol Smolenski
On behalf of ECPAT-USA
December 14, 2009

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UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Peter M. Robinson
President, USCIB

November 16, 2009

The Honorable Hillary Rodham Clinton
Secretary of State
U.S. Department of State
Harry S. Truman Bldg
2201 C St., NW
Washington, DC 20520-0001

Via Fax: 202-647-2283

Dear Madam Secretary:

I am writing on behalf of the United States Council for International Business (USCIB) to support the request of Senators Leahy, Kerry, Feingold, Cardin, and Franken that you provide the Congress the Administration's recommendations on how to bring the U.S. into compliance with a decision of the International Court of Justice (ICJ) concerning the access of foreign consular officers to their nationals detained under U.S. law.

The Vienna Convention on Consular Relations, a treaty ratified by the U.S. and therefore part of U.S. law, ensures the rights: (1) of foreign nationals to consular assistance without delay, and (2) of consulates to assist their citizens abroad. The U.S. is currently in violation of its international treaty obligations in the case of certain Mexican nationals. The ICJ has determined that the U.S. can remedy these violations by granting judicial hearings to determine whether prejudice resulted from the failure to provide consular access to the Mexican nationals in the *Case Concerning Avena and Other Mexican Nationals*.

As former State Department Legal Advisor John Bellinger III pointed out in a July opinion article in the New York Times, the Bush Administration took the position that it was legally obligated to follow the ICJ's decision and ordered state courts to take such action.

However, as Mr. Bellinger points out:

"... Texas challenged the President's order, and in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the President lacked inherent constitutional authority to supersede state criminal laws limiting appeals and that Congress had never enacted legislation authorizing him to do so."

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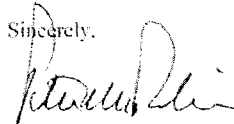
The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention. As recent history has shown, American citizens abroad are at times detained by oppressive or undemocratic regimes, and access to American consular officers may be their lifeline. The U.S. rightly insists that other countries grant American citizens the right to consular access. Overseas employees of the U.S. business community as well as all other Americans traveling or living abroad need this vital safety net. As it stands now, U.S. citizens abroad are at grave risk that other countries may not honor their reciprocal obligations.

We urge the Department of State to recommend to the Congress passage of legislation to bring the U.S. into compliance with the Vienna Convention. The inconvenience to our federal courts of granting judicial review to the Mexican nationals in the *Aventa* case and others is minor in comparison to the very real threat to the security of American businessmen and other U.S. citizens if no action is taken.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

I have sent an identical letter to the Attorney General.

Sincerely,



Peter M. Robinson



UNITED STATES WILL PARTICIPATE IN UN HUMAN RIGHTS PERIODIC REVIEW
State Department Creates Website to Engage Civil Society on Human Rights Review Process

The Department of State has created a [new website](#) in connection with the United States' participation in the UN Human Rights Council's Universal Periodic Review (UPR) process. This new website will feature an inbox, which will allow you to send ideas, comments, and analysis on issues relating to human rights in the United States. The UPR will provide the U.S. the opportunity to share with the world the challenges, success stories and best practices of promoting and protecting human rights within our borders. We hope the website will increase our ability to communicate with civil society before, during, and after the process.

ENGAGING CIVIL SOCIETY ON THE REVIEW

The United States Government has made a commitment to utilizing the UPR process to increase dialogue between the State Department and domestic groups concerning the human rights situation within the United States. An inter-agency U.S. government team will be travelling to select cities across the United States to engage directly with civil society including grassroots organizations, not-for-profits, and citizens groups. The email address and travel/consultation schedule will be listed on the website.

ABOUT THE UNIVERSAL PERIODIC REVIEW

The UPR is a unique process which involves a review of the human rights records of each of the 192 UN Member States once every four years.

- ▀ [Read More: Press Release](#)
- ▀ [Universal Periodic Review Website](#)
- ▀ [UPR Guidelines and Procedures](#)
- ▀ [Frequently and Questions](#)



WRITTEN STATEMENT FOR THE RECORD
 SUBMITTED TO THE
 COMMITTEE ON THE JUDICIARY
 SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
 UNITED STATES SENATE
 BY EJIM DIKE FOR
 THE HUMAN RIGHTS PROJECT AT THE URBAN JUSTICE CENTER
 WEDNESDAY, DECEMBER 16, 2009

The Human Rights Project at the Urban Justice Center is pleased to submit testimony for the first hearing of the Human Rights and the Law Subcommittee of the Senate Judiciary Committee on the implementation of human rights treaties. We thank Senator Durbin and Subcommittee members for their leadership in scheduling this very important hearing and we hope it signals the beginning of regular public hearings to monitor the domestic implementation of our human rights obligations.

The Human Rights Project at the Urban Justice Center works to hold the government accountable to universally accepted human rights standards and norms in addressing poverty and discrimination. Our work is based on the principle that freedom from all forms of discrimination is central to enjoying the full range of human rights—civil, political, economic, social and cultural. Our working principle echoes the thinking of President Franklin D. Roosevelt that “true individual freedom cannot exist without economic security and independence.” We promote social and legal protections for people living in poverty understanding that, in the human rights framework, poverty is more than the absence of an income or resources, but more comprehensively the absence of the choices, security, and power to realize the full range of human rights.¹ To this end, our methods include documentation of human rights violations, education of the public and policy makers on human rights standards and norms, policy analysis, and legislative advocacy to promote the local implementation of human rights.

Race Disparities in the United States and New York City

Despite strong civil rights laws, we continue to see racial inequality in almost of all spheres of life. The most recent census results from the American Community Survey revealed that poverty and its associated conditions is disproportionately

¹ Craig Mokhiber, Deputy Director of the New York Office for the United Nations High Commissioner for Human Rights, Statement at the United Nations Panel, Race, Poverty and Power, December 10, 2009.

found in communities of color. For example, while the 2008 median household income was \$51,116 and the poverty rate about 18% in New York City, it was \$35,003 in the Bronx which is overwhelmingly Black and Latino (with a poverty rate of about 28%). Furthermore, almost half of the households headed by women with children in the Bronx were living in poverty. The situation in New York City is similar to that of other major cities in the United States including Atlanta, Washington, San Francisco, Miami and Chicago.²

In 2007, the Human Rights Project at the Urban Justice Center coordinated a report submitted to the United Nations Committee on the Elimination of Racial Discrimination in preparation of the review of the United States on its compliance with the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The report titled, *Race Realities in New York City*, with contributions from over thirty groups, found that race disparities linked directly or indirectly to government policies or practices exist in almost every realm of life for New Yorkers.

To mention a few examples, the report found the following disparities³:

Education

- In 2006, 43% of Black students and 41% of Latino students in New York City graduated on time, compared to 67% of White students and 68% of Asian students. For students with limited English proficiency (LEP), the graduation rate dropped to 22%.
- New York City schools disproportionately suspend poor and minority students, for the same infractions: 8.3% for Blacks, 4.8% for Latinos, compared to 2.5% for whites. More than 90 percent of students in Second Opportunity Schools for students serving lengthy suspensions are Black or Latino.

Employment

- Almost 80% of the New York City's higher paying administrative and managerial job positions are held by Whites. In contrast, while Blacks, Latinos and Asians make up 37%, 16% and 4%, respectively, of the city's workforce, they only account collectively for 19% of the total senior and executive staff of city agencies.

Health

- Black and Latino New Yorkers are more than twice as likely as White residents to be either uninsured or publicly insured, which also means that

² Yen, Hope. US Income Gap Widens as Poor Take Hit in Recession. Associated Press Writer, September 28, 2009, available at http://news.yahoo.com/s/ap/20090928/ap_on_go_ot/us_census_income_gap

³ The Human Rights Project at the Urban Justice Center, *Race Realities in New York City*, (2007), available at http://www.hrpujc.org/documents/RaceRealities_001.pdf.

they are steered towards public hospitals or offered differential treatment in private hospitals.

- The proportion of African Americans in a New York City community is a strong predictor of whether a hospital will be closed, notwithstanding the community's health needs.
- Although the New York city-wide infant mortality rate is 5.9, for African Americans it is 10.5.

Mental Health

- In New York State, Blacks are almost three times as likely as their White counterparts to be subjected to court-ordered mental health treatment, and Latinos are twice as likely.

Housing

- African Americans are over 5 times as likely, and Latino borrowers almost 4 times as likely, as White borrowers to receive high-cost home purchase loans. These sub-prime loans increase the likelihood of home foreclosure. Not surprisingly, 90% of people living in homeless shelters are Black and/or Latino.
- New York is the most segregated major metropolitan area for Latinos in the United States, and the eighth-most segregated area for African-Americans.

Criminal Justice

- Blacks and Latinos make up about half the general New York City population, but constitute 91% of the jail population. Over 92 percent of those serving drug-related sentences are Black and Latino.
- The majority of youth arrested for marijuana possession are Black and Latino, yet the City's own statistics show that White youth are more likely to use illegal substances – such as marijuana – than Black youth.
- Over half of police stops involved black suspects, 29% involved Latinos, while only 11% involved whites. When stopped, 45% of Blacks and Latinos were frisked compared to 29% of white suspects, even though white suspects were 70% more likely than black suspects to have a weapon.

Child Welfare

- Black and Latino children constitute an overwhelming 86% of the child welfare system. In fact, half of the New York City's caseloads come from 15 community districts that are primarily Black and Latino. Furthermore, a study of Black children in New York City showed that they are also more than twice as likely as White children to be removed from the home after a substantiated substance abuse claim.

Domestic Violence

- Women of color are arrested more often than White women when the police arrive at the scene of a domestic violence incident. In particular, police are more likely to arrest Black women due to stereotypes of them as overly aggressive. In New York City, one study found that more than 70% of the cases in which both partners in a domestic dispute were arrested involved racial minorities.

Immigrant Rights

- Despite laws that mandate the availability of language assistance services by health care providers to LEP patients, 75% of hospitals in New York City do not provide consistent and meaningful language access along key points of the health delivery process.
- The informal sector, which is characterized by exploitative working conditions and very few labor protections, is composed predominantly of people of color. One in five of the immigrant population in New York City is undocumented, and must therefore work in the informal sector. An overwhelming 95% of domestic workers are people of color, 99% are foreign-born, and 93% are women.

Need to Fully Implement the Human Rights Obligation to Advance Equality

These disparities will only get worse in the aftermath of the economic crisis. It is estimated, that nationwide, a third of African Americans and 40% of Latinos are likely to fall out of middle class and into poverty before crisis is over.⁴ The persistence of these disparities and our government's failure to prioritize it as a crisis is unacceptable. We as a society can and must do more. The Human Rights Project at the Urban Justice Center believes the immediate solutions lie in the implementation of our human rights obligations. As this Subcommittee looks toward concrete steps that it can take to address this crisis, we recommend the following:

Full Implementation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD or "Race Treaty"): We commend the government for fulfilling its reporting requirements since it ratified ICERD in 1994. We look forward to working with the State Department as it prepares for the submission of its next report to the United Nations Committee on the Elimination of Racial Discrimination due on 20 November 2011. While the government is current in its reporting requirements, there is still some work to be done in order to fully implement the protections of the Race Treaty. Specifically, the Human Rights Project at the Urban Justice Center encourages the following steps towards full implementation of ICERD:

⁴ Faultlines, Al Jazeera English, The Colour of Recession, (November 27, 2009) available at <http://english.aljazeera.net/programmes/faultlines/2009/11/2009112783949208668.html>

- The State Department and other relevant agencies should develop and adopt a comprehensive and proactive action plan to comply with the requirements of ICERD, and to respond to the Concluding Observations of the United Nations Committee on the Elimination of all forms of Racial Discrimination.⁵ The plan should include mechanisms to identify and remedy policies and practices that have a disproportionate negative effect based on race, ethnicity, and gender, as well as all the protected classes in respective local and state civil rights laws. Several localities including groups in New York City have been working to develop model human rights impact assessment tools.⁶ The plan should include provisions to support these efforts.
- One of the challenges to effective analysis of the disparate impact of policies and practices based on race, ethnicity and gender is the lack of disaggregated data. Congress should encourage the collection of data disaggregated at least by race and gender, and appropriately disaggregated by immigration status, sexual orientation, and gender identity. Furthermore, Congress should encourage the establishment of separate categories for the four largest Asian groups, as well as for the Middle-Eastern and Arab populations.
- ICERD was ratified by Congress with a declaration that the provisions of the treaty are not self-executing. We encourage Congress to pass legislation that would fully implement the provisions of ICERD.

Strengthening Accountability Mechanisms to Monitor and Implement Human Rights Treaties: The Human Rights Project at the Urban Justice Center also serves on the Steering Committee of the Campaign for a New Domestic Human Rights Agenda⁷, a coalition of more than 50 human rights, civil rights and social justice organizations working to strengthen our country's commitment to human rights at home and abroad. Specifically, the Campaign is working to improve accountability mechanisms to monitor and implement our human rights obligations under human rights law. In concert with the Campaign, we call on the State Department and Congress to fully implement ICERD, and to take action on the following:

- Revitalize an Interagency Working Group on Human Rights to coordinate the efforts of the Executive departments and agencies to implement human rights obligations in U.S. domestic policy;
- Transform the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights, and to expand its mandate to include civil and human rights issues experienced by members of the LGBTI community, and

⁵ Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, 03/05/2008, available at <http://www.hrpajc.org/documents/ICERDConcludingComment2008.pdf>.

⁶ The New York City Human Rights Initiative is a coalition of over 100 groups in New York City dedicated to the local implementation of human rights treaties. Please see contact information at www.nychri.org or www.hrpajc.org.

⁷ See http://www.uslrnetwork.org/new_domestic_human_rights

to monitor human rights implementation and enforcement efforts. A transformed Commission must function as an independent national human rights institution and would thus require structural changes supported by Congress; and

- Strengthen federal, state, and local government coordination in support of human rights monitoring, implementation and education.

Addressing the Specific Economic Needs of Communities of Color and Women:

The economic crisis has had a devastating effect on communities of color. The unemployment rate for African Americans is more than fifty per cent higher, and thirty per cent higher for Latinos than it is for White Americans. In New York City, the unemployment rate for Black New Yorkers was four times that of other New Yorkers at the beginning of the year.⁸ Unemployment is caused by a lack of jobs.⁹ To effectively address the problem, we need a government program to create direct employment where the private sector has failed to provide viable employment opportunities with a living wage, and pathways to move out of poverty. The United States government has an obligation to secure the right to decent work as specified by its formal acceptance of the United Nations Charter, the Universal Declaration of Human Rights, the International Convention on the Elimination of all forms of Racial Discrimination, and the International Covenant on Civil and Political Rights. We urge the Administration and Congress to adopt jobs program in the same vein as the New Deal public works program within the first quarter of 2010.

Expanding Human Rights Protections by Ratifying Outstanding Treaties:

The Human Rights Project at the Urban Justice Center urges the Administration and Congress to move expeditiously towards the ratification of outstanding human rights treaties including: The Convention on the Rights of the Child – the United States and Somalia are the only countries that have not yet ratified this treaty to protect the human rights of children; The Convention on the Elimination of all forms of Discrimination Against Women – the Administration has indicated interest in ratifying this treaty; The International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; and the Convention on the Rights of Persons with Disabilities. We also strongly urge the Administration to sign the United Nations Declaration on the Rights of Indigenous Peoples.

In closing, we thank the Subcommittee again for the opportunity to submit this testimony. Please contact us at edike@urbanjustice.org or 646-602-5629 if you have any questions.

⁸ Job Losses Show Wider Racial Gap in New York City. New York Times. By Patrick McGeehan and Mathew R. Warren. July 12, 2009. <http://www.nytimes.com/2009/07/13/nyregion/13unemployment.html>

⁹ The United States Bureau of Labor Statistics available at <http://www.bls.gov/news.release/empsit.nr0.htm>



**TESTIMONY OF THE
US HUMAN RIGHTS NETWORK**

**Task Force on the Effective Implementation of the Convention on the
Elimination of All Forms of Racial Discrimination
(CERD Task Force)**

**The Law of the Land: U.S. Implementation of Human Rights
Treaties**

Senate Judiciary Subcommittee on Human Rights and the Law

December 16, 2009

Chairman Durbin and members of the Senate Subcommittee, thank you for your leadership in coordinating this important hearing on treaty implementation. We are encouraged by the effort to include civil society in this important dialogue and look forward to continued engagement with your office and the administration.

The CERD Task Force, a subgroup of the US Human Rights Network, was formed in 2007 to coordinate a national civil society shadow report that was submitted to the U.N. Committee on the Elimination of Racial Discrimination in 2008. The Task Force is made up of organizations that represent the leading voices in human rights and racial justice. Our core mission is to ensure the effective implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its key obligations at the national and local level.

The mission of the USHRN is to 1) promote US accountability to universal human rights standards by building linkages between organizations and individuals working on human rights issues in the US; 2) strive towards building a human rights culture in the US that puts those directly affected by human rights violations, with a special emphasis on grassroots organizations and social movements, in a central leadership role; and 3) work towards connecting the US human rights movement with the broader US social justice movement and human rights movements around the world.

In the spirit of meaningful discussion between the Government and members of civil society, the USHRN welcomes the opportunity to submit a written response regarding implementation of the ICERD and in particular to bring attention to the lack of implementation of the key recommendations found in the 2008 Concluding Observations.¹

Background on ICERD

In May of 2007, the U.S. government submitted a long-overdue report to the United Nations Committee on the Elimination of Racial Discrimination regarding its compliance with the Convention.² The report, covered the fourth, fifth, and sixth periodic reports of the United States to the committee.

In response to the state report, civil society, under the leadership of the US Human Rights Network CERD Task Force, coordinated a 600 plus page "shadow report." The report included the response of 130 national, state and local organizations, including local grassroots advocates, national policy groups, public interest law firms, research institutes, civil rights attorneys and human rights experts.

¹ Concluding observations of the Committee on the Elimination of Racial Discrimination. [CERD/C/USA/CO/6/] February 2008

² The Committee considered the fourth, fifth and sixth periodic reports of the United States of America, submitted in a single document (CERD/C/USA/6), at its 1853rd and 1854th meetings (CERD/C/SR.1853 and 1854), held on 21 and 22 February 2008. At its 1870th meeting (CERD/C/SR.1870), held on 5 March 2008, it adopted the concluding observations.

Topics covered by the shadow report included the ongoing, devastating, and racially discriminatory impacts of the U.S. government's response to hurricanes Katrina and Rita; persistent housing discrimination and homelessness; increasing racial disparities in education and the racially discriminatory effects of the school-to-prison pipeline; historic and ongoing violations of indigenous peoples' rights; dramatic racial disparities in health and access to health care and reproductive rights; widespread racial profiling and police brutality; stark racial disparities in the juvenile and criminal justice systems and the resultant racially discriminatory impacts of prison conditions and post-incarceration penalties; discrimination against immigrants of color; and racial discrimination in employment and racial disparities in workplace conditions.

The review of the U.S. record on racial discrimination culminated in two days of hearings before the ICERD committee in February 2008. More than 125 people from roughly 100 organizations across the country traveled to Geneva, Switzerland to monitor and participate in the hearings. The U.S. delegation constituted the largest group of non-governmental organizations ever to monitor a review of the U.S. government's compliance with its obligations under international law.

Concluding Observations

On March 7, 2008, the Committee on the Elimination of Racial Discrimination adopted its Concluding Observations and Recommendations regarding the fourth, fifth, and sixth Periodic Report of the United States.

Paragraph 45 of the Committee's Concluding Observations and Recommendations called on the United States to "provide information on the way it has followed up on the Committee's recommendations contained in paragraphs 14 [racial profiling], 19 [Western Shoshone Decision No 68], 21 [juvenile life without parole], 31 [housing and those on the Gulf Coast displaced by Hurricanes Katrina and Rita] and 36 [public education and CERD], pursuant to paragraph 1 of rule 65 of the rules of procedure."

On January 19, 2009, as one of its last official actions, the Bush Administration submitted its Rule 65 follow-up report.³ In response to the submission, civil society once again submitted a one-year follow up report with the committee on the lack of implementation of the concluding observations.

Definition of Racial Discrimination under ICERD and Disparate Impact

The CERD Committee reminded the United States of the previous concluding observations in 2001, emphasizing that "the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in article 1, paragraph 1, of the Convention which requires States parties to prohibit and

³ CERD/C/USA/CO/6/Add.1. [5 February 2009]

eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.⁴

The Committee recommends the State party to review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure – in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.

This definition is particularly important in light of strict interpretations of Title VI Civil Rights Act. While effect discrimination (also called disparate impact) is prohibited by Title VI through implementing regulation, it is essentially unenforceable.⁵

The CERD treaty is an important tool in combating racial discrimination. At its core, it covers the both intentional discrimination and policies and practices that have a discriminatory effect. This is an increasingly important notion in relation to the racial disparities found in education, poverty, and health care. CERD requires state parties to examine and reform their own policies that create racial disparities and segregation and it also requires states to monitor and take affirmative steps to address general societal discrimination and segregation, including the continuing legacy of historical discrimination.⁶

To this end the United States has done very little to review and assess the disparate impacts of its policies and practices in the areas of education, poverty, and health care. While data on race is collected and there is overwhelming evidence of the disparate impact of policies in communities of color, nothing or little is done to remedy these policies or outcomes.

The CERD Task Force calls on the Sub-Committee to push for and support a National Plan of Action on Racial Justice and Human Rights that fully implements the Concluding Observations of the ICERD Committee. **A national action plan would not only bring the United States in alignment with its obligations under ICERD but would provide the U.S. with an opportunity to assess the state of race under the Obama administration and put forth measurable benchmarks for eliminating and reducing disparities in communities of color.** Developed nations across the globe, including Ireland, have developed and implemented important National Action Plans related to human rights.⁷

⁴ A/56/18, paras. 380-407

⁵ In *Alexander v. Sandoval*, the Supreme court has held that an individual cannot sue (that is does not have a private right of action) on effect discrimination that only an agency can enforce the regulation.

⁶ Poverty & Race. By Phil Tegler. March/April 2007 • Vol. 16, No. 2

⁷ *Planning For Diversity: The National Action Plan Against Racism, 2005 – 2008. Prepared by the Department of Justice, Equality and Law Reform.*

In recommendation [35] of the Concluding Observations, the Committee expressed concerns that claims of racial discrimination under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment must be accompanied by proof of intentional discrimination. (Articles 1 (1) and 6).

The Committee recommended that the State party review its federal and state legislation and practice concerning the burden of proof in racial discrimination claims, with a view to allowing – in accordance with article 1, paragraph 1 of the Convention – a more balanced sharing of the burden of proof between the plaintiff, who must establish a *prima facie* case of discrimination, whether direct or based on a disparate impact, and the defendant, who should provide evidence of an objective and reasonable justification for the differential treatment.

The Committee calls in particular on the State Party to consider adoption of the Civil Rights Act of 2008.

The treaty, and the concluding observations issued in 2001 and 2008, call on the United States to establish a national institution whose purpose would be to monitor the implementation of ICERD and its provisions. Several organizations, including Columbia Law School's Human Rights Institute have provided this committee with particular recommendations for compliance with the concluding observations.⁸ We support the recommendations put forth and look forward to working with the committee to realize the priorities set forth in *Human Rights at Home: A Domestic Blueprint for the New Administration (2008)*.

In addition to the concluding observations that required a one year follow-submission, there are several additional observations that were included in the report that require legislative action. We have included some of those recommendations below.

Additional Concluding Observations

1. While welcoming the acknowledgement by the delegation that the State party is bound to apply the Convention throughout its territory and to ensure its effective application at all levels – federal, state, and local – regardless of the federal structure of its government, the Committee notes with concern the lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels. (Article 2)

⁸ See Catherine Powell, American Constitution Society for Law and Policy, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (2008) [hereinafter *Blueprint*], available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>; see also Leadership Conference on Civil Rights, *Restoring the Conscience of a Nation* (2009) [hereinafter *LCCR Report*], available at http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf.

The Committee recommends that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels.

2. The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling – including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* – such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 9/11 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa. (Articles 2 and 5 (b))

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, *inter alia* by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation no. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.

3. The Committee notes with concern that recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms. (Article 2 (2))

The Committee reiterates that the adoption of special measures “when circumstances so warrant” is an obligation arising from article 2, paragraph 2, of the Convention. The Committee therefore calls once again on the State party to adopt and strengthen the use of such measures when circumstances warrant their use as a tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial, ethnic and national minorities.

4. The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in

poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. (Article 3)

The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:

- (i) support the development of public housing complexes outside poor, racially segregated areas;
- (ii) eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and
- (iii) ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of “steering” and other discriminatory practices carried out by private actors.

5. The Committee remains concerned about the persistence of *de facto* racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address *de facto* segregation by prohibiting the use of race-conscious measures as a tool to promote integration. (Articles 2 (2), 3 and 5 (e) (v))

The Committee recommends that the State party undertake further studies to identify the underlying causes of *de facto* segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school de-segregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures – including the enactment of legislation – to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

6. While appreciating that some forms of hate speech and other activities designed to intimidate, such as the burning of crosses, are not protected under the First Amendment to the U.S. Constitution, the Committee remains concerned about the wide scope of the reservation entered by the State party at the time of ratification of the Convention with respect to the dissemination of ideas based on racial superiority and hatred. (Article 4)

The Committee draws the attention of the State party to its general recommendations No. 7 (1985) and No. 15 (1993) concerning the implementation of article 4 of the Convention, and request the State party to consider withdrawing or narrowing the scope of its reservations to article 4 of the Convention. In this regard, the Committee wishes to reiterate that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas.

7. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1 (68) of 2006 (CERD/C/USA/DEC/1). (Article 5)

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

8. The Committee reiterates its concern with regard to the persistent racial disparities in the criminal justice system of the State party, including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African American persons, receive at various stages of criminal proceedings. (Article 5 (a))

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, according to which stark racial disparities in the administration and functioning of the criminal justice system, including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, may be regarded as factual indicators of racial discrimination, the Committee recommends that the State party take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other organs administering justice, including further studies to determine the nature and scope of the problem, and the implementation of national strategies or plans of action aimed at the elimination of structural racial discrimination.

9. The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole. (Article 5 (a))

The Committee recalls the concerns expressed by the Human Rights Committee (CCPR/C/USA/CO/3/Rev.1, para. 34) and the Committee against Torture (CAT/C/USA/CO/2, para. 34) with regard to federal and state legislation allowing the use of life imprisonment without parole against young offenders, including children. In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

10. While welcoming the recent initiatives undertaken by the State party to improve the quality of criminal defense programmes for indigent persons, the Committee is concerned about the disproportionate impact that persistent systemic inadequacies in these programmes have on indigent defendants belonging to racial, ethnic and national minorities. The Committee also notes with concern the disproportionate impact that the lack of a generally recognised right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities. (Article 5 (a))

The Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defense programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, *inter alia* by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs – such as housing, health care, or child custody – are at stake.

11. The Committee remains concerned about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of studies, including a recent study released in October 2007 by the American Bar Association (ABA).⁹ (Article 5 (a))

Taking into account its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends

⁹ American Bar Association, "State Death Penalty Assessments: Key Findings," 29 October 2007, <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>.

that the State party undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices. The Committee wishes to reiterate its previous recommendation – contained in paragraph 396 of its previous concluding observations of 2001 – that the State party adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.

12. The Committee regrets the position taken by State party that the Convention is not applicable to the treatment of foreign detainees held as “enemy combatants”, on the basis of the argument that the law of armed conflict is the exclusive *lex specialis* applicable, and that in any event the Convention “would be inapplicable to allegations of unequal treatment of foreign detainees” in accordance to article 1, paragraph 2, of the Convention. The Committee also notes with concern that the State party exposes non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or *refoulement* to third countries where there are substantial reasons to believe that they will be subjected to such treatment. (Articles 5 (a), 5 (b) and 6)

Bearing in mind its general recommendation no. 30 (2004) on non-citizens, the Committee wishes to reiterate that States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice, to the extent recognised under international law, and that Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination set out in article 1, paragraph 1, of the Convention.

The Committee also recalls its Statement on racial discrimination and measures to combat terrorism (A/57/18), according to which States parties to the Convention are under an obligation to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin.

The Committee therefore urges the State party to adopt all necessary measures to guarantee the right of foreign detainees held as “enemy combatants” to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violations. The Committee further request the State party to ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.

13. While recognising the efforts made by the State party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border. The Committee also notes with concern that despite the efforts made by the State party to prosecute law enforcement officials for criminal misconduct, impunity of police officers responsible for abuses allegedly remains a widespread problem. (Articles 5 (b) and 6)

The Committee recommends that the State party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the U.S.-Mexico border, *inter alia* by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee further requests the State party to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.

14. While welcoming the various measures adopted by the State party to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, the Committee remains deeply concerned about the incidence of rape and sexual violence experienced by women belonging to such groups, particularly with regard to American Indian and Alaska Native women and female migrant workers, especially domestic workers. The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered. (Articles 5 (b) and 6)

The Committee recommends that the State party increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, *inter alia* by:

- (i) **setting up and adequately funding prevention and early assistance centres, counselling services and temporary shelters;**
- (ii) **providing specific training for those working within the criminal justice system, including police officers, lawyers, prosecutors and judges, and medical personnel;**
- (iii) **undertaking information campaigns to raise awareness among women belonging to racial, ethnic and national minorities about the mechanisms and procedures provided for in national legislation on racism and discrimination; and**

- (iv) **ensuring that reports of rape and sexual violence against women belonging to racial, ethnic and national minorities, and in particular Native American women, are independently, promptly and thoroughly investigated, and that perpetrators are prosecuted and appropriately punished.**

The Committee requests the State party to include information on the results of these measures and on the number of victims, perpetrators, convictions, and the types of sanctions imposed, in its next periodic report.

15. The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system. The Committee notes with particular concern that in some states, individuals remain disenfranchised even after the completion of their sentences. (Article 5 (c))

Taking into account the disproportionate impact that the implementation of disenfranchisement laws has on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, the Committee recommends that the State Party adopt all appropriate measures to ensure that the denial of voting rights is used only with regard to persons convicted of the most serious crimes, and that the right to vote is in any case automatically restored after the completion of the criminal sentence.

16. The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterised by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including *Hoffman Plastics Compound, Inc. v. NLRB* (2007), *Ledbetter v. Goodyear Tire and Rubber Co.* (2007) and *Long Island Care at Home, Ltd. v. Coke* (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses. (Articles 5 (e) (i) and 6)

The Committee recommends that the State party take all appropriate measures – including increasing the use of “pattern and practice” investigations – to combat *de facto* discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention. The Committee further recommends that the State

party take effective measures – including the enactment of legislation, such as the proposed Civil Rights Act of 2008 – to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.

17. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi))

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.

18. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions. (Articles 2 (1) (d) and 5 (e))

In light of article 2, paragraph 1 (d), and 5 (e) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities

of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.

19. The Committee, while noting the efforts undertaken by the State party and civil society organisations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane. (Article 5 (e) (iii))

The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls on the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them.

20. While noting the wide range of measures and policies adopted by the State party to improve access to health insurance and adequate health care and services, the Committee is concerned that a large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services. (Article 5 (e) (iv))

The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services. The Committee requests the State party to collect statistical data on health disparities affecting persons belonging to racial, ethnic and national minorities, disaggregated by age, gender, race, ethnic or national origin, and to include it in its next periodic report.

21. The Committee regrets that despite the efforts of the State party, wide racial disparities continue to exist in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among women and children belonging to racial, ethnic and national minorities, especially African Americans, the high incidence of unintended pregnancies and greater abortion rates affecting African American women, and the growing disparities in HIV infection rates for minority women. (Article 5 (e) (iv))

The Committee recommends that the State party continue its efforts to address persistent racial disparities in sexual and reproductive health, in particular by:

- (i) **improving access to maternal health care, family planning, pre- and post- natal care and emergency obstetric services, *inter alia* through the reduction of eligibility barriers for Medicaid coverage;**
- (ii) **facilitating access to adequate contraceptive and family planning methods; and**
- (iii) **providing adequate sexual education aimed at the prevention of unintended pregnancies and sexually-transmitted infections.**

22. While welcoming the measures adopted by the State party to reduce the significant disparities in the field of education, including the adoption of the *No Child Left Behind Act* of 2001 (NCLB), the Committee remains concerned about the persistent “achievement gap” between students belonging to racial, ethnic or national minorities, including English Language Learner (“ELL”) students, and white students. The Committee also notes with concern that alleged racial disparities in suspension, expulsion and arrest rates in schools contribute to exacerbate the high drop out rate and the referral to the justice system of students belonging to racial, ethnic or national minorities. (Article 5 (e) (v))

The Committee recommends that the State party adopt all appropriate measures – including special measures in accordance with article 2, paragraph 2, of the Convention – to reduce the persistent “achievement gap” between students belonging to racial, ethnic or national minorities and white students in the field of education, *inter alia* by improving the quality of education provided to these students. The Committee also calls on the State Party to encourage school districts to review their “zero tolerance” school discipline policies, with a view to limiting the imposition of suspension or expulsion to the most serious cases of school misconduct, and to provide training opportunities for police officers deployed to patrol school hallways.

23. The Committee regrets that despite the efforts made by the State party to provide training programmes and courses on anti-discrimination legislation adopted at the federal and state levels, no specific training programmes or courses have been provided to, *inter alia*, government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and other public officials in order to raise their awareness about the Convention and its provisions. Similarly, the Committee notes with regret that information about the Convention and its provisions has not been brought to the attention of the public in general. (Article 7)

The Committee recommends that the State party organise public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social

workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.

24. The Committee requests the State party to provide, in its next periodic report, detailed information on the legislation applicable to refugees and asylum seekers, and on the alleged mandatory and prolonged detention of a large number of non-citizens, including undocumented migrant workers, victims of trafficking, asylum seekers and refugees, as well as members of their families. (Article 5 (b), 5 (e) (iv) and 6)
25. The Committee also requests the State party to provide, in its next periodic report, detailed information on the measures adopted to preserve and promote the culture and traditions of American Indian and Alaska Native (AIAN) and Native Hawaiian and Other Pacific Islander (NHPI) peoples. The Committee further requests the State party to provide information on the extent to which curricula and textbooks for primary and secondary schools reflect the multi-ethnic nature of the State party, and provide sufficient information on the history and culture of the different racial, ethnic and national groups living in its territory. (Article 7)
26. The Committee is aware of the position of the State party with regard to the Durban Declaration and Programme of Action and its follow up, but in view of the importance that such process has for the achievement of the goals of the Convention, it calls on the State party to consider participating in the preparatory process as well as in the Review Conference itself.
27. The Committee notes that the State party has not made the optional declaration provided for in article 14 of the Convention and invites it to consider doing so.
28. The Committee recommends that the State party ratify the amendment to article 8, paragraph 6, of the Convention, adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by the General Assembly on 16 December 1992 (resolution A/RES/47/111). In this connection, the Committee cites General Assembly resolution of 19 December 2006 (A/RES/61/148), in which the Assembly strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.
29. The Committee recommends that the State party's reports be made readily available to the public at the time of their submission, and that the observations of the Committee with respect to these reports be similarly publicised in the official and national languages.
30. The Committee recommends that the State party consult widely with organisations of civil society working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report.

31. The Committee recommends that the State party submit its seventh, eighth and ninth periodic reports in a single document, due on 20 November 2011, and that the report be comprehensive and address all points raised in the present concluding observations.



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**Written Statement for the Record
 Hearing on U.S. Treaty Compliance
 Senate Committee on the Judiciary
 Subcommittee on Human Rights and the Law**

December 16, 2009

Honorable Richard J. Durbin and
 Members of the Senate Committee on the Judiciary
 Subcommittee on Human Rights and the Law
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Mr. Chairman, Honorable Members,

On behalf of the Center for Law and Global Justice of the University of San Francisco School of Law, I would like to submit this letter for the record and commend you for holding hearings on U.S. compliance with international treaty obligations. We urge you to consider the issue of juvenile life without parole sentences, a practice that occurs in federal as well as state cases involving juveniles, and which impairs United States compliance with international human rights treaties and customary international law obligations.

We have confirmed through our investigation of global law and practice, as described in our law review article (see below for website address), that the United States is the only country in the world to sentence children to life in prison without the possibility of parole review. We recently reconfirmed these findings, updated at <http://www.law.usfca.edu/academics/projects/jlwop.html>, which are particularly relevant in the wake of the two U.S. Supreme Court cases pending decision on this subject. All other nations of the world have condemned this practice as against international law. Of the more than 2,500 children serving anywhere in the world, all are located in prisons in this country. Continuing to apply this sentence leaves the United States isolated in an area of human rights and criminal justice where we once served as a global leader.

The United States has been urged to abolish this practice by the United Nations General Assembly, the United Nations Human Rights Council, to which the U.S. was just elected a member, and by the three major human rights treaty bodies with oversight authority for the treaties to which the U.S. is a legal party. (See our law review article describing this in greater detail, "Sentencing Children to Die in Prison: Global Law and Practice," 42 *USF Law Review* 983 (2008), posted at: <http://www.law.usfca.edu/centers/documents/jlwoplawreview.pdf>.)

Last year, the U.N. Committee on Racial Discrimination raised serious questions about U.S. compliance with our obligations under the Convention on the Elimination of Racial Discrimination because of the significant racial disparity in the application of this sentence in many states across the country. In June, 2009, on behalf of numerous human rights organizations, we submitted a letter to the Committee clarifying our earlier reports to include new information about the federal government's application of this sentence disproportionately to youth of color now serving in U.S. federal prisons. The racial disparity is of serious concern given that over 70% of those serving are African American or Hispanic youths.

Other treaty bodies which have condemned the use of this sentence and indicated their concern in reviewing U.S. compliance with treaty obligations, include the Committee against Torture and the U.N. Human Rights Committee (monitoring bodies for the Convention Against Torture and the International Covenant on Civil and Political Rights, respectively, of which the U.S. is also a party). The law review article referenced in this letter documents this issue further, as do other materials found on our site at: <http://www.law.usfca.edu/academics/projects/jlwop.html>.

On behalf of the Center for Law and Global Justice, I thank the Committee for considering these issues in its hearing scheduled for December 16, 2009, and would request that this letter be included formally into the official record for the hearings.

I would also be happy to provide any further information on this subject to the Committee at any time. I can be reached at (415) 422-3330 or via email at mleighton@usfca.edu.

Sincere regards,



Michelle Leighton
Director Human Rights Programs

Re-Submitted: December 17, 2009



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December 14, 2009

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am a Clinical Professor of Law at the Rutgers School of Law-Newark where I have taught for 16 years. I am also the Co-Director of the Constitutional Litigation Clinic, a law firm that specializes in civil rights and human rights law that has been part of the Rutgers Law School curriculum for 40 years. Much of my work focuses on the intersection between constitutional law and international law.

I commend the Subcommittee for holding hearings on implementing human rights treaties. This action is the first step towards acknowledging that the U.S. has a legal obligation to both its citizens and the world to enforce the human rights treaties that it has ratified. I hope that this historic hearing is just the first of many.

In the past twenty years, the U.S. has ratified several international human rights treaties including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Elimination of All Forms of

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Racial Discrimination. Unfortunately, the U.S. has included broad reservations, understandings and declarations ("RUDs") in all the human rights treaties it has signed. The RUDs essentially render the human rights treaties unenforceable. RUDs have been criticized by the United Nations Human Rights Committee-which is authorized to review the U.S.'s compliance with human rights treaties every five years. The RUDs have also been criticized by other nations who are signatories to human rights treaties.

Article VI of the United States Constitution makes clear treaties are the supreme law of the land. It is thus critical for the U.S. to ensure that it takes every action to implement its treaty obligations.

Implementation is doable. The U.S. could easily follow the example of Canada in implementing its treaties. Like the U.S., Canada has a federalist system in which governing power is shared between the federal government and the provinces. Canada's federal government works closely with provincial and local governments before and after the ratification of treaties to determine how they will be implemented. In addition, the federal and provincial governments work together to prepare reports regarding their progress with implementing the treaty into domestic laws.

In order for the U.S. to meet its constitutional obligations, I urge that the Subcommittee take the following steps to implement the human rights treaties that the U.S. has ratified:

1. Immediately withdraw all RUDs to all human rights treaties.
2. Draft and enact clear legislation, akin to 42 U.S.C. § 1983, to breathe life into human rights treaties. Such legislation would allow treaties to be invoked in courts of law by victims of human rights violations.
3. Establish a federal-level commission much like Canada's to implement treaties on federal, state and local levels of government.
4. Provide immediate training to legislators, judges and members of the executive branch concerning the U.S.'s

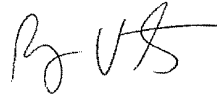
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obligations under the various human rights treaties it has ratified.

I also urge the Subcommittee to make it a priority to ratify human rights treaties that the U.S. has signed, but not formally ratified. Those treaties are: the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on Economic, Social and Cultural Rights.

Rutgers Law School would be happy to provide the Subcommittee with any assistance it needs to help incorporate treaty-based human rights law into the legal fabric of the United States.

Respectfully submitted,



Penny M. Venetis

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