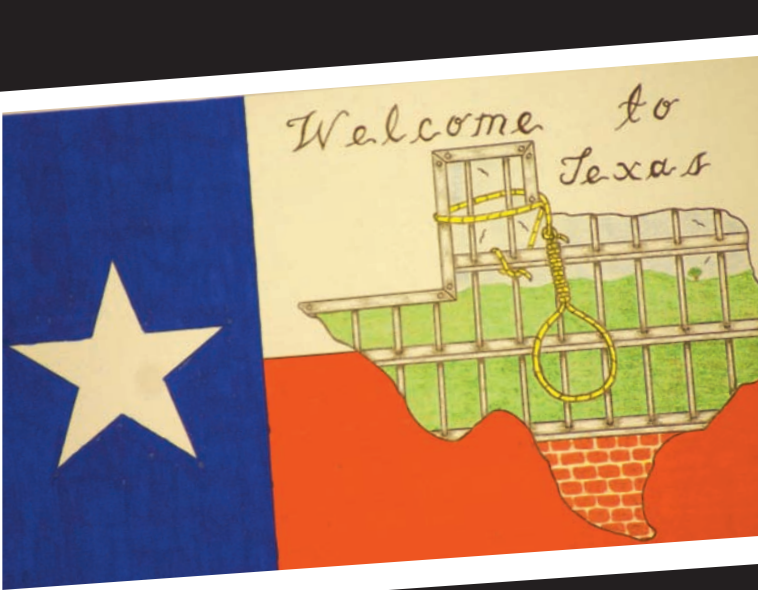


# HUMAN RIGHTS

BEGIN AT

# HOME

CELEBRATING THE 60TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS



## **Human Rights Begin at Home**

### **Celebrating the 60th Anniversary of the Universal Declaration of Human Rights**

Published: Published April 2009 (Online version posted December 10, 2008)

Edited By: Jamil Dakwar and Mia Nitchun

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution, the laws and treaties of the United States.

In 2004, the ACLU created a Human Rights Program (HRP) specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. HRP is part of a reemerging movement of U.S. based organizations that uses the international human rights framework in domestic rights advocacy. The Program uses human rights strategies to complement existing ACLU advocacy in the areas of national security, immigrants' rights, women's rights, racial justice, the death penalty and children's rights.

Learn more about the program at [www.aclu.org/humanrights/](http://www.aclu.org/humanrights/)

#### OFFICERS AND DIRECTORS

Susan N. Herman, President

Anthony D. Romero, Executive Director

Richard Zacks, Treasurer

#### ACLU NATIONAL OFFICE

125 Broad Street, 18th Fl.

New York, NY 10004-2400

(212) 549-2500

[www.aclu.org](http://www.aclu.org)



Production coordinated by Todd Drew.

The artwork in this report was created by Willa Tracosas.

Editorial assistance provided by Aadika Singh, Nahal Zamani and Greer Feick.

# Contents

- SUSAN N. HERMAN **Foreword** (*i*)
- JAMIL DAKWAR **Introduction** (*iv*)
- LENORA M. LAPIDUS **Advancing Equality:**  
*Using International Human Rights Strategies  
to Further Women's Rights at Home* (1)
- LALEH ISPAHANI  
AND DENNIS PARKER **A Long March to Progress:**  
*Human Rights Advocacy to End  
Racial Discrimination in America* (6)
- ANNA ARCENEUX  
AND CHRISTOPHER HILL **Executing Human Rights:**  
*The Death Penalty in the United States* (10)
- CHANDRA BHATNAGAR **The Continuing Struggle:**  
*Human Rights and Immigrant Workers* (14)
- T. JEREMY GUNN **Faith & Freedom:**  
*Using the UDHR to Practice What We Preach* (19)
- VANITA GUPTA  
AND LISA GRAYBILL **Justice Denied:**  
*Immigrant Families Detained at Hutto* (23)
- STEVEN WATT **Human Rights on the Judicial Front:**  
*Litigating Protection in U.S. Courts* (29)
- JENNIFER TURNER  
AND ALICE FARMER **Children of Lesser Rights:**  
*The United States Failure to Ratify the Convention  
on the Rights of the Child* (33)
- JAMES FELAKOS **Enabling Everyone:**  
*The United Nations Convention on the Rights  
of Persons with Disabilities* (36)
- HINA SHAMSI **The Larger Struggle:**  
*Human Security Requires Human Rights* (40)

This publication is dedicated to the memory of  
ACLU Publications Director Todd Drew. Todd died on Jan. 15, 2009,  
at 41 years of age. This UDHR report was his last project.

Todd brought great talent and dedication to his role as Publications Director  
for the National ACLU. As he did with so many other ACLU publications, he worked  
around the clock to ensure that this report was ready for posting on the web  
by December 10: International Human Rights Day.

Those of us who had the good fortune to work with Todd will attest  
to his remarkable warmth and generosity of spirit. His legacy will be remembered  
not only through the many publications that Todd produced for the ACLU,  
but also through the way he touched us all with his  
unfailing kindness and good cheer.

# Foreword

SUSAN N. HERMAN

Just after I was elected President of the American Civil Liberties Union on October 18, 2008, a reporter asked me what my goals were for the organization. One of the top priorities I listed was to further expand the use of international law as part of the ACLU's work to protect and defend civil liberties in the United States.

Attention to international human rights norms is both an old and new frontier for the ACLU. Roger Baldwin, co-founder of the ACLU in 1920, argued for a broad vision of the ACLU's mission: in addition to protecting constitutional liberties by resisting censorship in all forms, Baldwin maintained that the organization should also devote itself to "aid Negroes in their fight for civil rights," to campaign against police misconduct, and to fight attempts to deport or exclude immigrants in unfair proceedings. These are all familiar parts of the ACLU's mandate today, which includes not only protection of civil liberties, but protection of civil and human rights. Baldwin also called for ACLU involvement in the international civil liberties community, recognizing the indissoluble connection between what was happening in the rest of the world and civil rights and civil liberties in the United States. His colleagues enthusiastically agreed with all of his agenda except for the international component. In its formative years, the ACLU understandably shied away from international involvement for fear of dissipating resources.

Baldwin understood, as his col-

leagues evidently did not, that American rights and liberties cannot be defended in isolation. The battle for civil rights provides one dramatic example of how international opinion helped to form domestic constitutional law. The ACLU was among the first organizations in the United States to fight racial segregation. Sometimes its efforts were successful, as when a challenge to racial segregation in the armed forces led to Harry Truman's 1948 executive order banning this form of segregation. But other victories, like desegregation of the schools, took decades of work to achieve. This was because so many Americans, including the courts, continued to believe that the American experience was unique, and that "separate but equal" facilities and other forms of racial discrimination were acceptable under the United States Constitution. Individual voices from outside the United States, like that of Swedish economist Gunnar Myrdal, helped to fuel the battle for civil rights in our country. Myrdal's 1944 study of race relations, *An American Dilemma*, is widely credited with contributing to the United States Supreme Court's landmark decision in *Brown v. Board of Education* that separate but equal education would henceforth be considered unconstitutional.

After World War II, the Universal Declaration of Human Rights (UDHR) melded individual voices from around the world into a powerful chorus of opposition to deprivation of rights on the basis of race or color, or on other

grounds like “sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This Declaration, adopted by the United Nations in 1948, was a response to the chilling lesson of World War II: that intolerance of people based on their race, religion, sexuality, or opinions can culminate in inhuman behavior. In the Universal Declaration of Human Rights, the international community declared that every person has a right to be treated with dignity. This Declaration has consequences within and beyond the United States.

Roger Baldwin would be proud of today’s ACLU. In the early seventies, the ACLU Board of Directors first adopted a policy (amended in 1992) acknowledging that active and expressed support for international human rights legitimizes and strengthens the value of civil liberties and civil rights within the United States as well as in the rest of the world. The policy went on to express the ACLU’s support for promoting the Universal Declaration of Human Rights, in addition to other international covenants of human rights like the 1953 United Nations Convention on the Rights of Women, and the 1956 United Nations Convention on the Elimination of All Forms of Racial Discrimination.

To implement this policy, the ACLU established a Human Rights Program, whose mission is to ensure that the U.S. government complies with universal human rights principles as well as the U.S. Constitution. The Program uses human rights strategies to complement

preexisting ACLU advocacy on national security, immigrants’ rights, women’s rights, and racial justice issues. These strategies, sometimes invoking the UDHR and sometimes other international sources, have proved essential in areas where, as in early cases about race, parochial United States courts have been dismissive of our concerns.

One successful example of the use of international rights strategies to persuade the United States Supreme Court to change American law has been in the area of capital punishment. The current Supreme Court holds that capital punishment is not unconstitutionally cruel and unusual—unusual though it may be among the countries of the world. Nevertheless, advocates including the ACLU recently persuaded the United States Supreme Court to rule that execution of the mentally retarded (in *Atkins v. Virginia* in 2002) and of juveniles (in *Roper v. Simmons* in 2005), amounts to unconstitutional cruel and unusual punishment. Demonstrating to the Court that international human rights principles set a higher standard than American law was a critical part of this effort.

In other areas, American courts have not yet heeded international norms. During the week after I was elected President, ACLU lawyers brought their client, Jessica Gonzales (now Lenahan), before the Inter-American Commission on Human Rights (IACHR or “the Commission”) for a hearing. This was a second attempt at justice for Gonzales. She had been un-

able to obtain a hearing in United States courts on the merits of her claim, which asserted that her children were killed because the Colorado police refused to enforce a protective order she had won against her estranged husband.

Six months earlier, ACLU lawyers had asked the Commission to hear the case of Khaled El-Masri, who was denied a hearing in American courts on his claim that he had been a victim of the United States government’s practice of extraordinary rendition. The courts were willing to assume that El-Masri was telling the truth in his nightmarish tale of being kidnapped at the Macedonian border, sent to a black site, detained, and tortured, all in a case of mistaken identity. The United States courts nevertheless dismissed his case on the basis of the so-called “state secrets privilege”—in other words, ruling that the United States government should be allowed to keep its secrets, no matter how shameful.

Another successful example of ACLU involvement in the international arena is its advocacy surrounding the submission of a 2007 report to the U.N. committee that monitors the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The report, *Race and Ethnicity in America: Turning a Blind Eye to Injustice*, provides a detailed examination of human rights violations in the U.S., including the government’s response to Hurricane Katrina, escalating police brutality, racial profiling, the exploitation of migrant workers, a dramatic

increase in anti-immigrant practices, and the “school-to-prison pipeline,” whereby students of color are channeled out of school and into the criminal justice system. The ACLU sent a delegation to Geneva for the 2008 Committee review of U.S. compliance with ICERD. This delegation gave testimony, in a variety of forums, to the government’s failure to address problems of widespread racial and ethnic discrimination in America. The ACLU continues its involvement with the CERD process through documentation of violations, encouraging Congress to establish and implement treaty enforcement mechanisms and by incorporating the CERD Committee’s recommendations into its issue advocacy.

Participation in forums outside the United States and use of international human rights declarations and covenants like the UDHR are still relatively new tools for ACLU lawyers, but they

are and should be tools for the future. As the Board’s policy says, the ACLU’s primary concern is with defending civil rights and liberties in the United States and with the actions of United States officials. We are not looking to open branch offices in London or Beijing. But our work is very much connected with that of rights advocates in the UK and China. We work in the hope that American law will provide positive models for those defending rights and liberties in other countries. But in the areas where our country is not a leader, we hope that, as in the area of capital punishment, we can learn to follow.



Susan N. Herman  
*President, American Civil Liberties Union*  
December 2008

# Introduction

## *The UDHR at Sixty ... Human Rights Begin at Home*

JAMIL DAKWAR

Sixty years ago the United Nations adopted the Universal Declaration of Human Rights (UDHR). The UDHR has since become the foundation of the modern human rights system or, in the words of Eleanor Roosevelt, “the international Magna Carta.” The UDHR laid the foundation for a system of rights which are universal, indivisible, and interdependent. The UDHR recognizes that full realization of one’s civil and political rights is contingent upon access to economic, social and cultural rights as well.

Its 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, NGOs and advocates to take action anywhere human rights are threatened. Sadly, as a result of eight years of ruinous Bush administration policies, one place where those rights are in jeopardy is right here at home.

Under the guidance of Eleanor Roosevelt, the United States was a driving force in the creation of the UDHR and the document was clearly influenced by the U.S. Bill of Rights. But, like the Bill of Rights, the UDHR has suffered as U.S. policies and practices have not always lived up to the ideals they stand for. Particularly in the last eight years, the U.S. has fallen disastrously behind in its commitment to recognize and protect human rights at home and abroad. The UDHR describes how, “... disregard and contempt for human rights have resulted in barbarous acts

which have outraged the conscience of mankind.” It is extraordinary to realize that this description has come to apply so aptly to our own government.

Although the notion of universal rights to be enjoyed by all persons was a great step forward, the decisions of the U.S. government during the past 60 years have greatly hindered the ability of people to enjoy these rights, both abroad and at home. Beginning with the debate, during and immediately following World War II, over the creation of an international human rights system, the U.S. pushed for and ultimately succeeded in creating a non-binding declaration, instead of a binding covenant. This decision was taken to pacify segregationists in the U.S. Congress. A further impediment to the realization of the UDHR has been the view, by supporters of U.S. exceptionalism, that the UDHR and international human rights law are unnecessary at home, and should be used exclusively as a tool of U.S. foreign policy.

Indeed, when most Americans think about human rights, they tend to associate them with what happens overseas. This common misperception is largely a result of a deliberate policy to exempt the U.S. from domestic human rights obligations. We are told that human rights are a foreign concept which belong to the realm of U.S. foreign policy, within the exclusive jurisdiction of the State Department and the congressional foreign relations committees. Ironically, and quite tragically, the consequences of the 9/11 attacks,



and the U.S. government response, resulted in bringing the debate about human rights back home with the expansion of abusive and unchecked powers of the executive branch. This imperial approach, and assumption of unauthorized power, led to unfounded claims that national security takes precedence over human rights obligations. These claims were further used to justify the use of torture, secret and indefinite detention, unfair trials, unfettered governmental surveillance, and ethnic profiling.

The failure by the Bush administration to adopt and adhere to clear standards that prohibit the use of torture, cruel, inhuman or degrading treatment or punishment, led to the widespread and systemic abuse of detainees and prisoners, in U.S. custody, in Afghanistan, Guantánamo Bay, Iraq and elsewhere. These standards, as codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), offer more expansive protections than the standards set forth in the 5th and 8th amendments to the U.S. Constitution. In 1994, the U.S. Senate ratified CAT based on the recommended ratification 'package' from the Clinton administration. This package included reservations, understandings and declarations (RUDs) which, in effect, circumvented the full applicability of CAT, and made it easier for the Bush administration to design and justify torture and other abusive interrogation policies.

More generally, the U.S. govern-

ment's current policies, from the failure to adequately abide by existing human rights treaty obligations, to the failure to ratify the majority of international human rights treaties—including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women—continue to hinder our ability to realize many basic rights and protections. They also negatively impact upon the U.S. moral and political standing in the world.

It is equally important to examine the state of human rights at home. Recent compelling examples include: the government's inadequate response in the wake of hurricanes Katrina and Rita; pervasive discrimination against racial minorities in the areas of education, housing, and criminal justice, including the death penalty; the imposition of life sentences on juveniles without possibility of parole; discriminatory and unfair treatment of immigrant and migrant workers; the abhorrent conditions in immigration detention facilities; and the existence of family detention facilities such as the T. Don Hutto Center in Texas.

One of the most important challenges facing President Barack H. Obama is to reassert the commitment of the United States to the rule of law and restore respect for the U.S. Constitution and international law.

Obama's statement on International Human Rights Day, as well as his inaugural speech and first address to Congress, are encouraging signs that

the new administration is serious about committing itself to live up to the ideals of the UDHR and to use it as a beacon for setting policy at home and abroad. Obama made the following statement on December 10, 2008 as President-elect:

The United States was founded on the idea that all people are endowed with inalienable rights, and that principle has allowed us to work to perfect our union at home while standing as a beacon of hope to the world. Today, that principle is embodied in agreements Americans helped forge—the Universal Declaration of Human Rights, the Geneva Conventions, and treaties against torture and genocide—and it unites us with people from every country and culture.

When the United States stands up for human rights, by example at home and by effort abroad, we align ourselves with men and women around the world who struggle for the right to speak their minds, to choose their leaders, and to be treated with dignity and respect.... So on this Human Rights Day, let us rededicate ourselves to the advancement of human rights and freedoms for all, and pledge always to live by the ideals we promote to the world.

Furthermore, in his first hours and days in the White House, President

Obama acted on his pledge to restore America's moral leadership by shutting down Guantánamo within one year, suspending the military commissions, prohibiting CIA secret prisons, and enforcing the ban on torture. While these are major positive steps in the right direction, we think they should be followed by the institution of other bold accountability and transparency measures and the restoration of fundamental human rights such as the right to effective remedy, due process and fair trial.

Opening a new chapter in promoting and protecting human rights at home will require all branches of government to engage proactively to bring current policies and laws into compliance with human rights commitments. To do so, President Obama will have to work with Congress to implement these commitments by transforming them into detailed domestic laws, policies, and programs with effective enforcement and monitoring mechanisms. A good first step would be to reconstitute the Interagency Working Group on Hu-

man Rights. This would 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 1998, but was effectively disbanded during the Bush administration.

Many more robust steps will be required on the federal, state and local level in order to make a clean break with the past and ensure that the U.S. will once again be a nation that respects the rule of law, not one that considers itself above the law. Reaffirming the commitment to the rights and freedoms laid out in the UDHR will send a clear message to the world that the U.S. is ready to reclaim its role as a leader in human rights; but this long journey must begin here at home, with the U.S. leading by example.

Finally, at this transitional moment, the ACLU along with our peer organizations has an historical oppor-

tunity to engage the American people and the new administration by building on the phenomenal grassroots mobilization that brought about an unprecedented electoral victory. We need to adopt an integrative approach to human rights advocacy that incorporates community organizing and coalition building, in addition to utilizing litigation and legislative strategies. We must strengthen our commitment to holding the government accountable to implementing fair and transparent policies that place human dignity at the center of their actions.

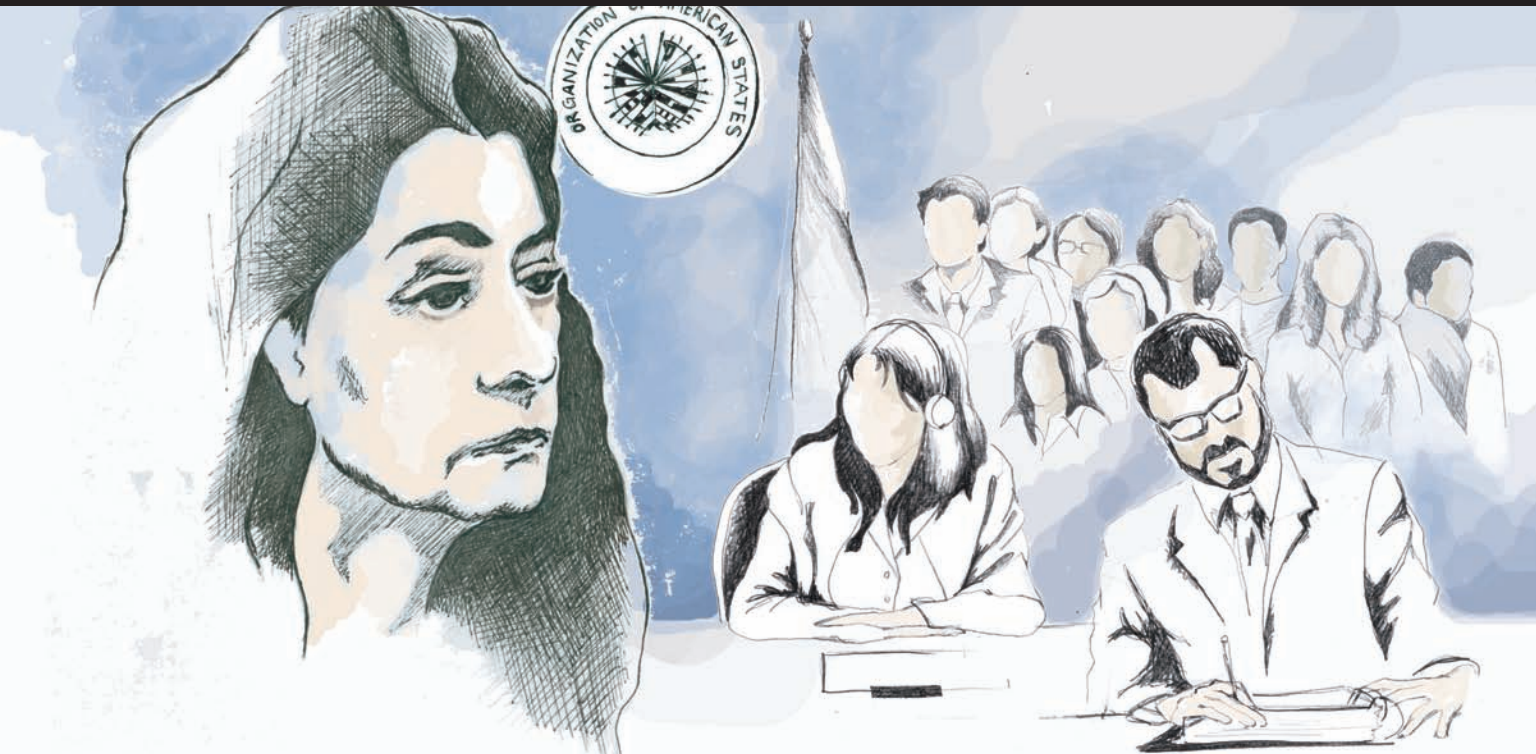


**Jamil Dakwar**

*Director, ACLU Human Rights Program  
April 2009*

# Advancing Equality

*Using International Human Rights Strategies  
to Further Women's Rights at Home*



LENORA M. LAPIDUS

December 10, 2008, marks the 60th anniversary of the Universal Declaration of Human Rights (UDHR). The UDHR sets forth the “highest aspirations” for a world in which peace, equality, and respect for human rights and dignity of all people is the norm. Unfortunately, 60 years later, we are still striving to attain these aspirations. But a new day is on the rise.

During the 1960s and 1970s, civil rights lawyers began using the federal courts to challenge state governments that continued to treat African Americans and women as second-class citizens. The U.S. Constitution and the Supreme Court were seen as tools that could enshrine in law the public’s changing attitudes resulting from the

civil rights and women’s rights movements.

For many decades the Supreme Court served as the final arbiter in compelling states and private actors to treat all people in the United States as equals. However, in recent years, the Court has rolled back many of these protections and has taken a sharp about-face with regard to providing remedies to individuals for civil rights violations.

In light of this turn-around and in recognition of the United States as part of the broader international family of nations around the world, U.S.-based advocates have in recent years embraced international human rights norms and mechanisms as a new

strategy for achieving true equality. These norms and mechanisms provide opportunities for holding the government accountable in ways that are no longer available in domestic courts.

The efforts of Jessica Gonzales (now Lenahan) to hold the U.S. government accountable for failing to protect her and her children from a vicious act of domestic violence provides an excellent case study of the ways in which U.S. constitutional law and domestic court litigation fall short while international human rights norms and mechanisms can provide far greater protection of individual rights.

Jessica Gonzales lived in Castle Rock, Colorado. In May 1999, she ob-

A few weeks after Jessica Gonzales had obtained the order, Simon Gonzales kidnapped the three girls. At about 5:30 p.m., Jessica Gonzales called the Castle Rock Police Department to inform them that she believed her ex-husband had taken the children in violation of her protective order and requested that the police search for the children and bring them home. Over the next ten hours, Jessica Gonzales repeatedly contacted the police, by phone and in person, and begged them to enforce her protective order. Each time the police told her they could not do anything and that she should call them back later if Simon Gonzales had not brought the children home.

the Castle Rock Police Department had no duty to protect her or her children from harm caused by Simon Gonzales.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal of Jessica Gonzales's substantive due process claim but reversed with regard to her procedural due process claim. The Tenth Circuit held that the mandatory arrest provisions of Colorado state law gave Jessica Gonzales an entitlement to police enforcement of her protective order, as a form of property right, and that the Constitution prohibited the State from depriving her of this right without some fair procedure. The Town of Castle Rock sought review by the full Tenth Circuit, which affirmed the panel's decision en banc. The Town of Castle Rock then sought certiorari by the U.S. Supreme Court. On June 27, 2005, the U.S. Supreme Court in *Town of Castle Rock v. Gonzales*, reversed the Tenth Circuit's decision and found that Jessica Gonzales had no procedural due process right to police enforcement of her protective order.

In most circumstances, this ruling by the Supreme Court would be viewed as the final step in challenging the police malfeasance. However, Jessica Gonzales was not willing to accept defeat and neither were her attorneys at the ACLU. Instead, we decided to pursue international human rights strategies to raise the visibility of this problem and to force the United States to engage in a dialogue about violence against women and police accountability. We raised claims of human rights violations before both regional and global human rights bodies.

In December 2005, just six months after the Supreme Court issued its decision, the ACLU filed a petition on behalf of Jessica Gonzales before the Inter-American Commission on Human Rights (IACHR or "the Commission").

*U.S. constitutional law and domestic court litigation fall short while international human rights norms and mechanisms can provide far greater protection of individual rights.*

tained a domestic violence order of protection against her estranged husband, Simon Gonzales. The order required him to stay away from her and their three daughters, Leslie, who was seven, Katheryn, eight, and Rebecca, ten. The protective order reiterated Colorado law, which mandates that an "officer shall arrest, or . . . seek a warrant for the arrest" of an individual when probable cause exists to believe that the individual has violated a protective order. Colorado's law, like mandatory arrest laws around the country, was adopted specifically to address the longstanding problem of police failure to treat domestic violence seriously and in order to remove police discretion in such circumstances.

At 3:30 a.m., Simon Gonzales drove up to the police station and opened fire. The police shot back and killed him. When they looked in the cab of his truck, the police found the bodies of the three dead girls. The girls may have been killed by Simon Gonzales with a gun purchased that day, or it is also possible that the girls were killed by gun fire from the police barrage of bullets.

In June 2000, Jessica Gonzales filed a lawsuit against the Castle Rock Police Department alleging that the police failure to enforce her protective order violated her substantive and procedural due process rights. The U.S. District Court for the District of Colorado dismissed the action holding that

Jessica Gonzales is currently represented by the ACLU and the Columbia Human Rights Clinic in proceedings before the Commission. The IACHR is responsible for the protection and promotion of human rights in the Americas. The Commission hears individual petitions, holds general hearings on thematic human rights violations, investigates abuses and issues country and thematic reports on a range of human rights violations.

Under the individual petition procedures, anyone in the Americas can file a petition alleging human rights violations by a member state of the Organization of American States (OAS). Although the Commission cannot issue binding judgments, it can issue findings and observations setting out its conclusions, suggestions for changes in practices, and recommendations to States Parties.

In her petition, Jessica Gonzales alleged that the police's failure to enforce her order of protection, Castle Rock's failure to conduct a full investigation into the deaths of her three children, and the U.S. courts' failure to provide a remedy for this police malfeasance constituted violations of the American Declaration on the Rights and Duties of Man.

Two of the most significant differences between the American Declaration, like other international human rights law, and the U.S. Constitution are: first, that a State Party has an affirmative obligation to provide protection from harm and is not merely precluded from interfering with a woman's safety (a "negative right"); and second, that the State Party must act with due diligence to protect individuals from harm caused by third parties, not simply ensure that no harm is committed by the government itself. These two basic premises of international human rights law provide far greater protection for

victims of gender-based violence than does U.S. law, as it has been interpreted by the Supreme Court.

The relief sought in the IACHR petition includes: a thorough investi-

gation into the events that resulted in the deaths of Jessica Gonzales' three daughters; state legislative reform to ensure that the terms of domestic violence orders of protection are properly and effectively enforced; the provision of civil remedies for victims who fail to receive such protection; funding for and proper oversight of prevention and support services for victims of domestic violence; and the creation of training programs for law enforcement officers aimed at educating police officers about the complexities of domestic violence as well as training on gender-sensitive responses.

The U.S. responded to Jessica Gonzales' petition in December 2006, arguing that the Commission lacked jurisdiction to consider the petition. The government asserted that the American Declaration is a non-binding instrument, that its provisions are aspirational only, and that it imposes no affirmative obligations on States Parties to prevent violence committed by private actors. However, the U.S. then went on to engage the arguments and dispute the facts raised in the petition which demonstrated its acceptance, at least tacitly, of these proceedings and ultimately to the Commission's findings and recommendations.

On March 2, 2007, the IACHR held a hearing on Jessica Gonzales' petition. This hearing was historic because

it was the first time that the Commission had held an individual hearing on a petition alleging human rights violations against the U.S. for policies and practices related to domestic violence.

*“Jessica Gonzales was not willing to accept defeat and neither were her attorneys at the ACLU.”*

It was also significant because it was the first time in the seven years that Jessica Gonzales had been pursuing justice through legal channels that she was provided an opportunity to testify in a legal proceeding before a full tribunal and finally have her "day in court." Although the U.S. disputed the jurisdiction of the Commission to hear the petition, it engaged fully in the process.

In July 2007, the Commission declared in a landmark "admissibility" decision that Jessica Gonzales' case could proceed, rejecting the U.S.' position that the American Declaration does not create positive governmental obligations. Instead, the decision holds the U.S. to international standards of state responsibility to exercise "due diligence" to prevent, investigate, and punish human rights violations and protect and compensate victims of domestic violence.

On October 22, 2008, Jessica Gonzales, her counsel, and an expert on police practices argued the merits of her case before the IACHR. The U.S. again sent a high level delegation. The hearing, which lasted an hour and a half, was packed with standing-room only crowds of supporters for Jessica Gonzales and was broadcast live on the internet. We expect the Commission to issue its recommendations in 2009.

Parallel to the proceedings before the IACHR, the ACLU also raised



*“We decided to pursue international human rights strategies to raise the visibility of this problem and to force the United States to engage in a dialogue about violence against women and police accountability.”*

Jessica Gonzales' case with the United Nations Special Rapporteur on Violence Against Women, Prof. Yakin Ertürk, who submitted a confidential communication to the United States inquiring about the human rights violations suffered by Jessica Gonzales. After the United States refused to respond, the Special Rapporteur documented her communication in a report to the United Nations Human Rights Council. For Jessica Gonzales, the process of telling her story to an international human rights expert and having the expert agree to take up her case and communicate with the United States about its policies provid-

ed some sense of justice. This process also gave us, her attorneys, an opportunity to push the United States to answer for its failures, rather than having the issue simply end with the Supreme Court's ruling dismissing her lawsuit.

The ACLU also raised the issue of violence against women, including the abuses suffered by Jessica Gonzales, before two treaty-based bodies: the United Nations Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), and the Committee on the Elimination of Racial Discrimination (CERD Committee), which

monitors compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The ICCPR provides for equal application of rights and effective remedies for violations of those rights. In contrast to U.S. constitutional law, the ICCPR requires the government to not only refrain from interfering with individuals' rights, but also to take affirmative measures to ensure that individuals can exercise their rights. In June 2006, the ACLU submitted a report to the U.N. Human Rights Committee describing the various ways in which the U.S. has failed to comply with the ICCPR. The report cited the Supreme Court's decision in *Castle Rock v. Gonzales*, as an example of the way in which the United States has imperiled both the equal application of rights and the availability of effective (or in some cases, any) remedies—in violation of the ICCPR. *Gonzales* is one of many cases decided by the Supreme Court in recent years that has sharply limited the ability of individuals to sue for civil rights violations. As a result, the only civil legal recourse for individual victims of gender-based violence under U.S. law is through state courts, which often minimize the importance of violence against women and generally provide state officials with immunity from suit for failing to protect women from private violence.

In July 2006, the United States appeared before the Human Rights Committee in Geneva, Switzerland as part of the periodic review process for its compliance with the ICCPR. The ACLU sent a delegation to Geneva to participate in the review process. Jessica Gonzales accompanied the delegation and took part in a Victims' Testimony Panel. This gave her the opportunity to testify publicly in an international forum about the failings of the Castle Rock Police Department that led to the deaths of her

three young daughters. This experience was gratifying and also forced the U.S. to provide answers for its failures, thereby adding pressure on the government to alter its policies with regard to ending violence against women.

The ACLU also raised the case of Jessica Gonzales and violence against minority women in a report detailing U.S. violations of ICERD. The report cited the Supreme Court's decision in *Gonzales* noting that additional factors in the government's failure to protect women are: the interpretation of the U.S. constitutional guarantee to protection from violence as a "negative" right rather than a "positive" right, and the government's denial of its obligation to protect women from harm by private parties.

In its Concluding Observations, the CERD Committee noted as a "Positive Aspect" the 2005 re-authorization of the Violence Against Women Act (VAWA). However, the CERD Committee also recommended that the U.S. "increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities [by,] *inter alia*, . . . providing specific training for those working within the criminal justice system, including police officers . . . prosecutors and judges." Further, the CERD Com-

mittee requested that the U.S. "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."

The tragedy suffered by Jessica Gonzales poignantly illustrates the ongoing problem of police failure to protect women, particularly women of color, from intimate partner violence, in violation of ICERD. The fact that the CERD Committee commented on this violation in its Concluding Observations marked another victory in gaining international recognition of the widespread problem of domestic violence in the U.S. and of the government's failure to adequately address this problem.

The advocacy in which we have engaged on behalf of Jessica Gonzales illustrates the range of international human rights mechanisms that can be employed to influence U.S. policy to end violence against women. By engaging these various mechanisms, advocates are able to shine a spotlight on the widespread problems of violence against women and the police's lack of accountability for preventing such violence.

Further, as international bodies issue observations, recommendations, and reports on U.S. abuses and viola-

tions of international law in the *Gonzales* case specifically, and with regard to the problem of domestic violence and the police's lack of accountability more generally, it will become increasingly difficult for the U.S. to continue to disavow governmental responsibility for protecting women from intimate violence.

These changes will not come easily or quickly, especially given the United States' oft-espoused disdain for international human rights mechanisms. Yet advocates must engage in this struggle as it is the most promising avenue available at this moment in history to bring about meaningful policy changes with regard to violence against women and many other human rights abuses. Only through such efforts will we achieve the aspirations set forth in the Universal Declaration of Human Rights and ensure equality and dignity for all.

**Lenora M. Lapidus**, *Director*,  
ACLU Women's Rights Project

# A Long March to Progress

*Human Rights Advocacy  
to End Racial Discrimination in America*



LALEH ISPAHANI  
AND DENNIS PARKER

Race has been inextricably woven into the fabric of the United Nation's human rights framework from its very inception. The relationship between the role of race in America and international human rights is a complex one in which each sphere affects the other. Although the United States pioneered many advances in racial justice, developments in the international arena have resulted in the United States falling behind the rest of the world in some respects.

In order to understand the dynamic between race in the international human rights perspective and within the United States, it is useful to examine the

root considerations of race in a human rights framework. The cornerstone of that framework, the 1948 Universal Declaration of Human Rights (UDHR or "the Declaration"), established race as a distinction that must be erased from all considerations of national and universal rights and freedoms stating:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as **race**, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



The Declaration was the first document to set universally applicable standards concerning racial and ethnic equality. Its drafters came from many corners of the globe and were influenced by the racial and ethnic horrors that marked World War II, the anti-colonial and anti-apartheid movements of the time, and the U.S. civil rights movement. Eleanor Roosevelt, the influential chair of the body that drafted the Declaration, the U.N. Commission on Human Rights, had been involved with the NAACP, a leading civil rights organization, since 1934.

Southern segregationists lobbied against legally binding treaties which would have a direct effect on U.S. laws and policies of segregation and apartheid. For example, there was strong opposition to U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide which was also adopted by the U.N. in 1948. Realizing the potential threat of the emerging human rights movement to the status quo, the U.S. delegation ultimately submitted to domestic pressures which demanded that the UDHR not contain any legally binding provisions that would make it an enforceable document.<sup>1</sup>

U.S. civil rights movement leaders embraced these emerging human rights principles, were aware of the discrepancy between these principles and U.S. law, and grasped the relevance to their own struggle. Thus, they believed that while U.S. authorities could use domestic law to suppress civil rights actions in the short term, they would not ultimately be successful in depriving Americans of fundamental and universally declared inalienable rights. When state authorities banned the NAACP, the Rev. Fred Shuttlesworth aptly commented, "... [t]hey can outlaw an organization, but they cannot outlaw the movement of a people determined to be free."

Malcolm X was one of the most prominent figures in the United States to make the connection between the struggle for civil rights and the international human rights movement. He saw the United Nations as a means to expose contradictions in the U.S. system, for example, between the language of the Bill of Rights and the doctrine of "separate but equal." Malcolm X traveled to more than a dozen African countries along with a delegation from

for ICERD influenced by the U.S. civil rights movement. In 1966, then United States Ambassador to the U.N., Arthur Goldberg, explicitly linked support for the treaty with the domestic struggle for racial equality, describing it as "completely [in accord with] the policy of my government and the sentiments of the overwhelming majority of our citizens." Goldberg added, the U.S. "has not always measured up to its constitutional heritage of equality ... but we

*“It became evident that to properly secure the Declaration’s prohibitions against racial and ethnic inequalities, more concrete race-related protections were necessary.”*

the Student Non-Violent Coordinating Committee (co-founded by Martin Luther King) and proposed to bring the "... case of the Afro-American before the General Assembly of the United Nations and hold the U.S. in violation of the Human Rights Charter." Civil rights leaders sought to draw international attention to the mistreatment of minorities in the U.S. as a means to link the civil rights movement to the larger notion of a struggle for human rights.

Over time, it became evident that to properly secure the Declaration’s prohibitions against racial and ethnic inequalities, more concrete race-related protections were necessary. Thus, a multilateral treaty focused on issues of race and ethnicity, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), was developed. ICERD was the first major international human rights agreement adopted since the Declaration.

The U.S. signed ICERD on September 28, 1966, its political support

have made much progress in the past few years, and while not all our ills have been cured, we are on the march."

Unfortunately, Goldberg’s assessment was overly optimistic. Despite the United States’ signing ICERD in 1966 and the passage of the Civil Rights Act of 1964 and the Voting Rights Act the following year, the march whose beginning Goldberg heralded could more accurately be described as a labored slog. Beginning in the sixties and continuing to the present, Americans sought with great difficulty to realize the promises of internationally recognized standards through action in the courts and in the streets. It wasn’t until nearly 30 years after its inception that the U.S. Senate ratified ICERD, on June 24, 1994, making it the law of the land. Even today, despite the election of an African American president, race continues to divide the country in key socio-economic ways. Progress also proved to be slow in the international arena.

ICERD is a broad treaty, protecting

racial and ethnic minorities including indigenous peoples and non-citizens under U.S. jurisdiction against violations of a broad array of civil, political, social and economic rights. These rights include the following:

- to be free of violence;
- to equal treatment before courts;
- to participate in elections as voters and candidates and to participate in government;
- to work;
- to free choice of employment, just and favorable conditions of work, protection against unemployment, equal pay for equal work, and just and favorable pay;
- to join and form unions;
- to housing;
- to healthcare;
- to social security and social services;
- to education and training;
- to equal participation in cultural activities. Significantly, CERD applies to the federal, state and local levels of government, requiring them to review their policies with a view to bringing them into conformity with the treaty.

ICERD departs in several respects from most domestic civil rights laws. First, ICERD broadens the view of what constitutes discrimination to include an assessment of the impact of policies, not simply their intent:

In this Convention, the term 'racial discrimination' shall mean 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 rec-

*ICERD departs in several respects from most domestic civil rights laws. First, ICERD broadens the view of what constitutes discrimination to include an assessment of the impact of policies, not simply their intent.*

ognition, 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.

Second, ICERD requires the use of affirmative action remedies to eliminate "persistent disparities" and "ensure adequate development" of minorities. Third, ICERD affords non-citizens the same basic anti-discrimination protections as citizens (except for certain political rights such as voting). Finally, ICERD requires states to address overlapping or intersectional racial and gender-based discrimination as well as structural inequalities facing women of color. Given the increased scope of its coverage over the protections offered by American civil rights laws, ICERD has assumed an increased profile in measuring American progress and setting standards for meaningful equality.

Under ICERD, the U.S. is obliged to submit periodic written reports to the U.N. CERD committee that monitors ICERD compliance, following which it must submit to an oral examination by that committee. Non-governmental organizations such as the ACLU may participate in this review process by submitting reports balancing or otherwise critiquing the government reports, known as "shadow reports." In the last decade, the government has done little to meet its obligations under ICERD and very few laws and policies have been enacted pursuant to the U.S.

treaty obligations under ICERD.

To ensure the U.S. begins to meet these obligations, the ACLU along with many other U.S. based human right organizations coordinated by the U.S. Human Rights Network participated fully in the United States' last review. In spring 2007, after the U.S. presented the CERD Committee with a periodic report portraying an incomplete and inaccurate picture of race issues in the U.S., the ACLU began to document U.S. government violations of the treaty. In December 2007, it submitted a shadow report to the Committee entitled *Race & Ethnicity in America: Turning a Blind Eye to Injustice*, which presented overwhelming evidence to counter the U.S. claim to treaty compliance.

The ACLU sent a delegation of national and affiliate staff, as well as clients who had suffered ICERD violations, to Geneva, Switzerland in February 2008, to observe the CERD Committee's two day oral examination of U.S. government representatives about claims made in the official U.S. report. The ACLU's delegates were able to draw attention to its shadow report in an international setting and to advocate for key issues with the CERD Committee. The delegation worked to ensure that Committee members and other influential U.N. personnel were fully briefed on U.S. violations and to ensure that these violations were reflected in the Committee's eventual report. During its oral examination of U.S. representatives, the CERD Committee demonstrated a

sophisticated, deep and thorough understanding of U.S. race issues. After two weeks of deliberation, the Committee issued a public report, "Concluding Observations," that credited the U.S. for progress in certain areas while recommending improvement in a wide range of other areas.

To capitalize on the momentum and opportunities created for advocacy by these recommendations, the ACLU has undertaken various efforts to sustain and broaden both government and community interest in ICERD. The first relates to what the Committee terms a "constructive dialogue" aimed at helping the U.S. government implement ICERD. As part of this dialogue, the Committee specifically asked the government to take action on certain issues and report on them within one year, rather than the customary four-year reporting period. These issues include racial profiling, life sentences for juveniles without the possibility of parole, and improved instruction of government officials, judiciary, law enforcement, teachers, social workers and the public as to treaty rights. After evaluating the information the U.S. submits, the CERD Committee will issue a public letter commenting on the information. The ACLU and its affiliates will participate in this process by collecting and providing the Committee with information that can serve as a basis to evaluate the official report.

Another ACLU objective involves ICERD-related education and implementation for officials and the public nationwide. ACLU staff members have participated in educational briefings on ICERD for federal legislators and staff and have encouraged Congress to establish treaty enforcement mechanisms. Some of these legislators have begun to pay attention and have taken steps to improve ICERD recognition and implementation. For example, Rep. Al-

cee Hastings (D-FL) organized a briefing on ICERD for legislators and their staffs, in which the ACLU participated, and soon after introduced House Resolution 1055 on March 21, 2008 recognizing ICERD and calling on the U.S. to

violence, blight and neglect that continues to haunt us." Specific remedies mentioned in the Obama-Biden election campaign include: overturning an employment discrimination ruling by the Supreme Court that curtails minor-

*U.S. civil rights movement leaders embraced these emerging human rights principles, were aware of the discrepancy between these principles and U.S. law, and grasped the relevance to their own struggle.*

meet its commitments to the treaty.

In areas where the U.S. has failed to implement ICERD at the state and local level, ACLU affiliates can help to repair this breach by working with state legislators and caucuses to pass implementing legislation. A model exists: the California Constitution (Section 31) and Code (Section 8315) follow ICERD's expansive definition of racial discrimination. The Code also reflects ICERD's view as to "special measures" (without granting an individual a private cause of action to challenge any special measures undertaken for the purpose of securing adequate advancement of those racial groups requiring the protection). The ACLU can also continue to assist in treaty enforcement by incorporating the CERD Committee's recommendations into its issue advocacy.

The historic election of the nation's first African American as President is both a symbolic and concrete break from the past. It is hoped that the administration will take affirmative steps to implement and enforce ICERD and other human rights treaties. President Obama noted last year, in his now famous speech on race, how entrenched the issue of race remains in America today and described, "... the cycle of

ities and women's ability to challenge pay discrimination; expanding the Hate Crimes Statutes; ending voting practices that suppress minority votes; cracking down on racial profiling; and eliminating racially discriminatory sentence disparities.

Although the new administration inherits a nation in disarray, with two wars and the worst financial crisis since the 1930s, it must nevertheless strive to ensure that equality and opportunity are given priority in an agenda committed to bringing about real change. As Obama declared, "...one of the tasks we set forth at the beginning of this campaign [was] to continue the long march of those who came before us, a march for a more just, more equal, more free, more caring and more prosperous America." We look forward to participating in that march forward.

**Laleh Ispahani**, *Program Director*,  
Open Society U.S. Programs,  
Transparency and Integrity Fund  
and **Dennis Parker**, *Director*,  
ACLU Racial Justice Program

<sup>1</sup> Anderson, Carol. *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955*. Cambridge University Press (April 2003).

# Executing Human Rights

## *The Death Penalty in the United States*



ANNA ARCENEUX  
AND CHRISTOPHER HILL

“Perhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent.”—Supreme Court Justice William Brennan Jr., 1994

The administration of the death penalty in the United States has been a failed experiment that stands in stark violation of the right to life unequivocally provided by Article 3 of the Universal Declaration of Human Rights (UDHR), adopted in 1948. The drafters of the UDHR contemplated eventual abolition of the death penalty, but it wasn't until 1991 that the international community, in a complementary treaty to the UDHR, adopted the Second Op-

tional Protocol to the International Covenant on Civil and Political Rights calling for total abolition of capital punishment.

Since 1977, over 1125 people—men, women, children (at the time of the crime), the mentally retarded, and the mentally ill—have been denied their right to life by execution at the hands of the State. The United States' administration of the death penalty, in 36 states, in the federal system and in the

military, continues to violate this basic human right.

Though it presents itself as a beacon of democratic values to the international community, the United States stands alone among its Western neighbors in its continued application of the death penalty. In 2006, 91% of all known executions occurred in six countries: China, Iran, Pakistan, Iraq, Sudan and the United States. As of January 2008, the number of people awaiting execution across the country exceeded 3,300. With approximately 20,000 people under sentence of death across the world, the United States maintains a grossly disproportionate share of the international death row population.

In recent years, the United States has taken some important steps in protecting the right to life by barring the execution of juveniles and the mentally retarded. But until this country extends that right to all persons facing execution, the United States will continue to violate this most fundamental of human rights.

The drafters of the UDHR anticipated that racial discrimination would remain a human rights concern and, in Article 2, prohibited racial bias in the guarantee of all rights and freedoms

that the race of the victim has more of an impact on the decision to impose the death penalty than the race of the perpetrator. A study by the *American*

to choose another method, such as electrocution, if it was legally permitted when the sentence was given. In Tennessee, Daryl Holton, a man who may

*“Though it presents itself as a beacon of democratic values to the international community, the United States stands alone among its Western neighbors in its continued application of the death penalty.”*

*Sociological Review* showed that minorities who are convicted of killing white people are more likely to have their death sentences carried out. Co-author of the study and Ohio State University Sociology Professor David Jacobs said, “[w]hite lives are still valued more than black ones when it comes to deciding who gets executed and who does not.”<sup>1</sup>

Article 5 of the UDHR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The very nature of a government putting a person to death before their body fails them is cruel. This is not, however, the only cruelty or torture involved with implementation of the death penalty in the

have been mentally ill, chose to die in the electric chair. The Supreme Court of the State of Nebraska held that use of the electric chair is cruel and unusual punishment.

Although the Supreme Court of the United States recently ruled that the State of Kentucky’s method of lethal injection did not amount to cruel and unusual punishment, there is still significant evidence that death by that method qualifies as torture. The three-drug cocktail which is delivered intravenously must follow a certain order. The first drug, sodium thiopental, renders the inmate unconscious. This is important because the next two drugs are extremely painful. The second drug, pancuronium bromide, causes paralysis. The third drug, potassium chloride, causes cardiac arrest. If the first drug does not result in unconsciousness, the paralytic will prevent the inmate from expressing pain when the second and third drugs are injected—leading to a horrific and inhumane death. In Florida, Angel Diaz was executed by lethal injection. The autopsy showed that there were chemical burns throughout his arms, demonstrating that the IVs went through his soft tissue. In Ohio, Joseph Clark cried out while being executed, “It don’t work!” He also requested to be given something by mouth so the torture would end. The execution of

*“Statistics show that the race of the victim has more of an impact on the decision to impose the death penalty than the race of the perpetrator.”*

set forth in the document. The capital punishment system is plagued with inequities resulting from racial prejudice. According to a 2003 report by Amnesty International, African Americans made up only 12% of the population but accounted for 40% of those on death row in the United States. Statistics show

United States. The very methods used in the death chambers in this country are degrading and inhumane.

The state of Delaware used hanging to execute Billy Bailey as recently as 1996. Lethal injection is the method of execution used by most jurisdictions. However, some states allow a person

Christopher Newton, also in Ohio, took so long that he was given a bathroom break.

Executions carried out in the United States violate Article 5 of the UDHR's prohibition on torture and cruel punishment because they torture the condemned. When holding the electric chair unconstitutional, Nebraska Supreme Court Judge William Connolly stated, "We recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it."

Article 10 of the UDHR entitles all people "in full equality to a fair and public hearing by an independent and impartial tribunal." Juries and judges fail to uphold this right to capital defen-

tal murder trials therefore face not an impartial and independent jury of their peers but a jury biased to vote for death.

Studies of jurors who have actually served on a capital murder trial reveal disturbingly inaccurate perceptions of their duty under the law. United States law is clear that there are no specific circumstances under which the death penalty is required. However, many jurors erroneously believe that the death penalty is required by law if the murder was heinous or if the defendant poses a potential danger in the future. Similarly, many jurors believed the death penalty to be the only acceptable punishment for specific crimes such as the murder of a police officer or multiple victims.

The great majority of death penalty jurisdictions in the United States

These same judges campaign with a "tough on crime" platform. Electoral partisanship has no place in the process of deciding who will live or die and clearly violates Article 10.

The United States legal system does not offer sufficient protections to prevent innocent people from being sentenced to death. During jury selection, in order to serve on a capital jury, jurors are repeatedly asked to affirm their willingness to impose the death penalty should they convict the defendant of murder. Studies of capital jury behavior illustrate that this process itself persuades them that the defendant must be guilty, otherwise the court would not be so concerned with punishment at this initial stage. Consequently, at the outset of the trial, before hearing any evidence, many jurors have already made up their minds that the defendant is guilty. This violates Article 11 of the UDHR which provides the right to presumption of innocence until proven guilty. It is no surprise that since 1973, 130 people in 26 states have been exonerated from death row. Strong evidence suggests that many innocent men have been executed and many more remain on death row across the country.

Philip Alston, the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions, recently examined the death penalty system in the United States, concentrating on the states of Texas, with the highest number of executions in the country, and Alabama, with the most death sentences per capita. In those states, Alston noted particularly egregious violations: defendants regularly lack adequate legal counsel, the system of selecting judges through the electoral process is defective, and the states show no sense of urgency in reforming their blatantly flawed criminal justice systems. Alston also noted that procedural barriers in the federal legal

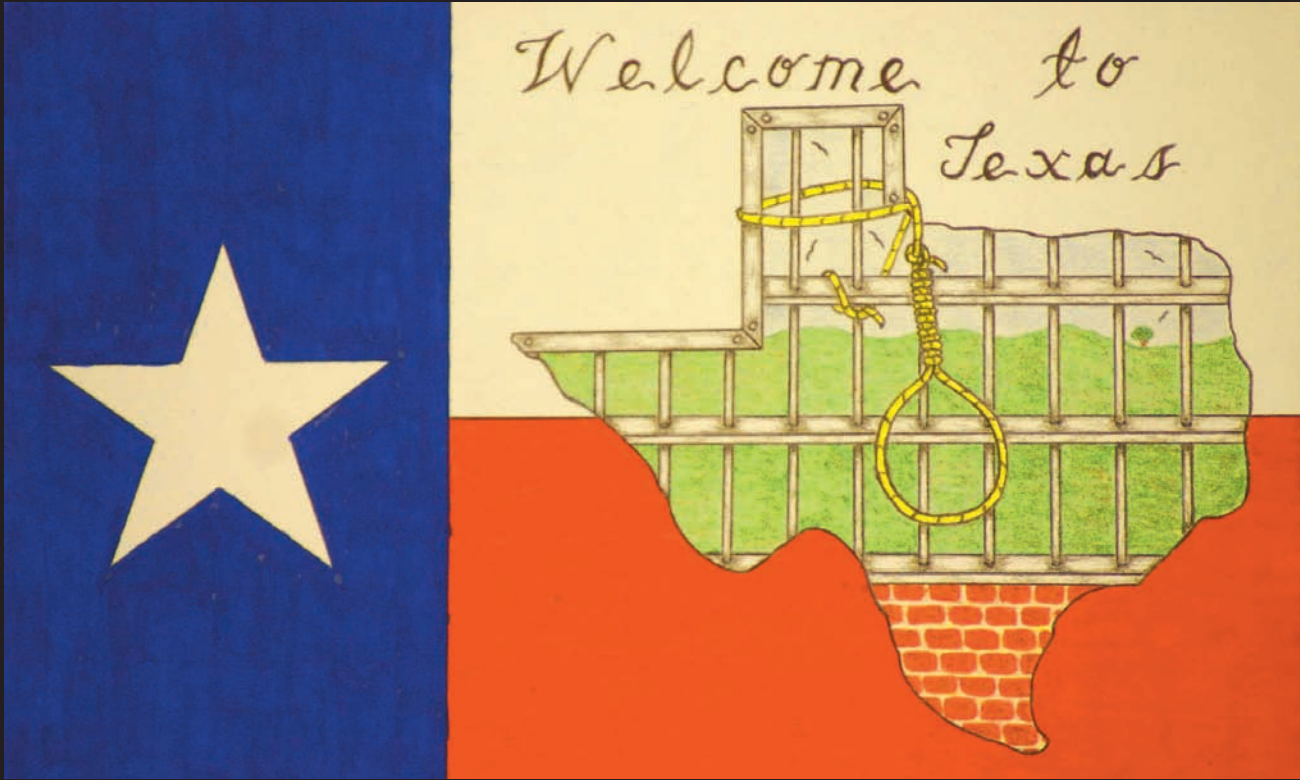
*Nebraska Supreme Court Judge William Connolly stated, ' . . . it is the hallmark of a civilized society that we punish cruelty without practicing it.'*

dants across the country. Any potential juror asked to serve on a capital trial must undergo the process of "death qualification," meaning that they *must* be able to consider death as a punishment. United States Supreme Court jurisprudence provides that any juror who will be substantially impaired in his ability to impose the death penalty may be excluded from service. What results is a systematic exclusion of jurors who oppose the death penalty and a jury stacked towards conviction and death. By virtue of their views on the death penalty, certain religious groups are systematically disenfranchised from service on death penalty trials, and people of color continue to be routinely excluded from service on capital juries for pretextual reasons. Defendants in capi-

fail to uphold the right of capital defendants to an impartial tribunal through the election of its judiciary. In the capital punishment context, this violation manifests most troublingly in states like Alabama and Florida, where the judge has authority to override a jury's recommended sentence of life imprisonment. The increasingly partisan interests in judicial campaigns, in the words of former U.S. Supreme Court Justice Sandra Day O'Connor, "threaten the integrity of judicial selection." The practice of judicial override is particularly troubling in Alabama, where approximately 20% of Alabama's death row inmates were sentenced to death by an elected judge after a jury had recommended—sometimes unanimously—that the defendant be sentenced to life.

# Perry Austin

Illustration by Texas Death Row Inmate Perry Austin



system make it difficult for defendants under a death sentence to obtain adequate review of their cases.

In 2002, the American Bar Association called for a nationwide moratorium on executions and released findings from a three year study on state death penalty systems in the United States. Key problem areas in the operation of these systems included significant racial disparities, inadequate indigent defense services and irregular clemency review processes. International human rights bodies, including the U.N. Human Rights committee and, most recently, the U.N. Committee on the Elimination of Racial Discrimination, have raised similar concerns and called upon the

U.S. to “adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.”

As the world commemorates the anniversary of the Universal Declaration of Human Rights, the ACLU urges the United States to extend these rights guaranteed by the UDHR to all members of our society and to ratify its companion treaties, especially the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty. At a minimum, the U.S. should begin by imposing a national moratorium on use of the death penalty in

keeping with the 2007 U.N. General Assembly resolution calling for a global moratorium. Ultimately, the United States’ compliance with international human rights norms will require nothing less than a complete abolition of the death penalty.

**Anna Arceneaux**, *Staff Attorney*,  
ACLU Capital Punishment Project  
and **Christopher Hill**, *State Strategies*  
Coordinator, ACLU Capital  
Punishment Project

---

<sup>1</sup> *Research News*, Ohio State University, July 21, 2007.

# The Struggle Continues

## *Human Rights and Immigrant Workers*



CHANDRA BHATNAGAR

“For people of good will around the world, that document (UDHR) is more than just words: It’s a global testament of humanity, a standard by which any humble person on Earth can stand in judgment of any government on Earth.” —Former U.S. President Ronald Reagan (March 1989, U.S. Department of State Bulletin)

“This Declaration (UDHR) is one of the most important documents of the 20th century, indeed of human history, for it represents the first time men and women sought to articulate the core aspirations of all the world’s people.” —Former U.S. President Bill Clinton (An Electronic Journal of the U.S. Information Agency Volume 3, Number 3, October 1998)



The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948. Since that time, American presidents from Reagan, to Clinton, to George W. Bush, have lauded the document, and various fundamental rights guaranteed in the UDHR are now considered by many legal scholars to be part of “customary international law” and therefore binding on all nations. Article 1 of the UDHR guarantees that “[a]ll human beings are born free and equal in dignity and rights.” Article 2 provides that these rights should be granted to all persons “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.” Article 7 prohibits discrimination based upon citizenship or immigration status, as “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” Moreover, the UDHR states that all people are entitled to the rights protected in the Declaration including, Article 20(1), “the right to freedom of peaceful assembly and association and ...the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment(.).”, Article 23(2) which provides for “the right to equal pay for equal work,” and Article 23(4) which guarantees “the right to form and to join trade unions...”

In addition to the UDHR, the founding document of the United Nations, the U.N. Charter, promotes universal respect for, and adherence to, the human rights and fundamental freedoms of all people, without distinction as to race, sex, language or religion. The U.N. Charter and the UDHR, as well as subsequent human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), Inter-

national Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), all firmly establish the principle that no human being can be outside the projection of the law or “illegal.”

Despite the clearly established principle that discrimination and abuse based upon immigration status is a violation of human rights, and notwithstanding the rhetoric of Presidents’ Reagan and Clinton, currently, the U.S.

“... ‘*guestworker*’ or temporary worker programs have proven to be exploitative and harmful to immigrant workers...”

government’s policies sanction human rights violations against low-wage immigrant workers based upon their immigration or employment status. Abuse of immigrant workers is not a new phenomenon, as immigrant workers have been mistreated throughout American history, from Chinese railroad workers to Mexican “*braceros*.” However, recent groups of immigrants are uniquely vulnerable because of the heated contemporary debate over immigration, the post-9/11 climate of fear and suspicion of immigrants, and the overall scapegoating of immigrant communities for a host of societal ills in a nation with a suffering economy. More explicitly, within the contemporary context, there are three discrete groups of immigrant workers who are most vulnerable to racism, xenophobia, and clearly defined human rights abuses: *guestworkers*, undocumented workers, and domestic and agricultural workers.

Throughout history, both in the United States and around the world, “*guestworker*” or temporary worker programs have proven to be exploitative and harmful to immigrant workers, creating a permanent underclass of disposable and vulnerable labor. This pattern continues in the present day. Most *guestworkers* have paid exorbitant amounts of money in their countries of origin to “recruiters” contracted by American companies to “import” immigrant workers into the United States. The recruiting process is fraught with fraud and exploitation,

leaving the workers extremely susceptible to abuse from the moment that they arrive in this country. Entering the workforce with mountains of debt and with their circumstances frequently obscured from societal scrutiny because of social, linguistic and geographic isolation, the *guestworkers*’ vulnerability is then compounded by workplace mistreatment. As a group, *guestworkers* are systemically underpaid, deprived of fundamental workplace protections, and subjected to racial discrimination and (on top of these abuses) some workers are subjected to forced labor and physical violence.

Frequently the workers have no capacity to challenge their mistreatment as employers control the workers’ very ability to remain legally in this country. Moreover, unlike most other workers (both immigrant and non-immigrant), *guestworkers* do not enjoy the security of an equitable labor market. They cannot leave an abusive

employer and take a job with another American employer who might pay better wages and offer better working conditions. Instead, the U.S. guest-worker program treats the workers as though they are the exclusive property of the employer who brings them in. If the worker decides they want to leave an employer, or if they complain about abuse or mistreatment, they face deportation back to their countries of origin. The threat of deportation is particularly severe, as the guestworkers will face staggering debt upon return to their home country and the workers are aware that the recruiters, loan

One American employer described his use of guestworkers brought from India in the following manner:

*You bring them in, pay them two or three dollars an hour, give them a little food, give them a place to stay. That's cheap labor. And they're the hardest-working sons of bitches you'll find—harder than any white man you can find around here.<sup>1</sup>*

Recently, the ACLU joined a class action lawsuit brought on behalf of over 500 guestworkers from India.<sup>2</sup> The lawsuit charges that these men were

brought to work in shipyards in the wake of Hurricane Katrina, they were misleadingly recruited, exploited and mistreated as the recruiting agents held the workers' passports and visas and coerced them into paying extraordinary fees for recruitment, immigration processing, and travel. Upon their arrival in the U.S., the lawsuit alleges that the workers were forced to live in squalid living conditions in guarded, overcrowded labor camps, subjected to fraudulent payment practices, and faced psychological abuse, and threats of serious legal and physical harm if they did not work under the employer-restricted guestworker visa.

The litigation arose out of a broader organizing campaign spearheaded by the Alliance of Guestworkers for Dignity, a project of the New Orleans Workers' Center for Racial Justice. In addition to the federal court litigation, in partnership with the ACLU, the workers have testified before the U.N. Special Rapporteur on the Human Rights of Migrants, the U.N. Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and

*There is an explicit racialized history to the exclusion of both domestic workers and agricultural workers from fundamental protections.*

sharks, and other bad actors who take part in this process can, and do, perpetrate various sorts of violence, as well as physical and economic retaliation.

trafficked into the U.S. through the federal government's H-2B guestworker program with dishonest assurances of becoming lawful permanent U.S. resi-



Agricultural workers are among the most exploited and vulnerable. Photos courtesy of the Farmworker Association of Florida ([www.floridafarmworkers.org](http://www.floridafarmworkers.org))

Related Intolerance, and senior staff at the UN Office of the High Commissioner for Human Rights.

While the right to equal protection of the law is a fundamental human right, sadly, in the United States, undocumented workers do not enjoy equal protection of the law and suffer from both *de jure* and *de facto* discrimination based on immigration status. Recent jurisprudential decisions have undermined equal protection beginning with *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), where the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to compensate an undocumented worker for the wages he or she would have received had they not been subjected to an unfair labor practice, and unlawfully terminated before finding new employment.

The *Hoffman* decision has led to an erosion of rights protection for undocumented workers as the Court reasoned that the workers' "unlawful status" made them ineligible for relief. Unsurprisingly, since that time, employer defendants have cited *Hoffman* in contending that undocumented workers are not entitled to fundamental workplace remedies under labor or employment-related statutes, including Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the state law equivalents of federal anti-discrimination and workplace wage and hour protections. Some courts have exported the *Hoffman* rationale into other contexts, restricting both undocumented workers' access to courts and entitlement to various rights and remedies. Undocumented workers have lost safeguards in the areas of accessible remedies when injured or killed on the job, overtime pay, workers' compensation, fam-

ily and medical leave, and other areas. Low-wage South Asian and Muslim workers are particularly vulnerable, as they face intersectional forms of anti-immigrant hostility, employment abuse, and post-9/11-related discrimination.

In the wake of *Hoffman*, and with the reality that in some states, employment and labor protections under state law have been either eliminated or severely limited for undocumented workers (including basic workplace protec-

“... we must make real our commitment to the fundamental principle that no human being can be ‘illegal.’”

tions such as freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury), the ACLU, along with the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law, filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition was submitted to the commission on behalf of the United Mine Workers of America, AFL-CIO, Interfaith Justice Network, and six immigrant workers who are representative of the millions of undocumented workers in the United States labor force. The ACLU and our partners filed this groundbreaking petition to assert the fundamental human rights of all workers (irrespective of their immigration status) and to ensure that the U.S. complies with international human rights law, which requires all nations

to apply their workplace protections equally and without discrimination based on immigration status.

The ACLU, along with collaborating organizations, have also raised the *Hoffman* issue before the U.N. Human Rights Committee which monitors compliance with the ICCPR, and the Committee on the Elimination of Racial Discrimination which oversees compliance with ICERD. This advocacy has resulted in the CERD Committee issuing a Concluding Observation rec-

ommending that the United States “... 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.”

Domestic workers and agricultural workers are specifically barred from particular protections defined in the National Labor Relations Act, the federal Fair Labor Standards Act, and the Occupational Health and Safety Act. By virtue of being excluded from minimum wage and overtime pay, minimum worker health and safety protections, and the right to organize and bargain collectively, these groups of workers are among the most exploited and vulnerable of any population of workers. According to the Coalition of Immokalee Workers, currently, farmworkers in Florida have to pick two tons of tomatoes to make \$50 in

one day. Domestic workers frequently suffer gross human rights violations, including being victimized by physical, emotional, and sexual abuse. They also face systemic labor violations, often being asked to provide work up to 19 hours per day and to be perpetually available and “on call.” Many domestic workers are not given days off and their promised wages are often reduced or withheld completely.

There is an explicit racialized history to the exclusion of both domestic workers and agricultural workers from fundamental protections. In the 1930’s when the National Labor Relations Act and Fair Labor Standards Act were passed, agricultural workers and domestic workers were predominantly African American men and women. Under pressure from the growers’ lobby, Southern senators were able to negotiate exemptions for these two categories of labor, thereby disproportionately harming African American workers in the South. The disparate impact of this racially discriminatory exclusion continues, as in the contemporary context, domestic workers are mostly immigrants from South Asian, Caribbean, and Latin American countries, and agricultural workers are predominantly immigrants from Latin America and the Caribbean, in addition to smaller populations of African American workers.

The ACLU has brought several lawsuits on behalf of immigrant women domestic workers who have been traf-

ficked into the United States by abusive employers, including some cases on behalf of domestic workers employed by diplomats. We have argued that no form of immunity should protect diplomats who abuse and exploit their employees, and that all workers are entitled to fundamental human rights including the right to effective remedy.

To address the egregious violations outlined in this article, and to begin the process of coming into compliance with its human rights obligations, the Obama administration should apply workplace protections equally, and without discrimination based upon race, citizenship, or immigration status. Congress can play a significant role in addressing some of these problems by passing the Civil Rights Act of 2008, or similar legislation; and must seek to ensure that minority and immigrant workers, including undocumented migrant workers, are afforded effective protection and remedies when they suffer employer-inflicted human rights violations. Congress can also remove the discriminatory barriers faced by domestic and agricultural workers to obtaining protections contained in the National Labor Relations Act, the federal Fair Labor Standards Act, and the Occupational Health and Safety Act. Finally, Congress can either eliminate the H-2B guestworker program, or modify the program to ensure that workers have the freedom to move from one employer to another; that

employers bear all costs incurred in transporting and recruiting the guestworkers to come to the United States; and that the guestworkers have the opportunity, at the conclusion of their visa, to apply for lawful permanent residency.

Another American president, John F. Kennedy, remarked, “[W]e shall be judged more by what we do at home than what we preach abroad.” Following President Kennedy’s admonition, we must cast a global spotlight on the U.S. government’s human rights record—particularly its glaring failure to protect low-wage immigrant workers from discrimination and abuse—and we must make real our commitment to the fundamental principle that no human being can be “illegal.”

**Chandra Bhatnagar**, *Staff Attorney*,  
ACLU Human Rights Program

---

<sup>1</sup> John Bowe, *Nobodies: Modern American Slave Labor and the Dark Side of the New Global Economy* (New York: Random House, 2007), p. 93.

<sup>2</sup> The ACLU is co-counsel with Dewey & LeBoeuf LLP, the Southern Poverty Law Center, the Asian American Legal Defense and Education Fund, the Louisiana Justice Institute and the New Orleans Workers’ Center for Racial Justice.

# Faith & Freedom

*Using the UDHR to Practice What We Preach*



T. JEREMY GUNN

The first full, modern articulation of international standards protecting freedom of religion and belief is found in the 1948 Universal Declaration of Human Rights (UDHR). The core of those standards is articulated in Article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In addition to Article 18, there are other important clauses within the

UDHR that complement the protections for freedom of religion or belief, including the Preamble, Articles 2, 16, 26 (providing that certain rights cannot be limited on the basis of race, religion, or other impermissible factors), and other articles that provide for freedom of expression and freedom of association. Most of the major international and regional human rights instruments drafted after 1948 trace their origins back to the UDHR. The majority of the current constitutions of countries of the world were drafted after 1950, and many of them can trace their own protections for freedom of religion back to the UDHR.

The rights of religious believers are among the oldest protected by in-

ternational treaties. Prior to 1948, they typically appeared in one of two limited guises. The first were as provisions in bilateral treaties requiring a country to respect the rights of a religious minor-

Second, individuals have the right to form groups and to practice their religion in community with others.

Third, freedom of religion or belief protects not only adherents of religion,

out digressing into the legality of U.S. obligations to comply with international law, there are, in fact, three mechanisms for international monitoring of internal U.S. practices pertaining to freedom of religion:

First, the U.N. Committee on Human Rights. The United States is required to submit a report to the U.N. Committee on Human Rights once every five years to describe U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR), including Article 18 of the ICCPR, which pertains to freedom of religion or belief. The U.S. government has now submitted a total of three periodic reports. Following the submission of the U.S. reports, the U.N. Human Rights Committee issues its own report and calls for additional information. In addition, NGOs, including the ACLU, often issue their own "shadow reports" which usually differ markedly from the United States' account in describing its compliance with the entire range of human rights issues, including religious freedom.

The second monitoring mechanism is through the U.N. Special Rapporteur on Freedom of Religion or Belief. The Special Rapporteur issues ongoing reports evaluating U.N. member states compliance with international standards for freedom of religion and belief. The United States is included in these ongoing reports. In addition, the Special Rapporteur may make an "*in situ*" visit to countries in order to conduct a more detailed examination of a country's practices. Such a country visit to the U.S. took place in 1998.

The third mechanism is the Organization for Security and Cooperation in Europe (OSCE) with 56 participating states. The OSCE holds an annual "human dimension implementation meeting" where participating states offer criticisms and comments on each others' human rights practices. NGOs are

ity living within the country. The second were the famous multinational "minority treaties" that were negotiated and ratified between the First and Second World Wars, and that protected the rights of religious minorities to practice their religion as a group. But it was not until the UDHR in 1948 that an international body, the Commission on Human Rights, under the leadership of Eleanor Roosevelt, negotiated and adopted an international standard that was much broader than any previous instrument.

If the words of Article 18 seem either obvious or unexceptional to the twenty-first century reader, it is in large measure due to the fact that the UDHR helped establish what is now widely regarded as the governing international standard. While it cannot be said that the freedom of religion principles of the UDHR are universally accepted (and it certainly should not be imagined that are respected in practice), they do articulate several themes that are widely acknowledged, including:

First, freedom of religion or belief is a right that belongs to everyone. It is not a "group right" that resides only in a community (as in the minority treaties) where the community can in turn force those in its midst to accept the group's practices. The locus of the right is in the individual.

but all people of conscience whether they believe in one God, many gods, or no God. It protects *beliefs* in addition to *religions*.

Fourth, people have, in addition to the freedom to express religious (or non-religious) beliefs, the additional right to *manifest* those beliefs in ways such as wearing religious attire and engaging in religious activities in public.

Fifth, individuals have the right to change their religious beliefs and practices, which includes the right to convert to another religion or to leave religion altogether. This right, in conjunction with the right to express religious viewpoints, provides for the right to persuade, proselytize, and convert.

Finally, the UDHR (implicitly in Article 18 and explicitly in Articles 2, 16, and 26) prohibits the state from discriminating against people on the basis of religion.

**B**ecause the UDHR is a "declaration" and not a binding "treaty" (or convention), it contains no mechanisms for legal enforcement. While it is common for international lawyers to assert that the UDHR is "customary international law" and therefore is "legally binding," there are no legal mechanisms either in the UDHR itself or in American domestic law to give it legal effect. With-

also permitted to express their own observations and critiques.

With some important exceptions, the United States may be regarded as a country where religious freedom is widely protected and where a wide range of religious believers are free to practice their religion alone or in community with others. Unlike many countries of the world, it is relatively easy in the United States to form religious organizations that receive state recognition, obtain tax-exempt status, buy property, hire employees, and erect religious buildings. Indeed, the creation of religious organizations as legal entities is so routine and unexceptional in the United States that Americans typically do not realize how difficult this can be in other places in the world.

For most practical purposes, governments in the United States do not interfere in religious activities, review religious literature, restrict religious expression, nor permit state discrimination on the basis of religion. People are free to join religions, leave religions, and form new religions. Moreover, many elements of civil society in the United States are broadly protective of religion. There are many legal organizations that are secular (such as the ACLU), or religious, that actively defend the rights of individuals and religious communities, both in the courts and in the legislatures. It is not only the U.S. Constitution and the constitutions of the fifty states that provide a legal framework for protecting religious beliefs, but there are many laws that prohibit religious discrimination (such as in employment), and that promote free exercise of religion.

While religious freedom in the United States largely complies with international norms and is generally superior to most other countries in the world, there are some important weak-

nesses that should be noted. Societal discrimination may arise with regard to any religious (or belief) group, whether Roman Catholic, Jewish, fundamentalist Christian, Scientologist, Mormon, Jehovah's Witnesses, or another. Each may be subject to harassment, acts of vandalism, or hate speech. While

full due process, a hearing, a trial or even statement of reasons.

*Non-believers.* While laws generally do not discriminate against non-believers *per se*, there is significant societal pressure against those who do not acknowledge a belief in God. It is difficult

*“While American laws do not discriminate against particular religions, and while most religious groups are free to practice, there are certain groups disproportionately subjected to unfavorable treatment by society and at times by public officials. Three groups that fall into this category are Muslims, non-believers and Native Americans.”*

American laws do not discriminate against particular religions, and while most religious groups are free to practice, there are certain groups disproportionately subjected to unfavorable treatment by society and at times by public officials. Three groups that fall into this category are Muslims, non-believers and Native Americans.

*Muslims.* Even before September 11, 2001, Muslims have been disproportionately subjected to disparate treatment and discrimination. Security officials have long been understood to apply “religious and ethnic profiling” particularly at borders and for plane travel. The discrimination may be based on appearance or on names. Federal authorities have designated Muslim charities as supporting or engaging in terrorism and seized their assets based upon unproved and unsubstantiated allegations of their involvement in terrorist financing very often without

to identify any major elected political official in the United States who openly professes to be a non-believer. Non-belief in God is viewed with suspicion and linked to being “un-American.” Governments often further an official theism by erecting state-funded monuments promoting religious beliefs, sponsoring religious activities and rituals, and promoting particular religious beliefs and practices at public schools.

*Native American religions.* There are important political and legal barriers that restrict Native Americans from freely exercising their religious beliefs. While there might be some practical reasons for not deferring to Native American religious beliefs in cases such as where the recognition of a sacred site (e.g., a mountain) might infringe on other uses, there are a significant number of examples where the discrimination is due simply to bias, a lack of familiarity, or an unwillingness

of the majority to compromise with Native American practices.

Apart from these three groups, societal or legal interference with the rights of religious freedom typically are short-term and exceptions to the rule.

Since the 1940s, the United States has played a prominent role in vigorously promoting the rhetoric of “freedom of religion” (though *not* “freedom of religion *and* belief”) in the international arena. During World War II, Franklin Roosevelt identified “freedom to worship” as one of the “four freedoms” for which the allies were fighting against totalitarianism. Eleanor Roosevelt played an important role in promoting the UDHR. Americans at the Second Vatican Council were influential in promoting religious freedom within the Catholic Church. In many international bodies, it is the United States that

is most likely to raise questions about other countries’ compliance with international religious freedom standards.

In 1998, the U.S. Congress enacted the International Religious Freedom Act that, by law, makes the promotion of international religious freedom an integral part of U.S. foreign policy. The law created an office within the State Department assigned to promoting religious freedom which issues an annual report on the status of religious freedom in the countries of the world.

While the United States may be credited for bringing added attention to religious persecution and discrimination, it has not always taken an appropriate and balanced approach. As with other aspects of its foreign policy program, the United States tends to act unilaterally and to put pressure on other countries rather than to seek allies with similar concerns. The U.S. should emphasize the promotion of freedom rath-

er than condemn those who violate it.

Eleanor Roosevelt said, “Learn from the mistakes of others. You can’t live long enough to make them all yourself.” As a country which makes religious freedom a foreign policy priority, the U.S. should be particularly well-versed in the dangers of restricting those freedoms. Sixty years after the UDHR, Eleanor Roosevelt’s dream has not been fully realized—even within her own country. While the U.S. has more widespread religious freedom than is found in much of the rest of the world, there are still steps that must be taken to improve the state of religious freedom at home. Only then can religious freedom be promoted abroad without reservation or hypocrisy.

**T. Jeremy Gunn**, *Director*,  
ACLU Program on Freedom of Religion  
and Belief



# Justice Denied

## *Immigrant Families Detained at Hutto*



VANITA GUPTA  
AND LISA GRAYBILL

There is little question that the massive expansion of immigration detention in the United States over the last decade poses a serious human rights crisis. Between 1994 and 2006, the average daily population of immigrants in Immigration and Customs Enforcement (ICE) custody increased from approximately 5,500 to 27,000 detainees. Over the course of 2006, the number of individuals detained reached 283,000. By 2000, detained immigrants represented the fastest-growing segment of the U.S. prison population.

This exponential rise in the detention of immigrants led ICE in recent years to seek additional funding and space to house detainees. Detention

space has increased from approximately 8,300 beds in 1996 to 32,000 beds in 2008. ICE's budget for detention operations has nearly doubled from \$864 million in FY 2005 to \$1.65 billion in FY 2008. Immigration detention, as a result, has become the new face of the prison industrial complex. State and local jails are now renting out space to hold immigrant detainees, usually yielding greater profit than they would reap with state and county detainees. Immigration detention has bailed out private prison companies such as the Corrections Corporation of America (CCA), which was going bankrupt in 2000 but is now making huge profits by running federal immigration facilities.

As part of this growth in the immigration detention industrial complex, ICE has devised new forms of immigration detention. One particularly pernicious form is that of family detention. Family detention involves the detention of immigrant children, ranging from birth to 17 years of age, who are detained with one or more parents as the family awaits removal proceedings. While family detention is still a relatively new form of immigration detention—there are currently two such facilities nation-wide—the story of the fight for human rights within one such facility, the T. Don Hutto Family Detention Center, sheds light on the power of a multi-pronged advocacy strategy. This strategy combines human rights approaches with traditional legal advocacy to hold the government accountable for unacceptable infringements on human dignity and basic human rights.

As immigration enforcement became an increasing priority for the U.S. government, ICE began to shift its practice from releasing immigrant families while their immigration claims were processed to detaining families indefinitely pending resolution of their claims. In November 2005, the Department of Homeland Security (DHS) commenced its “Secure Border Initiative.” By August 2006, DHS Secretary Michael Chertoff declared that the government had fully terminated its previous “catch and release” policy and implemented a new policy entitled “catch and detain.”

DHS justified its policy of family detention by claiming that the “catch and detain” policy, for individuals entering or apprehended in the United States with children, was necessary to deter child smuggling. Whereas, the “catch and release” policy could encourage prospective migrants to “rent” or kidnap children for the purpose of crossing the border, thereby ensuring

the migrant would be released if apprehended. The government first separated parents apprehended with their children, placing the children in shelters for unaccompanied minors managed by the Office of Refugee Resettlement (ORR) and detaining parents in any one of countless detention centers across

cells. Movement in the facility stopped numerous times per day for “count,” which sometimes lasted for hours, and lasers and cameras monitored the cell doors at night to ensure no one moved.

ICE’s choice to expand family detention and to place parents and children in a penal facility like Hutto di-

“There is little question that the massive expansion of immigration detention in the United States over the last decade poses a serious human rights crisis.”

the country. However, in response to Congressional criticism that the government was unlawfully designating such children as “unaccompanied,” ICE began to expand its capacity to detain children and their parents together.

Until 2006, the only “family detention” facility used by ICE was an 84-bed former nursing home in Berks County, Pennsylvania. The Berks County facility, opened in 2001, was clearly institutional, but non-penal in atmosphere and practice. In May 2006, however, ICE began housing immigration detainees at the T. Don Hutto Family Residential Center, a 512-bed former medium security prison in Texas. The Hutto facility is owned and operated by the CCA, the nation’s largest for-profit prison provider. Unlike the Berks facility, Hutto is unmistakably a prison, inside and out. The exterior is surrounded by concertina wire; visitors have to pass through extensive security to enter the facility and are prohibited from passing beyond the visitation area. In past years, parents and children were clothed in prison garb and confined to cells for most of the day. Children received only one hour of schooling per day and were prohibited from taking pens, pencils, toys, or even stuffed animals into their

rectly contravened a Congressional preference, first articulated in 2005, that DHS should *release* immigrant families whenever possible or use alternatives to detention, such as the Intensive Supervised Appearance Program. In response to ICE’s opening of the Hutto facility in May 2006, Congress reiterated its concern that family detention should be used only as a last resort and appropriated funding to increase alternatives to detention. DHS ignored this and subsequent Congressional directives in favor of aggressively pursuing its new policy of detaining families.

When word that children as young as one and two years old were being incarcerated with their parents at the Hutto facility began to reach churches, attorneys, and activists in Taylor and neighboring Austin, in the Fall of 2006, the community responded with outrage and indignation. A group of activists began to march and hold vigils outside the Hutto facility. They were frequently joined by local clergy and community members shocked to find that there were children in prison nearby. The protests attracted media attention, which in turn generated interest and concern about the conditions

at Hutto from national and international advocacy organizations.

The Women's Commission for Refugee Women and Children (WCRWC) sent Michelle Brané, Director of its Detention and Asylum Program, to observe and document conditions in both the Hutto and Berks facilities. Brané's findings were published by the WCRWC in a lengthy report entitled *Locking Up Family Values: The Detention of Immigrant Families*, issued on February 22, 2007. The report, which sharply criticized the penal environment at Hutto and ICE's policies toward family detention, garnered significant national media attention. The public now had access to a report that documented conditions and problems at Hutto using a human rights framework. The report also placed family detention in an in-

ternational context by providing relevant comparative analysis and international standards enumerated in several human rights declarations and treaties that apply to children and families in detention, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). These conventions elevate the role of the family as a fundamental unit in society and permit the use of detention against children only as a measure of last resort and for the shortest possible time. They also restrict the use of detention for asylum seekers, particularly children and other vulnerable populations.

The United States is also a party to the ICCPR which reiterates the basic

protections relating to family detention provided by the UDHR. These include the right to a timely court proceeding to determine the legality of arrest and immediate release should the detention be determined unlawful; recognition of the family's right to protection by the state as the core unit of society; and the right to protection by the law against arbitrary or illegal interference with a family's privacy, home, honor and reputation.

Together, these articles as articulated by the UDHR and reiterated by the ICCPR combine to reinforce the core principle—that all human beings, regardless of political or immigration status, are entitled to fundamental protections and to be treated fairly, humanely, with dignity, and with recognition universally as a person before the law.

Although the United States has not yet ratified the CRC, it was a major participant during the ten year drafting process and, as a signatory, is prohibited from taking actions that would defeat the CRC's goals and principles. Specific provisions within the CRC apply directly to the ongoing and increasing detention of families within the United States and its obligation to ensure adequate services and conditions to children regardless of their immigration status:

- Article 10, "Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner."

- Article 25, "States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment or his or her physical or mental health, to a periodic review of the treatment provided to the



Belkys Susana Blanco (right) and her daughter Susana Rodriguez Blanco, prepare to depart from the Austin airport to stay with friends while pursuing their asylum claims. Belkys and Susana were detained at Hutto for nearly six months.

*child and all other circumstances relevant to his or her placement.”*

- *Article 27, “State’s Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”*

In February 1999, the Office of the United Nations High Commissioner for Refugees (UNHCR) issued the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. The document frowns upon the detention of asylum seekers but states that, if used, detention should be restricted to the minimum period necessary to establish the applicant’s identity and basis for asylum claim. States are required to ensure adequate treatment levels including education, healthcare and counseling. The UNHCR guidelines also call for special protection of vulnerable populations—especially women and children. Minors who are asylum seekers should not be detained and no asylum seeker should be penalized for illegal entry or residence so long as

they present themselves as requested to the authorities and are able to show demonstrable cause for their presence.

The WCRWC report also highlighted the fact that while the United States

ees inside. Barbara Hines, a University of Texas School of Law professor, who runs the university’s immigration clinic, was able to begin interviewing clients beyond the security checkpoint at Hutto

“A group of activists began to march and hold vigils outside the Hutto facility. They were frequently joined by local clergy and community members shocked to find that there were children in prison nearby.”

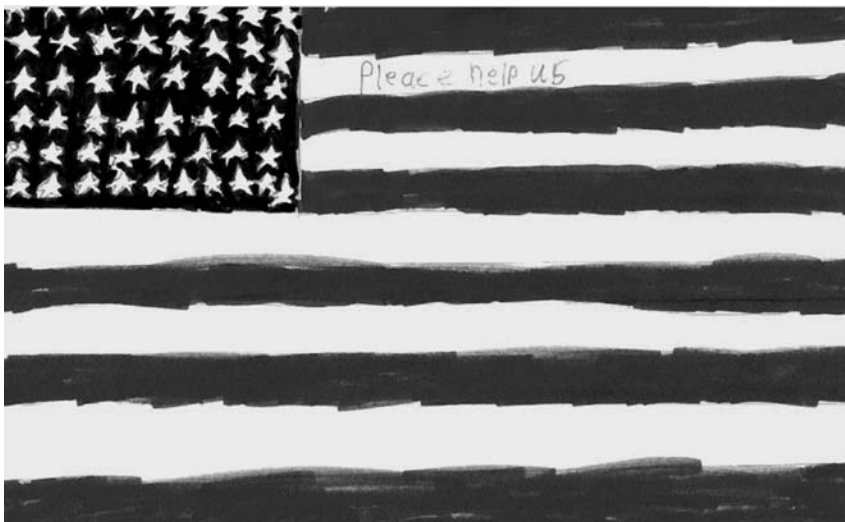
is not alone in detaining families—the United Kingdom and Germany also detain families under conditions similar to those at Hutto —nations such as Australia and Sweden offer alternative approaches that might serve as a model for improved detention practices in the United States.

Despite the groundswell of opposition to Hutto, it remained difficult for the public to get information about conditions inside the facility. ICE routinely refused all public requests for access to the facility or to the detain-

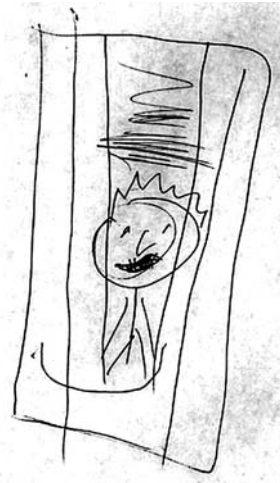
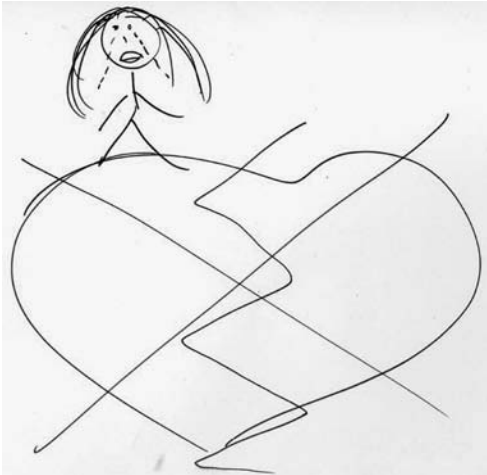
ees in September 2006. She was shocked to see infants dressed in institutional clothing and alarmed about conditions for the children detained inside. She reached out to the ACLU of Texas which issued a series of Open Records Requests to Williamson County.

In early 2007, lawyers from the ACLU national office began to interview detainees with Barbara Hines. It soon became clear that conditions at Hutto were degrading and harmful to the detainee children. Approximately 400 people were then detained in Hutto, half of them children and many of them refugees seeking political asylum. What ICE called a “Family Residential Facility” was in fact functionally and structurally a prison. Children were required to wear prison garb, received only one hour of recreation a day, Monday through Friday, and some children did not go outdoors for a month at a time. They were detained in small cells for 11-12 hours each day where they could not keep food, toys, or pens, and had no privacy, even when using the toilet.

Many children lacked access to adequate medical, dental, and mental health treatment, and were denied meaningful educational opportunities. Guards frequently disciplined children by threatening to separate them per-



A child detained at Hutto embedded a heartbreaking plea in this painting of the American flag.



Drawings from children detained at Hutto.

manently from their parents; children were prohibited from having contact visits with non-detained family members; and fathers and mothers were not permitted to be together in their respective detention spaces. ACLU lawyers discovered that Hutto was not licensed by any state agency.

By operating the facility, ICE was violating its duty to meet the minimum standards and conditions for the housing and release of all minors in federal immigration custody set forth in a 1997 settlement agreement in the case of *Flores v. Meese*. Recognizing the vulnerability of children, this settlement established that children should be released promptly to family members when possible, that those who remained in ICE's custody be placed in the least restrictive setting available, and that minors be guaranteed basic educational, health, and social benefits and rights.

On March 6, 2007, the ACLU, in conjunction with the ACLU of Texas, the University of Texas School of Law Immigration Clinic and the law firm of LeBoeuf, Lamb, Greene & MacRae LLP filed lawsuits on behalf of ten immigrant children, ages 3 to 16, chal-

lenging their illegal detention at the T. Don Hutto facility in Taylor, Texas. The families represented came from countries including Lithuania, Canada, Haiti, Honduras, Somalia, and Guyana and many had fled dangerous situations to seek asylum in the United States.

The ACLU's lawsuit was coordinated with a communications strategy to inform the public about conditions at

just days before the visit, DHS abruptly announced that the Special Rapporteur would not be granted access to the facility on the grounds that Hutto was subject to "pending litigation."

On May 8, 2007, thirty-seven national and international organizations submitted an open letter to DHS Secretary Chertoff urging Mr. Bustamante to reconsider the decision, given the special role of Special Rapporteurs in ensuring that states abide by their obligations under international human rights law. Although DHS refused this appeal, the ACLU and immigrants' rights organizations arranged for him to interview former detainees who described conditions at Hutto.

Advocacy around the Special Rapporteur's visit and the government's last-minute decision to deny him entry to Hutto added to mounting pressure on the government to make changes within the facility. The Special Rapporteur's final report, submitted to the U.N. Human Rights Council in March 2008, included a specific recommendation that the U.S. government cease family

*... all human beings, regardless of political or immigration status, are entitled to fundamental protections and to be treated fairly, humanely, with dignity, and with recognition universally as a person before the law.*

Hutto. National and international media outlets decried the detention of children. The U.N. Special Rapporteur on the Human Rights of Migrants, Dr. Jorge Bustamante, was scheduled to tour the Hutto facility on May 7, 2007, as part of a multi-state official fact-finding mission. The mission had been carefully planned and negotiated with the government but

detention and identify alternatives to detention. The report provided yet another opportunity for local, national and international advocacy and attention to the ongoing human rights violations at Hutto.

On August 2007, the ACLU announced a landmark settlement with

ICE that greatly improved conditions for immigrant children and their families detained at Hutto. Since the original lawsuits were filed, all 26 children represented by the ACLU have been released.

More recently, advocates have gained the attention of the Inter-American Commission on Human Rights (IACHR or “the Commission”). The Commission, which is affiliated with the Organization of American States, monitors compliance by member states, including the U.S., with the American Declaration of Rights and Duties of Man and other international human rights laws. On October 1, 2008, attorneys with the IACHR met with advocates and former detainees in Austin, to discuss

conditions at Hutto as part of a fact-finding mission on the treatment of immigrant families and asylum seekers. On October 28, a number of organizations, including the University of Texas School of Law Immigration Clinic, testified in front of the IACHR in support of their petition regarding due process violations in immigration detention.

Conditions at Hutto have gradually improved as a result of the groundbreaking litigation and public scrutiny that brought about profound changes in the operation of the facility and the population housed there. Nevertheless, the practice of family detention remains in stark violation of all prevailing human rights laws and standards; and advocacy groups continue to press Con-

gress to insist that DHS find humane alternatives for managing families whose immigration status is in limbo. Though, at first, the human rights abuses at Hutto seemed impervious to challenge, a multipronged strategy combining human rights and traditional legal advocacy resulted in widespread reform of conditions and practices in the facility and sparked a public debate over the legitimacy of family detention that continues to generate national and international attention.

**Vanita Gupta**, *Staff Attorney*,  
ACLU Racial Justice Program  
and **Lisa Graybill**, *Legal Director*,  
ACLU of Texas

# Human Rights on the Judicial Front

## *Litigating Protection in U.S. Courts*



Where, after all, do universal human rights begin?  
In small places, close to home ...  
Unless these rights have meaning there,  
they have little or no meaning anywhere.  
Without concerted citizen action to uphold them  
close to home, we shall look in vain for progress  
in the larger world.

—Eleanor Roosevelt, 1953

STEVEN WATT

Since the Universal Declaration of Human Rights (UDHR or “the Declaration”) was adopted in 1948, the international community has codified and developed an extensive body of human rights protections covering the full gamut of civil and political rights as well as social, economic and cultural rights—from the right of everyone to be free from torture and inhumane treatment, to the right to health and education. The U.S. Constitution and laws reflect some of these rights and, in some respects, afford us greater protection. However, in a growing number of areas, international standards offer more comprehensive protection than our domestic laws. The international pro-

hibition against “cruel, inhuman or degrading treatment or punishment,” for instance, proscribes more conduct than its domestic equivalent—the Eighth Amendment’s prohibition against “cruel and unusual punishment.”

U.S. laws incorporate some international human rights standards. For example, the United States has signed and ratified three important human rights treaties: the International Covenant on Civil and Political Rights, the Convention against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination. In ratifying these instruments, the U.S. government assumed binding international legal obligations and sig-

naled its commitment to abide by the standards that these treaties enshrine. Following ratification, under the U.S. Constitution, these treaties become the “supreme law of the land” on par with an Act of Congress and superior to conflicting state laws. U.S. courts, including the Supreme Court, have long recognized this fact, as well as the validity of customary international law. This body of law refers to general and consistent practices adhered to by the international community out of a sense of legal obligation. The Supreme Court has repeatedly held that these laws form part of U.S. law, and more specifically, federal common law. Although integral to the U.S. legal system, violations of these international guarantees regularly occur in the United States, and there is no obvious mechanism for enforcement. But attorneys can use the U.S. court system as a means to enforce these protections and U.S. legal principles recognize this possibility.

U.S. courts have a mandate to consider both treaty-based and customary international law claims when they are presented. The Supremacy Clause of the U.S. Constitution provides that treaties are supreme law and Article III that federal courts can hear cases arising under international law. Lawyers

sion—or indirectly: by informing the court’s decision in a persuasive manner, i.e., to use international standards as a rule *for* decision.

Apart from the few instances where Congress passed legislation af-

law, requires that courts interpret state and federal law so that it does not conflict with international law. The principle is applicable both to treaties and customary international law. For some judges, using treaties in this manner is

*“... in a growing number of areas, international standards offer more comprehensive protection than our domestic laws.”*

fording individuals a right to sue based on human rights standards, options available to lawyers seeking to rely directly on treaty-based claims are rather limited. This is primarily due to the fact that the three human rights treaties to which the United States is a party are “non-self-executing”, a judicially created doctrine that precludes individuals from relying directly upon violations of treaty-based rights as a cause of action in federal or state courts unless legislation specifically provides for such a right. Because of this doctrine, U.S. courts have repeatedly expressed unwillingness to apply international human rights treaties as binding law.

Despite their non-self-executing nature, human rights treaties are not

much less controversial than using international law as the rule of decision because they can avoid acknowledging any formal obligation to abide by international law.

This approach is not new. U.S. courts at all levels have shown receptivity to this indirect approach to help clarify the meaning of vague or unsettled domestic laws. In 1949, for example, the Supreme Court referenced article 20(2) of the Declaration, which states that “[n]o one may be compelled to belong to an association” in order to uphold as constitutional an amendment in Arizona’s constitution that prohibited closed-shop union arrangements. In recent years, the Supreme Court has continued to apply this principle, referencing international rights standards and jurisprudence as well as foreign laws and practices in their opinions with increasing regularity. In its last seven terms, the Court found it persuasive to cite human rights treaties prohibiting race and sex discrimination, as well as a decision of the European Court of Human Rights on sodomy laws in the United Kingdom and their negative impact on the right to privacy and family life, international practices with respect to the death penalty, and customary international law. These references were used in deciding important cases addressing affirmative action,

*“Although integral to the U.S. legal system, violations of these international guarantees regularly occur in the United States, and there is no obvious mechanism for enforcement.”*

therefore have a legal basis for raising international standards in litigation. They can raise the standards directly—by requesting the court to apply international standards as the rule *of* deci-

tionally without value in U.S. litigation. These treaties may be utilized by lawyers indirectly, in a persuasive manner, for their interpretative value. This principle, rooted in Supreme Court case



same-sex conduct, execution of the mentally retarded and juveniles, the rights of men detained at Guantánamo, and the validity of claims under customary international law brought under the Alien Tort Claims Act of 1789.

The Court's reference to international legal standards has mostly been confined to an occasional footnote or fleeting sentence; but in 2005, Justice Kennedy devoted an entire section of his opinion in *Roper v. Simmons*—a case striking down the juvenile death penalty—to international and foreign practice in this area. Justice Kennedy noted that, “[o]ur determination finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” International law, including the Convention on the Rights of the Child, the majority found, was relevant to interpreting the Constitution's Eighth Amendment prohibition against cruel and unusual punishment. And, in 2006, relying in part upon an in-depth, detailed analysis of specific provisions of the Geneva Conventions, the Supreme Court struck down as unconstitutional the military commissions set up by the Bush administration to try men detained at Guantánamo. In addition, former Justice O'Connor and the late Chief Justice Rehnquist, as well as two of the current Court's more liberal justices, Ginsberg and Breyer, have all either spoken publicly or written about the importance of understanding international law. The use of international precedent by the Court is not without its critics. Justices Scalia and Thomas, have been two of the most vocal opponents of the Courts' increasing use of international and foreign legal standards, and have filed joint dissenting opinions in all recent cases in which the majority has referenced international precedent. Their dissents have singled out and chastised the majority's refer-

ence to international standards. For example, dissenting from the majority decision to strike down the Texas sodomy law in *Lawrence v. Texas* as unconstitutional, Scalia, joined by Thomas, dismissed the Court's discussion of “foreign views” as “meaningless dicta ....” Some Judges in the lower courts,

Court found that conditions at a community correctional center violated inmates' constitutional rights, because they “transgress[ed] today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”

State courts have adopted a similar approach to their interpretation of

“... *Lawyers today should consider the crucial role they can perform in realizing human rights standards. If they fail to raise these standards in litigation, judges will not be given the opportunity to consider and enforce them and the Declaration's guarantee of human rights protections and dignity for all will remain an unfulfilled and unattainable promise.*”

notable among them Judge Richard Posner from the Seventh Circuit Court of Appeals, have expressed similar views in legal opinions, Op-Eds and law reviews.

Notwithstanding these negative views, courts at the federal and state levels have for decades routinely utilized international standards to give contextual support to their holdings. Judges have used international law as a tool to interpret provisions of federal and state constitutions, and attorneys have relied on them for persuasive authority in arguing for a more expansive view of their client's rights. For example, in *Lareau v. Manson*, the Connecticut Federal District Court looked to international standards, including the United Nations Standard Minimum Rules on Treatment of Prisoners to give fuller meaning to the Eighth Amendment. Referencing these standards, the

state laws. In *Boehm v. Superior Court*, the California Court of Appeals relied on Article 25 of the Declaration to interpret a general statutory duty by the state to support the poor. When the county reduced general assistance benefits without considering the recipients' need for clothing, transportation and medical care, the court held this to be “arbitrar[y] and capricious.” The court used the Declaration to provide support for the notion that “common sense and all notions of human dignity” require a minimum level of subsistence. In *Sterling v. Cupp*, the Oregon Supreme Court likewise referenced the Declaration—in addition to five additional treaties and other international instruments addressing the rights of prisoners—to aid in the interpretation of a vague state constitutional provision requiring that inmates not be treated with “unnecessary rigor.” Guided in

part by these international standards, the court held that a state law permitting female prison officers to supervise male prisoners was unconstitutional. The court did not apply these standards to decide the case; rather it used them to more precisely define the meaning of “unnecessary rigor” in the context of a state-run prison system.

These cases represent just a few from around the country in which international human rights standards have been raised in litigation and considered by courts in a broad and diverse range of social justice issues—from the right of same sex couples to marry, to the rights of children and prisoners. Even

though international law forms part of U.S. law, attorneys continue to dispute the utility of arguments based on international standards. They frequently contend that international law is unenforceable, will not be recognized by the judge as valid, or will damage the case. These arguments should, of course, be carefully considered, but where international standards are well defined and offer protections that are equal to, or greater than, applicable domestic law, they should be advanced in appropriate cases.

Finally, lawyers today should consider the crucial role they can perform in realizing human rights standards. If

they fail to raise these standards in litigation, judges will not be given the opportunity to consider and enforce them and the UDHR’s guarantee of human rights protections and dignity for all will remain an unfulfilled and unattainable promise. As Eleanor Roosevelt proclaimed, “[w]ithout concerted citizen action to uphold [human rights] close to home, we shall look in vain for progress in the larger world.”

**Steven Watt**, *Senior Staff Attorney*,  
ACLU Human Rights Program

# Children of Lesser Rights

*The United States Failure to Ratify  
the Convention on the Rights of the Child*



JENNIFER TURNER  
AND ALICE FARMER

As we celebrate the 60th anniversary of the Universal Declaration of Human Rights (UDHR), we must formally recognize the protection the declaration gives to children—and push for further realization of those rights by ratifying the Convention on the Rights of the Child (CRC or “the Convention”).

The United States has long been a firm supporter of human rights in general and the UDHR in particular—but has yet to embrace the CRC. As Sen. Hillary Rodham Clinton stated, “...in spite of our progress on human rights over the last half-century, it is unconscionable that we still have not seen the circle of human dignity expanded to include all the children of our world.”

The UDHR offers strong protection for children’s rights, declaring “all human beings are born free and equal in dignity and rights.” It does not limit those rights exclusively to adults. The declaration provides a foundation for the protection offered to children in human rights law today.

Children are especially vulnerable members of society, and documents drafted since the UDHR reflect this reality. The General Assembly of the United Nations adopted the Declaration of the Rights of the Child in 1959. This declaration restates several provisions of the Universal Declaration of Human Rights as applicable to children. Notably, “the child shall enjoy special pro-

tection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”

The CRC, adopted in 1989, is the most comprehensive treaty that exists on children’s rights. It has been ratified

and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”

juvenile offenders or to have children serving life without parole. Life without parole is theoretically available for juvenile offenders under 18 in only ten other countries, but all of these countries do not apply the sentence to minors and no one in these countries who committed a crime when under the age of 18 is serving life without parole.

The CRC requires in Article 37(b) that the arrest, detention or imprisonment of children should be measures of last resort and applied for the shortest appropriate period of time. However, the U.S. government continues to detain disproportionate numbers of children of color in juvenile detention and to rely on incarceration as a means of addressing children’s social, mental and behavioral issues. In 2005, UNICEF estimated that one million children and adolescents are in confinement worldwide. In 2003, the number of juveniles incarcerated in the United States alone reached nearly 100,000. According to the U.S. Bureau of Justice Statistics, in June 2004, an estimated 7,083 children under the age of 18 were held in adult jails, accounting for 1% of the total jail population.

Once in custody, children are victimized by sexual abuse, denied adequate education, denied adequate physical or mental healthcare, subjected to physical and emotional violence, improperly housed with adult populations, and provided insufficient contact with their parents and families.<sup>1</sup> Article 37(c) of the CRC guarantees children’s right to be treated with dignity and in conditions of confinement that take into account the special needs of children.

The CRC prohibits the use of corporal punishment in schools. The Committee on the Rights of the Child, the body charged with authoritative interpretation and overseeing the CRC,

*“If ratified by the United States, the CRC would provide explicit legal recognition that children in U.S. possess fundamental human rights.”*

by every country in the world except the United States and Somalia. The CRC reflects the nearly universal recognition of children’s unique human rights protection needs. Building on the fundamental notions of human dignity in the UDHR, the CRC recognizes that the rights of all children cannot be fulfilled without governments promoting those rights.

The CRC embraces children’s rights that are central to U.S. values. It aims to ensure children’s survival, well-being and development, while taking into account the ways their education, housing, health care, mental, nutritional, and social developmental needs are distinct from adults. The treaty contains a holistic approach to the rights of children and adolescents. It guarantees their civil and political rights —such as the right to be free from sexual exploitation and to proper treatment while in detention—as well as their economic, social and cultural rights, such as the right to education and health care. The Convention encompasses all youth up to the age of 18.

If ratified by the United States, the CRC would provide explicit legal recog-

children detained in juvenile detention facilities, and children subjected to corporal punishment in school.

The CRC explicitly prohibits sentencing children to incarceration for life without parole. Article 37(a) of the CRC states, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” Although the juvenile death penalty was eliminated in 2005 by the U.S. Supreme Court in *Roper v. Simmons*, 41 states continue to sentence children to life without parole for crimes committed before they are 18 years old. In many states, juveniles can be transferred to adult courts and sentenced to life without any chance of parole regardless of their age, and without considering the circumstances of the offense. At least 2,381 people in the United States are currently incarcerated for life without the possibility of parole for crimes they committed as children.

The United States is the only country in the world known to either issue the sentence of life without parole for

states in General Comment 8 that corporal punishment “directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.” Yet according to official reports every year in the United States, at least 220,000 children in public schools are subjected to corporal punishment, damaging the school environment and teaching students that violence is legitimate.

Permitted in 21 states, corporal punishment typically takes the form of “paddling:” an administrator or teacher hits a child repeatedly on the buttocks with a long wooden board, causing pain, humiliation, and in some cases, deep bruising or other serious injuries. African American students and students with physical or mental disabilities receive corporal punishment at disproportionate rates, creating a hostile environment that makes it even more difficult for these students to succeed.<sup>2</sup>

Much like the UDHR, the CRC has been widely embraced. Of 195 countries in the world, 193 countries are parties to the treaty; the United States and Somalia (which does not have an internationally recognized and functioning government) are the only countries in the world not to have ratified or acceded to the treaty. Despite the fact that the United States was a major and active participant throughout the ten-year drafting process for the treaty, the CRC is not binding on the United States. The United States has taken the first step, by signing the treaty. As a signatory, the United States must not take actions that would defeat the CRC’s object and purpose. Yet this leaves children with insufficient protection. Full U.S. ratification of the CRC is long overdue.

The U.S. government has proclaimed its commitment to the CRC’s principles on several occasions. In

*Roper v. Simmons*, the Supreme Court explicitly acknowledged the CRC’s authority as an expression of the “overwhelming weight of international

“Now, at the 60th anniversary of the UDHR, it is time for the United States to stand behind its oft-stated ideals of individual liberty and human dignity by ratifying the CRC.”

opinion” in interpreting domestic legal standards, observing that the “express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”

The Supreme Court is not alone in its support for the CRC. When Ambassador Madeleine Albright signed the CRC on behalf of the United States she declared, “The Convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children[.]”

Members of Congress have repeatedly pushed for ratification of the CRC. In 1992, Senator Patrick Leahy urged the Senate to sponsor a resolution calling for ratification of the CRC. He attributed ongoing resistance to a misperception by opponents of the CRC that it is anti-family or would infringe upon states’ rights. Rather, he pointed out, it provides internationally agreed upon minimum standards that protect children from poverty, abuse, hunger, and abusive labor practices; and creates a foundation by which countries can work together to ensure optimal development for their children in a secure and healthy environment.

Now, at the 60th anniversary of the

UDHR, it is time for the United States to stand behind its oft-stated ideals of individual liberty and human dignity by ratifying the CRC. When juvenile of-

fenders are sentenced to life without parole, when minors are confined under substandard conditions, and when students are subjected to corporal punishment in school—the human rights of children and adolescents are denied.

Despite the fact that the U.S. played a crucial role in drafting the UDHR, it continues to allow ongoing and repeated abuse against its own children. Minority children are disproportionately impacted by these rights violations and urgently need the protective guarantees that ratification of the CRC would provide. The United States should uphold all children’s right to conditions that provide them with freedom and dignity—and should substantiate its historic commitment to human rights—by ratifying the Convention.

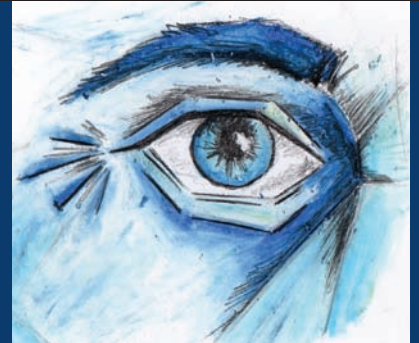
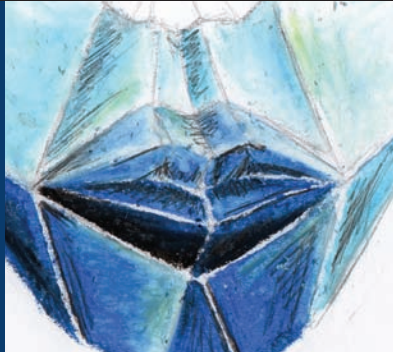
**Jennifer Turner**, *Human Rights Researcher*, ACLU Human Rights Program and **Alice Farmer**, *Aryeh Neier Fellow*, ACLU Human Rights Program

<sup>1</sup> See, e.g. Human Rights Watch & ACLU, *Custody and Control: Conditions of Confinement in New York’s Juvenile Prisons for Girls* (2006); Coalition for Juvenile Justice, *Ain’t No Place Anybody Would Want to Be: Conditions of Confinement for Youth* (1999).

<sup>2</sup> Human Rights Watch & ACLU, *A Violent Education: Corporal Punishment of Children in U.S. Public Schools* (2008).

# Enabling Everyone

## *The United Nations Convention on the Rights of Persons with Disabilities*



JAMES FELAKOS

The entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or “the Convention”) on May 3, 2008, was an historic event that promises to improve the lives of some 650 million people with disabilities throughout the world. The Convention has been called “revolutionary” by some commentators for its holistic and visionary approach to disability. Critical to the CRPD’s progressive nature is the replacement of the traditional medical-social welfare model of disability that focuses on the *inability* of individuals, with the social-human rights model that focuses on *capability* and inclusion. This approach posits that the real barriers to full participation reside not in the individual,

but rather in their external environment, as evidenced by the language of Article 1 of the CRPD, which emphasizes that impairments in “interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.” In addition, the Convention unites the civil and political rights traditionally provided by anti-discrimination legislation (referred to as first generation rights) with the economic, social and cultural rights conferred through equality measures (second generation rights).

The CRPD was the first human rights treaty of the 21st Century and had record input from people with disabilities. Little more than one year after being opened for signature, the CRPD

was ratified by more than the requisite twenty nations and became a legally-enforceable treaty. One-hundred thirty-six countries (States Parties) have signed the Convention.

The United States—although it did participate in the negotiating sessions—has thus far chosen not to ratify the CRPD. The Convention has significant overlap with ADA and the other United States laws protecting disability rights). However, the Convention changes the framework around which disability is defined to be more positive and inclusive. It also addresses the problems individuals with disabilities encounter in society in a more holistic manner, accounting for past discrimination and current problems with the built environment, as opposed to the discrete manner in which the ADA typically addresses problems. Under the Convention, States Parties are obligated to prevent discrimination against, promote accessibility by, and work to achieve the full realization of economic, social, and cultural rights for persons with disabilities.

Notably, the Convention's authors were unable—due to philosophical differences—to agree on a definition of “disability.” The resulting compromise was to define it parenthetically at paragraph (e) of the Preamble and to offer another non-exhaustive definition in the body of the Convention. The Preamble states:

*Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others . . .

This description of disability as not an individual's condition but rather

as the flawed interaction between that impaired condition and society's lack of adaptation to it, departs radically from conventional thought and is a core con-

“*The CRPD was the first human rights treaty of the 21st Century and had record input from people with disabilities.*”

cept of the Convention. “Disability” is then partially defined in Article 1:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

These two approaches combine to at least partly define who is to be protected by the Convention.

The Preamble identifies myriad factors derived primarily from principles articulated in the Universal Declaration of Human Rights that underscores the need for the Convention. These include: each individual's inherent dignity, worth, and right to equality; the importance of mainstreaming disability issues as part of strategic development; the need to fight discrimination and to protect human rights; the need to improve the living conditions of persons with disabilities; the importance of autonomy and self-determination; the particular risks faced by women and children with disabilities; the fact that the majority of persons with disabilities live in poverty; the crucial need to make all spheres of life accessible to persons with disabilities; and the key importance of the family. Echoing the aspirational concepts

highlighted in the Preamble, eight core principles governing the Convention are identified in the text: respect for the individual's inherent dignity, autonomy,

and independence; non-discrimination; full participation in society; respect for human diversity; equality of opportunity; accessibility; gender equality; and children's rights.

A number of terms are given broad definitions in the Convention, including “reasonable accommodation,” which is described as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” The concept of “universal design” critical to the Convention (and absent from the ADA) is defined as the design of products, environments, programs and services which do not require additional adaptation for use by all persons. Finally, “discrimination on the basis of disability” is defined to include conduct which has the purpose *or effect* of denying equal rights and freedoms.

The CRPD flows from earlier human rights instruments and integrates them into its text. As stated in the Preamble to the CRPD,

Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all

the rights and freedoms set forth therein, without distinction of any kind.... Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.

The CRPD does not create new rights for persons with disabilities, but creates a framework which ensures that they have access to the human rights due to all. The CRPD combines the anti-discrimination rights found in the International Covenant on Civil and Political Rights (ICCPR) with rights related to an adequate standard of living and equality found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). This integration follows the United Nations "human right to development" theory, which posits that both sets of rights are integral for development and must be enforced at the same time. For example, civil rights laws prevent prejudicial harm while equality measures remedy inequities that already exist as a result of a history of discrimination.

In addition to these international documents which comprise the International Bill of Rights, the CRPD also specifically includes articles related to the rights of women with disabilities and children with disabilities, the core principles of which are found respectively in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC)—both of which the United States has failed to ratify. These articles do not stand on their own but, rather, correspond to other CRPD Articles and are meant to be integrated into the Convention.

The Convention creates a United Nations oversight committee to moni-

tor compliance with the Convention. An Optional Protocol accompanying the Convention establishes Committee procedures for addressing complaints of Convention violations made against particular States Parties by individuals or groups. By ratifying the Optional Protocol, a State Party consents to the Committee's jurisdiction to address such complaints; in the absence of such ratification, the Committee will not receive or consider complaints regarding that State Party. The Convention does not create a private right of action on its own and it does not require

discrete manner in which the ADA and other domestic laws typically address problems only prospectively. For example, while the ADA and Fair Housing Act require a certain level of accessibility in new buildings and housing, they have much less stringent requirements on the majority of existing structures. Each building is analyzed individually or, if applicable, as part of a development, owner by owner. Unlike the ADA, the Convention requires that States Parties take "effective" action to ensure that resources are available to people with disabilities on an equal

*“This description of disability as not an individual’s condition but rather as the flawed interaction between that impaired condition and society’s lack of adaptation to it, departs radically from conventional thought and is a core concept of the Convention.”*

States Parties to create such a right. Instead, enforcement of the Convention's requirements occurs through the reporting and monitoring mechanisms created in Article 34 and responses to complaints directed to the Committee by individuals or groups if the State Party has signed the Optional Protocol.

The Convention has significant overlap with the ADA and the other United States laws protecting disability rights. However, the Convention changes the framework around which disability is defined to be more positive and inclusive. It also addresses the problems individuals with disabilities encounter in society more comprehensively, accounting for past discrimination and problems with the current built environment, as opposed to the

basis. The Convention thus employs equality measures absent from current domestic law to remedy inequities that exist due to past practices. The Convention does not prescribe a particular manner of effective action but, in the realm of housing, for example, a State Party might require universal access for all new construction and dramatically expanded tax breaks for modifications to existing housing to ensure that people with disabilities can live independently on an equal basis with the general population.

If adopted by the United States, the CRPD's unique combination of first and second generation rights could inspire a more vigorous and comprehensive approach within the U.S. to the myriad injustices still suffered by



persons with disabilities. Of the major party presidential candidates in 2008, only Senator Obama indicated that he would sign the Convention.

Signature and ratification of the CRPD, which requires member states to share best practices and technical assistance, would signify a commitment by the U.S. to providing critical global leadership on disability rights issues. It would ensure that the United States promotes disability-inclusive development practices at home and abroad, helping to increase equality for persons with disabilities throughout the world.

*Jim Felakos, ACLU Disability Rights Fellow*

The author would like to acknowledge the following articles that were useful in the development of his ideas for this essay:

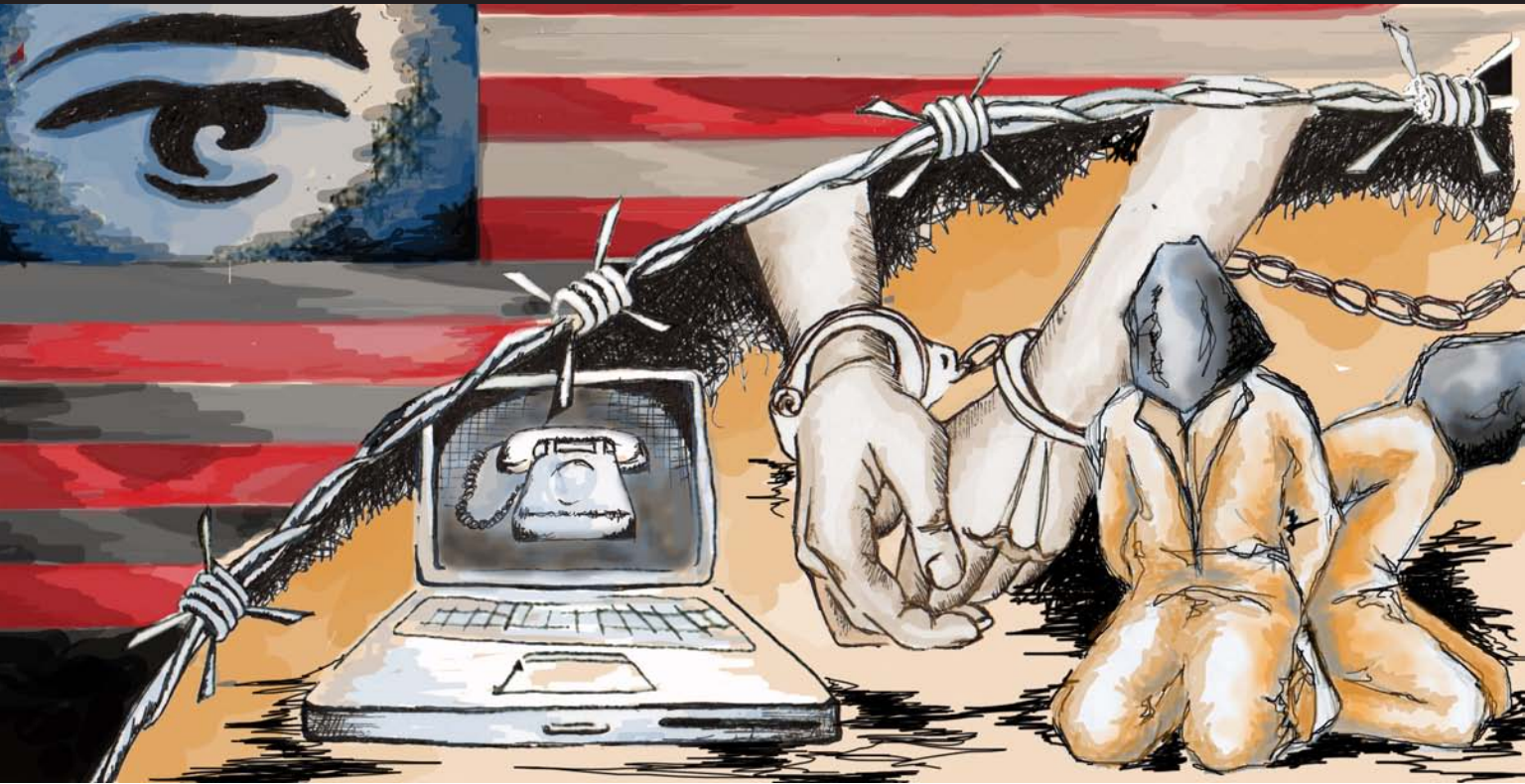
Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, HUMAN RIGHTS BRIEF, Vol. 14, No. 2 (2007).

Michael Ashley Stein, *A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities*, 31, MENTAL & PHYSICAL DISABILITY L. Rep. (2007).

Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Rights*, Hastings L.J. (2007).

# The Larger Struggle

*Human Security Requires Human Rights*



HINA SHAMSI

Eleanor Roosevelt, the driving force behind the Universal Declaration of Human Rights (UDHR or “the Declaration”), was a woman not just of strong ideals, but also of eminent pragmatism. In a post-World War II world riven by ideological and political conflict, and struggling with economic devastation, she understood that the foundational document of a nascent human rights movement would win universal acceptance only if it carried moral force.

Long before Harvard professor Joseph Nye coined the term “soft power,” Mrs. Roosevelt recognized that her ability to persuade other nations to embrace her views depended on the

legitimacy of the values she espoused. Drawing, therefore, upon the U.S. Bill of Rights, the Magna Carta and the Declaration of the Rights of Man, Mrs. Roosevelt persuaded delegates from around the world to join her in crafting, in elegant and simple language, a declaration of fundamental rights and freedoms grounded in the principles of dignity, equality, justice, and opportunity. The Declaration is now the most widely-recognized statement of the rights to which every person on our planet is entitled.

On the 60th anniversary of the Declaration, America’s historic role as a leader in the human rights movement

and its moral standing in the community of nations have been damaged as never before. As the world now knows, the Bush administration's response to the terrible tragedy of September 11, 2001, called into question truths Americans had thought self-evident about themselves. American officials had helped draft the Convention against Torture and the United States was at the forefront of the anti-torture movement. Yet, starting in 2001, U.S. personnel subjected hundreds, perhaps thousands, of people in Guantánamo, Iraq and Afghanistan to cruel and inhuman treatment, and tortured an unknown number. More than 70 detainees in Iraq and Afghanistan have died in the custody of the United States because of gross recklessness, abuse or torture, and four detainees at Guantánamo have committed suicide. America historically stood for the principle of justice in accordance with the rule of law, yet starting in 2002, hundreds of men were detained without charge in Guantánamo and secretly, in other countries. America has always been the land of immigrants, but after 9/11 the Bush administration established special programs in which thousands of immigrants were questioned, wrongly detained, and hundreds unfairly deported, often for minor immigration violations such as overstaying a visa.

Of course, the United States' relationship to international law and the human rights movement has always been an ambivalent one. Even as the United States was at the forefront of the development of human rights in virtually all areas, it has also defended its right to act unilaterally and with "exceptionalism." For example, as a habitual matter, when the Senate ratifies a treaty at the request of the executive branch, it does so subject to reservations, understandings and declarations that prevent changes in domestic law. Other forms of American exceptionalism include the

insistence—by Democratic and Republican administrations alike—that other nations adhere to international standards that favor U.S. interests, while failing to adhere to standards or treaties that do not (in that administration's view) serve the United States.

The Bush Administration's positions—its insistence that *no law* applied to constrain executive action during a global war of indefinite duration—are of a different magnitude altogether. Other administrations have justified American exceptionalism with, for example, the argument that domestic law trumped the United States' international legal obligations. The Bush administration went much further. It claimed that there are places (Guantánamo) and kinds of people ("enemy combatants") entirely outside the protection of the U.S. Constitution or of international human rights and humanitarian law. Whereas once Eleanor Roosevelt told her audiences that "Among free men the end cannot justify the means," over the last eight years, leading U.S. officials demonstrated that they had no interest in acting within the rule of law and, worse, that they saw the law as a hindrance.

In the name of national security, the Bush administration increased human insecurity. In doing so, it presided over the most precipitous decline of American soft power in a generation—at a time when the battle over ideals and values is at its most critical. Top officials ignored or were willfully blind to fundamental truths. Fair hearings do not jeopardize security; unfair hearings—which send a message to the world that the United States is willing to deviate from its history, its values, and its system of laws—do. Torture and cruelty damages not only the victim, but also the perpetrator and society. In the words of one senior Special Operations interrogator, "Torture and abuse are against my moral fabric. The cliché

still bears repeating: such outrages are inconsistent with American principles. And then there's the pragmatic side: torture and abuse cost American lives." Abu Ghraib and Guantánamo are now recruiting tools for those who want to stoke hatred of the United States and its allies. Repressive governments around the world have pointed to the United States' behavior as an excuse for illegal actions against their own citizens, further delegitimizing the United States' moral authority.

We stand now at one of history's turning points. With new leadership, the United States has the potential to regain its moral status, to regain its soft power and thus its ability to be a leader in the broader struggle, of which the struggle against terrorism is a part. Among the other crucial parts of the larger struggle that must be rekindled—and that are necessary to achieve the long-term strategic goal of combating terrorism—are battles against discrimination, lack of education, disease, injustice and poverty. But the United States must first turn its back decisively on the illegal policies and practices of the previous administration. It must also conduct an independent and non-partisan investigation into the nature and extent of those policies, their origin, and who should be held responsible for them; above all, it must ensure accountability and redress for violations of law.

Sixty years ago, American leadership helped bring the nations of the world together to issue a Declaration that begins: *the 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.* Now, more than ever, it is time for America to once again set an example, and history guides the way.

Hina Shamsi, *Staff Attorney,*  
ACLU National Security Project

