



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

Submitted by

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**I. Introduction**

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

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

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

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

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

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

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

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

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

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

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

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

### **III. Importance of Human Rights Treaty Implementation**

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

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

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

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<sup>2</sup> The ACLU has submitted shadow reports to the United Nations treaty-monitoring bodies reviewing U.S. compliance. See ACLU, *THE PERSISTENCE OF RACIAL & ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)* (Aug. 2009), available at [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf); ACLU, *SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS* (May 2008), available at [http://www.aclu.org/pdfs/humanrights/crc\\_report\\_20080513.pdf](http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf); ACLU, *RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE, SHADOW REPORT SUBMITTED TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)* (Dec. 2007), available at [http://www.aclu.org/files/pdfs/humanrights/cerd\\_full\\_report.pdf](http://www.aclu.org/files/pdfs/humanrights/cerd_full_report.pdf); ACLU, *ENDURING ABUSE: TORTURE & CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD* (Apr. 2006), available at [http://www.aclu.org/files/safefree/torture/torture\\_report.pdf](http://www.aclu.org/files/safefree/torture/torture_report.pdf); ACLU, *DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)* (Jun. 2006), available at <http://www.aclu.org/files/pdfs/iccprreport20060620.pdf>.

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

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

#### **IV. Reservations, Understandings, and Declarations**

In order to understand why ratified human rights treaties, so far, have had little or virtually no impact on U.S. domestic laws and polices, it is important to remember the underlying principles that appear to have guided Congress during ratification. These principles were translated into Reservations, Understandings, and Declarations (RUDs) entered on the occasion of treaty ratification, which have limited full applicability of the treaties<sup>5</sup>:

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

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<sup>3</sup> U.S. CONST. art. VI, para. 2.

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

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

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

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

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

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

## **V. Recommendations on Congressional Treaty Implementation Measures**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

<sup>16</sup> *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

<sup>17</sup> *Id.* at 1368.

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

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

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

## **VII. Conclusion**

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

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<sup>20</sup> ACLU, *Human Rights on the Judicial Front: Litigating Protection in U.S. Courts*, printed in HUMAN RIGHTS BEGINS AT HOME (Dec. 2008), available at [http://www.udhr60.org/hr\\_on\\_judicial\\_front.pdf](http://www.udhr60.org/hr_on_judicial_front.pdf).