



May 2007

# Preliminary Analysis of the United States Report to the Committee on the Elimination of Racial Discrimination

## Background information

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The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is the principal international treaty for the elimination of racism, racial discrimination and other forms of intolerance. CERD was adopted by the United Nations in 1965 and came into force in 1969. The Convention requires countries to review governmental, national and local policies, and to amend or repeal laws and regulations that have the effect of creating or perpetuating racial discrimination, including as they affect indigenous people, women and migrants. CERD also requires countries to take positive measures, including affirmative action, to redress racial inequalities. CERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Countries that have ratified the CERD treaty must submit periodic reports on compliance to the 18-member Committee on the Elimination of Racial

Discrimination (CERD Committee), the body of independent experts responsible for monitoring compliance with CERD. The CERD Committee meets twice a year in Geneva for three-week sessions in March and August. It considers a number of reports from various countries during each session.

## US Report on Compliance with CERD

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In 1994, the United States ratified CERD, which obligates all levels of government (federal, state, and local) to comply with the treaty provisions. Since ratification, the US has submitted only one report on its compliance with the treaty, in 2000 (which combined three overdue reports). The US was due to submit additional reports in November 2003, but failed to meet the deadline. Last month, the State Department submitted its overdue report to the CERD committee in Geneva (covering 2000 - 2006) and posted it on its website: [http://www.state.gov/g/drl/rls/cerd\\_report/](http://www.state.gov/g/drl/rls/cerd_report/)

The CERD Committee is expected to consider the US report at its session in March 2008. When the report is reviewed, the US State Department will send a formal delegation to the session, which will include representatives from several relevant federal agencies. CERD Committee members will then hold formal proceedings over two days in which members will question the State Department delegation and the agency representatives about the report. At the conclusion of its review of the US report, the CERD Committee will issue a final report referred to as its Concluding Observations. The Concluding Observations will evaluate the US report and its compliance with CERD requirements. The 2001 Concluding Observations are available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18,paras.380-407.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18,paras.380-407.En?Opendocument)

■ The US report chose to disregard racial discrimination problems in the Gulf Coast states of Louisiana and Mississippi, where Hurricane Katrina exposed the terrible social and economic inequities attendant on those states' minority and underprivileged populations.

While the ACLU welcomes the US government's submission of this report and appreciates the effort made to comply with the treaty reporting obligations, we note below, in brief, our initial analysis and disagreement with some of the information contained in it. We particularly wish to note certain omissions the government has made, and not least its decision to focus on only four, unrepresentative states (Illinois, New Mexico, Oregon, and South Carolina'), notably excluding populous California and Texas, states with large migrant communities and among the country's most extensive racial discrimination problems. We also regret that the US report chose to disregard racial discrimination problems in the Gulf Coast states of Louisiana and Mississippi, where Hurricane Katrina exposed the terrible social and economic inequities attendant on those states' minority and under-privileged populations. The ACLU, will coordinate with a wide coalition of advocacy, human rights, and grass roots organizations led by the US Human Rights Network, and will submit an independent shadow report to the CERD committee detailing the US government's failure to meet its obligations under the CERD treaty later this year.

## **Guarantee Equality and Non-Discrimination in Enjoyment of Specific Rights (Article 5)**

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### **A. RIGHT TO EQUAL TREATMENT BEFORE TRIBUNALS AND ALL OTHER ORGANS ADMINISTERING JUSTICE**

#### *1. Right to counsel*

**US Report:** Counsel for indigent defendants is provided without discrimination based on race, color, ethnicity, and other factors. States and localities use a variety of methods for delivering indigent criminal defense services, including public defender programs, assigned counsel programs and contract attorneys. The federal system also uses similar types of programs.

**ACLU:** State public defender programs remain grossly under-funded, with the brunt often borne by racial minorities who are confined, given discriminatory policing and selective prosecution, at disproportionate rates. Examples of seriously deficient indigent defense systems include systems administered by counties in Michigan, Pennsylvania, Ohio, Nevada, and Washington State. Moreover, the right to free counsel is only available in criminal proceedings and is not available to the hundreds of thousands of detainees held in immigration detention facilities.

#### *2. Discrimination by Law Enforcement*

**US Report:** Since January 2001, the US Department of Justice's (DOJ) Civil Rights Division has reached 14 settlements with law enforcement agencies.

**ACLU:** The government only specifically references 9 of the 14 settlements in its Report. Of them, 7 have expired, and 2 are expiring in the near future. Moreover, studies have documented the persistence of racial profiling in some of these jurisdictions, such as Cleveland. Similarly, in Oregon, the Criminal Justice Commission has conducted 4 annual statewide surveys (2002-2005) to assess the public's views of law enforcement contacts and the prevalence of racially-biased policing. Additionally, substantial state police traffic stop data was collected and analyzed. The data and surveys indicate that people of color are more likely than white drivers to be stopped and to believe that race was a factor in the stop; disbelieve the reason police give for the stop; be searched; and be taken into custody. Additionally, the recent release of a government report highlights continued racial

profiling of African-Americans and Hispanics, nationally. Thus, in recent years, the government has in fact under-enforced the federal anti-discrimination statutes and brought too few “pattern or practice” cases, making urgent the passage of federal anti-profiling and data collection legislation. (Courts find a “pattern or practice” when the evidence establishes that discriminatory actions were the defendant’s regular practice, rather than an isolated instance.)

**US Report:** The DOJ has issued racial profiling guidelines for federal law enforcement officers.

**ACLU:** The guidelines prohibit racial profiling but provide no rights or remedies and thus cannot be used to hold the government accountable for its actions. Additionally, they include a broad and largely undefined exception for “national security”, a loophole that could be used to circumvent the policy guidelines as a whole. Meanwhile, racial profiling persists, and in the wake of 9/11, larger numbers of individuals and communities are being affected, often due to the prevailing anti-immigrant sentiment and hostility that pervades the country.

**US Report:** Private litigants may sue law enforcement agencies based on allegations of racially discriminatory police activities.

**ACLU:** While true, the burden of proof of intent to discriminate under the Fourteenth Amendment and Title VI is impossibly high, and Fourth Amendment protections have been diluted. Thus, it is very hard to prevail in these cases, and victims are deterred from suing. In this regard, we note the US government’s failure to adopt the definition of “racial discrimination” under the CERD treaty to provides broader protections for “any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise” of human rights.

**US Report:** The government established outreach programs in the aftermath of 9/11 for Arab and Muslim communities.

**ACLU:** Other government programs, including Special Registration (involving the registration, fingerprinting, photography and interrogation of non-citizens from 25 predominantly Muslim and Arab countries) and dragnet-style FBI questioning of Muslim, South Asian, and Arab men, undercut the benefits of such outreach efforts. A 2006 study supported by DOJ showed that Arab-Americans feared the intrusion of these and other federal policies and practices even more than individual acts of hate or violence.

### *3. Representation in the Criminal Justice System*

**US Report:** The reasons for disparities in incarceration rates are complex. Some research suggests that the disparities are related to differential involvement in crime.

**ACLU:** Solid research, including ACLU studies done in Massachusetts and New York, demonstrates that these disparities are related to government policies and the disparate treatment of minorities at every stage of the criminal justice system, from investigation to sentencing, with respect to both juveniles and adults. As one example, despite equal or lower rates of drug use among racial minority women than among Caucasian women, racial minority women are significantly overrepresented among those imprisoned for drug crimes. This is a result of racially targeted law enforcement practices, racially disparate charging and sentencing, the expansion of criminal liability through legal provisions such as accomplice liability, and the imposition of unduly harsh mandatory minimum sentences failing to take into account the often peripheral involvement of women defendants in drug crimes and other mitigating factors.

### *4. Capital Punishment*

**US Report:** All criminal defendants, especially those in potential capital cases, enjoy numerous procedural guarantees, which are respected and enforced by the courts.

**ACLU:** In fact, procedural protections often fail, with catastrophic results. There is compelling evidence that states have executed at least 8 likely innocent men (6 African American or Latino). Moreover, 123 people on death row were either: 1) granted full executive pardons based on new evidence of innocence; or 2) had their convictions overturned and were either acquitted at retrial or had all charges dropped. These wrongful convictions were primarily due to a failure of procedural protections and fair processes. Procedural failures also often result in the erroneous imposition of a death sentence even where guilt is not at issue. In the few instances in which it takes such cases, the US Supreme Court has repeatedly reversed death sentences in Texas, the nation’s leader in executions, for violations stemming from flawed sentencing proceedings. Finally, courts frequently fail to uphold “the right to challenge the makeup of the jury,” with a recent example again from Texas where the prosecutor purposefully eliminated nearly all qualified black prospective jurors. Challenges to death sentences take decades, and hardly represent the robust

protections that should be available to those facing capital prosecution.

**US Report:** Of the inmates in prison under sentence of death by the states and federal government, 56% were white and 42% were African-American.

**ACLU:** Nationally, the racial composition of those on death row is 45% white, 42% black, and 11% Hispanic. By labeling Hispanic inmates as “white,” and thus over-representing the percentage of white people on death row, the government creates the impression that the death penalty is utilized in a more racially balanced manner than it truly is.

## 5. Prisons

**US Report:** Since 2001, the Civil Rights Division (CRD) has used the Civil Rights of Institutionalized Persons Act (CRIPA) and other statutes to prosecute allegations of torture, cruel, inhuman, and degrading treatment or punishment, or other abuse. The Division has opened 69 CRIPA investigations, issued 53 findings letters, filed 22 cases, and obtained 53 settlement agreements.

**ACLU:** The government claims that the CRD has vigorously enforced the civil rights of persons in the nation’s prisons and jails under the CRIPA. However, to make this claim, the government admittedly cites statistics that include many institutions that are not prisons or jails. In fact, the CRD rarely investigates abuse in prisons and jails. Even when it does investigate, the investigations rarely result in litigation, and even more rarely, in enforceable court orders. Indeed, since 2002, not a single CRD investigation of a prison or jail has resulted in a new enforceable court order. In the entire 2002-04 period, the CRD took action to enforce existing court orders in just one prison or jail case, and the CRD has not produced an annual report on its activities to the US Congress since 2004.

**US Report:** The Report does not discuss the treatment of prisoners during Hurricane Katrina.

**ACLU:** During and after Hurricane Katrina, many prisoners from Orleans Parish Prison (the New Orleans jail), Jefferson Parish Correctional Center, and other correctional facilities in Louisiana faced systematic and racially motivated assaults by prison guards. At the Jena Correctional Facility, prisoners reported being slapped, punched, beaten, stripped naked, hit with belts, and kicked by correc-

tional officers. The detainees, most of whom were African-American, were subjected to degrading treatment and racist slurs by the correctional officers, most of whom were white. After documenting this abuse, Human Rights Watch and the NAACP Legal Defense Fund called upon the Civil Rights Division to conduct an investigation into the abuse at Jena. The Civil Rights Division refused to conduct an investigation, noting that the facility had been closed shortly after the abuse allegations were publicized. Likewise, the ACLU called upon the DOJ to investigate the abuses New Orleans prisoners suffered during and after Katrina at prisons and jails throughout the state. No information was released publicly about whether any such investigation ever took place, or whether any of the guards responsible for the abuse were reprimanded or otherwise disciplined.

## B. RIGHT TO SECURITY OF PERSON AND PROTECTION BY THE STATE AGAINST VIOLENCE OR BODILY HARM, INFLICTED BY GOVERNMENT OFFICIALS OR BY INDIVIDUAL GROUP OR INSTITUTION

### 1. Racially-motivated Crimes

**US Report:** The government has made efforts to prevent and punish race-based hate crimes.

**ACLU:** Immediately following the September 11 terrorist attacks, the FBI documented a 1600% increase in hate crimes against those perceived to be Muslim or Arab and a 130% increase in incidents directed at individuals on the basis of ethnicity or national origin. The atmosphere of hysteria and paranoia created by the government and some of its programs in the aftermath of 9/11 may have contributed to an increase in such crimes. Congress should pass the Local Law Enforcement Hate Crimes Prevention Act pending before it.

### 2. Violence against Women

**US Report:** The US report is silent as to violence against women.

**ACLU:** Racial minority women are especially vulnerable to violence. For example, while African-American women and white women with the same economic characteristics experience similar levels of domestic violence, African-American women experience a higher rate of domestic violence in part because they are more likely to live in disadvantaged neighborhoods and

experience economic distress. Native American women experience the highest rate of violence of any group in the US. Police response to reports of domestic violence is frequently inadequate, exposing racial minority women in particular to persistent and grave danger. An additional factor in the government's failure to protect women from violence is the interpretation of US constitutional guarantees as "negative" rights rather than as "positive" rights to affirmative protection from violence, and the government's denial of its obligation to protect women from harm by private parties, as in the 2005 US Supreme Court case, *Town of Castle Rock v. Gonzales*.

### 3. Police Brutality

**US Report:** The US report neglects entirely the serious issue of police brutality.

**ACLU:** The police continue to brutalize and take the lives of many racial minority Americans. The murders of 92-year old Kathryn Johnson in Atlanta, Sean Bell in New York City, and Ronald Madison, a mentally disabled man shot in the back by New Orleans police in the days following Hurricane Katrina, are a few recent examples. The International Association of Chiefs of Police's National Use of Force Database reported 175,000 use-of-force incidents from 1994-2000 with only 750 complaints sustained. Racial disparities exist: in New York City, 76% of overall complaints to the city's Civilian Complaint Review Board were made by African-Americans, with two-thirds of the police brutality complaints made by African-Americans and Latinos. New technologies contribute to the problem. Since 2001, over 200 Taser-related deaths have been reported with 80% of Taser use on unarmed individuals. Again, there are racial disparities: in San Diego, California, African-Americans and Latinos were twice as likely to be Tasered than whites. There has been an historic lack of accountability by the police in misconduct and brutality cases. The FBI, while collecting and reporting data on violence against police, reports no data on *violence by police*. In addition, the DOJ has failed, in its additional duty created by its contractual relationship (in its capacity of grantor of specialized funding to state and local police agencies), to monitor, and hold accountable, grantees for failing to uphold representations to obey the law and uphold the constitution. The DOJ has failed to use its "pattern or practice" jurisdiction to investigate systemic issues of police abuse and misconduct to the extent it is warranted.

## C. POLITICAL RIGHTS

### 1. Help America Vote Act (HAVA) and the Voting Rights Act (VRA)

**US Report:** The VRA is the primary federal statute banning racial discrimination in the election process. The DOJ also enforces HAVA, passed in 2002, to improve the administration of US elections.

**ACLU:** Enforcement of the primary nationwide antidiscrimination provision of the VRA, Section 2, is at a virtual standstill, with fewer cases brought and at a lower rate than ever since 1982. Additionally, the US report fails to mention the DOJ's pre-clearance of repressive new laws that require voters to present identification, including picture identification, at the polls on election day, as those in force in Georgia, Florida and Arizona, even though the Georgia law was held by a federal court to be a poll tax. In addition, in the weeks preceding the 2004 presidential election, the DOJ argued in multiple litigations that private citizens could not enforce *any* rights under HAVA, only the DOJ could.

### 2. Felony Disfranchisement

**US Report:** The loss of voting rights does not stem from a person's membership in a racial group but is based on the criminal acts perpetrated by the individual.

**ACLU:** Laws in 48 states that deprive over 5.3 million people of the right to vote disproportionately affect minorities and their communities. In all, 2 million African Americans, 1 of every 12 adults, are disfranchised. Empirical studies in Rhode Island and Atlanta, Georgia deeply underscore the harm to minority communities, where most of these prisoners live and originate. Additionally, several states unfairly require the payment of restitution before returning the vote, and some condition the acquisition of certain occupational licenses on civil rights restoration (usually the right to vote, serve on a jury, and hold public office).

## D. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### 1. Health

**US Report:** "[S]trong overall care" is "provided by the US health-care system." The government also reports on specific programs and public health issues.

**ACLU:** There are in fact two, racially stratified, health-care systems in the US – a private system of care and an inferior and overburdened public system disproportionately relied on by low-income racial minorities. The programs cited by the US report consist largely of research studies and outreach campaigns rather than concrete investments in public health. In reality, burdensome eligibility restrictions, increasing privatization, and outright denials of care, such as abortion services under Medicaid programs in several states, exacerbate the hardships suffered by those relying on government health programs. As a result, racial minorities suffer relatively poor health care and health outcomes.

## 2. Employment Discrimination

**US Report:** The US has “strong legal protections safeguarding the right to free choice of employment and just and fair conditions of employment.”

**ACLU:** Racialized economic injustice and exploitation persist in the US and are exacerbated by government policies. For example, vulnerable groups of workers, most of whom are racial minority women or men, are explicitly excluded from overtime and minimum wage requirements. Likewise, domestic workers, many of whom are migrant workers, are denied some federal labor law protections. For example, domestic workers employed by foreign diplomats are denied judicial remedies by the legal doctrine of diplomatic immunity, making them vulnerable to exploitation and labor trafficking. Even in “white collar” professions, such as scientific and technological fields, women and racial minorities endure discrimination, lack of role models, lower salaries, and limited resources.

## 3. Right to Housing

**US Report:** The federal Department of Housing and Urban Development (HUD) has taken action to address housing discrimination.

**ACLU:** Historically, HUD perpetrated housing discrimination by selectively insuring home loans on an explicitly racial basis. Since that time, the US’ failure to remedy housing segregation has affected minority communities’ access to community resources such as education and social services. Most people

living in government-subsidized housing, moreover, belong to racial minorities and are indigent women raising young children. Public and affordable housing is insufficient, substandard, and subject to unfair restrictions. For example, public housing policies discriminate against the victims of domestic violence and their dependents. Many also discriminate against or deny admission to individuals with felony and/or drug convictions, a group that, like those in public housing overall, is disproportionately minority.

## 4. Right to Education and Training

**US Report:** The government has taken action to desegregate schools. *De jure* racial segregation in education has been illegal in the US since the 1954 decision *Brown v. Board of Education*. As a result of *Brown*, the Civil Rights Act of 1964, and later cases and statutes, schools became increasingly integrated. The DOJ’s CRD continues to monitor compliance of school districts and initiates case reviews where deemed necessary, initiating 228 case reviews and resolving 126 cases leading to declarations of unitary status (i.e., a school system has made the transition from a segregated or “racially dual” system to a desegregated or “unitary” system) and dismissal since 2000. The issues monitored by the CRD include student assignments, faculty hiring and assignments, the availability of equitable facilities, and the distribution of resources.

**ACLU:** The trend toward the desegregation of American schools reported by the US has largely reversed. Since 1991, schools have been re-segregating, most notably in the South and in the border states of California, Arizona, New Mexico and Texas for African-American students, and in the West for Latinos. The reasons for this re-segregation are varied but include the dismissal of school desegregation cases based on findings of unitary status. The DOJ has also taken a position in two cases pending before the US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, in which the government raises objections to voluntary school desegregation in a way that undermines the ability of school districts to correct voluntarily racial and ethnic isolation in schools.

**US Report:** The No Child Left Behind Act of 2001 (NCLB) was designed to bring all students up to grade level in reading and math, to close the achievement gaps between students of dif-

ferent races and ethnicities within a decade, and to hold schools accountable for results through annual assessments. Data from 2005 shows that although achievement gaps between white and minority students continue to exist for all groups except Asians and Pacific Islanders, the gaps are beginning to narrow, even as student populations are becoming more diverse.

**ACLU:** Although the NCLB substantially expands federal jurisdiction over the nation's public schools, the efficacy of the program has been limited by a number of factors, including the combination of the imposition of extremely stringent educational standards without a corresponding increase in resources to local educational agencies, the failure in particular to provide resources to low-performing schools and the granting of waivers to states regarding compliance with NCLB requirements in a way that undermines the goals of the program itself. As a result, substantial disparities in educational performance between racial minority students and white students and between students of low-socio economic status and economically advantaged students persist.

**US Report:** The report does not refer to the "school to prison pipeline" problem.

**ACLU:** The "school to prison pipeline," a disturbing national trend, refers to the increasingly widespread practice of funneling primarily children of color out of public schools and into the juvenile and criminal justice systems. These are often children with learning disabilities or histories of poverty, abuse or neglect. Rather than addressing their needs through additional educational services, they are isolated and punished. Policy trends responsible for this problem include "zero-tolerance" policies criminalizing minor instances of school misconduct; schools increasingly ignoring due process protections for these children, expelling them from public schools and placing them in alternative schools and detention facilities; and policy initiatives including the federal No Child Left Behind Act that place an undue emphasis on 'high stakes testing,' providing schools the incentive to push out low performing students. For example, in the Winner school district in South Dakota, middle and high schools disproportionately punish Native American students for alleged misconduct. Native American students, many with learning disabilities, are 3 times more likely than Caucasian students to be suspended and more than

10 times more likely to be arrested for school misconduct. Over one-third of the Native American students will be suspended, and roughly 1 in every 7 Native children will be arrested for violating a school disciplinary rule, in any year. Native children who defend themselves against racial harassment by Caucasian children are routinely arrested.

**US Report:** An assortment of policy statements and bureaucratic structures, as well as policies of the DOJ and other executive agencies, aim at ameliorating educational inequality.

**ACLU:** These government policies and structures have in fact exacerbated educational inequalities. Educational discrimination based on race and gender is pervasive. In recent years, government agencies have shirked their duties to investigate and eradicate such discrimination. For example, vocational education programs are overwhelmingly sex segregated, leaving women, including women of color, with poorly remunerated, traditionally female skills. Yet the DOJ's Office of Civil Rights has failed to conduct statutorily mandated compliance reviews of such programs. In addition, the government's recent changes to the regulations under the federal law banning sex discrimination in education make it easier for public schools to segregate classes by gender. Because these "new solutions" are often tested in failing schools, and, due to governmental structural racism in housing, most failing schools are in predominantly minority neighborhoods, these sex segregated educational policies disparately impact racial minority girls.

## Right to Remedy for Discrimination (Article 6)

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### A. RIGHT TO EFFECTIVE PROTECTION AND REMEDIES AGAINST ACTS OF RACIAL DISCRIMINATION THAT VIOLATE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

#### 1. Right to Effective Judicial Remedies

**US Report:** US law offers those affected by racial or ethnic discrimination a number of remedies, ranging from individual suits in the courts to reliance on administrative procedures to civil or criminal prosecution of offenders by appropriate governmental entities.

**ACLU:** Victims of racial discrimination in the US are required to meet a burden of proof that exceeds the requirements of CERD and of international law. By obliging victims of discrimination to prove the discriminatory intent, as opposed to discriminatory effect, of a policy, the US imposes an impermissible burden on racial minorities and others who seek to assert their non-discrimination rights.

## Measures to Combat Prejudice through Teaching, Culture and Information (Article 7)

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### 1. Teaching

**US Report:** A number of federal statutes prohibit discrimination in education. Many schools in the US feature human rights education as part of their curricula.

**ACLU:** Prohibiting discrimination in education, instructing federal employees in anti-discrimination, and relying upon a small number of educational institutions to provide a basic level of human rights education do not meet the requirements of international human rights law. Societal discrimination continues to be pervasive in the US. The government must take its human rights obligations seriously and begin to provide basic human rights education.

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<sup>1</sup>Furthermore, the government does not mention the race discrimination that *does* exist in these states, and misstates the extent of state government financial and staff support that corrective institutions receive.



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