



# The Power of Justice

Applying international human rights standards  
to American domestic practices

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Center for American Progress



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Front Cover Image: In this Jan. 28, 2009, file photo after an overnight snowfall, Neil Floyd starts a fire to keep warm outside his tent in the small tent city, where he lives with other homeless people in Camden, N.J. More than 37 million Americans live in poverty.



# Introduction and summary

At the heart of the American experiment lies a paradox. A country founded upon a conception of its own uniqueness—an exceptional nation—sought to be a model for other countries to emulate. To the extent those countries did emulate it, however, the perception of America as unique began to dissipate. The more countries began to copy the values and virtues of the American tradition, the more they began to compare America to her own ideals. The measurer became the measured. And to the extent she fell short of those ideals, she tended to defend herself through a renewed claim to her own uniqueness. In no small degree it is the tension between these two characteristics—monotype and template—that accounts for the United States’ ambivalence toward the rest of the world and the world’s toward it.

In terms of human rights, that ambivalence has manifested itself in the coupling of unparalleled leadership with frequent resistance to the implications of that leadership for the United States itself. Since the end of World War II, no country has been more influential in the development of the international human rights regimen than the United States, beginning with Franklin Roosevelt’s “Four Freedoms” speech, the Atlantic Charter, and Eleanor Roosevelt’s guiding role in the creation of the Universal Declaration of Human Rights, or UDHR. At the same time no democratic country has been more reticent to acknowledge the application of that regimen’s standards to its own domestic performance.

That is in part because the United States has fallen short of those standards in significant ways. The Bush administration’s unapologetic use of torture, secret prisons, and extraordinary rendition, which clearly violated international legal norms, is but among the most visible of those shortfalls. But there are many others: The United States is, for example, the only country in the world that regularly sentences children under 18 years-old to life incarceration without the possibility of parole and the only country other than Somalia not to have ratified the Convention on the Rights of the Child, or CRC.<sup>1</sup>

The United States’ disregard for the international human rights regimen, at the simplest level, looks like little more than hypocrisy. But, hypocritical though it may be, it reflects the vagaries of American history, ignorance about the relationship between the country’s domestic practices and its foreign policy goals, and uncertainty—even among human rights advocates—about the advantages of framing domestic justice struggles in international human rights terms.

*“... our power alone cannot protect us... our security emanates from the force of our example...”*

– President Barack Obama’s 2009 Inaugural Address

Now is the time to sort through that confusion.

The United States is, in the first place, emerging from a period that witnessed an unprecedented plunge in its worldwide popularity and credibility caused in good part by its own human rights violations connected to the so-called “war on terror.” Today, many Americans are eager to see the United States restore its international standing and they recognize that will entail pursuing security through diplomacy and international institutions and not just military force.<sup>2</sup>

Second, Americans strongly support the concept of human rights, including such social and economic rights as those to food, education, and health care. Seventy-seven percent of Americans, for example, say the government has an obligation to meet the basic human need for health care.<sup>3</sup>

Third, international human rights standards and mechanisms—despite some of those mechanisms’ shortcomings—hold more promise today than at any time since the passage of the UDHR in 1948. This is the case thanks to the development of a system of U.N. bodies and special procedures as well as regional human rights courts charged with addressing human rights violations; the agreement by the member states of the European Union to submit themselves to common human rights standards; the successes of the War Crimes Tribunals for the former Yugoslavia and Rwanda; the trials of Alberto Fujimori in Peru and former Khmer Rouge operatives in Cambodia; the growing recognition of the principle of universal jurisdiction; the adoption by the United Nations in 2005 of the “responsibility to protect;” and the establishment of a functioning International Criminal Court that has recently brought its first indictment against a sitting head of state.

Finally, domestic activists in the United States are finding international human rights laws and standards more and more useful resources with which to frame and advance their causes. Organizations as influential as Oxfam International, the American Civil Liberties Union, and the National Association for the Advancement of Colored People have adopted human rights language and concepts. And these groups display, in the words of the Leadership Conference on Civil Rights Education Fund, “increasing awareness of the importance of connecting the struggle for social justice in the United States to a broader movement for human rights around the world.”<sup>4</sup> The U.S. Human Rights Network was formed in 2003 and serves as a coordinating body for the work of more than 200 groups that focus on domestic human rights.<sup>5</sup>

Moreover, all this is coming at a time when there is at least some reason to believe a new American administration may be more open to understanding some of its domestic policy goals in human rights terms. In the second presidential debate, candidate Barack Obama said that health care “should be a right for every American” and cited as “fundamentally wrong” his mother’s experience of being denied payment for her treatments as she lay dying of cancer.<sup>6</sup> In his statement on Human Rights Day 2008, the president-elect called upon the United States to “stand up for human rights, by example at home and by effort abroad.”<sup>7</sup>

This is not to say for a moment, however, that the use of language and principles derived from international human rights instrumentalities is no longer controversial in this country. Supreme Court Justice Antonin Scalia has described reference to non-U.S. law by the Court as “meaningless” but “dangerous” dicta.<sup>8</sup> When he was House Majority Leader, Rep. Tom DeLay (R-TX) called Justice Anthony Kennedy’s nods to international law in several of his opinions for the majority “outrageous.”<sup>9</sup> In the recent tumult over the appointment of distinguished human rights scholar Harold Hongju Koh to the position of legal advisor at the U.S. Department of State, opponents have referred to international law as “international imperialism” and a “euphemism for left-wing extremism.”<sup>10</sup>

Clearly, then, there remains considerable discomfort about submitting American practices to international review—discomfort that is fueled by America’s self-identity, fears for its sovereignty, and suspicion—which is in some cases justifiable—of the limits and implications of international jurisprudence, such as in its permitted restrictions on free speech.

This paper is designed to address that resistance not from the standpoint of legal strategy but from that of policy formation and political action. It will argue that, when done well, the utilizing of international human rights standards can add significant value to domestic social justice agendas and it will encourage activists, opinion leaders, policymakers, legislators, and administration officials to think in those terms.

It begins by briefly describing the historical roots of the concept of the United States as an “exceptional nation” and how that has led to a suspicion of submitting American practices to international scrutiny (Section I). It then traces how, from the Civil War onward, resistance to the application of international norms to U. S. domestic issues has proven harmful to the achievement of U.S. foreign policy goals (Section II).

If that is the case, why—other than an historical predilection to exceptionalism—has the United States traditionally balked at understanding its own domestic problems in human rights terms? The paper explains the basis upon which civil rights activists themselves shunned a “human rights” framework and cites other sources of reticence to embrace international law and standards, such as fears about sovereignty, criticisms of the undemocratic nature of such norms, and conflation of social and economic rights with “socialism” (Section III).

The paper argues, however, that international law and standards can be an invaluable resource in bringing about human rights change—change which comes about through a dynamic combination of social movements with their grassroots advocacy and legal mandates recognizing “rights” as *rights*. It then goes on to cite numerous ways in which the use of an international human rights framework can be advantageous for both advocates and public officials in pursuit of their respective responsibilities to address domestic social problems. For advocates, for example, such a framework can provide common standards against which to measure the shortcoming of domestic policies, provide a common

language, and introduce new ways of thinking about old problems. For policymakers, it can increase American security, reinforce the United States' credibility as a critic, and help avoid litigation (Section IV).

The paper concludes with a series of recommendations to advocates, policy analysts, legislators, and policymakers that will advance the application of international human rights standards and principles to domestic issues. These include, for advocates, focusing major attention on local- and state-level change; framing standards as guiding norms and not obligations; and making health care reform a “rights” issues. For legislators and policymakers, recommendations include conforming U. S. law to treaty obligations, ratifying additional key human rights treaties, adopting requirements for human rights impact assessments of appropriate legislation and policies, and becoming educated about implementation of social and economic rights (Section V).

The United States has since 1948 ratified only a handful of human rights treaties and conventions—in addition to humanitarian treaties, such as the Geneva Conventions. Those it *has* ratified it has declared to not be self executing (meaning they cannot be legally enforceable without enabling legislation) and it has attached a variety of reservations to them, many designed to insure the subordination of the instrument to the U.S. Constitution.<sup>11</sup> Under the Supremacy Clause of the Constitution, however, upon ratification these treaties become the “supreme Law of the Land” to which “the Judges in every State” are bound.<sup>12</sup> There are of course many other treaties that have not been ratified and are therefore not legally binding on the United States. And there are also many other sources of international law, including international custom, decisions of international judicial bodies, and resolutions of the U.N. Security Council.

In addition to international law, however, there are also “international human rights standards” that do not necessarily have force of law—for example, recommendations of U.N. treaty bodies—but reflect international interpretation of “best practices.” Because the focus of this paper is not a legal one, we will in general refer to “standards” as incorporating both international law and wisdom. It is not, of course, that the international community can never be “wrong” about an issue. But, when an authoritative international body has arrived at a position, it is at least worth considering whether we might not have something to learn from it.



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