

Understanding Human Rights Instruments and a Human Rights Framework

The legal relevance of human rights instruments with respect to U.S. policy and governance should be understood based on (1) U.S. **ratification** of international human rights instruments¹, and (2) the **experience and recommendations** of human rights scholars, NGOs, international legal experts, and international oversight bodies working to realize human rights practice in the U.S.

(1) **Human Rights Instruments Ratified by the U.S.**

The U.S. has signed every major international human rights instrument, and historically played a leading role in the development of the U.N. Charter, the Universal Declaration of Human Rights [UDHR], and the International Criminal Court [ICC]. Yet the U.S. has so far only ratified the Convention Against Torture [CAT], the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], and the International Covenant on Civil and Political Rights [ICCPR].

When state parties ratify a human rights instrument, they agree to:

- a) “Respect” the instrument. The state party agrees not to manifestly violate the agreements, rights, rules, or standards articulated in the treaty.
- b) “Protect” the rights of those falling under the authority of that state. The state party agrees to guard the articulated rights from internal or external threats.
- c) “Fulfill” the obligations of the instrument through creating an “enabling environment” through which rights can be reasonably enjoyed and standards can be reasonably met. For example, in agreeing to provide for the “right to education” by signing the International Covenant on Economic, Social and Cultural Rights [ICESR], (ICESCR), a state perhaps agrees to provide the schools and infrastructure that would make such a right meaningful in practice.

However, in ratifying the CAT, ICCPR, and ICERD, the U.S. included a reservation² noting that the instruments are “not self executing,” or that their legal relevance is to be decided on a case-by-case basis in U.S. judicial and legislative processes. In sum, this means that the U.S. agrees in principle with every major human rights instrument as a state signatory, and though it ratified three central instruments, the U.S. has so far failed to *fully* ratify any of them to the extent that they automatically become the “supreme Law of the land” (U.S. Constitution). The U.S. stands alone when it comes to this grand historical contradiction—what human rights scholars call

¹ Human rights instruments refer to the documents defining human rights through international law. These documents include both declarations (non-binding, such as the UDHR) and ratified treaties (such as the two Covenants). Binding human rights instruments have the same legal weight as other international treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.

² “Reservations” refer to the exceptions (the “fine print”) that may accompany and qualify state ratification.

“American exceptionalism.”³ This does *not* mean that international human rights law does not apply in the U.S.—rather its role is a contested terrain across contexts.

(2) **Relevance of Human Rights In Lieu of Ratification**

Despite this lack of automatic substantive legal obligations, human rights law and certainly a human rights discourse are far from irrelevant when it comes to U.S. policy. Human rights provide a powerful framework for local government agencies and authorities to evaluate existing laws and policies as well as develop programs to advance and strengthen human rights in local communities. Many strategies to realize human rights practice in the U.S. are based on the ratification and recognition of human rights instruments as the standard for policy and practice at local levels of governance. To demonstrate the strategies and reasoning for doing so, see the 2012 study and report by Columbia Law School’s Human Rights Institute, *Bringing Human Rights Home*⁴:

[The following] recommendations apply to all state and local officials because authority to implement human rights belongs to all local decision-makers, including governors, mayors, state legislators, city council members, law enforcement, city, county and town executives, and boards of supervisors. Indeed, fulfilling the promise of human rights will ultimately require multiple strategies and collaboration among all levels of government.

- Making Aspirational Commitments to, and Raising Awareness of, Human Rights (NOTE: this would include efforts toward “human rights education”)
- Reframing Local Concerns as Human Rights Issues
- Fostering Participatory Governance
- Reporting on Local Compliance with Human Rights Treaties; and
- Conducting Human Rights Based Audits and Impact Assessments

A human rights framework is especially useful in that it:

- Places a focus on proactively identifying and addressing problems.
- Empowers and elevates public service.
- Fosters partnerships and promotes inclusivity.
- Enhances responsiveness and accountability.
- Emphasizes addressing systemic causes of discrimination.
- Provides opportunities to demonstrate leadership locally and globally (often in solidarity networks) (pg. 6).

Additionally, organizations representing civil society in the U.S. have been increasingly engaged at the international level, linking local social problems to broad (problematic) trends in U.S. domestic and foreign policy. In the 2014 review of the U.S. record under the Convention Against Torture in Geneva⁵, representatives from U.S. civil

³ Hertel, S., & Libal, K. (Eds.). (2011). *Human rights in the United States: Beyond exceptionalism*. Cambridge University Press.

⁴ Page 1. Please see the full report here: <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf>

⁵ For a detailed discussion of these hearings and links to the CAT review documents, see the following from the US Human Rights Network: <http://www.ushrnetwork.org/events/cat-review-us>.

only justified “in situations where an imminent and serious threat of harm persists after less drastic methods have been tried and failed.”⁹

In addition to finding the use of pepper spray highly problematic and “counterproductive,” a federal court in *Alexander v. Boyd* (876 F. Supp. 133, 1995) found that its “indiscriminate use” violated the constitutional rights of juvenile detainees under the Due Process clause while “teaching the victims to inflict pain as a method of controlling others and makes the juveniles more volatile, more aggressive, and less likely to respond properly to authority figures.” These findings are particularly interesting in that suffering the effects of pepper spray (as an undeserving target or innocent bystander) was characterized by the court as a form of coercive punishment, as well as posing risks of long-term medical complications.

The majority of states have prohibited the use of chemical restraints in their juvenile detention systems, suggesting that use of OC spray departs not only from best practices in juvenile justice, but from the mainstream of accepted professional practice around the country.¹⁰

*Institute of Judicial Administration [IJA]/American Bar Association [ABA] Standards for Juvenile Justice*¹¹

- “7.8 Limitations on restraints and weapons.

A. Mechanical restraints.

Given the small size of programs, it should not be necessary to use mechanical restraints within the facility. The program director may authorize the use of mechanical restraints during transportation only.

B. Chemical restraints.

In extreme situations, chemical restraints may be used under strict controls. The department should develop regulations governing their use.

C. Weapons.

Under no circumstances should personnel take any weapons into the facility.
Commentary

The standard holds that mechanical and chemical restraints should not be used within facilities. The rationale for this position is: 1. Given the small size of the

⁹ Youth Law Center, Department of Justice Complaint Against the County of San Diego Department of Probation Regarding the Excessive Use of Pepper Spray and Other Civil Rights Violations in San Diego Juvenile Detention Facilities, July 25, 2014, p. 22, citing *Alexander S. v. Boyd*, 876 F. Supp. 773, 796-99 (D.S.C. 1995).

¹⁰ Center for Children’s Law and Policy, “Chemical Agents in Juvenile Facilities,” 2012

¹¹ See pages 145-6 of the IJA-ABA Juvenile Justice Standards Relating to Corrections Administration, found in full at: http://www.americanbar.org/groups/criminal_justice/pages/juvenilejusticestandards.html.

program these methods are not necessary; and 2. There has been a consistent history of abuse of these methods in juvenile corrections settings...In extreme situations a facility may use chemicals as a restraint. The department should develop regulations governing use...such regulations should contain stringent controls on access, and provide that chemical restraints may be used only to prevent serious injury to persons or property.”

*U.N. Standard Minimum Rules for the Treatment of Prisoners*¹²

- “33. Instruments of restraint¹³, such as handcuffs, chains, irons and straitjackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
 - (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
 - (b) On medical grounds by direction of the medical officer;
 - (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.”

The International Covenant on Civil and Political Rights [ICCPR]

- Article 7, articulating the protection against torture. This is a non-derogable right, meaning that it cannot be violated under any circumstance. Further, Article 10 guarantees the right to “humane treatment” when deprived of liberty.
- Articles 2 and 26, guaranteeing freedoms from discrimination and the right to equal protection under the law.
- Article 14, guaranteeing due process and the presumption of innocence.

The International Convention on the Elimination of all forms of Racial Discrimination [ICERD]

- In contrast to Constitutional law in the U.S., “conscious racial animus” is not required to find any particular state policy in violation of the treaty as a form of “racial discrimination.” Instead, all that is required is evidence of the policy’s systematically racially disparate effects, regardless of explicit racial discourse or clear personal (“racist”) intent. This is important to consider in any examination

¹² Please see page 5 of the U.N. Standard Minimum Rules for the Treatment of Prisoners (1955) here: <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>. See also CJA report (2011, pg. 4).

¹³ OC spray is often legally interpreted and discussed as a form of “chemical restraint.”

including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour.”

- Article 3, Best Interests of the Child

“10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”

- Article 6, The Right to Life, Survival and Development

“11. ... this basic right should result in a policy of responding to juvenile delinquency in ways that support the child’s development. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC (see paragraphs 75-77 below). The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured.”

- Article 40(1), Dignity

“13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

- Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented. Reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).

SCC Human Relations Commission - Justice Review Committee
Human Rights Framework for Report on use of OC Spray in SCC Juv. Det. Center

- Article 37(c), Treatment and Conditions

“89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities...
- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned...”

Convention Against Torture [CAT]

It is first important to note that the CAT has a lower bar for the definition of torture than the Constitutional standards under the 8th Amendment. We have already discussed the implications of Constitutional protections against torture for juvenile detainees in the U.S. above, so we will not reproduce the same arguments according to the CAT here. That said, the following is taken from the 2014 Concluding Observations from the periodic review of the U.S. that concluded in November 2014.¹⁵ The Committee Against Torture recommended the following with regard to juvenile justice in the U.S.:

- “Juvenile Justice

23. The Committee remains concerned at the notable gaps in the protection of juveniles in the State party’s criminal justice system. In particular, the Committee expresses once again its concern at the conditions of detention for juveniles,

¹⁵ See here for the full document: <http://www.ushrnetwork.org/resources-media/cat-concluding-observations-2014>.

including their placement in adult jails and prisons, and in solitary confinement (art. 11 and 16).

The State party should take the necessary measures to ensure the proper functioning of the juvenile system in compliance with international standards. In particular, the State party should:

(a) Ensure full implementation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, General Assembly res. 40/33 of 29 November 1985, annex) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines, General Assembly resolution 45/112, annex);

(b) Ensure that juvenile detainees and prisoners under 18 are held separately from adults, in line with the provisions of The Beijing Rules (rules 13.4 and 26.3), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 of 14 December 1990, rules 17, 28 and 29);

(c) Prohibit any use of solitary confinement against juveniles (see, para. 20);

(d) Resort more to alternatives to incarceration, taking into account the provisions of the United Nations Standard Minimum Rules for Non-custodial 12 Measures (the Tokyo Rules, General Assembly resolution 45/110, of 14 December 1990) and the Bangkok Rules.”

Analysis: Use of Oleoresin Capsicum (OC) or “Pepper Spray” in California Juvenile Detention Facilities

Contextual Note:

Approximately 1.5 million youth are arrested per year annually (nationally), 95% for non-violent offenses. Juvenile crime rates and rates of arrest continue to drop (as is the case with most adult crimes over the same period)¹⁶. Today, 30% fewer youth (across race) are getting caught up in the juvenile justice/delinquency system than in 2002, yet the racial disparities have grown somewhat. African American youth are 4.6

¹⁶ PPIC. (2014). Just the facts: California. See: http://www.ppic.org/main/popup.asp?u=../content/images/JuvenileJusticefig2_full.png&t=Felony%20arrest%20rates%20have%20dropped%20for%20both%20juveniles%20and%20young%20adults.

Oppel, Richard. (05/23/2011). Steady Decline in Major Crime Baffles Experts. *The New York Times*. See: http://www.nytimes.com/2011/05/24/us/24crime.html?_r=0.

Butts, Jeffrey. (10/04/2013). Violent youth crime in the U.S. falls to new 32-year low. *Research and Evaluation: Databits*. John Jay College of Criminal Justice. See: <http://johnjayresearch.org/rec/files/2013/10/databit201304.pdf>.

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