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## A Systems Approach to Identifying Structural Discrimination Through the Lens of Hate Crimes

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# A Systems Approach to Identifying Structural Discrimination Through the Lens of Hate Crimes

Hansdeep Singh<sup>†</sup> Jaspreet Singh<sup>††</sup>, and Prabhjot Singh<sup>†††</sup>

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#### INTRODUCTION

On August 5, 2012, white supremacist Wade Michael Page attacked congregants at a Gurdwara (Sikh house of worship) in Oak Creek, Wisconsin.<sup>1</sup> Page killed six worshippers that morning, prompting widespread concern about bias-crimes across the nation.

These concerns are not unsubstantiated. From 2001-2010, the Federal Bureau of Investigations (FBI) documented eighty bias-motivated homicides in the United States. Since 2011, as many as eight bias-motivated homicides have occurred against members of the Sikh community alone. Muslims and others of Middle Eastern and South Asian descent are also increasingly facing bias-motivated violence in the United States.<sup>2</sup>

According to Uniform Crime Reports (UCR) data collected by the FBI under the Hate Crimes Statistics Act (HCSA),<sup>3</sup> hate crimes motivated by

1. The Oak Creek, Wisconsin massacre claimed the lives of six Sikhs and the Elk Grove, California shooting claimed the lives of two Sikh elderly gentlemen. The Elk Grove killings were investigated as bias-motivated attacks, but without capturing the perpetrators, there is no confirmation of these attacks as hate crimes. *See History of Hate: Crimes Against Sikhs Since 9/11*, HUFFINGTON POST (Aug. 7, 2012), [http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911\\_n\\_1751841.html](http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911_n_1751841.html).

2. *See Deepa Iyer, Post-9/11 Discrimination Must End*, USA TODAY (Aug. 8, 2012), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-08-09/sikh-shooting-muslims-bias/56920502/1>.

3. The Uniform Crime Reports are compilations of crime statistics published by the FBI and collected from over 18,000 law enforcement agencies around the country, including cities, counties, universities, and states. *See* FEDERAL BUREAU OF INVESTIGATIONS ("FBI"), UNIFORM CRIME REPORTS,

religious bias accounted for 1,318 offenses reported by law enforcement.<sup>4</sup> However, as the FBI data relies on information *voluntarily* provided by police precincts, the UCR statistics likely mask a much larger problem in our country.<sup>5</sup>

Even more alarming, governmental data on hate crimes against certain communities has been virtually non-existent despite clear evidence of hate-motivated violence against particularly vulnerable communities after 9/11.<sup>6</sup> For example, the FBI's Hate Crime Incident Report (Form 1-699) fails to account for crimes against particularly vulnerable communities such as Sikhs, Hindus, and Arabs.<sup>7</sup> As a result, these communities have suffered an incalculable loss. FBI data enables law enforcement to identify crime trends and dedicate the requisite resources and training to protect these communities from hate-motivated violence.<sup>8</sup>

Moreover, the Department of Homeland Security's limited monitoring of domestic right-wing extremists has further stunted the government's ability to protect and warn vulnerable communities from attacks.<sup>9</sup> The government's disproportionate focus on Islamic extremism also continues to feed into majoritarian stereotypes of minority communities and has hardened discriminatory sentiments towards these communities.<sup>10</sup> The U.S. fails to protect minority communities facing hate crimes by engaging in

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<http://www.fbi.gov/about-us/cjis/ucr/ucr>.

4. The FBI data on hate crimes appears in the FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS, HATE CRIME STATISTICS 2011 (2012), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011> [hereinafter "HATE CRIME STATISTICS 2011."] The specific sections of the report are available in different online sections. The specific section where the data can be found will be indicated in each cites which refers to the report. For example, the statistic cited to above in regards to information at hate crime victims can be found at HATE CRIME STATISTICS 2011, INCIDENTS AND OFFENSES, *supra* note 4 (Incidents and Offenses).

5. See HATE CRIME STATISTICS 2011, *supra* note 4 (About Hate Crime Statistics).

6. See HUMAN RIGHTS FIRST, VIOLENCE BASED ON RELIGIOUS BIAS, <http://www.humanrightsfirst.org/our-work/fighting-discrimination/2008-hate-crime-survey/usa/iii-violence-based-on-religious-bias/>.

7. FBI, HATE CRIME INCIDENT REPORT: FORM 1-699, available at <http://www.fbi.gov/about-us/cjis/ucr/reporting-forms/hate-crime-incident-report-pdf>. On June 5, 2013 the FBI Advisory Policy Board (APB) changed their position and agreed to code Sikhs, Hindus, and Arabs on the Uniform Crime Reporting (UCR) forms. FBI Director, Robert Mueller, must still approve the recommendation. Once approved, implementation will not occur till 2015. *Community Update: The Battle for Inclusion has been Won; FBI Advisory Policy Board Votes to Track Sikh, Hindu, and Arab Hate Crimes*, ICAAD (June 13, 2013), <http://icaadglobal.org/mediaItem.php?id=155>.

8. See Ryan Jacobs, *Just Like in "The Wire," Real FBI Crime Stats are "Juked"*, MOTHER JONES (June 19, 2012), <http://www.motherjones.com/mojo/2012/06/fbi-crime-stats-fudged-the-wire-nypd>.

9. See *Hate Crimes & the Threat of Domestic Extremism: Hearing Before the Senate Judiciary Subcomm. on the Constitution, Civil Rights and Human Rights*, 112th Cong., 8-13 (Sep. 19, 2012) (statement of Daryl Johnson, former Senior Terrorism Analyst at the U.S. Dept. of Homeland Security), transcript available at <http://judiciary.senate.gov/pdf/9-19-12JohnsonTestimony.pdf>; Rania Khalek, *DHS's Right-Wing Terror Blind Spot*, Salon (Aug. 15, 2012), [http://www.salon.com/2012/08/15/dhss\\_right\\_wing\\_terror\\_blind\\_spot/](http://www.salon.com/2012/08/15/dhss_right_wing_terror_blind_spot/) [hereinafter Johnson].

10. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577-78 (2002).

these inequitable practices. Redressing these structurally discriminatory practices is critical for the prevention of future bias-motivated violence.

This article outlines a methodology for addressing issues of structural discrimination in the context of hate crimes. Part I of this article explores how a systems approach can be used to identify issues of structural discrimination that perpetuate the U.S. government's failure to respond to bias-motivated violence against vulnerable communities. Part II discusses the latent defects in the U.S. government's documentation of hate crimes and efforts to combat hate crimes. Lastly, Part III introduces a holistic approach to address the U.S. government's failure to adequately protect minority communities. This section outlines domestic and international strategies to ensure that the state is held accountable for failing to protect vulnerable communities.

#### I. IDENTIFYING STRUCTURAL DISCRIMINATION IS PARAMOUNT TO EFFECTIVE HATE CRIME PREVENTION

Laws, societal norms, cultural values, and government structures often mask discrimination that impedes on the social, cultural, economic, or political rights of vulnerable communities.<sup>11</sup> These forms of structural discrimination help to create and enshrine social inequality amongst marginalized groups.<sup>12</sup> Because this phenomenon is not immediately apparent, impacted communities may find it difficult to establish that they are being discriminated against, and the public may subsequently reject their claims of discrimination, instead blaming the impacted communities for failing to assimilate into the existing social structure.<sup>13</sup>

Structural discrimination manifests in multi-faceted ways. Through our organizational work, we have identified five salient forms of structural discrimination:

- **Social exclusion:** Social exclusion refers to “the multi-dimensional and dynamic process of being shut out, fully or partially, from the economic, social and cultural systems that determine the social integration of a person in society.”<sup>14</sup> It results from deeply-embedded societal norms that favor assimilation rather than integration and leads to the “othering” of individuals and communities that do not conform to the prevailing norms.
- **Formal equality/equality per se:** Formal equality, “the idea

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11. See Tristin K. Green, *A Structural Approach As Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854-57 (2007).

12. *Id.*

13. Katie R. Eyer, *That's not Discrimination: American Beliefs and the Limits of Anti-Discrimination law*, 96 MINN. L. REV. 1275, 1276-87 (2012).

14. See JANE MATHEISON ET AL., SOCIAL EXCLUSION MEANING, MEASUREMENT, AND EXPERIENCE AND LINKS TO HEALTH INEQUALITIES 86 (World Health Organization, 2008).

that rights protection can be grounded on an objective foundation of principles,” manifests in facially neutral laws, policies, or case-law that reflect majoritarian sentiment and leads to the disparate treatment or impact on specific communities.<sup>15</sup>

- **Denial or suppression of identity:** Denial or suppression of identity occurs where the State views the distinctive identity of specific communities with suspicion or fear and uses majoritarian influence or legal means to mandate conformity.
- **Failure to protect:** Failure to protect refers to the obligation countries have in international law to protect communities from violence perpetrated by government officials or private persons.<sup>16</sup> When the institutional systems that exist to protect vulnerable communities from violence fail, the State bears the responsibility for the lack of accountability.
- **Cultural norms:** Cultural norms, such as caste-based and patriarchal ideologies, are deeply-embedded traditions that permeate all aspects of life. Even though the government may not directly sanction these traditions, the government may be unwilling or unable to enforce laws to remove these discriminatory barriers.

Discriminatory policies can be difficult for the public to identify. In the U.S., scholars have studied the relationship between discrimination and the meritocratic ideals that largely inform American belief systems.<sup>17</sup> For example, Katie Eyer considers the belief that the U.S. is a meritocracy in the context of employment discrimination.<sup>18</sup> Meritocratic ideals reflect the idea that economic advancement is based on achievement and that if a person works hard, he or she will be successful. Eyer notes that individuals who accept that the U.S. is a meritocracy may deny that discrimination occurs or believe that victims of discrimination are to blame.<sup>19</sup> They may also believe that people who claim discrimination are trying to subvert meritocratic ideals.<sup>20</sup> This occurs because discrimination itself is a concept that challenges the authenticity of meritocratic ideals. “Simply put, if minorities, women, and other disadvantaged groups are regularly denied opportunities on the basis of reasons other than their effort

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15. See John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 534 (1992).

16. See OFFICE OF THE SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE, THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited April 10, 2013) (stating that “Sovereignty no longer exclusively protects States from foreign interference; it is a charge of responsibility that holds States accountable for the welfare of their people”).

17. See Eyer, *supra* note 13, at 1276.

18. *Id.* at 1276-80.

19. *Id.* at 1306-12.

20. *Id.* at 1308-12.

and abilities, then we do not live in a meritocracy.”<sup>21</sup>

As a result, many in the public are unable to identify and acknowledge discrimination, even where there is direct evidence of it.<sup>22</sup> Acknowledging discrimination undermines their tightly held meritocratic beliefs and triggers an adverse response.<sup>23</sup> In fact, empirical studies demonstrate that less than five-percent of plaintiffs charging discrimination will obtain litigated relief in the U.S.<sup>24</sup> The lack of legal redress for victims of discrimination occurs despite efforts “to publicize continuing egregious incidents of discrimination, and to institutionalize broader understandings of discrimination.”<sup>25</sup> Rather, “the public continues to adhere strongly to the view that discrimination is a rare, explicit, and [a] narrow phenomenon. . . .”<sup>26</sup> The American public has a “blind spot” towards recognizing and identifying both direct and indirect forms of discrimination.

Failing to address issues of structural discrimination can serve as an impetus for violence against vulnerable communities. For example, Berkeley Law Professor Leti Volpp explains:

In simultaneously advocating policies of colorblindness for citizenry while engaging in racial profiling for noncitizens, and publicly embracing all religions while particularly privileging Christianity, the administration has, in the name of democratic inclusion, disingenuously excluded. Thus, that an epidemic of hate violence has occurred within the context of ‘private’ relations does not mean that such violence is without ‘public’ origins or consequences.<sup>27</sup>

Using a comprehensive mechanism can help identify and address the structural discrimination which both encourages violence towards vulnerable communities, and allows that violence to go undetected.

*A. The Universal Periodic Review (UPR) Should be Leveraged to Combat Structural Discrimination.*

International law is no longer a “narrowly circumscribed domain of foreign affairs.”<sup>28</sup> Rather, international law is a dynamic body of law, of which monitoring, interpretation, and enforcement have become increasingly decoupled from state control and consent.<sup>29</sup> While there are

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21. *Id.* at 1306.

22. *Id.* at 1289.

23. *Id.* at 1350.

24. *Id.* at 1276.

25. *Id.* at 1340.

26. *Id.*

27. Volpp, *supra* note 10, at 1583.

28. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EJIL 907 (2004), available at <http://207.57.19.226/journal/Vol15/No5/3.pdf>.

29. *Id.* at 914 (stating that “though states have consented to the treaty as a framework for dealing with a specified range of issues, once they have signed on, the specific rights and obligations are determined without their consent by these treaty-based bodies.”).

several criticisms raised against establishing an international legal system,<sup>30</sup> supporters of international law (some who have even raised these criticisms) recognize that, despite its limitations, the role and scope of international law has expanded, not contracted, over time.<sup>31</sup>

One such expansion occurred in 2006 when the United Nations introduced the Universal Periodic Review (UPR), a new international law procedure that sought to examine human rights conditions globally and consolidate all relevant stakeholder information in a central space.<sup>32</sup> The UPR periodically examines the human rights records of over 190 UN member states.<sup>33</sup> The Human Rights Council (HRC) reviews each state's self-reporting of their human rights conditions, the steps each state takes to implement changes, and whether the states are fulfilling their human rights obligations.<sup>34</sup> Each country stands on equal footing before the HRC.<sup>35</sup>

The UPR Process proceeds as follows. (1) Every four to five years, the State Under Review (SuR) delivers a comprehensive report on its human rights record and subjects itself to the critique of the international community.<sup>36</sup> At this stage, other states, UN bodies, NGOs, Academic Institutions, Regional Organizations, and human rights defenders offer their own written summarized reports.<sup>37</sup> These reports are further consolidated by the Office of High Commissioner for Human Rights (OHCHR).<sup>38</sup>

(2) All relevant stakeholders then meet in Geneva, Switzerland where the SuR undergoes its assessment.<sup>39</sup> The right to speak is limited to states or special observers, which includes NGOs.<sup>40</sup> (3) States make their official recommendations regarding how the SuR can improve its human rights conditions.<sup>41</sup> (4) The SuR formally announces whether it will accept, reject,

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30. For instance, international human rights law has been critiqued for impinging on "democracy and constitutional self-government." Kumm, *supra* note 28, at 907. Moreover, the UN has been largely unable to get its member states to ratify major treaties, and limiting statements such as reservations, understandings, and declarations (also known as RUDs) blunt the impact of treaties and call into question their efficacy for individual member states; There also remains the difficulty of ensuring that member states properly integrate international treaties into their own legal frameworks. *See id.*

31. *See id.* at 913 ("subject matter of international law has expanded significantly").

32. *See* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ("OHCHR"), UNIVERSAL PERIODIC REVIEW, <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (last visited May 25, 2013).

33. *Id.*

34. *Id.*

35. *Id.*

36. UPR-INFO, UPR PROCESS, <http://www.upr-info.org/-UPR-Process-.html> (last visited May 25, 2013).

37. *See* OHCHR, CONTRIBUTIONS AND PARTICIPATION OF "OTHER STAKEHOLDERS" IN THE UPR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx> (last visited May 25, 2013); FIDH DELEGATION TO THE UN, THE UNIVERSAL PERIODIC REVIEW-HANDBOOK 2 (2009).

38. UPR-INFO, *supra* note 36.

39. *Id.*

40. *See* OHCHR, *supra* note 37; FIDH DELEGATION TO THE UN, *supra* note 37.

41. *Id.* at 3.

consider, or deliberate on the official recommendations.<sup>42</sup>

The UPR is a powerful mechanism because it is universal; the participating states voluntarily consent to the process and, once they have accepted recommendations put forth by the international community, the states commit themselves to taking definitive steps in improving their human rights records.<sup>43</sup> According to the United Nations Office of the High Commissioner on Human Rights (OHCHR), “no other mechanism of this kind exists.”<sup>44</sup>

The UPR also integrates numerous UN human rights mechanisms in its procedure, including commentary from the UN Treaty Bodies, which monitor the implementation of international human rights treaties, and the use of Special Procedures, which are independent human rights experts who advise the Human Rights Council on thematic or country-specific human rights.<sup>45</sup> Further, the UPR encourages non-governmental organization (NGO) participation.<sup>46</sup> Thus, as a consistent and cyclical recommendation, review, and implementation monitoring procedure that includes both governmental and NGO participation, the UPR can serve as an important tool for identifying and combating human rights abuses.

The first cycle of the UPR ended in 2011 and achieved 100% participation from all 193 countries participating.<sup>47</sup> The second cycle of the UPR began in 2012.<sup>48</sup> Almost all of the 193 participating countries have committed to participating in the second cycle of the UPR, which provides optimism that the UPR will advance the human rights dialogue where other mechanisms have only had moderate success.<sup>49</sup> Already, the UPR has been successful in bringing disparate voices to the table<sup>50</sup> and works to ensure that each party involved will hold one another accountable for their recommendations and public assurances made in the international forum.<sup>51</sup>

### *1. The UPR has Greatly Augmented NGO Participation in the International Dialogue around Human Rights*

Throughout the UPR process, NGOs have the opportunity to participate in national consultations, submit reports, lobby members of the

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42. *Id.* at 3-4.

43. See OHCHR, BASIC FACTS ABOUT THE UPR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited May 25, 2013).

44. *Id.*

45. *Id.*

46. *Id.*

47. OHCHR, *supra* note 32.

48. UPR-INFO OFFICIAL CALENDAR FOR THE SECOND CYCLE OF THE UPR, [http://www.upr-info.org/IMG/pdf/UPR-FullCycleCalendar\\_2nd.pdf](http://www.upr-info.org/IMG/pdf/UPR-FullCycleCalendar_2nd.pdf) (last visited May 25, 2013).

49. Israel is, thus far, the only country that did not participate in the second cycle of the UPR process. *Israel Urged to Participate in Universal Periodic Review*, UNA-UK (Jan. 28, 2013), <http://www.una.org.uk/news/13/01/israel-urged-participate-universal-periodic-review>.

50. See OHCHR, *supra* note 37.

51. *Id.*

UPR Working Group (which consists of the 47 members of the HRC)<sup>52</sup>, and orally present their human rights concerns in Geneva during the review process.<sup>53</sup> Additionally, all of the UN reporting, monitoring, and adjudicative information that comes from Treaty Bodies and the Special Procedures is summarized into Reports authored by the Office of High Commissioner for Human Rights (OHCHR).<sup>54</sup>

NGO participation in the UPR process is immensely important for the identification and advancement of human rights concerns because NGOs are often best positioned to assess firsthand information about human rights concerns or violations. State reports may mask the true extent of the problem and exaggerate the effectiveness of implementing programs to remedy human rights concerns; whereas, NGOs often engage in a variety of functions, including monitoring, reporting, advocacy, providing direct assistance, and leading grassroots efforts.<sup>55</sup> As such, the participation of NGOs in the UPR process serves as a powerful tool to highlight injustices faced by marginalized communities and to internationalize local, state, and national issues. The UPR is helpful to NGOs because the UPR framework brings together thousands of human rights issues to the forefront by making available many of the findings from Special Rapporteurs and Treaty Bodies, and also individual NGO reports that provide greater analysis of human rights concerns.<sup>56</sup>

Further, the public can access every recommendation made through the UPR process and the states' subsequent responses to the recommendations.<sup>57</sup> This transparency allows for NGOs to actively monitor countries to ensure compliance. If a country deviates from its promises, NGOs can hold the country accountable by raising the issue in both a domestic and international forum. Moreover, NGOs are responsible for commenting on the State's implementation of recommendations during the mid-term reporting period.<sup>58</sup> To be clear, much of the advocacy efforts spurred by the UPR reports and recommendations take root at the local, state, and national level.<sup>59</sup> But NGOs are given an international platform in which to voice the concerns of the populations they serve and to champion human rights causes. The international community is increasingly

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52. *Id.* The UPR Working Group adopts the list of issues and conducts the reviews of each country.

53. UPR-INFO, NGOS, <http://www.upr-info.org/-NGOs-.html> (last visited May 25, 2013).

54. *See* OHCHR, UPR, DOCUMENTATION, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> (last visited May 25, 2013).

55. *See* James A. Paul, *Global Policy Forum, NGOs and Global Policy Making*, GLOBAL POLICY FORUM (June 2000), <http://www.globalpolicy.org/component/content/article/177/31611.html>.

56. *See* OHCHR, *supra* note 54 (Documentation).

57. *See id.*

58. UPR-INFO, *Universal Periodic Review: Civil Society's Follow-Up Kit*, [http://www.upr-info.org/followup/stable/Civil\\_society\\_kit.pdf](http://www.upr-info.org/followup/stable/Civil_society_kit.pdf).

59. *See* UPR-INFO, *supra* note 53 (NGOs); CLAUDE E. WELCH, JR., *NGOS AND HUMAN RIGHTS PROMISE AND PERFORMANCE* (University of Pennsylvania Press, 2001).

recognizing the importance of NGOs as relevant stakeholders in identifying gaps and voicing concerns in states' abilities to uphold international human rights norms.<sup>60</sup>

## 2. ICAAD Uses the UPR to Identify and Combat Structural Discrimination

When a state comes under its universal periodic review and is scheduled to appear before the Human Rights Council, the State submits a comprehensive report detailing its human rights record.<sup>61</sup> Simultaneously, the OHCHR submits a compilation of UN information and a summary of civil society (NGO) reports on the state's human rights record.<sup>62</sup> The NGOs are generally required to provide their reports five months prior to the OHCHR's submissions.<sup>63</sup> Ultimately, the other states review the SuR's human rights report and can submit recommendations that identify how the SuR can improve its human rights record.<sup>64</sup> The SuR retains the option to accept, reject, or provide no definitive response.<sup>65</sup> This provides a follow-up framework during the second and future cycles of review, which look at whether the states effectively implemented the accepted recommendations. More importantly, the process allows NGOs, UN bodies, and governments to illuminate gaps in the existing recommendations that can then be raised in subsequent phases of the UPR.

The International Center for Advocates Against Discrimination (ICAAD) is a non-profit organization that works to empower marginalized communities to combat structural discrimination by bridging the gap between international human rights law and its implementation.<sup>66</sup> ICAAD uses the UPR as a mechanism to both identify and address issues of structural discrimination.<sup>67</sup> We engage with the UPR process in four steps:

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60. Paul, *supra* note 55. See also WELCH, *supra* note 59.

61. OHCHR, *supra* note 43 (Basic Facts).

62. See OHCHR, *supra* note 54 (Documentation).

63. See OHCHR, UNIVERSAL PERIODIC REVIEW: A PRACTICAL GUIDE FOR CIVIL SOCIETY 16, available at <http://www.ohchr.org/EN/HRBodies/UPR/Documents/PracticalGuideCivilSociety.pdf>.

64. See UPR-INFO, *supra* note 36 (UPR Process).

65. See UPR-INFO, STATES, <http://www.upr-info.org/-Countries-.html> (last visited May 25, 2013). Where the SuR has rejected recommendations, the second and future cycles of review provide the opportunity for stakeholders to raise the issue again and to provide updates on the human rights concern. This is why it is important for NGOs that have intimate knowledge of the human rights concerns in the SuR to lobby members of the Working Group to direct the focus of the review to the most pressing concerns, even where the SuR has rejected an issue. See UPR-Info, *supra* note 56 (NGOs). The rejection of recommendations can direct NGOs to put more resources into data-collection to better prove their concerns during the next cycle.

66. See INTERNATIONAL CENTER FOR ADVOCATES AGAINST DISCRIMINATION ("ICAAD"), MISSION AND TRANSPARENCY, <http://www.icaadglobal.org/#about> (last visited May 25, 2013).

67. See Jaspreet Singh, ICAAD, *UPR Training for Mapping Structural Discrimination*, PREZI (March 12, 2013), [http://prezi.com/xd2hn2\\_hgdgd/upr-training-for-mapping-structural-discrimination/](http://prezi.com/xd2hn2_hgdgd/upr-training-for-mapping-structural-discrimination/) for a step-by-step tutorial on identifying structural discrimination.

*i. Identification*

We identify structural discrimination issues within our program areas (women's rights, minority rights, and religious freedoms) through targeted research conducted by our own legal team, law firm, and law school clinic partners.<sup>68</sup> After using the data from the UPR process to identify potential structural discrimination issues, we then analyze the underlying reports to determine if those issues are ripe for further action (advocacy, litigation, etc.). For issues deemed ripe for continued advocacy, UPR Reports are submitted to the UN Human Rights Council during specific countries' reporting periods.<sup>69</sup> These Reports detail how the SuR is failing to uphold its international human rights obligations through the use of statistical analysis, case studies, and information collected through our own advocacy, litigation, and partnerships with local communities and NGOs.

*ii. Strategy*

We provide policy papers on issues of structural discrimination that have been identified through the UPR process and that are related to one of our program areas. These papers provide:

- A brief assessment of the rule of law;
- Analysis of existing policies and laws that are meant to protect or further women's rights, minority rights, or religious freedoms;
- Identification of structural discrimination in policy, legislation, case-law, or cultural norms;
- A review the states' obligations under international law;
- Identification of particularly vulnerable communities;

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68. An example of a structural discrimination issue we identified through this process is Fiji's Criminal Procedure Code Section 163. While statistics are easily accessible regarding the horrifying rates of violence against women (VAW) in Fiji, the UPR recommendations given by Norway led us to believe there were discriminatory laws in place that allowed VAW to go unchecked. A review of background documentation submitted by the Fiji Women's Rights Movement NGO informed us of a custom, *bulubulu* that allows for mitigation in sentencing for cases of sexual assault. Fiji Women's Rights Movement (FWRM), *Shadow NGO Report on Fiji's Second, Third, and Fourth Combined Periodic Report to the Committee on the Elimination of Discrimination against Women*, 27, 36 (July 28, 2009), [http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/FJ/FWRM\\_UPR\\_FJI\\_S07\\_2010\\_Fiji\\_WomenRightsMovement\\_annex1.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/FJ/FWRM_UPR_FJI_S07_2010_Fiji_WomenRightsMovement_annex1.pdf). Further research yielded the discriminatory legal policy, Section 163, which codified the custom of *bulubulu* for assaults generally, but which Judges interpreted to include sexual assaults, precluding many victims of VAW from obtaining full redress. See *Kunadei v State*, FJHC 187; HAA0080J.2002S (2002), <http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2002/187.html>.

69. ICAAD submitted a report documenting the French Headscarf Ban prior to the UPR of France in July 2012. See ICAAD, UNITED NATIONS HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW: FRANCE, available at <http://icaadglobal.org/mediaItem.php?id=59>. This report was quoted and cited in OHCHR's summary of stakeholder submissions on France. See UNITED NATIONS HUMAN RIGHTS COUNCIL, SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN ACCORDANCE WITH PARAGRAPH 5 OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 16/21 (2012), available at <http://icaadglobal.org/mediaItem.php?id=139>.

Data that shows the impact of structural discrimination;  
Strategies/best practices that can be implemented locally, nationally, regionally, and internationally to address the problem;  
Input from local NGOs or experts.

*iii. Implementation*

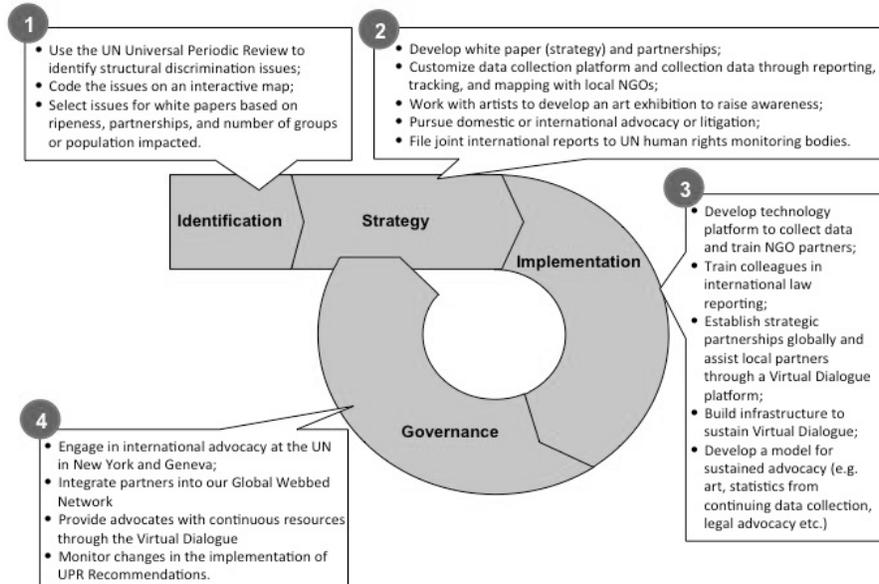
We implement the strategies from the policy papers by working with our global and local partners. These strategies include rule of law training, pushing forward model legislation, faith-based training to sensitize leaders to human rights norms and the potential conflict with customary traditions, training local NGOs to participate in UPR reporting and other international mechanisms, data collection and mapping to highlight and track issues and provide accurate information for advocacy, building capacity among local and regional NGOs to push for ratification and implementation of major international law treaties, and potentially co-counseling with local NGOs to pursue domestic litigation or file international complaints with the relevant UN mechanisms.

*iv. Governance*

After providing resources and training to stakeholders on the ground, we step into a governance role and assist through international advocacy at the UN. This may take the form of drafting joint UPR Reports for the Human Rights Council or Shadow Reports for the various treaty bodies. Additionally, we can monitor mid-term UPR Reports to assess the implementation of the UPR recommendations that states have accepted.

This multi-faceted approach allows ICAAD to engage in advocacy at the local, national, and international levels. In using this approach, we utilize a “Global Webbed Network” (GWN) of partners (e.g. law firms, law schools, NGOs, UN, media, and sometimes governments) to build a comprehensive strategy that identifies and combats structural discrimination.

### ICAAD's Project Life Cycle



#### B. Hate Crimes in the U.S. are a Structural Discrimination Issue

The UPR process is valuable in identifying structural discrimination issues because it provides resources that specifically address how policies, legislation, case law, and cultural norms further discrimination against vulnerable populations. Here, we will illuminate the context for how ICAAD attorneys came to find the UPR and the value it provided for our hate crimes advocacy in the U.S.

On March 4, 2011, two elderly Sikh gentlemen were killed in Elk Grove, California as they were engaged in their daily walk through their neighborhood.<sup>70</sup> Law enforcement officials investigated the killings as a possible hate crime but were unable to apprehend the perpetrators.<sup>71</sup> Colleagues working on this matter and many in the Sikh community were deeply disturbed by the events, and renewed calls for law enforcement and the FBI to meaningfully address crimes targeting their community.<sup>72</sup>

Sikh advocacy organizations and the Sikh community-at-large became increasingly vocal and began advocating with the U.S. Attorneys in California, the Civil Rights Division of the Department of Justice (DOJ),

70. Felicia Mello, *Hate Crimes Against Sikhs Go Untracked, Lawmakers Say*, ELKGROVEPATCH (Apr. 27, 2012), <http://elkgrove.patch.com/articles/hate-crimes-against-sikhs-go-untracked-legislators-say>.

71. *Id.*

72. See *id.*; Lee Romney, *Attack on Sikh men Triggers Outcry in Elk Grove, Calif., and Beyond*, L.A. TIMES (Apr. 11, 2012), <http://articles.latimes.com/2011/apr/11/local/la-me-0411-sikhs-20110411>.

and the FBI to ensure a proper investigation of the matter.<sup>73</sup> These advocacy groups recognized that the incident in Elk Grove was only a microcosm of a decade of violence since 9/11 against the Sikh community that remained unchecked.<sup>74</sup> ICAAD attorneys also became increasingly frustrated with the lack of domestic follow through. We began to look at international mechanisms that would hold the state accountable for its failure to protect its citizens.<sup>75</sup> Soon thereafter, one of our partners, the NGO Committee on Human Rights, a UN Economic and Social Council (ECOSOC) Committee, introduced us to the UPR mechanism.

In researching the UPR, we found that on August 23, 2010, after submitting its Report to the Human Rights Council, the U.S. underwent the UPR review for the first time. During the review, Ecuador issued a recommendation that the U.S. ensure prosecution and punishment of those engaged in hate or xenophobic violence.<sup>76</sup> The U.S. affirmatively accepted this recommendation and promised to take action.<sup>77</sup> Human Rights First (HRF) and the Council for Global Equality (CGE) echoed these concerns.<sup>78</sup>

By reviewing the UPR Reports by NGOs, we also uncovered severe limitations in how the U.S. government monitored its domestic hate crimes. For example, HRF noted that because the U.S. government engaged in a voluntary system of documenting hate crimes at the local level, fewer and fewer jurisdictions were reporting these incidents.<sup>79</sup> Subsequently, in doing

73. See Stephen Magagnini, *Feds Send Official to Elk Grove in Aftermath of Alleged Hate Crime*, THE SACRAMENTO BEE, Mar. 8, 2011, <http://blogs.sacbee.com/crime/archives/2011/03/feds-send-offic.html>; Anant Singh, *Reward in Sikh Killings Case in Elk Grove Grows to \$57,000*, UNITED SIKHS BLOG (Oct. 17, 2011), <http://www.unitedsikhs.org/blog/2011/10/reward-in-sikh-killings-case-in-elk-grove-grows-to-57000/>; *2 Sikhs Shot, One Killed in California*, THE SIKH COALITION (Mar. 8, 2011), <http://www.sikhcoalition.org/advisories/2011/2-sikhs-shot-one-killed-in-california>.

74. For information on hate crime and violence against Sikhs in the last decade, see *History of Hate: Crimes Against Sikhs Since 9/11*, *supra* note 1.

75. Some of the international mechanisms we reviewed include: 1) International Covenant on Civil and Political Rights (ICCPR), 2) International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), 3) the Inter-American Commission on Human Rights (IACHR), 4) and UPR. The U.S. has ratified, and is therefore subject to, the ICCPR, ICERD, and the IACHR. The U.S. is subject to the Inter-American Commission, not the Court.

76. UPR-INFO, DATABASE OF UPR RECOMMENDATIONS: ECUADOR RECOMMENDATION, available at [http://www.upr-info.org/database/index.php?limit=0&f\\_SUR=186&f\\_SMR=All&order=&orderDir=ASC&orderP=true&f\\_Issue=All&searchReco=&resultMax=25&response=&action\\_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly](http://www.upr-info.org/database/index.php?limit=0&f_SUR=186&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly). (To locate Ecuador's recommendations in the UPR database, select from drop-down menu "State under Review" (U.S.) and select from drop-down menu "Issue" (Racial Discrimination). This will give you a narrowed search result of 26 recommendations, one of which is from Ecuador.)

77. See *id.* (In the case of Ecuador's specific recommendation for the U.S. punish "xenophobic criminal acts", the U.S. "Accepted" the recommendation and indicated it would take "General Action")

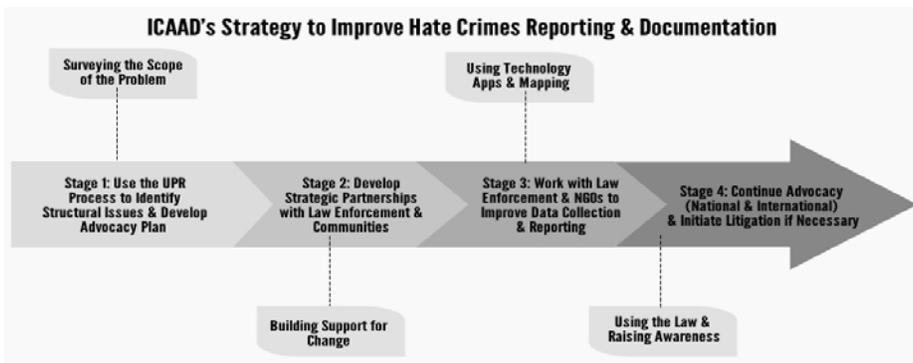
78. See generally HUMAN RIGHTS FIRST, FIRST SUBMISSION TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, UNIVERSAL PERIODIC REVIEW: UNITED STATES OF AMERICA (November 26, 2010), available at [http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/HRF\\_HumanRightsFirst.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/HRF_HumanRightsFirst.pdf).

79. *Id.* at 5 (stating that the "Underreporting of hate crimes to law enforcement agencies remains

research for our policy paper on hate crimes that would be submitted as a Shadow Report to the Committee on the Elimination of all Forms of Racial Discrimination (CERD), we identified additional gaps in how hate crimes were coded, documented, and monitored in the US.<sup>80</sup>

Engaging with the UPR mechanism allowed for a more comprehensive assessment of hate crimes in the U.S. and pushed us to identify other serious gaps in the hate crimes regime not covered in the initial UPR recommendations. These additional gaps include lack of law enforcement education about hate crimes laws leading to poor investigation and reporting of incidents, lack of coding for particularly vulnerable groups on the FBI 1-699 form, and the gutting of the DHS division that focused on combating non-Islamic extremist ideologies.<sup>81</sup>

Once we found a methodology in the UPR process to assist in identifying the structural flaws in policy that made it more prevalent for bias-motivated crimes to occur, we were able to develop partnerships with law firms and NGOs to assist in the process of researching gaps in hate crimes documentation and prevention, providing the basis of a developing strategic policy paper (in this case, a Shadow Report). This process allowed us to consolidate our advocacy efforts at the governmental level, coordinate with NGO partners, and research best practices and methods of redress at both the domestic and international level.



Using the UPR process helped build momentum for further inquiry into the discrimination embedded within the hate crimes regime in the U.S. In the following section, we detail pertinent defects discovered through our UPR research and discussions with government agencies, including the DOJ, the FBI, and the DHS.

a serious problem”).

80. Shadow reports are filed by NGOs to supplement or present alternative information to the periodic government reports that State parties are required to submit under treaties.

81. See John Deidrich, *Citing Sikh shooting, 100 in Congress Ask FBI to Expand Hate Crime Tracking*, JOURNAL SENTINEL ONLINE (Mar. 21, 2013), <http://www.jsonline.com/news/milwaukee/citing-sikh-shooting-100-in-congress-ask-fbi-to-expand-hate-crime-tracking-6c98ib8-199387391.html>; Johnson, *supra* note 9.

## II. HATE CRIMES DOCUMENTATION & PREVENTION IN THE U.S. HAS SYSTEMIC FLAWS

In using UPR documentation as a basis for our research, we identified structural deficiencies in how the government documents and allocates resources for the prevention of hate crimes that disparately impact marginalized communities. By illuminating gaps and defects in the U.S. government's response systems, ICAAD is able to craft a specific advocacy plan, engage in the necessary training of government officials, and determine what legal causes of action may be appropriate to bring suit in domestic and international forums if the government is unwilling to mitigate the existing discrimination.

The FBI's 2011 hate crime statistics indicate that 19.8% of the 6,216 single-bias incidents were motivated by religious bias.<sup>82</sup> This statistic represents one of the highest percentages of religious bias-motivated hate crimes ever recorded by the FBI since it began documenting hate crimes statistics nationwide in 1992, including immediately after 9/11.<sup>83</sup> Similarly, hate crimes motivated by LGBT bias has steadily increased since 2005 and now represents 20.8% of all bias-motivated crimes, the highest percentage ever recorded.<sup>84</sup> Even so, these statistics may represent only a small portion of the actual number of hate crimes in this country. The Bureau of Justice, for instance, estimates that from 2007 to 2011, about 259,700 nonfatal violent and property hate crimes against persons age 12 or older occurred annually.<sup>85</sup> The violent attack in Oak Creek brought national attention to Sikh Americans, a lesser-known but vibrant community that has been in the U.S. for over a century. What became clear in the aftermath of the massacre was the government's inability to accurately code this event as a bias-motivated hate crime against Sikhs because the FBI's Hate Crime Incident Form had no place to mark Anti-Sikh hate crimes, except by including them in a catchall category.<sup>86</sup> This problem also extends to Arab and Hindu communities, who have also been particularly vulnerable targets

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82. HATE CRIME STATISTICS 2011, INCIDENTS AND OFFENSES, *supra* note 4 (Incidents and Offenses).

83. *Id.*

84. *Id.* It is unsurprising that a rise in hate crimes directed towards Sikhs, Muslims, and other brown bodies has coincided with a rise in hate crimes against the LGBT community. Jasbir K. Puar and Amit S. Rai explain that propaganda which purports America's military enemies in the War on Terror are sexual deviants causes American patriotism to become defined by violent, hyper-masculinity; this subsequently "incites violence against queers and specifically queers of color." See Jaspar K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriotism*, 72 SOC. TEXT 117, 125-30 (2002).

85. NATHAN SANDHOLTZ ET AL., U.S. DEP'T. OF JUSTICE, HATE CRIME VICTIMIZATION, 2003-2011 1 (2012), <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf>.

86. Sikhs are still not coded separately on Hate Crime Incident forms, despite the fact that NGOs have documented over 700 bias motivated incidents targeting specifically Sikhs post 9/11. CNN Wire Staff, *Temple Shooting Dredges up Memories of long History of bias Crimes Against Sikhs*, CNN, Aug. 6, 2012, <http://www.cnn.com/2012/08/06/us/sikhs-bias-crimes>.

of post-9/11 violence but are not coded separately on the incident forms.<sup>87</sup>

Our research for the UPR and Shadow Reports also uncovered findings that the division within the DHS responsible for monitoring right wing extremist groups was gutted in 2009 after conservative groups protested a report that linked right-wing extremism to conservative ideology.<sup>88</sup> This fact looms large given that the Oak Creek massacre was committed by a white supremacist.<sup>89</sup> Accurate documentation and monitoring is a necessary step for the prevention of hates crimes. The next section discusses the disparity in reporting and its detrimental impact on vulnerable communities.

*A. Underreporting of Hate Crimes Masks the Severity of the Problem  
and Leads to Limited Governmental Resources Being Directed to  
Vulnerable Communities*

The FBI Uniform Crime Reports may be grossly undercounting hate crimes. The Uniform Crime Reports, which are based on data received from over 18,000 law enforcement agencies, provide that there were 7,713 victims of hate crimes in 2011.<sup>90</sup> Out of the 14,575 jurisdictions that participated in reporting hate crimes to the FBI, 86.7% of agencies reported zero hate crimes.<sup>91</sup> Over sixty of those jurisdictions have a population over 100,000.<sup>92</sup> The FBI, in fact, has never reported more than 10,000 hate crimes in any given year.<sup>93</sup>

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87. *Id.* See also Deidrich, *supra* note 81.

88. Khalek, *supra* note 9.

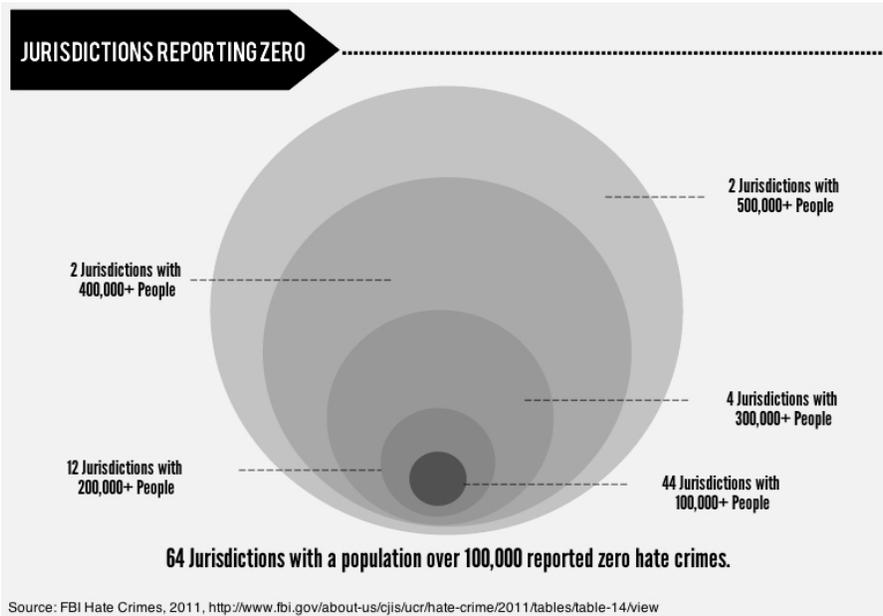
89. NBC26 Staff, *Remembering the Oak Creek Tragedy*, NBC (Aug. 11, 2013), <http://www.nbc26.com/news/Remembering-the-Oak-Creek-Tragedy-219210361.html>.

90. See HATE CRIME STATISTICS 2011, *supra* note 4 (Incidents and Offenses).

91. See HATE CRIME STATISTICS 2011, *supra* note 4 (Victims).

92. See HATE CRIME STATISTICS 2011, *supra* note 4 (Hate Crime Jurisdiction, at Table 14).

93. The FBI data on hate crimes appears in the FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, UCR PUBLICATIONS (2012), <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Hate>. Can access Hate Crimes Statistics from 1996-2011.



In contrast, the Bureau of Justice Statistics' 2013 Special Report on hate crime victimizations, which relies heavily on data from the National Crime Victimization Survey (NCVS), indicates that from 2007-2011, an average of 259,700 hate crime victimizations occurred each year.<sup>94</sup> The NCVS data suggests that FBI data based on official police reports may only take account of a marginal number of crimes which are motivated by hate, bias, or animus. Although surveys have their own deficiencies (e.g. respondent recollection), the NCVS has overcome some of the challenges through the use of "representative sampling on a national level in a longitudinal or repeated cross-sectional design."<sup>95</sup>

In 2001, the National Crime Victimization Survey began asking respondents who have been the victims of vandalism and various interpersonal crimes whether they believe that hate was a factor in the offenses committed against them. This survey involves random sampling of thousands of households in a rotating panel design. In developing an understanding of other types of crime the NCVS (particularly in combination with the UCR) has been invaluable, e.g., in helping to determine the prevalence, offense profiles, trends, and other important dimensions of crime.<sup>96</sup>

A sizeable part of the problem uncovered by the NCVS is that law

94. SANDHOLTZ ET AL., *supra* note 85, at 1.

95. MICHAEL SHIVELY, STUDY OF LITERATURE AND LEGISLATION ON HATE CRIMES IN AMERICA 3 (Abt Associates Inc., March 31, 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf>.

96. *Id.*

enforcement was not notified about hate crime victimizations in 65% of the cases documented by NCVS.<sup>97</sup> Hate crime victims may avoid reporting crimes to the police for a number of reasons. For instance, as Rick Dovalina of the League of United Latin American Citizens suggests, undocumented persons who are victims of hate crimes may not report these incidences to the police because of a fear of law enforcement and deportation.<sup>98</sup>

Additionally, a commissioned Report by the DOJ in 2005 noted that (1) people that may not understand what constitutes hate crime in their state, and may not mention that they believe hate or bias motivated the offense committed against them; (2) some victims may be reluctant to report known offenses to police; and (3) law enforcement that may not recognize or prefer not to acknowledge the role of hate in certain offenses.<sup>99</sup>

This data is also grossly incomplete because compliance with the FBI's request for hate crime data is voluntary.<sup>100</sup> Commenting on the zero hate crime incidents reported in the state of Mississippi in 2005, 2006, and 2007, Heidi Beirich of the Southern Poverty Law Center notes, "Hate crime data as the FBI reports is underreported by an ungodly amount False States like California have thousands of hate crimes, and the state of Mississippi with its record of racial animus has none? It's ridiculous."<sup>101</sup> The concerns about the inadequacy of police reports may prevent lawmakers and relevant agencies from missing crime patterns, and making sound decisions about how to allocate limited resources to prevent, prosecute, and protect communities from hate crimes.<sup>102</sup> Despite decade-long calls from the Bureau of Justice Assistance ("BJA") to require all law enforcement agencies to collect hate crimes data, along with their regular UCR reported data (which does not include mandatory reporting of hate crimes data), the Department of Justice has yet to mandate this type of comprehensive data collection.<sup>103</sup>

The Crime Victims' Institute (CVI) points to the Hate Crimes Task Force (HCTF) of New York City as a model to overcome some of the failures that lead to underreporting and mistrust between the local community and law enforcement, such as fear that the police will not take

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97. *Id.* at 5.

98. Cindy Horswell, *Hate Crimes Fall in Houston and Texas*, HOUSTON CHRON (Dec. 29, 2007), <http://www.chron.com/news/houston-texas/article/Hate-crimes-fall-in-Houston-and-Texas-1801444.php>.

99. SHIVELY, *supra* note 95, at ii-iii.

100. Nicole Krasavage and Scott Bronstein, *Are Victims Falling Through America's Hate Crime Data Gap?*, CNN, March 23, 2013, <http://www.cnn.com/2013/03/15/justice/hate-crime-statistics>.

101. *Id.*

102. *See* Jacobs, *supra* note 8.

103. *See* BUREAU OF JUSTICE ASSISTANCE, A POLICYMAKER'S GUIDE TO HATE CRIMES 15 (1997), <https://www.ncjrs.gov/pdffiles1/bja/162304.pdf>.

victim claims seriously.<sup>104</sup> For instance, while the National Crime Victimization Survey (NCVS) provides that “only 19.2% of the hate crime incidents reported by victims were determined by local authorities to be bias-related,”<sup>105</sup> “examination of the police response in New York from 1996-2005 shows that the Hate Crime Task Force of the New York Police Department (HCTF) confirmed as hate crimes almost 91% of victim reports.”<sup>106</sup> CVI explained that this disparity existed not because victims were any more or less truthful in other jurisdictions, but because unlike many jurisdictions, HCTF engages in proper law enforcement training, engagement with NGOs and the affected communities, and oversight over hate crimes documentation.<sup>107</sup> The HCTF’s efforts have led to a better understanding of the scope of the problem in New York City, and have led to further outreach into affected communities and more resources devoted to stopping bias-motivated crimes.

Conversely, the failure to document hate crimes by law enforcement causes affected communities to feel further alienated and prevents public officials from properly apportioning resources to address crimes targeting vulnerable communities.<sup>108</sup> The failure to investigate and accurately report hate crimes leads law enforcement officials to treat hate-motivated crimes directed towards particularly vulnerable communities as isolated events, rather as part of a larger trend of hate and violence.<sup>109</sup> A few examples of the kinds of resources that government could provide include the following: increased police patrols of property that is more likely to be targeted (e.g. houses of worship, community centers); training officers to follow set procedures when investigating and questioning victims, witnesses, or perpetrators in potential bias related incidents; funding for the installation of protective boundaries; holding press conferences in solidarity with the community; holding public education events; and

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104. Glen Kercher, et. al, *Hate Crimes* 16-21 (Aug. 2008), CRIME VICTIMS INSTITUTE (“CVI”), <http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf>.

105. *Id.* at 16.

106. *Id.*

107. *See id.* at 16-18.

108. *See* Maria Cramer, *Statistics on hate Crimes are Sparse*, BOSTON.COM (Dec. 13, 2010), [http://www.boston.com/news/local/massachusetts/articles/2010/12/13/statistics\\_on\\_hate\\_crimes\\_are\\_sparse/](http://www.boston.com/news/local/massachusetts/articles/2010/12/13/statistics_on_hate_crimes_are_sparse/). There are many resources, including federal funds to improve security of facilities that may be threatened, and other funds allocated for preparedness available to communities that can display a need for protection through statistics. *See* Jack Jenkins & Aaron Shapiro, *Sikhs Argue for ‘The Dignity of Being A Statistic’ At Senate Hearing*, THINKPROGRESS (Sept. 21, 2012), <http://thinkprogress.org/politics/2012/09/21/892871/sikhs-argue-for-the-dignity-of-being-a-statistic-at-senate-hearing/?mobile=nc>.

109. Indeed, the Hate Crime Statistics Act’s “purpose was to establish a national data collection system on crimes motivated by hate so that federal and local law enforcement authorities could determine whether hate crimes were isolated events or a more pervasive problem, and whether any particular groups were more likely to be targeted than others.” Susan J. Becker, *Tumbling Towers As Turning Points: Will 9/11 Usher in A New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WM. & MARY J. WOMEN & L. 207, 250 (2003).

conducting training by agencies, like the FBI, on measures the community can take to better protect itself.

The government's failure to support and protect these communities deepens and reinforces their lack of trust in law enforcement, especially amongst immigrant and lower-income families, leading people to believe that reporting crimes to the police is ineffective.<sup>110</sup> Thus, non-reporting and the failure to adequately document these crimes can effectively silence and further marginalize communities experiencing repeated hate motivated violence.

*B. The Failure to Code Sikhs on Hate Crime Incident Forms  
Continues to Marginalize a Vulnerable Community<sup>111</sup>*

The Sikh community is one example of a group that has been effectively silenced by the government's failure to recognize and accurately document the violence community members have faced. Many members of the Sikh faith wear turbans and maintain uncut hair and unshorn beards in accordance to their religious beliefs.<sup>112</sup> As a result of their distinctively visible identity, members of the Sikh community are particularly susceptible to hate crimes.<sup>113</sup> The government has been on notice of this vulnerability for over a decade.<sup>114</sup> Yet, rather than code violent incidents against Sikhs as "anti-Sikh" hate crimes, the FBI continues to code these incidents as "anti-Muslim", "anti-Other Religion," or as race or ethnicity

110. Having directly represented victims of hate crimes, one of the most common complaints of victims is that police reports inaccurately described the attack or failed to record pertinent information. Victims also often express a belief that the police will not do anything anyway. *See also* SHIVELY, *supra* note 95, at iii, 59, 82, which notes that after individuals reported hate crimes and observed a lack of action by police, many individuals choose not to report.

111. On June 5, 2013 the FBI Advisory Policy Board (APB) changed their stance and agreed to code Sikhs, Hindus, and Arabs on the Uniform Crimes Reporting (UCR) forms. FBI Director, Robert Mueller, must still approve the recommendation. Once approved, implementation will not occur till 2015. Community Update, *The Battle for Inclusion has been Won; FBI Advisory Policy Board Votes to Track Sikh, Hindu, and Arab Hate Crimes*, ICAAD (June 13, 2013), <http://icaadglobal.org/mediaItem.php?id=155>.

112. *See* Moni Basu, *The Sikh Turban at once Personal and Extremely Public*, CNN (Aug. 8, 2012), <http://religion.blogs.cnn.com/2012/08/08/the-sikh-turban-at-once-personal-and-extremely-public/>.

113. Blog posts on hate-mongering websites clearly identify Sikhs as potential targets. Ryan Lenz, *White Supremacists React to Sikh Massacre*, SOUTHERN POVERTY LAW CENTER (Aug. 7, 2012), <http://www.splcenter.org/get-informed/news/white-supremacists-react-to-sikh-massacre>. *See also* Ethan Rouen, *Teen Guilty in Sikh hair chop*, NY DAILY NEWS (Mar. 8, 2008), [http://articles.nydailynews.com/2008-03-08/local/29432790\\_1\\_sikh-crime-charges-hair](http://articles.nydailynews.com/2008-03-08/local/29432790_1_sikh-crime-charges-hair); Basu *supra* note 112.

114. The NYPD has recognized that Sikhs are intended targets of hate crimes because of their identity. The Investigation of Hate Crimes Model Policy, created by the International Association of Chiefs of Police (IACP), includes an example of a Sikh victim (who had his hair forcibly cut against the tenants of the religion) in the section regarding possible signs of a hate crime. *See* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE ("IACP"), INVESTIGATION OF HATE CRIMES: MODEL POLICY 5 (2009), [http://www.nychiefs.org/ModelPolicies/MPTC\\_Hate\\_Crimes\\_Model\\_Policy.pdf](http://www.nychiefs.org/ModelPolicies/MPTC_Hate_Crimes_Model_Policy.pdf).

based incidents.<sup>115</sup>

The U.S. government's failure to accurately code Sikh victims of hate crimes on its forms, despite clear evidence that the Sikh identity can be a trigger for hate-related violence, severely undercuts the purpose of coding hate crimes altogether. Incident forms, such as the forms used by the FBI, provide a mechanism for the government to track how communities have been affected by hate crimes. If the government does not recognize groups that are particularly susceptible to hate crimes on its incident forms, the government cannot attempt to warn or protect these communities. Since 9/11, civil rights organizations have documented over 700 incidents of hate crimes against the Sikh community.<sup>116</sup> For a community with approximately 500,000 members in the United States<sup>117</sup> to have experienced such a high level of violence, it is unconscionable that law enforcement would not take definitive steps to accurately code all bias-motivated acts against this community going forward.<sup>118</sup>

*C. DHS' Failure to Monitor non-Islamic Extremist Groups  
Compromised its Ability to warn or Prevent the Massacre in Oak  
Creek and Others*

The U.S. government has failed to allocate sufficient resources toward identifying domestic terrorism coming from non-Islamic sources.<sup>119</sup> The Oak Creek massacre exposed this flaw in how the government monitors groups with supremacist ideologies. Wade Michael Page, the attacker who killed six people at the Oak Creek Gurdwara, was part of the white supremacist group Hammerskin nation and a former military member who had been tracked for a decade by the Southern Poverty Law Center (SPLC)<sup>120</sup> and since 2010 by the Anti-Defamation League (ADL).<sup>121</sup>

115. Letter from Congressman Joseph Crowley to Eric Holder, Attorney General of the United States, U.S. Dep't of Justice (April 19, 2012), available at [http://crowley.house.gov/sites/crowley.house.gov/files/Letter%20to%20DOJ%20on%20Hate%20Crimes%20Against%20Sikh-Americans%2004-19-2012\\_0.pdf](http://crowley.house.gov/sites/crowley.house.gov/files/Letter%20to%20DOJ%20on%20Hate%20Crimes%20Against%20Sikh-Americans%2004-19-2012_0.pdf); Mello, *supra* note 70; HUMAN RIGHTS FIRST, *supra* note 6.

116. CNN Wire Staff, *supra* note 86.

117. *How Many U.S. Sikhs?*, PEW RESEARCH CENTER (Aug 6, 2012), <http://www.pewresearch.org/2012/08/06/ask-the-expert-how-many-us-sikhs/>.

118. The FBI has begun the process of considering changing its hate crime reporting system to track attacks against Sikhs, but actual reporting may not begin until 2015. Anju Kaur, *FBI may not Begin Tracking hate Crimes Against Sikhs Until 2015*, SIKH NEWS NETWORK (Dec. 5, 2012), <http://www.sikhnn.com/headlines/2379/fbi-may-not-begin-tracking-hate-crimes-against-sikhs-until-2015>.

119. See R. Jeffrey Smith, *Homeland Security Department curtails home-grown terror analysis*, WASH. POST (June 7, 2011), [http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH\\_story.html](http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html); Johnson, *supra* note 9.

120. Mark Potok, *Shooter Was On Radar For Years, Expert Says*, NPR (Aug. 8, 2012), <http://www.npr.org/2012/08/08/158419582/shooter-was-on-radar-for-years-expert-says>.

121. *ADL Connects Suspected Shooter at Wisconsin Sikh Temple to White Supremacist Skinhead Group*, ADL (Aug. 6, 2012), <http://blog.adl.org/extremism/adl-connects-suspected-shooter-at>

Despite Page's strong ties to the white supremacist movement, the FBI monitored Page only sporadically.<sup>122</sup> In stark contrast, the New York Police Department (NYPD) spent \$135 million of federal funds to monitor predominantly Muslim neighborhoods in New York for six years, and did not generate a single terrorist lead or investigation.<sup>123</sup> The NYPD continues this program and it seems the Justice Department has done nothing to review the practice, despite promising to do so.<sup>124</sup> All the while, the government's disproportionate focus on rooting out domestic terrorism from Islamic sources continues to feed into the same stereotypes that fuel hate crimes.<sup>125</sup>

On September 19, 2012, the U.S. Senate Judiciary Committee held a hearing, chaired by Senator Durbin, titled "Hate Crimes & the Threat of Domestic Extremism."<sup>126</sup> During the hearing, Daryl Johnson, former Senior Terrorism Analyst at the U.S. Dept. of Homeland Security (DHS), Office of Intelligence & Analysis (I&A), identified the government's failure to prevent, warn, and protect vulnerable communities from hate crimes and domestic terrorism from right wing extremist groups.<sup>127</sup> In his testimony, Johnson pointed out that "domestic rightwing extremists trumped all other forms of ideologically motivated violence in the U.S. for number of deaths" since September 11, 2001.<sup>128</sup> Despite these numbers, DHS has wrongly focused on investigating only one source of domestic terrorism—threats from al-Qaeda and affiliates—rather than focusing its attention also on non-Islamic extremists.<sup>129</sup> In fact, the FBI originally published reports on domestic terrorism within the U.S. (including terrorism attempts and

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wisconsin-sikh-temple-to-white-supremacist-skinhead-group.

122. Annie-Rose Strasser, *Republicans Blasted Obama Administration for Warning About Right-Wing Domestic Terrorism*, THINKPROGRESS (Aug. 7, 2012), <http://thinkprogress.org/politics/2012/08/07/645421/right-wing-extremism/?mobile=nc>.

123. Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led To No Leads, Terror Cases*, HUFFINGTON POST (Aug 21, 2012), [http://www.huffingtonpost.com/2012/08/21/nypd-muslim-spying-led-to\\_n\\_1817149.html](http://www.huffingtonpost.com/2012/08/21/nypd-muslim-spying-led-to_n_1817149.html). See also AP, *Report: Millions of White House dollars helped pay for NYPD Muslim surveillance*, FOXNEWS (Feb. 27, 2012), <http://www.foxnews.com/politics/2012/02/27/report-millions-white-house-dollars-helped-pay-for-nypd-muslim-surveillance/>.

124. Seth F. Wessler, *NYPD Has Changed 'Nothing' About Muslim Spying Program*, COLORLINES (April 8, 2013), [http://colorlines.com/archives/2013/04/nypd\\_has\\_changed\\_nothing\\_about\\_muslim\\_spying\\_program.html](http://colorlines.com/archives/2013/04/nypd_has_changed_nothing_about_muslim_spying_program.html). See also Adam Serwer, *Whatever Happened to the Obama Administration's Review of NYPD Spying?*, MOTHERJONES (April 4, 2013), <http://www.motherjones.com/politics/2013/04/nypd-muslim-surveillance-justice-department-eric-holder>.

125. Volpp, *supra* note 10, at 1577-78.

126. See *Hate Crimes & the Threat of Domestic Extremism: Hearing Before the Senate Judiciary Subcomm. on the Constitution, Civil Rights and Human Rights*, 112th Cong., 8-13 (Sep. 19, 2012), available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=3fd304c9f884bebd65a28be7fc18fdca>.

127. Johnson *supra* note 9, at 9.

128. *Id.* at 2. See also *The Benefits of Hindsight*, THE ECONOMIST (Aug. 18, 2012), <http://www.economist.com/node/21560566>.

129. *Id.* at 8, 9.

prevention measures), but has ceased to do so since 2006.<sup>130</sup> Furthermore, except for the FBI, governmental divisions are experiencing shortages of analysts who monitor right wing extremism.<sup>131</sup>

Johnson's testimony at the Senate hearing was not his first attempt to shed crucial insight on domestic non-Islamic extremism. In 2009, Johnson's team at DHS released a report titled "Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment."<sup>132</sup> The 2009 DHS report highlighted triggers that potentially motivate hate groups, including economic downturn, the election of a black president, illegal immigration, gun control, and hate groups recruiting military veterans.<sup>133</sup> The report received considerable conservative pushback and was criticized for unfairly targeting conservative ideas and groups (e.g. the Tea Party).<sup>134</sup> Shortly afterward, Johnson's division of eight analysts, which was the only division within DHS actively monitoring non-Islamic extremist groups in America, was downsized to just one analyst.<sup>135</sup>

In his testimony, Johnson also pointed to a key failure in the government's monitoring of extremists groups: the lack of resources devoted to using Behavioral Threat Assessment (BTA).<sup>136</sup> BTA is a methodology that uses a variety of questions and observational techniques to determine whether an individual is at higher risk for violently acting out and would warrant further governmental investigation.<sup>137</sup> Johnson explained that BTA is essential to identifying high risk individuals likely to act out and ultimately preventing hate-motivated violence, such as the violence faced by men, women, and children praying at the Oak Creek Sikh temple.<sup>138</sup> Instead, however, the U.S. government substantially relies on private citizens' reports of "suspicious behavior" or potential threats, such as DHS' "See Something, Say Something" campaign.<sup>139</sup> Private reporting

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130. *Id.*

131. *Id.* at 9.

132. See DEP'T. OF HOMELAND SECURITY (DHS), RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (Apr. 7, 2009), available at <http://www.fas.org/irp/eprint/rightwing.pdf>.

133. *See id.*

134. See R. Jeffrey Smith, *Homeland Security Department Curtails Home-grown Terror Analysis*, THE WASH. POST (June 7, 2011), [http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH\\_story.html](http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html).

135. Johnson, *supra* note 9, at 9 (single analyst was left at DHS to monitor the entire spectrum of non-Islamic domestic extremism). *See also* Khalek *supra* note 9.

136. Johnson, *supra* note 9, at 10.

137. Johnson, *supra* note 9 at 9-11. *See* J. Reid Meloy, et al., *The Role of Warning Behaviors in Threat Assessment: An Exploration and Suggested Typology*, 30 BEHAV. SCI. LAW 256, 256-279 (2012).

138. *See* Johnson, *supra* note 9, at 10.

139. Johnson, *supra* note 9, at 11. *See also* DEP'T OF HOMELAND SECURITY, "IF YOU SEE SOMETHING, SAY SOMETHING" CAMPAIGN, <http://www.dhs.gov/if-you-see-something-say-something-campaign>.

of suspicious activity renders an “inordinate number” of “false positives.”<sup>140</sup> Objective intelligence analysis, such as BTA, which specializes in investigating right-wing extremist ideology may mitigate, if not prevent, incidents like Oak Creek.<sup>141</sup>

### III. ICAAD IS PURSUING SEVERAL DOMESTIC AND INTERNATIONAL STRATEGIES TO ENHANCE THE U.S. GOVERNMENT’S ACCOUNTABILITY

Below, we explore potential avenues to reduce or control hate crimes in the U.S., which ICAAD is currently advocating to implement, either independently or in partnership with other civil and human rights groups.

#### A. *The UPR process provides International and Domestic Accountability.*

##### 1. *International Accountability*

The UPR process provides NGOs the ability to hold the government accountable for direct or indirect discrimination. We can leverage the UPR process by providing a UPR report to the Human Rights Council on structural discrimination in relation to xenophobia and hate crimes in the U.S. during the U.S.’ second cycle of review in 2015. In this report, we aim to identify remaining gaps in hate crimes laws and implementation, and as a part of the UPR process can expect a response to the recommendations from the U.S. government. The recommendations that the state accepts can be commented on once again during the mid-term implementation report and then reviewed by all the stakeholders in the following cycle, providing a regular mechanism for state accountability.

The UPR process is not the only international mechanism through which we can advocate our concerns. We are also filing Shadow Reports with the U.N. Human Rights Committee for the International Covenant on Civil and Political Rights (ICCPR)<sup>142</sup> in 2013 and with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>143</sup> in 2014. These filings promote U.S. accountability again by raising a domestic civil rights issue to an international platform, by having the Treaty Body Committees review and provide recommendations on why the U.S. government is falling short on its binding commitment to uphold

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140. Johnson, *supra* note 9, at 11.

141. *Id.*

142. See ACLU, FAQ: THE COVENANT ON CIVIL & POLITICAL RIGHTS, <http://www.aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr>.

143. See GLOBAL GOVERNANCE WATCH, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, [http://www.globalgovernancewatch.org/human\\_rights/the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination](http://www.globalgovernancewatch.org/human_rights/the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination).

the treaties it has ratified, and by pressuring the U.S. to respond definitely to steps it will take to ameliorate the specific human rights concerns raised.<sup>144</sup>

## 2. *Domestic Accountability, Proposed Changes to Policy, and Advocacy*

ICAAD's domestic efforts to enhance the U.S. government's accountability are on-going. We engage directly with government agencies charged with implementing hate crimes tracking, prevention, and prosecution, such as the DOJ, FBI, and DHS, and with Congress, media, and NGOs to advocate for changes in how the U.S. government documents, codes, and monitors hate crimes. The domestic statements and reports we have submitted point to particular failures in the system and potential solutions enumerated hereafter.

### B. *The NYPD Model Addresses Common Failures in Hate Crime Documentation*

On August 14, 2009, the New York State Division of Criminal Justice Services (DCJS) implemented a plan to improve hate crimes reporting and new procedures.<sup>145</sup> The plan addressed three specific failures.<sup>146</sup>

#### 1. *NY State and Local Law Enforcement Agencies Have Failed to Identify Hate Crimes*

To address the limitations of various departments to identify hate crimes, the DCJS shares the model policy with departments across the state.<sup>147</sup> This facilitates thorough investigations and provides departments with the framework to properly document potential hate crime incidents.

#### 2. *Victims may not Report Hate Crimes.*

Victims of hate crimes decide not to report the crimes for several reasons, including fear of deportation because of their immigration status, fear of law enforcement, and the belief that reporting hate crimes will not be taken seriously.<sup>148</sup> The NYPD Community Relations Bureau engages with community NGOs and leaders to build communities' trust in law enforcement,<sup>149</sup> which can include training and sensitizing law enforcement

144. See ACLU, *supra* note 142; GLOBAL GOVERNANCE WATCH, *supra* note 143.

145. See NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, IMPROVING HATE CRIME DATA QUALITY (Aug. 14, 2009), <http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/hatecrimedataquality.htm>.

146. *Id.*

147. *Id.*

148. Horswell, *supra* note 98; SHIVELY, *supra* note 95.

149. See New York Police Department, *Community Affairs Bureau*, [http://www.nyc.gov/html/nypd/html/community\\_affairs/community\\_affairs.shtml](http://www.nyc.gov/html/nypd/html/community_affairs/community_affairs.shtml) ("The Community Affairs Bureau was established to foster positive and productive police-community relations. By

to particularly vulnerable communities affected by hate crimes. Additionally, members of the city council, borough government leaders, and various members of civil society often stand together in solidarity following hate-crime incidents in order to bring attention and resources to the incident and to visibly recognize the painful effects hate crimes have on the community.<sup>150</sup>

### 3. *Law Enforcement Agencies may fail to Submit Hate Crime Information Internally*

DCJS conducts a comprehensive validation of hate crime data, asking individual police agencies to verify hate crime incidents or arrests that had been reported or transmitted to DCJS.<sup>151</sup> For the year 2008, thanks to the validation process, DCJS identified 112 additional hate crime incidents that were not reported within law enforcement agencies in New York.<sup>152</sup> Other states may avoid underreporting these incidents through adopting the simple validation process instituted by DJCS.

### C. *Model Hate Crimes Assessments Must Be Integrated into Patrol Guides Nationwide*

Local law enforcement agencies may or may not provide training and guidelines on how to investigate and document hate or bias-motivated incidents. The inclusion of bias-motivated incident guidelines in the NYPD Patrol Guide has long been a tremendous asset to the NYPD because the guidelines promote proper investigation and documentation of hate crimes.<sup>153</sup> Including hate crime procedural guidelines in Patrol Guides throughout the country should ensure that police officers receive the training to properly investigate and document from the inception of an incident. Proper investigation and documentation of crimes is especially critical for hate crimes because successful prosecution is heavily reliant on evidence of the perpetrator's *mens rea*,<sup>154</sup> which can be established through careful investigation immediately following the crime.

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partnering with community leaders, civic organizations, block associations, and concerned individuals, we work to create solutions for problems that arise within the city's many communities.").

150. See, e.g. *News Conference About a hate Crime Against a Sikh Student*, available at <http://www.youtube.com/watch?v=3sdmWPHu4>. In the authors' experiences, engagement by the police (including the NYPD) and politicians generally occurs after local community leaders bring the incident to their attention.

151. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, *supra* note 145.

152. *Id.*

153. See Alison Mitchel, *Police Find Bias Crimes are Often Wrapped in Ambiguity*, N.Y. TIMES (Jan 27, 1992), <http://www.nytimes.com/1992/01/27/nyregion/police-find-bias-crimes-are-often-wrapped-in-ambiguity.html>.

154. See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 712-13 (1993).

*D. The Attorney General's Hate Crimes Initiative to Foster Law Enforcement and Civil Society Collaborations Must be Revitalized*

In 1997, then Attorney General Janet Reno put forth a comprehensive Hate Crimes Training Initiative to be deployed throughout the nation.<sup>155</sup> The Initiative went beyond bolstering law enforcement to combat hate crimes. The Initiative recognized the need to draw “on local people to craft solutions that are tailored to the particular problems of the local community.”<sup>156</sup> The Initiative also suggested additional measures to combat and prevent hate crimes, including the following:

- Use of community outreach to facilitate effective reporting, investigation, and persecution of hate crimes;
- Expansion of hate crime education and training at the federal, state, and local law enforcement levels;
- Increase in classroom-based education programs at schools; and
- Improvement in data collection.<sup>157</sup>

Effective hate crime tracking requires participation from all interested parties. Thus, local law enforcement and the FBI should make efforts to integrate community and NGO documentation of hate crimes. Additionally, law enforcement and NGO collaboration programs should include training for communities to become better organized so that they can manage crisis effectively.<sup>158</sup> The training provided as part of the collaboration should include mechanisms to quickly report incidents, share reliable information, enhance awareness of security concerns, and identify risk factors to protect affected communities.

*E. Reporting Victim Demographics is Crucial for Law Enforcement and NGOs*

Victim demographics provide vital information that can assist law enforcement in protecting vulnerable communities. Some states, such as New York, already include substantial victim demographics in their state hate crime reports.<sup>159</sup> This information should also be included in the

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155. See Stephen Wessler, *Addressing Hate Crimes: Six Initiatives That Are Enhancing the Efforts of Criminal Justice Practitioners*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE (Feb. 2000), available at <http://www.ncjrs.gov/pdffiles1/bja/179559.pdf>.

156. Memorandum from the Office of the Attorney General for All United States Attorneys: Implementation of Hate Crimes Initiative (Dec. 22, 1997), available at <http://www.justice.gov/ag/readingroom/hatecrimeinit.htm>.

157. *Id.*

158. An excellent example of a collaboration program is the Secure Community Network (SCN), a national security initiative organized by the Jewish community in collaboration and partnership with DHS. See SECURE COMMUNITY NETWORK, <http://www.scnus.org/>; SCN HOMELAND SECURITY & PREPAREDNESS TRAINING CENTER, <http://www.scnus.org/page.aspx?id=240399>.

159. See NYS UNIFORM CRIME REPORTING, INSTRUCTIONS FOR PREPARING THE HATE CRIME INCIDENT REPORT (May 2013), <http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/forms/hatecrime.pdf>.

Uniform Crime Reports. Additionally, reports should include information regarding the victim's religion. Victims who have suffered the trauma of hate crime should also have the right to self-identify.

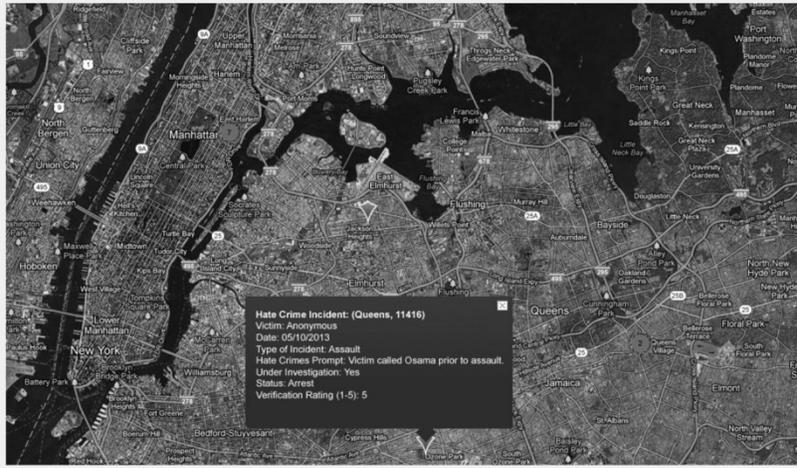
There are several benefits to including victim demographic information in hate crime reports. First, understanding the communities who are being victimized allows law enforcement to better understand, assist, protect, and warn those communities of potential bias-motivated violence. Second, documenting and coding hate crimes to properly reflect the victims' identities (such as Anti-Sikh, Anti-Hindu, and Anti-Arab) encourages members of identity groups to report hate-motivated crimes to law enforcement agencies. In turn, this can also foster partnerships between law enforcement and the targeted communities, which can facilitate prosecution of hate crimes. Finally, better documentation can help to ensure that law enforcement allocate adequate resources to communities that are especially vulnerable to bias-motivated crimes.

*F. Hate Crimes Mobile Reporting System & Mapping Platform Can Improve Hate Crime Reporting*

ICAAD is engaged in discussions with the NYPD to pilot a Hate Crimes Mobile Reporting System & Mapping Platform. With the widespread popularity of smart-phones, a mobile application that allows users to report hate-motivated incidents as soon as they occur would go a long way to encourage reporting of bias related incidents, especially those incidents that are less violent (e.g. hate graffiti) and hence less likely to be reported. A hate-crime reporting app would not replace emergency 911 calling and assistance, but the app would allow users to record information while still fresh in their minds, and may even allow users to take and submit pictures of the incidents with their phone cameras.

In essence, users could submit a complaint via text or through the app that would directly be transmitted to the NYPD and to authorized civil rights organizations, and mapped to track the incident. This system will help to build the relationships between the communities and police and provide an outlet for individuals to report crimes facing discrimination who may not otherwise come forward. Additionally, by mapping the incidents, it becomes easier to track trends and hotspots of activity, and also to visually represent the incidents to the general public.

### Improving Documentation with App & Text Reporting & Mapping



*G. Domestic and International Litigation may be Pursued.*

We have yet to pursue litigation against the U.S. government on the issue of hate crimes. However, litigation remains a potential avenue of relief. Among numerous theories to litigate, there are viable arguments under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution for members of communities who are repeatedly victims of hate crimes, and yet, who the FBI has not coded. These communities have not been supplied resources normally provided to communities facing such crisis, and could have a potential claim of discrimination under the Equal Protection Clause.

Another potential avenue for litigation is under the Inter-American Commission on Human Rights (IACHR). The IACHR is an independent commission created by the Organization of American States in 1959 and headquartered in Washington D.C.<sup>160</sup> The IACHR's mandate "is to promote the observance and protection of human rights."<sup>161</sup> While requiring exhaustion of certain domestic remedies<sup>162</sup>, there is potential for filing a claim regarding the U.S.' failure to protect vulnerable communities because of inequitable implementation of policies aimed at deterring bias based crimes.<sup>163</sup>

#### CONCLUSION

Structural discrimination issues must be combated through a holistic approach that promotes transparency, accountability, and a willingness to change both government-produced inequality and prejudicial societal beliefs and practices. ICAAD promotes this change by using a systems approach to addressing structural discrimination. While discrimination, such as bias-motivated crimes, have existed in one form or another for centuries, barriers to communication are being removed at a rate previously unknown in history, predominantly because of large-scale information sharing and our dependence on remaining interconnected. The increasing influence of international law is a testament to that interconnectivity. The combination of scrutiny through accountability, leverage through advocacy, and engagement with interested parties at every level—local, national, and international—allows ICAAD to systematically combat issues of structural

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160. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, WHAT IS THE IACHR?, <http://www.oas.org/en/iachr/mandate/what.asp>.

161. *Id.*

162. Inter-American Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, art. 28(h) (2009) (amended Sept 2, 2011), <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

163. See Organization of American States, American Declaration of the Rights and Duties of Man, Art. 1, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc.6 rev.1 at 17 (1992) ("Every human being has the right to life, liberty and the security of his person").

discrimination while amplifying the voice of vulnerable communities that are severely unrepresented.