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About International Center for Advocates Against Discrimination (ICAAD):

ICAAD uses a systems approach to combat structural discrimination against women and minorities globally. We identify gaps in the societal structures that marginalize vulnerable communities using a transdisciplinary approach that combines law, technology and art. Our evidence based research utilizes teams of experts to identify specific structural discrimination policies, marshal resources and key partnerships, and provide strategic support of local NGOs with the aim of systematically uprooting discrimination within different societal sectors (e.g. legislative, judicial, law enforcement, health, faith, etc.).

Executive Summary

This report examines the United States' (U.S.) compliance with its international human rights obligations in the protection of minorities and vulnerable groups from hate crimes and related discrimination. During the U.S.' first cycle through the Universal Periodic Review (UPR), amongst 27 recommendations to the U.S. in relation to racial discrimination, five recommendations, by Ecuador, Venezuela, Egypt, Bangladesh, and Iran dealt with specifically with xenophobia and hate crimes.¹ The recommendations on this issue came as no surprise as hate crimes and racially, ethnically, and religiously motivated violence against minorities and other vulnerable groups have been a consistent part of American history.

While the U.S. made progress in its hate crimes legal framework with the adoption of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) in 2009, revisiting coding of particularly effected communities, and by pursuing more aggressive enforcement by Federal Agencies, as this report reveals, the U.S. government continues to fail to protect minority communities from hate crimes through a combination of inadequate data collection, documenting only 3% of hate crimes, limited training of law enforcement to investigate and document hate crimes, and a failure to devote resources to monitor domestic extremists with supremacist ideologies.

The information submitted in this report is culled from a number of studies, analysis of statistics provided primarily by governmental sources, and comes through the experience of ICAAD's attorneys working directly on hate crime cases, primarily involving incidents against Sikhs² of South Asian descent.

I. First Cycle Recommendations, Follow-Up, and the Recent Conclusions of the CERD Committee

Five countries gave recommendations directly associated with hate crimes and xenophobic acts in the first cycle. While all the recommendations requested that the U.S. take action to combat xenophobia, Ecuador's recommendation referenced specific hate crimes against Ecuadorian nationals, and the recommendations of Iran and Egypt reference discriminatory acts against Arabs and Muslims.³ This is significant because of the number of high-profile incidents involving migrants, and the sustained increase in attacks against the Arab, Muslim, Sikh, and South Asian communities in the 13 years following the September 11, 2011 attacks on the World Trade Center in New York.

The U.S. government notes in response to these recommendations by stating "we have comprehensive Federal and State legislation and strategies to combat racial discrimination. We are working diligently toward better enforcement and implementation of these laws and

¹ Report of the Working Group on the Universal Periodic Review – United States of America, Human Rights Council A/HRC/16/11, Paragraph 92 - Ecuador (92.103), Venezuela (92.82), Egypt (92.98), Bangladesh (92.106), and Iran (92.190).

² Two assaults against Sikhs alleged to be hate crimes in New York City happened within two weeks of each other last month. See *Doctor Jaspreet Singh Batra, Victim Of Another Alleged Sikh Hate Crime, Urges Message Of Forgiveness*, The Huffington Post, (Aug. 11, 2014), available at: http://www.huffingtonpost.com/2014/08/11/doctor-jaspreet-singh-batra-sikh-hate-crime_n_5668166.html.

³ Supra, Note 1.

programs.”⁴ Furthermore, the government states that it “take[s] effective measures to counter intolerance, violence, and discrimination against all members of all minority groups, including Muslims.”⁵

The federal government has taken some steps to ameliorate bias-motivated crimes. First, Congress’s passage of the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act marked an important step in protecting the voices of all vulnerable communities by expanding federal hate crimes laws to include “crimes motivated by a victim’s actual or perceived gender, disability, sexual orientation or gender identity.”⁶

Second, after years of advocacy by ICAAD and other civil rights organizations, on June 5, 2013 the FBI Advisory Policy Board (APB) changed their long held position and agreed to code Sikh, Hindu, and Arabs on the Uniform Crime Reporting (UCR) forms.⁷ For years, these particularly vulnerable communities, especially post 9/11, did not have hate crimes against their communities coded in the UCR Form I-699. Often, the crimes were categorized in catchall categories (i.e. Anti-Other Religion), and therefore, masking the level of violence against these communities for over a decade. Recently, this move has prompted the FBI to include other faith-based communities to the 1-699 form.⁸ FBI outgoing Director, Robert Mueller, recently approved these recommendations, however, the changes do not go into effect until 2015.⁹ The most encouraging part of this process was that the highest levels of the executive branch, including Attorney General Eric Holder, recommended the FBI amend its existing policies.

Additionally, the DOJ has been extremely vigilant in pursuing hate crimes that fall within its jurisdiction, citing that “[i]n the past four fiscal years (2009-2012), the Department has prosecuted 29 percent more hate crime cases than were prosecuted in the previous three fiscal years (2005 -2008), and charged 78 percent more hate crime defendants.”¹⁰

Unfortunately, the actions the U.S. government has taken thus far lack in comprehensiveness, diligence, and effectiveness. Under the current Uniform Crime Reporting (UCR) Program led by the Federal Bureau of Investigation (FBI), only 3% percent of all hate crimes are documented. In 2012, the UCR reported 7,713 victims of hate crimes,¹¹ whereas, the National Crime Victimization Survey (NCVS) reported on average 259,700 hate crimes a year from 2007-

⁴ UPR Recommendations Supported by the U.S. Government, June 2014, available at: <http://www.state.gov/j/drl/upr/recommendations/index.htm>.

⁵ *Id.*

⁶ See 18 U.S.C. 249.

⁷ CAPAC Praises Recommendation for FBI to Track Hate Crimes Against Sikh, Hindu, and Arab Americans (June 6, 2013), <http://capac-chu.house.gov/press-release/capac-praises-recommendation-fbi-track-hate-crimes-against-sikh-hindu-and-arab>.

⁸ Jaweed Kaleem, *FBI to Start Tracking Hate Crimes Against Sikhs, Hindus, and Arabs*, Huffpost Religion (June 5, 2013), http://www.huffingtonpost.com/2013/06/05/hate-crimes-sikhs-hindus-arabs-fbi_n_3392760.html.

⁹ CAPAC, *supra* note 7.

¹⁰ *Accomplishments Under the Leadership of Attorney General Eric Holder*, Department of Justice (DOJ) (April 2013), <http://www.justice.gov/accomplishments/>.

¹¹ FBI Uniform Crime Reporting (UCR), Hate Crime Incident Report, available at: <http://www.fbi.gov/about-us/cjis/ucr/reporting-forms/hate-crime-incident-report-pdf>.

2011.¹² The 34 fold gap in documentation of hate crimes reveals systemic flaws that result in the government failing to devote adequate resources: to train police officers in properly identifying bias indicators in crime, to monitor domestic hate groups rather than disproportionately focusing on Islamic extremism, and to protect particularly vulnerable communities from hate crimes.

Notably, following the U.S. review by the Committee on the Convention for the Elimination of All Forms of Racial Discrimination (CERD) in August 2014, the CERD Committee's Concluding Observations shared ICAAD's concern¹³ about the "underreporting of instances of hate crimes by the victims to the police, as well as by law enforcement officials to the FBI given the voluntary nature to comply with the FBI's request for hate crime statistics."¹⁴

The Committee recommended that the U.S.

"[i]mprove its data collection system for statistics on complaints of hate crimes, including by officially requiring all law enforcement agencies to record and transmit all such instances to the FBI, disaggregated by factors such as race, ethnicity, age and religion, and regularly publicize such information... Ensure that all law enforcement officials and all new recruits are provided with initial and ongoing in-service training on the investigation and reporting of complaints of hate crimes."¹⁵

II. Legal Framework

Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits State parties from engaging in any act or practice of racial discrimination and requires them "to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." Article 2 also requires State parties to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

Article 26 of the International Covenant on Civil and Political Rights (ICCPR), requires State parties to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Notably, the ICCPR reaches discrimination both in law and fact that arises from public and private actors.¹⁶

¹² Nathan Sandholtz, et al., U.S. Dep't. Of Justice, Hate Crime Victimization, 2003-2011, 4 (Mar. 2013), <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf>. note 18, at 1.

¹³ See Perpetuating Discrimination: How the U.S. Government's Compliance with the Underreporting of Hate Crimes Leads to a Failure to Protect Minority Groups and Effectively Combat Hate Crimes, ICAAD Shadow Report to the 7th-9th Periodic Reports of the United States 85th Session of the Committee on the Elimination of Racial Discrimination, Geneva, (August 2014), available at: <http://icaadglobal.org/mediaItem.php?id=182>

¹⁴ Concluding Observations on the Combined Seventh to Ninth Periodic Reports of United States of America, Committee on the Elimination of Racial Discrimination, Advanced Edited Version, ¶9 (29 August 2014), CERD/C/USA/CO/7-9, available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf

¹⁵ *Id.*

¹⁶ U.N. Human Rights Committee, *General Comment No. 18: Non-Discrimination*, ¶¶ 9, 12 (Oct. 11, 1989), available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument).

Therefore, to comply with Article 2 of CERD and Article 26 of the ICCPR, the United States must take affirmative steps to “diminish or eliminate conditions which cause or help to perpetuate discrimination”¹⁷, thereby, uprooting the structural issues that make minority communities susceptible to bias-motivated crimes (hate crimes).

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

A. Gaps in Data and Law Enforcement’s Failure to Voluntarily Report Hate Crimes

The FBI UCR data masks a widespread problem of reporting hate crimes under the Hate Crimes Statistics Act (HCSA). Under the UCR, the FBI recorded 5,796 bias-motivated incidents which resulted in 7,164 victims in 2012.¹⁸ Out of the 13,022 jurisdictions that participated in the program covering 248,809,710 people, *86.2% of agencies reported zero hate crimes*.¹⁹ “This does not mean that they failed to report; rather, they affirmatively reported to the FBI that *no hate crimes occurred in their jurisdiction*.”²⁰ Further, in 43 of those jurisdictions, the population exceeds 100,000 people.²¹ Breaking this down, jurisdictions representing the equivalent of almost a third (76,542,952) of the U.S. population, reported zero hate crimes.

According to the National Crime Victimization Survey, 65% of all hate crime victimizations are never reported to the police.²² Many of the reasons stem from mistrust of law enforcement to:

- investigate their claim thoroughly,
- prosecute the case as a hate crime,
- prevent retaliation, and not use their position to deport victims who lack legal immigrant status.

Moreover, as there is no federal mandate to ensure recording of hate crimes by local law enforcement jurisdictions, reporting is *voluntary*, and thus leads to a significant amount of underreporting.²³ No federal laws require participation in the UCR program nor do they require agencies provide a full year's worth of data.²⁴ To deal with this data gap, the FBI has developed

¹⁷ *Id.* at ¶ 10.

¹⁸ FBI Uniform Crime Reporting (UCR), Hate Crime Incident Report, available at: <http://www.fbi.gov/about-us/cjis/ucr/reporting-forms/hate-crime-incident-report-pdf>.

¹⁹ FBI Uniform Crime Reports, 2012 Hate Crimes Statistics, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012>

²⁰ Leadership Conference on Civil Rights, *Hate Crimes in America: The Nature and Magnitude of the Problem*, <http://www.civilrights.org/publications/hatecrimes/nature---and---magnitude.html>.

²¹ See Hate Crime Statistics 2012, Hate Crime by Jurisdiction, at Table 14, available at: http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/tables-and-data-declarations/14tabledatadecpdf/table_14_hate_crime_zero_data_submitted_per_quarter_by_state_and_agency_2012.xls/view

²² Michael Shively, Study of Literature and Legislation on Hate Crimes in America, 5 (Abt Associates Inc., March 31, 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf>.

²³ Human Rights First (HRF), in filing a report during the U.S.’s Universal Periodic Review, noted that a voluntary system of documenting hate crimes at the local level, produced few jurisdictions that were reporting these incidents. See generally, Human Rights First, First Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review: United States of America (Nov. 26, 2010), http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/HRF_HumanRightsFirst.pdf. (stating that the “Underreporting of hate crimes to law enforcement agencies remains a serious problem”).

²⁴ Peter P. Lynch, et al., *Understanding Crime Statistics: Revisiting the Divergence of NCVS and UCR*, Cambridge University Press, note 13 at 67-69 (2007).

an entire methodology to approximate missing data, which can produce significant errors.²⁵ Furthermore, some police departments “cook the books” by underreporting the number of crimes reported to them by victims . . . or may be recorded as less serious crimes.

For the most part, the FBI cannot determine when this occurs . . . except when newspapers uncover them, or when civil rights advocacy groups mount community pressure.²⁶ An example of such a failure was the hit and run death of a 61-year-old African American man in July 2012 who was killed by an 18-year old white driver in Mississippi; despite being charged with murder, prosecutors failed to charge the driver with a hate crime.²⁷ This comes as little surprise as Mississippi has no Uniform Crime Reporting Program and reported zero hate crimes to the FBI in 2005, 2006, 2007.²⁸ Anecdotally, based on the authors’ experience in New York City, police and prosecutors are highly unlikely to charge a suspect with a hate crime as opposed to a common crime unless there is pressure from community or civil rights groups; and New York is considered one of the more compliant states. Currently, only 32 of 50 states have legislation mandating hate crimes data collection.²⁹

B. Police Department Culture and Training Plays a Vital Role in Whether Hate Crimes are Properly Documented

The Department of Justice in 2005 made an observation that some law enforcement agencies “prefer [] not to acknowledge the role of hate in certain offenses.”³⁰ This point underscores how law enforcement officials allow bias to infiltrate and impact how they document hate crimes. The CJSAC Report which did a pilot study on hate crimes documentation at the local agency level supports this observation by finding that “some officers did not believe in enforcing bias crimes against white offenders . . . [giving] those officers the authority to effectively nullify hate crime law.”³¹

Moreover, the Report found that police department culture is one of the strongest determinants of officer behavior, and consequently, whether they feel incentivized or disincentivized to document hate crimes. The culture in a police department had an overwhelming effect on the thoroughness of hate crimes reporting.³² For example, agencies that infrequently reported hate crimes were likely to have a culture of “discouragers” in leadership positions and perpetuate the notion that “reporting hate crimes results in negative publicity [and] . . . supports the agendas of gay and minority groups.”³³

²⁵ *Id.* at 270.

²⁶ *Id.*

²⁷ Nicole Krasavage, et al., *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>.

²⁸ *Id.*

²⁹ See Alison M. Smith, State Statutes Governing Hate Crimes, Congressional Research Service (Sept. 28, 2010), <http://www.fas.org/spp/crs/misc/RL33099.pdf>; ADL, Anti-Defamation League State Hate Crime Statutory Provisions (updated Mar. 2013), http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws_march_2013.pdf.

³⁰ Shivley, *supra* note 23, at iii

³¹ S. M. Haas et al., *Assessing the Validity of Hate Crime Reporting: An Analysis of NIBRS Data*, Charleston, WV: Criminal Justice Statistical Analysis Center, Office of Research and Strategic Planning, Division of Justice and Community Service, 8 (July 2011).

³² *Id.* 6-8.

³³ *Id.* at 7

Through focus groups, the CJSAC Report further illuminated that officers need further training in identifying “indicators of bias”³⁴ and that a vast majority of undercounting of hate crimes, 67.35% in the pilot study conducted, can be attributed to insufficiently understanding that hate crimes are not only national headline or “clear-cut cases.”³⁵ It is no surprise then that hate crime data collection efforts “lag[] behind data regarding most other types of crime.”³⁶

As a result of the combination of voluntary reporting with a failure to adequately train and instill a better culture in police officers to identify bias indicators in crime, there is little chance that the scope of violence directed at vulnerable communities will be understood.

C. Failure to Dedicate Adequate Resources to Monitoring Domestic Hate Groups Leaves Minority Communities Susceptible

Unfortunately, the failure to properly document hate crimes is compounded by the federal government’s limited monitoring of domestic hate groups. On August 5, 2012, one of the largest hate crimes in U.S. history occurred with the killing of six worshipers at Oak Creek Sikh Gurdwara.³⁷ This massacre highlighted the government’s failure to monitor domestic extremist groups who hold supremacist ideologies.³⁸ During a Senate hearing on hate crimes, former senior analyst for the Department of Homeland Security (DHS), Daryl Johnson, testified that that “domestic rightwing extremists trumped all other forms of ideologically motivated violence in the U.S. for number of deaths” since September 11, 2001. Furthermore, DHS reduced the number of analysts who monitor domestic extremism (non-Islamic) from eight analysts to one in 2009.³⁹ Disproportionate resources have been used on surveillance and monitoring of Islamic extremism, leaving the U.S. with a blind spot for domestic hate groups that have swelled to its highest levels.

Although the U.S. has “Federal and State legislation and strategies to combat racial discrimination,”⁴⁰ it has not addressed the failure of proper data collection, training of law enforcement, and monitoring of domestic hate groups, each of which have severe direct and downstream effects. As a result, relevant law enforcement agencies do not have enough information to identify crime patterns and make sound decisions about how to allocate limited resources to prevent, prosecute, and protect communities from bias-motivated acts. Ultimately, all Americans are left more vulnerable when the true scope of the bias-motivated violence in the U.S. remains unknown.

³⁴ *Id.* at 21.

³⁵ *Id.* at 18 (The consensus in the CJSAC study was “when you do see a hate crime, it is the type that makes national headlines”).

³⁶ Shivley, *supra* note 23, at iv.

³⁷ 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-sikhssince-911_n_1751841.html.

³⁸ Mark Potok, Shooter Was On Radar For Years, Expert Says, NPR (Aug. 8, 2012), available at: <http://www.npr.org/2012/08/08/158419582/shooter-was-on-radar-for-years-expert-says>.

³⁹ 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/

⁴⁰ *Supra* Note 3.

IV. Recommendations

To address its failure to comply with its international obligations in relation to the protection of vulnerable groups from hate crimes, the U.S. federal government should:

- “Improve its data collection system for statistics on complaints of hate crimes, including by officially requiring all law enforcement agencies to record and transmit all such instances to the FBI, disaggregated by factors such as race, ethnicity, age and religion, and regularly publicize such information;”⁴¹
- Require law enforcement agencies to provide both quarterly and full year data on hate crimes, rather than having the FBI apply estimation analysis UCR data;
- “Ensure that all law enforcement officials and all new recruits are provided with initial and ongoing in-service training on the investigation and reporting of complaints of hate crimes;”⁴²
- Allocate sufficient resources to states to provide comprehensive training for officers to identify bias indicators in crime and incorporate hate crimes investigation procedures in *Patrol Guides* used by law enforcement;
- “Support research assessing the prevalence, incidence, predictors, and outcomes of hate crimes, as well as the psychological impact of hate crimes on victims, their families, and the community;”⁴³
- Provide training to support the implementation of the new provisions to code Arab, Hindu, Sikh and other minority groups previously excluded from reporting forms in 2015;
- Revitalize collaboration between Hate Crimes Task Forces and civil society in every major city across the nation;
- Have the FBI and local law enforcement bridge the hate crimes documentation gap by working with a broad coalition of stakeholders, including civil society, to identify innovative solutions for more robust data collection; recognizing that combating hate crimes must be a shared burden;
- Strengthen DHS and FBI monitoring of non-Islamic extremist groups and keep vulnerable communities and civil society informed of potential threats;
- Use Behavioral Threat Assessments (BTAs) to identify individuals or groups who display supremacist ideology to prevent bias-motivated crimes against vulnerable communities;
- Ensure robust enforcement by having the DOJ file appropriate cases under HCPA; vigorously defend the constitutionality of the Act; and ensure continued education, outreach, and training to federal, state, and local law enforcement officials on HCPA and its requirements.

⁴¹ Concluding Observations on the Combined Seventh to Ninth Periodic Reports of United States of America, Committee on the Elimination of Racial Discrimination, Advanced Edited Version, ¶9 (29 August 2014), CERD/C/USA/CO/7-9, available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf

⁴² *Id.*

⁴³ American Psychological Association, *Psychology of Hate Crimes*, 2 (June 2009), <http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf>.