

Changing the Paradigm: Addressing the Criminalization of Homelessness in the United States through the UN Human Rights Committee Review

By ERIC TARS AND KIRSTEN BLUME, *National Law Center on Homelessness & Poverty*,
<http://nlchp.org> - etars@nlchp.org

Introduction

Criminalization of homelessness will be in the international spotlight as hundreds of advocates join top government officials from the United States in Geneva, Switzerland, October 17-18, 2013, for the Human Rights Committee (HRC) Hearing on U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). As a result of strategic advocacy by the National Law Center on Homelessness and Poverty (the Law Center), not only will the government be held accountable by the HRC at the hearings, but the process as a whole has already been used to advance the domestic policy conversation around criminalization.

There is no legal right to housing in the U.S. Annually more than 3.5 million people in the U.S. experience homelessness.¹ U.S. policies and laws criminalizing homelessness continue to grow as local communities experience increases in homelessness and as more visible homeless populations emerge. A significant number of U.S. jurisdictions routinely and discriminately target homeless people under ordinances which prohibit particular behavior such as obstructing sidewalks, loitering, panhandling, begging, trespassing, camping, and sitting or lying in particular areas.² These policies can deprive individuals of safe, legal, and dignified opportunities to perform necessary human functions such as sleeping, eating, and even going to the bathroom. At the same time, foreclosures continue and government funding for housing has declined leaving few viable alternatives.

The Law Center is strategically using the opportunity of the ICCPR review to complement its domestic policy advocacy and litigation efforts to combat criminalization of homelessness, promote constructive alternatives, and work toward a human rights approach to homelessness which ultimately will ensure enjoyment of the human right to adequate housing. This includes opportunities for drawing international and domestic attention in connection with the UN review; creating, and holding the U.S. government accountable to, specific human rights standards on criminalization; and engaging with the government at the federal and local level through the review process.

Overview of HRC Review

Timeline of Review

US report	December, 2011
USICH report on criminalization	May, 2012
Law Center report to the HRC to inform list of issues	December, 2012
HRC list of issues	March, 2013
US response to list of issues	June, 2013
USICH meeting on criminalization	July, 2013
Law Center shadow report to HRC	August, 2013
HRC Hearing on the US	October, 2013

¹ National Law Center on Homelessness and Poverty, *Cruel, Inhuman, and Degrading: Homelessness in the United States under the International Covenant on Civil and Political Rights*, 5 (Aug. 23, 2013), available at <http://www.nlchp.org/content/pubs/CruelI.pdf>.

² *Id.* at 6.

³ Eric Tars, *Who Knows What Lurks in the Hearts of Human Rights Violators? The Shadow (Reporter) Knows: Human Rights Shadow Reporting: A Strategic Tool for Domestic Justice*, 42 Clearinghouse Rev. 475 (Jan-Feb 2009), <http://www.nlchp.org/content/pubs/ShadowReportArticleCR.pdf>.

US Report to the HRC

The U.S. Senate ratified the ICCPR in 1992. A ratified treaty is “Supreme Law of the Land” under Article VI(2) of the U.S. Constitution.³ However, in ratifying the treaty the U.S. Senate attached reservations that make the treaty less actionable in U.S. courts. In turn, applying international civil and political rights laws at the federal and local levels requires additional advocacy by non-governmental organizations such as the Law Center.⁴

Countries which ratify the ICCPR are required to submit a report to the HRC every four years regarding compliance. The U.S. issued its fourth periodic report on its ICCPR compliance on December 30, 2011.⁵ The 400 page report made numerous references to human rights issues related to topics such as fair housing and foreclosures but failed to address the depth and scale of homelessness. For instance, while lauding the Obama Administration’s stimulus funding for housing, the report does not mention the number of foreclosures or the inadequate assistance given to those seeking to avoid foreclosures and homelessness. The report also neglected to mention the various ways that numerous U.S. jurisdictions have turned to policies of criminalization to resolve the increased visibility of homelessness.

Using the HRC Review for Domestic Advocacy

The Law Center’s advocacy on criminalization of homelessness as an issue under the ICCPR notched one victory before the review process fully began. Following consultations on criminalization hosted by the U.S. Interagency Council on Homelessness (USICH) and Department of Justice (DOJ) in 2011 in which the Law Center promoted accountability to human rights standards, in May 2012, the USICH issued a report, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*, which recognizes that, in addition to possible violations under the U.S. Constitution, the criminalization of homelessness may implicate our human rights treaty obligations under the ICCPR and the Convention Against

Torture.⁶ This was a huge achievement – it was the first time any U.S. domestic agency recognized any domestic practice as a potential treaty violation. However, this made it even more important for us as advocates to ensure the point was confirmed by the HRC as the official arbiters of the ICCPR.

After receiving a country’s report, the HRC responds with its own List of Issues which highlight the areas of its primary concern in preparation for the hearings on the report. As part of a NGO effort to influence this list of issues, the Law Center, in collaboration with the effort coordinated by the US Human Rights Network, submitted a brief report to the Committee explaining its concerns with the criminalization of homelessness under the ICCPR, and suggesting a question for the Committee’s List of Issues.⁷

In its report to the HRC, the Law Center focused on ICCPR Articles 7 and 26 as they apply to the criminalization of homelessness. Article 7 of the ICCPR provides that “no one shall be subjected to...cruel, inhuman or degrading treatment.”⁸ Some U.S. courts have found that criminally punishing individuals for basic life-sustaining activities such as sleeping, eating, or eliminating bodily wastes when no legal alternative exists is cruel and unusual under the U.S. Constitution, so the Law Center wants complementary international language to further establish this norm. The Law Center also argued that Article 26’s protection from discrimination is violated by the disparate enforcement of the facially neutral laws against homeless individuals, often discriminating on multiple, intersecting grounds, including race, gender and disability status.⁹

The report cites the international record on criminalization of homelessness the Law Center has been systematically building through other U.N. human rights monitors. In recent years, the U.N. Special Rapporteurs on the right to adequate housing, on racism, on extreme poverty and human rights, and on the right to water and sanitation have all made comments in country mission or thematic

4 *Id.*

5 United States of America, Fourth Periodic Report to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Dec. 30, 2011, available at <http://www.state.gov/j/drl/rls/179781.htm>.

6 Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness*, 8 (2012) (USICH and the Access to Justice Initiative of the U.S. Dep’t of Justice, with support from the Department of Housing and Urban Development, convened a summit to gather information for this report), available at http://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf.

7 National Law Center on Homelessness and Poverty, *Criminalization of Homelessness in the United States of America*, 3 (Dec., 2012), available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14566_E.pdf.

8 International Covenant on Civil and Political Rights, Art. 7, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

9 International Covenant on Civil and Political Rights, Art. 26, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

reports on the criminalization of homelessness in the U.S., with increasing recognition that criminalization may present a violation of the right to be free from cruel, inhuman and degrading treatment. The Law Center has publicized these standards, and hosted meetings with the Rapporteurs and government officials to discuss their findings.

As a result of the advocacy report, the HRC included the criminalization of homelessness in its list of issues published in March, 2013, obligating the U.S. to respond both in written form and at the oral hearing in Geneva.¹⁰ However, the HRC only listed the issue under Art. 2 and 26 (nondiscrimination), and not under Art. 7 (cruel, inhuman and degrading treatment), an important goal for the Law Center.

The Law Center then sought to leverage the inclusion of criminalization as a key issue on the HRC list to advance its federal policy advocacy. Knowing the government would have to prepare a written response to the HRC (and would want to look good), the Law Center proposed working with the USICH to convene a meeting of its agencies, including the DOJ, Housing and Urban Development (HUD), Health and Human Services, and Veterans Affairs to discuss both substantive responses as well as how it would reply in writing. Although the USICH was unable to convene its meeting before the U.S. issued its written response to the HRC, the Law Center was able to share a proposed draft of language it hoped the government would adopt. However, the U.S.'s written submission did not reflect much of this language.¹¹

The USICH, with Law Center support, hosted its convening on criminalization in July, 2013. The meeting focused on each agency's policies to address criminalization of homelessness with a heavy emphasis on framing the lack of federal efforts in this area as potential violations of both stated domestic policy and U.S. ICCPR treaty obligations. Although criminalization laws are primarily implemented on state and local levels, the federal government has an important role to play, and the Law Center shared numerous policy recommendations for the agencies that

they could implement to fulfill their obligations.¹² These include the federal government taking proactive stances against proposed criminalization ordinances; supporting communities in constructive alternatives to criminalization and discouraging criminalizing practices through the use of funding incentives; and increasing investigations into local criminalization policies. While the agencies did not respond to all the Law Center's recommendations on the spot, the USICH tasked all agency delegates to respond at the next USICH inter-agency policy meeting in September, 2013. The Law Center also shared a draft of its planned shadow report to the Committee (discussed further below) with the USICH, and received substantive feedback from the government on the content of the report. For the USICH to engage in this level of internal accountability with itself and other government agencies in the context of a treaty review represents unprecedented progress.

On August 30, 2013, again in coordination with the US Human Rights Network, the Law Center submitted its full shadow report to the HRC entitled *Cruel, Inhuman, and Degrading: Criminalization of Homelessness in the U.S. under the International Covenant on Civil and Political Rights*.¹³ Shadow reports, a kind of amicus brief for the committee, give the committee additional information on which to question the U.S. during the hearing and suggests language for Concluding Observations.¹⁴ Concluding Observations are the committees' final authoritative statements expressing concerns about rights violations and recommendations for corrective action.¹⁵

The Law Center's shadow report, co-authored with the Yale Law School Allard K. Lowenstein International Human Rights Clinic, and endorsed by two dozen other organizations, presents a full case of how government policies toward homeless persons in the U.S. violate, in addition to Art. 2, 7, and 26, the right to liberty and security of the person (Article 9), the right to privacy (Article 17), the right to the family (Article 17 and 23), the right to freedom of expression (Article 21), and voting rights (Article 25).¹⁶ The Law Center shared its report widely with the non-governmental community and with U.S. governmental agencies.

¹⁰ See NLCHP, *Cruel, Inhuman, and Degrading*, *supra* note 1, at 5.

¹¹ UN Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report of the United States of America, March, 2013, *available at* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/CCPR_C_USA_Q_4_Add-1_14642_E.pdf.

¹² National Law Center on Homelessness and Poverty, Criminalization Briefing Paper, (July 7, 2013), *available at* <http://nlchp.org/content/pubs/2013%2007%2018%20Criminalization%20Briefing%20Paper.pdf>.

¹³ See NLCHP, *Cruel, Inhuman, and Degrading*, *supra* note 1.

¹⁴ See NLCHP, Human Rights Shadow Reporting, *supra* note 3, at 477.

¹⁵ *Id.*

¹⁶ See NLCHP, *Cruel, Inhuman, and Degrading*, *supra* note 1, at 5.

On World Habitat Day 2013 (October 7th) NLCHP will host a webinar regarding the substance of the report with the hope of raising awareness about the importance of these advocacy efforts prior to the HRC hearings. The Law Center invited the USICH to participate in the webinar, both as an opportunity for USICH to show steps they and the government are taking to respond to our recommendations, and as an additional incentive for them to actually take those steps, so they have something to share..

Goals for the HRC Hearings in Geneva

At the hearings in Geneva, HRC committee members convene informal meetings with organizations before holding the two day official review of the U.S. government.¹⁷ While working on all the issues covered in the shadow report, the Law Center's primary objectives with the Committee will be to ensure targeted questions to the U.S. delegation on criminalization and to emphasize the vital importance of a strong Concluding Observation on the criminalization of homeless under not only Articles 2 and 26, but also Article 7 (as well as Arts. 9, 17 and 21). The recognition under Article 7 is significant for domestic advocates, as it parallels the language of the 8th Amendment of the U.S. Constitution, but also for advocates in other countries, as it will further entrench the emerging international norm of criminalization of homelessness as cruel, inhuman, and degrading treatment.¹⁸

Assuming those strong Concluding Observations emerge, the Law Center will publicize them and pursue further meetings with the U.S. government to implement the HRC Concluding Observations via the Law Center's policy recommendations.

Conclusions

The Law Center's engagement thus far has already produced successes at the federal and local levels in applying international law to domestic policy. At the federal level, as noted above, the USICH efforts to hold itself and its agencies accountable to international human rights review is an unprecedented and a significant step forward toward domestic policy reform. The Law Center's

strategic approach to engage the USICH in holding a meeting of its agencies and to monitor those agencies on their progress demonstrates the importance of advocacy in the HRC review process. For the first time, the federal government is monitoring itself and its agencies on the topic of criminalization, in the context of a human rights treaty review.

Moreover, the Law Center has successfully used the HRC review in its local advocacy against a disturbing plan to ban homeless persons from the downtown area of Columbia, South Carolina and force their relocation to a remote shelter, with police preventing their return to downtown without an appointment.¹⁹ Local lawyers from the South Carolina Appleseed Legal Justice Center were overjoyed when the Law Center shared with them that Columbia Mayor Steve Benjamin sponsored a resolution at the U.S. Conference of Mayors Annual Meeting promoting the implementation of international human rights treaties in their cities.²⁰ The Law Center included the Columbia proposal as an example of criminalization in its shadow report, so it could then advocate with the mayor and council that this was part of the international review. Additionally, the USICH stepped up its public opposition to the proposal, one of our recommendations in our shadow report. Following a meeting with Appleseed and other local advocates, the mayor withdrew his support for the proposal, forcing the council to examine other more constructive approaches.

The Law Center's engagement with the HRC review is the latest step in its long-term campaign to integrate international human rights standards into the domestic policy discourse on issues of homelessness. Moreover, it is working to share the model of accountability it is developing with advocates working on other issues through its leadership in the Human Rights at Home (HuRAH) Campaign, so that human rights accountability becomes the norm.²¹ We hope it provides support for similar campaigns in Europe, and welcome opportunities to collaborate in pushing both international and domestic standards to preserve the basic human dignity of homeless persons, and ultimately, provide the enjoyment of the human right to housing for all.

17 See Tars, Human Rights Shadow Reporting, *supra* note 3, at 477.

18 National Law Center on Homelessness and Poverty, Yale Law Allard K. Lowenstein International Human Rights Law Clinic, and UC Irvine School of Law International Human Rights Clinic, Report to the UN HRC on Criminalization of Homelessness in the United States, March, 2013, available at http://www.nlchp.org/content/pubs/USIConHomelessness_ListofIssues3.pdf?utm_source=February+2013+IJT&utm_campaign=IJT&utm_medium=email.

19 Cliff LeBlanc, *Being Homeless in Columbia Could Get You Arrested*, The State, South Carolina (Aug. 10, 2013).

20 United States Conference of Mayors, Resolution No. 57 Promoting and Encouraging International Human Rights, 81st Annual Meeting, 89 (June 21-24, 2013), available at <http://usmayors.org/81stAnnualMeeting/media/proposed-resolutions.pdf>.

21 See <http://hurahcampaign.org>.