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Annual Human Rights in the United States Symposium and CLE

Human Rights Treaty Obligations and the U.S.: The Rocky Road to Rights

June 15, 2023
1:00 – 4:30 PM EDT

AGENDA AND MATERIALS LIST

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The Program on Human Rights and the Global Economy (PHRGE)
at the Northeastern University School of Law

Via Virtual Platform

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Human Rights Treaty Obligations and the U.S. :
The Rocky Road to Rights

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AGENDA

1:00 – 1:15 OPENING REMARKS
Martha Davis, University Distinguished Professor of Law, Northeastern University School of Law

1:15 – 2:00 KEYNOTE REMARKS
Introduction by Jamil Dakwar, Director, ACLU Human Rights Program
Meg Satterthwaite, UN Special Rapporteur on the Independence of Judges and Lawyers

2:00 – 3:15 SESSION I: THE COURTS AND US COMPLIANCE WITH THE TREATY OBLIGATIONS

The U.S. has repeatedly cited its well-established judicial system as a strength when reporting to human rights bodies, including the UN Human Rights Committee. However, polling indicates that the US public increasingly questions the independence and legitimacy of the Supreme Court and lower courts. In addition, many judges seem to have turned away from acknowledging the persuasive value of international human rights law, a practice that commanded a majority of the Supreme Court as recently as 2003, in the case of *Lawrence v. Texas*. This panel will look at recent and pending Supreme Court cases and trends through the lens of the ICCPR and other treaty obligations, and will discuss possible responses to a judicial system that seems to reject the value of human rights norms. Topics to be discussed will include: reproductive rights, indigenous rights, affirmative action, and voting rights. Panelists will offer suggestions about how to reaffirm the role of human rights in the US judicial system.

Panelists

- Patty Ferguson-Bohnee, Clinical Professor of Law, Sandra Day O'Connor College of Law at Arizona State University
- Pilar Herrero, Senior Staff Attorney, Center for Reproductive Rights
- Maryum Jordan, Climate Justice Attorney, EarthRights International
- Ian Kysel, Assistant Clinical Professor of Law, Cornell Law School

Moderator: Cynthia Soohoo, Professor of Law, City University of New York/Co-Director of the Human Rights and Gender Justice Clinic

3:15 – 4:30 SESSION II: THE TREATY REVIEW PROCESS IN THE U.S.

The human rights treaty review process is a central pillar of the international human rights system. But is it working in the U.S.? In recent years, the U.S. government has typically conducted a small number of consultations prior to a human rights treaty review. In addition, the federal government often invites one or two representatives of subnational governments to participate as members of the government delegation. The review process itself takes place in Geneva, attended by members of civil society and including, in recent years, opportunities for remote participation. This panel will assess this process and recommend ways that the treaty review process could be made more effective in the U.S. Panelists will include civil society activists, advocates, and representatives of subnational governments. Federal government actors will be invited to attend and respond.

Panelists

- Margaret Huang, Chief Executive Officer, Southern Poverty Law Center
- Dr. Alisa Warren, President, International Association of Official Human Rights Agencies
- Dr. Domenico Zipoli, Project Coordinator, Geneva Human Rights Platform / Research Fellow, Geneva Academy of International Humanitarian Law and Human Rights

Respondent

- Johnathan J. Smith, Deputy Assistant Attorney General, Civil Rights Division, U.S. Dept. Of Justice

Moderator: Lisa Reinsberg, Executive Director, International Justice Resource Center

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KEYNOTE

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SESSION II: THE TREATY REVIEW PROCESS IN THE UNITED STATES

11. Lawrence C. Moss, *Opportunities for Non-governmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council,* 2 J. HUM. RTS. PRAC. 122 (2010). [240]

12. COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, ADVANCING RACIAL JUSTICE AND HUMAN RIGHTS: RIGHTS-BASED STRATEGIES FOR THE CURRENT ERA, 9-20 (Feb. 2019), https://hri.law.columbia.edu/sites/default/files/publications/advancing_racial_justice_and_human_rights_-_2018_hri_cle_conference_report.pdf. [269]

13. AMNESTY INT'L, *The Ongoing Business of Strengthening the UN Human Rights Treaty Bodies: Joint NGO response to the report of the co-facilitators of the UN General Assembly's review of the UN human rights treaty body system,* (Nov. 30, 2020). [295]

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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers

Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite

Summary

The present report is the first submitted by the current mandate holder, Margaret Satterthwaite. In it, she presents her vision for the mandate in the coming years.

The Special Rapporteur on the independence of judges and lawyers sets out the need for a reimagining of access to justice and the rule of law from the diverse perspectives of those who bear the brunt of deep inequalities, systematic discrimination and persistent marginalization. She outlines major challenges to the independence of judges and lawyers that she will prioritize in her work.

The Special Rapporteur also describes her methods of work and shares initial recommendations. She looks forward to collaborating with member States and other relevant actors to address systemic problems within judicial and legal systems, to safeguard the role of independent judges and lawyers in checking unaccountable power and protecting rights, to advance access to justice for all and to support grass-roots justice solutions.

Contents

I. Introduction

1. The present report[1] is the first submitted to the Human Rights Council by the newly appointed Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite. In it, she presents her vision for the mandate in the coming years. Identifying core principles underlying her mandate, she sets out the need to reimagine access to justice and the rule of law, paying special attention to the perspectives of those who bear the brunt of deep inequalities, systematic discrimination and persistent marginalization.

2. The Special Rapporteur also outlines several major challenges to the independence of judges and lawyers that are among the topics that she will prioritize in her work. Her treatment of each topic will necessarily be limited given the nature of the present report, and the list of priorities is not inclusive of every topic she plans to address.

3. She also describes her methods of work and how she will engage with member States, judges and lawyers, civil society and others to improve access to justice for all, strengthen the rule of law and promote the realization of human rights through independent and fair legal and judicial systems. Finally, she shares conclusions and recommendations aimed at encouraging member States to safeguard the independence of the judiciary, the legal profession and the prosecution function, with the aim of protecting human rights and the rule of law.[2]

II. Reimagining access to justice and the rule of law

4. As the world confronts brutal wars in several regions, the third year of a global pandemic, the climate crisis, shocking levels of inequality and heightened polarization, it is time to reinvigorate, and even reconceive of, institutions and norms relating to justice. Challenges exist in all regions: leaders who hold themselves above the law, organized crime that escapes legal strictures, powerful economic actors who play by different rules and marginalized communities that cannot harness legal protection. These perils manifest in similar ways, including through interference by political leaders in the role of independent judges; bribes, threats or other efforts to assert undue influence over the judiciary and the legal profession; and denial of legal services – even the most basic – to communities experiencing discrimination and exclusion.

5. The mandate of the Special Rapporteur on the independence of judges and lawyers, established in 1994, has a modest but crucial role to play. International human rights law requires that States create independent and impartial legal systems that guarantee that no one is above the law, no one is outside the protection of the law and no one is excluded or harmed by the law. Many hurdles stand in the way of making this vision a reality. But a clear-eyed look at key obstacles, an embrace of international human rights law and norms, and lessons from emerging good practice across the globe suggest that there are ways forward. By carrying out and supporting such work, the mandate can address systemic inequalities within legal systems, safeguard the role of independent judges in checking unaccountable power, advance access to justice and amplify grass-roots justice solutions.

6. The new mandate holder believes that this moment calls for a fundamental reimagining – or, in some cases, a recommitment to – the rule of law and access to justice. This moment demands the prioritization of the insights of those for whom these systems are falling short, as well as taking into account data, lessons from practice and innovative approaches to entrenched problems. Reimagining the rule of law from the diverse perspectives of those whose rights are too often violated will require that the mandate holder engage with, and learn from, those who are often left outside the protection of the law. It will demand renewed engagement with bedrock guarantees, including how best to safeguard the role of an independent judiciary in the face of corruption, organized crime and efforts to

[1] The Special Rapporteur thanks Rebecca Riddell for outstanding research and analysis for the present report and her students at the New York University School of Law for their assistance with its preparation. They bear no responsibility for the final content.

[2] Human Rights Council resolution 44/8.

assert undue influence. It means asking how best to address judicial systems affected by autocratization, democratic decay, the climate crisis, polarization, viral and weaponized disinformation, systemic discrimination and the legacies of colonialism. Reimagining the rule of law also requires a considered look at criminal legal systems and the role of prosecutors, including considering how they can best ensure the human rights of all to security and dignity.

7. Reimagining access to justice requires ensuring that all persons can enjoy the whole range of human rights – civil, political, economic, social and cultural. Lawyers and community-based justice advocates play a key role in this endeavour. Lawyers must be able to freely exercise their profession with the resources necessary to defend those charged with crimes, seek remedies for grave violations and facilitate fulfilment of rights. They can also undertake efforts to dismantle the dynamics of exclusion in the legal system, including those that affect groups marginalized due to ethnic or racial discrimination, persons experiencing extreme poverty, persons with disabilities, those of diverse gender identities and sexual orientations, Indigenous Peoples and others facing histories of entrenched dispossession or discrimination. Finally, reimagining access to justice entails embracing an expanded legal ecosystem and recognizing the power and promise of community-based justice advocates, such as community paralegals, "barefoot lawyers" and legal navigators, to extend and enhance legal services and support for isolated and underserved communities.

III. Priority challenges to judicial independence

8. Judicial independence is an issue of vital importance in the shared struggle for the realization of human rights. It is a bedrock aspect of the right to a fair trial and essential to advance the full range of human rights.[3] Properly understood, judicial independence is a key safeguard against rising authoritarianism and an indispensable element in ensuring justice systems are fit for purpose. It requires attention to the structure of the State and the separation of powers.

9. In carrying out her mandate, the Special Rapporteur will seek to build on the work of the previous mandate holders on this topic, as well as explore contemporary challenges and best practices for strengthening judicial independence. This will entail focusing on situations in which judges and prosecutors are at grave risk, identifying individual and systemic threats to judicial independence, contributing to greater appreciation of emerging challenges and exploring innovative, rights-enhancing prosecutorial practices.

A. Legal standards

10. The preamble to the Universal Declaration of Human Rights recognizes that human rights should be protected by the rule of law. Article 10 states that every person is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charge. This right has been broadly included in major international and regional human rights treaties since the adoption of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights guarantees the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of any criminal charge and any rights and obligations in a suit at law.[4] The requirement of an independent and impartial tribunal is an absolute right not subject to any exception, and States must take specific measures to guarantee the independence of the judiciary.[5]

11. The full enjoyment of human rights depends on and requires an independent judiciary. For example, judicial independence is essential to the realization of women's rights,[6] and its

[3] Human Rights Committee, general comment No. 32 (2007), para. 58.
[4] International Covenant on Civil and Political Rights, art. 14.
[5] Human Rights Committee, general comment No. 32 (2007), para. 19.
[6] Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 1 and 14 (observing that independence is a requirement of a good quality justice system, in turn an essential component of access to justice, which is essential for the realization of

absence has been tied to corruption, an overall culture of impunity and the undermining of women's access to justice.[7] Judicial independence is also key to safeguarding economic, social and cultural rights,[8] as well as the rights of migrant workers.[9] Similarly, rights and obligations relating to the prohibition on torture clearly require judicial independence and its absence raises serious concern about accountability.[10] Human rights guarantees in turn inform the meaning of, and requirements concerning, judicial independence and the right to a fair trial.[11]

12. The Basic Principles on the Independence of the Judiciary provide helpful guidance, including on the need for judicial independence to be enshrined in the constitution or the law of the country, as well as for judges to decide on matters without any restrictions, improper influences, inducements, pressures, threats or interferences – whether direct or indirect.[12] They have played an essential role as guarantors of judicial independence since they were adopted in 1985.[13]

B. Priority challenges

13. The Special Rapporteur is gravely concerned about persistent challenges to judicial independence, despite strong protection in international law and standards. She will seek to build on the excellent work carried out by previous mandate holders, who rightly focused attention on a broad range of challenges and threats, such as those involving organized crime,[14] corruption,[15] states of emergency,[16] military tribunals[17] and "disguised sanctions" – sanctions with the aim of interfering with the professional activities of judges.[18]

14. The Special Rapporteur will also focus on a number of challenges to judicial independence that may have been overlooked, are emerging, or are taking on new relevance in the present moment. She will consider how human rights, and related international law and standards, can guide the response to these challenges.

1. Autocratization and democratic decay

15. Recent years have been characterized by severe polarization and a global wave of democratic decay and autocratization that pose serious risks to human rights. Democratic decay happens when key features of a country's formal democratic system see meaningful decline.[19] Autocratization occurs when leaders dismantle or reduce the capacity of other branches of government to check their power. These dynamics encompass changes in governing structures, as well as limits and outright attacks on basic rights.[20] They often go hand in hand with crackdowns on civil society, shrinking civic space and increased persecution of human rights defenders.

protected rights).

7 CEDAW/C/HND/CO/9, paras. 14 and 15; and CEDAW/C/TUR/CO/8, paras. 18 and 19.

8 E/C.12/UZB/CO/3, para. 7; and E/C.12/SRB/CO/3, para. 9.

9 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 18; and CMW/C/SYR/CO/2-3, para. 35.

10 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2 and 13; Committee against Torture, general comment No. 3 (2012), paras. 2 and 18; and CAT/C/ARE/CO/1, paras. 23 and 24.

11 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (New York, Oxford University Press, 2021), pp. 8–10, citing *Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019*, p. 418, at p. 510, Declaration of Judge Robinson.

12 Basic Principles on the Independence of the Judiciary, principles 1 and 2.

13 A/74/176, para. 3.

14 A/72/140.

15 A/67/305.

16 A/63/271.

17 A/68/285.

18 A/75/172.

19 Vanessa A. Boese and others, *Autocratization Changing Nature? Democracy Report 2022* (Gothenburg, Varieties of Democracy Institute, 2022).

20 Ibid., pp. 16 and 17.

16. Attacks on judicial independence are a hallmark feature of autocratization and democratic decay. On the other hand, an independent judiciary can play a critical role in protecting rights in the face of autocratization and resisting democratic decline. The Special Rapporteur will focus on attacks on judicial independence, especially those that may amount to situations in which the functions and competencies of the judiciary and the executive are not clearly distinguishable or in which the latter is able to control or direct the former, which the Human Rights Committee has clarified are incompatible with the notion of an independent tribunal.[21]

17. Member States certainly have wide latitude in the establishment and reform of court systems and a variety of institutional arrangements are permissible under human rights law. However, where changes threaten the independence of tribunals, the broad range of rights that depend on the independence of the judiciary are placed at risk. Attacks on the independence of the judiciary should not be allowed to masquerade as benign reforms.

18. The Special Rapporteur will carry out a careful review of court reforms to understand the conditions under which they may constitute efforts to dismantle or undermine judicial independence in connection with autocratization or democratic decay. Often, such changes are implemented slowly and their impact may be difficult to fully understand until the changes have had systemic effects. The Special Rapporteur will attend to such changes and their impact on human rights, raising concerns and seeking protection for independent judiciaries. She will offer support to member States seeking to recover from incursions on judicial independence, and she will identify good practices among States seeking to insure against such attacks.

19. Situations of concern to the Special Rapporteur may include new limits on courts' jurisdiction to review the legality of executive or parliamentary action or reforms to the nature or composition of courts – particularly high courts – that effectively diminish their independence and ability to remedy human rights violations. These may include politically strategic reductions in the size of the highest court, arbitrary removal of judges or reductions in their terms, or the subjection of judges to early retirement in a manner that politicizes their role. Alternatively, such situations may include the appointment or retention of judges seen as favourable to those in other branches of government through a politicized expansion of the size of the highest court, the arbitrary abolishment of a retirement age or extension of terms, or the irregular creation of extraordinary chambers. The Special Rapporteur will also consider situations in which the process or rules around selection and appointment are altered in a way that reduces the focus on potential judges' capability and integrity and increases the role of candidates' presumed or stated political affiliations. The Special Rapporteur will also look into imposed changes to the rules regulating judicial interpretation and reasoning, or abrupt restrictions on their discretion, in contexts in which these changes are politically inflected. Even seemingly neutral rules of judicial administration may be politicized and used as tools to discipline or reward judges for their decisions. The Special Rapporteur is also concerned about the possibility of remunerative efforts to undermine judicial independence – such as politicized cuts to or long-term freezes of salaries that materially affect judges' livelihoods and that diminish the strength and independence of the profession.

2. Climate crisis and climate-related displacement

20. As a result of the climate crisis, a number of new and complex challenges are being brought to bear on public institutions, including judicial systems, and people-centred justice solutions have taken on heightened importance.[22] Courts are facing new questions, including the adjudication of high-stakes climate-related litigation, as well as issues relating to climate change-induced displacement. As a result, new pressures may be brought to bear on courts and judges may confront novel efforts to infringe on their independence. The Special Rapporteur will carry out work looking at judicial independence in these contexts.

[21] Human Rights Committee, general comment No. 32 (2007), para. 19.

[22] International Development Law Organization, "Rule of law: responses to climate insecurity", Issue Brief (2022), pp. 10–16.

3. Digital technologies

21. The Special Rapporteur is concerned about challenges to judicial independence linked to digital technologies, especially disinformation, online harassment and threats, and artificial intelligence.

(a) Disinformation

22. In recent years and due in large part to digital technologies, the reach and impact of disinformation has expanded rapidly. Disinformation – understood here as false information disseminated intentionally to cause serious social harm[23] – can have profound negative consequences for human rights.

23. In this context, the Special Rapporteur notes with great concern the challenge that disinformation poses to judiciaries globally, and also recognizes the important role that an independent judiciary can play in upholding human rights in the context of disinformation. The Special Rapporteur intends to focus on the corrosive impact of efforts to spread disinformation about judicial decisions, systems and actors – such as disinformation campaigns that exploit racist, xenophobic or sexist tropes. She will disseminate best practices for courts to address disinformation affecting judicial independence, including by strengthening engagement with members of the public, providing greater transparency about procedures and decisions, and ensuring meaningful access to information for all.

(b) Online attacks

24. The Special Rapporteur is concerned about online attacks against judges in retaliation for their professional activities. Defined here as the pervasive or severe targeting of an individual judge or group of judges online through harmful behaviour,[24] online attacks against judges can take different forms, such as the release of highly sensitive personal details, the spread of disinformation or even making unfounded allegations that foreseeably place judges at a heightened risk of physical attack. The Special Rapporteur is particularly concerned about online attacks against judges traditionally underrepresented in the judiciary, including women judges, judges with disabilities, LGBTQI+ judges, as well as judges from groups marginalized due to ethnic, racial, religious, or other forms of discrimination or exclusion. Online attacks are a significant concern not only because digital platforms are well-established public squares, but also because of the potential relationship between online abuse and physical harassment or attacks.

25. The Special Rapporteur will prioritize online attacks carried out as part of broader efforts to undermine the independence of the judiciary. In such cases, online attacks may constitute a violation of the rights of an individual, as well as an attack on the rule of law and the separation of powers. Such efforts, especially ones coordinated and carried out by public officials, affiliates and political parties, represent an important and alarming trend.

26. States have an obligation to protect judges and court officials from online attacks. It is also critical that responses by States and companies not punish or censor legitimate criticism of public officials, including judges, and judicial decisions. In her work, the Special Rapporteur will seek to better understand the nature and impacts of online abuse targeting judges, including through engagement with judicial professionals. She will seek to support individual judges who face online abuse, highlight patterns and identify and disseminate best practices for combating such abuse while upholding human rights.

(c) Artificial intelligence

27. The Special Rapporteur is eager to address the consequences and impacts of artificial intelligence on judicial independence, including the high stakes and grave risks involved as artificial intelligence moves increasingly into judicial decision-making spaces, as well as conditions under which its use may be compliant with human rights law and could advance

[23] A/HRC/47/25, para. 15.

[24] Pen America, “Defining ‘online abuse’: a glossary of terms”. Available at: https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms (last accessed 4 April 2023).

access to justice. Artificial intelligence is not one thing only, but rather refers to a "constellation" of processes and technologies enabling computers to complement or replace specific tasks otherwise performed by humans, such as making decisions and solving problems.[25]

28. Understood this way, artificial intelligence is of inherent interest for the judiciary and, indeed, many judicial systems across the world are adopting it for a variety of purposes and activities.[26] However, algorithmic decision-making brings promise and peril for the rule of law and for judicial independence. The Special Rapporteur intends to examine these issues in depth, exploring especially how issues of algorithmic bias, inequalities inherent in many data sets used to train artificial intelligence, the need for democratic oversight, auditing and accountability regarding artificial intelligence systems, as well as threats to privacy, interact with judicial independence. She hopes to contribute to greater understanding of the measures member States should take if they are to involve artificial intelligence in judicial processes, in order to ensure that judicial independence is preserved and to ensure compliance with human rights law and standards.

4. Efforts by businesses and those with economic advantages to unduly influence the judiciary

29. The Special Rapporteur is concerned about the potentially distorting effects of economic and corporate power on the independence of the judiciary. Communities and civil society organizations that look to courts to vindicate rights have long raised concerns about the risks of corporate and economic elite "capture" of the judiciary. In this context, "capture" expresses the idea of a public interest being trumped by specific private interests such that State action is "taken over by a private actor whose outcome is designed and operated primarily for their benefit and at the expense of society as a whole".[27]

30. The Special Rapporteur will explore ways that businesses and individuals or groups with significant economic advantages may seek to unduly influence judges in order to obtain favourable outcomes. This could include attempts at quid pro quo corruption, but also other activities that could constitute inappropriate, sometimes systemic, efforts to unduly influence judges. She will ask, for example, when training programmes for judges that are paid for by corporations or interest groups, or offers of future employment in fields in which the candidate is not well qualified, may involve undue influence. She will also consider the range of ways that businesses and economically advantaged actors may seek to shape the nature and composition of the overall judiciary to create a climate more conducive to specific business or economic interests, including long-term, organized efforts to unduly influence the judicial appointment process.

31. Additionally, she will look at whether and how businesses may seek to use judicial proceedings and litigation tactics – at times abusive ones – to undermine activities protected by human rights law. If successful, such efforts could challenge the very notion of an independent judicial system as a means for achieving justice. She will endeavour to understand how corporations may seek to use courts to challenge rights defenders, communities and officials seeking to pursue the public interest, such as through strategic litigation against public participation suits[28] or abuse of defamation laws.[29]

32. The Special Rapporteur will explore the types of evidence that can be used to assess the impacts of such efforts, including data on resolution of disputes, access to information and procedural guarantees in specialized and privatized forums, as well as the impact on civil

[25] A/73/348, para. 3.

[26] United Nations Educational, Scientific and Cultural Organization, "AI and the rule of law: capacity building for judicial systems", 1 February 2023.

[27] Caroline Devaux, "Towards a legal theory of capture", *European Law Journal*, vol. 24, No. 6 (November 2018), pp. 458 and 460.

[28] A/77/201, paras. 71 and 72; and International Center for Not-for-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPs in the Global South and How to Respond* (Washington, D.C., July 2020).

[29] Communication AL OTH 16/2018. All communications referenced in this report are available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments.

society. She will also look at special topics such as the implications in the context of a rapidly expanding field of climate litigation.[30]

33. The Special Rapporteur will examine the measures taken by member States to ensure judiciaries are insulated from improper interference, consider judicial standards in light of any evidence of sustained efforts by businesses or those with economic advantages to seek to unduly influence judges and judicial systems, and disseminate best practices and innovative ideas for safeguarding the independence of the judiciary.

5. Systemic inequalities and discrimination that threaten independence

34. To effectively play its role in defending equality for all under the rule of law, the composition of the judiciary should be diverse and representative. The right to equality and to take part in public institutions on the basis of non-discrimination is guaranteed by human rights law, with specific considerations relating to participation in the judiciary articulated for those who commonly experience discrimination, including women,[31] members of groups marginalized due to ethnic, racial or other forms of discrimination, [32] persons with disabilities[33] and LGBTQI+ persons.[34] These guarantees have been echoed in the Sustainable Development Goals, in which target 16.7 reflects States' commitment to ensure responsive, inclusive, participatory and representative decision-making at all levels. One of the two indicators for this target is "proportions of positions in national and local institutions, including … (c) the judiciary, compared to national distributions, by sex, age, persons with disabilities and population groups."[35] Despite these commitments, where disaggregated data exist, they often indicate that dominant groups make up a disproportionate share of the

[30] Communication AL OTH 16/2018.

[31] The Human Rights Committee has, for example, urged the United Kingdom of Great Britain and Northern Ireland to increase the representation of women in the civil service and in the judiciary, where women were concentrated in the lower-instance courts (CCPR/C/GBR/CO/7, para. 12). The Committee on the Elimination of Discrimination against Women has recommended the adoption of legislative provisions promoting or addressing gender representation in the judiciary to States, including France (CEDAW/C/FRA/CO/6, para. 25), Luxembourg (CEDAW/C/LUX/CO/5, para. 22), Norway (CEDAW/C/NOR/CO/7, paras. 24 and 25) and Panama (CEDAW/C/PAN/CO/8, paras. 29 and 30), and welcomed the establishment of proportional lists and quotas in Morocco (CEDAW/C/MAR/CO/5-6, para. 27).

[32] For example, the Committee on the Elimination of Racial Discrimination has recommended that States adopt measures to ensure fair and equitable representation of ethnic minorities in decision-making positions, including through special measures and by identifying and removing barriers (CERD/C/AZE/CO/10-12, para. 25), and the recruitment of individuals from minority and/or ethnolinguistic groups and regions to ensure equitable representation in the judiciary (CERD/C/ZWE/CO/5-11, para. 44; and CERD/C/POL/CO/22-24, para. 20).

[33] In its general comment No. 7 (2018), the Committee on the Rights of Persons with Disabilities observed that the right of persons with disabilities to have access to justice (art. 13) implied that persons with disabilities had the right to participate on an equal basis with others in the justice system as a whole. That participation included persons with disabilities assuming the roles of judges as part of the democratic system that contributed to good governance (para. 81). The Committee has recommended that States implement measures to ensure that persons with disabilities are represented in the judiciary, such as providing individualized support and procedural accommodation for persons with disabilities who wish to act as judges (CRPD/C/BGD/CO/1, para. 28) or other measures, including legislation, to ensure that women with disabilities are represented in the judiciary (CRPD/C/KOR/CO/2-3, para. 14; and CRPD/C/SGP/CO/1, para. 12).

[34] For example, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has stressed the need for greater representation along lines of sexual orientation and gender identity in the judiciary (A/HRC/38/43/Add.1, para. 80).

[35] See https://sdgs.un.org/goals/goal16.

judiciary[36] and those seeking a judicial career may face intersectional discrimination or obstacles.[37]

35. Former mandate holders have paid needed attention to gender inequality among judges and magistrates around the world, urging States to ensure that women have the same rights as men to be judges, court officers and members of international judicial bodies.[38] The Special Rapporteur commends member States that have made significant improvements in the representation of women in the judiciary in recent years. Empirical research shows that efforts to change the process for appointment to these courts has a concrete impact, improving women's representation appreciably.[39] She notes that former Special Rapporteur Diego García-Sayán urged States to ensure that at least 50 per cent of their judiciary was made up of women by 2030, as envisioned by target 16.7 of the Sustainable Development Goals.[40] The Special Rapporteur would like to extend this work to examine gaps in women's representation across the different levels of the judiciary, and ask whether women tend to cluster at lower levels of judicial systems. Another issue she intends to examine is that of "autocratic genderwashing", which entails taking limited actions that advance women's representation – such as nominating women to judicial posts – in the context of carrying out more systemic practices that undermine human rights, including gender equality.[41]

36. The Special Rapporteur will also examine other forms of systemic discrimination as it manifests in judicial systems, advancing the principle that the right to an independent and impartial tribunal encompasses the right to access a court that is not marred by racism, ethnic prejudice, gender discrimination, ableism or other forms of systemic discrimination or bias.[42] The Special Rapporteur will also prioritize, in her engagement with member States, the need to improve the collection and publication of disaggregated data that will help officials and the broader public better understand the nature and impact of discrimination and inequality on the judiciary.

37. The Special Rapporteur will also look at legacies of colonialism that continue to affect the judiciary today. Many countries' judicial systems were deeply shaped by colonialism. The Special Rapporteur will highlight successful efforts to address contemporary manifestations of colonialism, which can threaten the legitimacy of judicial systems and undermine the right to a fair trial.[43] She will work with Governments, intergovernmental organizations and civil society to identify good practices for dismantling institutional forms of discrimination and advancing equality for all.

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[36] American Constitution Society, "Diversity of the Federal Bench: current statistics on the gender and racial diversity of the Article III courts"; Tracey E. George and Albert H. Yoon, "The gavel gap: who sits in judgment on state courts" (American Constitution Society, 2016); Eric Lesh, "Justice out of balance: how the election of judges and the stunning lack of diversity on state courts threaten LGBT rights" (Lambda Legal, 2016), p. 14; and United Kingdom, Ministry of Justice, "Diversity of the judiciary: legal professions, new appointments and current post-holders – 2022 statistics" (14 July 2022), sect. 6.4.

[37] International Legal Assistance Consortium, "Judicial diversity: a tool to increase access to justice in Colombia, Guatemala and Mexico", Discussion Paper III of the Judges as Peacebuilders Project (Stockholm, 2022), p. 11.

[38] A/66/289.

[39] Nancy Arrington and others, "Constitutional reform and the gender diversification of peak courts", *American Political Science Review*, vol. 115, No. 3 (2021).

[40] A/76/142, para. 99.

[41] Pär Zetterberg and Elin Bjarnegård, "How autocrats weaponize women's rights", *Journal of Democracy*, vol. 33, No. 2 (2022). See also United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), "Democratic backsliding and the backlash against women's rights: understanding the current challenges for feminist politics", Discussion Paper (2020).

[42] Committee on the Elimination of Racial Discrimination, general comment No. 31 (2005).

[43] African Court on Human and Peoples' Rights, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Advisory Opinion, 4 December 2020, paras. 79 and 88–94 (holding that the formulation of vagrancy laws "are a reflection of an outdated and largely colonial perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status" and that detention using such laws entails violations of the right to a fair trial).

6. Strengthening respect for the independence of Indigenous Peoples' justice systems

38. The Special Rapporteur also intends to focus on judicial independence in the context of the realization of Indigenous Peoples' rights. Consistent with her emphasis on systemic discrimination, she will look at how questions of judicial independence relate to stark discrimination and inequalities faced by Indigenous Peoples within "ordinary" justice systems.[44]

39. She will also prioritize the independence of Indigenous justice systems. Human rights law recognizes, as set out in the United Nations Declaration on the Rights of Indigenous Peoples, Indigenous Peoples' right to autonomy or self-government in matters relating to their internal and local affairs, the right to maintain and strengthen their distinct political and legal institutions, as well as the right to promote, develop and maintain juridical systems or customs.[45] However, despite the valuable contributions of Indigenous justice mechanisms around the world towards resolving disputes and realizing rights, in practice, recognition of the traditional justice systems and customary laws of Indigenous Peoples remains generally limited.[46] Building on the work of other mandate holders and treaty bodies, and the writings of Indigenous judges, scholars and leaders, the Special Rapporteur will look at persistent and contemporary challenges to recognition of the judicial independence of judges in Indigenous legal systems. She will explore the impact on rights, including on women's rights,[47] of jurisdictional, territorial or subject-matter restrictions on Indigenous justice systems.[48] She will consider what measures member States and others can undertake to ensure the respect of the right of Indigenous Peoples to autonomous legal institutions and processes and disseminate good practices for member States in their relations with Indigenous Peoples' justice systems.[49]

7. Challenges to judicial integrity

40. In addition to focusing on institutional threats to judicial independence, the Special Rapporteur will address the issue of judicial integrity, understood as judicial independence at an individual level. The realization of human rights depends on judicial integrity, including freedom from bias, impartiality and the equal treatment of all.

41. The Bangalore Principles of Judicial Conduct, a non-binding but authoritative set of principles adopted in 2002 following an extensive international and consultative process, provide useful guidance to judges everywhere, including by providing them with a framework for regulating judicial conduct.[50] They stress the value of independence, impartiality, integrity, propriety, equality, competence and diligence. They also offer concrete guidance, for example, on recusal due to the economic interest of a judge or family member or, in relations with members of the bar, avoiding situations that could reasonably give rise to the appearance of favouritism or partiality.[51]

42. Former Special Rapporteurs have carried out important work examining potential departures from standards of judicial integrity by judges, including in relation to potential bias against defendants,[52] non-nationals[53] and women.[54] They have affirmed the relevance of the Bangalore Principles as a framework for analysing judicial conduct and strengthening judicial integrity, with former Special Rapporteur García-Sayán urging the integration of the Bangalore Principles into the Basic Principles on Independence of the Judiciary.[55] The present Special Rapporteur will continue this work and ask how judicial integrity and the

[44] A/HRC/42/37, paras. 28–49.
[45] United Nations Declaration on the Rights of Indigenous Peoples, arts. 4, 5 and 34.
[46] A/HRC/42/37, paras. 52 and 62–67.
[47] A/77/136, para. 29.
[48] A/HRC/42/37, para. 75.
[49] Ibid., para. 50.
[50] Bangalore Principles of Judicial Conduct, preamble.
[51] Ibid., principles 2.5 and 4.3.
[52] Communication LKA 5/2012.
[53] A/HRC/29/26/Add.1, para. 43.
[54] Ibid., para. 72.
[55] A/74/176, para. 23.

Bangalore Principles can help address a number of contemporary challenges to judicial conduct, including discrimination, harassment or abuse on the basis of sex, race, class, disability, gender identity, sexual orientation and other, often intersecting, prohibited grounds.

8. Strengthening the role of independent prosecutors in protecting human rights

43. Across legal systems, prosecutors are entrusted with the authority to act on behalf of society and enforce criminal laws fairly, consistently and expeditiously. The Guidelines on the Role of Prosecutors underscore that prosecutors must act with impartiality, objectivity, confidentiality and victim-centredness. As former Special Rapporteur García-Sayán explained, prosecutors, as guarantors of the justice system, had a responsibility to ensure respect for the rule of law based on the obligation to respect, protect and uphold established human rights.[56]

44. Former Special Rapporteur Gabriela Knaul explored the thin line between ensuring that prosecutors were accountable in the discharge of their functions and the imperative that prosecutors operated independently and without fear, pressure, threats or favour.[57] Former Special Rapporteur García-Sayán emphasized the central role of prosecutors in the fight against corruption, explaining that no matter which form it took, corruption always came at a price, which was ultimately paid by the population and their human rights.[58] The Special Rapporteur endorses this view and intends to continue the work of her predecessors. In this connection, the Special Rapporteur notes that she has already engaged with States on cases in which prosecutors have themselves been targeted for prosecution and detained, apparently for pursuing corruption or other human rights cases against powerful actors.[59] In some situations, prosecutors have even been killed seemingly for their professional activities, an appalling and flagrant human rights violation that seriously undermines the rule of law.

45. The Special Rapporteur will also explore efforts in recent years to reimagine the role of prosecutors in ending discriminatory practices and advancing transitional or reparative justice. In many countries, often following work by social movements and civil society, prosecutors are adopting innovative practices aimed at ending overincarceration, dismantling bias and discrimination, and advancing justice and reconciliation. The United Nations system has recognized the problem of overuse of incarceration, which is often fuelled by "zero tolerance" policies and populist rhetoric that call for stricter law enforcement and sentencing, despite evidence that these steps do not deter crime.[60] It has also emphasized that these factors often combine with discrimination and marginalization, resulting in the overrepresentation of minority and marginalized groups among those incarcerated.[61] The Special Rapporteur intends to engage with creative prosecutors, civil society and those directly affected by these policies to explore decarceration and depenalization. A high priority will be identifying good practices among prosecutors who are using their discretion and authority to explore alternatives to prosecution, as envisioned by the Guidelines on the Role of Prosecutors,[62] and non-prosecution and law reform aimed at decriminalizing statuses or acts that are protected by human rights law.[63]

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[56] A/HRC/44/47, summary.

[57] A/HRC/20/19, para. 2.

[58] A/HRC/44/47, para. 20.

[59] Communication GTM 6/2022. The Human Rights Committee and the Committee against Torture have expressed concern about the unilateral termination of the agreement between Guatemala and the United Nations that governed the functioning of the International Commission against Impunity in Guatemala and the persecution and criminalization of some former staff of the Commission (A/HRC/WG.6/42/GTM/2, para. 28).

[60] United Nations system common position on incarceration (April 2021), p. 4.

[61] Ibid.

[62] Guidelines on the Role of Prosecutors, arts. 18 and 19.

[63] United Nations system common position on incarceration, p. 4 ("Individuals may also be deprived of liberty for apostasy or so-called 'moral crimes', many of them linked to discrimination against women and lesbian, gay, bisexual, transgender or intersex persons"). See also African Court on Human and Peoples' Rights, *Request for Advisory Opinion by the Pan African Lawyers Union*, para.

46. Other promising practices the Special Rapporteur will examine include the creation of conviction integrity review units, in which individual cases or sets of related cases are reinvestigated to uncover and remedy potential miscarriages of justice, especially cases involving communities that experience systemic discrimination or marginalization. Such units and related practices have led to exonerations, the overturning of wrongful prosecutions and remedies for cases that involved mistreatment, including the use of torture to coerce false confessions.[64]

47. The Special Rapporteur also intends to highlight prosecutorial efforts to embrace restorative or reparative justice approaches and transitional justice models when these comport with human rights law. These approaches encompass efforts to repair the harm done by crime and restore victims and their communities to a sense of wholeness. In some contexts, transitional justice models may be appropriate, especially following conflict or widespread violence. These models require active engagement by perpetrators and victims alike, and must be implemented in ways that protect victims' rights, as well as defendants' rights to due process, independent and impartial justice and legal aid. In assessing these practices, the Special Rapporteur will attend to practices that diminish rights-violating practices while advancing the human rights of victims, defendants and marginalized communities.

IV. Priority challenges to the independence of lawyers and access to justice

48. The Special Rapporteur will seek to build on the important work of her predecessors to identify concrete ways to strengthen the free and independent practice of law, highlight risks to lawyers and improve access to justice. This includes the valuable work by former Special Rapporteur Mónica Pinto on protecting the independence of lawyers and the legal profession,[65] as well as efforts by former Special Rapporteur García-Sayán to highlight attacks on the independence of lawyers, including interference in bar associations, physical and psychological abuse of lawyers and their families, defamation in the media and abusive disciplinary proceedings.[66] It also encompasses the long-standing and important work of multiple mandate holders to clarify States' obligations with regard to providing legal aid schemes in criminal and non-criminal matters, and in judicial as well as non-judicial proceedings.[67]

A. Legal standards

49. The critical role of lawyers in advancing access to justice is firmly established in international law and standards. The Universal Declaration of Human Rights recognizes the right of everyone charged with a criminal offence to all the guarantees necessary for one's defence.[68] Article 14 of the International Covenant on Civil and Political Rights contains a number of guarantees related to access to counsel for those accused of a criminal offence, including the right to legal assistance of one's choosing, and free legal assistance when the interests of justice require and defendants do not have sufficient means to pay. A number of requirements follow, including the right to confidentially communicate with a lawyer in private, and that courts and other relevant authorities not hinder lawyers from fulfilling their tasks effectively.[69]

155 (iii) (finding that vagrancy laws, because they criminalize "the status of an individual", are incompatible with the human rights set out in the African Charter on Human and Peoples' Rights).

64 Barry Scheck, "Conviction integrity units revisited", *Ohio State Journal of Criminal Law*, vol. 14, No. 2 (2017), pp. 705–752. Another model is the use of conviction review commissions. See, for example, New Zealand Criminal Cases Review Commission/Te Kāhui Tātari Ture, "How the process works".

65 A/71/348.

66 A/HRC/50/36.

67 A/HRC/8/4, para. 23; and A/HRC/23/43, paras. 46–48.

68 Universal Declaration of Human Rights, art. 11.

69 Human Rights Committee, general comment No. 32 (2007), paras. 34 and 38.

50. Other instruments offer useful guidance on the concrete meaning of these guarantees, as well as measures that member States should adopt to ensure that lawyers are able to play their critical role defending human rights.[70] These include the Basic Principles on the Role of Lawyers, which are the most comprehensive international normative framework aimed at safeguarding the right of access to legal assistance and the independent functioning of the legal profession.[71] Crucially, the Basic Principles set out a number of guarantees necessary for lawyers to function.[72] Governments should, for example, ensure that lawyers are able to perform all their professional tasks without intimidation, harassment or improper interference; be able to consult with their clients freely; and not be threatened with sanctions for actions taken in accordance with their professional role.[73] The Basic Principles apply, as appropriate, to persons who exercise the function of lawyer without having the formal status of lawyers. They have been explicitly cited by a number of regional and national courts and, furthermore, the values and protections they articulate are recognized in many other jurisdictions.[74]

B. Priority challenges

1. Targeting of lawyers

51. The Special Rapporteur is extremely concerned about widespread and increasing efforts to target lawyers for their work. Amidst deepening autocratization globally, lawyers increasingly may face threats, arrest, prosecution, imprisonment and even death. This is especially true for lawyers who are active in the defence of human rights, women's rights, minority groups, refugees and migrants, Indigenous Peoples, the LGBTQI+ community and the environment.[75] Such targeting violates the rights of lawyers, but also affects the rights of other individuals to a fair trial and to the broad range of human rights meant to be protected by rule of law and a functioning judicial system.[76]

52. The Special Rapporteur intends to work in this area by responding to individual threats – particularly where they are grave or suggest a systemic effort to undermine the ability of the legal profession to advance rights – and by identifying common and emerging trends. She will pay close attention to criminal and civil proceedings instituted against lawyers, including strategic litigation against public participation suits, and other potential misuses of legal proceedings to punish and silence legitimate legal work.

53. She is also focused on the issue of reprisals against lawyers and other justice system actors due to their engagement with international or regional human rights mechanisms. She will take care to highlight these cases, which seek to undermine the critical safeguarding role that independent human rights entities can play.

54. Additionally, and consistent with her priority of expanding the legal ecosystem, she will seek to systematically examine the targeting of all persons exercising legal functions, such as paralegals, whether they have the status of lawyer or not. She will also concern herself with the targeting of the wide range of actors who may face attacks because of their affiliation with legal systems, including court and justice agency staff.

55. Through dialogue with United Nations and government officials, businesses, civil society, lawyers, community-based justice advocates and others, the Special Rapporteur will

[70] A/71/348, para. 21.
[71] Ibid., para. 22.
[72] Basic Principles on the Role of Lawyers, principles 16–22. Other principles set out that lawyers must be able to provide legal services, play their special role in criminal justice matters, have specific qualifications and training, fulfil certain duties and responsibilities, enjoy freedom of expression and association, be able to take part in professional associations and be guaranteed fairness in disciplinary proceedings.
[73] Ibid., principle 16.
[74] Law Society of England and Wales, *UN Basic Principles on the Role of Lawyers: Independence of the Legal Profession and Lawyer/Client Rights Worldwide* (2022), p. 52.
[75] A/HRC/50/36, para. 2.
[76] International Covenant on Civil and Political Rights, art. 14 (3). See also Human Rights Committee, general comment No. 32 (2007); and Basic Principles on the Role of Lawyers.

gather information about threats and share ideas regarding ways to strengthen the free and independent exercise of the legal profession.

2. Dismantling harmful structures and practices within the profession

56. In addition to recognizing the essential, admirable and too often dangerous role that lawyers play in advancing access to justice, the Special Rapporteur will also explore the role of lawyers in dismantling structures and practices within the legal system that can harm rights holders and keep equal justice from becoming a reality.

57. She will examine policies and practices in the legal field that may amount to discrimination on the basis of race, ethnicity, caste, sex, sexual orientation, gender identity, ableism, migration status and other arbitrary bases. Some of these practices are easy to identify, such as explicit rules or de facto practices that restrict law licences to men. Others may be underappreciated, such as cases in which courthouses and other legal institutions are not physically accessible. Racism may prevent lawyers from groups marginalized due to ethnic, racial or other forms of discrimination from being viewed on their merits as advocates or legal counsellors. These forms of discrimination occur in relations with the State, as well as among lawyers[77] themselves. In some places, bar associations have applied discriminatory rules or practices, effectively excluding historically marginalized groups. [78] Non-discrimination and equality protections exist for lawyers in too few jurisdictions.[79]

58. Finally, lawyers have too often sought to categorically exclude non-lawyers – even those who are trained and well prepared – from engaging in legal education, advising or advocacy with communities that seek services to access justice. The Special Rapporteur will shine a light on these issues and examine good practices for overcoming them.

3. Closing the justice gap by expanding the legal ecosystem

59. In 2019, the Task Force on Justice, a highly regarded group of experts on justice systems, estimated that 253 million people lived in extreme conditions of injustice.[80] This distressing statistic encompasses an estimated 40 million people subjected to modern slavery, 12 million people who are stateless, and more than 200 million people who live in communities "where high levels of insecurity make it impossible for them to seek justice".[81] The Task Force also pointed to much broader conditions of injustice, estimating that 1.5 billion people had justice problems they could not solve, including unreported violence or crime, or a civil or administrative justice problem they could not resolve.[82] Another 4.5 billion people were estimated to be "excluded from the opportunities the law provides" due to lack of legal identity, work in the informal sector or lack of secure tenure to housing or land.[83] These conditions render them "vulnerable to abuse and exploitation and less able to access economic opportunities and public services".[84] In addition to these direct impacts, the "lack of access to justice can economically impact individuals, businesses, government finances, and ultimately entire economies", according to the Open Government Partnership and Pathfinders for Peaceful, Just and Inclusive Societies.[85]

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77 Kieran Pender, *Beyond Us Too? Regulatory Responses to Bullying and Sexual Harassment in the Legal Profession* (London, International Bar Association, 2022).

78 Adjoa A. Aiyetoro, "Truth matters: a call for the American Bar Association to acknowledge its past and make reparations to African descendants", *George Mason University Civil Rights Law Journal*, vol. 18 (2007), p. 69.

79 International Bar Association, "A global directory of anti-discrimination rules within the legal profession: main findings" (London, 2022) (in which it was noted that bars and regulators in only 18 per cent of countries globally dealt with discrimination as a specific issue in their codes, rules or regulations).

80 Task Force on Justice, *Justice for All – Final Report* (New York, Center on International Cooperation, 2019), p. 18.

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 Mark Weston, "The benefits of access to justice for economies, societies, and the social contract: a

60. The Task Force on Justice is one of the many initiatives championing equal access to justice for all, which include the Justice Action Coalition, an initiative of States and civil society partners, and the Global Roundtables on Equal Access to Justice of the Organisation for Economic Co-operation and Development.[86] Using ideas around people-centred justice, these initiatives call for a shift from justice systems built "for the few" to systems that provide accessible, affordable and quality justice services for all.

61. The Special Rapporteur commends these efforts and believes that such a shift requires an expanded legal ecosystem. While there are many lawyers in the world, they are often scarce where justice problems are the most severe, including in rural areas, informal settlements, inside prisons and other detention facilities, and among marginalized or excluded communities.[87] Even when lawyers are present, their services may be too expensive or not suited to solve everyday problems. Furthermore, formal training for lawyers may lead to viewing issues technically or in an isolated, acontextual manner, hindering an understanding of the way justice problems arise alongside human relationships, family conflicts and cultural practices. There are also often barriers to entering the profession that are particularly severe for those most affected by conditions of injustice.

62. Lawyers are not the only legal personnel who can accompany people seeking solutions to justice problems. Evidence demonstrates that trained laypersons – variously called community paralegals, "barefoot lawyers" or community-based justice advocates – can make a real difference by helping communities and individuals to know their rights, understand how to use the law to solve their problems and choose a path forward. The direct experience and understanding such actors bring can be especially valuable in supporting others in navigating their unmet justice needs. As in public health systems, which depend on not only doctors but also nurses, physicians' assistants and community health workers, legal systems that embrace a variety of roles will also have a better chance of systematically addressing the issues that make people's lives more challenging.[88]

63. The Special Rapporteur will build on the work of former Special Rapporteur Knaul to highlight the contributions of paralegals and their critical role in enhancing access to justice. She recognized that paralegals were often in a better position than lawyers to provide legal services tailored to the needs of specific communities and groups[89] and that they often lived and worked within the community, which often allowed them to have direct knowledge of the situation and needs of the community that legal professionals working outside of the community frequently did not.[90] The Special Rapporteur believes that it is time to recognize the expertise of community-based justice workers.

64. Any expansion of the formal legal system must be carried out carefully, while fully recognizing and protecting the special role of lawyers in the legal system. The Special Rapporteur is eager to engage in discussions that advance this effort, gathering and disseminating good practices from civil society and member States where such expansion has taken place and engaging in capacity-building on these issues. She will highlight examples of how collaboration between lawyers and community-based justice workers can act as a force multiplier for fulfilling the justice needs of those who face obstacles. In her next thematic report, the Special Rapporteur will examine these issues in depth, exploring

literature review" (Open Government Partnership and Pathfinders for Peaceful, Just and Inclusive Societies, 2022), p. 7.

86 Organisation for Economic Co-operation and Development, "OECD Framework and Good Practice Principles for People-Centred Justice" (2021), pp. 3–4. Available at: www.oecd.org/governance/global-roundtables-access-to-justice/good-practice-principles-for-people-centred-justice.pdf.

87 United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report* (New York, United Nations, 2011), pp. 11 and 12, table 1.

88 Vivek Maru, "How can we make legal support accessible to all?", video, National Public Radio, 12 October 2018.

89 A/HRC/29/26, para. 43.

90 A/HRC/23/43, para. 71.

the promise of community-based justice workers and other forms of legal empowerment for ensuring human rights for all.[91]

V. Methods of work

65. The Special Rapporteur looks forward to engaging with member States, judicial and legal professional associations, judges, lawyers, community-based justice advocates, members of civil society and others on issues of relevance to the mandate. She is grateful for the strong relationships that former Special Rapporteurs have created with judicial associations, bar and other lawyers' associations and ministries of justice, and she intends to continue these connections. Recognizing that those who experience rights violations have especially important insights into the ways that legal systems may fail, she will also endeavour to prioritize direct exchanges with rights holders in her activities.

66. Since assuming the mandate, the Special Rapporteur has used official communications, statements and press releases to raise concerns about alleged violations of human rights relating to the independence of the judiciary and the legal profession. These include alleged violations of the rights of one or more individuals, including individual judges, lawyers, prosecutors and other justice advocates,[92] as well as alleged violations of the rights of groups and communities, including lawyers and judges more broadly, and particularly women.[93] She has also conveyed her concerns regarding the compliance of proposed national legislation that may affect the independence of judges and lawyers with international human rights law.[94] The Special Rapporteur sees communications as an indispensable tool for her to draw the attention of Governments and others to alleged human rights violations, and to seek to ensure that any violations are prevented, stopped or investigated.

67. The Special Rapporteur looks forward to using future thematic reports to highlight and explore priority areas and to disseminate best practices for tackling complex and urgent issues. Her first report to the General Assembly, on the promise of legal empowerment in expanding access to justice, will be submitted later this year. Other areas she may seek to address include safeguarding the independence of refugee and immigration judges, diagnosing and responding to efforts by businesses or those with economic advantages to unduly influence the judiciary, the independence of Indigenous Peoples' justice systems, the impact of artificial intelligence on judicial independence, and dismantling systemic inequalities within legal and judicial systems.

[91] This work will draw on the expertise of community-based justice advocates in many countries around the world. See, for example, Namati/Global Legal Empowerment Network, "About the Network". Available at: https://namati.org/network. For more on legal empowerment, see Stephen Golub, ed., *Legal Empowerment: Practitioners' Perspectives* (Rome, International Development Law Organization, 2010); Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor*, vol. 1 (New York, 2008); Vivek Maru, "Between law and society: paralegals and the provision of justice services in Sierra Leone and worldwide", *Yale Journal of International Law*, vol. 31, No. 427 (2006); and Stephen Golub, "Beyond rule of law orthodoxy: the legal empowerment alternative", Rule of Law Series, No. 41 (Carnegie Endowment for International Peace, 2003). For recent discussions, see, for example: Uganda Association of Women Lawyers, Kenyan Section of the International Commission of Jurists and the Legal Empowerment Network, *The Role of Legal Empowerment Groups in Addressing Gender-based Violence in Sub-Saharan Africa During the Pandemic* (2022); and Sukti Dhital and Tyler Walton, "Legal empowerment approaches in the context of COVID-19", *Journal of Human Rights*, vol. 19, No. 5 (2020).

[92] Communications GTM 6/2022 and IRN 30/2022.

[93] United Nations Office of the High Commissioner for Human Rights, "UN experts: legal professionals in Afghanistan face extreme risks, need urgent international support", media statement, 20 January 2023.

[94] Communication ISR 2/2023.

68. The Special Rapporteur will use country visits to engage with Governments and carry out in-depth assessments of the independence of judges, lawyers and community-based justice advocates, as well as access to justice for all and the right to a fair trial. Since assuming the mandate, she has extended requests to a number of countries. She very much hopes for positive responses.

69. The Special Rapporteur also intends for her mandate to play a constructive role as a convenor and disseminator of best practices, including through the organization of and participation in workshops, training and information exchanges. She also hopes to offer her expertise to States, intergovernmental organizations and communities tackling problems relevant to her mandate.

70. In all areas of her work, the Special Rapporteur will focus on strengthening the relationship between her mandate, individuals most affected by human rights violations relating to her mandate and the broader public. She will explore new modalities for incorporating participatory methods into her activities and for increasing the accountability of her office to rights holders. She will also bring a feminist, intersectional and anti-racist lens to her work. To these ends, she plans to convene diverse and globally representative advisory groups that will advise her over the course of her mandate. Additionally, with advice from communities, she will seek to develop accessible multimedia products in multiple languages and use social media and news media to more effectively gather and share relevant information, as well as to provide greater transparency.

VI. Conclusion and recommendations

71. **The Special Rapporteur shares the Human Rights Council's conviction that an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are essential prerequisites for the protection of human rights and fundamental freedoms and the application of the rule of law and for ensuring fair trials without any discrimination.**[95]

72. **The Special Rapporteur looks forward to carrying out her mandate; to addressing alleged violations regarding the independence of the judiciary, lawyers and all actors carrying out legal functions or affiliated with legal systems, as well as documenting progress achieved in protecting and enhancing their independence; to exploring the issues that she has identified as priorities and making concrete recommendations thereon; to carrying out country visits and, through these and other functions, engaging with member States and others to offer technical assistance and support; to cooperating closely with other special procedures and United Nations bodies, mandates and mechanisms while avoiding duplication; to reporting annually to the Human Rights Council and the General Assembly; and, in so doing, to contributing to the strengthening of judicial independence and the free exercise of the legal profession, as well as the advancement of access to justice for all.**

73. **In this initial report, the Special Rapporteur will offer only limited recommendations regarding how Governments in particular may engage with her office. Further recommendations are not warranted at this time, as she has not addressed the various topics that she plans to prioritize in great depth.**

74. **States should:**

(a) **Undertake measures that protect and enhance an independent and impartial judiciary, as well as an independent legal profession;**

(b) **Cooperate with and assist the Special Rapporteur, including by responding favourably to her requests to visit and providing timely, meaningful responses to the communications that she issues.**

[95] Human Rights Council resolution 44/8.

75. **The Special Rapporteur welcomes engagement with judicial and bar associations, judges, prosecutors, lawyers, community-based justice advocates, civil society organizations and others with the mandate. She looks forward to receiving their concerns, responding to alleged violations, documenting best practices and engaging in constructive dialogue.**

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SYMPOSIUM

FOREWORD: CRITICAL LEGAL EMPOWERMENT

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INTRODUCTION

"Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred, our avarice, our data banks and dead ideas, our dead rivers and smoky skies behind us. Or we can walk through lightly, with little luggage, ready to imagine another world. And ready to fight for it."

—Arundhati Roy, 2020[1]

In 2019, 5.1 billion people worldwide were found to live outside the protection of the law.[2] Global pandemics, climate emergencies, threats to democracy, and income inequality continue to exacerbate this justice crisis.[3] Take, for example, the United States, where tens of millions of Americans face civil justice problems.[4] For those living on the margins, a medical emergency, an eviction notice, or a change in immigration status can hurl families deeper into poverty, putting them at risk of incarceration, family separation, or death.[5] The COVID-19 pandemic laid this bare, with serious illness and job losses overwhelmingly "affect[ing] low-wage, minority workers."[6]

And yet, when injustice arises, most people in the United States are left to navigate a highly technical labyrinth of laws, regulations,

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[1] Arundhati Roy, *"The Pandemic Is a Portal,"* FIN. TIMES (April 3, 2020), https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca [https://perma.cc/7LU6-ZBEN].

[2] THE TASK FORCE ON JUSTICE, JUSTICE FOR ALL – FINAL REPORT 18 (2019), https://www.justice.sdg16.plus [https://perma.cc/7TXH-M8DR] ("In total, 5.1 billion people—two-thirds of the world's population—lack meaningful access to justice."). These are people who "live in the most extreme conditions of injustice," "try and fail to solve problems that have a legal dimension," and "lack the legal protections that allow them to claim their rights, fulfill their potential, and participate in shaping the future of their countries." *Id.* at 32.

[3] Joseph E. Stiglitz, *COVID Has Made Global Inequality Much Worse*, SCI. AM. (Mar. 1, 2022), https://www.scientificamerican.com/article/covid-has-made-global-inequality-much-worse [https://perma.cc/EHJ9-NEQY] ("Global billionaire wealth grew by $4.4 trillion between 2020 and 2021, and at the same time more than 100 million people fell below the poverty line.").

[4] Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 49 (2019) ("Tens of millions of Americans face justice problems that place them at risk of devastating outcomes."); *see also* John G. Levi & David M. Rubenstein, *Introduction*, 148 DAEDALUS 7, 8 (2019) ("The 2017 report found that some 71 percent of low-income households had experienced at least one civil legal problem in the previous year.").

[5] Sandefur, *supra* note 4, at 49.

[6] Heather Long, Andrew Van Dam, Alyssa Flowers & Leslie Shapiro, *The Covid-19 Recession Is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality [https://perma.cc/5CQD-VXMS].

and court systems without any meaningful support.[7] Indeed, eighty-six percent of low-income Americans reported inadequate or no legal help to address their civil legal problems, and ninety percent of tenants facing eviction reported having no lawyer, while more than ninety percent of the landlords reported having one.[8] 2022 statistics from the American Bar Association show that only 7.7% of lawyers who graduated from law school in 2021 work in the public interest sector.[9]

These numbers, while shocking, do not capture the human impact of the many injustices the Black, Brown, low-income, LGBTQI+, and other marginalized people in the United States face each day. This is a crisis of injustice, and it calls for a deep change in approach to alter the basic conditions of those who experience persistent injustice. In our current legal ecosystem, lawyers place themselves at the center of efforts to resolve justice problems. Legal empowerment—a global movement led by the grassroots, with lawyers and other professionals in supporting, rather than leading, roles—is a crucial part of the justice transformation that is needed.[10] Inspired by grassroots justice efforts in the United States and around the globe, the 2022 annual *New York University (N.Y.U.) Law Review* Symposium volume, *Critical Legal Empowerment: Strategies for Community Built Justice*, is a partnership between the *N.Y.U. Law Review* and the Bernstein Institute for Human Rights. The collaboration is rooted in a desire to

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[7] *See* Gillian K. Hadfield, *More Markets, More Justice*, 148 DAEDALUS 37, 38–39 (2019) ("[M]ore complex systems require more expertise and specialization, which means people can't access the system of rules if they can't afford to hire expert help."); *see also* Beenish Riaz, *Envisioning Community Paralegals in the United States: Beginning to Fix the Broken Immigration System*, 45 N.Y.U. REV. L. & SOC. CHANGE 82, 85 (2021) ("The access-to-justice crisis is especially acute in the U.S. immigration context. In deportation cases . . . 'only 37% of all immigrants, and a mere 14% of detained immigrants' have legal representation.").

[8] Levi & Rubenstein, *supra* note 4, at 8; *see also* James Barron, *A Legal Challenge to Rules Against Legal Advice from Nonlawyers*, N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/nyregion/legal-advice-volunteers-consumer-debt.html [https://perma.cc/QB23-ZANX] ("In 2018 and 2019, a total of 265,000 consumer debt suits were filed . . . in New York State. Over 95 percent of the defendants were not represented by a lawyer, and of those, 88 percent did not respond to the suit.").

[9] AM. BAR ASS'N, EMPLOYMENT OUTCOMES AS OF APRIL 2022 (CLASS OF 2021 GRADUATES) 1 (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/class-2021-online-table.pdf [https://perma.cc/GF75-Y7YF].

[10] Margaret Satterthwaite, *Critical Legal Empowerment for Human Rights*, *in* LEGAL MOBILIZATION FOR HUMAN RIGHTS: COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 1, 2 (Grainne de Búrca ed., 2022). This Section and the next one draws on and integrates language from the piece without formally citing all passages from which the concepts come.

uplift the knowledge, voices, and demands of those directly impacted in the building of an American legal ecosystem that is truly just.[11]

Legal empowerment is a rights-based methodology that democratizes laws and centers people in their own fight for justice by creating opportunities for people to "know, use, and shape" the laws that impact their lives.[12] The field has iterated and evolved, drawing insights from trade-union and feminist movements, which saw the "emancipatory power of popular education and therefore embedded rights awareness with self-reflection and collective action."[13] It also finds roots in anti-apartheid movements where community members partnered with lawyers, NGOs, and churches to document violations, provide legal assistance, and bear witness to the injustice endured by communities of color.[14] Legal empowerment emerged as a principal strategy to increase access to justice.[15] However, as it was adopted by the development and international aid sector, legal empowerment took on an increasingly technocratic character.[16] When used by these global actors, the term was often associated with property rights and the formalization of assets and transactions in the informal sector.[17] The term gained prominence with the 2008 UN Commission on Legal

[11] To realize this vision and ensure we practice the values we espouse, the Bernstein Institute and the *N.Y.U. Law Review* invited a dynamic group of community justice advocates to serve as Advisory Committee members: Nixon Boumba, Ariadna Godreau-Aubert, Antonio Gutierrez, Lam Ho, Jay Monteverde, Jhody Polk, Alejo Rodriguez, and Jayshree Satpute. The Committee contributed valuable collective inquiry and reflection, as we co-designed a symposium that solidifies the knowledge that comes from lived experience.

[12] Sukti Dhital & Tyler Walton, *Legal Empowerment Approaches in the Context of COVID-19*, 19 J. HUM. RTS. 582, 582 (2020). This Section draws on and integrates language from the piece without formally citing all passages from which the concepts come.

[13] FRANCESCA FERUGLIO, DO MORE EMPOWERED CITIZENS MAKE MORE ACCOUNTABLE STATES? POWER AND LEGITIMACY IN LEGAL EMPOWERMENT INITIATIVES IN KENYA AND SOUTH AFRICA 6 (2017); *see also* Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, PERSPS. ON POL., Mar. 2003, at 45–68 (discussing labor union organizing strategies).

[14] *See* Jackie Dugard & Katherine Drage, *'To Whom Do the People Take Their Issues?' The Contribution of Community-Based Paralegals to Access to Justice in South Africa* 11, 14 (Just. and Dev. Working Paper, Paper No. 21, 2013) (providing an overview of the evolution of the community paralegal movement in South Africa).

[15] Stephen Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative* 3 (Carnegie Endowment Working Paper, Paper No. 41, 2003).

[16] *See id.* (noting the value of legal empowerment as an essential strategy to advance socioeconomic development); *see also* Rachel M. Gisselquist, *Legal Empowerment and Group-Based Inequality*, 55 J. DEV. STUD. 333, 333, 343–44 (2019) (noting different realms legal empowerment has been used in, arguing that legal empowerment can inform research and practice, and explaining the weaknesses of understanding legal empowerment only through an evidence-based policy perspective).

[17] *See* Bård A. Andreassen, *The Right to Development and Legal Empowerment of the Poor*, 33 BANGL. DEV. STUD. 311, 313 (2010) ("The legal empowerment agenda assumes that secure property to means of production . . . can help improve people's opportunity to

Empowerment of the Poor (CLEP), which defined "legal empowerment" as "the process through which the poor become protected and are enabled to use the law to advance their rights and their interests."[18] Today more than 2,900 organizations in over 170 countries are part of a global network dedicated to legal empowerment.[19]

I
Critical Legal Empowerment

A growing community of practitioners and academics reject technocratic approaches to legal empowerment, as those approaches assume the "existence of a legal system that dispenses justice."[20] This pursuit "obscure[s] the current distribution of economic, social, and political power, and how that distribution favors those who have power and burdens those who do not."[21] In its place, we call for critical legal empowerment, an approach that embraces community-based efforts to redistribute legal power and demands space for communities to engage directly in legal work and the legal profession.[22] We suggest that the potential of legal empowerment will be more fully realized when it embraces a "critical" shift to understanding that social change—and transformations in major economic, social, and cultural structures—will come only when legal efforts effectively build the power of communities facing human rights violations to transform those systems. It necessitates a shift from viewing directly impacted people as "recipients of services provided by lawyers and other professionals into change agents who force greater transparency, accountability, and fairness" from legal systems.[23] Inspired by scholars of critical race theory, this quality of critique requires self-reflection, humility, and a commitment to critical praxis grounded in the grassroots.[24]

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invest in production of marketable goods and hence, contribute to a long-term reduction or abolition of property.").

[18] Comm'n on Legal Empowerment of the Poor & United Nations Dev. Programme, Making the Law Work for Everyone: Report of the Commission on Legal Empowerment 26 (2008).

[19] *About the Network*, Namati, https://www.namati.org/network [https://perma.cc/N4UL-KMN3].

[20] Sameer Ashar & Annie Lai, *Access to Power*, 148 Daedalus 82, 83 (2019).

[21] *Id.* at 82.

[22] For a brief summary of legal empowerment methods used in immigrant rights, see Just. Power, https://www.justicepower.org [https://perma.cc/CJF4-72J4].

[23] Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 Alb. L. Rev. 1281, 1281 (2015).

[24] *See* Angela P. Harris, *Racing Law: Legal Scholarship and the Critical Race Revolution*, 52 Equity & Excellence in Educ. 12, 17–19 (2019); *see also* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-*

In this way, critical legal empowerment serves to help isolated communities in the United States by acting as "a safe road for . . . me and my family, for me and my community, for me and my neighbors, for me and our youth, for me and my local leaders, for me and institutions, for me and my incarcerated communities to think about the law."[25] From community-driven litigation to community paralegals to accompaniment programs (among others), these strategies envision community participation as essential to the legal work—inside and outside of the courtroom. Community paralegals (also known as "barefoot lawyers," community legal workers, or justice advocates) are individuals who are informally trained on law and skills[26] and become agents of social change who serve as a bridge between their community and the systems they navigate, lifting up new community-generated demands.[27] Community-driven litigation is an approach to lawyering that transfers legal power into the hands of community members and reimagines the position of attorneys relative to their clients and community partners as "collaborators" rather than "experts."[28] Immigration and criminal courts across the country

Civil Rights America, 95 MICH. L. REV. 821, 829, 874 (1997) (noting that "[c]ritical race praxis combines critical pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities" and that "[i]ts central idea is that racial justice requires antisubordination practice," with the praxis a way of "infusing antiracism practice with aspects of critical inquiry and pragmatism, and then recasting theory in light of practical experience").

[25] Jhody Polk, Founder and Dir., Legal Empowerment and Advoc. Hub, Bernstein Institute for Human Rights and *N.Y.U. Law Review* Symposium: Critical Legal Empowerment, What Is Critical Legal Empowerment? (Feb. 24, 2022), https://www.youtube.com/watch?v=DIImPXJoFoA [https://perma.cc/7P48-CVWY].

[26] Many community justice workers receive training from grassroots and community-based organizations. Some of these training programs are in-depth, substantial, and challenging. However, these advocates do not usually receive training in accredited, license-certifying institutions like law schools. *See* Vivek Maru & Varun Gauri, *Paralegals in Comparative Perspective: What Have We Learned Across These Six Countries?*, *in* COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE 1–42 (Vivek Maru & Varun Gauri eds., 2018).

[27] Conducting a comparative study of the work of community paralegals across six countries, Maru and Gauri note that "the most effective [community] paralegals served as educators, demystifying law and equipping people to advocate for themselves" and that "[a]t their best, paralegals help people journey from powerlessness to hope." *Id.* at 29.

[28] *See* Antonio Gutierrez, Co-Founder, Org. Cmtys. Against Deportations, Bernstein Institute for Human Rights and *N.Y.U. Law Review* Symposium: Critical Legal Empowerment, Community-Driven Litigation: Transferring Legal Power to Community (Feb. 25, 2022), https://www.youtube.com/watch?v=8fxfvB8udug [https://perma.cc/AU9N-F5YX]. ("Attorneys need to understand that these conversations, these litigation projects are not for them, [it] is not their time to shine, but it is really a time for the narrative of those directly impacted to be amplified, to create a platform for them because they have never had that."); *see also* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 92, 96 (2022) (noting that participatory litigation involves plaintiffs "in all aspects of the suit," including "choosing class representatives,

increasingly recognize the power of accompaniment, a strategy that promotes the rights and dignity of immigrants and challenges power dynamics by bearing witness, expressing solidarity, and transforming power within legal settings.[29] The use of popular rights education continues to be a powerful legal empowerment strategy; when laws are translated into a language that the community can engage and use, rights awareness becomes a tool of self-reflection and collective action.[30]

It is with this backdrop that we—three activist lawyers and professors—share our respective journeys towards critical legal empowerment. Each of us saw the law as a tool to advance human rights and social justice in the United States and around the world. And while we secured important legal victories for our clients and their communities, we experienced a reckoning—a sometimes painful acknowledgement of the ways the legal system and the legal profession actively harm and silence community voices and participation.[31] From regulations that bar community members from offering advice to each other,[32] to rules that limit who can speak in court,[33] or negotiations conducted without the presence of clients and communities,[34] many structures within the legal system marginalize community voices.[35] Legal education and the legal profession exalt attorneys as

deciding on claims to present, making important tactical decisions, negotiating and ratifying a settlement agreement, and monitoring the settlement decree," and envisions "participation as a fundamental component of class-action, impact, and movement litigation").

[29] *See Accompaniment*, JUST. POWER, https://www.justicepower.org/accompaniment [https://perma.cc/DPB7-FBJ4] (defining accompaniment and detailing how it is used in the immigration space); *see also* Moore et al., *supra* note 23, at 1283, 1289.

[30] *See* Feruglio, *supra* note 13, at 21, 23, 35 ("Education programmes help citizens to grapple with the political and juridical systems which, coupled with increasing awareness of rights and building their skills, provides them with a language and a platform to engage with the state.").

[31] *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544 (1988) ("The gap between what poor people want to say and what the law wants to hear often seems enormous.").

[32] *See* MODEL RULES OF PRO. CONDUCT r. 5.5(a), (b) (AM. BAR ASS'N 2018).

[33] *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 4 (1990) ("[B]ureaucratic institutions disable all citizens—especially those from subordinated social groups—from meaningful participation in their own political lives.").

[34] *See* Lobel, *supra* note 28, at 94, 128 (stating that "[i]n class-action lawsuits, plaintiffs are often excluded from any role, with courts even allowing lawyers to settle claims despite the opposition of most named plaintiffs or class members" and that the legal code of ethics places "ultimate legal decisionmaking power in the lawyer's hands").

[35] *See* Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1108 (2016) (noting that current ethics rules "leave the lawyer relatively free to decide strategic and tactical questions as he or she sees fit, even in the face of a client's objections").

the "experts" or project them as "saviors"—those uniquely qualified to "diagnose people's problems as legal, and to provide the services that treat them."[36] The combination of rules that exclude communities and trainings that teach attorneys to see themselves as the protagonists[37] in justice stories place lawyers at the center of a monopolistic legal ecosystem with minimal input from the clients and communities impacted by injustice.[38] This lawyer-centered approach limits imagination and carries harmful consequences.[39] It is in this place of humility, embrace of collective problem solving, and recognition of lived experience as expertise where critical legal empowerment begins.

II
SUKTI

As a first-generation Nepali immigrant, I was drawn to the law as a tool to advance social change, particularly for women and other marginalized communities. Years after becoming a lawyer, I was living and working in New Delhi, India, at a local human rights organization directing its Reproductive Rights unit. It was exhausting, creative work—with legal petitions filed across the country addressing maternal mortality, unsafe abortions, and forced sterilizations and their devastating impacts on women. Our team secured legal victories

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[36] Sandefur, *supra* note 4, at 49–50 (noting "the key assumption that any problem with legal implications requires the involvement of a legally trained professional for a just, fair, or successful resolution"); *see also* White, *supra* note 31, at 544 ("[T]he professional culture of legal training and practice leads advocates to compound the isolation and dependency that clients already feel."); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451–52 (1992) ("The predominant image of the lawyer-client relationship is one of professional dominance and lay passivity. The lawyer governs the relationship [and] defines the terms of the interaction . . . . Lawyers resent and resist the few clients who take an active role in their cases, considering them hostile.").

[37] *See* Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2133 (2007) (noting that the "conventional narrative" frames the lawyer as the protagonist called to solve a social problem).

[38] *See* Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DAEDALUS 177, 187 (2019) (noting that professional organizations like bar associations "are primarily guilds whose aim is to protect and expand monopoly domains for their members' work, demand for their services, and their fees and profits"); *see also* Felstiner & Sarat, *supra* note 36, at 1452 (referencing a study by Spangler that found "private practitioners and corporate counsel are less likely to dictate action to their clients than are legal services lawyers").

[39] Ashar and Lai have expressed skepticism with the premise that more lawyers are the answer to the access-to-justice crisis. *See* Ashar & Lai, *supra* note 20, at 83 ("[T]raditional access-to-justice approaches ha[ve] not in fact produced justice. Those initiatives missed a crucial point. Legal process is a means by which the powerful are able to legitimize the system's outcomes, violent as they may be.").

that recognized these issues as human rights violations, and yet, the groundbreaking decisions failed to translate to real changes on the ground.

I'll never forget our client Fatima, who delivered her baby under a tree in public view because the local hospital denied her medical care. We filed a case in the Delhi High Court arguing that the government violated Fatima's constitutional and human rights by failing to provide her life-saving pregnancy care. A year later we secured the first decision by a national court to recognize maternal mortality as a human rights violation and award constitutional damages.[40] We were overjoyed by the victory and what it meant for women around the world. However, six months later Fatima was still living under a tree, barely able to care for her mother and children, and largely unaware of her rights under the law. This happened time and time again. Governments would disregard our court orders, and affected communities remained unaware of their rights. We recognized the limits of our legal approach and an accompanying need to redistribute legal power to directly impacted communities. Even though community leaders carried generational wisdom—a deep understanding of cultural context and strategies to navigate oppressive systems—they rarely were brought into discussions with lawyers around legal advocacy. We wondered: Could we create an organization that built community power and centered grassroots legal education and empowerment?

These questions led to the co-founding of Nazdeek, a legal empowerment organization dedicated to bringing access to justice closer to marginalized communities in India.[41] In partnership with indigenous and Dalit[42] women, we helped build collectives of community paralegals in the most unexpected of places. Nazdeek taught basic laws, rights, and skills (such as data collection, advocacy, and complaint drafting) to indigenous women in the tea gardens of Assam and

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[40] *See* Laxmi Mandal v. Deen Dayal Harinagar Hosp., 172 (2010) DLT 9 (India); *see also* Ximena Andión Ibañez, *The Role of National and International Courts: Human Rights Litigation as a Strategy to Hold States Accountable for Maternal Deaths*, *in* MATERNAL MORTALITY, HUMAN RIGHTS AND ACCOUNTABILITY 49 (Paul Hunt & Tony Gray eds., 2013) (noting that the decision will have "major implications for future public interest litigation combating maternal mortality").

[41] *See About Us*, NAZDEEK, https://www.nazdeek.org [https://perma.cc/8F9R-TX74].

[42] *See* Thenmozhi Soundararajan, *A New Lawsuit Shines a Light on Caste Discrimination in the U.S. and Around the World*, WASH. POST (July 13, 2020), https://www.washingtonpost.com/opinions/2020/07/13/new-lawsuit-shines-light-caste-discrimination-us-around-world [https://perma.cc/9LEE-DYA4] ("Caste is a structure of oppression that affects more than 260 million people[,] . . . determining every aspect of their life . . . . Dalits, who are at the bottom of this system, are branded 'untouchable' and sentenced to a caste apartheid . . . [and] in South Asia, the impunity surrounding this oppressive system is unyielding.").

Dalit women in the informal settlements of Delhi.[43] Over time, they became community paralegals who collected data on human rights violations, filed cases, organized protests, and accompanied community members through their justice journeys. And we became collaborators who learned to listen, embrace collective problem solving, and translate laws into an accessible language that our community partners could use. We were not familiar with the vocabulary then, but we were practicing critical legal empowerment. We worked in partnership with women leaders to create opportunities to learn, activate, shape, and ultimately transform the laws that impact their lives.[44] And it worked. Through collaborative advocacy, litigation, and organizing, creative community-rooted solutions emerged that resulted in higher wages, better hospitals, and a moratorium on forced evictions.[45] Crucially, at the center of these efforts were women who saw themselves as agents of change.

After nearly a decade in India, in 2016 I moved back to the United States and joined the newly established Bernstein Institute for Human Rights at the NYU School of Law.[46] I was charged with creating a compelling mission and vision for the Institute—and legal empowerment felt like the natural place to begin. In so many countries around the world, as my experience in India had shown, there were diverse and dynamic roles for community members to engage in legal work. And yet here in the United States, our profession actively excluded community participation in legal work and reinforced a system of hierarchy that was not only costly and inaccessible, but also continued to marginalize those directly impacted by injustice. In response, we built a center dedicated to advancing human rights through critical legal empowerment, and embraced a participatory approach to human rights research, education, and advocacy. Our

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[43] Francesca Feruglio, *Legal Empowerment as a Path Towards Social Justice and Inclusion: The Work of Nazdeek*, ADVICENOW, https://www.advicenow.org.uk/sites/default/files/uploads/F-Feruglio_Nazdeeks-work.pdf [https://perma.cc/46PW-8SU3].

[44] *See* Maru & Gauri, *supra* note 26, at 35 ("Community paralegals have the potential to turn law into something people can understand, use, and shape. . . . [W]e found paralegals applying a combination of six broad approaches to help people exercise their rights: (1) education, (2) mediation, (3) organizing, (4) advocacy, (5) monitoring, and, with the help of lawyers, (6) litigation."); *see also* Riaz, *supra* note 7, at 89 ("Many community paralegals have experienced the system themselves or have had family members experience the system, so they understand where immigrants come from and can help individuals exercise their agency, make informed decisions, and better participate in their cases.").

[45] *Nazdeek*, RTS. COLAB, https://www.rightscolab.org/case_study/nazdeek [https://perma.cc/3DJ3-Y3RT].

[46] ROBERT & HELEN BERNSTEIN INST. FOR HUM. RTS., https://www.law.nyu.edu/centers/bernstein-institute [https://perma.cc/9CZ4-CW3H].

north star remains a deep commitment to uplifting and supporting community-based efforts to redistribute legal power. This means creating opportunities for community members to share their expertise and wisdom with traditional legal actors, advocating for reform of regulations that limit community participation, and modeling a way of collaboration between attorneys, community members, and justice allies that is rooted in trust, humility, and creative problem solving.

III
Lam

In early 2022, I represented a Vietnamese immigrant woman in a divorce case. During a hearing, as she painstakingly and painfully testified about her brutal rape by her husband, the judge repeatedly interrupted, telling her to stop speaking. She should only speak to answer questions asked by her lawyer: Even when I asked questions that she did not want to answer, my questions failed to elicit the suffering she experienced, or they did not give her an opportunity to say what she wanted—needed—to say. After her direct testimony concluded, her husband attempted a cross examination. The judge rejected every question he tried to ask because he could not phrase them in the proper form or establish their relevance. When it was his turn to present his testimony, the judge rejected every effort he made to present his case because he could not frame it within the scope of the hearing. Flustered, frustrated, and resigned, he stopped trying. Chastened into silence, not able to offer any defense, he waited for the judge to make a decision that would radically alter his life. While I was satisfied with the outcome of the hearing and the protections we secured for our client, I felt complicit in denying her husband any opportunity to defend himself. Both parties were effectively silenced by the legal system that was supposed to be a platform for fairness.

The hearing brought back memories of another Vietnamese immigrant couple and their forced silence. When I was in elementary school, my mother didn't have a say in her divorce. Without an attorney, she signed papers giving away everything—all rights to her children and the little money that my parents had saved working overnight shifts on an assembly line—due to mistaken fears of being deported back to Vietnam. When I was in college, my father stood silently in court facing criminal charges in a different case. There were no Vietnamese interpreters, so he didn't say anything. I'm not sure if he fully understood what was happening in the legal proceeding. The judge spoke only to me, asking a few brief questions about the allegations, even though I was not there to witness the incident. Based

solely on my responses, he ruled on my father's case. What could be more credible and probative than my English words? Certainly not those of a Vietnamese immigrant who couldn't speak English—even if they belonged to the one whose actions were being judged and whose life could be ruined.

I became a lawyer because of my parents. I thought I could become a lawyer who could empower people like my parents to use their voices as effective self-advocates in our legal system. But after I started practicing law, I realized that as a lawyer, I actually played a large role in how the legal process strips people of their agency. From the moment we take on a case, lawyers are expected to take over speaking for their clients. Judges appear to prefer the "decorum" and "efficiency" of communicating through attorneys, so they typically expect to only hear from lawyers, except in controlled situations like when we conduct highly regulated direct and cross examinations of people. Frequently, litigants are discouraged, or even prohibited,[47] from attending their own hearings. So we translate their stories into legal language, effectively rewriting our clients into caricatures of the most victimized and helpless versions of themselves. To garner sympathy from judges and juries, we routinely portray women as battered and powerless, desperately needing the court's intervention—focusing on what they suffered while ignoring all they have done to fight back. We present immigrants and refugees as suppliant targets of persecution fleeing dangerous, poor countries—disregarding their resilience in escaping a bad situation and ignoring the rich, fulfilling lives they lived in their native countries.

These realizations catalyzed my search for an approach to law that recognized how hierarchical, marginalizing, and silencing the American legal system is, including the very practice of law by direct legal services and other public interest lawyers. It led me to critical legal empowerment and the founding of Beyond Legal Aid, an organization that collaborates with activists and organizers to empower underserved communities to create their own community-located, community-owned and operated, and, most importantly, community-directed legal aid programs.[48]

Indeed, my journey toward legal empowerment was marked by mistakes that reveal how insidious legal practices can be in prioritizing

[47] Judges generally can set rules and procedures regarding who may participate in proceedings before them. Some examples of court appearances at which parties may be prohibited from attending include mediations in federal appellate cases, state court pretrial conferences, and judicially overseen settlement conferences.

[48] *Mission and Model*, Beyond Legal Aid, https://www.beyondlegalaid.org [https://perma.cc/BG38-E37S].

the work done by lawyers and undervaluing the agency of their collaborators. One of the greatest mistakes—and most critical moments in my career—occurred at the end of my second year as a community lawyer on the west side of Chicago. After eighteen months of operating two community-based legal clinics in North Lawndale, I met with my main community contact. He thanked me for my hard work and for proving the benefits of having a legal clinic in the neighborhood. He then introduced me to my replacement, a lawyer who was also a member of the community, and asked me to support him as he set up a new clinic. The new clinic would be operated purely by the North Lawndale church and would replace the two I had started.[49]

It took me several years to overcome the sense of failure, hurt, and betrayal from being so abruptly dismissed, without any discussion or notice. It was critical legal empowerment that provided me with the vocabulary and perspective to think about the important legal work that can be—and is—done by communities. It also prompted me to reconsider the power inequities that exist between lawyers—even those dedicated to public interest—and the communities with which they work. By reframing the church's decision to replace my clinic and me with their own program and attorney as an example of a community powerfully being in charge of and meeting its own needs, I finally understood that what had happened was the pinnacle of community-driven change. As a community and movement lawyer, my focus had been on my work, the so-called "lawyering," instead of recognizing and supporting the community's inspiring achievement: building its own legal aid program for its members and no longer needing to rely upon an outside lawyer. This achievement exemplifies the spirit of legal empowerment and inspired Beyond Legal Aid's founding. As lawyers, we should be as committed—even more driven—to support what communities and their members can do to resolve their own problems, including legal issues, than what we personally can do.

But this requires a willingness to change how the legal system, courts, and the legal profession operate, and for lawyers to be constantly vigilant of our own behavior. For example, several years after founding Beyond Legal Aid, I made a mistake while representing a group of tenants after a fire occurred in their building in Chicago. Their landlord attempted to mass-evict families with as little as ten days' notice. Working with our community partner, the Autonomous Tenants Union, we not only represented them in their eviction proceedings, but we also supported the tenants to form a "tenant union"

[49] *Our History*, LAWNDALE CHRISTIAN LEGAL CTR., https://www.lclc.net [https://perma.cc/9R4M-LZ22].

for solidarity and collective bargaining. This empowered the tenant union to organize a public shaming campaign, including speaking out in rallies, press conferences, and social media. Their organizing caused such embarrassment for the landlord that he capitulated to all their demands. His attorney called me, and we discussed terms for a settlement agreement far greater than legal remedies available under the law. Altogether, the tenants obtained over $25,000 in waived rent, relocation assistance, and reimbursement for utilities and property damage. They also obtained first refusal for yearly leases (even when they did not have leases) after the renovation of their units at their prior rates.[50] The victory was a testament to the power of community-driven litigation, using the law in collaboration with organizing, under the direction and leadership of community members and organizers.

However, I also made a critical mistake in the case, taking for granted how legal practice defaults to attorneys being in charge and speaking for their clients. In debriefing about the victory, an organizer challenged my rote action of negotiating with the opposing attorney without the participation of any of the tenants. Even though the tenants had formed a union to negotiate collectively, and it was their organizing that catalyzed the landlord's concession, I had immediately fallen into the standard practice of negotiating privately with the landlord's attorney. I had taken away the tenants' opportunity to come up with their own terms and broker their own deal.

Why had I so automatically negotiated for them? Do lawyers have to be bound by court rules and procedures when they prevent articulate, passionate clients from speaking their authentic truths? And what would it mean for lawyers to shift the power of the law into the hands of impacted communities? How can we ensure that, in court, parties are able to tell their own stories and are empowered to fight their legal struggles against injustice in their own way? What would it look like for the United States to have a better legal system: one that empowers, rather than harms, and amplifies, rather than silences, the voices of those facing injustice? These are the questions that I have faced, and continue to face, on my mistake-defined journey to critical legal empowerment.

IV
MEG

For many years, I worked to name the approach to human rights work that I was trying to learn, to practice, and to share with my stu-

[50] *See* Jackie Casey, *Beyond Legal Aid: Transforming How Legal Services to the Poor Are Delivered*, 28 J. AFFORDABLE HOUS. 357, 358 (2019).

dents in the Global Justice Clinic, which I teach at NYU.[51] Was it enough to say that we worked "in solidarity," that we were "rights-based," or that we endeavored to be "client-centered"? Those terms felt too clinical, and insufficiently disruptive. While I was out on maternity leave, I had a bit more space than usual to mull over these questions.

When I returned from maternity leave in 2010, I renamed the clinic. Frustrated with the old structures and many of the grounding rules for human rights advocacy, I wanted to de-center the legal framing of "rights," re-center "justice" in its place, and situate our fraught endeavor in a global—rather than an "international"—context. The work I was interested in teaching my students to do was less about international courts and tribunals and more about forging partnerships to end violations that crossed borders. Instead of returning to the International Human Rights Clinic I had co-taught for many years, I began to build the "Global Justice Clinic."[52] The focus would be projects and cases—or, perhaps more precisely, engagements—in which our place in the world, as law students and lawyers inside a U.S.-based law school, would be part of the story.

I wanted to reject the disembodied, free-floating sense of being "international actors" who roamed the world seeking "projects." I was eager to take on board the longstanding critiques by TWAIL[53] scholars and anti-racist activists. I focused on working within what I came to call the Clinic's "moral jurisdiction"—those places and spaces where institutions based in the Global North (governments, companies, cultural practices, and discourses) were actively and directly implicated in human rights violations, and where we brought value to the efforts led by those directly impacted. These places, of course, include a broad swath of geographically, economically, and culturally defined communities on the losing end of neoliberal global capitalism, from New York City itself to the Amazon basin to the hills of Haiti.

Since 2013, the Global Justice Clinic (GJC) has partnered with a social movement in Haiti that organized itself to assert Haitian self-

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[51] This Section is drawn from Meg Satterthwaite, *Critical Legal Empowerment for Human Rights*, Open Glob. Rts. (May 27, 2021), https://www.openglobalrights.org/critical-legal-empowerment-for-human-rights [https://perma.cc/9WX9-C9G3].

[52] *Global Justice Clinic - for JDs*, NYU Law, https://www.law.nyu.edu/academics/clinics/globaljustice-jd [https://perma.cc/H6ZQ-SRQW].

[53] TWAIL is an acronym for Third-World Approaches to International Law. As Makau Mutua explains, TWAIL scholars seek to "understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans." Makau W. Mutua, *What is TWAIL?*, 94 Proc. Am. Soc'y Int'l L. Ann. Meeting 31, 31 (2000).

determination over the emerging question of industrial gold mining. Made up of numerous Haitian social movement, peasant, and human rights groups, by January 2013, the Kolektif Jistis Min (KJM) had uncovered important information about U.S. and Canadian companies that held permits to research, explore, and exploit gold in Haiti.[54] However, they also had many open questions and sought support in advancing their objectives. The Clinic and KJM began to hold exploratory discussions aimed at determining how we might work together. At first, we framed the engagement as one aimed at advancing human rights in the gold mining sector. Now, many years later, we see the work as joint opposition to the development of the Haitian gold mining sector itself. This shift, from a position held out as "neutral" concerning extractives in Haiti, to one in which we jointly voice our opposition to extractivism itself, encapsulates our learning over these past years.

During this time, we have done much together.[55] Some of our work has looked like traditional human rights advocacy, including a hearing before the Inter-American Commission on Human Rights,[56] a comprehensive report on the mining sector,[57] shadow reports sub-

[54] Kolektif Jistis Min Ayiti, FACEBOOK, https://www.facebook.com/Kolektif-Jistis-Min-ayiti-1731000047135737 [https://perma.cc/EXS2-BLAE]; *see also Extraction minière en Haïti, le pays pourra-t-il supporter les conséquences environnementales ?*, LE NOUVELLISTE (Mar. 8, 2021), https://www.lenouvelliste.com/article/227029/extraction-miniere-en-haiti-le-pays-pourra-t-il-supporter-les-consequences-environnementales [https://perma.cc/NG75-36E9] (describing the founding, purpose, and work of KJM); *Contre la publication d'un décret sur les mines*, LE NOUVELLISTE (Oct. 1, 2015), https://www.lenouvelliste.com/article/150573/contre-la-publication-dun-decret-sur-les-mines [https://perma.cc/FA92-QLWY] (concerning KJM resistance to executive decree on mining).

[55] It is important to note that much of our joint work was made possible through the leadership of Haitian activists including Nixon Boumba, who is coauthor of an Article in this Volume. *See* Margaret Satterthwaite & Nixon Boumba, *Tout Moun se Moun: Critical Legal Empowerment for Human Rights in Haiti*, 97 N.Y.U. L. REV. 1566 (2022). It was also the result of the visionary work of a talented American lawyer and former GJC student: Ellie Happel, now Associate Director of the GJC and directing the Clinic's Haiti and Caribbean Climate Justice work, who lived in Port-au-Prince for more than five years. This proximity was both crucial and rare.

[56] *Global Justice Clinic Student Testifies Before Inter-American Commission on Human Rights*, NYU LAW (Apr. 3, 2015), https://www.law.nyu.edu/news/Global-Justice-Clinic-IACHR-testimony-Haiti-mining-Etienne-Chenier-Lafleche [https://perma.cc/6XDU-4U9C]; *Global Justice Clinic and Haitian Partners Granted Hearing Before IACHR*, CTR. FOR HUM. RTS. & GLOB. JUST. (Mar. 6, 2015), https://www.chrgj.org/2015/03/06/global-justice-clinic-and-haitian-partners-granted-hearing-before-iachr [https://perma.cc/8JJT-KGYH].

[57] GLOB. JUST. CLINIC, N.Y. UNIV. SCH. OF L. & HAITI JUST. INITIATIVE, UNIV. OF CAL. HASTINGS COLL. OF THE L., BYEN KONTE, MAL KALKILE? HUMAN RIGHTS AND ENVIRONMENTAL RISKS OF GOLD MINING IN HAITI (2015) [hereinafter BYEN KONTE], https://www.chrgj.org/wp-content/uploads/2016/09/byen_konte_mal_kalkile_human_rights_and_environmental_risks_of_gold_mining_in_haiti.pdf [https://perma.cc/X4P2-NRF2].

mitted to various UN mechanisms,[58] careful analysis of a pro-company draft mining law,[59] and a complaint about the World Bank's role in advancing that bill lodged with the Inspection Panel (the complaint was thrown out on a technicality).[60] Other activities have been more innovative and obviously empowering, such as support for KJM's "10 Days of Action," in which KJM hosted anti-mining activists from Latin America and Africa for ten days of collective learning and exchange,[61] and a rights-based, participatory baseline study on water that we conducted with local communities sitting inside a gold mining permit.[62]

Although it would be possible to identify varying levels of "success" and "failure" for different aspects of this work, what seems most important at this time of great tumult—in Haiti and the world more broadly—is that we have found ways to create bonds of true solidarity across vast divides of privilege, geography, language, culture, education, and more. We have been able—through humility, listening, and the forging of a collective through honest grappling with issues of power—to collaborate in ways that feel, at times, like a little bit of justice.

The language of critical legal empowerment gives us a new framework to articulate the goals we seek and the ways we do our work. Not only do we engage in a collective effort, but we also endeavor to ensure those whose rights are most impacted are in the lead, that they can use and shape the law, and that they can demand transformation in systems enacting injustice. In order to equip law students to partner

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[58] *See, e.g.*, FRANCISCANS INT'L & GLOB. JUST. CLINIC, N.Y. UNIV. SCH. OF L., CONTRIBUTION TO THE LIST OF ISSUES ON HAITI (Mar. 27, 2020).

[59] BYEN KONTE, *supra* note 57, at 164–99; Glob. Just. Clinic, N.Y. Univ. Sch. of L., *Haiti's Emerging Mining Sector*, CTR. FOR HUM. RTS. & GLOB. JUST., https://www.chrgj.org/wp-content/uploads/2017/08/Brief-Analysis-of-2014-Mining-Law_Global-Justice-Clinic_8.2017-1.pdf [https://perma.cc/QP2C-VMB7].

[60] Press Release, Ctr. for Hum. Rts. & Glob. Just., Haitian Communities File Complaint About World Bank-Supported Mining Law (Jan. 7, 2015), https://www.chrgj.org/2015/01/07/haitian-communities-file-complaint-about-world-bank-supported-mining-law-2 [https://perma.cc/4AQQ-GAKV]; Letter from Kolektif Jistis Min to Dilek Barlas, Exec. Sec'y, WBG Inspection Panel (Jan. 7, 2015), https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/ENG-Complaint_FINAL.pdf [https://perma.cc/7P4M-YSD4]; Memorandum from Gonzalo Castro de la Mata, Chairman, WBG Inspection Panel, to Exec. Dirs., Int'l Dev. Ass'n (Feb. 6, 2015) https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/100-Notice%20of%20Non-Registration%28English%29.pdf [https://perma.cc/B64P-RSAE].

[61] *Momentum on Halting Mining*, AM. JEWISH WORLD SERV., https://www.ajws.org/stories/momentum-on-halting-mining [https://perma.cc/9ZXS-DBDP].

[62] Press Release, Glob. Just. Clinic, N.Y. Univ. Sch. of L., Industrial Gold Mining Poses Serious Risks to Water in Northern Haiti (Dec. 11, 2018), https://www.chrgj.org/wp-content/uploads/2018/12/181211_Press-Release_GJC.pdf [https://perma.cc/CC77-DFKQ].

with communities, we must identify the skills, methods, and approaches that will enable them to do so. Is it possible to teach humility, self-critique, and deep commitment—all while ensuring students are prepared to engage in legal analysis, argument, and writing? I believe it is possible—though it demands a shift in how we conceive of the curriculum, teaching, and work of the Clinic. We now spend more time learning directly from our community partners, thinking about how to shift material, intellectual, and legal resources, and asking when and where we could make more space for legal work to be democratized.

CONCLUSION

These three stories are woven together by a need for lawyers to recognize—and follow—the leadership of those who are the targets of injustice, demand accountability of lawyers to rights-holders, and require engagement with community demands—whether supported by the existing law or not. These relationships are "grounded in acts of translation, trust, and transformation" and foundational to "shifting power, building individual and collective agency, and protecting human rights."[63]

The collection of Articles in this special Volume brings forward the themes and strategies discussed in the *Critical Legal Empowerment* Symposium. We hear directly from frontline organizers, attorneys, and researchers who call for the redistribution of legal power to the grassroots level. The pieces broaden our collective understanding of how communities and movements in the United States are engaging with the law and legal systems to advance their rights and to resist exclusion and oppression. Such political power is needed to change the global systems that have led to radical inequality

[63] Dhital & Walton, *supra* note 12, at 584 ("Translation . . . democratizes laws and legal systems into a language that communities can understand . . . . Trust . . . is an act of inclusive decision making and is foundational to thriving relationships between organizations and community partners. Transformation is . . . [when] individuals and communities reclaim their power . . . and rebuild systems that work for everyone."); *see also* Krystina François, Sec'y, The Black Collective, Bernstein Institute for Human Rights and *N.Y.U. Law Review* Symposium: Critical Legal Empowerment, Community-Driven Litigation: Transferring Legal Power to Community (Feb. 25, 2022), https://www.youtube.com/watch?v=8fxfvB8udug [https://perma.cc/AU9N-F5YX] ("Trust and that relationship building is, I believe, the secret sauce to really great lawyer-organizer collaboration."); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 917 (1992) ("The lawyer as translator also does not act as mere intermediary between the client and the legal system. Instead, the lawyer acts as facilitator, one who enables dialogue across lines of social difference between the client, law, and legal decisionmaker[,] . . . to establish connection and understanding between clients and decisionmakers.").

and build a more diverse and just legal ecosystem. In these instances, critical legal empowerment can ensure that those who are directly impacted are the authors of their own liberation and can demand transformation of the law.[64]

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[64] *See* Gerardo Reyes Chavez, Member Leader, Coal. of Immokalee Workers' Union, Bernstein Institute for Human Rights and *N.Y.U. Law Review* Symposium: Critical Legal Empowerment, Looking Ahead: Building Alternatives, Transforming Structures (Feb. 25, 2022), https://www.youtube.com/watch?v=84AUsE7rDYQ [https://perma.cc/S9C2-JURW] ("This is not an issue of us wanting to do the right thing because it is moral. . . . It's about building the power that's necessary for workers so that they can have their autonomy in terms of what's needed on codes like the [Universal Declaration of Human Rights].").

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

About the mandate

Special Rapporteur on the independence of judges and lawyers

Share

Mandate

In 1994, the Commission on Human Rights, in resolution **1994/41**, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, decided to appoint, for a period of three years, a Special Rapporteur on the independence of judges and lawyers. Like other Special Procedures, this mandate was assumed by the Human Rights Council (General Assembly resolution **60/251**), and extended for one year, subject to the review to be undertaken by the Council (Human Rights Council decision **2006/102**).

In June 2008, the mandate of the Special Rapporteur on the independence of judges and lawyers was subject to review undertaken by the Human Rights Council and extended for a period of three years. The mandate was further extended by resolution **8/6**, resolution **17/2**, resolution **26/7** and resolution **35/11**. The ma

(a) To inquire into any substantial allegations transmitted to him or her and to report his or her conclusions and recommendations thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) To identify ways and means to improve the judicial system, and make concrete recommendations thereon;

(d) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers and court officials;

(e) To apply a gender perspective in his or her work;

(f) To continue to cooperate closely, while avoiding duplication, with relevant United Nations bodies, mandates and mechanisms and with regional organizations;

(g) To report regularly to the Council in accordance with its programme of work, and annually to the General Assembly.

In the discharge of these functions:

(a) The Special Rapporteur acts on information submitted to his/her attention concerning alleged violations relating to the independence and impartiality of the judiciary and the independence of the legal profession by sending allegation letters and urgent appeals to concerned Governments to clarify and/or bring these cases to their attention. See Individual Complaints. The communications sent by the Special Rapporteur (both urgent appeals and allegations letters) are published in the ne communication report of special procedures.

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Rights Council, presenting his/her findings, conclusions and recommendations. See **Country Visits**.

(c) The Special Rapporteur presents annual thematic reports to the Human Rights Council (June session) and the General Assembly highlighting important issues or areas of concern related to the mandate. See **Annual Reports**.

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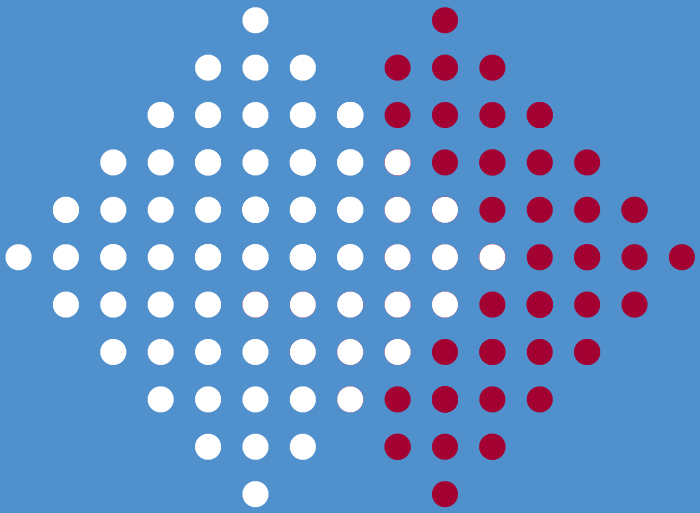
THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT



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United Nations Office on Drugs and Crime

043

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

UNITED NATIONS
Vienna, 2018

045

In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary. ECOSOC invited States to encourage their judiciaries to take into consideration the Principles when reviewing or developing rules with respect to judicial conduct.

ECOSOC 2006/23

STRENGTHENING BASIC PRINCIPLES OF JUDICIAL CONDUCT

The Economic and Social Council,

Recalling the Charter of the United Nations, in which Member States affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Recalling also the Universal Declaration of Human Rights, which enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Recalling further the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,[1] which both guarantee the exercise of those rights, and that the International Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

[1] General Assembly resolution 2200 A (XXI), annex.

Recalling the United Nations Convention against Corruption,[2] which in its article 11 obliges States parties, in accordance with the fundamental principles of their legal systems and without prejudice to judicial independence, to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, including rules with respect to the conduct of members of the judiciary,

Convinced that corruption of members of the judiciary undermines the rule of law and affects public confidence in the judicial system,

Convinced also that the integrity, independence and impartiality of the judiciary are essential prerequisites for the effective protection of human rights and economic development,

Recalling General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, in which the Assembly endorsed the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985,[3]

Recalling also the recommendations adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo from 29 April to 8 May 1995,[4]

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[2] General Assembly resolution 58/4, annex.

[3] See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex.

[4] See A/CONF.169/16/Rev.1, chap. I, resolution 1, sect. III.

concerning the independence and impartiality of the judiciary and the proper functioning of prosecutorial and legal services in the field of criminal justice,

Recalling further that in 2000 the Centre for International Crime Prevention of the Secretariat invited a group of chief justices of the common law tradition to develop a concept of judicial integrity, consistent with the principle of judicial independence, which would have the potential to have a positive impact on the standard of judicial conduct and to raise the level of public confidence in the rule of law,

Recalling the second meeting of the Judicial Group on Strengthening Judicial Integrity, held in 2001 in Bangalore, India, at which the chief justices recognized the need for universally acceptable standards of judicial integrity and drafted the Bangalore Principles of Judicial Conduct,[5]

Recalling also that the Judicial Group on Strengthening Judicial Integrity thereafter conducted extensive consultations with judiciaries of more than eighty countries of all legal traditions, leading to the endorsement of the Bangalore Principles of Judicial Conduct by various judicial forums, including a Round Table Meeting of Chief Justices, held in The Hague on 25 and 26 November 2002, which was attended by senior judges of the civil law tradition as well as judges of the International Court of Justice,

Recalling further Commission on Human Rights resolution 2003/43, on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, in which the Commission took

[5] E/CN.4/2003/65, annex.

note of the Bangalore Principles of Judicial Conduct and brought those principles to the attention of Member States, relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration,

Recalling Commission on Human Rights resolution 2003/39 on the integrity of the judicial system, in which the Commission emphasized the integrity of the judicial system as an essential prerequisite for the protection of human rights and for ensuring that there was no discrimination in the administration of justice,

1. *Invites* Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary;

2. *Emphasizes* that the Bangalore Principles of Judicial Conduct represent a further development and are complementary to the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolutions 40/32 and 40/146;

3. *Acknowledges* the important work carried out by the Judicial Group on Strengthening Judicial Integrity under the auspices of the United Nations Office on Drugs and Crime, as well as other international and regional judicial forums that contribute to the development and dissemination of standards and measures to strengthen judicial independence, impartiality and integrity;

4. *Requests* the United Nations Office on Drugs and Crime, within available extrabudgetary resources, not excluding the use of

existing resources from the regular budget of the Office[6] and in particular through its Global Programme against Corruption, to continue to support the work of the Judicial Group on Strengthening Judicial Integrity;

5. *Expresses appreciation* to Member States that have made voluntary contributions to the United Nations Office on Drugs and Crime in support of the work of the Judicial Group on Strengthening Judicial Integrity;

6. *Invites* Member States to make voluntary contributions, as appropriate, to the United Nations Crime Prevention and Criminal Justice Fund to support the Judicial Group on Strengthening Judicial Integrity, and to continue to provide, through the Global Programme against Corruption, technical assistance to developing countries and countries with economies in transition, upon request, to strengthen the integrity and capacity of their judiciaries;

7. *Also invites* Member States to submit to the Secretary-General their views regarding the Bangalore Principles of Judicial Conduct and to suggest revisions, as appropriate;

8. *Requests* the United Nations Office on Drugs and Crime, within available extrabudgetary resources, not excluding the use of existing resources from the regular budget of the Office,[7] to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Group on Strengthening Judicial Integrity

[6] This language does not provide a basis for an increase in the regular budget or requests for supplemental increases.

[7] This language does not provide a basis for an increase in the regular budget or requests for supplemental increases.

and other international and regional judicial forums, to develop a technical guide to be used in providing technical assistance aimed at strengthening judicial integrity and capacity, as well as a commentary on the Bangalore Principles of Judicial Conduct, taking into account the views expressed and the revisions suggested by Member States;

9. *Requests* the Secretary-General to report to the Commission on Crime Prevention and Criminal Justice at its sixteenth session on the implementation of the present resolution.

ANNEX

Bangalore Principles of Judicial Conduct

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge,

WHEREAS the International Covenant on Civil and Political Rights[8] guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law,

[8] General Assembly resolution 2200 A (XXI), annex.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions,

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice,

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law,

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society,

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system,

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country,

AND WHEREAS the Basic Principles on the Independence of the Judiciary[9] are designed to secure and promote the independence of the judiciary and are addressed primarily to States,

[9] See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

Value 1
Independence

Principle

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.

1.5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

Value 2
Impartiality

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

2.1. A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

Such proceedings include, but are not limited to, instances where:

(a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or

(c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3
Integrity

Principle

Integrity is essential to the proper discharge of the judicial office.

Application

3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4
Propriety

Principle

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application

4.1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4. A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7. A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8. A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgement as a judge.

4.9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11. Subject to the proper performance of judicial duties, a judge may:

(a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

(b) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

(c) Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

(d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12. A judge shall not practise law while the holder of judicial office.

4.13. A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14. A judge and members of the judge's family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16. Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5
Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not

limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5. A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6
Competence and diligence

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Application

6.1. The judicial duties of a judge take precedence over all other activities.

6.2. A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3. A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges.

6.4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6. A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Implementation

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

Definitions

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge, including law clerks;

"Judge" means any person exercising judicial power, however designated;

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household;

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

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Protection of lawyers against undue interference in the free and independent exercise of the legal profession

Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán

Summary

In the present report, which is being submitted pursuant to resolution 44/8, the Special Rapporteur addresses the issue of the protection of persons who practise law, since the free exercise of the legal profession is an indispensable element of the judicial guarantees that ensure a fair trial and the protection of human rights. The Special Rapporteur describes the international and regional standards that are aimed at protecting the legal profession.

The Special Rapporteur notes with concern a global increase in practices that undermine, limit, restrict and hinder the practice of law. This is especially true for lawyers whose activities are focused on the fight against corruption, the defence of human rights or the protection of groups in vulnerable situations.

In his report, the Special Rapporteur identifies trends and patterns of interference in and attacks on the legal profession. He also describes the means used to carry out such attacks, including interference in bar associations, legislation, physical and psychological abuse of lawyers and their families, defamation in the media and in social media, arbitrary disciplinary proceedings, use of the judicial system and the police corps. The Special Rapporteur has also identified violations of professional secrecy, as well as searches of the offices of legal professionals and seizure of their property.

The Special Rapporteur stresses that persons who practise law play a fundamental role in the consolidation of the rule of law and the protection of human rights. States have a duty to guarantee that these persons can exercise their profession without undue restrictions. The Special Rapporteur concludes his report with recommendations to member States on how to protect persons practising law.

I. Introduction

1. Lawyers and the free practice of the legal profession are indispensable to the rule of law, the protection of human rights and an independent judicial system. The free practice of the legal profession helps to ensure access to justice, oversight of the State authorities and the protection of due process and judicial guarantees. States should ensure that those who practise law are able to do so free from intimidation, hindrance, harassment and interference.

2. The Special Rapporteur notes with concern a global increase in practices that undermine, limit, restrict and hinder the practice of law. Lawyers are especially vulnerable when their activities are focused on the fight against corruption, the defence of human rights, women's rights, the protection of ethnic, racial, religious or national minorities, indigenous peoples, the LGBTQI+ community, the environment or other issues of public relevance. Restrictions on the work of lawyers have increased as a result of the measures adopted by the States in response to the coronavirus disease (COVID-19) pandemic.[1]

3. The Special Rapporteur has received information indicating that, between 2010 and 2020, more than 2,500 lawyers were killed, detained or kidnapped in different regions of the world.[2] The information includes homicides, prosecutions and attempts to undermine the independence of the profession. The Special Rapporteur is therefore submitting this report on actions that jeopardize the free exercise of the legal profession.

4. In 2018, the Special Rapporteur submitted to the General Assembly a report on the rights of bar and professional associations of lawyers.[3] Various forms of interference in the independence of the associations were analysed and a series of good practices to guarantee the independence and effectiveness of bar associations were highlighted.

5. This report provides an account of the difficulties and obstacles faced by lawyers and of the mechanisms and strategies used to undermine their work and independence. It also puts forward recommended measures to strengthen the free practice of law, which is a fundamental component of an independent system of the administration of justice.

6. The Special Rapporteur wishes to highlight the work done in the protection and consolidation of the rule of law for all persons exercising legal functions, whether or not they have the official status of lawyers. The international principles and standards on the independence of the legal profession and its free exercise, in particular the Basic Principles on the Role of Lawyers,[4] are essential elements that should serve as a guide for those who practise law, as well as for their professional associations, and should also be upheld by State authorities.

7. The Special Rapporteur publicly circulated a questionnaire requesting input from States, civil society organizations and professional associations of lawyers. At the close of the survey,[5] 24 responses had been received from member States, 22 from civil society organizations and 23 from bar associations, for a total of 69 responses. The Special Rapporteur is grateful for the responses and emphasizes that participation in the survey was essential in order to have information and criteria for analysis based on the broad and free participation of a range of actors.

8. The Special Rapporteur expresses his appreciation to the International Bar Association's Human Rights Institute, the Council of Bars and Law Societies of Europe, the Cyrus R. Vance Center for International Justice and the Konrad-Adenauer-Stiftung for their help in organizing regional consultations with lawyers and members of civil society between November 2021 and January 2022, in preparation for this report. These consultations were carried out in Europe, Asia, Africa, the Middle East and North Africa, Central Asia and Latin America. The Special Rapporteur also wishes to thank the Human Rights Clinic of the

[1] A/HRC/47/35.
[2] Information provided for the preparation of this report in November 2021.
[3] A/73/365.
[4] A/CONF.144/28/Rev.l.
[5] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.

Human Rights Research and Education Centre at the University of Ottawa for the considerable support it provided in the preparation of this report.

II. International standards

A. International Covenant on Civil and Political Rights

9. Article 14 of the International Covenant on Civil and Political Rights refers to the right to equality before the courts and the right to appear before a competent, independent and impartial tribunal. The right to choose one's counsel is provided for in paragraph 3 (b) of the same article.

10. Article 14 (3) refers to the right to legal representation and establishes minimum guarantees for individuals charged with a crime, including the possibility of defending themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.

11. Harassment of persons practising law may result in violations of the rights of clients including the right to due process (article 14 of the Covenant), to liberty and legal security (article 9 of the Covenant) and to freedom from torture or other ill-treatment (article 7 of the Covenant).

12. The Human Rights Committee[6] has established that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

13. In general comment No. 13 (1984), the Committee emphasizes that lawyers should be able to counsel and to represent their clients in accordance with their professional standards and judgment without restrictions, influences, pressures or undue interference. This interpretation supports the idea that, in order to comply with their obligations under the Covenant, States parties must refrain from interfering in judicial proceedings and also from influencing, pressuring or interfering in any way with the ability of lawyers to counsel and represent their clients.

14. The Human Rights Council, in line with international law, has established that all States must guarantee the independence of lawyers and their ability to perform their functions accordingly, by taking effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional functions without interference, harassment, threats or intimidation of any kind.[7]

B. Basic Principles on the Role of Lawyers

15. In accordance with the Basic Principles on the Role of Lawyers, States must ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and that they do not suffer and are not threatened with prosecution or other administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (principle 16).

16. In accordance with principle 18, lawyers must not be identified with their clients or their clients' causes as a result of discharging their functions.

[6] General recommendation No. 32 (2007), para. 10.

[7] Human Rights Council resolution 35/12.

C. Declaration on Human Rights Defenders

17. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), adopted by consensus by the General Assembly in 1998, is aimed at protecting all human rights defenders, including lawyers.[8] The Declaration makes clear that States must take all necessary measures to ensure the protection of human rights defenders by the competent authorities against all forms of violence, threats, retaliation, de facto or de jure discrimination, pressure or any other arbitrary action related to the legitimate exercise of the rights established in the Declaration (article 12).

D. Inter-American system of human rights

18. The protection of lawyers in the Inter-American system is based on the interpretation of regional human rights instruments, in particular, the provisions on the right to a fair and impartial trial, the right of access to justice, the separation of powers and respect for the rule of law.[9]

19. In this system, the obligation to respect the independence of lawyers is established in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights[10] and the commitments set out in the Inter-American Democratic Charter.[11]

20. This obligation is interpreted and enforced by the institutions that make up the regional human rights protection system: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, whose decisions are binding on the States Parties that have recognized its competence.

21. The American Convention on Human Rights specifies the obligations of States to ensure that any person may seek protection and justice for acts that violate his or her rights. Article 8 of the Convention establishes the right to a fair trial by an independent and impartial tribunal and further provides that every person accused of a criminal offence must have access to legal counsel.

22. The Inter-American Democratic Charter states that "the separation of powers and independence of the branches of government"[12] is one of the essential elements of democracy. It also states that respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.[13]

E. African system of human rights

23. Article 45 of the African Charter on Human and Peoples' Rights lists the functions of the African Commission on Human and Peoples' Rights, which include the establishment of principles on fundamental freedoms and the interpretation of the African Charter. Article 26 of the Charter imposes a duty on States Parties to guarantee the independence of the courts.

24. In 2003, the African Commission established the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa. Although these are not binding, they

[8] General Assembly resolution 53/144.

[9] Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas*, 2013; Advisory Opinion OC-11/90 on the exceptions to the exhaustion of domestic remedies (American Convention on Human Rights, art. 46 (1) and (2) (a) and (b)), 10 August 1990, para. 41; Inter-American Court of Human Rights, *Reverón Trujillo v. Venezuela*, judgment of 30 June 2009, Series C No. 197, paras. 146–147. Inter-American Court of Human Rights, *Zambrano Vélez et al. v. Ecuador*, judgment of 4 July 2007, Series C No. 166, para. 122.

[10] Organization of American States, American Convention on Human Rights, 22 November 1969.

[11] Organization of American States, Inter-American Commission on Human Rights, Inter-American Democratic Charter.

[12] Ibid., art. 3.

[13] Ibid., art. 4.

provide guidance to States on how to protect lawyers' ability to exercise their profession without interference, respect client confidentiality, and provide legal professionals with access to the information necessary to enable them to provide effective legal assistance. As established in the principles and guidelines, lawyers also enjoy penal and civil immunity for statements made in good faith in pleadings or proceedings and have the right to expeditious and fair disciplinary hearings conducted before an impartial body in accordance with a code of professional conduct.[14]

25. The African Commission has used its mandate, established in article 45 of the African Charter on Human and Peoples' Rights, to condemn attacks on lawyers and has consistently criticized the persecution of lawyers. The Commission's position was made clear after Kenyan human rights lawyer Willie Kimani was attacked and killed by police in 2016.[15] The Commission found that attacking lawyers created an atmosphere of fear and insecurity and that such actions were contrary to the rights established under the African Charter. It also called on the Kenyan authorities to investigate the matter and undertake reforms to ensure that the police fully respected and upheld human rights and to prevent the recurrence of similar incidents. In another case, in which activist lawyers were deported from the United Republic of Tanzania, the African Commission urged that State to take urgent corrective measures.[16]

F. European system of human rights

26. The right of any person arrested to be brought promptly before a judge for the purpose of deciding the lawfulness of his or her detention is set out in article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[17] Even though there is no explicit mention of a right to legal assistance, the European Court of Human Rights found that such a right may be considered to have been violated if the exclusion of a person's lawyers is considered as arbitrary in the circumstances of a given case.[18]

27. The right to defend oneself in person or through legal assistance of one's own choosing is established in article 6 of the European Convention on Human Rights. The right to a fair trial under this article includes access to legal counsel of the accused's choosing from the outset, as established by the European Court of Human Rights.[19] However, according to the Court, this right may be subject to certain restrictions when free legal assistance is provided and also when it is up to the courts to decide whether the interests of justice require that the lawyer appointed by them defend the accused.[20]

28. The national authorities must take into account the wishes of the accused with regard to his or her choice of legal representation, except where there are relevant and sufficient grounds to do otherwise.[21] In the absence of such grounds, a restriction on the free choice of counsel would amount to a violation of article 6[22] of the European Convention on Human Rights.

29. Article 8 of the European Convention on Human Rights concerns the right to respect for private and family life. According to the case law of the European Court of Human Rights, the search of lawyers' offices for the purpose of finding incriminating evidence relating to

[14] See https://www.achpr.org/legalinstruments/detail?id=38.
[15] See https://achpr.org/pressrelease/detail?id=129.
[16] See https://www.achpr.org/pressrelease/detail?id=76.
[17] See https://echr.coe.int/Documents/Convention_ENG.pdf.
[18] A/71/348, para. 26. European Court of Human Rights, *Lebedev v. Russia*, judgment of 25 October 2007.
[19] *Atristain Gorosabel v. Spain*, judgment of 18 January 2022.
[20] *Croissant v. Germany*, judgment of 25 September 1992, para. 29.
[21] European Court of Human Rights, *Vitan v. Romania*, judgment of 25 March 2008, application No. 42084/02, para. 59.
[22] European Court of Human Rights, *Dvorski v. Croatia*, judgment of 20 October 2015, application No. 25703/11, para. 76.

such lawyers' clients runs counter to article 8. Furthermore, the notion of "private life" should not be taken to exclude activities of a professional or business nature.[23]

30. Recommendation No. R(2000)21 of the Committee of Ministers of the Council of Europe, for its part, stresses the need to take all necessary measures to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public in the light of the provisions of the European Convention on Human Rights.[24]

31. On 30 January 2019, the Committee of Ministers of the Council of Europe tasked the European Committee on Legal Co-operation to prepare a feasibility study on the added value of a European convention on the profession of lawyer. This initiative was supported by the European Committee on Legal Co-operation.[25]

32. According to the information received, starting in the spring of 2022, a committee of experts will be set up for the purpose of elaborating, over a two-year period, a draft legal instrument aimed at strengthening the protection of the profession of lawyer and the right to practise freely, without prejudice or restraint. The draft will be submitted in due course to the Committee of Ministers of the Council of Europe for adoption.

33. The Special Rapporteur has followed the development of various initiatives in connection with the preparation of a convention and welcomes the fact that the committee of experts will, this year, begin its work, in which the Special Rapporteur and the major organizations of lawyers in the region will participate as observers. Of the ideas that have been put forward at this preliminary stage, the Special Rapporteur notes positively the proposals that the resulting convention should be open to accession by non-member States of the Council of Europe. Such an instrument would be strengthened if its geographic scope of protection were broadened and more countries and people had access to it.

III. Trends and patterns of interference in the free practice of law

34. There are several patterns of interference in the exercise of the legal profession. Those who defend human rights in cases related to national security or corruption are in a particularly sensitive situation. Another issue is the arbitrary identification of the lawyer with his client.

A. Lawyers who defend human rights

35. In 2021, the Special Rapporteur sent communications to Cameroon, China, Egypt, the Russian Federation, the Philippines, Guatemala, Iran (Islamic Republic of), Lebanon, Morocco, Pakistan, Rwanda, Sri Lanka, Tajikistan, Turkey and the State of Palestine, concerning disappearances, arrests, coercive actions and threats involving lawyers and human rights defenders.[26]

36. In February 2019, the European Parliament held a hearing on attacks on lawyers and human rights defenders. Countries in which the activities of lawyers are hindered and may result in prosecution or arrest included Azerbaijan, China, Kazakhstan and Turkey.[27] In 2020,

[23] European Court of Human Rights, *Niemietz v. Germany*, judgment of 16 December 1992.

[24] See https://rm.coe.int/16804c392c.

[25] See https://www.ccbe.eu/actions/european-convention-on-the-profession-of-lawyer/.

[26] See communications LBN 8/2021, IRN 28/2021, TJK 2/2021, EGY 8/2021, PSE 4/2021, TUR 10/2021, LKA 2/2021, RWA 1/2021, GTM 5/2021, MAR 4/2021, EGY 5/2021, IRN 16/2021, RUS 7/2021, PHL 3/2021, TUR 9/2021, IRN 12/2021, CHN 4/2021, PAK 3/2021 and CMR 1/2021. All the communications referenced in the present report are available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments.

[27] See https://www.europarl.europa.eu/committees/en/hearing-on-attacks-on-the-legal-professi/product-details/20190131CHE05821.

several Zimbabwean lawyers were arrested and harassed because of their professional and human rights activities.[28]

37. In 2018, four Kazakh human rights activists were sentenced to prison for their social media activities and peaceful protests. Their defence lawyers suffered political pressure from prosecutors, the State security service and judges. In protest against the accusations made against him and the violations of his procedural rights, one of the activists slashed his wrists during the hearings. The court took disciplinary action against his lawyer, allegedly for failing to prevent this desperate act.[29]

38. In 2019, several organizations condemned the disciplinary actions of the Azerbaijan Bar Association against a human rights lawyer. The lawyer's suspension and disbarment was considered by the International Bar Association's Human Rights Institute as a sign that the Presidium of the Azerbaijan Bar Association is failing to support the development of the legal profession in relation to human rights cases in Azerbaijan.[30]

39. Violent acts against lawyers and other human rights defenders are sometimes perpetrated by organized political and nationalist groups. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has reported that, in Ukraine, organized political and nationalist groups have been involved in attacks against judges, lawyers, activists and other people considered to be "traitors" or "separatists".[31]

40. In the area of human rights advocacy, it is worth mentioning the Esperanza Protocol, an initiative led by the Center for Justice and International Law. It is the first international tool to promote an effective response to threats against human rights defenders. It addresses the threats faced by human rights defenders, journalists and others who work to uphold democracy and the full enjoyment of human rights around the world, including those of lawyers.[32]

B. Cases related to national security

41. In some cases, law enforcement agencies themselves interfere with the legitimate work of lawyers. In others, human rights violations of persons practising law arise from within the judicial system. For example, the Human Rights Council found that military courts and special counter-terrorism courts have sometimes been used to silence and intimidate persons practising law.[33]

42. According to a human rights organization, in Turkey, the Public Prosecution Service routinely investigates and opens cases against lawyers under the Counter-Terrorism Act (No. 3713) for activities undertaken in the discharge of their professional duties and have associated them with the alleged crimes of their clients.[34] Various international human rights organizations have denounced the abusive use of the Counter-Terrorism Act to persecute persons practising law.[35] Between 2016 and 2022, more than 1,600 lawyers were prosecuted and 615 were placed in pretrial detention. A total of 474 lawyers have been sentenced to 2,966 years of imprisonment on the grounds of membership in a "terrorist organization"

[28] See https://kubatana.net/2020/08/16/law-society-of-zimbabwe-statement-on-deteriorating-human-rights-situation-in-zimbabwe/.

[29] See https://www.europarl.europa.eu/committees/en/hearing-on-attacks-on-the-legal-professi/product-details/20190131CHE05821.

[30] See https://www.ibanet.org/article/CC9DBFCB-43B6-4A4F-86ED-201D6EFAD95A.

[31] See the conference room paper prepared by OHCHR on the human rights situation in Ukraine, available at https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session40/list-reports.

[32] See https://cejil.org/en/press-releases/the-esperanza-protocol-first-international-tool-to-respond-to-threats-against-human-rights-defenders/.

[33] A/HRC/44/54.

[34] See https://hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey.

[35] See https://fidu.it/language/en/turkey-third-party-intervention-to-the-echr-in-the-case-of-saglam-against-turkey/.

(Criminal Code, art. 314).[36] Pretrial detention, arrest and searches of lawyers' homes are considered to be human rights violations when they are based on mere supposition and there is no evidence to justify such measures.[37]

43. In Myanmar, following the coup d'état that took place on February 2021, lawyers who defended the protesters were arrested and detained on grounds of national security.[38] Since 2014, Egyptian lawyers have suffered waves of repression amid a human rights crisis resulting from the Government's campaign against Islamists, whom they have accused of being terrorists. They have been repeatedly arrested and persecuted to force them to avoid political cases. At the peak of the crisis in November 2015, more than 200 lawyers were behind bars.[39]

44. In Iraq, many lawyers have been reportedly intimidated, threatened or killed in the context of terrorist attacks perpetrated by insurgent groups.[40]

45. In the course of the consultations held in connection with the present report, it was reported that, in the Syrian Arab Republic, violations in Government-controlled areas are often indirect, with security often cited as a basis for related acts or, in some cases, carried out by the bar association. In some areas of the country, attacks – including, in many cases, physical assaults on lawyers – are perpetrated directly by the de facto authorities.[41]

46. Handling the COVID-19 pandemic as a matter of national security has led to the imposition of a number of restrictions on the activities of lawyers. In many countries, the adoption of pandemic-related measures has made it more difficult for lawyers to advise their clients. This aspect of their work was not considered an essential service, and so the provision of legal services was blocked, as were visits to detention centres. Violations of the principle of confidentiality and the denial of rights normally guaranteed in the lawyer-client relationship were also found.[42]

47. In Lebanon in 2020, a lawyer was beaten in broad daylight by members of the internal security forces, allegedly for violating the Beirut lockdown order. At the time, the officers reportedly threatened the Beirut Bar Association and its president.[43] In the Islamic Republic of Iran, women's rights lawyers and human rights activists who criticized the lockdown policies adopted in response to the pandemic have been illegally interrogated for defending their positions on social media.[44]

C. Cases of corruption

48. Corruption has a direct impact on the operation of State institutions and therefore on the enjoyment of human rights. Independent and effective justice is the main tool used by societies to effectively investigate and punish corruption cases, which is also the purpose of the obligations set out in the United Nations Convention against Corruption.

49. The Special Rapporteur has referred to this in several reports, most notably in his report to the General Assembly in 2017. As to the relevance and significance of the Convention, the Special Rapporteur has emphasized that[45] "as it is a key tool to address corruption, this Convention should also be seen as a fundamental international instrument for

[36] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[37] European Court of Human Rights, *Tercan v. Turkey*, application No. 6158/18, judgment of 29 September 2021.
[38] See https://www.ecba.org/extdocserv/projects/HR/20210315_HRC_ECBA_Myanmar.pdf.
[39] See http://www.aeud.org/2017/04/defendingandprotectinglawyers/#.WPna28Q-D-o.facebook.
[40] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[41] Information provided by the Middle East and North Africa region for the preparation of this report.
[42] A/HRC/47/35.
[43] See communication LBN 7/2021.
[44] See https://ecba.org/extdocserv/projects/HR/20201204_JointstatementNasrin.pdf.
[45] A/72/140, para. 29.

the protection of human rights, and it therefore warrants continued attention from the relevant competent bodies".

50. Evidence of corruption in the judiciaries of many countries has steadily grown in recent decades, so much so that the judiciary is perceived to be the second most corrupt institution, after the police.[46] In Equatorial Guinea, Guatemala and the Bolivarian Republic of Venezuela, lawyers, judges and prosecutors fighting against corruption and organized crime have been dismissed and forced into exile for their anti-corruption efforts in the political arena.[47]

51. In Slovakia, a number of lawyers have been in pretrial detention for over a year on charges that they defended members of organized crime. The bar association intervened through an amicus curiae and requested that the principle that one cannot be prosecuted for providing legal services be respected.[48]

52. In July 2020, a lawyer known for his work in defending anti-corruption protesters was arrested in Beirut and brutally beaten by a group of people in what appeared to be a murder attempt. Similar cases have been reported with regard to a considerable number of Lebanese lawyers.[49]

53. Similarly, in Guatemala or El Salvador, legal professionals are attacked and defamed for denouncing cases of corruption or abuse by the State authorities.[50]

D. Association of lawyers with their clients

54. This situation most often affects professionals working on political cases involving issues such as national minorities, the environment and human rights. Lawyers and paralegals subjected to pressure and attacks have been previously associated with their clients or their clients' interests.[51]

55. Lawyers in Cameroon or Ghana have criticized this type of association, which occurred even as they were assisting clients at a police station. During the reported incidents, the lawyers felt coerced and feared that the police would consider them participants in the alleged crime.[52] The Belgian, German, Slovak, Hungarian, Italian and Romanian bar associations have reported that the association of lawyers with their clients has led to attacks in respect of the exercise of lawyers' professional duties.[53] In Ukraine, lawyers directly involved in representing defendants in high-profile political cases have been murdered.[54]

56. In May 2021, the Special Rapporteur sent a communication to the Russian Federation concerning the arrest and detention of the lawyer Ivan Pavlov, in connection with the legitimate exercise of his professional activities in favour of a well-known opposition leader. On 30 April 2021, Federal Security Service agents searched Mr. Pavlov's hotel room in Moscow. Federal Security Service agents also searched his home, the office of Team 29 and Mr. Pavlov's summer cottage in the area of St. Petersburg. During the search, Federal Security Service agents allegedly seized most of the documents related to a politically

[46] Ibid, para. 41.
[47] A/75/172 and A/HRC/44/47.
[48] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[49] Ibid.
[50] Information provided by the Konrad-Adenauer-Stiftung for the preparation of this report.
[51] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[52] Information provided by the International Bar Association's Human Rights Institute in November 2020 for the preparation of this report.
[53] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[54] See https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-ENG.pdf.

sensitive case Mr. Pavlov was working on, including information subject to attorney/client confidentiality.[55]

IV. Means of interference

A. Interference in bar and professional associations of lawyers

57. The increasing interference of States in the organization, administration and functioning of lawyers' organizations and associations is also of particular concern to the Special Rapporteur, who previously analysed various forms of interference in the independence of lawyers' associations in 2018.[56] In that report, the Special Rapporteur highlighted legal and administrative obstacles that prevented lawyers from establishing or joining independent professional organizations, ranging from the political affiliation of their members to different forms of control exercised by the executive or judicial branch on entry into or continued practice of the legal profession, and threats of disciplinary action and intimidation directed at the members of bar associations. The Special Rapporteur reminded national authorities that they should support the establishment and work of bar associations without interfering in those processes.

58. In Zimbabwe, the amendment of the Legal Practitioners Act in July 2021 allowed the Government to increase its leverage over the Zimbabwe Bar Association through ministerial appointments and control of foreign funding.[57] In 2021, the Special Rapporteur sent a communication to the Islamic Republic of Iran regarding a series of legislative measures aimed at undermining the independence of bar associations.[58]

59. In Turkey, 78 investigations and prosecution proceedings are reported to have been launched against at least 68 members of the Diyarbakir Bar Association.[59] Two former presidents of the Bar Association, Fethi Gümüs and Mehmet Emin Aktar, were sentenced to 7 years and 6 months and 6 years and 3 months in prison, respectively, under counter-terrorism legislation.[60]

60. In 2020, Act No. 7249 entered into force, modifying the electoral system of the chambers of the bar and further restricting the independence of bar associations and the legal profession.[61] This law was adopted following the release by the Ankara Bar Association of a press statement criticizing a statement made by the Director General of Religious Affairs containing implicit anti-LGBTQI+ hate speech, and in spite of protests by the heads of Turkish bar associations.[62]

61. In Belarus, the new Law on the Bar and Advocacy[63] came into force in November 2021, authorizing the Government to intervene in the appointment of the heads of bar associations and their governing bodies.[64] At least 27 lawyers have been disbarred or suspended for speaking out against the recent wave of crackdowns in Belarus.[65] This is a

[55] See communication RUS 6/2021.

[56] A/73/365.

[57] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.

[58] See communication IRN 26/2021.

[59] See https://arrestedlawyers.files.wordpress.com/2021/04/ahm-yillik-rapor-30-martt-1617614102.pdf.

[60] Ibid.

[61] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statements/2020/EN_HRP_20201210_CCBE-Statement-on-the-situation-of-the-legal-profession-in-Turkey.pdf.

[62] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.

[63] See https://www.americanbar.org/groups/human_rights/reports/belarus--lawyers-under-threat--increasing-suppression-of-the-leg/.

[64] Information provided by the Council of Bars and Law Societies of Europe in November 2021 for the preparation of this report.

[65] See https://www.hrw.org/news/2021/10/26/belarusian-authorities-retaliate-against-lawyers-defending-human-rights.

direct attack on the independence of the justice system and the free exercise of the legal profession.[66]

62. In Lithuania, the executive branch launched several legislative initiatives directed against the Lithuanian Bar Association. These initiatives proposed, inter alia, a reform of the procedure for disciplinary action against lawyers through amendments to the Law on the Bar, empowering the Ministry of Justice to influence disciplinary proceedings. A bill on the civil service sought to exclude the Bar Association from the administration of all processes governing the legal profession, including bar examinations, admission to the Bar and disciplinary proceedings.[67] In El Salvador, the legislature is considering a bill on foreign agents which, according to Salvadoran and international organizations, could be used to restrict the defence of human rights.[68]

63. Civil society in the Bolivarian Republic of Venezuela has been speaking out against the instrumentalization of bar associations by State agencies. The measures that the Government has taken through the intermediary of the National Electoral Council have allegedly restricted the freedoms normally enjoyed by bar associations, in particular through the monitoring of their electoral processes, which has undermined their autonomy and internal working arrangements.[69]

64. Codes of professional conduct are another of the instruments sometimes used to intimidate and persecute lawyers. The Special Rapporteur emphasizes that codes of professional conduct for lawyers should respect their fundamental rights (including freedom of expression) and should be drafted by associations of lawyers themselves, and that, where such codes are established by law, the legal profession should be duly consulted at all stages of the legislative process.[70]

65. In many regions, bar associations are sometimes pressured into deleting their publications and comments on social networks.[71] Such conduct is entirely contrary to the Basic Principles on the Role of Lawyers.

B. Physical and psychological abuse of lawyers and their families

66. International lawyers' associations have reported policies of harassment of the legal profession in some countries. In 2021, the Council of Bars and Law Societies of Europe identified instances of physical and psychological abuse in 38 countries around the world, including Belarus, China, Egypt, the Islamic Republic of Iran, the Philippines, and Turkey.[72]

67. Together with the other thematic mandate holders of the Human Rights Council, the Special Rapporteur transmitted a communication to the Government of Turkey expressing concern about the detention of 48 lawyers, 7 trainee lawyers, 4 dismissed judges and 1 law graduate in September 2020 in Ankara.[73]

68. Between 2015 and 2020, a total of 1,323 human rights defenders, several of them lawyers, were killed. Most of these killings occurred in Latin America, and environmental human rights defenders were the primary victims.[74] It has been reported that 162 lawyers were killed in Honduras between 2009 and 2021.[75]

[66] A/73/365.
[67] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[68] Information provided by the Konrad-Adenauer-Stiftung for the preparation of this report.
[69] See https://accesoalajusticia.org/la-toma-del-poder-en-los-colegios-de-abogados-de-venezuela-2000–2020/.
[70] A/64/181, para. 53.
[71] Information provided by the Africa region for the preparation of this report.
[72] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/_REPORTS_-_RAPPORTS/2021/EN_2021_OVERVIEW-CCBE-LETTERS-2021.pdf.
[73] See communication TUR 18/2020.
[74] A/HRC/46/35.
[75] Information provided by the Vance Center for the preparation of this report.

69. In the Philippines, there have been 105 attacks on legal professionals since 2016, leaving 20 survivors and 85 dead.[76] In March 2021, the Philippine Senate adopted a resolution condemning the killing of and acts of violence against members of the legal profession and calling for necessary steps to be taken to ensure their safety and protection.[77] In the Philippines, impunity is linked to alleged anti-drug campaigns. The lack of effective measures increases the likelihood that perpetrators will not be held accountable for their actions.

70. The circumstances described above create a "culture of impunity" in which the perpetrators of such attacks are able to violate the rights of lawyers and their clients without consequence. Before being attacked, most of the lawyers targeted were publicly designated as enemies of the State and labelled as, for example, "communists" or "terrorists". The combination of such labels with the culture of impunity previously described is one of the primary explanations for the high rate of extrajudicial killings in the Philippines.[78]

71. On 7 November 2021, a bomb exploded outside the home of the parents of a certain lawyer in West Jakarta. The lawyer in question had previously investigated politicians who own mining businesses in West Papua. She is currently under criminal investigation on charges of incitement and dissemination of disinformation related to protests in the West Papua region in 2019. Since this incident, she has been living in exile in Australia.[79]

72. During the consultations, it was brought to light that some lawyers had had to flee their countries owing to threats or had been coerced into dropping certain cases or lawsuits when pressure was put on members of their families living in the country. In Pakistan, the national authorities are providing police protection for a lawyer and his family, who nonetheless continue to receive serious and credible threats.[80]

73. In September 2019, the Ukrainian National Bar Association reported the case of a lawyer who regularly faced threats directed at him and his family because of his work on a case involving the killing of a judge.[81] In Bosnia and Herzegovina, numerous lawyers have been attacked for carrying out their professional duties. The perpetrators of these attacks have not yet been identified.[82]

74. The Special Rapporteur is deeply concerned about the frequency with which the consultations carried out revealed situations of impunity for State agents who had attacked members of the legal profession. Such impunity extended to situations as serious as forced disappearances and extrajudicial executions.[83]

75. In November 2021, Lawyers for Lawyers and the Council of Bars and Law Societies of Europe expressed concern about the alleged torture of an Iranian human rights lawyer.[84] The Special Rapporteur has received information about an alleged increase in the number of cases of enforced disappearance of human rights defenders in the Sindh province of Pakistan.[85]

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[76] See https://defendlawyers.files.wordpress.com/2021/10/final-report-to-supreme-court-philippines-1-october-2021–1.pdf.

[77] Philippines, Senate Resolution No. 691 of 24 March 2021. Available at https://legacy.senate.gov.ph/lis/bill_res.aspx?congress=18&q=SRN-691.

[78] A/HRC/44/22.

[79] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Indonesia_-_Indonesie/2021/EN_HRL_20211203_Indonesia_Harassment-of-lawyer-Veronica-Koman.pdf.

[80] See communication PAK 9/2021.

[81] See https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-ENG.pdf.

[82] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Bosnia_and_Herzegovina_-_Bosnie-Herzegovine/2017/EN_HRL_20170228_Bosnia_and_Herzegovina_Attacks_against_lawyers.pdf.

[83] A/HRC/42/40 and A/HRC/44/22.

[84] See https://lawyersforlawyers.org/en/joint-letter-on-the-reported-torture-of-payam-derafshan/.

[85] See communication PAK 3/2021.

C. Defamation in the media

76. It is common for lawyers who defend and represent persons under investigation for or accused of security offences within the framework of counter-terrorism legislation or in relation to high profile political cases to face stigmatization or defamation in the media and on social networks. The pressure caused by such actions severely limits the free exercise of the legal profession by lawyers and paralegals.

77. A high proportion of the professionals consulted reported the proliferation of smear campaigns on social networks against lawyers and paralegals involved in cases that are sensitive for persons in political power.[86] As a result of such actions, the media and the general public may misinterpret, or fail to understand, the purpose of legal defence and the duty of legal professionals, which is to represent a client; this does not imply that the lawyer approves of the client's actions or is guilty of a crime for defending that client.

78. The Inter-American Commission on Human Rights has found that the criminalization of lawyers is sometimes preceded by actions such as statements by senior officials accusing them of committing crimes or illegal activities with a view to delegitimizing their work.[87]

79. The Special Rapporteur has observed that, on occasion, the media and users of social media make statements and value judgments that have the effect of increasing pressure on members of the legal profession, which is dangerous given their line of work. In the United Kingdom of Great Britain and Northern Ireland, in 2016, a campaign of harassment involving Members of Parliament and some media outlets was conducted against lawyers from the region of Ulster who had called for an investigation into acts committed by British soldiers in Northern Ireland.[88] In the Bolivarian Republic of Venezuela, the lack of independence in the criminal justice system has led to an increase in attacks against human rights defenders instigated by the Government and media outlets close to the Government; these attacks have gone unpunished.[89]

80. There have been reports of defamation campaigns against independent lawyers allegedly carried out by State authorities to influence the work of lawyers in Azerbaijan,[90] China, Mexico,[91] the Russian Federation and Turkey, among others.[92] In 2019, human rights organizations and activists in Mexico called for the cessation of the defamation of the lawyer of the parents of 43 missing trainee teachers from Ayotzinapa, following statements made by the former head of the Guerrero State Attorney General's Office, in which he claimed that the lawyer had obstructed investigations into the incident and was profiteering by defending the families of the missing students.[93]

D. Disciplinary procedures

81. The Special Rapporteur has repeatedly maintained that disciplinary proceedings against lawyers must be carried out in accordance with the procedural guarantees established

[86] Information provided by the Konrad-Adenauer-Stiftung for the preparation of this report.

[87] Criminalization of Human Rights Defenders, document No. 49/15, 31 December 2015, para. 15.

[88] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.

[89] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Venezuela_-_Venezuela/2015/EN_HRL_20151105_Venezuela__attacks_on_lawyers_2_.pdf.

[90] For information on Azerbaijan provided by Human Rights Watch, see http://www.hrw.org/en/europecentral-asia/azerbaijan. Specifically, see https://www.hrw.org/report/2010/10/26/beaten-blacklisted-and-behind-bars/vanishing-space-freedom-expression-azerbaijan.

[91] Information provided by the Vance Center for the preparation of this report.

[92] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.

[93] See https://hchr.org.mx/onu_dh_medios/investigador-que-dudo-de-la-version-de-la-pgr-sobre-los-43-se-dice-perseguido/.

in article 14 of the Covenant, among other norms.[94] It is therefore necessary to reiterate that the power to discipline lawyers should be vested in an independent body. The principle of the "natural judge" requires that the disciplinary authority be established by law.

82. Ambiguous grounds for disciplinary action open the door to overly broad or abusive interpretations and risk undermining the independence of the legal profession. Overly general formulations may also create uncertainty and unpredictability as to the conduct requiring disciplinary action, in breach of the principle of legality.[95] Consequently, the principles of legality, foreseeability and narrow interpretation, which apply in criminal matters, also apply, mutatis mutandis, to disciplinary matters.[96]

83. Lawyers are sometimes subject to temporary or permanent professional disqualification without due process or a final decision by the disciplinary authority that sets out all relevant legal grounds and evidence supporting the imposition of a disciplinary sanction leading to disbarment. In 2020, in the United Republic of Tanzania, a female lawyer was disbarred, allegedly as a result of statements she made in good faith in the legitimate exercise of the legal profession.[97]

84. The Special Rapporteur has documented multiple cases in which disciplinary proceedings against lawyers were handled by the executive branch.[98] It is reported that, in Hungary, in 2018, a group of lawyers was disqualified from practising law when their right to freedom of professional association was restricted.[99]

85. In Binding Precedent No. 5, the Supreme Court of Brazil established that it is not unconstitutional for a lawyer subject to disciplinary proceedings not to have access to legal counsel. This interpretation undermines the legal profession, since it means that lawyers may be sanctioned through administrative proceedings. In order for disciplinary proceedings to comply with international standards, the principles of due process and a fair hearing and the adversarial principle must be observed.[100]

86. In places such as Azerbaijan,[101] the Russian Federation,[102] India,[103] Japan,[104] Kazakhstan,[105] Kenya,[106] Maldives[107] and the United Republic of Tanzania,[108] an increasing number of disciplinary proceedings against lawyers handling cases involving human rights or politically sensitive topics have been brought on the basis of complaints submitted by the authorities. In the Russian Federation, the labelling of a lawyer as a "foreign agent" means that the authorities may file a motion to initiate disciplinary proceedings seeking his or her disbarment, as in the aforementioned case of the lawyer of a well-known political opponent.[109]

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94 A/HRC/38/38, para. 63; A/HRC/26/32 para. 90; and A/HRC/11/41, para. 61.
95 A/75/172, para. 17.
96 Inter-American Court of Human Rights, *López Lone et al. v. Honduras*, judgment of 5 October 2015, para. 257.
97 See communication TZA 5/2020.
98 A/HRC/23/43/Add.3, E/CN.4/2006/52/Add.3 and A/73/365.
99 Information provided by the Council of Bars and Law Societies of Europe for the preparation of this report.
100 Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
101 See https://ehrac.org.uk/wp-content/uploads/2021/03/EHRAC-Azerbaijani_Resource_guide_01–2.pdf. See also https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
102 See https://www.hrw.org/news/2021/09/27/russia-three-human-rights-groups-penalized.
103 Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
104 Ibid.
105 Ibid.
106 Ibid.
107 See https://www.icj.org/maldives-authorities-must-end-assault-on-the-legal-profession/.
108 See communication TZA 2/2021.
109 See https://lawyersforlawyers.org/en/russian-federation-authorities-must-cease-harassment-of-lawyer-ivan-pavlov/.

87. Lawyers in countries such as Belarus[110] and Turkey[111] have highlighted the fact that some groups of lawyers are not granted a licence to practise because they are associated with certain activities, such as the defence of human rights, the fight against corruption or the defence of minorities. This constitutes an attack on the free exercise of the legal profession and is a disguised sanction.[112]

88. The decision not to grant professional licences to lawyers associated with certain issues endangers future generations of lawyers interested in defending human rights and fundamental freedoms.[113] In 2021, the Qualification Commission for Legal Practice in Belarus revoked the licences of five lawyers, allegedly for providing legal services to opposition leaders and peaceful protesters.[114]

89. Disciplinary measures are a powerful weapon in the hands of Governments, allowing them to interfere with the professional activities of lawyers, in particular those handling cases brought against the State or representing causes or clients that may make them unpopular.[115] The establishment of an independent system for the consideration of disciplinary proceedings for alleged violations of the rules of professional ethics constitutes an important factor in the independence of the legal profession.[116]

E. Use of the judicial system and the police

90. Between 2020 and 2021, the Special Rapporteur received allegations of the use of coercion, detention, harassment and other practices against lawyers in connection with the lawyers' legitimate performance of their professional duties in countries such as Belarus, Cabo Verde, the Russian Federation, the Philippines, Haiti, Kuwait, Pakistan, Romania, the United Republic of Tanzania and Zimbabwe.[117]

91. In the Philippines, the Government has been repeatedly criticized for its harassment of lawyers and the impunity with which it treated the killing of dozens of lawyers during the pandemic. Most of these attacks have apparently been perpetrated by members of the President's counter-insurgency task force, or else by national security agencies and State security forces.[118]

92. In Cabo Verde, in March 2021, the lawyer Mr. Pinto Monteiro was arrested for reasons linked to the performance of his legitimate professional duties as defence counsel for a diplomat of the Bolivarian Republic of Venezuela.[119] In Romania, Mr. Robert Roșu was sentenced to 5 years' imprisonment in connection with the legitimate performance of his duties.[120]

93. There have been reports of the continued criminalization in Belarus of lawyers and journalists, many of whom are charged with economic crimes or have had their right to freedom of expression restricted, for providing legal assistance to protesters, civil society activists or journalists in the aftermath of the August 2020 elections.[121]

94. Attacks on lawyers and on the independence of the legal profession have been reported in the United Republic of Tanzania. The lawyers Jebra Kambole, Edson Kilatu and

[110] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers.
[111] Ibid.
[112] A/75/172.
[113] See https://www.omct.org/en/resources/reports/control-over-lawyers-threatens-human-rights.
[114] See communication BLR 5/2021.
[115] A/73/365, para. 71.
[116] A/71/348, paras. 94–95; and A/64/181, paras. 55–58.
[117] See communications RUS 6/2021, ROU 1/2021, KWT 1/2021, RUS 9/2020, HTI 3/2020, TZA 5/2020, PAK 9/2021, CPV 1/2021, BLR 9/2020, ZWE 4/2020; see also A/HRC/47/35.
[118] A/HRC/47/35, para. 34.
[119] See communication CPV 1/2021.
[120] See communication ROU 1/2021.
[121] See communication BLR 4/2021.

Tito Elia Magoti were disbarred and arrested for defending opposition political leaders, defending human rights and criticizing the country's justice system, respectively.[122]

F. Professional secrecy, searches and seizures

95. The Special Rapporteur has received information on the intervention of public authorities in the free exercise of the legal profession through searches of lawyers' offices and the interception of client-attorney communications for later use at trial.[123]

96. In Belgium, there have been reports of the illegal seizure, during searches of lawyers' offices, of documentation that was irrelevant to the purpose of search, for subsequent use in relation to other matters.[124] In Croatia, there are no exceptions in law to respect for professional secrecy, but in some cases lawyers are obliged to disclose information to the Anti-Money-Laundering Authority if there is a suspicion that money-laundering has occurred.[125] In 2020, the Romanian Bar Association reported its concern that lawyers' rights to professional secrecy had been violated by their being summoned to hearings as witnesses in cases against their clients and through abusive searches of their professional premises, from which documents are taken regardless of whether they relate to the investigation.[126]

97. According to the report of the Council of Bars and Law Societies of Europe, in France, it was revealed in June 2020 that the Financial Prosecutor's Office had studied the detailed telephone records of several law firms, even the telephone records of the Minister of Justice, with a view to identifying alleged informants within the judiciary who might have provided information to two individuals, both of whom were lawyers and also involved in a case under investigation.[127] In France, the Criminal Division of the Court of Cassation has ruled that correspondence between a lawyer and his or her client may be seized in the context of searches, provided that they do not concern the exercise of the right of defence.[128]

98. In the context of emergency measures enacted to address the COVID-19 pandemic, some States violated lawyer-client privilege. This occurred in various prisons where conversations were tapped, preventing lawyers from freely performing their duties.[129]

99. The sort of actions described above violates the principle of confidentiality that should prevail between a lawyer and his or her client and the standards of due process. The principle of confidentiality is intended to protect verbal and written communications between lawyers and between lawyers and their clients.

V. Conclusions

100. **All persons exercising legal functions, whether or not they have the official status of lawyer, are fundamental to the protection and consolidation of the rule of law.**

101. **The international principles and standards on the independence of the legal profession and its free exercise, in particular the Basic Principles on the Role of Lawyers, are essential elements that should serve as a guide for those who practise law,**

[122] See communication TZA 2/2021.

[123] Contributions will be posted on the Special Rapporteur's web page, available at https://www.ohchr.org/en/calls-for-input/calls-input/call-input-protection-lawyers. See also https://rm.coe.int/cdcj-2020-8e-add1-feasibility-study-profession-of-lawyer/1680a1c757.

[124] See https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ROL/RoL_Position_papers/EN_RoL_20210326_CCBE-contribution-for-the-RoL-Report-2021.pdf.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] See https://www.legifrance.gouv.fr/juri/id/JURITEXT000042619502.

[129] See https://www.icj.org/wp-content/uploads/2020/06/CIS-Justice-and-coronavirus-Advocacy-Analysis-brief-ENG-2020.pdf, para. 21.

as well as for their professional associations, and should also be upheld by State authorities.

102. **States have a duty to ensure that persons who practise law can exercise their profession without undue restrictions. They must therefore take the necessary steps to ensure that such persons can perform their professional duties without any kind of interference, harassment, threats or intimidation.**

103. **In many countries, the free and independent exercise of the legal profession is guaranteed by law. However, this duty to guarantee is often not adequately fulfilled. To ensure full compliance with the obligations set out in the Basic Principles on the Role of Lawyers and in domestic legislation, it is essential to establish effective institutional and legal guarantees of judicial independence, which is indispensable.**

104. **Members of the legal profession may be attacked or intimidated by a variety of actors, including State bodies and institutions, organized criminal groups and, in certain circumstances, lawyers' associations themselves.**

105. **In some countries, under the pretext of maintaining national security or combating terrorism, corruption or the pandemic, the authorities have restricted the exercise of the legal profession. These restrictions are especially harsh when space for civil society protest and participation is also limited. The treatment of persons who promote accountability and transparency or who work in the field of human rights is often among the most concerning.**

106. **Attacks on groups of lawyers defending certain causes have increased considerably in many countries in recent times. Legal practitioners whose work touches on topics such as the exercise of freedom of expression or political rights, the defence of human rights, the environment, women's rights, ethnic minorities or the rights of the LGBTQI+ community are the targets of threats and attacks, even attempts on their lives.**

107. **Legal initiatives aimed at limiting the free exercise of the legal and paralegal professions are now commonplace in many regions of the world. Such intervention may even take the form of interference by the executive branch in the work of the decision-making bodies of the legal profession, or may be achieved through the adoption of legislation.**

108. **When members of the legal profession are threatened or attacked, timely and adequate investigations are not always carried out, investigative measures are sometimes delayed, and the opportunity to gather the evidence needed to prosecute and punish those responsible is missed.**

109. **Cases of the surveillance, harassment, public lynching, stigmatization, criminalization and co-option of, and threats and attacks against, certain groups of lawyers require a more consistent and effective response from States.**

110. **In some countries, disbarment has been used as a form of repression by the authorities against lawyers who defend human rights cases or members of the political opposition or protesters and lawyers who advocate essential principles of the rule of law and human rights.**

111. **Such arbitrary disbarments not only undermine the rule of law in general, but also violate the human rights of the disbarred lawyers and the fundamental principles that safeguard the independence of the judiciary and the legal profession.**

VI. Recommendations

112. **States should take all necessary measures to ensure the free exercise of the legal profession, in all circumstances, so that lawyers may exercise their legitimate professional rights and duties without fear of reprisals and free from all restrictions, including judicial harassment.**

113. **Part of States' duty to guarantee is to protect the physical and psychological integrity and safety of lawyers and their families. This entails taking effective measures to observe, in law and practice, the Basic Principles on the Role of Lawyers and other standards related to the independence and duties of lawyers.**

114. **States should design and carry out measures to prevent the identification of lawyers with their clients or the causes they defend.**

115. **States should pay special attention to cases and disputes in which legal professionals are exposed to high-profile situations because of the sensitivity of the legal cases they represent. The impact of attacks on lawyers representing sensitive issues hinders and undermines their general capacity to perform their professional duties.**

116. **States should review, amend or refrain from adopting legislation that may interfere with the independence of lawyers and the free exercise of their profession, particularly counter-terrorism, security, drug control or pandemic-related legislation.**

117. **Disciplinary bodies responsible for prosecuting and adjudicating cases of alleged breaches of professional duties must be independent from the government authorities, in particular the executive branch, including ministries of justice and other institutions. The composition of such disciplinary and monitoring bodies should include legal professionals. Where disciplinary bodies are directly connected to or dependent on the executive branch of government, or include a significant number of representatives of that branch, the legal norms underpinning them should be reviewed to ensure that they are truly independent.**

118. **Bar associations should be independent and self-governing professional associations, set up to promote and protect the independence and the integrity of lawyers and to safeguard their professional interests. Their status and important functions should be recognized and supported by States, which should refrain from interfering in their work and functioning.**[130]

119. **Admission to the legal profession should be regulated by law and admission processes should be clear, transparent and objective.**

120. **States should refrain from interfering in admission processes and bar associations should be directly and independently responsible for such processes and the granting of licences to practise.**[131]

121. **States should carry out communication policies to inform and convince the public of the importance of respect for human rights, the rule of law, the separation of powers and the need for lawyers to be able to practise their profession independently and without undue interference.**

122. **The Special Rapporteur urges national authorities to immediately put in place the necessary measures to bring an end to threats against and the harassment and mistreatment of persons practising law in general. In particular, they should ensure that law enforcement officials who may be involved in such abuses are investigated and held accountable.**

123. **The Special Rapporteur urges public prosecutors to closely monitor situations and cases in which lawyers might be criminalized for performing their duties. When such circumstances arise, appropriate orders should be issued to prevent public prosecutors from maliciously prosecuting members of the legal profession who criticize State officials and institutions in the exercise of their independence and freedom of expression.**

124. **Starting this year, within the framework of the Council of Europe, a committee of experts will begin preparing a draft international legal instrument aimed at strengthening the protection of the legal profession and the right to practise law freely without prejudice or hindrance. The Special Rapporteur recommends that the**

[130] A/71/348.
[131] Ibid.

committee of experts seriously consider making the resulting draft a binding instrument that is open to accession by non-member States of the Council of Europe. The Special Rapporteur welcomes the fact that he has been invited to participate, albeit without the right to vote, in the work of this committee of experts.

125. **It is essential that persons who practise and/or are called upon to practise law have access to continuous and adequate training in international and regional standards related to judicial independence, human rights and the fight against corruption.**

126. **The recommendations made by the Special Rapporteur in his 2018 report to the General Assembly on bars and lawyers' associations[132] and those raised in 2016 by his predecessor, Monica Pinto, in her report to the General Assembly on the role of lawyers[133] remain relevant. This shows that only limited progress made in the protection of the free exercise of the legal profession since those reports were issued.**

[132] A/73/365.
[133] A/71/348.

No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,
v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF UNITED NATIONS MANDATE HOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are mandate-holders appointed by the U.N. Human Rights Council "with mandates to report and advise on human rights from a thematic or country-specific perspective." Office of the High Commissioner for Human Rights ("OHCHR"), *Special Procedures of the Human Rights Council*, https://www.ohchr.org/en/hrbodies/sp/pages/introduction.aspx (last visited Sept. 15, 2021).

Amici serving as Special Rapporteurs are part of "[t]he system of Special Procedures" that "is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social." *Id.* As mandate-holders, *amici* are independent human rights experts selected for their "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity." Human Rights Council, *Institution-building of the United Nations Human Rights Council*, ¶ 39, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007). Special Rapporteurs "undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith" and "do not receive financial remuneration." OHCHR, *Special Procedures of the Human Rights Council.*

Amici are also accorded certain privileges and immunities as experts on mission for the United Nations

[1] No counsel for any party authored this brief in whole or in part, and no person other than counsel for *amici* made a monetary contribution to fund its preparation or submission. Counsel for Petitioners and Respondents filed blanket consents to the filing of *amicus curiae* briefs.

under Article VI of the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, to which the United States has been a party since 1970.

This brief is submitted voluntarily without prejudice to, and should not be considered as, a waiver, express or implied, of the privileges and immunities of the United Nations, its officials or experts on missions, under the 1946 Convention on the Privileges and Immunities of the United Nations and recognized principles of international law. Authorization for the positions and views expressed herein, in accordance with the independence of the *amici*'s positions and respective mandates, was neither sought nor given by the United Nations, including the Human Rights Council, the OHCHR, or any of the officials associated with those bodies.

SUMMARY OF ARGUMENT

Mississippi asks this Court to overrule *Roe v. Wade*, 410 U.S. 173 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), by arguing, in part and incorrectly, that federal constitutional protection for abortion in the United States is out of step with the rest of the world and that the "march of progress" has made abortion access unnecessary for women's autonomy and equality. Petrs. Br. 4. *Amici* seek to set the record straight and explain how international human rights law protects abortion access.

The overwhelming trend for the past half-century has been toward the liberalization of abortion laws worldwide, with countries often using international

human rights law as a basis. *See generally* Int'l and Comparative Legal Scholars Br. This is because safe and legal abortion access constitutes a critical part of human rights and, in particular, the right to the highest attainable standard of health (which includes reproductive rights) as well as other human rights including the rights to non-discrimination and equality, respect for private life, the right to life, and the right to freedom from torture and cruel, inhuman and degrading treatment. *See, e.g.,* U.N. Human Rights Committee ("HRC"), *General Comment No. 36: Article 6 of the ICCPR, on the right to life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter HRC General Comment No. 36]; Committee on Economic, Social and Cultural Rights ("CESCR Committee"), *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 5, 10, 13, 45, U.N. Doc. E/C.12/GC/22 (May 2, 2016) [hereinafter CESCR Committee General Comment No. 22]; Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶¶ 11, 14, U.N. Doc. A/54/38/Rev.1, Chap. I (1999) [hereinafter CEDAW Committee General Recommendation No. 24].

The United States would contradict international human rights law by overturning its established constitutional protections for abortion access—both by failing to recognize abortion access as necessary for women's autonomy, equality and non-discrimination and by retrogressing on human rights contrary to international law.

The United States has ratified, and is bound by, a number of human rights treaties including the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 ("ICCPR") since 1992, the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2, 660 U.N.T.S. 195, 212 ("CERD") since 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113 ("CAT") since 1994. It has signed others—namely the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICESCR") in 1977, the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 ("CEDAW") in 1980, the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 ("CRC") in 1995, and the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S 3 ("CRPD") in 2009—and must refrain from defeating their object and purpose. *See, e.g.,* Vienna Convention on the Law of Treaties ("VCLT"), Art. 18, May 23, 1969, 1155 U.N.T.S. 331.

Treaty bodies, created and empowered under these treaties, and the U.N. Charter-based Human Rights Council and the Special Procedures created by it, examine States' compliance with human rights obligations. These bodies have repeatedly recognized that protections for abortion access are necessary to fulfill the rights to equality and non-discrimination, life, privacy, health, and freedom from torture, cruel, inhuman and degrading treatment, as well as freedom from gender-based violence, among other rights.

"Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl" nor "jeopardize their lives, subject them to physical or mental pain or suffering[,]" "discriminate against them or arbitrarily interfere with their privacy." HRC General Comment No. 36, ¶ 8. "States parties must provide safe, legal and effective access to abortion" including "where the pregnancy is the result of rape or incest" and also "should not introduce new barriers" and "should remove existing barriers to effective access by women and girls to safe and legal abortion[.]" *Id.*

In May 2020, the U.N. Working Group on discrimination against women and girls ("WGDAW"), the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on violence against women, its causes and consequences jointly decried the "pattern of restrictions and retrogressions in legal access to abortion care across" the United States through COVID-19 emergency orders suspending procedures "purportedly not immediately medically necessary[.]" Letter from the WGDAW to the United States, AL USA 11/2020 (May 22, 2020), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25279 (last visited Sept. 15, 2021) [hereinafter the Techane-Puras-Šimonović Letter]. The WGDAW emphasized that "[a]bortion care constitutes essential health care and must remain so and available during the COVID-19 crisis" and that restrictions to abortion access "constitute human rights violations and can cause irreversible harm, in particular to those women experiencing

multiple and intersecting forms of discrimination such as low-income women, women of color, immigrants, women with disabilities and LBTI people." *Id.*

In her 2021 report to the U.N. General Assembly, lead *amicus* Tlaleng Mofokeng underlined States' obligations to decriminalize abortion, to prevent unsafe abortion and to provide safe, legal and effective access to abortion, in a manner that does not result in the violation of women's rights to life and other human rights. *See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic*, ¶¶ 22, 40-41, U.N. Doc. A/76/172 (July 16, 2021) [hereinafter Mofokeng 2021 Report].

If *Roe* and *Casey* are overturned, many U.S. states will implement bans or near-bans on abortion access that will make individual state laws irreconcilable with international human rights law.[2] This would cause irreparable harm to women and girls in violation of the United States' obligations under the human rights treaties it has signed and ratified.

[2] U.S.-ratified treaties are binding on individual states and are the "supreme Law of the Land". U.S. CONST. art. VI, cl. 2. For example, the United States noted its understanding that the ICCPR shall be implemented "by the state and local governments; to the extent that [they] exercise jurisdiction over such matters."

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW SHOULD GUIDE THE SUPREME COURT IN THIS CASE

Since the nation's founding, international law has infused the U.S. Constitution. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale L. & Pol'y Rev. 329, 330 (2004) ("In writing the Constitution, the Framers . . . understood that the new nation would be bound by 'the Law of Nations,' today called international law.").

The Supreme Court has followed this tradition by interpreting and applying human rights treaties that the United States has ratified and signed. *See Roper v. Simmons*, 543 U.S. 551, 576 (2005) (identifying prevailing legal norms regarding juvenile death penalty by looking at international agreements, including CRC and ICCPR); *Graham v. Florida*, 560 U.S. 48, 81-82 (2010) (considering CRC's prohibition of sentencing juveniles to life imprisonment without the possibility of parole in determining whether practice was "cruel and unusual" under U.S. law); *cf. Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. and Breyer, J., concurring) (considering applicability of CERD to affirmative action policies at U.S. universities).

II. INTERNATIONAL HUMAN RIGHTS LAW PROTECTS ABORTION ACCESS

International human rights law is comprised of treaties that enshrine human rights including rights to equality and non-discrimination, life, privacy,

health, and freedom from torture, cruel, and inhuman and degrading treatment. States—including the United States—codified these fundamental human rights after the horrors of the Second World War.

In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights reflecting States' consensus that "[a]ll human beings are born free and equal in dignity and rights." G.A. Res. 217 (III) A, Article 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). These rights are "inherent from the moment of birth." U.N. GAOR 3rd Comm., 99th mtg., 110-124, U.N. Doc. A/PV/98-99 (1948). In the decades that followed, several core international treaties enshrined these fundamental rights. Under this treaty regime, States parties cannot invoke their own domestic law to justify non-compliance with their obligations. *See* VCLT art. 27.

Treaty bodies[3] are "mandated to monitor State parties' compliance with their treaty obligations" and also provide guidance on the fulfilment of rights. OHCHR, *Human Rights Bodies*, https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Sept. 15, 2021). *See also, e.g.*, HRC, *Draft General Comment No. 33 (2nd*

[3] These bodies include: the HRC monitoring the ICCPR, the Committee on the Elimination of Racial Discrimination ("CERD Committee") monitoring the CERD, the Committee against Torture ("CAT Committee") monitoring the CAT, the CESCR Committee monitoring the ICESCR, the CEDAW Committee monitoring CEDAW, the Committee on the Rights of the Child ("CRC Committee") monitoring the CRC, and the Committee on the Rights of Persons with Disabilities ("CRPD Committee") monitoring the CRPD.

version, 18 August 2008), ¶¶ 15-16, U.N. Doc. CCPR/C/GC/33/CRP.3 (Aug. 25, 2008) (reflecting HRC's view that it is the "authentic interpreter" of the ICCPR and that "[a] finding of a violation by the Committee engages the legal obligation of the State party to reconsider the matter"); CERD Art. 9 (empowering CERD Committee, *inter alia*, to "make suggestions and general recommendations based on the examination of the reports and information received from the States Parties"); CAT Art. 19 (empowering CAT Committee, *inter alia*, to make general comments on State Party reports submitted to it).

Over time, States and human rights bodies clarified that human rights treaty obligations encompass the reproductive rights of women and girls, including safe and legal abortion access. *See, e.g.,* HRC General Comment No. 36, ¶ 8; CESCR Committee General Comment No. 22, ¶¶ 10-11, 13-14, 45, 49; CESCR Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶¶ 34-35, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR Committee General Comment No. 14]; CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, ¶ 60, U.N. Doc. CRC/C/GC/20* (Dec. 6, 2016) [hereinafter CRC Committee General Comment No. 20]; *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011) [hereinafter *L.C. v. Peru*]; OHCHR, *Information Series on Sexual and Reproductive Health Rights: Abortion* (2020), https://www.ohchr.org/Documents/Is-

sues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf (last visited Sept. 15, 2021) [hereinafter OHCHR, *Information Series*].

At the 1994 International Conference on Population and Development ("ICPD"), States, including the United States, collectively acknowledged that "reproductive rights embrace certain human rights" and that ensuring safe abortion access is critical to women's reproductive health. ICPD, CAIRO, EGYPT, SEPT. 5–13, 1994, REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, ¶¶ 7.3, 8.19, 8.20(a), 8.25, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

In the 1995 Beijing Platform for Action (another consensus document), States recognized that "[r]eproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes[,]" including the "right to make decisions concerning reproduction free of discrimination, coercion and violence[.]" FOURTH WORLD CONFERENCE ON WOMEN, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING 4-15 SEPT. 1995, ¶¶ 94-95, U.N. Doc. A/CONF.177/20, annex II (Oct. 17, 1995).

Human rights bodies also have articulated the effects of abortion restrictions and their incompatibility with rights to equality and non-discrimination, privacy, life, health, and freedom from torture, cruel, inhuman and degrading treatment. *See, e.g.*, HRC General Comment No. 36, ¶ 8; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No.*

19, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) [hereinafter CEDAW Committee General Recommendation No. 35]; CESCR Committee General Comment No. 22, ¶ 10.

Lead *amicus* Mofokeng has recognized that "[v]iolence against women and girls manifests in numerous forms," including through "denied abortions". Human Rights Council, *Strategic priorities of work: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng*, ¶ 53, U.N. Doc. A/HRC/47/28 (Apr. 7, 2021).

A. Prohibitions on abortion access breach the right to equality and non-discrimination

Laws restricting abortion access discriminate against women and girls on the basis of sex and engage States' obligations under the ICCPR. *See* Techane-Puras-Šimonović Letter ("[T]he failure to provide adequate access" to abortion services "constitute[s] discrimination on the basis of sex, in contravention of ICCPR article 2.").[4]

For example, the HRC found that Irish laws criminalizing abortion can subject a woman "to a gender-based stereotype of the reproductive role of women primarily as mothers" in violation of the right to equal

[4] ICCPR Article 2 states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

protection of the law in ICCPR Article 26.[5] *Mellet v. Ireland*, HRC, Commc'n No. 2324/2013, ¶ 7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter *Mellet v. Ireland*]; *see also Whelan v. Ireland*, HRC, Commc'n No. 2425/2014, ¶ 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017) [hereinafter *Whelan v. Ireland*].

Contrary to the arguments of Petitioners' *amici*, CEDAW requires the safeguarding of women's reproductive rights and health, including abortion access.[6] CEDAW Article 12 requires States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Consequently, the CEDAW Committee made clear that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women." CEDAW Committee General Recommendation No. 24, ¶ 11.

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[5] ICCPR Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall 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."

[6] CEDAW Article 1 states that "discrimination against women" means "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

In 2011, the CEDAW Committee found that Peru must amend its law because it was discriminatory to deny abortion access to a girl who "was a minor and a victim of sexual abuse" and that restricted abortion access deprived her of "her entitlement to the medical services that her physical and mental condition required." *See L.C. v. Peru*, ¶ 8.15. In 2018, the CEDAW Committee concluded that abortion restrictions in Northern Ireland constituted discrimination because they affect only women, "preventing them from exercising reproductive choice[.]" CEDAW Committee, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Committee*, ¶ 65, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018) [hereinafter CEDAW 2018 UK Report].

Girls are particularly vulnerable to discrimination through restrictive abortion access. Lack of access to reproductive health services "contributes to adolescent girls being the group most at risk of dying or suffering serious or lifelong injuries in pregnancy and childbirth." CRC Committee General Comment No. 20, ¶ 59. The CRC Committee advised that "[t]here should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization" and "urge[d] States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions." *Id*. ¶ 60.

Moreover, international human rights treaties require States to take positive measures to achieve substantive equality and address inequalities faced by women and girls that a formal, gender-neutral or gender-blind approach to equality does not rectify, including by dismantling the discriminatory, racist, and xenophobic institutional structure and laws surrounding health and abortion services. *See, e.g.,* CEDAW Committee, *General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, (30th Sess., 2004),* in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶¶ 8-12, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004); CESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 9-10, U.N. Doc. E/C.12/ GC/20 (July 2, 2009); HRC, *CCPR General Comment No. 28: Article 3 (The equality of rights between men and women),* ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter HRC General Comment No. 28].

States must recognize that, pursued alone, formal equality disadvantages individuals who face intersectional discrimination on multiple grounds: "groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, lesbian, gay, bisexual, transgender and intersex persons, and people living with HIV/AIDS are more likely to experience multiple discrimination" and "may be disproportionately affected by intersectional discrimination in the context

of sexual and reproductive health." CESCR Committee General Comment No. 22, ¶ 30. *See also, e.g.* CRC Committee, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, ¶¶ 8-11, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013) [hereinafter CRC Committee General Comment No. 15]; CRPD Committee, *General comment No. 3 (2016) on women and girls with disabilities*, ¶ 2, U.N. Doc. CRPD/C/GC/3 (Nov. 25, 2016) [hereinafter CRPD General Comment No. 3] (noting barriers which "create situations of multiple and intersecting forms of discrimination against women and girls with disabilities"); HRC General Comment No. 28, ¶ 30; *K.L. v. Peru*, HRC, Commc'n No. 1153/2003, ¶¶ 6.3-6.5, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [hereinafter *K.L. v. Peru*]; *Mellet v. Ireland*, ¶ 7.11 (finding differential treatment where Ireland "failed to adequately take into account [woman's] medical needs and socioeconomic circumstances"); *Whelan v. Ireland*, ¶ 7.12 (same).

Restrictive abortion laws such as the Mississippi Act exemplify the intersectional discrimination that targets marginalized communities, as noted by the District Court below. *See Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n. 22 (S.D. Miss. 2018), *aff'd sub nom. Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

In its report to the Human Rights Council on its visit to the United States, the WGDAW cautioned that:

> The United States, which is a leading State in terms of formulating international human rights

> standards, is allowing its women to lag behind in the respect for these standards. While all women are victims of these "missing" rights, women who are poor; Native American, African-American, Hispanic and Asian women; women who are members of ethnic minorities; migrant women; lesbian, bisexual, transgender or intersex persons; women with disabilities; and older women are in a situation of heightened vulnerability.

Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America*, ¶ 87, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016).

African-American women and girls have historically been subjected to racism, and restrictive abortion laws subject them to intersectional discrimination that imperils their reproductive health. "The United States has the highest maternal mortality ratio among wealthy countries, and [B]lack women are three to four times more likely to die than White women[.]" Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America*, ¶ 57, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018) [hereinafter Human Rights Council, Extreme Poverty and Human Rights SR Report on United States].

Noting "the persistence of racial disparities in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among African American communities," the CERD Committee called on the United States to "[e]liminate racial disparities in the field of sexual and

reproductive health and standardize the data collection system on maternal and infant deaths in all states to effectively identify and address the causes of disparities in maternal and infant mortality rates[.]" CERD Committee, *Concluding Observations on the combined seventh to ninth periodic reports of the United States of America*, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Committee 2014 U.S. Observations].

Women living in poverty are vulnerable to abortion restrictions. The WGDAW observed that "in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices." OHCHR, *Information Series*. *See also Mellet v. Ireland*, ¶ 7.10; *Whelan v. Ireland*, ¶ 7.11.

In the United States, legal and practical limitations on abortion access result in intersectional discrimination compounded by poverty:

> Low-income women who would like to exercise their constitutional, privacy-derived right to access abortion services face legal and practical obstacles, such as mandatory waiting periods and long driving distances to clinics. This lack of access to abortion services traps many women in cycles of poverty.

Human Rights Council, Extreme Poverty and Human Rights SR Report on United States, ¶ 56.

Moreover, "rural women are more likely to resort to unsafe abortion than their urban counterparts, a situation that puts their lives at risk and compromises

their health." CEDAW Committee, *General recommendation No. 34 (2016) on the rights of rural women*, ¶ 38, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016). *See also* OHCHR, *Information Series*. The CESCR Committee clarified that States are required "to eradicate practical barriers" including "disproportionate costs and lack of physical or geographical access to sexual and reproductive health care." CESCR Committee General Comment No. 22, ¶ 46.

Abortion access is a prerequisite for equal protection of the law for women with disabilities. "[L]ike all women, women with disabilities have the right to choose the number and spacing of their children, as well as the right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." CRPD Committee General Comment No. 3, ¶ 38; *see also* CRPD Committee, *Concluding Observations on the initial report of Poland*, ¶ 44(e), U.N. Doc. CRPD/C/POL/CO/1 (Oct. 29, 2018).

B. Prohibitions on abortion access breach the right to privacy

"The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights." Working Group on the issue of discrimination against women in law and in practice (today WGDAW), ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018).

Special Rapporteur Mofokeng noted recently that "[w]omen, adolescents, girls and all persons capable of becoming pregnant have a right to make informed, free and responsible decisions concerning their reproduction, their body and sexual and reproductive health, free of discrimination, coercion and violence." Mofokeng 2021 Report, ¶ 40.

The CEDAW Committee recommends that States "[r]equire all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice[.]" CEDAW Committee General Recommendation No. 24, ¶ 31(e); *see also* CEDAW 2018 UK Report, ¶ 65 (noting that restrictive abortion law in Northern Ireland "affronts women's freedom of choice and autonomy and their right to self-determination").

The right to privacy under ICCPR Article 17 encompasses women's reproductive autonomy. *See* HRC General Comment No. 36, ¶ 8 (referencing right to privacy).[7] The HRC has found violations of the right to privacy in every case before it when the State interferes with reproductive decision-making or abortion access. This was reflected first in *K.L. v. Peru* in 2005 and recently in *Whelan v. Ireland* in 2016 and *Mellet v. Ireland* in 2017, where the HRC held that the decision to seek an abortion falls within the scope of the right to privacy under the ICCPR. *See K.L. v. Peru*, ¶ 6.4; *L.M.R. v. Argentina*, HRC, Commc'n No.

[7] ICCPR Article 17 states: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

1608/2007, ¶ 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2007); *Mellet v. Ireland*, ¶ 7.8; *Whelan v. Ireland*, ¶ 7.9. In *Mellet* and *Whelan*, the HRC held that forcing a woman to choose between continuing an unwanted pregnancy or traveling to another jurisdiction to receive a safe legal abortion at her personal expense was an intrusive interference contrary to the ICCPR. *See Mellet v. Ireland*, ¶ 7.8; *Whelan v. Ireland*, ¶ 7.9.

The CRC mandates that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence." CRC Art. 16. In *K.L. v. Peru*, ¶ 6.4, the HRC recognized that denying an adolescent girl access to abortion for a fatal fetal impairment was a violation of her right to privacy under the ICCPR.

C. Prohibitions on abortion access breach the right to life

The HRC's authoritative interpretation of ICCPR Article 6 clarifies longstanding standards developed over decades that abortion restrictions cannot imperil the right to life, among other rights, and force women and girls to undertake unsafe abortions:

> Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily

> interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. . . . States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. . . . States parties should remove existing barriers to effective access by women and girls to safe and legal abortion . . . and should not introduce new barriers[.]

HRC General Comment No. 36, ¶ 8.

Contrary to the assertions of several of Petitioners' *amici*, the right to life emanating from human rights treaties does not apply prenatally. *See, e.g.*, CEDAW 2018 UK Report, ¶ 68 ("[A]nalyses of major international human rights treaties on the right to life confirm that it does not extend to fetuses."); Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland from 22 to 25 November 2016, ¶ 93, CommDH (2017) 8 (Mar. 29, 2017) ("[T]he Eighth Amendment of the Irish Constitution, protecting the right to life of the unborn on an equal basis with the right to life of the pregnant woman, departs from the position consistently held by human rights bodies that the right to life, as enshrined in relevant international treaties, does not apply to prenatal life."); Council of Europe

Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe*, at 51 (Dec. 2017), https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead (last visited Sept. 16, 2021) ("[T]he right to life as enshrined in core international human rights treaties does not apply prior to birth and international human rights law does not recognise a prenatal right to life"; "the drafters of these treaties rejected claims that the right to life enshrined in those instruments should apply prenatally.").

During the drafting of ICCPR Article 6, delegations voted against adding text to the provision stating that "[t]he right to life is inherent in the human person . . . [f]rom the moment of conception[.]" U.N. GAOR, *Agenda Item 33, Report of the Third Committee*, ¶¶ 97, 113, 120(e), U.N. Doc. A/3764 (1957). The HRC has found in several cases that the right to life does not apply from conception, emphasizing women's right to life by protecting abortion access. The CEDAW and CRC Committees have focused on the violation of women's and girls' right to life through restrictions and punishments relating to abortion. *See, e.g., L.C. v. Peru*, ¶ 8.15; CRC Committee General Comment No. 15, ¶ 70.

While the CRC's preamble refers to "legal protection before as well as after birth", this was never intended to trump women's and girls' right to life in the context of abortion access. Supporters of this language expressly stated that "the purpose of the amendment was not to preclude the possibility of abortion[.]" U.N. Commission on Human Rights, *Question of a Convention on the Rights of the Child: Rep. of the Working Group*, 36th Sess., ¶ 6, U.N. Doc. E/CN.4/L.1542 (Mar.

10, 1980). This understanding is reflected by the CRC Committee, which has consistently criticized States' restrictive abortion laws and never recommended that a liberal abortion law be narrowed. *See* CRC Committee General Comment No. 20, ¶ 60.

The HRC has emphasized that States must reduce legal restrictions on family planning, which give rise to high rates of pregnancy, and illegal abortions—one of the principal causes of maternal mortality interfering with the right to life. *See* HRC, *Concluding observations on the fourth periodic report of the Philippines,* ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012). *See also* CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 47, U.N. Doc. CEDAW/C/OP.8/PHL/1 (Apr. 22, 2015) ("tak[ing] note of the potentially life-threatening consequences of resorting to unsafe abortion as a method of contraception and recall[ing] that there is a direct link between high maternal mortality rates resulting from unsafe abortion and lack of access to modern methods of contraception"); HRC General Comment No. 36, ¶ 8 ("States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions.").

In a joint statement, the CEDAW and CRPD Committees found that "access to safe and legal abortion, as well as related services and information are essential aspects of women's reproductive health and a prerequisite for safeguarding their human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy,

bodily integrity and freedom from torture and ill treatment." *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities, Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women* (Aug. 29, 2018), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_8744_E.docx (last visited Sept. 16, 2021) [hereinafter CEDAW and CRPD 2018 Joint Statement].

D. Prohibitions on abortion access breach the right to health

Abortion access is part of women's and girls' comprehensive reproductive health. The right to health encompasses rights to physical health, mental health, and social well-being.

ICESCR Article 12(1) enshrines "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." "The freedoms [protected by Article 12] include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant." CESCR Committee General Comment No. 22, ¶ 5.

The right to health "is not to be understood as a right to be *healthy*. The right to health contains both

freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation." CESCR Committee General Comment No. 14, ¶ 8, 11.

The Report of the Special Rapporteur on Health to the Human Rights Council has recognized that target 3.7 of the Sustainable Development Goals, on ensuring universal access to sexual and reproductive healthcare services, must be fulfilled in part by States adopting "a comprehensive gender-sensitive and non-discriminatory sexual and reproductive health policy" that is consistent with human rights standards. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* ¶¶ 89-92, U.N. Doc. A/HRC/32/32 (Apr. 4, 2016); Mofokeng 2021 Report, ¶¶ 40-43.

CRC Article 24 recognizes the right of the child to enjoy the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health and requires that States Parties "develop preventive health care, guidance for parents and family planning education and services."

The CRC Committee has stated that "[g]iven the high rates of pregnancy among adolescents globally and the additional risks of associated morbidity and mortality, States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including

family planning and safe abortion services." CRC Committee General Comment No. 15, ¶ 56.

The CEDAW Committee, jointly with the CRPD Committee, has framed abortion access as a component of the right to reproductive health, stating that "access to safe and legal abortion, as well as related services and information are essential aspects of women's reproductive health and a prerequisite for safeguarding their human rights to[…]health[...]" CEDAW and CRPD 2018 Joint Statement, 1.

Special Rapporteur Mofokeng notes that "[a]ccess to family planning, contraception including emergency contraception, safe abortion services and post-abortion care is a component of the right to health and, in particular, the right to sexual and reproductive health." Mofokeng 2021 Report, ¶ 33. The Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health has stated that "[t]he right to sexual and reproductive health is a fundamental part of the right to health. States must therefore ensure that this aspect of the right to health is fully realized," and that "[s]ome criminal and other legal restrictions in each of those areas, which are often discriminatory in nature, violate the right to health by restricting access to quality goods, services and information" and "infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity." U.N. GAOR, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, at 2, U.N. Doc. A/66/254 (Aug. 3, 2011).

The CESCR Committee notes that "[h]ealth facilities, goods, information and services related to sexual and reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers." CESCR Committee Comment No. 22, ¶ 15. The requirement of accessibility is made up of four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility. CESCR Committee, General Comment No. 14, ¶ 12(b). Accordingly, the CESCR Committee recommends that to enable the realization of a woman's right to health, States Parties should remove "all barriers interfering with [a woman's] access to health services, education and information including in the area of sexual and reproductive health." *Id.* ¶ 21, Exhibit 40.

The Report of the Working Group on the issue of discrimination against women in law and practice to the Human Rights Council states that "[w]omen's non-discriminatory enjoyment of the right to health must be autonomous, effective and affordable" and makes clear that criminalizing behavior attributed only to women is discriminatory and risks their lives and health. Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice,* at 1, U.N. Doc. A/HRC/32/44 (Apr. 8, 2016). *See also* World Health Organization, *Fact Sheet: Preventing unsafe abortion* (Sept. 25, 2020), https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion (last visited Sept. 16, 2021) (listing restrictive abortion laws as a barrier to safe abortion, with attendant risks to health and life of women).

The CERD Committee has addressed "the persistence of racial disparities in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among African-American communities[.]" CERD Committee 2014 U.S. Observations, ¶ 15.

The CRPD Committee has also emphasized that women and girls with disabilities face burdensome barriers "with regard to health care, including sexual and reproductive health services[.]" CRPD General Comment No. 3, ¶ 2.

E. Prohibitions on abortion access breach the right to be free from torture and cruel, inhuman or degrading treatment

CAT Article 1 defines "torture" as "any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person … for any reason based on discrimination of any kind" and the CAT Committee has consistently found that prohibitions on legal abortion can constitute a violation of the prohibition on torture. The CAT Committee has "expresse[d] concern at the severe physical and mental anguish and distress experienced by women and girls regarding termination of pregnancy" due to a State's policies. CAT Committee, *Concluding observations on the second periodic report of Ireland*, ¶ 31, U.N. Doc. CAT/C/IRL/CO/2 (Aug. 31, 2017). The CAT Committee found that Poland's restrictive 12-week gestation abortion laws combined with a lack of guidelines on abortion access "will result in physical and mental suffering so severe in pain and intensity as to amount to torture" and "engage the international responsibility

of the State party under the Convention." CAT Committee, *Concluding observations on the seventh periodic report of Poland*, ¶¶ 33-34, U.N. Doc. CAT/C/POL/CO/7 (Aug. 29, 2019).

The CAT Committee clarified that States parties must refrain "from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture[.]" CAT Committee, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 17, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). This obligation requires States to take effective legislative, administrative, judicial or other measures to prevent violations of reproductive rights amounting to torture or other cruel, inhuman or degrading treatment, including denial of abortion and post-abortion care. *See* Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, ¶ 46, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

The Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment has highlighted that "the denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill treatment." Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 44, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016). "International human rights law increasingly recognizes that abuse and mistreatment of women seeking reproductive health services cause tremendous and lasting physical and emotional suffering"

which can constitute cruel and degrading treatment. *See id.* ¶ 42.

ICCPR Article 7[8] protects both the dignity and physical and mental integrity of the individual, and the HRC has made clear that mental suffering violates this article. HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 5 (Mar. 10, 1992), https://www.refworld.org/docid/453883fb0.html (last visited Sept. 15, 2021). The HRC has viewed restrictions on abortion as a violation of the right to be free from torture, cruel, inhuman and degrading treatment since the first case on abortion decided in the U.N. system, *K.L. v. Peru*, ¶ 6.3. The HRC held in *Whelan* and *Mellet* that Irish laws restricting abortion access exacerbate physical and mental suffering and can constitute cruel, inhuman or degrading treatment in violation of ICCPR Article 7. *See Mellet v. Ireland*, ¶¶ 7.4-7.6; *Whelan v. Ireland*, ¶¶ 7.4-7.7. Upon the HRC's recommendations, in 2018 Ireland successfully voted on a referendum to remove from the Irish Constitution the article prohibiting abortion, enabling Ireland to comply with its international human rights obligations. *See generally* European Law Scholars Br.

The CEDAW Committee has identified a direct relationship between abortion access and the prohibition on torture and found that "[v]iolations of women's sexual and reproductive health and rights" such as "criminalization of abortion, denial or delay of safe

[8] ICCPR Article 7 states in relevant part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

abortion and/or post-abortion care, [and] forced continuation of pregnancy . . . are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment." CEDAW Committee General Recommendation No. 35, ¶ 18. In the CEDAW 2018 UK Report, ¶ 65, the Committee found that the abortion restrictions in Northern Ireland "involve[d] mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment[.]"

III. THE COURT SHOULD UPHOLD EXISTING CONSITUTIONAL PROTECTIONS FOR ABORTION ACCESS AND REFUSE THE RETROGRESSION OF RIGHTS, CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW

Overturning or curtailing constitutional protections to abortion access established in *Roe* and *Casey* constitutes retrogression in violation of human rights law. *See* HRC General Comment No. 36, ¶ 8 ("States parties should remove existing barriers to effective access by women and girls to safe and legal abortion . . . and should not introduce new barriers."). The United States should not regress and contravene human rights standards:

> Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity. This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include . . . imposition of barriers to information,

> goods and services relating to sexual and reproductive health[.]

CESCR Committee General Comment No. 22, ¶ 38. *See also* HRC, *Concluding observations on the sixth periodic report of Spain*, ¶ 13, U.N. Doc. CCPR/C/ESP/CO/6 (Aug. 14, 2015) (expressing concern over proposed legislation that "could increase the number of illegal abortions and put women's lives and health at risk in the State party").

During the Universal Periodic Review of the United States, several States recommended the United States to improve, protect, and ensure equitable access to comprehensive sexual and reproductive health, rights, services and information. *See* Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States*, at 21-22, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020). In response, the United States supported these recommendations concerning reproductive rights and health services. *See U.S. Statement during the Adoption of the Third Universal Periodic Review (UPR) of the United States* (Mar. 17, 2021), https://geneva.usmission.gov/2021/03/17/us-upr-1/ (last visited Sept. 16, 2021).

Petitioners' *amici* invoke the 2020 Geneva Declaration, but this non-binding, ideologically-motivated political declaration only serves to show how few countries seek to increase restrictions on abortion access, with just 34 out of 193 States signing. *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (October 2020). The United States withdrew its sponsorship and signature, and notified other countries of its withdrawal, in favor of a

policy "support[ing] women's and girls' sexual and reproductive health and rights in the United States, as well as globally." The White House, *Memorandum on Protecting Women's Health at Home and Abroad* (Jan. 28, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/ (last visited Sept. 16, 2021).

Dismantling the U.S. framework that has protected abortion access for nearly 50 years will lead to further violations of women's and girls' human rights. Many states have "trigger" abortion bans in place that would come into force if the Supreme Court overturns *Roe* and *Casey*. Resp'ts. Br. 43.

As a party and signatory to human rights treaties, the United States must ensure that individual states comply with treaty obligations, since a breach by any U.S. state engages the legal responsibility of the United States as a whole. *See* Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 4, U.N. Doc. A/56/10 (2001).

CONCLUSION

Upholding the Mississippi Act and thereby overturning nearly 50 years of constitutional protections for women's and girls' reproductive rights would contravene the United States' international human rights obligations.

Respectfully submitted,

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Counsel for Amici Curiae

September 20, 2021

APPENDIX

APPENDIX[9]
List of *Amici Curiae*

1. Dr. Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

2. Ms. E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

3. Mr. Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

4. Ms. Melissa Upreti, a member and current Chair of the U.N. Working Group on discrimination against women and girls

5. Ms. Dorothy Estrada-Tanck, Vice-Chair of the U.N. Working Group on discrimination against women and girls

6. Ms. Elizabeth Broderick, member of the U.N. Working Group on discrimination against women and girls

7. Ms. Ivana Radačić, member of the U.N. Working Group on discrimination against women and girls

[9] U.N. affiliation listed for identification.

8. Ms. Meskerem Geset Techane, member of the U.N. Working Group on discrimination against women and girls

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Comment
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AMERICAN JUDICIAL REJECTIONISM AND THE DOMESTIC COURT'S UNDERMINING OF INTERNATIONAL HUMAN RIGHTS LAW AND POLICY AFTER HUMAN RIGHT VIOLATIONS HAVE OCCURRED IN THE STATE

Abstract: Ahmaud Arbery, Breonna Taylor, and George Floyd's executions ignited protests across the world. These protests raised debate over the **United States** Supreme Court's creation of qualified immunity for police misconduct. This in turn creates an appropriate opportunity to stop and take stock of **United States** law surrounding protections and immunities afforded to law enforcement officials, relative to international law and policy on law enforcement accountability and oversight. In doing so, this article uncovers how the American judiciary carries out a new form of American rejectionism powered by its use of qualified immunity doctrine, which in practice, results in a lack of accountability for law enforcement officials. This effectively undermines international human rights law ratified by the State such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the International Convention on the Elimination of All Form of Racial Discrimination (ICERD). The State judiciary's exercise of qualified immunity doctrine also dismisses international policy developed by international organizations like the **United Nations** Office on Drugs and Crime (UNODC). The issue is unsettling for two reasons: (1) it effectively nullifies the **treaty** making process and (2) perpetuates a system where domestic courts are not accountable to international law ratified and enforced by the nation's other two branches of government. This article proposes a new approach to this area of the law: reforming Reservations, Understandings, and Declarations (RUDs) so as to not limit **treaties**' domestic effect within the State's judicial system and instilling within it greater and more principled acceptance of international legal norms.

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INTRODUCTION

The execution of Ahmaud Arbery, Breonna Taylor, and George Floyd has inspired people across the globe to call attention to laws that have consistently protected law enforcement officials and authorized them to act with absolute impunity. Such laws appropriately examined in this context have included the **United States** Supreme Court's creation of qualified immunity for police misconduct.[1] In examining for the first ***398** time how **United States**' law surrounding protections and immunities afforded to law enforcement officials square with international law and policy on law enforcement accountability and oversight, this article uncovers how the **United States**' highest court carries out an explicit form of American rejectionism powered by and through the continual use of the qualified immunity doctrine.

Internationally prescribed law and policy is undermined or rejected when judiciaries--like in the **United States**--develop legal doctrines akin to that of qualified immunity. The doctrine protects a law enforcement official from being held personally liable for human rights violations, so long as the official does not violate clearly established law. This in turn allows police officers to escape accountability.

International human rights law ratified by the **United States** sets out legal standards on the fundamental rights entitled to individuals in the context of policing. Practical guidance is also developed by international organizations to support States,[2] like the **United States**, in an endeavor to provide transparency, accountability, and police oversight, through disciplinary proceedings against law enforcement officials. Despite these legal obligations and guidance, the **United States**' Supreme Court stays firm and determined in their dismissal of international law and policy. This attitude threatens to delegitimize the **treaty** making process and perpetuates a system where State domestic court systems are not accountable to international law ratified by the State where the domestic courts sit.

This article proceeds in four parts. Part I provides a brief introduction to the qualified immunity doctrine, following its evolution before discussing how its evolved presence in the **United States** today results in a lack of accountability for law enforcement officials. Part II unpacks three international **treaties** undermined by the qualified immunity doctrine, while also discussing international standards that detail and put forth guidance for a more transparent and accountable State policing model. Part III illustrates how the **United States**' qualified immunity doctrine undermines international law and policy and explains why this is of notable importance. A brief Part IV recommends solutions to improve the **United States**' domestic court policy on this front. Among these solutions are reforming Reservations, Understandings, and Declarations ("RUDs") so as to not restrict the domestic effect **treaties** ***399** have within the State court system, and instilling within the State, greater and more principled acceptance of international legal norms.

I. THE UNITED STATES SUPREME COURT'S QUALIFIED IMMUNITY DOCTRINE

To understand why the **United States**' judiciary's use of qualified immunity undermines international law, one must first understand: (a) what qualified immunity is, and (b) how the doctrine's expansion over time results in decreased accountability and oversight for law enforcement. These understandings bring larger arguments about the undermining of international law and policy into focus.

A. Qualified Immunity as a Law Enforcement Official Legal Defense to Standing Civil Trial

"Qualified immunity is a defense to standing civil trial" as a law enforcement official.[3] When granted, officials exercising discretionary functions are given immunity from civil suit in cases dealing with statutory or constitutional rights violations.[4] Law enforcement officials can raise qualified immunity as an affirmative defense at all times when their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The doctrine

affords "government officials a 'margin of error' to make mistakes in the course of their work."[6] It also protects their "judgment calls made in a legally uncertain environment,"[7] and intends to protect "all but the plainly incompetent or those who knowingly violate the law."[8]

400** ***B. The Doctrine's Jurisprudence Results in a Lack of Accountability for Law Enforcement Officials

Qualified immunity's evolution over time led to a lack of accountability for law enforcement officials. This development began when the Court wished to clarify causes of actions that could be made against government officials under the Civil Rights Acts of 1871, and its statutory cause of action, Section 1983.[9] The statute and its statutory cause of action provided people with an avenue to file suit for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by persons acting "under color of any statute, ordinance, regulation custom, or usage, of any State or Territory."[10] When that person happened to be a law enforcement official, Section 1983, as written by the Congress, allowed civil legal remedies for individuals to seek legal redress for human right violations recognized under the Constitution.[11] This included the "right to be free from excessive force under the Fourth Amendment[,]" for example.[12] Indeed, Section 1983 is seen as a "vital component" to redeeming constitutional guarantees for two reasons.[13] Criminal prosecutions of police officers are scarce, so a plaintiff's "most plausible avenue for redress [is] often a civil suit for monetary damages."[14] It also provides a plaintiff with another avenue for redressability.

Pierson v. Ray was the first time the Court sought to clarify what causes of action could be made under Section 1983.[15] *Pierson* involved an action against city officers and municipal police for false arrest, imprisonment, and damages for the deprivation of the petitioner's civil rights.[16] Writing for the majority, Chief Justice Warren expanded the defense of good faith and probable cause, initially available to officers in common-law actions for false arrest and imprisonment, to ***401** actions under Section 1983.[17] The Court clarified that because there was no legislative record indicating an intent to abolish such immunities, the "principle of law" establishing immunities for law enforcement officials, had not been abolished by Section 1983's creation.[18]

Over time, these officer protections expanded.[19] Whereas the Court in *Pierson* had initially found that qualified immunity applied in instances where police officers exhibited "good faith" and "probable cause," the Court in *Harlow v. Fitzgerald* enlarged the standard by requiring that there be "clearly established" law for the types of violations committed, to overcome such immunities.[20] The Court reasoned that there should be balance between "the importance of a damages remedy to protect the rights of citizens" with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[21] The Court clarified that its purpose for reaching such conclusions was to allow "officials to do their jobs and to exercise judgment, wisdom and sense without worry of being sued."[22] Thus, the test we see today for qualified immunity was born: when government officials' conduct does not amount to a violation of "clearly established statutory or constitutional rights" that a reasonable person would have known, they are entitled to qualified immunity.[23]

The doctrine's expansion serves as a barrier for holding law enforcement officials accountable because the legal standard, since *Pierson* and its progenies, made it more difficult to bring claims against law enforcement officials as a civil plaintiff.[24] The difficulty arises because the legal standard requires a civil plaintiff to identify not only a ***402** "clear legal rule[,] but a prior case" with identical facts.[25] Civil plaintiffs struggle to show that the law or right was clearly established at the time the violation was committed.[26] This conundrum is due to the **United States**' Supreme Court having not yet clearly defined what it means for a right to have been "clearly established."[27] Specifically, the doctrine remains unclear "with respect to the nature of authority required to find a clearly established right."[28] Instead of providing guidance, the Court provides vague generalities that "existing precedent should place the constitutional question 'beyond debate.'"[29]

When the Court does provide some guidance, it has been contradictory.[30] At times, the Court paid little attention to the sources of law, and instead focused on how specifically the right had been defined.[31] In these cases, the Court held that the right must be defined with enough clarity that a reasonable official would know that what he or she is doing violated a right.[32] At other times, the Court stated that the facts of a prior case need not be "materially similar," and that although the exact

action in question does not have to be proved unlawful, prior existing law should make the unlawfulness of an action apparent.[33] Thus, the degree "to which the specific facts of the violation need to match ***403** existing precedent" is unclear.[34] The inconsistency is problematic because it continues to present difficulties for lower courts who are responsible for initially determining what "clearly established" law is for rights.[35] This, in turn, results in an ambiguous standard.

Because of the lack of clarity in the standard, the doctrine in practice protects law enforcement officials from even getting to trial.[36] Judges, in their "arbitrary degree of factual specificity in making that judgment ... ultimately leave the protections afforded by important rights unpredictable"[37] and err on the side of granting rather than denying qualified immunity. In other words, the expansive judicial discretion self-created by the decreased uniformity of qualified immunity rulings results in more protections for police and decreased protections for plaintiffs whose rights have been violated.[38] Moreover, deciding cases in this discretionary way leaves certain constitutional analysis unaddressed, which means the law is never left clear, never grows, and stalls.[39] This stalling leaves civil plaintiffs without a remedy for the violation of their rights.[40] As Justice Sotomayor's dissenting opinion notes in *Kisela*, this approach towards qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers" and is "symptomatic of 'a disturbing trend regarding the use of the Court's resources' in qualified immunity cases."[41] Indeed, a Reuters study confirms not only the growing inclination of the appellate courts to grant police immunity but also large geographical disparities in the rate that officers receive immunity.[42]

*404 II. INTERNATIONAL LEGAL OBLIGATIONS UNDER HUMAN RIGHTS TREATIES AND INTERNATIONAL LEGAL STANDARDS ON POLICE ACCOUNTABILITY

The ICCPR, the UNCAT, and the ICERD, set out legal standards applicable to both policing and the fundamental rights of an individual for States to observe. In addition, practical guidance developed by international organizations--like the UNODC--is given to support States like the **United States**, in an endeavor to provide transparency, accountability, and oversight in policing, as specific to disciplinary proceedings against law enforcement officials. To better understand the drawn connection, one need first know what the aforementioned **treaties** represent and the **United States**' role in the **treaties**. Similarly, practical guidance as carried out by UNODC must first be illustrated in order to bring forth the connection that this article presents.

A. International Legal Obligations Under the ICCPR, UNCAT, and the ICERD

In the international human rights arena, there are three **treaties** of notable importance that set out guiding principles on the fundamental rights of a person for ratifying States to observe and that are particularly undermined by the U.S. judiciary's creation and practice of the qualified immunity doctrine: the ICCPR,[43] the UNCAT,[44] and the ICERD.[45] Subject to RUDs,[46] ratifying States are bound by the respective **treaty** provisions.[47]

1. The ICCPR Guarantees Right to Effective Remedy for Civil Rights Violations.--The ICCPR is a multilateral **treaty** adopted by the **United Nations** Assembly that commits its parties to respect an individual's civil and political rights, including the right to life, human dignity, and freedom from torture.[48] Imbedded into the **treaty** is the ***405** guaranteed right to due process and a fair trial when those rights have been violated.[49]

The ICCPR establishes an international legal framework for a right to remedy, wherein the covenant compels ratifying State governments to take judicial measures in order to protect the rights afforded in the **treaty** provisions and allows for effective remedies to ensue.[50] As stated more specifically in the ICCPR, ratifying States need to have an adequate process in place, by which people can seek redress if their civil or political rights have been violated.[51] Notably, each State Party shoulders a burden:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting capacity;

> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislature authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[52]

In 1992, the **United States** Senate ratified the ICCPR.[53] As a result, the ICCPR effectively became the "supreme law of the land" and now carries the weight of federal law in the **United States**.[54] In carrying this status, the ICCPR obligates the **United States** to protect basic human rights including in instances where government entities and agents are involved.[55] To that end, the covenant compels the **United States**' government to take judicial measures towards protecting the rights listed in the **treaty's** provisions and to provide an effective remedy when those ***406** rights have been violated.[56] Subject to RUDs made at the time of ratifying the ICCPR, the **United States** cannot take measures that contradict or violate such provisions.[57]

Here, it is important to note that at the time of U.S. ratification of the ICCPR, there was a RUD rendering the **treaty** non-self-executing.[58] This RUD, in effect, limits litigants' ability to sue in court for direct enforcement of the **treaty** provisions.[59] Despite this, the **United States** is still obligated to uphold the object and purpose of the ratified **treaty**.[60]

2. Right to Prompt and Impartial Investigations, and Fair and Adequate Compensation under the UNCAT.--The UNCAT is a human rights **treaty** with the objective to help eliminate cruel, inhumane treatment across the international community.[61] This **treaty** is applicable to policing, specifically in terms of policing behavior (like torture).[62] UNCAT requires its signatories to take effective measures to avoid torture and other acts of cruel or inhuman treatment within their jurisdiction.[63] Upon the State's ratification, it must ensure that when there is inhumane treatment in violation of the **treaty's** provisions, it is made possible for an individual to initiate and proceed with a prompt and impartial investigation in the State.[64] Specifically, Article 12 and 13 obligate the ratifying State to ensure competent authorities promptly and impartially investigate, when there is reasonable belief that an act of torture has occurred in its jurisdiction.[65] Article 14 obligates the State party to ensure redress in its legal system for an act of torture.[66] This includes providing "an enforceable right to fair and adequate compensation" and in the event of the victim's death "as a result of torture, his [or her] dependents shall be entitled to compensation."[67]

Upon **United States** ratification in October 1994, the UNCAT became binding in the **United States**, consequentially expanding its ***407** application to all actions in the State, notably, actions involving "government entities and agents," down to the state and local level.[68] In effect, the Convention applies to police departments and other law enforcement agencies.[69] Though, in similar fashion to the ICCPR, the **United States** Senate, at the time of ratification, submitted a declaration, rendering the previously mentioned **treaty** provisions non-self-executing.[70]

*3. The Ratifying State's Obligation to **Review** Governmental Policies that Perpetuate Racial Discrimination under ICERD*.--The ICERD is a convention that commits its signatories to the elimination of racial discrimination and sets forth principles by which signatories can work to eliminate racial discrimination.[71] Notably, State parties guarantee that they will "take effective measures to **review** governmental, national, and local policies, and amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[72] Moreover, State parties shall ensure to those in their jurisdiction effective remedy procedures.[73]

Upon ratification of the ICERD in 1994, the **United States** committed itself to upholding equality and non-discrimination in the criminal legal system, and access to justice.[74] Similar to the ICCPR and UNCAT, the ICERD provisions apply to "government entities and agents, including all federal, state, city, and county and all forms of local government entities" in the **United States**.[75] Further, the ICERD carries the same weight as federal law, subject to RUDs filed at the time of

ratification.[76] Similar to the RUDs filed upon the ratification of the ICCPR and UNCAT, the United States declared the ICERD treaty to be ***408** non-self-executing upon ratification.[77] In the same vein, this prevents litigants from bringing ICERD claims into U.S. courts.[78]

B. International Policies on Police Accountability

In the policing arena, the United Nations has been anything but silent about the need for criminal legal system reform. Notably, the United Nations' High Commissioner for Human Rights led efforts to address systemic racism against African American individuals by adopting resolutions to condemn racial discrimination and violent practice at the hands of law enforcement.[79] Moreover, throughout the years, the United Nations and other international organizations created standards for countries to use as a way to hold police officers more accountable in the context of disciplinary proceedings initiated against them. The intention is to assist policymakers and key players within the State in helping to improve, promote and protect human rights at the domestic level.[80] In the context of policing, these sort of standards, guidelines, and norms projected by the international community serve as readymade tools for States across the globe by which accountability can be reinforced in their jurisdictions.[81]

1. International Standards and Practices Specific to Disciplinary Proceedings Against Police Officers.--At its core, international norms involving disciplinary proceedings against police officers communicate a need for States to respect and protect human rights. Narrowing into what exactly this entails, State police overseers have to be willing to hold police accountable. With this form of accountability "disrespect must be followed by appropriate disciplinary proceedings."[82] In other words, there must be a willingness to provide individuals with certain protections, which include disciplinary proceedings when violations have occurred. Specifically, these proceedings should not be limited to criminal proceedings, but should include both "civil and public administrative proceedings for compensation or redress."[83] Notably, international standards for policing include the ability for a fair trial to be conducted, where there is the ***409** "disclosing [of] dockets and other pieces of work-related information that may be self-incriminating."[84] In situations where "the complainant is injured, or the victim has died as a result of police action, the burden of proof falls on the police to explain" how this happened.[85]

This becomes especially important in the context of policing where "successful civil suits filed by victims [become] a critical tool for police departments to identify and remedy widespread abuses" in a way that criminal charges against police officers cannot.[86] Indeed, the UNODC emphasized the usefulness of a complainant filing a civil suit against the police officer or police agency accused of misconduct.[87] UNODC reasoned that it is a better accountability mechanism than existing police accountability systems, as civil litigation is historically a strong deterrent against future violations.[88]

III. QUALIFIED IMMUNITY DOCTRINE UNDERMINES INTERNATIONAL LAW AND POLICY, COMPROMISING ACCOUNTABILITY

Despite the law and policy put into place by the international community, the United States judicially created qualified immunity doctrine for law enforcement officials undermines the measures meant to secure law enforcement accountability. Although domestic courts in the State are not obligated to enforce treaties that are bound to non-self-executing RUDs or pay mind to what the international community offers as "advice" about domestic affairs,[89] creating this form of domestic court precedent poses bigger challenges to the treaty making process's legitimacy and it feeds into a system wherein State domestic court systems are held less accountable to treaties the State itself ratified.

A. The Lack of Clarity Found in the Doctrine Undermines International Law and Policy.

As discussed in Part I, the highest court in the United States has never given a clear definition of what it means for a right to be "clearly established,"[90] which has resulted in a lack of accountability for law ***410** enforcement officials.[91] This lack of accountability, whether intentional or not, undermines and rejects international law and policy that requires a State to hold

law enforcement officials accountable after a human rights violation occurs in its territory.

The ICCPR provides for an individual's right to effective remedy after a civil or political rights violation occurs in the ratifying State.[92] However, a State domestic court system undermines such State obligations when it creates doctrines like qualified immunity, which compromises the State's obligation of "ensur[ing] that any person whose civil rights or freedoms are violated[,] have an effective remedy," and that said remedy is guaranteed and enforced by judicial authorities.[93] Although the ICCPR does not explicitly consider civil legal redress to be a sign of ensuring effective remedy, it is arguable that not having civil legal redress in the **United States** compromises remedies' adequacy and effectiveness. In the **United States**, police officer criminal prosecutions are scarce and a plaintiff's "most plausible avenue for redress often is civil suit for monetary damages."[94] Thus, by limiting avenues for civil remedy as a result of the difficult standard that must be met to surpass qualified immunity, there are functionally no options in remedy.

Similarly, the qualified immunity doctrine undermines provisions under the UNCAT that guarantee an individual's right to prompt and impartial investigations, and fair and adequate compensation in the **United States** when acts of cruel, inhuman treatment are exhibited by law enforcement officials.[95] There is a lack of prompt and impartial investigations when a State domestic court doctrine limits the ability for an officer to even stand civil suit in the first place. This practice hinders both the ability to promptly redress violations against victims and judicial impartiality, by wielding vague legal standards to dismiss a civil case without having to analyze its implications. Moreover, the qualified immunity doctrine rejects much of the language in Article 14 which ensures that ratifying States provide redress for an act of torture and that a plaintiff have an enforceable right to fair and adequate compensation.[96] This is because the doctrine's application limits the ability to seek civil damages against officers who may have exercised cruel and inhuman treatment against an individual.

The doctrine also undermines ICERD provisions that speak to amending, rescinding or nullifying laws that have the effect of creating ***411** or perpetuating racial discrimination.[97] The doctrine in itself perpetuates egregious and racist conduct exercised by police officers because its standard makes it almost impossible to sue a police officer for damages.[98]

In short, international standards and practice specific to disciplinary proceedings against law enforcement officials are also undermined when State domestic court doctrine ignores the need for civil suits and standards in disciplinary proceedings.

As noted in Part II, international organizations such as the International Committee of the Red Cross (ICRC) and the UNODC suggest that there be civil proceedings for redress because of civil litigation's ability to serve as a strong deterrent against future violations.[99] Civil suits serve as a uniquely strong deterrent for a few reasons. First, litigation through Section 1983 tends to be "the only legal tool that is available to reach the nearly 18,000 police departments nationwide."[100] Second, civil suits against police officers are vital because modern discovery allows for information accumulation that can then be assessed "for trends ... suggesting problem officers, units and practices."[101] In the same way, one could also **review** evidence developed through case law "for personnel and policy lessons."[102]

However, the qualified immunity doctrine undermines these processes by preventing cases from ever coming to court. As a result, the doctrine's limitations do not pay enough attention to international policy stressing the importance for civil suits against police officers. Thus, the doctrine undermines international standards and norms that call for fair trials outside of criminal proceedings against law enforcement officials.[103] This includes a means for disclosure of self-incriminating information,[104] an ability for an accurate balancing of evidence,[105] and the burden falling on the law enforcement officials to explain how the ***412** violation might have occurred.[106] The U.S. judiciary's rejectionism in this way fails to acknowledge the advice given by international organizations, like ICRC and UNODC, that there is value in the ability to file civil suit against a law enforcement official. If there were an honest acknowledgement of such international policies, the U.S. judiciary would not make it so difficult to sue a law enforcement official in a non-criminal proceeding.

B. U.S. Rejectionism Delegitimizes the Treaty-making Process, and Results in a Lack of Accountability

As noted, State domestic courts are not obligated to enforce **treaties** that are bound to non-self-executing RUDs,[107] nor are

States obligated to follow advice given by the international community. However, this does not stop domestic disregard of international law and policy through court precedent from being unimportant. Creating domestic court precedent that undermines international law and policy delegitimizes the **treaty** making process and further perpetuates the notion that State domestic courts need not give credence to international law the State itself ratified.

Of course, international human rights law must be delicately balanced with sovereignty principles, especially in cases where sovereignty principles are exercised through the State domestic court system.[108] However, State domestic court rejectionist policy that undermines international law meant to combat a lack of accountability for law enforcement officials ends up incapacitating **treaties** the U.S. signs and ratifies. International **treaties** are built on shared interests, trust and are meant to promote greater cooperation among States.[109] In other words, State parties to an international **treaty** are supposed to have greater confidence that the terms to which they have agreed are followed by other State parties signing on.[110] Therefore, when domestic court precedent undermines such provisions, built confidence and trust established among signatories is jeopardized. Such undermining also presents larger issues regarding the **treaty**-making process's legitimacy and what it means for there to be international law if such undermining, whether intentional or not, is permitted by the State's branches of government.

***413** Further, allowing State domestic court systems to create a doctrine that rejects or disregards international law feeds into a larger problem. Namely, State domestic courts do not have to enforce **treaty** provisions the State itself ratifies due to federalism principles. Federalism principles rely on the notion that it is the legislature's job to implement the provisions of the **treaty** before it may be applied by the courts.[111] However, what is actually created is a State domestic court system that not only reverts to "local and regional human rights norms and institutions over international ones," but also creates precedent that undermines international laws that the State opted to be held accountable to.[112]

IV. RESOLUTIONS

Recommendations to combat instances where a State domestic court system creates doctrine that undermines international law and policy include the development of greater and more principled acceptance of international human right legal obligations and norms by domestic courts. The first specific suggestion broadly considers limiting the use of RUDs, so as to not restrict the domestic effect of **treaties** like the ICCPR, the UNCAT, and ICERD within the State court system. The second suggestion considers reforming a specific type of RUD: non-self-executing declarations, so that **treaties** like the ICCPR, the UNCAT, and ICERD can be acknowledged and enforced in domestic courts. A last recommendation calls for greater State recognition and integration of norms set forth by international communities.

A. Reforming RUDs to Counteract U.S. Judiciary Rejectionist Policy

Considering an appropriate use of RUDs is a positive step towards limiting cases where the State's domestic court system may be more inclined to create policy that undermines international law, whether explicitly or not.

RUDs lay out how a **treaty** will be interpreted under a State's laws,[113] as they are attachments put on an international **treaty** that clarify how the respective **treaty** will be interpreted in the ratifying State.[114] In other words, RUDs are a way for States to qualify their consent to a ***414** particular **treaty**.[115] In some ways, they can be seen as a State, at the outset, rejecting particular provisions of the **treaty** and usurping the **treaty's** law for a State's domestic needs.[116] It also seems to set a tone in the tension that exists between State sovereignty and "the notion of international order based on law."[117]

In the **United States**, RUDs are adopted by the Senate when it consents to the **treaty** and are included when the President decides to ratify the **treaty**.[118] Due to RUDs' ability to void States' obligations under provisions within **treaties**, international law scholars raise the concern that RUDs get in the way of "an international order that seeks to encourage genuine and full **treaty** participation" by the State as a whole.[119] Indeed, supporters of ratification view certain aspects of RUDs as warping the treatymaking process under the **United States** Constitution to the point of even reinvigorating the Bricker

Amendment--which, if adopted, would have wreaked damage on **treaty** power by making all **treaties** not self-executing.[120]

Consequently, RUDs should be limited. **Treaty** drafters should disallow RUDs and instead include no-reservation clauses and/or provisions limiting the use of RUDs.[121] This would make the State more accountable to the obligations listed within the provisions of a **treaty**. To be clear, there are cases where limiting RUDs will not be possible.[122] In those cases, the **United States** should not ratify the **treaty**.[123] Instead the **United States** should consider whether or not it should even sign onto such a **treaty** in the first place, and thereby risk violating the "object and purpose" of the **treaty's** enactment.[124] Limiting the broad overuse of RUDs may then be able to reorient the tone that the U.S. customarily projects when it comes to meaningfully upholding **treaty** mandates.[125] ***415** More importantly, limiting RUDs in this way might rebuild sentiment within the **United States** government, including the State's domestic court system, when it comes to paying mind to international law and policy because the State would only be signing **treaties** it is truly committed to upholding.

The possibility of limiting RUDs is not so far out of reach. The Senate push backed against limiting RUDs, due to the Senate's obvious need to conform international law to the Constitution.[126] However, the Senate has given consent to **treaties** that carry RUD limiting provisions although clarifying that their approval should "not be construed as precedent for such clauses in future agreements."[127] This suggests that progress can be made towards limiting the practice of RUDs.

This article is not denying the possibility that this shift might make the **United States** reconsider signing onto **treaties** altogether.[128] The **United States** has a history of being reluctant participation in multilateral **treaties**, unless significant reservations to the **treaty** can be attached.[129] Examples include referring back to the ICCPR, UNCAT, and ICERD, where the **United States** attached reservations in all three **treaties** that effectively excluded State's domestic courts from enforcing the **treaty's** provisions.[130] Additionally, when the **United States** became a party to the ICCPR, the State attached reservations that excluded U.S. obligations under the **treaty** that added to already-existing U.S. law.[131]

There is also the possibility that other State actors might determine "the **United States**' use of RUDs in important **treaties** more inappropriate and its ratification less important."[132] In this case, **treaty** drafters might be more willing to pass **treaties** with these sorts of provisions that limit RUDs and leave "the **United States** behind in the treatymaking process."[133] This means that other members of the international community might start creating RUD-limiting **treaties** that prevent the **United States** from joining if the **United States** "unnecessarily concerns itself with the enforceability of its RUDs."[134] Indeed, **treaties** have no sign of slowing anytime soon, and in instances ***416** where the **United States** ratifies less **treaties**, other states will continue signing and ratifying multilateral **treaties** without the **United States**.[135]

B. Rethinking RUD Non-Self-Executing Declarations

The **United States**' practice of declaring **treaties** non-self-executing via RUDs notably contributes to judicial rejectionist policy, as non-self-executing declarations mean that legislative action is required before it may be applied by the courts.[136] Without legislative action then, non-self-executing **treaties** are seen as a way for domestic courts to disregard **treaties** the State itself ratifies, which further perpetuates sentiment that **United States** domestic courts find no need to take human rights **treaties** seriously.[137] Most importantly, it allows domestic courts to create doctrines that undermines international legal obligations. In order to combat or limit such practices non-self-executing declarations should be reformed dramatically.

Notably, non-self-executing declarations are among the most important forms of RUDs, largely due to their remarkable ability to render human rights **treaties** unenforceable by domestic courts.[138] As previously mentioned, this is because these declarations make it so that a **treaty** is only enforceable in State domestic courts if the **United States**' political branches act to make it so.[139] Thus, this sort of RUD alleviates domestic courts from obligations tied to the provisions of a given **treaty**, and instead, punts the "task of implementing human rights obligations into domestic law" to the other branches of State government.[140]

Proponents of such practices cite that political branches have a legitimate need in preserving the domestic implementation of such **treaties**, and that the power over the conduct of U.S. foreign relations should be left to the political branches.[141]

However, such propositions are one-dimensional since they fail to acknowledge that all branches of the **United States** government should be accountable to internationally recognized and binding law and should act accordingly because **treaties** enjoy the benefit of the Supremacy Clause. One cannot be accountable to a **treaty's** provisions if there is no power to uphold or enforce it. An attachment to the **treaty's** ratification should not dramatically change it ***417** in this way. Instead, domestic courts should be empowered to uphold the supreme law of the land, which is what a **treaty** becomes upon ratification. This is important, as all branches should be accountable to the law and play an active role in upholding it, not just two of three branches of the government.

Moreover, international law scholars with federalism sympathy disregard that when one branch of government fails to act, the other must hold that branch accountable. Concerns over judicial activism are welcome, but one must also acknowledge the need for judicial oversight due to the separation of power principles. Domestic courts must have the ability to hold other branches of government accountable should those branches decide not to enforce and uphold **treaty** provisions the State itself committed to upholding. To do otherwise risks compromising the people's will, whose rights, as prescribed under **treaties**, are actively violated. Alternatively, one must consider the point of ratifying the **treaty** in the first place.

C. State Recognition and Integration of International Norms as a Means of Combatting Judicial Rejectionism

A final recommendation calls for wider acceptance of international norms and standards put into place by international organizations involving domestic affairs, such as policing. In theory, this would encourage greater domestic court recognition and aid in curbing domestic court precedent that undermines and discredits such standards and norms.

1. What Are International Organizations and Why Are They Important?-- International organizations serve many functions, including gathering information, monitoring trends, delivering services and aid, and providing forums for States to work together to achieve common objectives.[142] Relevant to this discussion, international organizations, typically created by **treaty**,[143] involve multiple nations, working in "good faith, on issues of common interest."[144] Because the scale of problems States face might be too great to confront alone, international organizations, such as the UNODC, offer assistance and encourage cross-national approaches to action involving domestic issues ***418** such as policing.[145] Efforts through international organizations create systems that bring nations "together in the areas of peace and security."[146] This strengthens charity and clears the way for "equitable distribution of [international] resources in the world."[147] These resources include manuals from experts such as "police officers, members of independent oversight bodies, international consultants, human right activists, and academics."[148] In the policing arena, these efforts provide "a system of internal and external checks and balances" to make sure law enforcement officials carry out their duties properly and are held responsible when they do not.[149]

2. Why listen?--The big question that seems to follow is why the **United States**--specifically the **United States** judiciary--would want to listen, when it already has a tough time listening to loud and articulate voices that define problems and potential solutions within its jurisdiction. The answer might be that there is more to be gained than lost. Specifically, international standards and norms have the ability to shift the way the **United States** judiciary thinks about its own legal interpretation, especially with respect to qualified immunity. As associate justice of the Supreme Court of the **United States**, Justice Breyer, notes, "forces of globalism, internationalism, and interdependence" and "forces of localism" need not be "antithetical to" one another.[150] They can coexist, and both can be accounted for.[151] As Justice Breyer further suggests, "look[ing] beyond [your] own shores" is needed "to answer questions of local law,"[152] even for questions of local law that might involve domestic affairs, such as policing.

CONCLUSION

Whether doctrines at the State domestic judicial level can continue undermining and rejecting international law and policy remains central to the future of treatymaking. The doctrine examined here, qualified immunity, has undermined the ICCPR, the UNCAT, the ICERD, and international policy by international organizations.

***419** The ICCPR does not specifically prescribe civil legal redress as an effective remedy that must be met by the ratifying State. However, in a State where criminal prosecutions of police officers are scarce, like the **United States**, difficulties to seek civil legal redress compromise the **treaties** provisions guaranteeing an effective remedy for victims.

Much in the same way, the qualified immunity doctrine also undermines provisions under the UNCAT, which guarantee prompt and impartial investigations and fair and adequate compensation in the ratifying State when law enforcement officials have exercised cruel and inhuman treatment against an individual. This is because the doctrine limits law enforcement officials from even being sued civilly.

Qualified immunity also undermines ICERD provisions that speak to reforming laws that have the effect of perpetuating racial discrimination. It perpetuates racist conduct by law enforcement officials because the standards for overcoming qualified immunity are so difficult to meet.

Likewise, the qualified immunity doctrine undermines international norms as it limits proceedings that are not criminal in nature and disregards the importance of civil proceedings.

If rejectionism by the **United States**' highest court continues, the treatymaking process stands to lose more than mere participation; it stands to lose weight and credibility. Future promises by the State will lack credibility, making it increasingly difficult to recapture the investment made as a ratifying State. Further, rejectionist practices will continue to encourage a system where State domestic courts do not have to enforce provisions of **treaties** that the State itself ratified. Further, RUDs in these **treaties** enable judicial rejectionism, relieves the judiciary from accountability, and endorses a branch of government's ability to create law that undermines international law. This article adds a new dimension to that debate by examining how the **United States**' highest court carries out rejectionist policy through the continual use of the qualified immunity doctrine, something seemingly domestic and far removed from international law and policy. Consequently, qualified immunity carries much more broad and far-reaching implications to the State's ability to ratify international **treaties** and a State judiciary's ability to undermine said **treaties**.

The future of **treaty** making is ultimately left in the hands of the **United States** and its allies. Reforming RUDs to not limit **treaties**' domestic effects within the State court system and instilling within the State greater and more principled acceptance of international legal norms has the ability to help lead a reoriented effort that sustain treatymaking's values.

Footnotes

d1 J.D. Candidate, University of Washington School of Law, Class of 2021. I want to thank Mike Angiulo and Jackie Cross for their insight and input into this Comment. I would also like to thank the Editorial Staff at *Washington International Law Journal* for their hard work, insightful comments, and incredible attention to detail, especially Sean Hyde, Kolby Cameron, and Katrina Mendoza.

1 *See* Pierson v. Ray, 386 U.S. 547 (1967).

2 For the purposes of this article, "State" refers to a sovereign whose citizens are relatively homogenous.

[3] Tim Miller, *Part IX Qualified Immunity*, FLETC, https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf.

[4] Pearson v. Callahan, 555 U.S. 223, 231 (2009); Sebesta v. Davis, 878 F.3d 226, 233 (7th Cir. 2017); Robbins v. Becker, 715 F.3d 691, 694 (8th Cir. 2013); *see also* Liff v. Office of Inspector Gen. for U.S. Dep't of Labor, 881 F.3d 912, 917-18 (D.C. Cir. 2018) (noting that qualified immunity is an entitlement given by the court to not have to stand trial or face other burdens of litigation); WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, *POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS* (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10492.

[5] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[6] Morse v. Cloutier, 869 F.3d 16, 22 (1st Cir. 2017).

[7] Ryder v. **United States**, 515 U.S. 177, 185 (1995).

[8] Mullenix v. Luna, 577 U.S. 7, 12 (2015) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); Dang *ex rel.* Dang v. Sheriff, Seminole Cty., 871 F.3d 1272, 1278 (11th Cir. 2017) (quoting Lee v. Ferraro, 284 F.3d 1188, 1994 (11th Cir. 2002)); West Virginia State Police v. Hughes, 238 W. Va. 406, 411 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); *see also* Andrea M. Alonso & Kenneth E. Pitcoff, *A Closer Look at Qualified Immunity*, N.Y. L.J. (Jul. 23, 2020, 10:10 AM), https://www.law.com/newyorklawjournal/2020/07/23/a-closer-look-at-qualified-immunity/ (explaining qualified immunity is not a catchall, and that "it is available to all government officials except those officers who, on an objective basis, are either 'plainly incompetent' or 'knowingly violates the law.").

[9] NOVAK, *supra* note 4, at 2.

[10] *Id.*

[11] *Id.*

[12] *Id.*; U.S. CONST. amend. IV, § 4; *see also Fourth Amendment*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/fourth_amendment (last visited Mar. 10, 2021) (noting that all searches and seizures under the Fourth Amendment must be reasonable, and that no excessive force shall be used).

[13] NOVAK, *supra* note 4, at 2.

[14] Marcus R. Nemeth, *How Was* That *Reasonable? The Misguided Development of the Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 991-92 (2019).

[15] Pierson v. Ray, 386 U.S. 547, 551 (1967).

[16] *Id.* at 548-50.

[17] *Id.* at 557.

[18] *Id.* at 554.

[19] Nimra Azmi, *The Supreme Court's Insidious Development of Qualified Immunity*, JUST SECURITY (June 12, 2020), https://www.justsecurity.org/70751/the-supreme-courts-insidious-development-of-qualified-immunity/ (explaining how since its inception, "qualified immunity's protections for officers have only expanded" and that the doctrine has since grown "as a barrier to justice in ... intertwined ways.")

[20] *Id.* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[21] *Harlow*, 457 U.S. at 807.

[22] West Virginia Lottery v. A-1 Amusement, Inc., 807 S.E.2d 760, 776 (2017) (quoting West Virginia Bd. of Educ. v. Marple, 783 S.E.2d 75, 82 (2015)).

[23] *Id. See also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (holding that qualified immunity protects police from civil suit as long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."); Nemeth, *supra* note 14, at 998-99.

[24] *See* Azmi, *supra* note 19; *see* JAY SCHEWEIKERT, CATO INSTITUTE, POLICY ANALYSIS NO. 901, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf (strongly indicating that the qualified immunity doctrine's expansion has resulted in a lack of accountability for law enforcement officials due to its legal standard).

[25] SCHEWEIKERT, *supra* note 24 (noting that in practice, the legal standard is a "huge hurdle for civil plaintiffs because it generally requires them to identify not just a clear legal rule, but a prior case with functionally identical facts").

[26] James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602-03 (2011) (stating that the lack of accountability stems from the inability to meet such a demanding standard to overcome such immunities awarded to law enforcement officials).

[27] *Id.* John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298-99 (2012) (describing how the Supreme Court has not given a definition of what it means for rights to have been "clearly established").

[28] Tyler Finn, *Qualified Immunity Formalism: 'Clearly Established Law' and the Right to Record Police Activity*, 119

COLUM. L. REV. 445, 450 (2019).

29 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (holding that plaintiffs seeking to overcome qualified immunity are required to present "existing precedent" that places the legal question "beyond debate"); *see also* Mullenix v. Luna, 577 U.S. 7, 12 (2015); Finn *supra* note 28, at 450.

30 Williams, *supra* note 27, at 1305.

31 Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (clarifying that lower courts should not read precedent broadly when determining if new facts should be governed by clearly established law); District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (noting that whether facts fall into the "clearly established" standard requires a "high 'degree of specificity'"); *see* Finn *supra* note 28, at 451 (explaining how the "Supreme Court has concentrated little attention on the relevant sources of law, instead focusing its holding on the specificity with which the right must be defined").

32 Hope v. Pelzer, 536 U.S. 730, 739 (2002); *Ashcroft*, 563 U.S. at 741; *see* Finn *supra* note 28, at 451 (emphasizing how the Supreme Court has looked for the invoked right to have been "defined with sufficient clarity so a reasonable official would understand that what she is doing violates that right").

33 Finn, *supra* note 28, at 452.

34 *Id.*

35 *Id.*

36 *See* Nemeth, *supra* note 14, at 992.

[37] Aaron Belzer, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 647 (2012).

[38] Williams, *supra* note 27, at 1299; Belzer, *supra* note 37.

[39] *Id.*

[40] *Id.*

[41] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

[42] Reuter's analysis found notable distinctions in how district court judges in two different states ruled on qualified immunity requests. For instance, Texas judges granted immunity more frequently to officers who used force against unarmed civilians than California judges did in cases where civilians were armed. Andrea Januta & Jackie Botts, *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, REUTERS (Dec. 23, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/.

[43] G.A. Res. 2200A (XXI) (Dec. 16, 1966).

[44] G.A. Res. 39/46, Convention Against Torture (Dec. 10, 1984).

[45] G.A. Res. 2106 (XX) (Dec. 21, 1965).

[46] RUDs are attachments to **treaties** that explain how a **treaty** will be interpreted with a State's domestic law once ratification is complete. RUDs limit the domestic effect of **treaties** and reframe certain provisions from the **treaties** in ways that make it consistent with American practices. Eric Chung, *The Judicial Enforceability and Legal Effects of*

Treaty *Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 170 (2016).

47 The Restatement (Third) of the Foreign Relations Law of the **United States** sets out basic principles of how customary law should be incorporated into the "law of the land" under Article IV of the Constitution. As the Court holds, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." The Paquete Habana, 175 U.S. 677, 700 (1900).

48 G.A. Res. 2200A, *supra* note 43, pmbl.

49 *Id.* pt. 2, art. 2.

50 *FAQ: The Covenant on Civil & Political Rights*, ACLU (Apr. 2019), https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr.

51 U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT, AND INTEGRITY, at 21, U.N. Sales No. E.11.IV.5 (2011), https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf.

52 G.A. Res. 2200A, *supra* note 43, pt. 2, art. 2, ¶ 3.

53 ACLU, *supra* note 50.

54 *Id.*

55 *Id.*

[56] *Id.*

[57] *Id.*

[58] S. Res. 95-20, 102d Cong., 138 Cong. Rec. S478-01 (1992) (enacted).

[59] ACLU, *supra* note 50.

[60] Vienna Convention on the Law of **Treaties**, art. 19, May 23, 1969, 1155 U.N.T.S. 331 (A "State is obliged to refrain from acts which would defeat the object and purpose of a **treaty**").

[61] *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation*, EVERYCRSREPORT.COM (Jan. 19, 2010), https://www.everycrsreport.com/reports/RL32438.html.

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[63] G.A. Res. 39/46, *supra* note 44.

[64] *Id.* arts. 12-13.

[65] *Id.*

66 *Id.* art. 14.

67 *Id.*

68 *FAQ: The Convention Against Torture*, ACLU, https://www.aclu.org/other/faq-convention-against-torture.

69 *Id.*

70 S. Res. 100-20, 101st Cong., 136 Cong. Rec. S17486-01 (1990) (enacted).

71 G.A. Res. 2106, *supra* note 45.

72 *Id.* art. 2, pt. 1(c).

73 *Id.* art. 6.

74 The **United States** commits itself to upholding ICERD's **treaty** provisions upon ratification. Though, the State has fallen short due to nullifying RUDs. Maya K. Watson, *The **United States**' Hollow Commitment to Eradicating Global Racial Discrimination*, AM. B. ASS'N (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-**united**-**states**--hollow-commitment-to-eradicating-global-racia/.

75 *Frequently Asked Questions Convention on the Elimination of All Forms of Racial Discrimination*, ACLU, https://www.aclu.org/sites/default/files/field_document/cerd_faqs.pdf (last visited Feb 19, 2021).

[76] *Id.*

[77] Watson, *supra* note 74.

[78] *Id.*

[79] *Human Rights Council Calls on Top UN Rights Official to Take Action on Racist Violence*, UN NEWS (June 19, 2020), https://news.un.org/en/story/2020/06/106672 2.

[80] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 2.

[81] *Id.* at 32.

[82] Int'l Comm. of the Red Cross [ICRC], *International Rules and Standards for Policing* at 53 (June 2015), https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf.

[83] *Id.* at 56.

[84] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 41.

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[86] *Fact Sheet: Civil Lawsuits Lead to Better Safer Law Enforcement*, CTR. FOR JUST. & DEMOCRACY AT N.Y.

LAW SCH. (June 20, 2017), https://centerjd.org/content/fact-sheet-civil-lawsuits-lead-better-safer-law-enforcement.

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90 Williams, *supra* note 27, at 1298-99.

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92 G.A. Res. 2200A, *supra* note 43.

93 *Id.* pt. 2, art. 2, ¶ 3.

94 Nemeth, *supra* note 14, at 991-92.

95 G.A. Res. 39/46, *supra* note 44, art. 12-4.

96 *Id.*

97 G.A. Res. 2106, *supra* note 45, art. 2, pt. 1(c).

98 Ian Millhiser, *Why Police Can Violate Your Constitutional Rights and Suffer No Consequences in Court*, VOX (June 3, 2020, 8:00 AM), https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court.

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100 Lynda G. Dodd, *Civil Right Suits Against the Police Are an Essential Tool for Enforcing the Constitution. But Cops Rarely Pay and Settlements Don't Lead to Change*, LSE US CENTRE (Nov. 18, 2015), https://blogs.lse.ac.uk/usappblog/2015/11/18/civil-rights-suits-against-the-police-are-an-essential-tool-for-enforcing-the-constitution-but-cops-rarely-pay-and-settlements-dont-lead-to-change/.

101 *Fact Sheet: Civil Lawsuits Lead to Better Safer Law Enforcement*, *supra* note 86.

102 *Id.*

103 U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 41.

104 *Id.*

105 *Id.*

106 *Id.* at 37.

107 Vasquez, *supra* note 89.

108 Watson, *supra* note 74.

109 Stanford Law Sch. & The Am. Univ. of Iraq, Sulaimani, *Public International Law: **Treaties** and International Organizations* 8 (Iraq Legal Education Initiative (ILEI) of Stanford Law School, Working Paper, 2016), https://law.stanford.edu/wp-content/uploads/2018/04/ILEI-**Treaties**-and-Intl-Orgs-2016.pdf.

110 *Id.*

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112 Jack Goldsmith, *The Unexceptional U.S. Rights RUDs*, 3 U. ST. THOMAS L.J. 311, 312 (2005).

113 Kevin C. Kennedy, *Conditional Approval of **Treaties** by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 99-122 (1996).

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115 Goldsmith, *supra* note 112, at 312.

116 *See* Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 117-18 (2008).

117 *Id.* at 115.

118 Chung, *supra* note 46, at 173.

119 *Id.* at 176.

120 Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341, 349 (1995) (conceding that "in retrospect, the Bricker Amendment, if adopted would have damaged the **treaty** power by making all **treaties** not self-executing"); *see also* Justin M. Loveland, *40 Years Later: It's Time for U.S. Ratification of the American Convention on Human Rights*, 18 SEATTLE J. FOR SOC. JUST. 129, 149 (2020) (explaining how the "Bricker Amendment" of the 1950s "engendered many aspects of both RUDs and the US exceptionalism ideology.")

121 Chung, *supra* note 46, at 209.

122 *Id.* at 220 (for example, cases when the **treaty** would be inconsistent with the Constitution or other domestic law and practices).

123 *Id.*

124 *Id.*

125 Watson, *supra* note 74.

126 Chung, *supra* note 46, at 210.

127 *Id.*

128 *Id.*

129 Frederic L. Kirgis, *Reservations to **Treaties** and **United** **States** Practice*, AM. SOC'Y OF INT'L L. (May 4, 2003), https://www.asil.org/insights/volume/8/issue/11/reservations-**treaties**-and-**united**-**states**-practice.

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134 *Id.*

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136 Vasquez, *supra* note 89.

137 Goldsmith, *supra* note 112, at 311-12.

138 *Id.* at 318.

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141 David Sloss, *Non-Self-Executing **Treaties**: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 3 (2002) (noting that "[o]n the one hand, the political branches have a legitimate desire to preserve their flexibility to manage the domestic implementation of **treaties**.")

142 Karen Mingst, *International Organization*, BRITANNICA, https://www.britannica.com/topic/international-organization (last modified May 21, 2020).

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145 *About the **United** **Nations** Office on Drugs and Crime*, U.N. OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/about-unodc/index.html (last visited Feb. 19, 2021).

146 *Intergovernmental Organizations (IGOs)*, *supra* note 144.

147 Badrul Alam Nill, Why Do We Need IGOs? (Dec. 10, 2017) (student paper, Daffodil International University) (on file with academia.edu).

148 U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at iii.

149 *Id.* at iv.

150 Stephen Breyer, *America's Courts Can't Ignore the World*, ATLANTIC (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/.

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152 *Id.*

30 WAILJ 397

No. 21-1271

In the Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,

Petitioners,

v.

REBECCA HARPER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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October 26, 2022

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INTEREST OF *AMICUS CURIAE*[1]

Human Rights Watch ("HRW") is a non-profit, non-partisan organization established in 1978 that investigates and reports on violations of fundamental human rights in over 100 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch has filed amicus briefs before various bodies, including the U.S. Supreme Court, U.S. courts of appeal, and the Inter-American Commission on Human Rights.

SUMMARY OF ARGUMENT

By approving the ratification of the International Covenant on Civil and Political Rights ("ICCPR")[2] and the International Convention on the Elimination of All Forms of Racial Discrimination

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[1] Pursuant to Supreme Court Rule 37.6, amicus affirms that no counsel for a party authored this brief in any part, and that no person or entity, other than amicus and their counsel, made a monetary contribution to fund the brief's preparation and submission. All parties have consented to the filing of this brief.

[2] International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 3 [hereinafter ICCPR].

("ICERD"), [3] Congress has guaranteed to all U.S. citizens the right to vote free from partisan gerrymandering and discrimination. It has also guaranteed an effective remedy for U.S. citizens against violations of that right. An effective remedy against partisan gerrymandering, as the ICCPR makes clear, means judicial review. The guarantee of the right to vote free from gerrymandering and to judicial review is the supreme law of the land.

In approving these treaties, Congress also explicitly recognized that guaranteeing these political rights serves important interests, including facilitating the ability of the United States to advocate effectively for the rule of law and democratic governance in other countries as a means of protecting against human rights abuses. HRW's experience in monitoring and investigating human rights abuses worldwide confirms that infringements on political rights, including restrictions on the right to vote as a result of gerrymandering, directly threaten other fundamental human rights, particularly for people historically marginalized or discriminated against based on religion, race, or ethnicity.

The North Carolina Supreme Court's decision in *Harper v. Hall*, 380 N.C. 317 (2022) vindicated not only Respondents' rights under the North Carolina State Constitution, but also the rights that Congress has guaranteed under the ICCPR and the ICERD. Adopting the novel interpretation of the Elections

[3] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195, 212 [hereinafter ICERD].

Clause urged by Petitioners in this case—the Independent State Legislature Theory ("ISLT")—would deprive Respondents, as well as all U.S. citizens, of any effective remedy against partisan gerrymandering. Respondents have identified numerous grounds on which the Court should reject the ISLT. HRW submits this amicus brief because the adoption of the ISLT would also directly contravene the protections set forth in the ICCPR and the ICERD. As a result, its adoption would undermine the important national interests that animated Congress's approval of those treaties, including the protection of human rights domestically and abroad.

ARGUMENT

I. CONGRESS, THROUGH THE RATIFICATION OF THE ICCPR AND THE ICERD, HAS GUARANTEED THE RIGHT TO VOTE FREE FROM PARTISAN GERRYMANDERING AND DISCRIMINATION, AS WELL AS AN EFFECTIVE REMEDY TO VINDICATE THAT RIGHT

As this Court has long made clear, once a treaty has been ratified, it "is a law of the land as an act of congress is." *Edye v. Robertson*, 112 U.S. 580, 598 (1884). The United States cannot ratify a treaty without the approval of the U.S. Senate by a two-thirds supermajority vote. U.S. Const. art. II, § 2, cl. 2. Once it has ratified a treaty, the United States, together with all other nations that have ratified that treaty, is "legally obligated to uphold the principles embodied in that treaty." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) (citing *Haver v. Yaker*, 76 U.S. 32, 35 (1869)). As a result of

Congress's approval of the ICCPR and the ICERD, which guarantee and require effective remedies to protect the right to vote free from partisan gerrymandering and discrimination, these protections are the "supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2.

A. The Right To Vote Free From Partisan Gerrymandering

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008). Article 25 of the ICCPR states that "[e]very citizen shall have the right and the opportunity . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." [4] By guaranteeing "equal suffrage," "genuine . . . elections," and the "free expression of the will of the electors," article 25 prohibits partisan gerrymandering. Partisan gerrymandering—"[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength" [5] —necessarily infringes on the "free expression of the will of the electors," deprives citizens of "equal suffrage" on the basis of their political opinions or party affiliation, and calls into question whether an election is in fact "genuine."

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[4] ICCPR, *supra* note 2, at art. 25.

[5] *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019).

To the extent that the plain text of article 25 of the ICCPR permits any ambiguity, the prohibition on partisan gerrymandering is set forth even more explicitly in the guidance issued by the U.N. Human Rights Committee ("HR Committee"), which, by the ICCPR's own terms, is the body charged with providing authoritative interpretations of the treaty, as well as with monitoring its implementation.[6] *See United States v. Duarte-Acero*, 208 F.3d 1282, 1287–88 (11th Cir. 2000) (holding that the HR Committee's General Comments "are recognized as a major source for interpretation of the ICCPR"). First, General Comment 25, issued by the HR Committee, states that the right to vote entails that "[n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of . . . *political or other opinion*."[7] Second, it states that the"[t]he drawing of electoral boundaries and the method of allocating votes *should not distort the distribution of voters* or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their

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[6] ICCPR, *supra* note 2, at art. 40(4) (authorizing the HR Committee to prepare general comments and transmit them to the state parties as appropriate); arts. 40–41 (tasking the HR Committee with monitoring State Parties' progress in implementing and complying with the ICCPR provisions); art. 28 (establishing the HR Committee).

[7] U.N. Human Rights Comm., General Comment No. 25 (1996) on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996), ¶ 3 (emphasis added). General Comment 25 also bars distinctions based on "race, colour, sex, language, religion, . . . national or social origin, property, birth or other status." *Id.*

representatives freely."[8] Third, the HR Committee also expressly counsels against any electoral framework where one's party membership could affect one's right to vote.[9]

B. The Right To Vote Free From Discrimination

The ICERD, which the United States has also ratified and therefore carries the same legal force as an act of Congress, states that signatories must eliminate racial discrimination with regard to "[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage."[10] Under the ICERD, the intent of government officials is largely irrelevant, as the state is obligated 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" without reference to the intent or aim of the state in instituting those laws or regulations.[11]

United Nations committees charged with monitoring implementation of treaties—in particular, the UN Committee on the Elimination of Racial Discrimination ("CERD")[12]—have expressed distinct

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[8] *Id.* ¶ 21 (emphasis added); *see also* ¶ 19.

[9] *Id.* ¶ 10.

[10] ICERD, *supra* note 3, at art. 5(c).

[11] *Id.* at art. 2, ¶ 1 (c).

[12] The CERD is the interpreting body of the ICERD. *See id.* at arts. 8–15.

concern over "the obstacles faced by individuals belonging to racial and ethnic minorities and indigenous peoples to effectively exercise their right to vote" in the United States.[13] Additionally, a recent study commissioned by the European Parliament expressed concern regarding partisan gerrymandering functioning as a proxy for racial discrimination in the United States, noting substantial similarities between what U.S. courts found to be racially motivated gerrymandering and what they found to be lawful partisan gerrymandering.[14] This study observed that partisan gerrymandering could cause the United States to fall short of its non-discrimination obligations under international law.[15]

These concerns are echoed in United States domestic law. Courts have noted political partisanship may serve as a "proxy" for membership in other racial, religious, or social groups. *See, e.g.*, *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016), *cert denied,* 137 S. Ct. 1399 (2017). Consequently, it is no surprise that international bodies have also found that the United States'

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[13] U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of The United States Of America, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014), ¶ 11.

[14] ELIZABETH L. OSBORNE, THE PRINCIPLES OF EQUALITY AND NON DISCRIMINATION, A COMPARATIVE LAW PERSPECTIVE: UNITED STATES OF AMERICA 1, 67–68 (2021), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689375/EPRS_STU(2021)689375_EN.pdf.

[15] *Id.* at 73.

boundary-drawing gamesmanship could result in discriminatory impacts across social groups. Partisan gerrymandering may therefore give rise to violations of non-discrimination provisions in both the ICCPR and the ICERD.[16]

[16] The right to equality and freedom from discrimination is set forth in articles 2(1) and 26 of the ICCPR. According to article 2(1), each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 26 of the ICCPR goes further to create an "autonomous right" of equality and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities." *See* U.N. Human Rights Comm., General Comment No. 18 (1989) on Non-Discrimination, U.N. Doc. HRI/GEN/1/Rev.6 (Nov. 10, 1989), ¶ 12. It states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall 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." ICCPR, *supra* note 2, at art. 26. The U.S. Senate made reservations with respect to its approval of the ratification of the non-discrimination provisions of the ICCPR, noting that discrimination was prohibited except where it was reasonably related to a legitimate government purpose. *See Resolution of Ratification: Senate Consideration of Treaty Document 95-20,* https://www.congress.gov/treaty-document/95th-congress/20/resolution-text. Tellingly, the U.S. Senate made no reservations with respect to article 25, which prohibits partisan gerrymandering.

C. The Right To An Effective Remedy When Voting Rights Are Violated

Congress also approved a guarantee to U.S. citizens of an effective remedy to vindicate the right to vote free from gerrymandering and discrimination. Article 2 of the ICCPR expressly requires all state parties not only "to respect," but also to "ensure" the rights recognized by the ICCPR, [17] including by "ensur[ing] that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."[18] Furthermore, the HR Committee has explained in General Comment 31 that article 2 of the ICCPR mandates more than simply "effective protection of [ICCPR] rights."[19] State Parties "must ensure that individuals also have accessible and effective remedies to vindicate those rights" by "establishing appropriate *judicial and administrative mechanisms* for addressing claims of rights violations

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[17] ICCPR, *supra* note 2, at art. 2(2); U.N. Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

[18] ICCPR, *supra* note 2, at art. 2(3)(a). Similarly, article 6 of the ICERD explicitly provides that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination." ICERD, *supra* note 3, at art. 6.

[19] Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

under domestic law."[20] General Comment 31 places particular importance on the judiciary as a means of assuring effective remedies to violations of the ICCPR, noting "the enjoyment of the rights recognized under the [ICCPR] can be effectively assured by the judiciary in many different ways, including direct applicability of the [ICCPR], application of comparable constitutional or other provisions of law, or the interpretive effect of the [ICCPR] in the application of national law."[21]

II. ADOPTION OF THE ISLT WOULD DEPRIVE VOTERS OF ANY EFFECTIVE REMEDY FOR PROHIBITED GERRYMANDERING IN CONTRAVENTION OF THE WILL OF CONGRESS AND THE NORTH CAROLINA STATE LEGISLATURE

In *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019), this Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts," but pointed to other judicial and administrative remedies available for such claims, including review by state courts and independent redistricting commissions. *Id.* at 2507–08; *see also Ariz. State Legislature v. Ariz. Indep.*

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[20] *Id.* (emphasis added); *see also* G.A. Res. 60/147, annex, ¶¶ 3(c), (d), 11–12, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

[21] Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

Redistricting Comm'n, 576 U.S. 787 (2015). Petitioners now urge the Court to adopt an interpretation of the Elections Clause that would foreclose those remedies and deprive U.S. citizens of any effective remedy to redress claims of partisan gerrymandering.[22] Petitioners' arguments should be rejected because such a result would plainly contravene the United States' legal obligations under the ICCPR and the ICERD. By approving those treaties, Congress has not only prohibited partisan gerrymandering, [23] but it has also committed to providing judicial or similar review as a remedy for claims of gerrymandering.[24]

As this Court has previously held, "[t]he Framers . . . gave Congress the power to do something about partisan gerrymandering in the Elections Clause." *See Rucho*, 139 S. Ct. at 2508. Petitioners concede, as they must, that the power of a state legislature to regulate federal elections is subject to "a final check on abuse" by Congress.[25] But Petitioners ignore the fact that Congress *has already spoken* on this issue by approving the ICCPR and the ICERD in

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[22] *See* Petitioners' Br. at 39 ("[T]he power to regulate federal elections lies with State legislatures alone, and the [Elections] Clause does not allow the state courts, or any other organ of state government, to second-guess the legislature's determinations.") (emphasis omitted), 40 n. 9 ("To the extent the Court were to find that some portion of the *Arizona* opinion is contrary to Petitioners' position in this case, and that the case is not distinguishable, the Court should overrule it.").

[23] *See supra* Section I.A.

[24] *See supra* Section I.C.

[25] Petitioners' Br. at 30.

the manner that the Founders explicitly contemplated, i.e., with a super-majority vote of the U.S. Senate.[26] By duly approving a treaty that prohibits partisan gerrymandering and requires effective remedies for voters to protect their rights, Congress *has* placed a check on the authority of state legislatures to engage in independent district-drawing.[27] Article 25 of the ICCPR—which Congress approved without reservations—prohibits partisan gerrymandering.[28] To fulfill a State Party's ICCPR article 2 obligation to provide "effective remedies," the HR Committee points to "judicial and administrative mechanisms" as appropriate to address violations of the ICCPR.[29] Following the Court's decision in *Rucho*, state court review of partisan gerrymandering is the only judicial review available to U.S. citizens that can satisfy this "effective remedy" obligation. *See Rucho*, 138 S. Ct. at 2507. In other words, Congress has exercised its constitutional authority by approving the ICCPR and has required judicial review to redress claims of partisan gerrymandering.

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[26] *See* U.S. Const. art. II, § 2, cl. 2; THE FEDERALIST NO. 69, at 359 (Alexander Hamilton) (distinguishing the powers of the President from those the monarchy in Great Britain based on, among other things, the requirement that treaties be made only "with the concurrence of a branch of the legislature").

[27] *See supra* Section I.

[28] *See supra* Section I.

[29] U.N. Human Rights Comm., General Comment No. 31 (1989) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), ¶ 15.

In addition, the North Carolina State Legislature has also already spoken on this issue, and Petitioners' theory would eviscerate the legislation passed in North Carolina to provide an adequate judicial remedy for addressing gerrymandered districts. As Non-State Respondents explain, "the [North Carolina] legislature provided that 'action[s] challenging the validity of any act . . . that apportions or redistricts . . . congressional districts shall be filed in' a particular court and unambiguously directed that the action 'shall be heard and determined by a three-judge panel' of that court."[30] That legislation even "endorsed 'judgment[s] declaring unconstitutional . . . any act' that 'apportions or redistricts . . . congressional districts.'"[31] Through that legislation, the North Carolina State Legislature has fulfilled obligations that the United States undertook under the ICCPR and the ICERD, consistent with the requirements of the Supremacy Clause. Because both Congress's approval of the ICCPR and the ICERD and duly enacted legislation by the North Carolina State Legislature bar the relief that Petitioners seek, the Court "[need] not pass upon [the] constitutional question" raised by Petitioners regarding the scope of the Elections Clause. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This

[30] Non-State Respondents' Br. at 59–60 (citing N.C. Gen. Stat. § 1-267.1(a)).

[31] *Id.* (citing N.C. Gen. Stat. § 120-2).

rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

III. ADOPTION OF THE ISLT WOULD CONTRAVENE THE U.S. FOREIGN POLICY OBJECTIVES THAT ANIMATED CONGRESSIONAL APPROVAL OF THE ICCPR

When Congress approved the ratification of the ICCPR, it noted that our nation's failure to do so in the past was "conspicuous, and in the view of many, hypocritical" in light of our nation's historic commitment to universal suffrage and nondiscrimination, both domestically and abroad.[32] Congress recognized that ratifying the ICCPR would "remove doubts about the seriousness of the U.S. commitment to human rights" and push back against efforts to delegitimize the United States as a global advocate for human rights, democratic self-governance, and the rule of law.[33] Foreign rivals have long cited the United States' failures to safeguard the rights of people historically marginalized or discriminated against based on religion, race,

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[32] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992).

[33] *Id.* at 3; Kenneth Roth, *Introduction, in* HUMAN RIGHTS WATCH, WORLD REPORT 2006 1, 6 (2006), https://www.hrw.org/legacy/wr2k6/introduction/introduction.pdf .

ethnicity, or other status in an effort to prevent the American system from being held up as a global exemplar. The Soviet Union, for example, has frequently tried to deflect criticism of its human rights abuses and call into question the purported virtues of democracy by pointing to the deeply entrenched racism against Black people in the United States.[34]

In response to these obstacles to the exercise of American influence abroad, members of Congress from both parties determined that it was in the national interest to ratify the ICCPR: "By ratifying the [ICCPR] at this time, the United States can enhance its ability to promote democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also in those countries in Africa and Asia which are beginning to move toward democratization." [35] The "anti-hypocrisy" concerns which animated the ratification of the ICCPR remain relevant today. Foreign rivals continue to use allegations of hypocrisy to undermine the ability of the United States to advocate abroad for human rights, including democratic self-governance and the rule of law.

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[34] Emily Couch, *Why We Should Stop Portraying African Americans as Victims in the Soviet Propaganda Game*, WILSON CTR. (Feb. 18, 2020), https://www.wilsoncenter.org/blog-post/why-we-should-stop-portraying-african-americans-victims-soviet-propaganda-game; Julia Ioffe, *The History of Russian Involvement in America's Race Wars*, ATLANTIC (Oct. 21, 2017), https://www.theatlantic.com/international/archive/2017/10/russia-facebook-race/542796/.

[35] S. Rep. No. 102-23, at 3 (1992).

A substantial amount of criticism from authoritarian governments is aimed at asserting that American elections do not express the free will of the electorate. For instance, in the past year, the policy director of the Central Committee of the Chinese Communist Party held a press conference stating that "[t]he electoral [democracies] of Western countries are actually [democracies] ruled by the capital, and they are a game of the rich, not real democracy." [36] Congress's goal in approving ratification of the ICCPR remains critical in positioning the United States to more effectively call attention to the fact that China has not ratified the ICCPR, that it largely precludes its citizens from participating in government decision-making, and that its political leadership routinely denies its citizens' rights without accountability.[37]

In approving the ratification of the ICCPR, Congress was motivated by the idea that the United States could participate in the United Nation's work to bring other nations into compliance with their

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[36] *See* Evelyn Cheng, *China Slams U.S. Democracy as a 'Game of the Rich' at an Event Promoting Xi's Growing Power*, CNBC (Nov. 15 2014), https://www.cnbc.com/2021/11/12/china-criticizes-us-democracy-while-promoting-xis-growing-power.html.

[37] *See* S. Rep. No. 102-23, at 3 (1992) ("By ratifying the [ICCPR] at this time, the United States can enhance its ability to promote democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also in those countries in Africa and Asia which are beginning to move toward democratization."); *China: Third Term for Xi Threatens Rights*, HUMAN RIGHTS WATCH (Oct. 10, 2022), https://www.hrw.org/news/2022/10/10/china-third-term-xi-threatens-rights.

obligations to safeguard their citizens' human rights.[38] The United States cannot fulfill Congress's stated intent to uphold its standing as an exemplar of democratic rights and freedoms, nor can it participate in the enforcement and compliance work of the HR Committee, unless it fulfills its obligations domestically. A ruling adopting Petitioners' interpretation of the Elections Clause would prevent the United States from fulfilling its these obligations. As a result, it would undermine the important interests that Congress expressly recognized in approving the ICCPR and hamper the United States' ability to promote its interests and protect fundamental human rights across the world.

Critically, if this Court were to adopt the ISLT as Petitioners urge, the resulting failure of the United States to uphold its obligations under the ICCPR would not go unnoticed. The HR Committee and the United States continue to monitor compliance with, and implementation of, obligations under the ICCPR through the submission of periodic reports.[39] These reports provide the United States with a mechanism to describe its progress in implementing and fulfilling its obligations under the ICCPR. In anticipation of the United States' most recent report, the HR Committee expressly included partisan gerrymandering in its "list of issues," asking the United States to "comment on the compatibility of practices of drawing electoral boundaries with a view to influencing election

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[38] *See* S. Rep. No. 102-23, at 3 (1992).

[39] *See* ICCPR, *supra* note 2, at art. 40 (outlining the requirements for States Parties and Committees to engage in periodic reports).

outcomes with article 25."[40] In its fifth periodic report, the United States responded that "[t]he drawing of electoral boundaries in U.S. states can be challenged in litigation filed under the U.S. Constitution or state constitutions or under the federal Voting Rights Act or state statutory law."[41] The United States specifically pointed to this Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* and a 2015 Florida Supreme Court case that "struck down that state's congressional districting plan as a violation of the Fair District amendments to the Florida constitution."[42] But under the theory advanced by Petitioners, these remedies would no longer exist. *See supra* Section II.

Finally, "[t]he application of international law domestically not only serves to hold the government accountable to its people but, more importantly . . . allows foreign nations to observe that the United States will live up to its international obligations, thus making other nations more willing to engage in a cooperative relationship with the United States."[43] This Court has previously looked to international legal

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[40] U.N. Human Rights Comm., List of Issues Prior to Submission of the Fifth Periodic Report of the United States of America, U.N. Doc CCPR/C/USA/QPR/5, ¶ 27 (Apr. 2, 2019).

[41] U.N. Human Rights Comm., Fifth Periodic Report Submitted by the United States of America Under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Due in 2020, U.N. Doc. CCPR/C/USA/5, ¶ 113 (Jan. 15, 2021).

[42] *Id.*

[43] Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 219 (2011).

standards, including ratified treaties, as an interpretive guide in reading the United States Constitution. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 102–103 (1958) (stating that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for crime" in support of the Court's holding that the Eighth Amendment bars a punishment of statelessness); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (interpreting the rights of prisoners of war in light of the United States' obligations under its ratified treaties on the law of war).[44] And the usage of international law in Supreme Court jurisprudence has not been the province of justices of any purported partisan affiliation.[45] "The overseas trade in the American Bill of Rights is an important means of

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[44] Examples of the Court citing to ratified treaties and international norms as powerful authorities in its constitutional jurisprudence abound. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (looking to international standards in abolishing the juvenile death penalty); *Graham v. Florida*, 560 U.S. 48, 81–82 (2010) (looking to the Convention on the Rights of the Child to conclude that the contemporary understanding of the Eighth Amendment did not allow sentences of life without parole for crimes committed before age 18); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing the European Court of Human Rights to refute the claim in *Bowers v. Hardwick* that same-sex sexual conduct was universally condemned).

[45] Ryan C. Black & Ryan J. Owens, *We Are the World: The U.S. Supreme Court's Use of Foreign Sources of Law*, 46 BRITISH J. POL. SCI. 891, 902 (2016).

strengthening international human rights,"[46] and has been since it was authored.

IV. ADOPTION OF THE ISLT WOULD UNDERMINE PROTECTIONS AGAINST PARTISAN GERRYMANDERING THAT ARE A BULWARK AGAINST OTHER HUMAN RIGHTS VIOLATIONS

When groups cannot exercise the right to vote free from gerrymandering—a right guaranteed by Congress through its approval of the ratification of the ICCPR and ICERD—those groups are particularly vulnerable to deprivations of other fundamental human rights. As procedural safeguards are cast aside, autocratic governments or leaders with such tendencies are empowered to disenfranchise marginalized communities, both in the United States and abroad. Disenfranchisement is often a precursor to additional discriminatory policies directed at groups based on race, ethnicity, religion, or other status. As a group's electoral power diminishes, so does its ability to remedy human rights violations through participation in the democratic process. For example, in Hungary, widespread gerrymandering has occurred alongside the severe mistreatment of migrants and refugees, discriminatory policies targeting women and lesbian, gay, bisexual, and transgender people, and the near-complete destruction of independent media.[47]

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[46] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988).

[47] *See* Lydia Gall, *Hungary's Authoritarian Leader is No Gift to U.S. Conservatives*, THE HILL (Aug. 4, 2022),

To provide the Court with necessary context on the potentially far-reaching negative effects that partisan gerrymandering and similar restrictions on the exercise of political rights can have on a wide array of human rights, particularly for groups experiencing discrimination based on race, ethnicity, religion, or other status, HRW provides below a detailed discussion of two additional recent examples, in Sri Lanka and Iran.

A. In Sri Lanka, District Gerrymandering Has Led To The Disenfranchisement Of Religious Minorities

The institutional changes primarily led by now-ousted Gotabaya Rajapaksa in Sri Lanka provide one example of an erosion of democratic safeguards which has had the effect of further disenfranchising religious minorities in the majority-Buddhist country.[48] The

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https://thehill.com/opinion/campaign/3585522-hungarys-authoritarian-leader-is-no-gift-to-us-conservatives/; Farbod Faraji & Lee Drutman, *Hungary's Viktor Orbán Can Thank the U.S. for Facilitating His Rise to Power*, CHICAGO TRIBUNE (Aug. 3, 2022), https://www.chicagotribune.com/opinion/commentary/ct-opinion-viktor-orban-turkey-authoritarian-power-us-electoral-system-20220803-erhu6pjlijgafcxj3wk5um32te-story.html (noting that district gerrymandering in Hungary, which models that of the United States, has helped keep Orbán in power and created an "anti-democratic feedback loop"); HUMAN RIGHTS WATCH, *Hungary: Events of 2021*, https://www.hrw.org/world-report/2022/country-chapters/hungary (last visited Oct. 23, 2022).

[48] Shaahidah Riza, *Delimitation and Its Effect on Minorities*, SRI LANKA BRIEF (Mar. 19, 2015), https://srilankabrief.org/delimitation-and-its-effects-on-minorities/; U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: SRI LANKA (Jun. 2, 2022),

drawing of electoral maps, known as delimitation in Sri Lanka,[49] is a fraught issue.[50] While there have been efforts at electoral reform aimed at proportional representation,[51] delimitation has been seen by many in the political and ethnic majority as a way to consolidate power.[52] Prominent nationalists have long called for the abolishment of provincial councils,

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https://www.state.gov/reports/2021-report-on-international-religious-freedom/sri-lanka/; Sujata Gamage, *Electoral Reform: NMSJ Proposes Mixed Member System Within Overall PR*, COLOMBO TELEGRAPH (Dec. 20, 2021), https://www.colombotelegraph.com/index.php/electoral-reform-nmsj-proposes-mixed-member-system-within-overall-pr/.

[49] Riza, *supra* note 48.

[50] Varun Nambiar, *Sri Lanka Supreme Court Rules Against Provincial Council Elections Before Delimitation of Electoral Districts*, JURIST (Sep. 3, 2019), https://www.jurist.org/news/2019/09/sri-lanka-supreme-court-rules-against-provincial-council-elections-before-delimitation-of-electoral-districts/ ("Delimitation has been a controversial political issue in Sri Lanka.").

[51] *See, e.g.*, *Three Political Parties Suggest an Electoral System Based on Proportional Representation for the Country*, COLOMBO PAGE (Oct. 8, 2021) http://colombopage.com/archive_21B/Oct08_1633705044CH.php.

[52] *See, e.g.*, *Provincial Councils' Delimitation Report in the House for Debate*, SUNDAY TIMES (Mar. 4, 2018), https://www.sundaytimes.lk/180304/news/provincial-councils-delimitation-report-in-the-house-for-debate-284427.html (noting concerns raised by members of the Delimitation Committee over Muslim representation and "unusual ethnic distribution" as a result of the electoral redistricting).

which they view as hindering their consolidation of power.[53]

The election of Gotabaya Rajapaksa accelerated attempts to chip away at electoral safeguards.[54] Citing COVID-19, Rajapaksa repeatedly postponed provincial council elections in 2020,[55] amid disputes over the delimitation of voting districts.[56] Rajapaksa also operated for five months without legislative

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[53] *See, e.g.*, Saman Indrajith, *Gevindu Insists on Abolishing Provincial Councils Under New Constitution*, ISLAND ONLINE (Sep. 26, 2020) https://island.lk/gevindu-insists-on-abolishing-provincial-councils-under-new-constitution/; *Sri Lanka Moves Closer Towards Abolishing Provincial Councils*, EARLY TIMES (May 16, 2013), http://www.earlytimes.in/newsdet.aspx?q=107523.

[54] Alan Keenan, *Sri Lanka: Landslide Win for the Rajapaksa Puts Democracy and Pluralism at Risk*, CRISIS GROUP (Aug. 12, 2020), https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-landslide-win-rajapaksa-puts-democracy-and-pluralism-risk.

[55] *Sri Lanka Decides to Postpone Provincial Elections*, SOUTH ASIAN MONITOR (Dec. 30, 2020), https://www.southasiamonitor.org/sri-lanka/sri-lanka-decides-postpone-provincial-elections.

[56] Freedom House, *Sri Lanka*, FREEDOM IN THE WORLD 2021, https://freedomhouse.org/country/sri-lanka/freedom-world/2021 (last visited Oct. 22, 2022) ("Provincial council elections were repeatedly postponed due to disputes over the delimitation of voting districts."). In 2019, the Sri Lanka Supreme Court held that the president could not unilaterally declare electoral district boundaries in the absence of the report of a delimitations review committee chaired by the prime minister. Nambiar, *supra* note 50; s*ee also Provincial Council Elections Cannot Be Held Under Previous System: Supreme Court*, NEWS FIRST (Sep. 3, 2019), https://www.newsfirst.lk/2019/09/03/provincial-council-elections-cannot-be-held-under-previous-system-supreme-court/.

oversight, exceeding the constitutional three-month maximum for a parliamentary recess.[57] During this period, the Rajapaksa administration created several task forces composed almost entirely of Sinhalese military and police officials[58] and adopted a series of policies and practices with a discriminatory impact on Sri Lanka's Muslim and Tamil minorities in particular.[59] In October of 2020, the Sri Lanka Podujana Peramuna government passed the 20th Amendment, which reintroduced expansive

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[57] Gulbin Sultana, *Sri Lanka Headed for Elections: Democracy in Distress?*, MANOHAR PARRIKAR INST. FOR DEF. STUDIES & ANALYSES (Jul. 17, 2020), https://idsa.in/issuebrief/sri-lanka-headed-for-elections-gsultana-170720; *Sri Lanka to Hold Coronavirus-Delayed Election on August 5*, AL JAZEERA (Jun. 11, 2020), https://www.aljazeera.com/news/2020/6/11/sri-lanka-to-hold-coronavirus-delayed-election-on-august-5.

[58] *See, e.g.*, Gazette Extraordinary No. 2178/18 of June 2, 2020 (Sri Lanka).

[59] Phillip Baumgart, *Sri Lanka's Parliamentary Elections Will Shape Its Political Future—Likely for the Worse*, NEW ATLANTICIST (Jul. 30, 2020), https://www.atlanticcouncil.org/blogs/new-atlanticist/sri-lankas-parliamentary-elections-will-shape-its-political-future-likely-for-the-worse/ ("[O]ne task force is vaguely charged with creating a "virtuous society" and eradicating "anti-social behavior," while another justifies the expropriation of Hindu and Muslim land in Sri Lanka's Eastern Province under the pretext of Buddhist archaeological preservation."). See C.V. Wigneswaran, *Why the Presidential Task Force on Archaeology in the Eastern Province and the Future of the Tamils*, COLOMBO TELEGRAPH (Apr. 23, 2021), https://www.colombotelegraph.com/index.php/why-the-presidential-task-force-on-archaeology-in-the-eastern-province-the-future-of-the-tamils/, on context into Rajapaksa's political objectives in creating the Buddhist archaeological preservation task force and its discriminatory impact on Tamils populations.

presidential powers, including allowing the president sole power to appoint commissioners to the Election Commission as well as the power to unilaterally dissolve parliament after two years and six months of the Legislature being elected.[60]

These actions coincided with widespread instances of electoral violence. During the November 2019 presidential election, observers reported violence and intimidation, mostly directed at Muslim voters.[61]

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[60] A BRIEF GUIDE TO THE 20TH AMENDMENT TO THE CONSTITUTION, CTR. FOR POLICY ALTERNATIVES (2021), https://www.cpalanka.org/wp-content/uploads/2021/07/A-brief-guide-to-the-20th-Amendment-to-the-Constitution-English-CPA-compressed_compressed-1.pdf; SUMMARY OF CHANGES UNDER THE PROPOSED 20TH AMENDMENT, CTR. FOR POLICY ALTERNATIVES, at 3, 6 (2020), https://www.cpalanka.org/wp-content/uploads/2020/09/Final-doc-Summary-of-Changes-Under-the-Proposed-20th-Amendment.pdf; s*ee also Sri Lanka: Newly Adopted 20th Amendment to the Constitution is Blow to the Rule of Law*, INT'L COMM'N JURISTS (Oct. 27, 2020), https://www.icj.org/sri-lanka-newly-adopted-20th-amendment-to-the-constitution-is-blow-to-the-rule-of-law/.

[61] Aanya Wipulasena, *Sri Lanka Election: Observers Report Poll Day Violations*, AL JAZEERA (Nov. 16, 2019), https://www.aljazeera.com/news/2019/11/16/sri-lanka-election-observers-report-poll-day-violations; 2019 SRI LANKAN PRESIDENTIAL ELECTION, ELECTION OBSERVATION REPORT, CTR. FOR MONITORING ELECTION VIOLENCE (2020), https://anfrel.org/wp-content/uploads/2020/06/cmev-presidential-election-2019-final-report-english-3.pdf; DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA EUR. UNION ELECTION OBSERVATION MISSION, FINAL REPORT: PRESIDENTIAL ELECTION, 16 NOVEMBER 2019 (2020), https://www.europarl.europa.eu/cmsdata/212448/Sri-Lanka_presidential_election_16_November_2019_EU_EOM_report.pdf.

Similarly, in the 2020 parliamentary elections, reports indicated intimidation and harassment of women, Muslim, and Tamil voters.[62]

This electoral misconduct has been coupled with other policies that prevent the free exercise of religion by religious minorities in Sri Lanka. For example, in 2020, the government imposed a requirement to cremate anyone who died with COVID-19.[63] Cremation is contrary to Muslim belief and the policy caused immense distress to a vulnerable minority. The government refused to lift this requirement for a year, despite World Health Organization guidelines that burial is safe, and opposition from United Nations experts, medical professionals in Sri Lanka, and religious leaders of all major faiths in the country.[64] When the "forced cremation" policy was eventually dropped, it was replaced by a restriction of burials to a single remote

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[62] Freedom House, *Sri Lanka*, FREEDOM IN THE WORLD 2021, https://freedomhouse.org/country/sri-lanka/freedom-world/2021 (last visited Oct. 22, 2022); DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA EUR. UNION ELECTION OBSERVATION MISSION, FINAL REPORT: PRESIDENTIAL ELECTION, 16 NOVEMBER 2019 (2020), https://www.europarl.europa.eu/cmsdata/212448/Sri-Lanka_presidential_election_16_November_2019_EU_EOM_report.pdf.

[63] *Sri Lanka: Covid-19 Forced Cremation of Muslims Discriminatory*, HUMAN RIGHTS WATCH (Jan. 18, 2021), https://www.hrw.org/news/2021/01/18/sri-lanka-covid-19-forced-cremation-muslims-discriminatory.

[64] *Id.*

site where grieving families were allegedly mistreated by security personnel.[65]

Similarly, local nongovernmental organizations have reported widespread impunity surrounding incidents of religiously-motivated discrimination and violence against minority religious groups.[66] In ten out of at least eleven cases of intimidation or attacks by Buddhist groups on Christian churches in 2021, police said the pastors were to blame for holding worship services; in three additional cases, police accused pastors of breaching the peace.[67] Religious rights groups reported instances in which police continued to prohibit, impede, and attempt to close Christian and Muslim places of worship, citing sham or pretextual governmental regulations.[68]

B. Iran's Political System Demonstrates That Without Effective Voting Remedies, Citizens Cannot Exercise Fundamental Rights

Recent events in Iran similarly demonstrate that autocratic governments without legitimate democratic institutions often extensively violate their citizens' human rights. Over the past several weeks, Iran has seen widespread anti-government protests

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[65] *Id.*

[66] U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: SRI LANKA 1 (2022), https://www.state.gov/reports/2021-report-on-international-religious-freedom/sri-lanka/.

[67] *Id.* at 6.

[68] *Id.* at 10.

following the death of 22-year-old Mahsa (Jina) Amini after Iran's religious morality police arrested her for allegedly violating hijab rules.[69] "Women and girls have been conspicuous on the front lines of the protests,"[70] where—joined by men and boys—they have been calling for "liberty, equality, no hijab, no oppression."[71] Authorities have responded to these protests with excessive and lethal force.[72]

The ability of victims to obtain recourse in the face of such state violence is hindered in Iran, as religious minorities and women have long been denied

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[69] *See* Farnaz Fassihi, *In Iran, Woman's Death After Arrest by the Morality Police Triggers Outrage*, N.Y. TIMES (Sept. 16, 2022), https://www.nytimes.com/2022/09/16/world/middleeast/iran-death-woman-protests.html.

[70] Farnaz Fassihi, *How Two Teenagers Became the New Faces of Iran's Protests*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2022/10/13/world/middleeast/iran-protests-killed-teens.html.

[71] Khosro Kalbasi Isfahani (@KhosroKalbasi), TWITTER (Oct. 3, 2022, 9:59 AM), https://twitter.com/KhosroKalbasi/status/1576935015492960256 ; *see also* Bill Van Esveld & Elaheh Sajadi, *In Iran, Schoolgirls Leading Protests for Freedom: Government Repression Extends to Children*, HUMAN RIGHTS WATCH (Oct. 12, 2022), https://www.hrw.org/news/2022/10/12/iran-schoolgirls-leading-protests-freedom.

[72] *Iran: Security Forces Fire On, Kill Protesters*, HUMAN RIGHTS WATCH (Oct. 5, 2022), https://www.hrw.org/news/2022/10/05/iran-security-forces-fire-kill-protesters.

equal political participation based on purported religious justifications.[73]

With the exception of a select number of designated seats for religious minorities, parliamentary candidates in Iran must have "belief in and practical obligation to Islam and the holy system of the Islamic Republic of Iran."[74] The Guardian Council, a powerful organization that has the power to veto parliamentary legislation, supervise elections, and approve or disqualify candidates, frequently discriminates against religious minorities and women who attempt to seek election to public positions.[75] For example, residents of Yazd, a city in central Iran, reelected Sepanta Niknam, who is Zoroastrian, to the city council in May 2017.[76] Although nothing in the election laws pertaining to city councils barred a member of a religious minority from representing Muslim-majority cities, the Guardian Council requested Niknam's immediate dismissal, and the Court of Administrative Justice suspended him in

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[73] U.N. Human Rights Comm., Concluding Observations: Iran, ¶ 5, U.N. Doc. CCPR/C/IRN/CO/3 (Nov. 29, 2011), https://digitallibrary.un.org/record/719297?ln=en.

[74] Law for the Elections of the Islamic Consultative Parliament [Majles] of 1995, art. 28 (Iran).

[75] HUMAN RIGHTS WATCH, ACCESS DENIED: IRAN'S EXCLUSIONARY ELECTIONS 3, 11–13 (2005), https://www.hrw.org/sites/default/files/media_2021/08/202108mena_iraq_exlcusionaryelection.pdf.

[76] Tara Sepehri Far, *Iran's Guardian Council Trounces Religious Freedom*, HUMAN RIGHTS WATCH (Oct. 28, 2017), https://www.hrw.org/news/2017/10/28/irans-guardian-council-trounces-religious-freedom.

October 2017 over the objections of the Yazd city council chairperson and the speaker of Iran's parliament.[77] The Guardian Council has also disqualified all women from standing as candidates for president.[78]

In sum, the Guardian Council, along with other unchecked powers in Iran's political system, operates under relatively few limits, and Iran's citizens lack effective remedies to protect their political rights.[79] The restrictions on voting rights and political participation for religious minorities and women in Iran have contributed to systemic patterns of discrimination against a majority of Iran's population.

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These examples highlight that the risks to human rights that stem from infringements on right to vote free from gerrymandering and discrimination are particularly severe for ethnic, racial and religious minorities and for women and girls.

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[77] *Id.*

[78] HUMAN RIGHTS WATCH, ACCESS DENIED: IRAN'S EXCLUSIONARY ELECTIONS 3, 11–13 (2005), https://www.hrw.org/sites/default/files/media_2021/08/202108mena_iraq_exlcusionaryelection.pdf; *see* U.S. DEP'T OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAN 50 (2021), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/iran.

[79] Freedom House, *Iran*, FREEDOM IN THE WORLD 2021, https://freedomhouse.org/country/iran/freedom-world/2022 (last visited Oct. 24, 2022).

CONCLUSION

The Petitioners' reading of the Elections Clause would deprive U.S. citizens whose right to vote is restricted through gerrymandering of their last effective remedy—judicial review by the state courts. Adopting the ISLT would therefore cause the United States to violate its obligations under the ICCPR and the ICERD, would contravene Congress's objectives in approving those treaties, and would hamper the United States' ability to promote its interests and protect fundamental human rights across the world.

Respectfully submitted,

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The Interface between Non-governmental Organisations and the Human Rights Committee

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Abstract

Non-governmental organisations (NGOs) are participating increasingly in the multifaceted work of the Human Rights Committee (HRC), which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). In particular, they have supplied shadow reports, provided input for the Committee's general comments, and have supported individuals filing communications with the Committee. In so doing, they have eroded the central role of the State in the various HRC procedures, have enriched the sources on which the HRC can draw, and have contributed considerably to the effectiveness and legitimacy of the Committee's work. Still, some improvements can be made to NGOs' participation, such as the introduction of greater transparency in NGO reporting and increased cooperation and coordination between the various NGOs.

Keywords

non-governmental organisations (NGOs); Human Rights Committee; International Covenant on Civil and Political Rights (ICCPR); compliance-monitoring

1. Introduction

As is well-known, the 1966 International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols[1] is one of the most important international treaties on human rights,[2] and its monitoring body, the Human Rights Committee (HRC, or 'the Committee') is considered to be one of the most important United Nations (UN) human rights bodies.[3] The Covenant, like any other human rights treaty, accords rights to individuals, and thus bestows a

1) The First Optional Protocol (1966) establishes an individual complaints mechanism and the Second Optional Protocol (1989) aims at the abolition of the death penalty. As of June 2011, 113 and 73 States were Parties to the Protocols, respectively. 167 States are Parties to the Covenant itself.

2) Together with the 1966 International Covenant on Economic, Social and Cultural Rights and the 1948 Universal Declaration of Human Rights it forms the international Bill of Rights.

3) P. Alston, *The United Nations and Human Rights*, (1992) p. 269. The HRC was established in 1976 under Article 28 of the ICCPR. It has 18 members who are all nationals of States that are Party to the Covenant. The members serve in their personal capacity and are required to be of "high moral character and recognized in the field of human rights".

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measure of international legal personality on them. Since individuals are the primary, and possibly even the only, beneficiaries of the Covenant,[4] it is arguable that they should be given a say in how their rights are precisely construed and how Contracting States' rights performance is monitored. Put differently, the legitimacy of the Covenant and its application may seem to rest at least in part on individuals' rights of participation in the Covenant's compliance-monitoring system.[5]

The establishment of an individual complaints mechanism, pursuant to which individuals who claim to be victims of a violation by a State Party to the Covenant that has jurisdiction over the individual can file a communication in relation to any of the rights set forth in the Covenant,[6] has definitely gone quite some way in addressing these concerns.[7] In this article, however, we examine how individuals organized in *non-governmental organisations* (NGOs) have been involved in the Committee's compliance-monitoring activities.[8] This form of popular participation in the Committee's work has so far hardly been the subject of scholarly research.[9]

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[4] It may be argued that, as human rights obligations are obligations *erga omnes*, *all* Contracting States have an interest in other Contracting States' compliance, and could thus be considered as 'beneficiaries' of the rights laid down in the Covenant. See for obligations *erga omnes* and the law of state responsibility: Articles 41 and 48 of the Articles on Responsibility of States for Internationally Wrongful Acts. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (UN Doc A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission*, (2001), vol. II, Part Two, as corrected.

[5] See generally on the link between the imposition of duties, but also rights, on non-state actors and the legitimacy of international law: C. Ryngaert, "Imposing International Duties on Non-State Actors and the Legitimacy of International Law", in M. Noortmann and C. Ryngaert (eds.), *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers* (2010) pp. 69–90.

[6] Art. 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 59, UN Doc A/6316 (1966), 999 UNTS 302, *entered into force* 23 March 1976.

[7] E.g., A. De Zayas, "Petitions before the United Nations Treaty Bodies: Focus on the Human Rights Committee's Optional Protocol Procedure", in G. Alfredsson, J. Grimheden, B.G. Ramcharan and A. De Zayas (eds.), *International Human Rights monitoring mechanisms: Essays in Honour of Jakob Th. Möller* (2009) pp. 35–76. As regards all treaty-monitoring bodies: WE. Vandenhole, *The Procedures before the UN Human Rights Treaty Bodies: Divergence or Convergence* (2004) xx + 331 pp.

[8] An NGO in this context means any international, regional, subregional, and national organization acting independent from direct control of any government and concerned with matters falling within the competence of the United Nations organs. An elaboration of the definition of NGO at the UN can be found in Art. 71 UN Charter; ECOSOC resolution 288B(X) of 27 February 1950 – revised by resolution 1296 and resolution 1996/31.

[9] See for a rare (and somewhat dated) publication: Y. Tyagi, "Cooperation between the Human Rights Committee and Nongovernmental Organizations: Permissibility and Propositions", 18 *Texas International Law Journal* (1983) pp. 277–285. There is a substantial amount of publications on the Human Rights Committee as such, which, in passing, also devote some attention to a role of the NGOs. See, e.g., A. Conte and R. Burchill (eds.), *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, (2009); E. Decaux (ed.), *Le Pacte international relative aux droits civils et politiques : commentaire article par article* (2008); J. Bair, *The International Covenant on Civil and Political*

It is noted at the outset that there are no formal cooperation arrangements between the Committee and NGOs. In contrast, other human rights monitoring bodies, such as the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, do formally provide for cooperation with NGOs.[10] However, over the years the HRC has incrementally accepted NGO input, and has considered it increasingly valuable.

Nowadays, NGOs are allowed to contribute – to varying degrees – to the Committee's work in various non-confidential stages of the four Committee's monitoring functions: (1) the examination of periodic reports submitted by States Parties on the human rights situation in their respective countries, to which NGOs can make a large contribution, (2) the drafting of 'general comments' (which provide an interpretative framework for provisions of the ICCPR so as to assist States Parties in their application of the Covenant), (3) the consideration of individual complaints under the Optional Protocol to the ICCPR; (4) the submission by a State Party, under Article 41 of the Covenant, of a communication to the Committee alleging that another State is violating its obligations under the ICCPR.[11]

In the first section of this article, the *genesis* of NGO involvement in monitoring the ICCPR through the HRC is discussed. The second – most substantial – section discusses in detail the current extent of NGO participation regarding each of the four monitoring functions of the HRC.

A third section attempts to assess the impact that NGOs have had on the practice of the HRC. Finally, an outlook on NGO participation in monitoring the ICCPR will be presented; in particular, current drawbacks of the system will be identified and possible solutions provided.

This article does not address NGOs' role in the *drafting* process of the Covenant. There is no denying that, from the very beginning, NGOs that had gained consultative status with the United Nations Economic and Social Council (ECOSOC) contributed to the drafting of the ICCPR, and that, even though they were merely allowed to participate in the process as *observers*, they had considerable

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Rights and its (First) Optional Protocol: a short commentary based on views, general comments and concluding observations by the Human Rights Committee', (2005); S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2004).

[10] Article 45 (a) of the Convention on the Rights of the Child provides: "The Committee may invite [...] other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates." A similar provision can be found in Article 38 (a) of the Convention on the Rights of Persons with Disabilities.

[11] The legal basis for the examination of country reports and the drafting of general comments can be found in Article 40(4) of the ICCPR, while the basis for the consideration of individual complaints is found in Article 5(1) of OP-I of the ICCPR. Article 41 of the ICCPR forms the legal basis for the examination of inter-State communications. While the possibility to file inter-State complaints exists, the procedure has not yet been used. States are generally reluctant to complain about situations within another State's own territory. Also, a complaint can only be made in respect of two countries that have declared that they recognize the inter-State complaints procedure (so far 48 States made such a declaration).

influence on the members of the Human Rights Commission (UNCHR) who drafted the Covenant.[12] During the tenth session of this Commission, when the final draft was created, no less than 56 representatives of 36 NGOs attended the session.[13] However, since the role of NGOs in the drafting procedure was limited and not well documented, it was decided not to include a section on the role of NGOs in the drafting process of the ICCPR in this article.

Before embarking on our analysis of NGO participation in the work of the HRC, the authors wish to emphasize their awareness, currently, that most of the recommendations for improved participation of NGOs in relation to the HRC do not focus solely on the HRC, but address the interaction of NGOs with all UN human rights treaty bodies. Given the current debate on treaty body reform, the trend is to look at the treaty bodies as a whole, and not at treaties in separate compartments. Notably, during the Inter-Committee Meetings (ICM), which take place annually between members of the human rights treaty bodies to enhance the effectiveness of the treaty body system as a whole, the synchronized interaction of NGOs with treaty bodies has been topic of debate.[14] During the latest ICM, all participants agreed that the "effective operation of the treaty body system depends on NGOs having effective access and being able to engage at all stages of the review process."[15] However, at the same meeting it was explained that currently there exists no unified approach to NGO participation in the work of UN human rights treaty bodies.[16] Therefore, in this article we still specifically address the HRC.

2. Genesis of NGO Participation in Monitoring the ICCPR

2.1. *Before the Adoption of the Covenant*

Neither the ICCPR nor its Optional Protocols make explicit reference to the participation of NGOs in monitoring the Covenant or the Protocols. However, during the drafting process of the ICCPR the question of whether a provision should be included in the text that would grant NGOs the right of petition was a recurring issue of debate.[17] Several proposals were made favouring an express mandate for NGOs in cooperation with the HRC, with some proposals demanding

[12] Tyagi, *supra* note 9, p. 278.

[13] Report of the Tenth Session of the Human Rights Commission, 18 UN ESCOR Supp. (No. 7) at 1–2, UN Doc. E/2573 (1954).

[14] See, for example, Inter-Committee meeting of the human rights treaty bodies, UN Doc. HRI/ICM/2011/2, 18 May 2011.

[15] Ibid., par. 4.

[16] International Service for Human Rights, *Inter-Committee Meeting discusses how to improve NGO and NHRI engagement with the treaty bodies*, available at http://www.ishr.ch/inter-committee-meetings. (last accessed on 23 August 2012).

[17] Tyagi, *supra* note 9, p. 278.

an absolute right for NGOs to file petitions with the Committee, other proposals suggesting this right be solely granted to NGOs having consultative status with ECOSOC, and still others opting for allowing individuals or groups of individuals to file petitions through NGOs. The subsequent debate focused on the second option. Ultimately, however, because the UNCHR was too heavily divided on the issue, a provision on the right of petition was not passed, although the significance of the role fulfilled by NGOs was acknowledged.[18] Objections to the participation of NGOs in the petition procedure were mainly based on three considerations: that the status of NGOs was not yet established in international law, that granting participatory rights to NGOs would give excessive importance to NGOs, and that the right to petition could be abused.[19]

Despite the absence of a provision in the ICCPR defining the role of NGOs at the Committee, the UN General Assembly did show appreciation for NGO efforts, when it passed a resolution (at the time of the adoption of the ICCPR and its Optional Protocol) requesting NGOs "to publicize the text of these instruments as widely as possible, using every means at their disposal, including all the appropriate media of information."[20]

2.2. *After the Adoption of the Covenant*

In the initial years of the HRC's activities, many Committee members were very reluctant to accept information other than that provided by the States Parties to the Covenant. The issue provoked lengthy discussions among the members,[21] but this discussion did not specifically focus on the involvement of NGOs, but rather on the question of whether UN specialised agencies like the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) should be allowed to cooperate with the HRC. During the fourth session of the HRC, it was decided that the Committee would not formalize the manner in which specialised agencies presented information to the Committee, but they were allowed, with permission of the Committee, to address the Committee during public meetings.[22] The specialised agencies would not be invited to submit comments on the parts of the reports of States Parties falling

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18) Report of the Tenth Session of the Human Right Commission, 18 UN ESCOR Supp. (No. 7) at 25, UN Doc. E/2573 (1954).

19) Annotations on the text of the Draft International Covenants on Human Rights as prepared by the Secretary-General, 10 UN GAOR Annex at 81, UN Doc. A/2929(1955) & Report of the Ninth Session of the Human Right Commission, 16 UN ESCOR Supp. (No. 8) at 16–17, UN Doc. E/2447 (1953).

20) GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 60, UN Doc. A/6316 (1966).

21) D. Fischer, "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee", 76 *American Journal of International Law* (1982) p. 146.

22) CCPR/C/SR.99, paras. 41–43.20 July 1978. Unlike NGOs, specialised agencies were referred to in the ICCPR. Article 40(3) of the Covenant allows the Secretary General of the United Nations "after consultation with the Committee, [to] transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence."

within their fields of competence,[23] but instead the HRC itself would decide what use to make of any information supplied to it.[24] Thus, the specialised agencies were initially accorded only a very limited role in the activities of the HRC.[25] More recently, however, the role of the specialised agencies has increased considerably, and has now also been codified in the HRC's Rules of Procedure of the Human Rights Committee. According to the working methods of the Human Rights Committee, specialised agencies are now invited to provide written reports containing country-specific information on States Parties whose reports are before them. Representatives of these entities are also invited to address the Committee at the beginning of each session of the Human Rights Committee. Moreover, the Secretary-General can, after consultation with the Committee, transmit to specialised agencies parts of the reports received from States Parties which may fall within their field of competence. The specialised agencies may then submit comments on those parts of the reports.[26]

The relationship between NGOs and the Committee was initially even more problematic. While it was clear from the outset that specialised agencies could at least make *some* contribution to the Committee's work, it was questioned whether NGOs should play *any* role at all.[27] The Eastern European members of the Committee were most vehemently opposed to NGO participation: socialist members Anatoly Movchan (Union of Soviet Socialist Republics) and Bernhard Graefrath (German Democratic Republic) argued that NGOs had no place in the ICCPR framework, and accused them of having an anti-Second and anti-Third World mindset which would harm rather than further the cause of human rights.[28] Most Western experts, in contrast, supported cooperation with NGOs on the grounds that the ICCPR did not deny such participation and that the Committee could benefit from the extensive experience of NGOs in the field of human rights.[29]

Eventually, the opponents' vision prevailed and NGOs were not given any chance to provide information to the Committee through official channels. They could not address the HRC as a whole during its meetings, nor could they address it through the UN Secretariat. The single method in which NGOs could find their way to the Committee was through a dialogue with separate members of the Committee acting in their individual capacity. But even then, whatever informa-

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23) GA A/34/40, par. 456.

24) CCPR/C/SR.180, par. 7, par. 15: "In the case of Chile the Committee had indeed considered information other than that supplied by the State Party in its report."

25) Alston, *supra* note 3, p. 393.

26) Rule 67 of the Rules of Procedure of the Human Right Committee, UN Doc. CCPR/C/3/Rev.9.

27) A.F. Bayefsky, (ed.), *The UN Human Rights Treaty System in the 21st Century*, (2000) p. 209. See also: T. Buergenthal, "The U.N. Human Rights Committee", 5 *Max Planck Yearbook of the United Nations Law*, (2001) p. 352.

28) Y. Tyagi, *The UN Human Rights Committee: Practice and Procedure* (2011) p. 217.

29) See *supra* notes 19 & 20.

tion the members received from NGOs could not be referred to publicly.[30] NGOs realised that they had to be tactful in approaching the Committee members and that they should refrain from seeking visibility within the Committee. Nevertheless, all realised that the members of the Committee, who function only on a part-time basis, did not have time to study all the required materials in between sessions of the Committee, and that, therefore, NGOs were of vital importance to inform Committee members on human rights situations in States Parties.[31] In addition, since the Committee is not a fact-finding body, other sources of information to cross-check information provided by States – and thus increase the effectiveness of the Committee – were welcome. There is no denying that from the very start the Committee members did use unofficial information. During the examination of the Colombian report in 1980, several members even referred explicitly to a report from Amnesty International on the human rights situation in the country.[32]

During the 1980s, the Committee slowly but steadily took on a more NGO-friendly approach. An interesting precedent in this regard is the dialogue between the HRC and the Dutch delegation at the review of the periodic report from the Netherlands. In the initial presentation of the report, Mr. Burgers, the head of the Dutch delegation, commented on a (shadow) report submitted by the Dutch section of the International Commission of Jurists which was circulated among the Committee members. Although not fully agreeing with the content of the report, he expressed his appreciation of the interest shown by that organisation "to contribute to the establishment of a constructive dialogue between the Government of the Netherlands and the Committee".[33] In reaction, a member of the Committee, Mr Opsahl, stated that there was no need for Mr. Burgers to articulate whether or not he agreed with the content of the report, since "the Committee's practice was to refer only to official United Nations documents."[34] But at the same time he noted that "there was nothing to prevent a State Party from referring to a document issued by non-governmental organisations."[35] According to one of the current members of the Committee, this debate in the early 1980s on how to make use of information provided by NGOs has accelerated the acceptance of such information by the HRC.[36]

The post-Cold War period then marked a real change in the attitude of the Committee toward NGO participation. Several members of the Committee have publicly observed that NGOs had been contacted during sessions of the HRC,

30) *See* Bayefsky, *supra* note 27, p. 209.
31) Alston, *supra* note 3, p. 406.
32) UN Doc. CCPR/C/SR.222 (1980).
33) CCPR/C/SR.321, 6 November 1981, Bonn (Mr. Burgers), par. 11.
34) CCPR/C/SR.321, 6 November 1981, Bonn (Mr. Movchan), par. 21.
35) Par. 33 (Mr Opsahl).
36) Interview with HRC member on 21/06/11.

and some openly used information compiled by NGOs.[37] Also new Eastern European members of the Committee began accepting input from NGOs. The HRC used information from NGOs more frequently and for different purposes: the Committee authorized Working Groups to use information from NGOs when drafting the List of Issues,[38] and "reaffirmed in late 1993 the practice of having documents submitted by NGOs officially distributed to all the members in the languages in which they had been received."[39] Moreover, since 1995, the Committee gave NGOs the opportunity to meet with inter-sessional working groups of the Committee to exchange information on the human rights situation of countries considered at the next session.[40] At the fifty-first session of the General Assembly, the chairperson of the Committee agreed that NGOs play a crucial role in supplying documents to the treaty bodies, and that their role should be expanded and facilitated.[41] At its sixty-sixth session, the HRC eventually decided to legitimize the use of NGO information, observing that NGOs "were making an extremely effective contribution to the work of the United Nations system", "served as the Committee's eyes and ears", and "in general had been doing an excellent job."[42]

3. Contemporary Participatory Rights and Practices of NGOs at the Human Rights Committee

Today, NGO involvement forms an integral part of the working methods of the Committee. In Chapter VIII of the working methods of the HRC, the participatory rights of NGO are laid down. Under this chapter, the Committee allows NGOs to provide reports containing country-specific information, address the Committee orally at the first morning meeting of each plenary session, and organize lunch-time briefings where they can supply information to the members before the examination of the State report.[43] In 2002, the Committee announced that it reserved the right to determine, at a later stage, whether other briefings by

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[37] See Tyagi, *supra* note 28, p. 218 for a detailed account. As Tyagi puts it very eloquently in *The UN Human Rights Committee*: "This exercise indicated glasnost in the Soviet perception of NGOs."

[38] The List of Issues constitutes "a series of questions for the State, which aim to identify the most crucial matters for the implementation of the ICCPR". (Centre for Civil and Political Rights, "UN Human Rights Committee: Participation in the Reporting Process, Guidelines For Non-Governmental Organisations", Geneva, 2010, p. 10) The Working Group which drafted the list of issues has been replaced by the Country Report Task Force whose task resembles that of its predecessor.

[39] Tyagi, *supra* note 28, p. 219.

[40] Buergenthal, *supra* note 27, p. 353.

[41] A/51/482, 11 October 1996 at par. 17, 24, 32, 35, 36, 38 & 39.

[42] CCPR/C/SR.1755, 21 July 1999, at par. 44, 45 & 46.

[43] Chapter VIII of the Working methods of the Human Rights Committee, available at: http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#n10, last accessed on 19 June 2011; and Bayefsky, *supra* note 27, p. 186.

NGOs should also become part of the Committee's official proceedings.[44] Apart from the role attributed to NGOs as articulated in the working methods of the HRC, there are, however, more ways in which NGOs can be involved in the functioning of the Committee. In the following sections, the role of NGOs with respect to each function of the HRC will be discussed: (a) the reporting procedure; (b) the emergency procedure; (c) the individual communication procedure; (d) general comments; and (e) the inter-State communication procedure.

3.1. *Reporting Procedure*

Each State Party to the ICCPR is required, under Article 40 of the Covenant, to submit periodic reports to the HRC "whenever the Committee so requests".[45] In those reports, the State Party should describe how it gives effect to the rights guaranteed in the ICCPR. State reports are subsequently examined during the session of the HRC, after which the Committee drafts Concluding Observations formulating positive aspects of the State's compliance to the ICCPR and raising matters of concern with suggestions for improvement.[46] In one of the final paragraphs of its Concluding Observations, the Committee may request the State Party concerned provide, within one year, relevant information on the implementation of specific recommendations made.[47] This relatively new practice is referred to as the follow-up procedure.[48] All stages in the reporting procedure are schematically depicted in Figure 1 below. At three of the five stages, NGOs can participate in the process, as is illustrated by the scheme below, designed by the Centre for Civil and Political Rights (an NGO).

Input from civil society, of which NGOs form an important part, is of great value in the reporting procedure of the HRC. Although NGOs do not have formal standing under the reporting procedure, their participation and submissions are highly appreciated.[49] States Parties do not always portray a human rights situation objectively; rather, they have a tendency of submitting positively biased

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[44] Paragraph 12, Annex III, Annual Report of the Human Rights Committee (2002), A/57/40 (Vol. I).

[45] Art. 40 (1) (b) of the ICCPR; usually every three, four or five years, depended on the performance of the State Party with regard to the implementation of the ICCPR.

[46] The Committee holds three sessions annually; twice in Geneva and once in New York.

[47] *See* Rules of Procedure (Rule 71(5)) and UN A/58/40 (Vol.1) Chapter VII, 2003 § 57.

[48] State Parties often failed to provide information on the implementation of the Concluding Observations in their next periodic report, therefore the Committee decided to formalise its follow-up procedure. This was done in General Comment 30, which was adopted on 16 July 2002. Paragraph 5 of General Comment 30 reads as follows: "After the Committee has adopted concluding observations, a follow-up procedure shall be employed in order to establish, maintain or restore a dialogue with the State party. For this purpose and in order to enable the Committee to take further action, the Committee shall appoint a Special Rapporteur, who will report to the Committee."

[49] UN Doc. A/55/40 (Vol. I) (2000), par. 17, the Committee states that it "welcomed the increasing interest shown and the participation by these agencies and organizations and thanked them for the information provided."

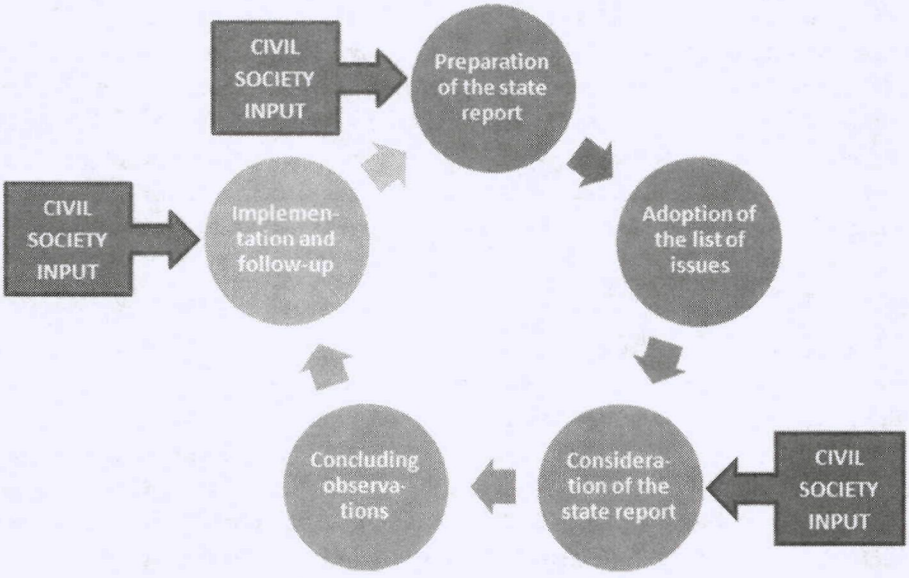

Fig. 1. Civil society input in the reporting process.[50]

reports. Therefore, without information from other sources, the HRC would not be able to form an accurate picture of the implementation of the Covenant in the concerned State.

Let us now look at the exact procedure of NGO participation in the reporting procedure. More than a year before the consideration of a State report during the sessions of the Committee, States Parties have to submit their periodic reports to the secretariat. These reports can, notwithstanding the fact that the State Party bears sole responsibility for the report, be drafted with the involvement of national NGOs – although Member States rarely make use of this opportunity.[51] Instead, NGOs often submit their own country specific reports (sometimes referred to as shadow reports).[52] These reports should be submitted in the very early stages of the reporting procedure, before the Country Report Task Forces (CRTFs) begin drafting the List of Issues, so that the CRTFs can use the information when

[50] Centre for Civil and Political Rights, "UN Human Rights Committee: Participation in the Reporting Process, Guidelines For Non-Governmental Organisations", Geneva, 2010.

[51] Bayefsky, *supra* note 27, p. 184. Nowadays, NGO contributions to the State report writing process vary by country, but often governments and NGOs are not very eager to cooperate in the drafting process. NGOs believe that the UN Committees underscore the importance of NGOs maintaining their independence from the government in this process. *See* e.g. http://www1.umn.edu/humanrts/svaw/law/un/enforcement/CRC.htm.

[52] International Covenant on Civil and Political Rights (ICCPR), Legal Implementation Index, July 2003, p. 46.

preparing the List of Issues.[53] When looking at a typical draft List of Issues, which still includes footnotes, it becomes clear that some thirty per cent of the Issues included are taken from or inspired by NGO reports.[54]

Before the session in which a State Party will be reviewed, the website of the Office of the High Commissioner of Human Rights (OHCHR) provides links to the State report, the adopted List of Issues, but also to submissions of NGOs.[55] In addition, the secretariat of the Committee has created, as of June 2011, an extranet for the Committee members, to ensure that they have all relevant information at their disposal to prepare for the upcoming session.[56] On this extranet, all the reports submitted by international as well as national NGOs are uploaded. From the questions posed by Committee members during formal dialogue with the delegation of the Member State concerned, it is clear that NGO information is frequently used and sometimes even explicitly referred to.[57] In some cases, the Committee considers a human rights situation of a State in the absence of a State report. In those instances, information from other sources becomes even more important.[58]

The CRTFs hold informal meetings with NGOs. Furthermore, NGOs have the opportunity to address the Committee during the NGO briefings that usually take place in the morning on the first day of the session. Moreover, NGOs can organise informal lunch meetings to raise their concerns and stress the points made in their report.[59] NGOs may additionally meet with individual members of the Committee. Also, the Centre for Civil and Political Rights has recently started producing webcasts of the examination of all States Parties' reports, increasing

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53) The CRTFs start drafting a List of Issues when the secretariat has received the state report of the State Party concerned. In the List of Issues, the Committee (more specifically the CRTF) lists issues that remain unclear after reading the periodic report. The List of Issues is sent to the State Party a year before the periodic report is being examined during a session of the Committee. It is only in 2011 that the Committee introduced the use of the List of Issues Prior to Reporting (in this document the Committee lists issues that it would like to see addressed by the State Party in the periodic report). Subsequently, it becomes even more important that NGOs send information in a very timely manner. In the latest annual report of the HRC it is stated that the CRTFs indeed consider material submitted by a number of national and international NGOs. (A/66/40 (Vol. 1), par. 13)

54) Experienced by one of the authors when working for one of the Committee members in May 2011.

55) *See* http://www2.ohchr.org/english/bodies/hrc/index.htm. The OHCHR is part of the Secretariat of the United Nations. It collaborates closely with, *inter alia*, NGOs and forms an important link between NGOs and the HRC (Office of the High Commissioner for Human Rights, *Working with the UN Human Rights Programme: A Handbook for Civil Society* (2008) p. 1).

56) Interview with HRC member on 19/06/11.

57) See for example: Human Rights Committee, *Comments of the Human Rights Committee, Egypt*, UN Doc. CCPR/C/79/Add.23 § 10 (1993) (adopted at the Committee's 48th Sess., 1260th meeting, 29 July 1993). Also, that this is common practice during the session of the Committee is confirmed by some Committee members to the authors on 26/06/2011.

58) This happened most recently when the Committee examined the Seychelles in March 2011 and Dominica in July 2011.

59) Inter-Committee meeting of the human rights treaty bodies, UN Doc. HRI/ICM/2011/2, 18 May 2011, par. 44.

the visibility of the HRC's work.[60] The Committee itself is highly appreciative of this new practice.[61]

At the end of each session, the Committee adopts Concluding Observations for each State under consideration. NGOs do not participate in the drafting of the Observations. However, they can make a large contribution to the work of the Committee by raising awareness of them on a national level. NGOs can ensure wide distribution of the Observations and encourage their implementation. Whenever a State fails to translate the Observations in the national language, NGOs often undertake this task and make them accessible to the authorities and other interested parties.[62]

In 2002 the HRC established the Follow-up to the Concluding Observations procedure.[63] This procedure obliges Member States to report back to the Committee, within one year, on the progress made concerning the implementation of a small number of the Concluding Observations. At this stage, NGOs can send alternative reports to the Special Rapporteur on Follow-up to Concluding Observations in which they provide information on the steps taken by the government to implement the Concluding Observations.

3.2. *Emergency Procedure*

The emergency procedure is considered part of the reporting procedure. It is based on Article 40 of the ICCPR and was developed by the HRC in 1991. In 1991 and 1992, the HRC requested emergency reports from *inter alia* Iraq, the former Yugoslavia, and Peru. To institutionalise this practice, the Committee amended its Rules of Procedure in April 1993.[64] Today, Rule 66(2) reads as follows: "Requests for submission of a report under Article 40, paragraph 1 (b), of the Covenant may be made in accordance with the periodicity decided by the Committee or at any other time the Committee may deem appropriate. In the case of an *exceptional situation* when the Committee is not in session, a request may be made through the Chairman, acting in consultation with the members of the Committee."[65]

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[60] The webcasts can be accessed at the following link: www.ustream.tv/channel/un-human-rights-committee.

[61] Report of the Human Rights Committee, UN Doc. A/66/40 (Vol. 1), 2011, par. 39.

[62] Centre for Civil and Political Rights, "UN Human Rights Committee: Participation in the Reporting Process, Guidelines For Non-Governmental Organisations", Geneva, 2010, p. 19.

[63] Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40 (A/57/40), vol. I, annex III, sect. A (2002). See Rules of Procedure (Rule 71(5)).

[64] Adopted at the Committee's 47th session, 1233d meeting (8 April 1993); included in UN GAOR, 48th Sess., Supp. No. 40, pt. I, Annex IX at 217, UN Doc. A/48/40 (1993).

[65] Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.3 (1994). Emphasis added.

Usually, when a request is made in an exceptional situation, the State Party has to submit its report within three months of the request. The submitted report is then discussed by the Committee at the next scheduled session.[66]

NGOs have an important role in bringing emergency situations of human rights violations to the attention of the HRC. When the Committee is in session, NGOs can directly approach the members of the Committee. Alternatively, when the HRC is not in session, NGOs can choose to address the Chairman through the Secretariat.[67]

Once reports are scheduled for consideration, the participation of NGOs is similar to that in the ordinary reporting procedure. Accordingly, NGOs can prepare written submissions and otherwise bring information to the attention of the Committee. In their submissions, however, NGOs should take the concerns of the Committee, as articulated in the request for a State report, into account.

Finally, when the Committee adopts Concluding Observations, NGOs are particularly useful in giving publicity to the outcome of the Committee's considerations. They also use this information in their own activities.[68]

3.3. *Individual Communication Procedure*

States are the principal actors in the implementation system of the ICCPR. However, as observed above, individuals are the ones who benefit from the provisions of the Covenant. Therefore, the Optional Protocol to the International Covenant on Civil and Political Rights (1966) (OP-I)[69] was adopted, which granted individuals *locus standi* to express their grievances before the Committee. Under the OP-I, the Committee can "receive and consider communications from individuals [...] who claim to be victims of a violation [by a State Party to the OP-I, whose jurisdiction the individual is subjected to,] of any of the rights set forth in the Covenant."[70] According to Article 2 of the OP-I, a written communication may only be submitted when the individual has "exhausted all available domestic remedies".

Generally, the alleged victim or his or her legal representative files a communication to the Committee. However, if the alleged victim is unable to act in person, someone can submit a complaint on his or her behalf, either if he or she was

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66) United Nations: Enable, International Norms and Standards Relating to Disability. http://www.un.org/esa/socdev/enable/comp202.htm (last accessed on 28 June 2011)

67) M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (2nd ed., 2002) p. 39.

68) *Ibid.*, pp. 39–40.

69) Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23 March 1976.

70) Article 1, ICCPR (1966).

given the authority by the complainant to act on his/her behalf,[71] or if he or she can establish a "sufficient link" with the alleged victim.[72] Overall, the "sufficient link" requirement is interpreted in a broad way, but communications submitted by NGOs[73] or a member of an NGO,[74] have been declared inadmissible because they did not fulfil the "sufficient link" requirement. Accordingly, NGOs officially do not have *locus standi* to bring communications before the Committee. That being said, this does not prevent NGOs from aiding individuals, as Tyagi noted, in the drafting of communications and substantiation of allegations.[75] Several law firms and NGOs are, and have been, involved in the individual communication procedures.

Even though NGOs can and do participate in the individual complaints procedure, some NGOs are still hesitant to act, in the face of a number of obstacles in the procedure. There is no opportunity to defend a case orally before the Committee, the Committee does not formally accept third party briefs or *amicus curiae* briefs,[76] and the backlog of cases before the Committee results in delays between the submission of a communication and the adoption of Views, making it impractical for NGOs to invest in such procedures. To remedy these defects, it was proposed to increase the participation of NGOs in the communication procedure through the creation of an international network of lawyers that could "encourage communications which raise certain key issues in order to develop the 'case-law' of the Human Rights Committee."[77] Although some human rights organisations, like Interights, have started to consider this idea, it has not yet been fully developed.

When the Committee receives a communication and has declared it admissible, the Committee formulates its Views on the merits of the case in a confidential session. In those Views, the HRC specifies whether it has found a violation of the ICCPR. If the Committee does not find a violation, the question of imple-

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[71] *See* for example, *A.B. v. Italy* (Comm. No. 565/1993) in *HRC 1994 Report II*, Annex X.AA, p. 361, par. 4.2. See also: International Service for Human Rights, *Simple guide to the UN treaty bodies* (2010) p. 29.

[72] *See* for example, *E.B. v. S* (Comm. No. 29/1978). *HRC Selected Decisions I*, p. 11. *See also* Tyagi, *supra note.*, p. 399. See also; M. Davidson, "The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights", 4 *Canterbury Law Review* (1991) p. 343.

[73] *X v. Uruguay*, Comm. No. 136/1983, *HRCttee 1983 Report*, Annex XXIX, pp. 245–6.; *Jovanovic v. Serbia*, Comm. No. 1355/2005, *HRCttee 2007 Report II*, Annex VIII.O, p. 525.; and *Beydon v. France*, Comm. No. 1400/2005, *HRCttee 2006 Report II*, Annex VI.EE, p. 645, par. 4.3.

[74] *L.A. v. Uruguay*, Comm. No. 128/1982, *ibid.*, Annex XXVI, pp. 239–40.

[75] Tyagi, *supra* note 28, p. 403.

[76] It should be noted that, although there is no formal procedure for submitting such interventions, there are instances where they have been informally circulated to Committee members, or where they are submitted by the petitioners, as legal memoranda or opinions of third parties, as part of the petitioner's file.

[77] Bayefsky, *supra* note 27, p. 188.

mentation is usually redundant.[78] However, when the Committee decides that the Covenant has been violated, the violating State Party has to give effect to the Views of the HRC. General Comment 33 of the HRC directs that "States Parties must use whatever means lie within their power in order to give effect to the views issued by the Committee."[79] Since 1990, the Committee has adopted a formal follow-up procedure to supervise how the State Party concerned implements its Views. NGOs can make important contributions to this follow-up procedure, via the office of the 'Special Rapporteur for the Follow-up of Views'. The task of this Rapporteur – a member of the Committee – is to maintain contact with States that have violated provision(s) of the ICCPR with regard to one of the individuals falling within their jurisdiction, in order to observe whether the State is giving effect to the Views adopted by the HRC.[80] To effectively carry out this task, the Special Rapporteur has access to a wide range of information sources, including from NGOs,[81] and can even meet with NGOs during a compliance-monitoring mission. Such a mission, however, has to date only been conducted once.[82] The Committee has for that matter stated that it "welcomes any information which non-governmental organisations might wish to submit as to what measures States Parties have taken, in respect of the implementation of the Committee's Views."[83]

3.4. *General Comments*

Under Article 40(4) of the ICCPR, the Committee is mandated to "transmit its reports, and such *general comments* as it may consider appropriate, to the States Parties."[84] General comments are drafted to provide guidance for States Parties on the interpretation of the provisions of the Covenant.

Until the beginning of the new millennium, NGOs were not allowed to contribute to the drafting of general comments. In fact, neither States Parties nor NGOs had the opportunity to make suggestions as to the content of the general

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78) In rare circumstances, the Committee can still make recommendations for implementation by the State Party, even though no violation of the ICCPR provision has been found. This happened, for example, in the *Brinkhof v. Netherlands* (Comm. No. 402/1990), in which the Committee recommended the State Party remove any discrimination against persons who object to military and substitute service, even though the Committee decided that the Netherlands had not violated the Covenant.

79) UN Doc. CCPR/C/GC/33 (5 November 2008), par. 20.

80) Rule 101 (formerly Rule 95) of the HRC Rules of Procedure, as well as *HRC 1990 Report II*, Annex XI, pp. 205–6.

81) O'Flaherty, *supra* note 67, p. 45.

82) In 1995 when the Special Rapporteur conducted a mission to investigate Jamaica's compliance with the Views adopted by the Committee, he met with several NGOs to gather information. See UN Doc. A/50/40, 3 October 1995, par. 557.

83) UN Doc., A/48/40, 10 July 1993, par. 466.

84) Emphasis added.

comments.[85] After this lack of transparency was criticized,[86] the Working Methods of the HRC have drastically changed. They now explain that "during the process of formulation of general comments, consultations take place with specialised agencies, non-governmental organisations, academics and other human rights treaty bodies, allowing for broader input into the process of elaboration of the general comment."[87] In practice, the HRC has allowed broad input indeed. For instance, in preparation of the draft of its 34th general comment on the freedom of opinion and expression (2011),[88] the Committee, after calling for written submissions from stakeholders, received in total some 300 drafting suggestions, many of which came from NGOs.[89] All submissions were considered during the public meetings of the Committee, and many suggestions supplied by NGOs were adopted. Often, whenever a suggestion from an NGO was brought up, the NGO was explicitly mentioned.[90] Moreover, as the drafting of the general comments is done during public sessions, NGOs have the opportunity to attend and report on them.

After a general comment has been adopted, NGOs can also engage in raising awareness of the general comment on a national level. They can ensure that the general comments are widely disseminated, discussed and understood. This could be done through press releases in various media, including new social media, like Facebook, which are in fact widely used by NGOs.[91]

3.5. *Inter-State Communication Procedure*

The inter-State communication procedure is provided for in Articles 41 and 42 of the Covenant and is optional in nature. Under Article 41, a State Party may, if it "considers that another State Party is not giving effect to the provisions of the present Covenant [...] bring the matter to the attention of that State Party."[92] If the issue is subsequently not being handled to the satisfaction of both Parties concerned, the matter may be brought to the attention of the Committee "six months after the receipt by the receiving State of the initial communication."[93]

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85) Tyagi, *supra* note 28, p. 294.

86) E. Marsh, "General Comments", http://www.icva.ch/doc00000486.html#58, par. 38 (last accessed on 26 June 2011).

87) Working Methods of the Human rights Committee, http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#a9 (last accessed on 26 June 2011).

88) Draft General Comment No. 34, CCPR/C/GC/34/CRP.6 (3 May 2011).

89) Website of the International Service for Human Rights: http://www.ishr.ch/treaty-bodies/1054–human-rights-committee-develop-draft-general-comment-on-freedom-of-expression (written by one of the authors of this article).

90) Experienced by one of the authors when working for one of the Committee members in May 2011.

91) Interview with HRC member on 21/06/11. Examples of NGOs using Facebook are Amnesty International and Human Rights Watch.

92) Art. 41.1(a) ICCPR.

93) Art. 41.1(b) ICCPR.

To date, only 48 States Parties have declared that they recognise the competence of the HRC under Article 41.[94] Despite repeated appeals from the Committee to use the inter-State communication procedure,[95] no communications have been submitted so far.[96]

The inter-State communication procedure envisages no formal role for NGOs. However, there are multiple ways in which NGOs could assist in the procedure. As Tyagi points out, they can lobby for initiating action against human rights violators, provide legal assistance to the complaining State, and supply relevant information to the HRC.[97]

4. Impact of NGOs at the Human Rights Committee

It is extremely difficult to make a systematic and comprehensive assessment of NGOs' impact on the implementation process of the ICCPR. Indeed, whenever the HRC uses information from an NGO source, it often does not make explicit reference to the source, a reluctance which may be explained by Committee members' concerns about appearing to be a mouthpiece of NGOs.

Nevertheless, it can safely be stated that NGOs have an undeniable influence on the activities of the Committee. Time and again the HRC and the General Assembly have stressed the vital contribution of NGOs to the work of the Committee. As early as 1982, one of the members of the Committee estimated that the HRC would have been 50 per cent less effective without NGO expertise.[98] Ever since, NGOs have become even more visible in the practice of the Committee, and have consequently had a greater impact.[99]

Considering the workload of Committee members, and the fact that they cannot have expertise in all issues handled before the HRC, the members admit that they could not do their work adequately without the information provided by

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94) See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#38 for a list of all States that made declarations.

95) In General Comment 31 on the nature of the general legal obligation imposed on States parties to the Covenant, the Committee states explicitly that it "reminds States Parties of the desirability of making the declaration under article 41. It further reminds those States parties already having made the declaration on the potential value of availing themselves of the formal procedure under the article." UN GAOR, 59th session, Supp No 40 (A/59/40), 1 October 2004, *Report of the Human Rights Committee*, vol 1, 175.

96) S. Ghandi, "The Human Rights Committee and interim measures of relief", 13 *Canterbury Law Review* (2007) p. 209, p. 211, and http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (last accessed on 10 June 2011).

97) Tyagi, *supra* note 28, p. 383.

98) Fischer, *supra* note 21, p. 147

99) This process has also taken place elsewhere in global governance. See J.T. Mathews, "Power Shift", 76 *Foreign Affairs* (1997) p. 53 (stating that NGOs "breed new ideas; advocate, protest, and mobilize public support; do legal, scientific, technical, and policy analysis; provide services; shape, implement, monitor, and enforce national and international commitments; and change institutions and norms [...] Increasingly, NGOs are able to push around even the largest governments.').

NGOs. This assisting role of NGOs has been institutionalised in HRC procedures: when preparing for the examination of State reports, the Secretariat distributes all relevant documents to the members including all reports submitted by NGOs. These reports are subsequently often cited in the questions asked to the delegations of the States under examination. Also during the sessions of the HRC, members actively consult NGOs, through personal meetings or even, as one member clarified, through briefings over Skype. It is clear, therefore, that indeed NGOs play an essential role in the monitoring process.[100]

Accordingly, NGOs are essential in monitoring national human rights situations, reporting to the HRC, and giving publicity to the HRC's work. Their impact may be greatest in the reporting procedure, but NGO influence is also evident regarding the other functions of the Committee. General comments, for instance, often include suggestions made by NGOs.

5. Future Outlook

Inevitably, the Committee has become reliant on the work done by NGOs.

NGO participation is very advantageous to the HRC, given the lack of adequate resources available to the Committee, the inadequacy of information received and the absence of verification machinery. That being said, to fully benefit from the potential of NGO involvement, its interaction with NGOs could be improved.[101]

There are a number of problems that currently beset the relation between the HRC and NGOs. For one thing, while the Committee's website contains information on the timetabling of reviews and deadlines for NGOs to submit reports, it does not contain information on the dates of all stages of the reporting process and not all the information is accessible in a timely fashion. Furthermore, the Committee conducts State reviews in the absence of a State report during a closed meeting. This seriously limits the potentially valuable role for NGOs in the process, since the confidential nature of the meetings makes them unable to report back on the issues raised by the HRC.[102] These problems have been identified by NGOs themselves, and therefore present just one side of the coin.

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[100] D. Kretzmer, "The UN Human Rights Committee and International Human Rights Monitoring", discussed on 10 March 2010 at the *IILJ International Legal Theory Colloquium*, p. 48, available at http://www.iilj.org/courses/documents/2010Colloquium.Kretzmer.pdf (last accessed on 22 December 2011).

[101] Tyagi, *supra* note 28, p. 224.

[102] T. Baldwin, J. Heiler and P. Mutzenberg, "Paper for the meeting between the NGOs and the Human Rights Committee on strengthening the interaction between the Committee and NHRIs and NGOs", 11 July 2011. Note that the few problems outlined in this article do not constitute an exhaustive list; for more issues consult the Paper. One of the additional problems outlined in the Paper is that there are said to be insufficient meetings between the HRC and NGOs. This problem has however already been resolved, as formal meetings are now organized for NGO and NHRI briefings before the review of each State.

Although there may nowadays be few concerns over the credentials and legitimacy of NGOs, the risk is of course that Committee members are seen as NGO proxies. Still, they are formally independent experts, and it is therefore expected that they guard their independence. At any rate, there is no evidence that Committee members do the bidding of NGOs. Thus, the concern that (some) Committee members pursue a political agenda, thereby sapping States Parties' continued support for the HRC process and the implementation of the ICCPR, appears overblown.[103]

In order to cure these defects – and to both increase NGO participation and secure the approval of States Parties – the idea of introducing more transparency in NGO reporting has been put forward. This could, for example, be achieved by revising the rules of procedure formalising the role of NGOs.[104] Such a more 'institutionalised' NGO role may limit irresponsible NGO conduct (*e.g.*, spreading inaccurate information which the HRC acts on).[105] At the same time, however, co-opting NGOs within the system may limit civil society's power to act as a counterweight to government action. It has been argued in this respect that, given the often laudable goals of NGO action, "unrecoverable costs caused by [NGO] resistance action would have to be anticipated" by the international community,[106] and that, therefore, calls for enhanced accountability should be resisted. Still, responsible behaviour of NGOs towards public opinion, towards their members, and towards the international community at large appears desirable. In particular, they may wish to establish due diligence procedures to ensure

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103) Compare the national magazine of the United Nations Association of Australia, ISSN 1035–218X No 209 (31 March 2000) http://www.unaa.org.au/news125.html (last accessed on 25 August 2011) ("[I]n many cases, there is an over-emphasis on non-government submissions. This has led to a growing perception that the committees are pursuing political agendas rather than fulfilling their 'expert' objectives.").

104) Tyagi, *supra* note 28, p. 225. See also *idem*, at 822 "An officially prescribed, albeit limited, role along with suitable safeguards is better than the laissez-faire situation that currently prevails.").

105) It is recalled that major accountability questions have been addressed at NGOs active in the environmental field. Notably the *Brent Spar* episode springs to mind here. When in the late 1990s, Shell decided to decommission the Brent Spar oil platform by sinking it in the North Sea. After a lobbying campaign by Greenpeace – which argued that sinking would lead to considerable environmental damage – Shell decided to dismantle the platform on land. Eventually, it turned out that sinking would have been the best option from both a safety and an environmental perspective. See for an account of the episode: G. Jordan, *Shell, Greenpeace and the Brent Spar* (2001) 392 pp. Greenpeace still defends that recycling was the best option. Cf. http://www.greenpeace.org/international/about/history/the-brent-spar (last accessed on 22 December 2011). Sinking would, amongst others, be environmentally friendly, in that it enables coral growth on the decommissioned oil rigs. See N. Bell and J. Smith, "Coral Growing on North Sea Oil Rights", *Nature* 402, 601 (9 December 1999). The episode created some chunks in Greenpeace's moral armor (although at the same time it ignited the debate over corporate social responsibility), and elicited the question as to whether an NGO could be held liable under international law for, spreading unsound scientific information.

106) D. Thürer, "The Emergence of Non-Governmental Organizations and the Transnational Enterprises", in R. Hoffmann and N. Geissler (eds.), *Non-State Actors as New Subjects of International Law: International Law – from the Traditional State Order towards the Law of the Global Community* (1999) p. 55.

that the information which they disseminate is accurate, to put in place sufficiently 'democratic' decision-making procedures, and to keep governments, at least partly, informed of their work.

Apart from improving transparency in the dealings between NGOs and the HRC, there is a growing necessity for cooperation between the various NGOs, and coordination of their work, so as to maximize their impact on the HRC's activities.[107] As we write, there is still too much fragmentation in, and overlap between, the reports and documents submitted by NGOs to the HRC. To increase their efficiency, NGOs may therefore more frequently want to join forces and submit joint reports. Also, NGOs could be involved in the drafting of periodic reports by States Parties. Currently, States Parties hardly use NGO sources when preparing their reports, but in the most recent statement on the *Strengthening and Reform of the UN Human Rights Treaty Body System* (the Pretoria Statement 2011) States are again encouraged to ensure NGO participation when drafting a State report.[108] That being said, when NGOs get involved in providing information to States drafting State reports, they should see to it that they do not lose their critical voice, a risk that is especially present if they are funded by the State.

6. Concluding Observations

NGOs have increasingly participated in the multifaceted work of the HRC. In particular, they have supplied shadow reports, provided input for the Committee's general comments, and have supported individuals filing communications with the Committee. In so doing, they have eroded the central role of the State in the various HRC procedures, have enriched the sources on which the HRC can draw, and have contributed considerably to the effectiveness and legitimacy of the Committee's work.

This process of enhanced NGO participation in the work of the HRC does not stand alone. It is part of a broader process of international law and governance structures opening up to non-state actors. Non-state actors such as NGOs can provide valuable expert views to international mechanisms, and add a whiff of global democracy to those mechanisms.[109] As one of the authors of this article

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[107] See, *e.g.*, Secretary-General Ban Ki-moon, Speech at World Economic Forum, Davos, Switzerland (29 January 2009) (stating that today's global leadership demands "a new constellation of international cooperation – governments, civil society and the private sector, working together for a collective global good", thereby underscoring the need for cooperation between different organizations.).

[108] Pretoria Statement on the Strengthening and Reform of the UN Human Rights Treaty Body System, 20 and 21 June 2011, par. 6.1.

[109] There is an extensive literature on the impact of NGO views on the international law and policy. See for their impact on the international human rights regime, e.g., in English: G.E. Edwards, "Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGO's) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs", 18 *Journal of International Law and Practice* (2010), p. 165; L.H. Mayer, "NGO Standing and Influence in Regional

described elsewhere, they have evolved from law-*takers* to law-*makers*. Channelling their views through NGOs, individuals do no longer simply 'receive' the law from States and international institutions, but influence its interpretation, and sometimes even its adoption.[110] They have become true participants in the international legal system.[111]

This evolution is particularly relevant for human rights law, the very addressees of which are individuals (and not States or institutions). By filing reports and providing information to the HRC, NGOs influence the construction and evolution of the ICCPR in ways that States, which will inevitably tend to balance human rights concerns with other collective considerations, cannot do. The question may be posed, eventually, whether, in eroding the central role of the State, NGOs are destined in the future to substitute States as the 'collective guarantors' of human rights protection systems.[112] Before NGOs assume such a role, however, vexing questions as to their legitimacy and accountability will have to be answered.[113]

Human Rights Courts and Commissions", 36 *Brooklyn Journal of International Law* (2011) p. 911. In French: S. Guillet, "Les relations entre les ONG et L'ONU dans le domaine des droits de l'Homme : UN partenarait en mutation", 7 *L'Observateur des Nations Unies* (1999) pp. 77–90; L.-A. Sicilianos, "Les ONG et l'évolution future du droit international des droits de l'homme", in G. Cohen-Jonathan et J.F. Flauss (éds.), *Les organisations non gouvernementales et le droit international des droits de l'homme* (2005). In German: M. Ölz, *Die NGO's im Recht des internationalen Menschenrechtsschutzes* (2002). See for the impact of one specific NGO, Amnesty International, on international courts and monitoring bodies: D. Zagorac, "International Courts and Compliance Bodies: the Experience of Amnesty International", in T. Treves (ed.), *Civil Society, International Courts and Compliance Bodies* (2005) pp. 11–39;

110) Noortmann and Ryngaert, *supra* note 5.

111) See J. d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law*, (2011).

112) The authors are indebted to the anonymous reviewer for this insight.

113) The source of the legitimacy of the state is often found in the democratic principle, and the state can be held to account, on the basis of international responsibility rules, before international dispute-settlement mechanisms. The political legitimacy of NGOs remains elusive, however, and NGOs are not seen as duty-bearers under international law. These arguments are not developed further in this article, but the authors refer to the symposium issue "Governing Civil Society: NGO Accountability, Legitimacy and Influence", 36 *Brooklyn Journal of International Law* (2011).

United Nations CCPR/C/USA/CO/4

International Covenant on Civil and Political Rights

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Human Rights Committee

Concluding observations on the fourth periodic report of the United States of America*

1. The Committee considered the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr.1) at its 3044th, 3045th and 3046th meetings (CCPR/C/SR.3044, 3045 and 3046), held on 13 and 14 March 2014. At its 3061st meeting (CCPR/C/SR.3061), held on 26 March 2014, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the fourth periodic report of the United States of America and the information presented therein. It expresses appreciation for the opportunity to renew its constructive dialogue with the State party's high-level delegation, which included representatives of state and local governments, on the measures taken by the State party during the reporting period to implement the provisions of the Covenant. The Committee is grateful to the State party for its written replies (CCPR/C/USA/Q/4/Add.1) to the list of issues (CCPR/C/USA/Q/4), which were supplemented by the oral responses provided by the delegation during the dialogue, and for the additional information that was provided in writing.

B. Positive aspects

3. The Committee notes with appreciation the many efforts undertaken by the State party and the progress made in protecting civil and political rights. The Committee welcomes in particular the following legislative and institutional steps taken by the State party:

(a) Full implementation of article 6, paragraph 5, of the Covenant in the aftermath of the Supreme Court's judgment in *Roper* v. *Simmons*, 543 U.S. 551 (2005), despite the State party's reservation to the contrary;

* Adopted by the Committee at its 110th session (10–28 March 2014).

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(b) Recognition by the Supreme Court in *Boumediene* v. *Bush*, 553 U.S. 723 (2008) of the extraterritorial application of constitutional habeas corpus rights to aliens detained at Guantánamo Bay;

(c) Presidential Executive Orders 13491 – Ensuring Lawful Interrogations, 13492 – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities and 13493 – Review of Detention Policy Options, issued on 22 January 2009;

(d) Support for the United Nations Declaration on the Rights of Indigenous Peoples, announced by President Obama on 16 December 2010;

(e) Presidential Executive Order 13567 establishing a periodic review of detainees at the Guantánamo Bay detention facility who have not been charged, convicted or designated for transfer, issued on 7 March 2011.

C. Principal matters of concern and recommendations

Applicability of the Covenant at national level

4. The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have been declared to be non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2).

The State party should:

(a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, inter alia, in the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant;

(b) Engage with stakeholders at all levels to identify ways to give greater effect to the Covenant at federal, state and local levels, taking into account that the obligations under the Covenant are binding on the State party as a whole, and that all branches of government and other public or governmental authorities at every level are in a position to engage the responsibility of the State party (general comment. No. 31, para. 4);

(c) Taking into account its declaration that provisions of the Covenant are non-self-executing, ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the United States of America, and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps. The State party should also consider acceding to the Optional Protocol to the Covenant, providing for an individual communication procedure.

(d) Strengthen and expand existing mechanisms mandated to monitor the implementation of human rights at federal, state, local and tribal levels, provide them with adequate human and financial resources or consider establishing an independent national human rights institution, in accordance with the principles relating to the

status of national institutions for the promotion and protection of human rights (the Paris Principles) (General Assembly resolution 48/134, annex).

(e) Reconsider its position regarding its reservations and declarations to the Covenant with a view to withdrawing them.

Accountability for past human rights violations

5. The Committee is concerned at the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the United States Government, including private contractors, for unlawful killings during its international operations, and the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called "enhanced interrogation techniques". While welcoming Presidential Executive Order 13491 of 22 January 2009 terminating the programme of secret detention and interrogation operated by the Central Intelligence Agency (CIA), the Committee notes with concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment committed in the context of the CIA secret rendition, interrogation and detention programmes were closed in 2012, resulting in only a meagre number of criminal charges being brought against low-level operatives. The Committee is concerned that many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims (arts. 2, 6, 7, 9, 10 and 14).

The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established. The State party should also consider the full incorporation of the doctrine of "command responsibility" in its criminal law and declassify and make public the report of the Senate Special Committee on Intelligence into the CIA secret detention programme.

Racial disparities in the criminal justice system

6. While appreciating the steps taken by the State party to address racial disparities in the criminal justice system, including the enactment in August 2010 of the Fair Sentencing Act and plans to work on reforming mandatory minimum sentencing statutes, the Committee continues to be concerned about racial disparities at different stages in the criminal justice system, as well as sentencing disparities and the overrepresentation of individuals belonging to racial and ethnic minorities in prisons and jails (arts. 2, 9, 14 and 26).

The State party should continue and step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state and local levels. The State party should ensure the retroactive application of the Fair Sentencing Act and reform mandatory minimum sentencing statutes.

Racial profiling

7. While welcoming plans to reform the "stop and frisk" programme in New York City, the Committee remains concerned about the practice of racial profiling and surveillance by law enforcement officials targeting certain ethnic minorities and the surveillance of Muslims, undertaken by the Federal Bureau of Investigation (FBI) and the New York Police Department (NYPD), in the absence of any suspicion of wrongdoing (arts. 2, 9, 12, 17 and 26).

The State party should continue and step up measures to effectively combat and eliminate racial profiling by federal, state and local law enforcement officials, inter alia, by:

(a) Pursuing the review of its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies and expanding protection against profiling on the basis of religion, religious appearance or national origin;

(b) Continuing to train state and local law enforcement personnel on cultural awareness and the inadmissibility of racial profiling; and

(c) Abolishing all "stop and frisk" practices.

Death penalty

8. While welcoming the overall decline in the number of executions and the increasing number of states that have abolished the death penalty, the Committee remains concerned about the continuing use of the death penalty and, in particular, racial disparities in its imposition that disproportionately affects African Americans, exacerbated by the rule that discrimination has to be proven on a case-by-case basis. The Committee is further concerned by the high number of persons wrongly sentenced to death, despite existing safeguards, and by the fact that 16 retentionist states do not provide for compensation for persons who are wrongfully convicted, while other states provide for insufficient compensation. Finally, the Committee notes with concern reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs (arts. 2, 6, 7, 9, 14 and 26).

The State party should:

(a) Take measures to effectively ensure that the death penalty is not imposed as a result of racial bias;

(b) Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, inter alia, effective legal representation for defendants in death penalty cases, including at the post-conviction stage;

(c) Ensure that retentionist states provide adequate compensation for persons who are wrongfully convicted;

(d) Ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution; and

(e) Consider establishing a moratorium on the death penalty at the federal level and engage with retentionist states with a view to achieving a nationwide moratorium.

The Committee also encourages the State party to consider acceding to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, on the occasion of the 25th anniversary of the Protocol.

Targeted killings using unmanned aerial vehicles (drones)

9. The Committee is concerned about the State party's practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles (UAV), also known as "drones", the lack of transparency regarding the criteria for drone strikes, including the legal justification for specific attacks, and the lack of accountability for the

loss of life resulting from such attacks. The Committee notes the State party's position that drone strikes are conducted in the course of its armed conflict with Al-Qaida, the Taliban and associated forces in accordance with its inherent right of national self-defence, and that they are governed by international humanitarian law as well as by the Presidential Policy Guidance that sets out standards for the use of lethal force outside areas of active hostilities. Nevertheless, the Committee remains concerned about the State party's very broad approach to the definition and geographical scope of "armed conflict", including the end of hostilities, the unclear interpretation of what constitutes an "imminent threat", who is a combatant or a civilian taking direct part in hostilities, the unclear position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice (arts. 2, 6 and 14).

The State party should revisit its position regarding legal justifications for the use of deadly force through drone attacks. It should:

(a) Ensure that any use of armed drones complies fully with its obligations under article 6 of the Covenant, including, in particular, with respect to the principles of precaution, distinction and proportionality in the context of an armed conflict;

(b) Subject to operational security, disclose the criteria for drone strikes, including the legal basis for specific attacks, the process of target identification and the circumstances in which drones are used;

(c) Provide for independent supervision and oversight of the specific implementation of regulations governing the use of drone strikes;

(d) In armed conflict situations, take all feasible measures to ensure the protection of civilians in specific drone attacks and to track and assess civilian casualties, as well as all necessary precautionary measures in order to avoid such casualties;

(e) Conduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible;

(f) Provide victims or their families with an effective remedy where there has been a violation, including adequate compensation, and establish accountability mechanisms for victims of allegedly unlawful drone attacks who are not compensated by their home governments.

Gun violence

10. While acknowledging the measures taken to reduce gun violence, the Committee remains concerned about the continuing high numbers of gun-related deaths and injuries and the disparate impact of gun violence on minorities, women and children. While commending the investigation by the United States Commission on Civil Rights of the discriminatory effect of the "Stand Your Ground" laws, the Committee is concerned about the proliferation of such laws which are used to circumvent the limits of legitimate self-defence in violation of the State party's duty to protect life (arts. 2, 6 and 26).

The State Party should take all necessary measures to abide by its obligation to effectively protect the right to life. In particular, it should:

(a) Continue its efforts to effectively curb gun violence, including through the continued pursuit of legislation requiring background checks for all private firearm transfers, in order to prevent possession of arms by persons recognized as prohibited individuals under federal law, and ensure strict enforcement of the Domestic Violence Offender Gun Ban of 1996 (the Lautenberg Amendment); and

(b) Review the Stand Your Ground laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence.

Excessive use of force by law enforcement officials

11. The Committee is concerned about the still high number of fatal shootings by certain police forces, including, for instance, in Chicago, and reports of excessive use of force by certain law enforcement officers, including the deadly use of tasers, which has a disparate impact on African Americans, and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border (arts. 2, 6, 7 and 26).

The State Party should:

(a) Step up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;

(b) Ensure that the new CBP directive on the use of deadly force is applied and enforced in practice; and

(c) Improve reporting of violations involving the excessive use of force and ensure that reported cases of excessive use of force are effectively investigated; that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations are re-opened when new evidence becomes available; and that victims or their families are provided with adequate compensation.

Legislation prohibiting torture

12. While noting that acts of torture may be prosecuted in a variety of ways at both the federal and state levels, the Committee is concerned about the lack of comprehensive legislation criminalizing all forms of torture, including mental torture, committed within the territory of the State party. The Committee is also concerned about the inability of torture victims to claim compensation from the State party and its officials due to the application of broad doctrines of legal privilege and immunity (arts. 2 and 7).

The State party should enact legislation to explicitly prohibit torture, including mental torture, wherever committed, and ensure that the law provides for penalties commensurate with the gravity of such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. The State party should ensure the availability of compensation to victims of torture.

Non-refoulement

13. While noting the measures taken to ensure compliance with the principle of non-refoulement in cases of extradition, expulsion, return and transfer of individuals to other countries, the Committee is concerned about the State party's reliance on diplomatic assurances that do not provide sufficient safeguards. It is also concerned at the State party's position that the principle of non-refoulement is not covered by the Covenant, despite the Committee's established jurisprudence and subsequent State practice (arts. 6 and 7).

The State party should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant; continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.

Trafficking and forced labour

14. While acknowledging the measures taken by the State party to address the issue of trafficking in persons and forced labour, the Committee remains concerned about cases of trafficking of persons, including children, for purposes of labour and sexual exploitation, and criminalization of victims on prostitution-related charges. It is concerned about the insufficient identification and investigation of cases of trafficking for labour purposes and notes with concern that certain categories of workers, such as farm workers and domestic workers, are explicitly excluded from protection under labour laws, thus rendering those categories of workers more vulnerable to trafficking. The Committee is also concerned that workers entering the United States of America under the H-2B work visa programme are also at a high risk of becoming victims of trafficking and/or forced labour (arts. 2, 8, 9, 14, 24 and 26).

The State party should continue its efforts to combat trafficking in persons, inter alia, by strengthening its preventive measures, increasing victim identification and systematically and vigorously investigating allegations of trafficking in persons, prosecuting and punishing those responsible and providing effective remedies to victims, including protection, rehabilitation and compensation. The State party should take all appropriate measures to prevent the criminalization of victims of sex trafficking, including child victims, insofar as they have been compelled to engage in unlawful activities. The State party should review its laws and regulations to ensure full protection against forced labour for all categories of workers and ensure effective oversight of labour conditions in any temporary visa programme. It should also reinforce its training activities and provide training to law enforcement and border and immigration officials, as well as to other relevant agencies such as labour law enforcement agencies and child welfare agencies.

Immigrants

15. The Committee is concerned that under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant. It is also concerned about the mandatory nature of the deportation of foreigners, without regard to elements such as the seriousness of crimes and misdemeanors committed, the length of lawful stay in the United States, health status, family ties and the fate of spouses and children staying behind, or the humanitarian situation in the country of destination. Finally, the Committee expresses concern about the exclusion of millions of undocumented immigrants and their children from coverage under the Affordable Care Act and the limited coverage of undocumented immigrants and immigrants residing lawfully in the United States for less than five years by Medicare and Children Health Insurance, all resulting in difficulties for immigrants in accessing adequate health care (arts. 7, 9, 13, 17, 24 and 26).

The Committee recommends that the State party review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions; take measures to ensure that affected persons have access to legal representation; and identify ways to facilitate access to adequate health care, including reproductive health-care services, by undocumented immigrants and immigrants and their families who have been residing lawfully in the United States for less than five years.

Domestic violence

16. The Committee is concerned that domestic violence continues to be prevalent in the State party, and that ethnic minorities, immigrants, American Indian and Alaska Native women are at particular risk. The Committee is also concerned that victims face obstacles to obtain remedies, and that law enforcement authorities are not legally required to act with

due diligence to protect victims of domestic violence and often inadequately respond to such cases (arts. 3, 7, 9 and 26).

The State party should, through the full and effective implementation of the Violence against Women Act and the Family Violence Prevention and Services Act, strengthen measures to prevent and combat domestic violence and ensure that law enforcement personnel appropriately respond to acts of domestic violence. The State party should ensure that cases of domestic violence are effectively investigated and that perpetrators are prosecuted and sanctioned. The State party should ensure remedies for all victims of domestic violence and take steps to improve the provision of emergency shelter, housing, child care, rehabilitative services and legal representation for women victims of domestic violence. The State party should also take measures to assist tribal authorities in their efforts to address domestic violence against Native American women.

Corporal punishment

17. The Committee is concerned about corporal punishment of children in schools, penal institutions, the home and all forms of childcare at federal, state and local levels. It is also concerned about the increasing criminalization of students to deal with disciplinary issues in schools (arts. 7, 10 and 24).

The State party should take practical steps, including through legislative measures, where appropriate, to put an end to corporal punishment in all settings. It should encourage non-violent forms of discipline as alternatives to corporal punishment and should conduct public information campaigns to raise awareness about its harmful effects. The State party should also promote the use of alternatives to the application of criminal law to address disciplinary issues in schools.

Non-consensual psychiatric treatment

18. The Committee is concerned about the widespread use of non-consensual psychiatric medication, electroshock and other restrictive and coercive practices in mental health services (arts. 7 and 17).

The State party should ensure that non-consensual use of psychiatric medication, electroshock and other restrictive and coercive practices in mental health services is generally prohibited. Non-consensual psychiatric treatment may only be applied, if at all, in exceptional cases as a measure of last resort where absolutely necessary for the benefit of the person concerned, provided that he or she is unable to give consent, and for the shortest possible time without any long-term impact and under independent review. The State party should promote psychiatric care aimed at preserving the dignity of patients, both adults and minors.

Criminalization of homelessness

19. While appreciating the steps taken by federal and some state and local authorities to address homelessness, the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman or degrading treatment (arts. 2, 7, 9, 17 and 26).

The State party should engage with state and local authorities to:

(a) Abolish the laws and policies criminalizing homelessness at state and local levels;

(b) Ensure close cooperation among all relevant stakeholders, including social, health, law enforcement and justice professionals at all levels, to intensify

efforts to find solutions for the homeless, in accordance with human rights standards; and

(c) Offer incentives for decriminalization and the implementation of such solutions, including by providing continued financial support to local authorities that implement alternatives to criminalization, and withdrawing funding from local authorities that criminalize the homeless.

Conditions of detention and use of solitary confinement

20. The Committee is concerned about the continued practice of holding persons deprived of their liberty, including, under certain circumstances, juveniles and persons with mental disabilities, in prolonged solitary confinement and about detainees being held in solitary confinement in pretrial detention. The Committee is furthermore concerned about poor detention conditions in death-row facilities (arts. 7, 9, 10, 17 and 24).

The State party should monitor the conditions of detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty are treated in accordance with the requirements of articles 7 and 10 of the Covenant and the Standard Minimum Rules for the Treatment of Prisoners. It should impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide, and abolish the practice in respect of anyone under the age of 18 and prisoners with serious mental illness. It should also bring the detention conditions of prisoners on death row into line with international standards.

Detainees at Guantánamo Bay

21. While noting the President's commitment to closing the Guantánamo Bay facility and the appointment of Special Envoys at the United States Departments of State and of Defense to continue to pursue the transfer of designated detainees, the Committee regrets that no timeline for closure of the facility has been provided. The Committee is also concerned that detainees held in Guantánamo Bay and in military facilities in Afghanistan are not dealt with through the ordinary criminal justice system after a protracted period of over a decade, in some cases (arts. 7, 9, 10 and 14).

The State party should expedite the transfer of detainees designated for transfer, including to Yemen, as well as the process of periodic review for Guantánamo detainees and ensure either their trial or their immediate release and the closure of the Guantánamo Bay facility. It should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.

National Security Agency surveillance

22. The Committee is concerned about the surveillance of communications in the interest of protecting national security, conducted by the National Security Agency (NSA) both within and outside the United States, through the bulk phone metadata surveillance programme (Section 215 of the USA PATRIOT Act) and, in particular, surveillance under Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendment Act, conducted through PRISM (collection of communications content from United States-based Internet companies) and UPSTREAM (collection of communications metadata and content by tapping fiber-optic cables carrying Internet traffic) and the adverse impact on individuals' right to privacy. The Committee is concerned that, until recently, judicial interpretations of FISA and rulings of the Foreign Intelligence Surveillance Court (FISC) had largely been kept secret, thus not allowing affected persons to know the law with

sufficient precision. The Committee is concerned that the current oversight system of the activities of the NSA fails to effectively protect the rights of the persons affected. While welcoming the recent Presidential Policy Directive/PPD-28, which now extends some safeguards to non-United States citizens "to the maximum extent feasible consistent with the national security", the Committee remains concerned that such persons enjoy only limited protection against excessive surveillance. Finally, the Committee is concerned that the persons affected have no access to effective remedies in case of abuse (arts. 2, 5 (1) and 17).

The State party should:

(a) Take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance;

(b) Ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that: (i) are publicly accessible; (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (iii) are sufficiently precise and specify in detail the precise circumstances in which any such interference may be permitted, the procedures for authorization, the categories of persons who may be placed under surveillance, the limit on the duration of surveillance; procedures for the use and storage of data collected; and (iv) provide for effective safeguards against abuse;

(c) Reform the current oversight system of surveillance activities to ensure its effectiveness, including by providing for judicial involvement in the authorization or monitoring of surveillance measures, and considering the establishment of strong and independent oversight mandates with a view to preventing abuses;

(d) Refrain from imposing mandatory retention of data by third parties;

(e) Ensure that affected persons have access to effective remedies in cases of abuse.

Juvenile justice and life imprisonment without parole

23. While noting with satisfaction the Supreme Court decisions prohibiting sentences of life imprisonment without parole for children convicted of non-homicide offences (*Graham* v. *Florida*), and barring sentences of mandatory life imprisonment without parole for children convicted of homicide offences (*Miller* v. *Alabama*) and the State party's commitment to their retroactive application, the Committee is concerned that a court may still, at its discretion, sentence a defendant to life imprisonment without parole for a homicide committed as a juvenile, and that a mandatory or non-homicide-related sentence of life imprisonment without parole may still be applied to adults. The Committee is also concerned that many states exclude 16 and 17 year olds from juvenile court jurisdictions so that juveniles continue to be tried in adult courts and incarcerated in adult institutions (arts. 7, 9, 10, 14, 15 and 24).

The State party should prohibit and abolish the sentence of life imprisonment without parole for juveniles, irrespective of the crime committed, as well as the mandatory and non-homicide-related sentence of life imprisonment without parole. It should also ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not transferred to adult courts. It should encourage states that automatically exclude 16 and 17 year olds from juvenile court jurisdictions to change their laws.

Voting rights

24. While noting with satisfaction the statement by the Attorney General on 11 February 2014, calling for a reform of state laws on felony disenfranchisement, the Committee reiterates its concern about the persistence of state-level felon disenfranchisement laws, its disproportionate impact on minorities and the lengthy and cumbersome voting restoration procedures in states. The Committee is further concerned that voter identification and other recently introduced eligibility requirements may impose excessive burdens on voters and result in de facto disenfranchisement of large numbers of voters, including members of minority groups. Finally, the Committee reiterates its concern that residents of the District of Columbia (D.C.) are denied the right to vote for and elect voting representatives to the United States Senate and House of Representatives (arts. 2, 10, 25 and 26).

The State party should ensure that all states reinstate voting rights to felons who have fully served their sentences; provide inmates with information about their voting restoration options; remove or streamline lengthy and cumbersome voting restoration procedures; as well as review automatic denial of the vote to any imprisoned felon, regardless of the nature of the offence. The State party should also take all necessary measures to ensure that voter identification requirements and the new eligibility requirements do not impose excessive burdens on voters and result in de facto disenfranchisement. The State party should also provide for the full voting rights of residents of Washington, D.C.

Rights of indigenous peoples

25. The Committee is concerned about the insufficient measures taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about the restriction of access of indigenous peoples to sacred areas that are essential for the preservation of their religious, cultural and spiritual practices, and the insufficiency of consultation with indigenous peoples on matters of interest to their communities (art. 27).

The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the indigenous communities that might be adversely affected by the State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities.

26. The State party should widely disseminate the Covenant, the text of its fourth periodic report, the written replies to the list of issues drawn up by the Committee and the present concluding observations among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, as well as the general public.

27. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 5, 10, 21 and 22 above.

28. The Committee requests the State party to provide in its next periodic report due to be submitted on 28 March 2019 specific, up-to-date information on the implementation of all its recommendations and on the Covenant as a whole. The Committee also requests the State party, when preparing its next periodic report, to continue its practice of broadly consulting with civil society and non-governmental organizations.

POLICY AND PRACTICE NOTE

Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council

By LAWRENCE C. MOSS*

Abstract

The Universal Periodic Review (UPR) process in the UN Human Rights Council offers new high-profile opportunities for nongovernmental organization (NGO) advocacy to improve the observance of human rights. Some of the most significant opportunities lie not in the proceedings in the Human Rights Council in Geneva, but internally in societies around the world. NGOs can engage in a continuous cycle of advocacy built around UPR: advocating for national consultations, special procedure visits, and ratification of human rights treaties; submitting information to treaty monitoring bodies and in the UPR process itself; advocating for the acceptance of recommendations made in UPR and then for implementation of those recommendations. NGO submissions for use in the UPR process are published on the Office of the High Commissioner of Human Rights (OHCHR) UPR website page for the state involved, and become part of a central reference for anyone looking at the human rights record of that government. OHCHR guidelines should be followed. NGOs should lobby states to make specific recommendations to the states under review. Governments may be lobbied to accept them both at their Geneva Mission and at home in their national capitals. Recommendations should call on states to take clearly identified measures. NGOs should continue advocacy to urge states to implement the commitments they made. UPR is useful for advocacy on the full range of human rights issues. UPR provides a new opportunity to address recommendations to violator states and focus international pressure to correct abuses and unjust practices. For states truly open to improvement, UPR offers an opportunity to get the attention of high-level officials and policy-makers for human rights problems.

Keywords: human rights; Human Rights Council; NGO; United Nations

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The UN General Assembly established a new UN Human Rights Council in 2006 to replace the former Commission on Human Rights. A prominent and entirely new feature of the Council is 'Universal Periodic Review' (UPR), a procedure under which the human rights record of each of the 192 UN Member States is to be reviewed once every four years. This procedure provides a new opportunity for international nongovernmental organizations (NGOs) to seek commitments from states to comply with their human rights obligations. It enables national NGOs to bring their human rights concerns to the attention of their own governments, to the media and the public in their own societies, and to the international community – seeking to secure commitments from their own governments for greater observance of human rights.

From an examination of the design and structure of the UPR process, we can identify some of the factors that are more likely to win attention to the concerns of NGOs and lead to specific, actionable recommendations for improvement addressed to the states under review. We further examined the NGO submissions of information in the spring of 2008 for the second session of the Council's UPR, the reports of the Working Groups (WGs) summarizing the 'interactive dialogues' held on 5–19 May 2008, and the final outcomes adopted at the Council's plenary sessions on 9–13 June 2008 – hoping to identify patterns indicating what issues could be raised more successfully within UPR.

Sixteen states were reviewed during the second UPR session. A statistical analysis was conducted as to the success of NGOs in getting their concerns raised by UN Member States in the UPR process and having their recommendations accepted by the state under review. The analysis considered whether the nature of the issues raised was a factor in these rates of success. The data were also examined as to the specificity of the recommendations accepted by states under review when compared with the NGO contributions to the process.

In general, there was substantial success in injecting human rights concerns raised by NGOs into the UPR process, but states showed considerable resistance to accepting NGO recommendations. A total of 745 factual statements, observations, or recommendations by NGOs were included in the summaries of 'other stakeholder information' used in the UPR of the 16 states under review in the second session. Of these, 523, or 70%, correspond to the recommendations made by UN Member States to the 16 states under review during the 'interactive dialogues', and were thus included in the report of the UPR WG. While this alone is significant in bringing attention to NGO concerns, ideally many recommendations will be accepted by the states under review – providing an opportunity for follow-up action demanding that the state honour its commitment to implement the recommendations that it has accepted.

The state under review can choose to either accept or reject but should, at a minimum, note the recommendations raised by other states during the interactive dialogue and thus included in the report of the WG. In the second session, 199 of the 523 recommendations corresponding to NGO inputs

were accepted – a success rate of 38%. A total of 222 NGO concerns were not raised by Member States during the dialogue, and were therefore not addressed at all by the state under review. The overall success rate for securing commitments from states under review regarding the 745 concerns stated by NGOs was therefore 30%.

Recommendations made by states alone had a higher success rate. In addition to the 523 recommendations corresponding to NGO inputs that states raised in the interactive dialogue, there were 263 additional recommendations made by states that apparently do not parallel any issues submitted by NGOs. Of these, 150 were accepted by states under review – a success rate of 57%.[1]

A total of 1,008 issues were thus advanced during the second UPR session (523 by NGOs and raised by states in the dialogues, 222 by NGOs but not raised by states, and 263 by the states alone). Of these, 786 were included in the WG report (523 by NGOs and raised by states in the dialogues, and 263 by states although not initially raised by NGOs), and 349 were accepted by states under review – an overall success rate of 44%. The 349 recommendations accepted by the state under review represented 35% of the total of 1,008 issues injected in the process.[2]

This study identified some of the factors that might make NGOs more successful in getting their concerns raised and addressed in the UPR process and their recommendations accepted by states under review. From both the framework and structure of the UPR, and the data on the second session, some recommendations are offered as to how NGOs can make more effective use of the NGO process. The starting point is the opportunities built into the design of the UPR process.

Background and General Assembly Negotiations on the Creation of UPR and the Role of NGOs

The UN Commission on Human Rights, established in 1948, only began to address situations of human rights abuse in individual states in the 1960s. Starting initially with Chile, Israel, and South Africa, the Commission came to address a broader range of situations – causing widespread disagreement as to which situations should be addressed, but common agreement that the process had become politicized. On the one hand, many human rights advocates felt that the Commission was under-inclusive, failing to address very serious situations existing in states that were politically powerful, had politically powerful allies, or were themselves members of the Commission,

1 While no attempt was made to quantify the 'toughness' of the recommendations, general review of the data suggests that some states formulated rather softer or more friendly recommendations to allied or friendly states – which the states under review readily accepted.

2 This analysis ignores the issues raised in treaty body and special procedure recommendations, and other UN information, except to the extent raised by NGOs or states during the process.

whereas many UN Member States claimed the Commission was too confrontational or selective, particularly in ways that represented a bias against developing states.

Leading up to a summit of world leaders to be held at the UN in 2005, a senior commission of diplomats and experts recommended, as part of wide range of reforms of the UN, that some of the problems of the 53-member Commission be addressed by replacing it with a universal body including all UN Member States.[3] In one of his more significant departures from that 'High-Level Panel' report, then UN Secretary-General Kofi Annan instead recommended that the Commission be replaced with a smaller Council whose members would require a two-thirds supermajority of the General Assembly to win election.[4]

As there was great disagreement whether the Commission had been too over-inclusive and/or confrontational, or too under-inclusive and/or deferential, in addressing human rights situations in different states around the world, the concept of a system that would review all Member States on an equal basis had potential appeal to both groups. In a speech to the Commission on Human Rights in April 2005 and an addendum to his report 'In Larger Freedom', Annan embraced this concept, proposing that the new Council should have 'a peer review function . . . to evaluate the fulfillment by all states of their human rights obligations' under which 'every Member State could come up for review on a periodic basis'.[5] The primary role of Member States would likely be retained by a procedure in which the review was to be conducted by 'peers', but subjecting all states to review would diminish the incentive for states to seek membership on the new body to protect themselves or allied states from criticism.

Annan made a strong statement of the advantages to be offered by peer review:

> Crucial to peer review is the notion of universal scrutiny, that is, that the performance of all Member States in regard to all human rights commitments should be subject to assessment by other States. The peer review would help avoid, to the extent possible, the politicization and selectivity that are hallmarks of the Commission's existing system. It should touch upon the entire spectrum of human rights, namely, civil, political, economic, social and cultural rights. The Human Rights Council will need to ensure that it develops a system of peer review that is fair, transparent and workable, whereby States are reviewed against

3 Report of the High-Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility (2 December 2004), A/59/565, para. 285 at page 89.

4 In Larger Freedom: Towards Development, Security and Human Rights for All (2005) http://www.un.org/largerfreedom/contents.htm at para. 183.

5 Addendum 1 to In Larger Freedom: Human Rights Council, Explanatory Note by the Secretary-General, The Secretary-General's proposal (14 April 12005), http://www.un.org/largerfreedom/add1.htm at para. 6.

> the same criteria. A fair system will require agreement on the quality and quantity of information used as the reference point for the review. In that regard, the Office of the High Commissioner could play a central role in compiling such information and ensuring a comprehensive and balanced approach to all human rights. The findings of the peer reviews of the Human Rights Council would help the international community better provide technical assistance and policy advice. Furthermore, it would help keep elected members accountable for their human rights commitments.[6]

Following Annan's report, negotiations ensued among the UN Member States as to the reform of the Commission and the nature of a new Human Rights Council to replace it. Various provisions envisioning a 'peer' or 'periodic' universal review process were included in different drafts of the outcome statement discussed at the 2005 World Summit. The final outcome statement adopted by the summit on 15 September 2005 contained only the most basic provision for a new Human Rights Council that would be empowered to address situations of human rights abuse, but made no mention of any universal review procedure nor of the participation to be allowed NGOs. All details of the Council were left to continuing negotiations in the General Assembly.[7]

It was generally contemplated during the General Assembly negotiations that a new system for periodically reviewing the human rights records of all Member States would be a prominent feature of the new Council,[8] but only a very basic statement on the nature of the process was agreed upon. General Assembly Resolution 60/251 was adopted on 15 March 2006 – establishing the Human Rights Council effective from 19 June 2006.[9] The Resolution provided only minimum guidelines for a UPR process, leaving the development of its 'modalities' to the Council itself, and making no specific provision to the participation of NGOs in the process. Paragraph 5(e) provided that the Council shall

> Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and

6 Id. Para. 8.

7 2005 World Summit Outcome (15 September 2005), A/60/L.1 at paras. 157–60.

8 The Options Paper presented by the President of the General Assembly on 3 November 2005, and all draft texts released by the President and his designated co-chairs for the negotiations, contained a provision for universal review.

9 A/Res/60/251 (2006), online at http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf.

> with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.

One basic question in those negotiations was whether the new Council would be a new principal organ of the UN – as are the Security Council and the General Assembly – or a subsidiary organ of the General Assembly? In the end it was decided to make the new body a subsidiary of the General Assembly – with that status to be reviewed after five years. This had immediate implications for the role of NGOs, which then had to be addressed in the negotiations.

The former UN Commission on Human Rights, as a subsidiary organ of the UN Economic and Social Council (ECOSOC), allowed considerable participation to NGOs, as contemplated by Article 71 of the UN Charter.[10] Implementing Article 71, ECOSOC established more specific arrangements governing NGO participation in its Resolution 1296 (XLIV) in 1968, and revised those arrangements in its Resolution 1996/31 in 1996. Depending on its level of NGO accreditation with the UN – General, Special, or Roster – NGOs had varying levels of rights to suggest agenda items for ECOSOC bodies, attend public meetings, submit written statements for consideration, or make oral presentations at public meetings.

There is no provision in the UN Charter for General Assembly consultation with NGOs. Indeed, the main committees of the General Assembly do not generally allow any participation by NGOs. This issue was recognized early in the negotiations to create the Council, and the various drafts of the resolutions establishing the Council generally provided for NGO consultation comparable with that enjoyed at the former Commission.

Paragraph 5(h) of General Assembly Resolution 60/251 required the Council to '[w]ork in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions *and civil society*' [italics added]. Paragraph 11 specifically modified the General Assembly rules of procedure applicable to the Council to carry over the arrangements and practices of the former Commission regarding NGOs:

> *Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers,

10 Article 71 of the UN Charter provides: 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned'.

> including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

As the UPR procedure did not exist in the former Commission, there was no precedent for how NGOs should be permitted to participate in the process. The Council itself would have to determine how NGOs would participate as part of its development of the modalities of the new UPR process.

Council Formulation of the Modalities for UPR

Upon convening in June 2006, the Council established an open-ended working group to formulate the modalities for UPR,[11] and there ensued a year of informal discussions and formal negotiations within the Council. NGOs participated in the Council discussions, and they and many human rights experts had ambitious ideas for a procedure that would rely heavily on independent experts to put an assessment of the country under review before the Council and shape the discussion. In a joint statement delivered at the Council's First Session on 27 June 2006,[12] Human Rights Watch, the International Service for Human Rights, the International Federation for Human Rights, and the Association for the Prevention of Torture proposed

> that the Council designate a session rapporteur, or a panel of experts, from a list of independent experts provided by the Office of the High Commissioner for Human Rights, to assemble all relevant recommendations of treaty bodies and special procedures, reports of the Office of the High Commissioner for Human Rights and relevant U.N. components, as well as NGOs' and national human rights institutions' reports, and prepare a background note and questions for the state under review.

The NGO joint statement proposed that the 'process should allow for both presentations and questions' by NGOs and Member States. In a Background Paper issued in August 2006, Human Rights Watch elaborated on key elements desirable in the NGO process, including the 'appointment of an expert or panel of experts who will review the compiled materials and distill this material into a list of key issues for review and questions to be addressed by the government', and 'an appropriate role for NGOs, including the possibility to submit reports for consideration, and the ability to participate in UPR discussions'.[13]

11 Council Dec. 1/103 (30 June 2006), A/61/53 at 34.

12 http://www.hrw.org/en/news/2006/06/27/universal-periodic-review-mechanism.

13 http://www.hrw.org/en/news/2006/08/18/universal-periodic-review.

During the negotiations over the following ten months, Member States developed a state-dominated process with a more limited role for NGOs. The basis and procedures for UPR were specified as part of the 'Institution-building' package adopted by the Council in Resolution 5/1 on 18 June 2007.[14] The procedures provided that there would be three 2-week sessions of the full Council sitting as a WG each year, with 48 states reviewed each year, so that each UN Member State would be reviewed once every four years.[15] The state under review is required to submit a national report of the state, not to exceed 20 pages. Providing an important opportunity for NGOs, paragraph 15(a) 'encouraged' states 'to prepare the information through a broad consultation process at the national level with all relevant stakeholders'.

There was a clear victory for NGOs in providing a direct channel for the input of NGO information into the UPR process. Early negotiations in the General Assembly had contemplated reliance only on the state report and official UN inputs,[16] whereas later drafts of the founding resolution, and Resolution 60/251 as adopted, were silent as to what documentation would go into the UPR process. Paragraph 15(c) of the Council's institution-building resolution provided that in addition to the report of the state under review, and a compilation prepared by the Office of the High Commissioner of Human Rights (OHCHR) of relevant official UN documents including the reports of treaty bodies and special procedures, UPR would be based on:

> Additional, credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. The Office of the High Commissioner for Human Rights will prepare a summary of such information which shall not exceed 10 pages.[17]

UPR being a new procedure, there was no precedent for the role NGOs may play in UPR under the 'practices observed by the Commission on Human Rights' – as required by General Assembly Resolution 60/251 which established the Council. The Council itself then made the choice to

14 HRC Resolution 5/1, 'Institution-building of the United Nations Human Rights Council'.

15 HRC Resolution 5/1, Para. 14.

16 See President of the General Assembly's 'Option Paper: Human Rights Council' (3/11/05) and 'Compilation Text: Human Rights Council' (28/11/05) para. OP6 (d)(ii). The negotiation co-chair's draft text of 11/12/05 contemplated allowing inputs by the state under review, the UN High Commissioner for Human Rights, and '[o]ther concerned organizations that the Council may deem appropriate', but this was stripped from subsequent draft texts and the final resolution as adopted.

17 HRC Resolution 5/1, Para. 15(c). Although the stakeholder compilation is limited to half the length of the national report, the reports 'do not have a hierarchy, thus distinguishing them from the State report and NGO shadow reports to Treaty Bodies'. Rachel Brett, 'Digging Foundations or Trenches: UN Human Rights Council: Year 2' (Quaker United Nations Office, Geneva, August 2008).

allow NGOs only to attend and observe the WG review sessions, but not to present information, ask questions, or otherwise participate actively. While both member and observer states of the council could participate in the interactive dialogue, other stakeholders, including NGOs, are permitted only to attend these sessions without participating. As the final outcome sessions are adopted in plenary sessions of the Council, however, the Council has allowed NGOs to participate in those sessions, as they would in other plenary sessions.

By lot, three rapporteurs (the 'Troika') are to be chosen from Council Member States in three of the five UN regional groups to facilitate the review sessions (with the state under review entitled to request that one of the rapporteurs be from its own region, and also allowed the rejection of one rapporteur). Three hours were allowed for the review session of each country, a half an hour for adoption of the proposed outcome statement in the WG, and one hour for consideration and adoption of the outcome statement in a plenary session of the Council.

One way where UPR clearly broadens the opportunities for NGO participation is in allowing national (domestic) NGOs from the country under review, being 'other relevant stakeholders', to submit information into the UPR process – whether or not they have gone through the long and sometimes difficult process of being accredited by the UN as NGOs with official consultative status under ECOSOC Resolution 1996/31. However, speaking in the plenary session, where the outcome statement is adopted, is limited to officially UN-accredited NGOs.

While far from the ideal procedure desired by NGOs, UPR nonetheless does provide significant opportunities for NGOs to raise their concerns before the highest level inter-governmental human rights body. HRC resolution 5/1 provides a variety of points where NGOs can intervene directly or indirectly in the process – some beginning years before the review process itself and others in the immediate period before the review process or during the process:

(a) By advocating for national consultations prior to the preparation of the national report of the country under review, and where held, participating in those consultations and raising their concerns.
(b) By otherwise raising, through lobbying, the media or NGO-sponsored events, human rights concerns within the country under review during the period leading up to preparation of the national report, and seeking to have their government address those concerns in its national report.
(c) By submission of information to relevant UN special procedures, with the request they seek to make country visits and investigate the information, well in advance of the compilation of UN information by OHCHR for the review.

(d) By submission of information in shadow reports to UN treaty monitoring bodies for those human rights treaties to which the country under review is a party – again, planned well in advance of the review so the conclusions of the treaty bodies will hopefully be issued before the compilation of UN information by OHCHR for the review.
(e) By submission of information to national human rights institutions where existing and credible, with the request they consider and include the concerns in information they submit to OHCHR.
(f) By submission of 'relevant and credible information' concerning the country under review in a statement directly to OHCHR, to be compiled and used as part of the review process.
(g) By lobbying member and observer states of the Council to ask particular questions and make specific recommendations to the state under review in the interactive dialogue.
(h) By lobbying the three HRC member and observer states to ask particular questions or raise particular human rights concerns for the working group session.
(i) By publishing information, holding events, or lobbying the state under review to bring attention to human rights concerns and pressure the state to accept recommendations made at the working group session.
(j) If an NGO with UN consultative status, to speak at the plenary session to highlight important aspects of the review and urge the state to implement the recommendations it accepted – and whether or not accredited, to lobby member and observer states of the Council and accredited NGOs to speak at the plenary session.
(k) To publicize the information brought forth in the UPR within the state under review and urge follow-up and implementation of the recommendations in the outcome statement.

This study focused in particular on the direct submission of information by NGOs to OHCHR, as these submissions constitute the most direct NGO participation in the process, and are available online.[18] The first challenge then for NGOs is to have their concerns included in the OHCHR summary of stakeholder information to be used in the review.[19]

18 To find the original NGO submissions, go to the OHCHR documentation page for UPR at http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx, and select the country of interest. The OHCHR 'Summary of stakeholder information' is then available on links on that page, and footnote 3 to that Summary tab will provide a list of the NGO submissions and links to their full texts. This provides admirable transparency and allows continuing reference to the underlying NGO submissions for anyone concerned with the state's human rights record, but NGOs should note that there is thus no confidentiality for the information they submit.

19 It was not determined when UPR began whether the original NGO submissions would be available on the OHCHR website. In fact it has become the practice that they are, which means they are available for use by states in the UPR dialogue, or for general reference,

OHCHR Specifications for NGO Submissions

The Council adopted only brief general guidelines for the information to be used in UPR, especially in the national report of the state under review.[20] The OHCHR, charged by the Council with preparing a 10-page summary of the information provided by other stakeholders, proceeded to develop and publish its own guidelines as to how to submit information for consideration in UPR.[21]

OHCHR 'strongly encouraged' stakeholders to draft their written submissions so that they:

- were specifically tailored for the UPR;
- contained credible and reliable information on the State under review;
- highlighted the main issues of concern and identify possible recommendations and/or best practices;
- covered a maximum four-year time period;
- and did not contain manifestly abusive language.

Technical guidelines included a requirement that submissions not be longer than five pages (although a more detailed factual report may be attached), or 10 pages for submissions by coalitions of stakeholders.[22]

OHCHR must itself determine the standards for selecting and compiling the NGO information to be included within the 10-page summary of stakeholder information. One of the challenges must be to determine what information is to be deemed 'reliable and credible'. OHCHR has developed its own internal standards and practices for determining what NGO information would be included in the summaries, but these have not been publically released. Review and summary of relevant stakeholder information within OHCHR is a very labour-intensive process. As of late 2008, reportedly more than 18 staff members were involved.

Well-known and highly regarded international NGOs that have a presence in Geneva, consultative status with the UN, and are known to OHCHR staff will be more likely to be deemed credible and can be more certain that the information that they submit will be deemed credible and reliable by OHCHR staff. If the OHCHR desk officer for the state under review knows the NGO, it will also likely help. Discussions with OHCHR staff suggest

whether or not the points raised are included in the OHCHR compilation. Still, the information will be more readily consulted by states if included in the OHCHR compilation.

20 HRC Decision 6/102 (27 September 2007).

21 'Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism', online at http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf, hereinafter 'OHCHR Guidelines'.

22 Further technical requirements, including the form and contents of the email transmitting the submission and the document and font format, etc. are in the 'Technical guidelines for the submission of stakeholders' information to OHCHR' also online at http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf at pages 8–9.

some measures that lesser known, national, or domestic NGOs can take to have their information accepted and included by OHCHR. Submissions should fully comply with the page limits and deadlines set by OHCHR. They should be well written and state their information clearly in well-organized form. They should demonstrate knowledge of the international human rights standards applicable to the state under review – including the treaties it has ratified and any voluntary commitments it has made, in UN conferences or in pledges while running for the Human Rights Council.

It is helpful to show knowledge of international human rights mechanisms, but in particular, OHCHR will look to include in its summaries NGO information that complements rather than duplicates information compiled from within the UN system.[23] Although the OHCHR Guidelines recommend the presentation of '[k]ey national priorities as identified by stakeholders', in practice OHCHR is most likely include material that very clearly delineates facts and concerns regarding specific current human rights issues in the state under review.

Nature of NGO and Type of Submission as a Factor in OHCHR Citation

Some OHCHR staff suggested that national NGOs gain credence and inclusion in the OHCHR summary of stakeholder information by submitting jointly in a coordinated report with other national NGOs, or together with an international NGO – particularly one holding consultative status. OHCHR's written NGO guidelines state that '[s]takeholders are encouraged to consult with one another at the national level for the preparation of the UPR submissions. Joint submissions by a large number of stakeholders are encouraged'.[24] An effort was made to examine the effectiveness of different types of NGOs in making recommendations that were cited in the OHCHR summaries, and of joint versus individual submissions, by a statistical analysis of the summaries of stakeholder information for the second UPR session held in May 2008.

A total of 745 factual statements, observations, or recommendations made by NGOs to the 16 states under review during the second session of the UPR were cited in the OHCHR summaries. International NGOs with UN consultative status were cited as a source for 477 of those factual statements, observations or recommendations, while national NGOs without UN status were cited as a source as to 325. National NGOs with UN status were cited

23 The OHCHR Guidelines state that '[s]takeholders may also, if they so wish, draw attention to *specific* conclusions and recommendations made by international and regional human rights mechanisms, and refer to the extent of implementation. However, stakeholders should refrain from listing all treaties ratification, concluding observations and recommendations of the human rights treaty bodies and/or the special procedures of the HRC, as the latter are reflected in the UN compilation prepared by OHCHR'. OHCHR Guidelines, para. 11.

24 OHCHR Guidelines, para. 13.

as the source for 72 recommendations. Where OHCHR cites just one NGO for its information or recommendation, 239 international NGOs with UN consultative status were cited, while only 80 national NGOs without UN status were cited.

Joint NGO submissions were cited 242 times in the OHCHR summaries of stakeholder information. Of these joint reports, 203 were co-sponsored by national NGOs that do not have consultative status. However, citation to the joint reports occurred 156 times with an international NGO that held consultative status.

Acceptance by States and Inclusion in Outcome Statements: 'Recommendation' as the Key Word

The greatest opportunity for NGOs to get states on the record in UPR as to commitments for improvement of human rights is to urge Member States to make specific recommendations to the state under review during the interactive dialogue. The recommendations made during the interactive dialogue are compiled by the three states serving as rapporteurs (the Troika) in the WG, largely with the assistance of OHCHR, in a summary presented to the state under review.[25] This practice is especially valuable because a 'recommendation' does not need the support of a majority of the Council, but only of a single UN Member State, to be included in the WG report.

The state under review is then expected to identify each of the recommendations that it accepts. The final outcome statement is required to list all of the recommendations made, and to identify those that the state under review has accepted. As stated in the Council's 'institution-building' package which established the modalities for UPR: 'Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council'.[26]

The President's Statement issued by the Council on 9 April 2008 elaborated on these requirements:

> The State under review is expected to examine all recommendations made, in accordance with the provisions of the annex to Council resolution 5/1. In all cases, the recommendations that enjoy the support of the State under review are to be identified as such. Other recommendations, together with the comments of the State under review, are to

25 HRC 8/PRST/1 (President's Statement), 'Modalities and practices for the universal periodic review process' (9 April 2008), paras. 8–9. Available at http://ap.ohchr.org/documents/E/HRC/p_s/A_HRC_PRST_8_1.pdf

26 HRC Resolution 5/1, para. 32.

> be noted. Both will be included in the report of the Working Group, to be adopted by the Council at its plenary session. The State under review is expected to follow up on the recommendations that enjoy its support as well as on voluntary commitments and pledges.[27]

Getting Member States to address specific actionable recommendations to the state under review and persuading the state under review to accept those recommendations in the outcome statement are thus vital to making successful use of the UPR process.

As discussed earlier, only Member States, and not NGOs, may participate in the interactive dialogue. Given the central importance of getting Member States to put recommendations to the state under review on the record during the interactive dialogue, NGOs should lobby states to do this – and also urge other NGOs to do the same. Member States may formulate recommendations from NGO factual statements and observations, but to advance specific actionable recommendations for use by states, NGOs should themselves propose such recommendations in their submissions. However, while the OHCHR guidelines encourage NGOs to 'identify possible recommendations', in practice OHCHR strongly favours clearly delineated statements of current human rights issues in the state under review rather than a list of recommendations for inclusion in its summaries. To increase the chances that OHCHR will include the NGO concern in its summary, and that Member States will use NGO information to propose specific actionable recommendations, NGOs should both provide clear statements of the facts and concerns regarding human rights situations in the state under review and propose specific recommendations for improvement.

The statistical analysis of the second UPR session supports this hypothesis. In total, 745 factual statements, observations, or recommendations made by NGOs were included in the OHCHR summaries of stakeholder information for the 16 states under review in the session. Of these, 523, or 70% of those made, correspond to recommendations made by Member States during the interactive dialogue, but 222 were not addressed in state recommendations. Only 138 of the 745 NGO issues in the OHCHR summaries were specifically denominated as 'recommendations', but a higher proportion of those, 112 out of these 138, or 81%, became state recommendations during the dialogues.

In addition to lobbying for NGO concerns to be put to the state under review during the dialogue, it is thus useful to state those concerns initially as 'recommendations' in the NGO submissions to be summarized by OHCHR.

27 HRC 8/PRST/1, para. 10. The State may indicate its response to the recommendations at any time from the interactive dialogue until the plenary session of the HRC where the outcome statement is considered. HRC 8/PRST/1, para. 11.

Nature of the Issue as a Factor in State Acceptance of Recommendations

States may be more willing to raise NGO recommendations with regard to some issues in the interactive dialogue, and states under review may be more willing to accept recommendations on some subjects than on others. In preparing its compilations of information from the UN system, and its summaries of other stakeholder information, OHCHR breaks down the issues raised into 14 categories. States may, or may not, use the same breakdown of issue categories in their national reports. The categories are as follows:

Issue	Description
0	International framework
1	Equality and nondiscrimination
2	Right to life, liberty and security of the person
3	Administration of justice, including impunity and the rule of law
4	Right to privacy, marriage, and family life
5	Freedom of movement
6	Freedom of religion or belief, expression, association and peaceful assembly, and right to participate in public and political life
7	Right to work and to just and favourable conditions of work
8	Right to social security and to an adequate standard of living
9	Right to education and to participate in the cultural life of the community
10	Minorities and indigenous peoples
11	Migrants, refugees and asylum seekers
12	Internally displaced persons
14	Human rights and counter-terrorism

As to each of the issue categories 0 to 14 (with 13 not used, and a few issues not categorized), the following table, derived from the accompanying spreadsheet, shows the number of recommendations in each category included in the WG report and the number (#) and percentage (%) of those accepted; the number of recommendations in the WG report made only by states and the number (#) and percentage (%) of those accepted; the number of recommendations in the WG report that correspond to information provided by NGOs and the number (#) and percentage (%) of those accepted; and the number of NGO information items *not* included in the WG report (as they were not raised by states in the interactive dialogue) as against the total number of NGO items in the OHCHR compilation, and the percentage (%) of the NGO items thus not addressed at all in the UPR process.

Issue category	Total recs	Total recs in WG report	# of WG recs accpt	% of WG recs accpt	State only recs	# of state recs accpt	% of state recs accpt	NGO-based recs in WG	# of NGO-based recs acc	% of NGO-based recs acc	NGO recs not incl in WG	Total NGO recs	% NGO recs not incl
0	154	135	68	50	78	39	50	57	29	51	19	76	25
1	120	98	51	52	37	26	70	61	25	41	22	83	27
2	228	188	76	40	38	20	53	150	56	37	40	190	21
3	160	129	55	43	41	22	54	88	33	38	31	119	26
4	30	19	2	11	3	1	33	16	1	6	11	27	41
5	2	0	0	—	0	0	—	0	0	—	2	2	100
6	61	47	19	40	12	5	42	35	14	40	14	49	29
7	20	7	4	57	1	1	100	6	3	50	13	19	68
8	87	48	31	65	20	19	95	28	12	43	39	67	58
9	35	29	15	52	12	8	67	17	7	41	6	23	26
10	44	35	4	11	11	2	18	24	2	8	9	33	39
11	31	28	12	43	5	2	40	23	10	43	3	26	12
12	8	6	5	83	1	1	100	5	4	80	2	7	29
14	21	14	7	50	4	4	100	10	3	30	7	17	41
N/C	7	3	0	0	0	0	0	3	0	0	4	7	57
Total	1,008	786	349	44	263	150	57	523	199	38	222	745	30

Some observations can be made as to the receptivity of states to NGO concerns with regard to each of these categories of issues.[28]

In the interactive dialogues, states were particularly likely to raise concerns expressed by NGOs regarding migrants, refugees, and asylum seekers (Category 11), and particularly unlikely to raise NGO concern regarding rights to work and just and favorable conditions of work (Category 7), and regarding rights to social security and an adequate standard of living (Category 8).

Of the 523 NGO concerns corresponding to recommendations made by Member States during the interactive dialogues, states under review were particularly likely to accept those regarding the international framework for human rights (Category 0), and particularly unlikely to accept those regarding rights to privacy, marriage, and family life (Category 4) and regarding minorities and indigenous peoples (Category 10).

Of the 263 recommendations made by states which do not correspond to NGO information in the OHCHR summaries, states under review were particularly likely to accept those regarding rights to social security and an adequate standard of living (Category 8), to equality and nondiscrimination (Category 1), and to education and participation in the cultural life of the community (Category 9). States under review were particularly unlikely to accept recommendations regarding minorities and indigenous peoples (Category 10).

Overall, of the 786 recommendations made in the WG reports, the states under review were particularly likely to accept those regarding rights to social security and an adequate standard of living (8), and to a considerable extent regarding rights to equality and nondiscrimination (1), and to education and participation in the cultural life of the community (9). States under review were particularly unlikely to accept recommendations regarding rights to privacy, marriage, and family life (4) and of minorities and indigenous peoples (10).

Nature and Human Rights Record of the State under Review as a Factor

The second UPR session, as indeed the earlier UPR sessions in general, was notable for reviewing states with average or better human rights records, and not the most serious violator states.[29] It may therefore be instructive for examining where UPR might in fact be most useful, for reviewing and urging improvement of the great range of human rights problems that many or most states face, in states that are reasonably willing to listen to and address the concerns of NGOs and other states.

28 The observations note the standouts well above or below the average for each of the three classes of recommendations, excluding those categories for which there were only a very small number of recommendations.

29 This may well have reflected a conscious decision by Member States to arrange the schedule to start with the less challenging situations first, and to put the more politically contentious countries off for later consideration.

The greater willingness to accept recommendations regarding social security, an adequate standard of living, and education, may reflect a broad acceptance of economic and development rights – and such recommendations are less likely to directly challenge state power.

Recommendations regarding most traditional civil and political rights (rights to life, liberty, and security of the person, to freedom of religion, belief, expression, association, peaceful assembly, and participation in public and political life, and regarding the administration of justice and the rule of law) are accepted only to a mixed extent by this average-to-better group of states under review. Still, securing commitments on these issues is very valuable to the cause of human rights.

The most contentious issues, even for this average-to-better group of states, are those where very different cultural norms may come into play (privacy, marriage, and family life issues) and those raising the rights of minority and indigenous groups within the society. Of the 17 recommendations in the WG reports regarding privacy, marriage, and family life (issue 4) not accepted by states under review, 11 dealt with issues of lesbian, gay, bisexual, and transgender (LGBT) rights, and 5 with the legal treatment of rape, adultery, polygamy, and/or fornication. Still, it is very valuable to force resistant states to respond to these issues at all in an international forum, and LGBT and women's rights advocates have seized on the opportunity that UPR provides to do so.

Of the 16 states reviewed in the second UPR session, the most severe conflict and most serious violations at that time were occurring in Sri Lanka.[30] Sri Lanka accepted 49 of the 81 recommendations made in the WG report – at 60% a higher proportion than the average of 44% by the 16 states under review during the second UPR session. Sri Lanka was most likely to reject those recommendations specifying very clearly defined measures to be taken (acceptance of OHCHR field presence; international monitoring; a standing invitation to special procedures; ratification of the International Criminal Court statute; and granting upcountry Tamils a right to vote). It broadly accepted general commitments to address issues of disappearances, torture, internally displaced persons, human rights defenders, child soldiers, and freedom of the press – all of which are grave human rights concerns in Sri Lanka. The challenge therefore is to monitor Sri Lanka's performance and pressure Sri Lanka to breathe life into these commitments. The broader lesson for NGOs and states is to formulate recommendations that are actionable and measurable rather than more general exhortations which even a violator state might accept but not carry out.

30 There were also serious human rights concerns with regard to Pakistan, which was under the military regime led by President Musharraf following a coup in 1999. The review interactive dialogue was held on 13 May 2008, while Pakistan was in flux after a new democratic government was elected in March 2008, and the recommendations did not focus heavily on the abuses of the prior military regime in the way that those regarding Sri Lanka focused on the conflict in that country.

Specificity of Recommendations in the Outcome Statements versus NGO Submissions

Although the OHCHR summaries of 'other stakeholder information' cite NGO reports, it is often difficult to distinguish what constituted an actual NGO 'recommendation' – and to what extent states relied on NGO information in formulating the recommendations they advanced in the interactive dialogues and which were thus incorporated in the WG reports. Of the 786 recommendations made by states during the dialogues in the second session, 523 appear to correspond to information provided by NGOs. Of the 786 recommendations, 263 did not appear to correspond to NGO information. Of the 523 state recommendations that do appear to correspond to NGO information, the state may have relied on the NGO information, or may have worked from the national report, or from UN information including treaty body and special procedure reports.

As fact finders, NGOs often provided a detailed account of human rights issues and violations, laws that were not enforced effectively, and specific steps that the states under review should take to ensure that the human rights of its citizens were protected. While a minority of recommendations by states addressed precise recommendations by NGOs, most of the state recommendations were vaguely worded.

Some state recommendations do appear to reflect clearly recommendations made by NGOs, and this study highlights some of those to indicate the kinds of NGO information and recommendations that can be effective in the UPR process.[31] This table compares some NGO concerns from the OHCHR summaries that may be deemed successful in leading to comparable specific recommendations made by states to the states under review:

NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
Regarding France, the Islamic Human Rights Commission (IHRC) noted that 'of the 220,000 recorded discrimination cases in France in 2006, only 43 went to trial and that the successful challenge by a litigant through the courts is not encouraging'. (Summary, para 7).	Indonesia recommended 'To finalize all outstanding cases of discrimination that have occurred since 2006' (Working Group Recommendation, para 8). (not official translation)

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31 It was not deemed efficacious to attempt to compare specificity on a scale or to do a statistical analysis. To demonstrate success in advancing specific recommendations, we work from examples.

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
Regarding France, FIACAT said that the use of guns with electrical impulsion is, according to the French government, nowadays tested in three penal establishments in spite of the position of the Committee against the Torture of United Nations according to which the usage of not lethal electrical weapon causes a high-pitched pain, constituting a form of torture, in violation of articles 1 and 16 of the Convention Against Torture (CAT). (not official translation)	Côte d'Ivoire recommended, 'To avoid experiments on detainees with electric impulsion weapons provoking acute pain, which can constitute a form of torture, in penitentiaries' (Working Group Recommendation, 17).
'26. CS indicated that while over the past 20 years, Japan has taken legislative and symbolic steps to recognize the Ainu as an indigenous people and to eliminate racial discrimination, against this particular group, it has not followed through with appropriate implementation of laws to protect the Ainu culture. The Ainu, numbering between 30,000 and 50,000, have resided for centuries on the northern Pacific island of Hokkaido. However, CS reported that the Ainu still experience discrimination as a result of Japan's mono-cultural national identity and the lack of judicial remedies to respond to discrimination. According to CS, Ainu children face discrimination in school; the Ainu language has not been incorporated in the educational curriculum; the Ainu also lack parliamentary representation. Today, the Ainu possess only ten percent of their ancestral lands. The Society for Threatened Peoples (STP) indicated that the Ainu are among Japan's poorest inhabitants. STP indicated that the Ainu are still struggling for full recognition and acceptance by the	States recommended, 'Review, inter alia, the land rights and other rights of the Ainu population and harmonize them with the United Nations Declaration on the Rights of Indigenous Peoples. (Algeria); Urge Japan to seek ways to initiating a dialogue with its indigenous peoples so that it can implement the United Nations Declaration on the Rights of Indigenous Peoples. (Guatemala)' (Working Group Recommendation, 19).

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
Japanese society of their culture and language, and for the recognition in law of their rights as indigenous people. The JFBA also raised concerns about discrimination against the Ainu as well as against the Buraku minority'.	
'28. Amnesty International [AI] mentioned that the lesbian, gay, bisexual and transgender (LGBT) community in Romania continues to suffer identity-based discrimination. A parade called the Gayfest, organized every year in May/June by the LGBT community, has been opposed by the Orthodox Church and the local authorities on several occasions. Those participating in the parade have been attacked by counter-demonstrators throwing eggs, stones and plastic bottles at the marchers, necessitating police protection. According to ACCEPT, IGLHRC & International Lesbian and Gay Association (ILGA), effective police protection at the march needs to be accompanied by police follow up to complaints about violence'.	Finland recommended, 'To investigate and prosecute those responsible for the attacks on peaceful lesbian and gay activists and ensure that future LGBT gatherings, including the annual GayFests, are both permitted and protected by the Romanian authorities' (Working Group Recommendation, 8).
In Romania, '16. AI expressed its concern that the placement, living conditions and treatment of patients in many psychiatric wards and hospitals violate international human rights standards. In 2004, it denounced the practice of subjecting individuals to involuntary psychiatric treatment without medical grounds and the deplorable conditions to which such persons were subjected. AI added that in 2004, 18 patients were reported to have died in a hospital in Poiana Mare, most of them as a	The United Kingdom recommended, to 'urgently consider improvements to conditions for psychiatric patients' (Working Group Recommendation, 22). Ireland recommended, to 'enact further measures to ensure adequate provision of mental health care' (Working Group Recommendation, 27).

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
result of malnutrition and hypothermia. Despite the evidence suggesting that the deaths had occurred in suspicious circumstances in February 2005, Romania's General Prosecutor decided to close the case of deaths in Poiana Mare, as a result of not having established a link between the deaths and the personnel's treatment of the patients. AI informed that a complaint was filed requesting the re-opening of the case. CLR mentioned that a frequent problem in these types of institutions were the lack of clear procedures for the institutions' residents to file complaints or petitions to the authorities'.	
For Sri Lanka, 'AI reported that the 17th Amendment to the Constitution, passed by the Parliament in 2001, establishes an independent, ten-member Constitutional Council (CC) mandated to recommend appointments to key public commissions in order to ensure their independence. The failure to appoint members to the CC and the President's subsequent decision to directly appoint the members of Sri Lanka's National Human Rights Commission (HRC) and the Police Commission are an indication of control by the executive of bodies responsible for criminal justice'.	The Netherlands recommended, 'To establish the Constitutional Council as foreseen by 17th Amendment to the Constitution as soon as possible, and that this Council be mandated to appoint a number of commissioners to public Commissions, such as the NHRC and the Police Commission' (Working Group Recommendation 57 (b)).
For Tonga, a national NGO stated '6. Under the Constitution of Tonga, as indicated by the LLP, women do not have the right to own and inherit registered/customary/ family land, instead hereditary land rights belong to male members of the family. Where ownership of land is transferred to a widow, this right of "stewardship"	Switzerland recommended, 'To consider repealing the discriminatory practice in the inheritance laws'. (Working Group Recommendations 38(c)). The Czech Republic also recommended, 'To amend legislation discriminating against

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
ownership is terminated if she remarries. The LLP continued to work in collaboration with other stakeholders to eliminate poverty and displacement in families headed by single mothers who do not have access to family land and housing. It called on the Government of Tonga, as a matter of urgent priority, to amend land laws that discriminate against women'.	women in the fields of inheritance, ownership to land and child support' (Working Group Recommendation 39(a)).
9. As to Tonga (in 7), 'In May 2007, the LLP assisted a Community Para-legal Taskforce on Human Rights to release a comprehensive report on this issue (Community Para-legal Taskforce on Human Rights, Documenting the Treatment of Detainees and Prisoners by Security Forces in the Kingdom of Tonga, May 2007). The report, based on more than 4 months of research, including the interview of over 80 persons arrested and detained by Security Forces, presented first hand description of events, photographs, medical and psychiatric reports, statistical analysis and interviews with representatives from the Security Forces and Judiciary to document the extent of ill treatment.' (In 11) [The LLP] 'further called on the Government of Tonga to consider the recommendations contained in the Community Para-legal Taskforce on Human Rights report, Documenting the Treatment of Detainees and Prisoners by Security Forces in the Kingdom of Tonga, in particular, as a matter of urgent priority'.	The Netherlands recommended, 'To facilitate extended access to prisons for NGOs and that it implements the recommendations contained in the report of the Community Para-legal Taskforce on Human Rights with regard to persons detained by the security forces' (Working Group Recommendation 64. 28(c)).
For Ukraine, 'AI recommended that the Government review legislation relating to racist crimes and ensure that law	The Netherlands recommended, 'To take further efficient measures to ensure that law enforcement

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
enforcement officers, prosecutors and judges involved in enforcing the law relating to racist crimes fully understand the nature of such crimes'.	officials, prosecutors and judges involved in enforcing the law relating to hate crimes and other violent acts of racial discrimination and xenophobia fully understand the nature of such crimes and that statistics on racist incidents are kept centrally and are publicized' (Working Group Recommendation 24).
For Ukraine, '24. UHHRU indicated that the selection procedure for judges is not transparent and that it encourages abuse and dependence of judges on public officials involved in the procedure. According to UHHRU, it is not uncommon for judges to experience pressure both from the authorities and from the interested parties. Various forms of influence are applied, ranging from letters, telephone calls and personal visits to the judges and chairpersons of the courts to open criticism of the court rulings. Such non-procedural relations between different parties and the judges are not prohibited by law'.	The United Kingdom recommended, 'To undertake further work regarding the independence of the judiciary and corruption in the judiciary and across the executive' (Working Group Recommendation, 23).
For Ukraine, '29. KRHG highlighted that the practice of using confessions not made voluntarily in criminal proceedings remains widespread. In criminal procedures, there are to this day no well-developed criteria for determining whether a confession was made voluntarily. According to KHRG, the legislation does not contain sufficiently clear provisions ensuring that any statement which has been made under torture shall not be invoked as evidence under any proceedings, as requested by CAT'.	The United States of America recommended, 'To change its domestic laws to make confessions obtained under torture inadmissible as evidence in criminal court proceedings against the person who confessed' (Working Group Recommendation, 22).

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NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
For Ukraine, '32. HRW reported that journalists and media outlets work free of direct government interference, but threats and physical attacks against journalists critical of government officials or other prominent figures remain a problem. HRW highlighted that media freedom activists lament that there have still been no charges brought against former senior government officials implicated in organizing Gongadze's killing'.	France recommended, 'To take all measures necessary to ensure that all acts of violence against journalists be investigated and that appropriate punishments are meted out' (Working Group Recommendation, 27).
For Zambia, 'HRW urged Zambia to ensure that provisions on equality before the law regardless of sex, and provisions prohibiting any law, culture, custom, or tradition that undermine the dignity, welfare, interests, or status of women or men (articles 38–40), are retained in the draft constitution, under discussion'.	Italy and Canada recommended, 'To take all appropriate measures to improve the situation of women's rights on the ground and retain in the draft Constitution currently under discussion both the provision on equality before the law regardless of sex and the provision prohibiting any law, culture, custom or tradition that undermine the dignity, welfare, interests or status of women' (Working Group Recommendation, 29).
For Zambia, 'Although the Zambian government has established the Victim Support Unit (VSU), a special unit of the police charged with addressing a variety of abuses, including domestic violence and property grabbing, lack of human and other resources undermines this unit's ability to address gender-based abuses. Similar observations were made by Child Rights organisations and OMCT'.	Denmark recommended, 'That all possible measures be taken to eliminate torture and other inhuman or degrading treatment or punishment, including that all mechanisms such as the PPCA and Victim Support Unit are fully implemented' (Working Group Recommendation, 6).
For Zambia, '9. OMCT recommended the Government to: ensure that the Commission is established in full conformity with the	France recommended, 'To strengthen the Human Rights Commission with a status in accordance with

Continued

Continued

NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
Principles related to the status of national institutions for the promotion and protection of human rights (Paris Principles); to reinforce the independence of the Commissioners, especially with regard to the appointment process; to ensure that the recommendations of the Commission are fully and promptly implemented and; to allow the Commission to receive funds to carry out its activities'.	the Paris Principles, particularly with respect to human resources and independence' (Working Group Recommendation, 9).
For Zambia, '27. As indicated by GR – ILGHRC sections 155–157 of the Zambian Penal Code criminalize any form of consensual same-sex conduct in private between consenting adults providing for the possibility of imprisonment from seven to fourteen years. Such provisions reinforce social stigma against gay, lesbian, bisexual and transgender individuals and expose them to the risk of deprivation of liberty, life, physical integrity and health. Similar observation was made by the ILGA in its joint submission'.	The Netherlands recommended, 'To strive to amend its Criminal Code to decriminalize same-sex activity between consenting adults in accordance with the recommendations of the Human Rights Committee' (Working Group Recommendation, 33).
For Zambia, '5. As also noted by Human Rights Watch (HRW), Zambian women do not enjoy effective legal protection of their property rights and as a result practices like property grabbing (the unlawful appropriation of marital property upon the death of a spouse by inlaws) and the unequal distribution of marital property according to customary law for women who divorce are widespread. This discrimination is sanctioned by Article 23 of Zambia's current constitution—currently undergoing review—which gives primacy to	Canada recommended, 'To take measures to improve the situation of widows and girl orphans, including by ensuring protection of inheritance through enforcement of legislative provisions' (Working Group Recommendation, 4).

Continued

Continued

NGO information as stated in OHCHR summaries of stakeholder information	Recommendation to state under review as listed in WG reports
customary law in marriage-related matters. Although Zambia has a law that regulates distribution of inheritance where the deceased did not leave a will (the Intestate Succession Act of 1989, amended 1996), which should help counter property grabbing, this law is ill-enforced. HRW urged the Zambian government to ensure better enforcement of the Intestate Succession Act'.	

All notes have been removed from quotes.

Conclusions

Established after several years of discussions and negotiations on an international level, the UPR process in the UN Human Rights Council offers new high-profile opportunities for NGO advocacy to improve the observance of human rights obligations by governments around the world. Some of the most significant opportunities lie not in the proceedings in the Human Rights Council in Geneva, but internally in societies around the world. Despite the limitations built into the process by states themselves in establishing the Council, the formal proceedings in Geneva do provide an opportunity to secure useful commitments from states upon which NGOs can then seek implementation.

Fewer than half of UN Member States have so far been reviewed in the new UPR process, and states generally appear to have great concern as to how they will appear when they stand before their peers and the world community in Geneva.[32] There is substantial press coverage within states as their governments are preparing to come up for review – and then when they appear for review. For national NGOs, in particular, this period provides an opportunity to press for greater observance of human rights both in public advocacy, and within national consultations if held for the upcoming review.

NGOs can engage in a continuous four-year cycle of advocacy built around UPR: advocating for and participating in national consultations;

32 The International Service for Human Rights observed that states under review at the second UPR session 'were generally represented by high level delegates, usually at the ministerial level, and large delegations, which seemed to signify that they took the process seriously'. ISHR, *UPR Monitor* (April–June 2008), online at http://www.ishr.ch/content/view/314/499.

advocating for special procedure visits and providing information to the human rights experts involved; advocating for ratification of human rights treaties and submitting information to treaty monitoring bodies; advocating for the acceptance of recommendations made in UPR and then monitoring and advocating for implementation of those recommendations. Forming a broad national coalition of NGOs for advocacy around the UPR process can be particularly effective.

Submitting information and recommendations directly for use in the UPR process is worthwhile in the first instance because the original submissions themselves are published on the OHCHR UPR website page for the state involved – together with the OHCHR compilations of other NGO submissions and of information from UN special procedures and treaty monitoring bodies. The NGO information thus becomes part of a central and readily available reference for anyone around the world looking at the human rights record of that government. Following OHCHR guidelines (page limits, avoidance of abusive language, etc.) will help ensure inclusion in the summaries of NGO information, as will providing information together with other credible national and international NGOs in joint submissions.

To make the UPR process itself as useful as possible, NGOs should first seek to have states raise their concerns as recommendations to the states under review in the 'interactive dialogues' by (a) clearly identifying in their written submissions to the process proposed 'recommendations' to the state under review after a clear statement of the underlying facts and concerns; and (b) lobbying UN Member States, either directly or with the assistance of international NGOs in Geneva, to make those recommendations in the dialogues. After the recommendations are listed in the Working Group report, the state under review may be lobbied to accept them both at its Geneva Mission, and by lobbying and public advocacy at home in its national capital.

To make those recommendations truly useful, they should be formulated in precise language calling on states to take clearly identified measures. In any event, NGOs should continue advocacy to urge states to implement the commitments they made, by calling on states to take specific measures to which they agreed in the UPR outcome statements, and by proposing measures to carry out the more general recommendations they accepted in the outcome statements.

UPR is useful for advocacy on the full range of human rights issues. Even knowing that violator states will be unlikely to accept specific recommendations to correct serious abuses, and that states will not likely accept recommendations to change policies based on longstanding social and cultural norms, UPR provides a new opportunity to address such recommendations to states and focus international pressure to correct abuses and unjust practices. For states truly open to dialogue and improvement,

UPR offers an opportunity to get the attention of high-level officials and policy-makers for human rights problems and for proposals to correct those problems.

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ADVANCING RACIAL JUSTICE AND HUMAN RIGHTS: RIGHTS-BASED STRATEGIES FOR THE CURRENT ERA

A POST CONFERENCE REPORT

COLUMBIA LAW SCHOOL
HUMAN RIGHTS INSTITUTE

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The Columbia Law School Human Rights Institute advances international human rights through education, advocacy, fact-finding, research, scholarship, and critical reflection. We work in partnership with advocates, communities, and organizations pushing for social change to develop and strengthen the human rights legal framework and mechanisms, promote justice and accountability for human rights violations, and build and amplify collective power.

The Institute's Human Rights in the U.S. Project builds the capacity of U.S. lawyers, policymakers, and advocates to incorporate a human rights framework into domestic social justice advocacy efforts. We build networks, facilitate trainings, conduct educational outreach, and promote coordination among progressive public policy and advocacy groups. We also directly contribute to the development of legal theories and positive precedents based on international law through work on select litigation before U.S. courts, in international and regional fora, and through other research and advocacy projects.

INTRODUCTION AND CONFERENCE SUMMARY

On June 1, 2018, the Human Rights Institute convened its 15th annual CLE Symposium on Human Rights in the United States, a signature event of the Human Rights Institute's Bringing Human Rights Lawyers' Network. The day-long event brought together more than 150 leading U.S. lawyers, activists, and academics, along with federal and local government representatives to share strategies to advance racial justice within a domestic and global context increasingly hostile to human rights.[1]

The Symposium was designed to develop U.S. lawyers' understanding of opportunities and challenges in implementing human rights principles of non-discrimination, equality, and participation. It also served as a forum to evaluate lessons learned from the successes achieved by the domestic human rights movement over the past two decades, and to chart a path forward at a time when human rights standards are permeating movement building, litigation, and policy advocacy to address individual and structural racism and discrimination.

Throughout the day, participants explored how human rights advocacy must pivot to ensure that core human rights are protected and respected. Advocates from international NGOs, such as Human Rights Watch, national legal organizations, including the ACLU and Latino Justice PRLDEF, as well as local advocacy groups, including the Michigan Welfare Rights Organization, Community Justice Project, and Black Women's Blueprint, highlighted the ways that human rights have been integrated into their work. Law school academic-activists from Howard, Berkeley, and Universidad Interamericana en Puerto Rico, as well as the Chair of the U.S. Civil Rights Commission, spoke about the potential and limitations of rights-based approaches in addressing police violence and advancing basic economic and social rights.

Panelists shared ways that human rights principles and international engagement are shaping policy on a wide range of issues including criminal justice, maternal health, housing, economic justice, voting, indigenous rights, and water, and identified recommendations for future advocacy. Speakers also highlighted the value of finding and leveraging unexpected allies, working with local actors in fighting back against rights regressive federal policies, and the key role that human rights education and

> "Human rights provide a powerful frame for advancing justice, as well as new tactics. If you listen to people who are struggling, and people who are the most marginalized, they are talking about their basic rights whether they use the words 'human rights' or not. They are talking about a conception of justice that comes from what is needed to make a person whole, and dignified."
>
> - Meena Jagannath, Community Justice Project (2018)

movement building play in advancing human rights accountability. Based on the consensus that rights-based approaches highlight the importance of dignity and basic rights for all,[2] participants identified specific ways that lawyers can support advocacy efforts in addition to traditional litigation and policy advocacy.

This report highlights key takeaways and themes from the Symposium, drawing from speakers' remarks and their advocacy. It also serves as a basic human rights primer, describing core human rights principles relevant to advancing racial justice, and sharing examples of the use of human rights standards and strategies to advance domestic social justice.

SYMPOSIUM BACKGROUND: USE OF HUMAN RIGHTS TO CHALLENGE ALL FORMS OF DISCRIMINATION: HISTORICAL TRENDS AND CURRENT CONTEXT

Human Rights Advocacy in the United States: Rooted in Struggles for Racial Equality in the 1940s and 1950s

Since 2016, the United States federal Government has been openly hostile to human rights. Withdrawing from cooperation with UN human rights bodies and absence from proceedings at the Inter-American Commission are just two demonstrations of disdain for global norms and institutions. Policy action at the national level confirms that promoting and protecting human rights is no longer on the federal agenda. Federal policies on issues ranging from voting rights to immigration explicitly discriminate against communities of color. Racist, xenophobic, and misogynist rhetoric have also fanned the flames of a political climate hostile to the rights of African Americans, immigrant communities, religious minorities, women, and almost every group that has been historically marginalized or vulnerable in the United States. Americans are increasingly divided, and hate, bias, and discrimination are growing.

In response to current challenges, U.S. lawyers and grassroots advocates are developing new tactics and strategies to advance racial justice. Across the country, human rights are permeating local policy to counter federal rollbacks, and advocates are engaging with international and regional mechanisms to shine a light on persistent forms of discrimination and new policies that marginalize communities of color. This advocacy builds on long-standing efforts to advance racial justice grounded in global human rights norms, which can be traced to the 1940s and 1950s. One of the earliest examples of UN engagement was the NAACP's "An Appeal to the World" in 1947. The NAACP filed a petition to the then UN Commission on Human Rights exposing racial discrimination in the U.S. at a time when many in the country desired to shield Jim Crow laws from international scrutiny and condemnation.

Racial justice advocates in the United States have continued to engage with international human rights mechanisms to challenge injustice, and leveraged human rights principles and standards in an effort to change policies that discriminate - regardless of whether discrimination is intentional or not. As a result, human rights principles have been reflected in jurisprudence, such as Supreme Court decisions on juvenile life without parole, where racial disparities in sentencing are evident. Human rights principles are also driving changes in local law. In 2017, New York City enacted legislation that guarantees legal representation to all low-income residents facing eviction, responding to advocacy that framed housing as a human right. Seattle has cited to the Universal Declaration on Human Rights in a law prohibiting racial bias in policing. Nine jurisdictions have local laws based on the Convention on the Elimination of All Forms of Discrimination Against Women.

It is in this context that the Human Rights Institute convened the 2018 CLE symposium, *Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era,* building upon growing advocacy

successes to explore the opportunities and challenges in efforts to fight for equality on the basis of human rights. Notably, just four years earlier in 2014, the Institute's CLE symposium focused specifically on the Convention on the Elimination of All Forms of Racial Discrimination (CERD), as the United States was preparing for a review by the UN CERD Committee. That year marked the 20th anniversary of U.S. ratification of CERD, and was a time of renewed U.S. engagement with the United Nations. The political context vastly changed in that short time. The 2018 discussion centered on retreat from human rights obligations and commitments, rather than renewed engagement. While the racial justice threats occurring in 2018 represent some long-standing challenges in the U.S., the overt efforts to undermine discrimination protections, marginalize communities of color, and avoid international accountability create unique barriers to advancing human rights protections.

The Renewed Urgency in the Fight for Fundamental Human Rights

Since 2016, Americans have seen rollbacks in hard won battles to advance racial justice. National leaders, including the President and Congress, have signaled that misogyny, xenophobia, anti-Muslim sentiment, and nativism are not only tolerated, but driving policy. One Symposium speaker aptly described this context, defined by federal policies that have been crafted to undermine racial equality, as "the new abnormal,"[3] citing examples from the arena of voting rights, education equity, and criminal justice, and urging symposium participants to continue to voice opposition, resist these policies, and remain vigilant in proposing alternative approaches.

The erosion of voting rights is one example where current policies have exacerbated efforts to undercut rights of African Americans. The 2013 *Shelby County v. Holder* decision significantly weakened the Voting Rights Act and exempted jurisdictions with a history of voting discrimination from submitting pre-clearances for any voting policy changes. Following *Shelby*, states and localities have imposed new discriminatory voting requirements and restrictions that have weakened turnout, particularly in communities of color, some based on false allegations that voter fraud is rampant. At the federal level, the current administration worked to bolster discriminatory voting laws by creating a so-called "Voter Integrity Commission" under the guise of addressing voter fraud. An array of civil rights advocates challenged the Commission as not only a waste of resources, but an illegal and unethical means to procure identifying data of millions of Americans. Persistent and concerted pressure ultimately led the Administration to abolish the panel.

> Peoples of the World, we American Negroes appeal to you; our treatment in America is not merely an internal question of the United States. It is a basic problem of humanity; of democracy; of discrimination because of race and color; and as such it demands your attention and action. No nation is so great that the world can afford to let it continue to be deliberately unjust, cruel and unfair toward its own citizens.
>
> - W.E.B. DuBois, An Appeal to the World: A Statement of Denial of Human Rights to Minorities in the Case of citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress (1947)

In the area of law enforcement and criminalization, the trends are similar. The ongoing national problem of discriminatory policing, which has had a severe death toll in African American communities, and which fuels what is globally viewed as a crisis in mass incarceration, has been continually brushed aside by DOJ leadership and the Executive. Current policies serve in most cases to perpetuate and exacerbate discriminatory practices, and to promote a one-sided rhetoric of law and order. Efforts to monitor police activity have been portrayed as undercutting effectiveness, rather than promoting equity. The Justice Department under Jeff Sessions has shown hostility to the consent decrees put in place to mandate police reforms and rolled back smart-on-crime initiatives that were originally designed to alleviate overly harsh sentences and mass incarceration. Immigration violations are increasingly criminalized, in turn increasing imprisonment of communities of color. Additionally, there has been a frontal attack on sanctuary jurisdictions.

While discrimination in the arena of voting, criminal justice, housing, and education represent long-standing challenges, speakers repeatedly underscored the need to continue to acknowledge and challenge the extreme nature of the current Administration's disregard for basic rights' protections and to respond with strategies that take the political climate into account. To stand up against an administration that often seems immune to being shamed, advocates must fight harder. To be effective requires more aggressive and strategic coordination across sectors, organizations, and institutions. Human rights advocates must also pivot to Congress and legislative and administrative advocacy. There are an array of ways that participation in oversight hearings and ongoing budgetary processes can be used to maintain current protections, challenge rollbacks, and further human rights agendas. It is particularly urgent for the human rights community to participate in judicial nominations and confirmations to shape the judiciary for decades to come.

As speakers continually acknowledged, the political climate is certainly challenging and the strategies necessary to respond are not easy, but there are reasons for optimism. The current Administration's overtly discriminatory rhetoric and action has brought to the surface the hostilities, ignorance, and racism that have been present for all of the United States' history and sit at the root of many of the inequities that continue to exist, forcing the nation to confront them. Indeed calls for human rights accountability have increased, and emerged in new places, such as Congress, reflecting the growing awareness of the necessity and value of invoking human rights principles to improve protections and advance racial justice. Further, U.S. media is more likely than ever before to cover domestic issues as human rights problems. National and local organizations continue to amp up efforts to build human rights into governance, through broad-based initiatives such as the "New Social Contract." Harnessing the resistance and supporting the communities that have longed struggled for racial justice is vital, and human rights standards and strategies provide a powerful tool in the advocacy arsenal.

> "Human and civil rights lawyers must recognize that the old playbook might not be sufficient ... and focus on new strategies ... coordinating across our organizations and institutions."
>
> - Todd Cox, NAACP Legal Defense Fund (2018)

Successfully advancing human rights today requires advocacy that recognizes the interrelated nature of rights. During the CLE Symposium, participants emphasized that in order to address the root causes of discrimination, tackling individual laws and policies is insufficient, and structural change is needed as well. Grassroots advocacy to secure adequate and affordable water offered one example of the inextricable connections between civil and political rights and economic, social, and cultural rights. Lack of clean water impacts access to education, and poses serious health risks, which disproportionately affect communities of color living in poverty and pervade all areas of life.[4] In Michigan, the advocates who have engaged with UN experts to improve water access have made the clear link between the existence of unelected emergency managers and privatization as key factors that led to a crisis.[5]

Importantly, a human rights lens connects local struggles to global anti-racism and anti-discrimination work. In addition to engaging with UN experts, emergent efforts to advance racial justice internationally, such as the International Decade of People of African Descent, were discussed as new platforms to shape law and policy to advance international, national, and local action. As participants noted, the transnational and interconnected nature of human rights work has long informed advocacy to advance the rights of Indigenous' Peoples. Decades of advocacy led to the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2017, and U.S. endorsement of the Declaration several years letter. While a positive step, it has not mitigated the need for resistance by the Standing Rock Sioux to the construction of the Dakota Access Pipeline (DAPL), a struggle which has engaged a number of UN human rights experts to shine a light on the underlying rights violations of indigenous communities, and the harmful treatment of human rights defenders who joined the struggle.

The remainder of this report will provide an overview of human rights standards relevant to racial justice, and discuss examples of how lawyers and advocates have engaged with international and regional mechanisms, and leveraged that engagement to enhance law, policy, and advocacy that promotes and protects human rights in the United States.

OVERVIEW OF CORE INTERNATIONAL AND REGIONAL HUMAN RIGHTS AGREEMENTS AND ACCOUNTABILITY MECHANISMS

Core UN Human Rights Treaties

In the aftermath of the atrocities of World War II, the protection of human rights became a central concern for the international community. Nations realized the imperative of developing a globally applicable human rights law framework and adopting human rights treaties focused on specific populations and particular rights, as well as mechanisms to monitor government actions. Each human rights treaty establishes a body of independent experts to interpret and monitor compliance with its provisions. These experts periodically review the human rights records of countries that have ratified human rights treaties, and some also issue decisions in individual cases. Civil society plays a pivotal role in the work of UN treaty bodies: providing information to treaty experts in the form of "shadow reports," as well as participating in interactive dialogue sessions with human rights experts. At the conclusion of every periodic review of a national government, the UN body of experts issues "Concluding Observations," which provide recommendations to strengthen human rights protections, often referencing information provided by civil society.

The United States has ratified only three of the core international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The U.S. has also ratified the two Optional Protocols to the Convention on the Rights of the Child. Under past administrations, there have been several Congressional hearings on the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and more recently, hearings on the Convention on the Rights of Persons with Disabilities (CRPD), but neither have been ratified.

According to the U.S. Constitution, ratified treaties are "the supreme law of the land." However, the United States has consistently declared human rights "non-self-executing" as a condition for ratification.[6] As a result, specific implementing legislation is needed for ratified treaties to be enforceable in domestic courts. The U.S. also typically attaches additional conditions (known as reservations, understandings, and declarations) to ratified treaties, placing limits on U.S. obligations under each treaty.[7] This includes a refusal to submit to individual complaints, as well as an indication that the federal, as well as state and local governments, bear responsibility for implementing treaties in a manner that is consistent with U.S. federalism.[8]

Figure 1: Core human rights treaties

Treaties Focused Specifically on Eliminating Discrimination

Given the CLE's focus on racial justice and equality, participants' remarks focused largely on the two treaties that expressly prohibit discrimination: CERD, ratified by the United States, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which the U.S. has signed but not yet ratified.

The International Convention on the Elimination of All Forms of Racial Discrimination

CERD was one of the first human rights treaties to be adopted by the international community – in 1965. At the time the treaty was adopted, the world community was wrestling with apartheid, Jim Crow laws, and decolonization. With the aim of preventing further marginalization and oppression, the Convention includes clear statements against racism, racial segregation, and racial discrimination.[9] It calls on governments to not only outlaw overt discrimination, but to affirmatively eradicate laws, policies, and practices that perpetuate inequality and impede the enjoyment of human rights.

CERD defines racial discrimination as "[a]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms."[10] Discriminatory impact alone is sufficient to demonstrate a right's violation. As panelists noted, once disparities are demonstrated, the onus is on the government to explain their cause and take

action to mitigate them. CERD also explicitly protects economic, social, and cultural rights, including housing and health. The human rights protections offered by CERD have catalyzed the human rights community's engagement with the United Nations. When the United States ratified CERD in 1994, it committed to report periodically on measures being taken to prevent racial discrimination and foster racial equality. In 2008 and 2014, large delegations of advocates submitted shadow reports to the CERD Committee and traveled to Geneva to raise concerns on a broad array of issues impacting communities of color. The Committee's 2014 Concluding Observations addressed racial profiling, surveillance, the disparate impact of environmental pollution, voting rights, access to healthcare, and housing, among other concerns.

The U.S. was scheduled for another review in 2018, but has failed to submit its report to the CERD Committee. While advocates call on the U.S. to uphold its obligations and undergo a review, the CERD Committee has continued to monitor and weigh in on racial justice in the United States. For example, in the wake of Charlottesville protests, the Committee issued an urgent action, calling upon the U.S. government to unequivocally and unconditionally reject and condemn racism in Charlottesville and throughout the country.

The Convention on the Elimination of All Forms of Discrimination Against Women

In 1979, the international community adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which prohibits discrimination against women and girls.

CEDAW defines discrimination similarly to CERD in order to prohibit distinctions and exclusions that have the goal or impact of limiting enjoyment of human rights for women on the basis of that identity.[11] Like CERD, CEDAW addresses both *de jure* and *de facto* discrimination and includes economic, social, and cultural rights protections, in addition to civil and political rights. CEDAW further requires governments to undertake measures to eliminate discrimination against women in political and public life, and requires governments to take measures to advance women's economic stability, such as ensuring equal pay and paid maternity leave.[12]

While the U.S. has not ratified the treaty, city and county governments across the United States have adopted CEDAW's core principles into law and policy. Nine jurisdictions, including San Francisco, Los Angeles, Miami-Dade County, Pittsburgh, and Cincinnati have adopted local CEDAW ordinances to take persistent gender inequity, and improve equitable spending, service delivery, and employment.[13]

UN Special Procedures

Special Procedures are independent human rights experts mandated by the United Nations Human Rights Council. Known as Special Rapporteurs, Independent Experts, or members of a Working Group, they monitor, report, and advise on either thematic or country-specific human rights issues.[14] Thematic mandates include a focus on topics such as People of African Descent; access to water and sanitation; housing; migrants; freedom of association & expression; privacy; and migrants, among others. The primary working methods of Special Procedures include sending and receiving communications to governments on particular issues of concern, producing reports on general trends and developments with regard to their specific mandates, and conducting visits to particular countries to analyze the national context.

Country visits have been highlighted as a significant opportunity to garner media attention and influence positive change.[15] In contrast to treaty body experts, who review compliance with one treaty during reviews that occur at the United Nations, UN Special Procedures have more flexibility because they base their findings and recommendations on a range of human rights norms, including principles in the Universal Declaration of Human Rights, and conduct fact-finding missions. U.S. advocates have engaged extensively with Special Procedures to promote human rights.[16] In recent years, Special Rapporteurs focused on the right to water and sanitation (2011), housing (2009), and extreme poverty (2017) have made official visits the United States, as have the Working Group on Discrimination Against Women (2015), and the Working Group on People of African Descent (2016). Their visits and recommendations have garnered significant media attention.

Regional Human Rights Monitoring: The Inter-American Human Rights System

In addition to the global UN human rights system, regional bodies provide avenues for human rights monitoring and accountability. The Inter-American Human Rights System is responsible for monitoring, promoting, and protecting human rights in the 35 members of the Organization of American States, of which the United States is a part.

The Inter-American System is comprised of two principal bodies: the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The Commission is a quasi-judicial body that promotes and protects human rights through an array of activities that include: advising governments on human rights policy, conducting country visits, issuing thematic and country-specific reports, holding public hearings on human rights concerns, and investigating and responding to complaints of human rights abuses. The Inter-American Court has binding authority to adjudicate human rights cases brought against countries that have accepted the Court's jurisdiction.

The United States is obligated to uphold the protections in the foundational American Declaration of the Rights and Duties of Man, and the OAS Charter. However, the United States has not ratified the American Convention on Human Rights, and the Inter-American Court cannot adjudicate cases against the United States. As a result, the Commission is the only human rights body in the world that has jurisdiction to hear individual complaints of human rights abuses against the United States. U.S. lawyers and advocates have long engaged with the Commission to hold the US accountable for human rights violations. Individuals seeking justice have filed cases in array of areas, including criminal justice, domestic violence, health, immigrant rights, indigenous land, military action abroad, and the right to vote.[17] These concerns have also been the subject of IACHR hearings and visits to the United States. In 2018, the Commission held a hearing on the situation of the human rights of persons affected by the cancellation of Temporary Protection Status (TPS) and Deferred Action on Childhood Arrivals (DACA). Four years earlier, IACHR representatives visited the U.S. to monitor the situation of unaccompanied children and families who have crossed the country's southern border.

Holding the U.S. Accountable for Human Rights at the Federal Level: The U.S. Commission on Civil Rights

Across the world, over 100 countries have established National Human Rights Institutions (NHRIs) to promote and monitor the effective implementation of international human rights principles at the national level by handling complaints, promoting human rights education, and making recommendations on law reform. While the United States lacks an NHRI,[18] they have a federal civil rights monitoring body that monitors the enforcement of, and compliance with, federal civil rights law: the U.S. Commission on Civil Rights (USCCR). The Commission was created by the Civil Rights Act of 1957 to shape civil rights policy at a national level. In recent years, the USCCR has focused on key issues that impact the enjoyment of human rights, including minority voting rights access, civil rights at immigration detention facilities, and police use of force. The USSCR is based in Washington D.C., but holds field hearings and also has 51 State Advisory Committees (SACs), one for each state and the District of Columbia. The SACs are empowered to highlight local civil rights concerns and issue recommendations that take into account local priorities and circumstances. Through the SACs and the USCCR, advocates can raise human rights concerns, and propose and analyze affirmative solutions to achieve racial justice based on globally accepted human rights principles. The USCCR can also contribute to global dialogues on human rights.[19]

BENEFITS OF ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS STANDARDS AND STRATEGIES

A rights-based approach encompasses using human rights law and human rights mechanisms to advance change, but it also refers to advocacy grounded in core human rights principles of universality, dignity, equality, non-discrimination, and meaningful participation of communities. Symposium participants explored the potential that advocacy at the UN and Inter-American Commission holds to center the voices of individuals impacted by human rights violations; make claims that are unavailable under domestic law; raise visibility of issues in the media; and reframe key community concerns and solutions. Discussions covered an array of advocacy efforts to address criminal justice, voting, sexual and gender-based violence, economic justice in Puerto Rico, and the right to basic needs such as housing, water, and sanitation, as well as efforts to uphold the rights of migrants and immigrants, and to preserve and protect lands and rights of native and indigenous peoples. The following section distills some of the discussions and includes additional examples of emblematic human rights advocacy.

Centering Voices and Experience of Individuals Impacted by Human Rights Violations

Symposium speakers highlighted the imperative of grassroots leadership in human rights advocacy. Taking human rights claims to regional and international human rights fora provides an opportunity for individuals who have experienced human rights violations to share their experience and demand justice. As part of UN reviews of the United States, impacted individuals can travel to Geneva, meet with representatives of UN member states and UN treaty body experts to share their concerns, and suggest recommendations to be made to the United States, in addition to submitting information in writing. UN Special Rapporteurs, as well as members of the Inter-American Commission often visit communities to gather information on the human rights situation. In addition, civil society consultations prior to the United States' Universal Periodic Review can provide a space to make demands for justice and accountability. As noted earlier, the Inter-American Commission on Human Rights is also a unique venue for individuals to testify to an audience of IACHR experts and U.S. government officials during cases and hearings. Each human rights mechanism provides some space to elevate the lived experience of individuals impacted by human rights violations.[20] As a number of speakers emphasized, having grassroots communities at the front and center of human rights advocacy can encourage mobilization and empower more individuals to speak up, share their stories, and vindicate their rights.

UN treaty body reviews have historically provided a significant opportunity for mobilization, and the review of U.S. compliance with the CERD in 2014 is emblematic. During the review, Black Women's Blueprint galvanized Black female and LGBTQI survivors of sexual and gender-based violence shared their stories through a shadow report, and by speaking with UN independent experts in Geneva, denouncing the lack of adequate protections against violence and bodily harm inflicted upon communities of color. The testimonies delivered in Geneva encouraged and mobilized more women

across the United States to share their own experiences and stories through various social media platforms.[21] It was an important moment for those who "did not think they could turn to the state for protection" to tell their personal stories and call for their right to protection by the state against violence and bodily harm.[22]

In 2014, Michael Brown's parents participated in the UN Committee Against Torture's review of the United States, discussing how the killing of their son and the excessive force by police officers against Ferguson protestors violate human rights prohibitions against torture and other cruel, inhuman, or degrading treatment. Going to international arenas to make these claims reflected a longstanding belief that issues of racism and discrimination are beyond America's ability to solve unilaterally.[23]

Official and unofficial visits of UN Special Procedures to the United States have also provided a platform to amplify the voices of individuals and groups fighting for basic rights. Visits of the UN Special Rapporteurs on housing and on clean water and sanitation to the U.S. have been described as "empowering and validating" for homeless individuals whom they have consulted because these engagements foster a sense "that there are others, people in power among them, who share their vision of a world in which everyone, regardless of housing or other status, is treated … with basic human dignity."[24]

More recently, the U.S. Human Rights Network partnered with local advocates from all over the U.S. to present testimony at an the Inter-American Commission hearing on the human right to water and sanitation. Representatives of communities directly affected by misguided and harmful water and sanitation policies in New Mexico, California, Michigan, and Alabama shared the impact of U.S. failure to recognize and protect these human rights, and provided recommendations to Commissioners, linking their concerns to transnational struggles. The Nation covered the hearing, highlighting testimonies on the adverse effects of lack of access to clean and affordable water.

Providing a space to make claims that are unavailable under domestic law

The lack of domestically available remedies and the ineffectiveness of traditional accountability mechanisms, including courts, have encouraged advocates to "look for new solutions outside of broken boxes."[25] Regional and international human rights mechanisms provide an important space to make claims that may be unavailable under domestic law, and when domestic channels fail to provide redress.

> Engaging in International Human Rights Mechanisms and amplifying a rights based approach does not compromise our domestic work, it enhances it. The power goes beyond legal definitions and policies, calling for approaches that ensure affected persons and communities are the voice and face of our human rights policies.
>
> - Rosalee Gonzalez, Executive Director, US Human Rights Network (2018)

Criminal justice, and juvenile justice in particular, is one area where U.S. practice is clearly out of step with international human rights law and global practice. Advocates have brought issues such as juvenile life without parole sentences to the attention of the UN and the Inter-American Commission as one strategy to tackle persistent racial disparities in sentencing. In its 2014 Concluding Observations, the CERD Committee highlighted the incompatibility of racial disparities at all levels of the juvenile justice system with human rights norms, and called for the U.S. to prohibit and abolish life imprisonment without parole for juvenile offenders and to intensify efforts to address the racial disparities in law enforcement.

The Inter-American Commission, the only human rights body that has jurisdiction to hear individual complaints against the U.S., provides a unique platform for victims and advocates to seek justice. In 2017, the Inter-American Commission opened the case of Anastasio Hernández-Rojas, who was brutally beaten, tortured, and killed in 2010 by more than a dozen federal border patrol agents. After the U.S. Department of Justice closed its investigation into Mr. Hernández-Rojas' death in 2015 – without pursuing federal charges against any of the agents involved – his family worked with advocates to file a petition with the Inter-American Commission, resulting in the IACHR's first case addressing unlawful killing by law enforcement against the United States.

Advocacy with regional and international mechanisms is also vital because it can address structural and long-term challenges, not just individual redress and compensation. As one ongoing example, advocates fighting for economic justice in Puerto Rico have engaged with the Inter-American Commission, holding public hearings on public debt, fiscal policy, poverty, and the right to vote in Puerto Rico. Given Puerto Rico's unique status, including its lack of independence and lack of political representation with the United States, the Inter-American Commission offers a unique platform for communities and local advocates to raise visibility of long-standing human rights violations, placing pressure on U.S. officials to respond.[26]

Enhancing Issue Visibility

Engaging with regional or international human rights mechanisms is a unique means to attract media attention and raise awareness of human rights concerns. This is important because media attention enables activists to identify and expose human rights concerns, amplify the message of their cause, and leverage greater awareness into a broader strategy.[27] Advocates can further leverage commentary from human rights experts in community organizing and advocacy.[28]
The UN Human Rights Committee's review of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR) attracted national media attention in 2014. The New York Times covered the review, focusing on U.S. government's position that the ICCPR does not impose extraterritorial obligations on the United States, a position the Committee rebuked.[29]

In 2014, the Special Rapporteur on the right to water and sanitation and the Special Rapporteur on the right to housing visited Detroit to examine the devastating impact of the city's water shutoffs, holding a series of meetings in neighborhoods that had lost water service. Their visits received widespread media attention, including reports in the Atlantic and the BBC, shining an international spotlight on Detroit's water crisis.[30]

The 2017 formal country visit of Special Rapporteur on Extreme Poverty and Human Rights garnered unprecedented media attention from national news outlets, including Washington Post and local media in jurisdictions in California and Alabama. The Special Rapporteur also published his own reflections of

his visit in the Guardian. Taken together, this coverage sparked new awareness and debates regarding the level of poverty in the U.S. at the local, national, and international levels.

Reframing Issues with a New Lens

Utilizing an international human rights framework allows advocates to recast a debate using a new lens, and to shine a light on the human dignity costs of law and policy, illustrate comparative approaches, draw from a globally accepted set of laws and norms, and highlight how domestic law and policy contravene them. Advocacy to advance the right to housing demonstrates this in practice. In particular, the criminalization of homelessness has gained increasing traction as a human rights violation, as a result of ongoing advocacy.

In partnership with advocates across the country, the National Law Center on Homelessness and Poverty has leveraged UN reviews by the CERD Committee and the Committee Against Torture to highlight the ways that criminalization of homelessness violates non-discrimination principles and the right to housing, and is a form of cruel, inhuman and degrading treatment. Following her country visit to the United States in 2011, the Special Rapporteur on the Right to Water and Sanitation highlighted in her report that local statutes prohibiting public urination and defecation are discriminatory in their effects. She underscored that such laws are discriminatory in effect because "such statutes are enforced against homeless individuals who often have no access to public restrooms and are given no alternatives,"[31] and raised concerns regarding the right to sanitation and the criminalization of individuals as a result of their lack of access to sanitary facilities. This advocacy has resulted in strong recommendations to the United States and media coverage, as well as influencing changes in housing law and policy.

Framing voting as a human rights issue has also increased avenues to raise structural challenges to exercising this fundamental human right. Although restrictive voter identification laws, gerrymandering, and state-level felon disenfranchisement have disproportionately impacted the voting rights of individuals of color, these practices have been upheld by federal courts. To highlight how these practices contravene U.S. human rights treaty obligations, advocates have engaged with ICCPR and CERD, submitting shadow reports that expose the scope of voting rights violations, particularly against communities of color. Human Rights Watch engaged with the CERD to highlight how the U.S. government's drug policies and felony disenfranchisement laws disproportionately affect black communities, contravening the government's treaty obligations under CERD.

This advocacy has led to strong recommendations from the United Nations. The Human Rights Committee called for the United States government to "take all necessary measures to ensure that voter identification requirements … do not impose excessive burdens on voters and result in de facto disenfranchisement."[32] The CERD Committee also issued recommendations that the U.S. "enforce federal voting rights legislation … in ways that encourage voter participation, … adopt federal legislation to prevent the implementation of voting regulations which have discriminatory impact … [and] ensure that all states reinstate voting rights to persons convicted of felony who have completed their sentences."[33] The Working Group of Experts on People of African Descent also highlighted voting rights violations after visiting the United States. The Working Group expressed concern that voter identification requirements and limits on early voting and registration in several states "served to discriminate against minorities such as African Americans" and called upon the U.S. government to "ensure that all states repeal laws that restrict voting rights," and urged "reinstatement of the voting rights of persons convicted of a felony who have completed their sentences."[34] UN reports and findings have been cited by the media and advocacy groups to raise awareness on how restrictions on voting

rights in the U.S. violate globally accepted human rights laws and principles. The CERD Committee's 2014 review of the U.S. was covered by international and domestic media outlets, including Aljazeera and PBS News Hour.

A more recent example, from late 2018, is the advocacy to prevent the U.S. Department of Homeland Security from adopting a new proposed rule on immigration policy, "Inadmissibility on Public Charge Grounds," which, if finalized, could allow the government to deny admission and lawful permanent residence to immigrants who have received or are likely to receive some form of public benefits. The Center for Constitutional Rights and Columbia Law School's Human Rights Institute submitted a public comment to DHS, highlighting the potentially harmful and discriminatory impacts of the proposed rule in violation of international human rights law, drawing from UN treaty body recommendations, and the report of the UN Special Rapporteur on extreme poverty after his 2017 visit to the U.S. Human Rights Watch also commented, highlighting how the proposed rule would violate the rights of vulnerable communities, including the rights to health and to non-discrimination.

LEVERAGING SUCCESS DOMESTICALLY

Human rights norms and principles promoted by regional or international human rights mechanisms can be used to inform federal, state, and local policy and to catalyze government responses to human rights violations. Advocates have also combined strategies of norm development and capacity building to incorporate human rights norms into litigation, policymaking, and organizing. Symposium participants discussed a range of examples from the arena of women's rights, criminal justice, and struggles to secure fundamental rights for low-wage workers, as well as ongoing advocacy to tackle discrimination against Muslim, South Asian, and Arab Communities. This section highlights just a few examples, focusing on housing, gender-based violence, reproductive justice and gender-equity, and noting an uptick in state and local government engagement with human rights in recent years.

Activists have utilized the international human rights framework to inform U.S. Supreme Court jurisprudence regarding juvenile life without parole. In the case *Graham v. Florida*, human rights organizations filed an amicus brief urging the Court to consider international law and foreign practice in its interpretation of the Eighth Amendment's clause prohibiting cruel and unusual punishment.[35] Justice Kennedy's majority opinion cited the UN Convention on the Rights of the Child's prohibition of the sentence and foreign practice, concluding that by "continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over."[36]

Alongside UN advocacy to challenge the criminalization of homelessness, mentioned above, domestic litigation and advocacy have shaped the view that criminalization can constitute violations of human rights and constitutional rights,[37] and have influenced the U.S. Department of Housing and Urban Development (HUD)'s change in its funding applications to incentivize efforts to reduce criminalization of homelessness.[38]

Human rights advocacy has also secured stronger policies in the arena of women's rights, while serving as means of alliance-building and mobilization. In 2011, the Inter-American Commission on Human Rights issued a landmark decision in the case of *Jessica Lenahan (Gonzales) v. United States of America*. The case was filed to seek redress for Lenahan, whose daughters were abducted by her estranged husband and killed after local police refused to enforce her domestic violence restraining, after all domestic avenues to pursue justice were closed. During the course of the Inter-American litigation, over 70 human rights organizations and individuals joined amicus briefs including Native American women's rights groups, domestic violence advocates, and children's rights groups. The Inter-American decision found that the United States violated the human rights of Lenahan and her children, and made comprehensive recommendations for changes to U.S. law and policy to prevent and address gender-based violence. Notably, the Inter-American Commission proceedings were the first time that Jessica was able to tell the story of the rights violations she experienced – she did not testify in the domestic proceedings. The decision in her favor reflected her personal testimony, and has also provided an avenue for policy change. At the national level, the decision was a catalyst for the U.S. Justice Department, which issued a landmark guidance, Identifying and Preventing Gender Bias in Law Enforcement to Domestic Violence and Sexual Assault, detailing how police departments should prevent and respond to sexual and gender-based violence to comply with civil rights laws. Locally, the decision

has served as the basis for a number of local jurisdictions to declare freedom from domestic violence as a human right, and foster changes in law and policy.

In recent years, the Center for Reproductive Rights has worked closely with national groups and grassroots advocates in Texas and across the U.S. South to improve reproductive healthcare access and outcomes for Latinx and Black women, grounding advocacy in human rights principles. The Center was a key partner in the Nuestro Texas campaign, which aimed to document the human rights impacts of lack of access to reproductive healthcare for immigrant communities in Texas and eliminate existing barriers. Through this campaign, and more recent work with the Black Mamas Matter Alliances to advance maternal health, rights, and justice, the Center has leveraged engagement with UN treaty bodies and UN Special Rapporteurs to elevate the voices of women who have experienced ongoing discrimination in securing adequate healthcare on an international stage, secured recommendations for changes to US policy to address inequities, and then used those recommendations in organizing, advocacy, and litigation.[39]

International human rights norms have not only impacted federal and state policy, but have also informed local governance. One of the earliest efforts by local governments to implement the norms of international human rights treaties was San Francisco's adoption of a local ordinance reflecting the human rights principles of CEDAW. In 1998, San Francisco adopted a local ordinance that called for the city to "integrate human rights principles and the local principles of CEDAW into its operations," eradicate policies that have discriminatory effects, proactively identify barriers to the realization of equal rights, and adopt a CEDAW Task Force to monitor the implementation of the ordinance.[40] Since the law's passage, San Francisco has conducted gender analyses of the City's departmental policies. Following San Francisco's lead, more cities and counties such as Los Angeles, Pittsburgh, and Miami-Dade County have adopted ordinances to enshrine CEDAW principles into law.[41]

Local governments have also supported community capacity building through providing human rights education opportunities. For example, Mayor William Bell of Birmingham hosted a human rights dialogue in 2015, offering an avenue to hold panel discussions on issues including social justice, immigration, education, marriage equality, homelessness, and poverty and include community voices in decision-making.[42] The discussions highlighted the interrelated nature of rights, the value of community participation and collaboration, and the need to address ongoing and multiple forms of discrimination. Such human rights dialogues lay a critical basis to "foster a more collaborative, transparent, and accountable approach to governance based on core human rights principles."[43] In cities across the country, local officials are innovating to address long-standing racial inequality on the basis of human rights. Under the leadership of Mayor Kitty Piercy, Eugene, Oregon updated its Human Rights Ordinance to reflect global human rights norms, and committed to become a human rights city.[44] In Jackson, Mississippi, Mayor Chokwe Antar Lumumba is focused on fostering economic justice and participatory democracy, grounded in human rights principles. State and local human rights agencies, and the umbrella organization of these agencies, IAOHRA, have also continuously fought to bring human rights home, participating in UN proceedings, committing to human rights principles, and fostering local human rights implementation.

LOOKING AHEAD: RESPONDING TO EMERGING THREATS WITH RIGHTS-BASED APPROACHES

Human rights organizations that have historically employed naming-and-shaming strategies to hold the government accountable now face an administration that "doesn't mind being named because it cannot be shamed."[45] By mobilizing and supporting new rights-based strategies to respond to current threats, advocates can build on past successes to advance human rights. The past demonstrates that success requires breaking down silos and engaging with new allies, as well as placing the communities with firsthand knowledge of rights' violations at the forefront of advocacy.[46]

The 15th Annual CLE symposium brought together a remarkable group of grassroots activists, attorneys, government officials, and academia for a focused discussion of the international human rights framework, strategies to effectively engage with regional and international human rights mechanisms and leverage success domestically, and ways to respond to emerging threats with rights-based approaches to advance racial justice in the United States.

Advocates are generating a creative and rich set of responses to push back against an administration that voices xenophobia, racism, misogyny, and nativism. Speakers emphasized that it is imperative to stand alongside those who stand up and speak out against blatant disregard for human rights. "Once we can hear, we must react. We must respond, and ultimately, we must act."[47] As struggles to advance racial justice continue, networks of lawyers and advocates, including the Bringing Human Rights Home Lawyers' Network and the U.S. Human Rights Network will continue to build the capacity of U.S. social justice advocates, create space to share strategies, and amplify the human rights wins that are secured.

ENDNOTES

[1] This document was prepared by the Human Rights Institute at Columbia Law School under the guidance of JoAnn Kamuf Ward, director of the Human Rights in the US Project. Gina Kim, a research assistant with the Institute from 2018-2019 conducted research and assisted with the drafting of the report. Legal fellow Anjli Parrin also contributed to the report. The Institute is grateful to all of the participants in the 2018 Human Rights in the US CLE Symposium who generously shared their insights, experience, expertise and time. We also extend our appreciation to the CLE Symposium co-sponsors: ACLU, Center for Constitutional Rights, Center for Reproductive Rights, Latino Justice PRLDEF, US Human Rights Network, and University of Pennsylvania Transnational Legal Clinic. We thank Cleary Gottlieb Steen & Hamilton LLP, who generously hosted the event, and made the discussions possible.

[2] Meena Jagannath, *Responding to Emerging Threats with Rights-Based Approaches*, Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era, June 1, 2018.

[3] Todd Cox, *Opening Remarks*, Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era, June 1, 2018.

[4] See *Going to the Toilet When You Want: Sanitation as a Human Right* (Human Rights Watch, 2017), https://www.hrw.org/report/2017/04/19/going-toilet-when-you-want/sanitation-human-right#.

[5] See *No Water for Poor People: The Nine Americans Who Risked Jail to Seek Justice,* The Nation, *available at https://www.theguardian.com/us-news/2017/jul/20/detroit-water-shutoffs-marian-kramer-bill-wylie-kellermann*

[6] *See* U.S. Constitution, art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .")

[7] For example, the United States ratified CERD in 1994, attaching three reservations. The reservations state that the treaty provisions will not regulate private actors, will not impose restrictions on free speech, and that any resulting International Court of Justice adjudication would require U.S. prior consent.

[8] In ratifying the ICCPR, the United States indicated that state and local governments share authority to implement the treaty, through the understanding that the ICCPR "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant. *See, e.g.,* Reservations, Understandings and Declarations to the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992). That state and local governments have responsibility to implement human rights is consistent with the fact that many human rights issues fall within areas of state and local jurisdiction, such as housing, criminal justice, education and employment. Columbia Law School Human Rights Institute & International Association of Official Human Rights Agencies, *Closing the Gap: The Federal Role in Respecting and Ensuring Human Rights at the State and Local Level*, (2013), *available at* https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20(ecopy).pdf.

[9] Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System Fact Sheet*, *available at* https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf.

[10] The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 4 , opened for signature Mar. 7, 1966, 660 UNT.S. 195

[11] The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 1 , opened for signature Mar. 7, 1966, 660 UNT.S. 195; The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art, 5(a), opened for signature Dec. 18, 1979, 1249 UNT.S. 13, entered into force Sept. 3, 1981

[12] Columbia Law School Human Rights Institute, *Gender Equity Through Human Rights: Local Efforts to Advance the Status of Women and Girls in the United States,* at 5 (Jan. 2017), *available at* https://www.law.columbia.edu/sites/default/files/microsites/human-rights-

institute/gender_equity_through_human_rights.pdf.

[13] *Id. See also* Cities for CEDAW, http://citiesforcedaw.org/

[14] OHCHR, *Special Procedures of the Human Rights Council,* accessed October 26, 2018, https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx. Country mandates focus on specific countries, including Myanmar, Sudan, and Belarus. The full list can be found at https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx

[15] Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights,* at 21 (2012) ("Of all the tools available to the independent experts, it is their visits to countries that yield the most attention and results.")

[16] Columbia Law School Human Rights Institute, *Engaging UN Special Procedures to Advance Human Rights at Home: A Guide for U.S. Advocates* (July 2015), *available at* https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/special_rapporteurs_report_final.pdf;

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[21] Farah Tanis, *Strategies for Effective International Engagement and Leveraging Success Domestically*, Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era, June 1, 2018.

[22] Farah Tanis, *Strategies for Effective International Engagement and Leveraging Success Domestically*, Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era, June 1, 2018.

[23] Justin Hansford, *Strategies for Effective International Engagement and Leveraging Success Domestically*, Advancing Racial Justice and Human Rights: Rights-Based Strategies for the Current Era, June 1, 2018.

[24] Mona Tawatao and Colin Bailey, *Toward a Human Rights Framework in Homelessness Advocacy: Bringing Clients Face-to-Face with the United Nations*, *Journal of Poverty Law and Policy* 45, no. 5–6 (October 2011): 169, http://povertylaw.org/files/docs/article/chr_2011_september_october_article_16.pdf.

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[43] *Bringing Human Rights Home: The Birmingham Mayor's Office Human Rights Dialogue*, 10.
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THE ONGOING BUSINESS OF STRENGTHENING THE UN HUMAN RIGHTS TREATY BODIES

Joint NGO response to the report of the co-facilitators of the UN General Assembly's review of the UN human rights treaty body system

INTRODUCTION

We welcome the report containing the findings and recommendations of the consultation process on the UN human rights treaty body system published by the co-facilitators of the process on 14 September 2020 (the Report).[1] We would like to extend our appreciation to the co-facilitators, the Permanent Representatives of Morocco and Switzerland to the UN, for their leadership in this process.

We appreciate that the co-facilitators adhered to the instructions of the President of the General Assembly to conduct the consultations in a "transparent and inclusive manner" and sought the views of civil society during the process, despite the many challenges that arose in the context of the COVID-19 pandemic.[2]

In their report addressed to the President of the 74th session of the UN General Assembly, the co-facilitators address several key issues that all stakeholders discussed during the three-month consultation process and make recommendations on how these should be addressed. In addition, the co-facilitators recommend that a "follow-up process" should be undertaken to allow for further discussions and consensus solutions to be reached that would allow Member States to reaffirm their support for General Assembly Resolution 68/268 on the treaty body system, and complement it where needed.

This joint NGO response highlights some of the key recommendations we consider fundamental for the strengthening of the human rights treaty body system (treaty body system), and includes our recommendations to States, the treaty bodies, the Office of the High Commissioner for Human Rights (OHCHR), and the President of the 75th session of the General Assembly on how to move forward on the implementation of these recommendations.

USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES[3]

We welcome the Report's conclusion and recommendations with regard to the need to increase the efficiency, transparency and accessibility of the treaty body system, including through technological developments. The COVID-19 pandemic has exposed the challenges treaty bodies face to function online. We welcome the efforts undertaken by treaty body members and their secretariats to switch to online sessions, but we are seriously concerned about the postponement, cancellation and scaling down of nearly all sessions scheduled for 2020, including, in particular, the postponement of reviews of States parties' periodic reports since March 2020.

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[1] Letter from the PGA dated 14 September with report of co-facilitators with views, findings and recommendations (hereafter *Co-facilitators report*), https://www.ohchr.org/Documents/HRBodies/TB/HRTD/HRTB_Summary_Report.pdf
[2] Letter from PGA - 8 April 2020 – appointment of co-facilitators, https://www.ohchr.org/Documents/HRBodies/TB/Letter_PGA_8April20_co_facilitatorsmeeting.pdf
[3] *Co-facilitators report*, p. 9.

We welcome more online accessibility and participation overall, and consider them positive developments for civil society engagement with the treaty bodies. Good practices regarding online participation by civil society already existed prior to the COVID-19 crisis, and we consider that these may be further built upon by drawing on this experience.

Digital technologies should be used as a tool, selectively and where appropriate, to increase the effectiveness, efficiency and flexibility of the treaty bodies, in their individual committees, across committees and with stakeholders.[4] Predictability, transparency and inclusivity, as well as security, privacy, confidentiality and accessibility, including adequate interpretation, are also essential conditions to enable the full participation of civil society.

Where online engagement is envisioned, adequate conditions to ensure predictability, transparency and inclusivity, as well as security, privacy, confidentiality and accessibility must be provided. Civil society experiences of online engagement to date must be taken into account when assessing current efforts. OHCHR and the United Nations Office at Geneva must ensure that suitable platforms are used, and Member States must ensure that funding is available for digital meeting platforms and for other technological needs of the system (see Individual communications).

INDIVIDUAL COMMUNICATIONS[5]

We welcome the Report's recommendation to invest in and set up a digital case management system for individual communications and urgent actions for parties to submit, access and track relevant information, including on the status of a case. Effective follow up communications with all parties are essential to ensure that accurate information is provided through all stages of consideration of individual communications and implementation of views.

Furthermore, we welcome the Report's conclusion that the individual communications system would benefit from the allocation of appropriate financial, human and technical resources to the Petitions Unit to enable it to more systematically manage the growing number of communications it receives and, at the same time, reduce the existing backlog. We recommend that Member States provide the necessary funding through the regular budget for such resources without further delay. We regret that the report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ)[6] on the programme budget for 2021 has recommended that the Fifth Committee deny the majority of the resources requested by the Secretary-General for additional staff support for the treaty bodies for 2021.

Given that a modern case management system, which enjoys strong and widespread support, is imperative for the effective and timely work of the treaty bodies, we recommend that it be set up by

[4] Our organizations, together with a total of 523 NGOs, have called on the treaty bodies and OHCHR to make arrangements for online reviews of states parties in 2021. Joint open NGO letter on the functioning of the UN Treaty Bodies during the COVID-19 pandemic, 5 October 2020, Index number: IOR 40/3163/2020, https://www.amnesty.org/en/documents/ior40/3163/2020/en/, Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system, 7 July 2020, Index number: IOR 40/2685/2020, https://www.amnesty.org/en/documents/ior40/2685/2020/en/, Statement ahead of the 32nd Annual Meeting of the Chairpersons of the UN Human Rights Treaty Bodies, 14 April 2020, Index number: IOR 40/2397/2020, https://www.amnesty.org/en/documents/ior40/2397/2020/en/, Statement to the 31st Meeting of the Chairpersons of the Human Rights Treaty Bodies, 25 June 2019, Index number: IOR 40/0596/2019, https://www.amnesty.org/en/documents/ior40/0596/2019/en/

[5] *Co-facilitators report*, p. 10.

[6] Advisory Committee on Administrative and Budgetary Questions, First report on the proposed programme budget for 2021, paras. VI.11-VI.16, http://www.un.org/ga/search/view_doc.asp?symbol=A/75/7

OHCHR[7], and that Member States provide funding for this purpose, either through the regular budget or through voluntary contributions to OHCHR, without further delay.

Member States should not support the ACABQ's recommendation to deny needed additional resources for the treaty bodies in 2021, and should advocate in the Fifth Committee for the full allocation of resources requested by the Secretary-General in his proposed budget for 2021. Member States should also urge the Secretary-General to request the full allocation of additional resources that the treaty bodies require in order to function effectively in his proposed budget for 2022, which he will prepare in the first months of 2021.

NOMINATION AND SELECTION OF TREATY BODY MEMBERS[8]

We welcome the support for the 'Guidelines on the independence and impartiality of members of the human rights treaty bodies' ("The Addis Ababa Guidelines") in a number of submissions to the co-facilitators. We welcome the strong opposition expressed by many States to establishing a code of conduct for treaty body members, which would be incompatible with the full independence of the treaty bodies - and potentially open a dangerous avenue for States to attempt to control the actions of treaty body experts.

In this regard, we welcome the co-facilitators' call that "States and all other stakeholders should recommit to fully respecting the independence of treaty body members and to avoiding any act that would interfere with the exercise of their functions".

States have been repeatedly reminded, including in resolution 68/268 itself, and in the biennial reports of the Secretary-General and NGO submissions to those reports,[9] of the importance of national competitive selection processes for the nomination of Committee experts, and/or of other independent vetting processes. Such processes would ensure that nominated candidates fulfil the highest standards of competence, expertise and independence that are necessary for the treaty bodies to best discharge their protection functions. Yet, few States have set up such national processes. Furthermore, States also frequently disregard the criteria set out for a merit based independent membership and engage in vote-trading to secure support for their candidates.

We welcome initiatives to increase openness and transparency around nominations and elections of treaty body experts. Improved nomination procedures will ensure strong pools of quality, independent and diverse candidates nominated by States. We recommend that when States formally put forward a nominee, they should also report about their national selection process, including compliance with principles for independent, open, transparent, participatory, competitive and merit-based selections with the aim of ensuring diversity of nominees, including based on gender, sexual orientation, race, ethnicity, disability, age, etc.

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[7] See joint NGO letter from October 2018 which called on the OHCHR to "Make optimal use of information technology and internal management instruments that can help to standardize, streamline, and facilitate the registration and processing of communications, "https://www.ishr.ch/sites/default/files/documents/letter_to_hc_on_indiv_complaints_to_tbs_final.pdf

[8] *Co-facilitators report*, p. 11.

[9] Report of the Secretary-General on the Status of the human rights treaty body system, A/71/118, 18 July 2016, https://undocs.org/A/71/118 , Report of the Secretary-General on the Status of the human rights treaty body system, A/73/309, 6 August 2018, Report of the Secretary-General on the Status of the human rights treaty body system, https://undocs.org/A/73/309, A/74/643, 10 January 2020, https://undocs.org/A/74/643, Treaty body strengthening- Joint NGO submission to the third biennial report of the Secretary General, 9 May 2019, Index number: IOR 40/0329/2019, https://www.amnesty.org/en/documents/ior40/0329/2019/en/, Summary Report: TB-NET & Amnesty International Event on Treaty Body Elections, 10 December 2018, Index number: IOR 40/9608/2018, https://www.amnesty.org/en/documents/ior40/9608/2018/en/

We also support the proposal to create a web-based elections platform and call on States parties to review carefully the expertise, independence and impartiality of the nominees, paying due attention to the geographical and gender composition of the respective treaty bodies, and not to vote for unqualified nominees as a consequence of vote-trading.[10]

A future follow-up process by the General Assembly should avoid any initiatives that would interfere with the independence and impartiality of the treaty bodies, and reject any attempt to introduce a so-called Code of Conduct or any purported Ethics Council for the treaty bodies.

ACCESSIBILITY AND ALIGNMENT OF WORKING METHODS AND METHODOLOGIES FOR ENGAGEMENT WITH STAKEHOLDERS AND FOLLOW-UP TO RECOMMENDATIONS[11]

We welcome the recommendation to the treaty bodies to adopt an aligned methodology for the constructive dialogue. We also welcome efforts to make the concluding observations more focused, concrete, targeted, measurable and implementable, as well as the recommendation that the treaty bodies should align their methodologies with respect to their interaction with stakeholders. However, we emphasize that the General Assembly must respect the independence of the treaty bodies and prerogative of the treaty bodies to establish their own working methods. In this connection, we urge the treaty bodies to take these steps without further delay.

In this regard, we also recommend that the treaty bodies establish -- and OHCHR provide support for -- additional opportunities to coordinate their work and strengthen procedural and jurisprudential coherence and mutual reinforcement, building on interdependence and indivisibility of rights. It is critical that in pursuing such opportunities each treaty's legal specificity be respected, and that the ultimate objective be to enhance States parties' compliance with their treaty obligations, as opposed to seeking to eliminate duplication for its own sake. This coordination can take place online and a plan in this regard should be proposed by OHCHR without further delay. States must provide funding for such meetings to be held.

We also welcome the recommendation to States to expand and institutionalize follow-up at national level. States should strengthen their engagement with the treaty bodies on issues of implementation, and also invest in national procedures to monitor implementation, such as the setting up of national mechanisms for reporting and follow-up.

The General Assembly should provide appropriate resources from the regular budget to ensure that the treaty body system is accessible to civil society and other relevant stakeholders, including through webcasting and online meetings, and for the development of necessary information management systems.

Member States should provide funding for an accessibility audit across the treaty bodies, including for their webpages, civil society participation, dialogue with States parties, and physical premises, with a view to proposing arrangements that would make possible and enhance the participation of persons with disabilities, including, for example, through the provision of international sign language interpretation, live captioning, Plain English, Easy-Read format and braille. Such an audit must not be limited to the Committee on the Rights of Persons with Disabilities.

[10] The proposal for a vetting process was echoed by the High Commissioner in her opening statement to the reviews process, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25917&LangID=E

[11] *Co-facilitators report*, p. 12-14 and 16.

FIXED CALENDAR AND PERIODICITY OF THE HUMAN RIGHTS TREATY BODIES SESSIONS[12]

We welcome the broad support for predictable reporting calendars and the benefits they could bring to the system as a whole, improving coordination of State reporting obligations, and also ensuring periodic scrutiny of all States parties. As the co-facilitators point out, fixed calendars would contribute to predictability and stability in reporting for both States parties and treaty bodies, as well as for civil society.

It is key that there is coordination among treaty bodies in the establishment of such calendars and with the UPR reporting obligations. We consider that such calendars will increase transparency, coordination and predictability and will promote regular reviews by all States parties. It is key that regularity of reviews be kept at the heart of the coordination and costing estimates that OHCHR will carry out. States are parties to the treaties and, therefore, must provide resources for effective monitoring of their implementation of their freely undertaken treaty obligations.

We support the position of the Chairs,[13] and the prerogative of all treaty bodies, to establish fixed review schedules for the regular reviews of all States parties. We strongly recommend that the treaty bodies move forward as one system and ensure coordination among the various Committees.

We support the Report's suggestion that OHCHR could prepare, in coordination with the treaty bodies, a proposed schedule and estimated costing for predictable review cycles, and encourage OHCHR to do so without further delay.

REVIEWS IN THE REGIONS[14]

We welcome the co-facilitators support for reviews in the region "as an important step towards increased domestic stakeholder accessibility, enhanced visibility of the treaty body system and closer interaction with national and regional human rights systems."

We consider that such reviews could have a positive effect in bringing the treaty bodies closer to the domestic stakeholders, including rights-holders, the ultimate beneficiaries, and increasing awareness and visibility of the work of the treaty bodies, as well as strengthening cooperation with regional human rights mechanisms.

We welcome the Report's recommendations to encourage the treaty bodies to engage with Member States at the regional level, including through reviews in regions, follow-up webinars on concluding observations and for the sharing of good practices. Member States should consider inviting treaty body members to hold discussions on follow-up issues in-country. OHCHR and host States should make the necessary arrangements to facilitate safe access for civil society representatives without fear of intimidation and reprisals, and should also support meaningful engagement by CSOs that may not be familiar with these processes.

[12] *Co-facilitators report*, p. 15.
[13] Position paper of the Chairs of the human rights treaty bodies on the future of the treaty body system - Annex III of A/74/256, https://tbinternet.ohchr.org/Treaties/CHAIRPERSONS/Shared%20Documents/1_Global/INT_CHAIRPERSONS_MCO_31_31309_E.docx and "Written contribution of the Chairs of human rights treaty bodies on the treaty body system review in 2020", 4 August 2020, https://www.ohchr.org/Documents/HRBodies/TB/HRTD/CoFacilitationProcess/outcomes/Written-contribution-co-facilitators.docx
[14] *Co-facilitators report*, p. 17.

CAPACITY BUILDING AND TECHNICAL ASSISTANCE

We welcome the activities that have been carried out as part of the OHCHR capacity building programme established by resolution 68/268, which has enabled dozens of countries around the world to submit their periodic reports to the treaty bodies. Nevertheless, we note that civil society engagement in the capacity building programme has been limited.

We support the call to strengthen the role of OHCHR in supporting the treaty body system and providing technical assistance for capacity building and for OHCHR to conduct a thorough, inclusive, independent and publicly available evaluation of the capacity-building programme. We also call for the integration of a dedicated civil society component into the capacity-building programme.

BUDGETARY ISSUES

We welcome the co-facilitators' recognition that the treaty bodies face serious resource deficits (as set out above in the section entitled individual communications) and that the failure of Member States to provide the treaty bodies with the resources they require to function has a direct impact on the enjoyment of human rights. We agree with the co-facilitators that States have an obligation to avoid taking actions that lead to this protection gap.

Since 2017, however, Member States have repeatedly denied the treaty bodies the full amount of resources they require to function, including by partially rejecting budget requests from the Secretary-General for additional staff support to allow the treaty bodies to process rising numbers of individual petitions (justified with reference to the resourcing formula in resolution 68/268); by making across-the-board cuts to UN travel funds aimed at reducing the overall UN budget that had an outsized impact on the treaty bodies; and by creating a financial architecture at the UN in which the Secretariat lacks cash reserves to draw upon when Member States fail to pay their assessed contributions to the UN in a timely fashion, leading to repeated cash flow crises that have threatened, in turn, OHCHR's ability to facilitate the treaty bodies' meetings and other activities.

We are also concerned that since 2017 the Secretary General has stopped requesting Member States to provide the full allocation of additional resources that the resourcing formula in resolution 68/268 indicates they require, let alone the additional resources that the Secretary-General's biennial reports to the UN General Assembly on the treaty bodies notes that they require to carry out mandated functions that are not covered by the resolution 68/268 formula.[15] We understand that this is a reflection of political pressure by States that are averse to growth in the regular UN budget in general and to the growth of resources allocated to support the treaty body system in particular.

In their report, the co-facilitators suggest that a follow-up process should revisit the funding formula in resolution 68/268 to allow States to identify and agree on more appropriate ways of calculating the treaty bodies' true resource needs. NGOs welcomed States' adoption of resolution 68/268 and its innovative resourcing formula because it reflected an unprecedented expression of consensus that States should objectively calculate and fully meet the treaty bodies' resource needs. We recognize that the 68/268 formula does not capture all of the relevant treaty bodies' needs. At the same time, we also recognize that present resource crisis affecting the treaty bodies has not arisen because Member States lack information about their actual resource needs; rather, the resource crisis is a consequence of a

[15] Status of the human rights treaty body system, Report of the Secretary-General, 10 January 2020, A/74/643, Chapter V, https://undocs.org/A/74/643

lack of political will on the part of some Member States to adequately fund these institutions and more broadly to ensure that the UN has the financial means it requires to operate.

Member States should act immediately, including in the context of the ongoing discussions on the regular UN budget for 2021 in the Fifth Committee, to address the serious resource shortfalls affecting the treaty bodies. In their discussions on the 2021 regular budget, Member States should at the very least approve the additional resources requested by the Secretary-General, and should, in fact, consider providing the additional resources that the treaty bodies need but that the Secretary-General has not requested; in the course of efforts to reduce the overall UN budget for 2021, Member States should also avoid imposing across-the-board cuts to travel budgets or cuts to other resources that will negatively affect the ability of the treaty body system to function.

Member States should also urge the Secretary-General to request the full allocation of additional resources that the treaty bodies require in order to function effectively in his proposed budget for 2022, which he will prepare in the first months of 2021.

Any follow-up process - and any future discussions about adjustments to the resourcing formula for the treaty bodies - must be aimed at reaffirming State support and adequate funding of the treaty bodies on the basis of their resource needs. The follow-up process will not benefit the treaty bodies, let alone rights-holders, if its practical result is to force the treaty bodies to adopt changes to their working methods aimed primarily at reducing their operational costs, rather than at making them more effective at monitoring States parties' compliance with their binding human rights treaty obligations.

CONCLUSIONS AND RECOMMENDATIONS

The co-facilitators' report clearly reflects widespread support for the treaty bodies, as well as the urgent need for technological upgrades and additional resources to facilitate and strengthen their ability to work effectively. We also welcome the strong conviction expressed by many stakeholders during the consultations that the independence of the treaty bodies must be maintained.

We encourage Member States, treaty bodies, and OHCHR to consider the recommendations set out in this document and to support their immediate implementation. We also recommend that the President of the General Assembly ensure that any follow-up process on the treaty bodies convened during the 75th session is carried out in an open, transparent and inclusive manner, as was the 2020 review, so that the views of civil society can continue to play an integral role in the proceedings.

RECOMMENDATIONS TO UN MEMBER STATES:

- Provide appropriate resources from the regular budget to ensure that the treaty body system is accessible to civil society and other relevant stakeholders, including through webcasting and online meetings, and for the development of necessary information management systems.
- Advocate for the full allocation of resources requested by the Secretary-General in the 2021 budget in the Fifth Committee and not support the ACABQ's recommendation to deny needed additional resources for the treaty bodies in 2021.
- Fund meetings that will enhance inter-committee coordination.
- Urge the Secretary-General to request the full allocation of additional resources that the treaty bodies require in order to function effectively in his proposed budget for 2022, to be prepared in the first months of 2021.
- Avoid imposing across-the-board cuts to travel budgets or cuts to other resources that will negatively affect the ability of the treaty body system to function.

- Fully respect the independence of treaty body and the prerogative to establish their own working methods.
- Reject any attempt to introduce a so-called Code of Conduct or any purported Ethics Council for the treaty bodies.
- When formally putting forward candidates for treaty body membership, report about the national selection process, including compliance with principles for independent, open, transparent, participatory, competitive and merit-based selections, with the aim of ensuring diversity of nominees, including based on gender, sexual orientation, race, ethnicity, disability, age, etc.
- Carefully review the pool of nominees, vote only for qualified nominees and avoid vote-trading for human rights expert mechanisms.
- States should strengthen their engagement with the treaty bodies on issues of implementation, and also invest in national procedures to monitor implementation, such as the setting up of national mechanisms for reporting and follow-up.
- Invite treaty body members to hold discussions on follow-up issues in-country.
- Provide funding for an accessibility audit across the treaty bodies, including for their webpages, civil society participation, dialogue with States parties, and physical premises, with a view to proposing arrangements that would make possible and enhance the participation of persons with disabilities, including, for example, through the provision of international sign language interpretation, live captioning, Plain English, Easy-Read format and braille. Such an audit must not be limited to the Committee on the Rights of Persons with Disabilities.

RECOMMENDATIONS TO THE HUMAN RIGHTS TREATY BODIES:

- Establish additional opportunities to coordinate the work by the treaty bodies in order to strengthen procedural and jurisprudence coherence and mutual reinforcement, building on interdependence and indivisibility of rights.
- Establish fixed review schedules for the regular review of all States parties and ensure due inter-committee coordination when establishing such calendars.

RECOMMENDATIONS TO THE UNITED NATIONS (OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, UN OFFICE AT GENEVA, UN SECRETARIAT):

- Take into account civil society experiences of online engagement to date and address shortcomings.
- Ensure suitable platforms for online engagement with the treaty bodies and that online engagement with the treaty bodies meet adequate conditions to ensure predictability, transparency and inclusivity, as well as security, privacy, confidentiality and accessibility.
- Provide support for inter-committee discussions to strengthen and coordinate the work of the treaty bodies and to strengthen procedural and jurisprudential coherence and mutual reinforcement, building on interdependence and indivisibility of rights.
- Prepare without delay, a proposed schedule and estimated costing for predictable review cycles.
- OHCHR in coordination with host States should make the necessary arrangements to facilitate safe access to revies in regions for civil society representatives without fear of intimidation and reprisals, and should also support meaningful engagement by CSOs that may not be familiar with these processes.
- Conduct a thorough, inclusive, independent and publicly available evaluation of the capacity-building programme and integrate a dedicated civil society component into the capacity-building programme.

RECOMMENDATION TO THE PRESIDENT OF THE GENERAL ASSEMBLY:

- Ensure that any follow-up process on the treaty bodies convened during the 75th session is carried out in an open, transparent and inclusive manner, as was the 2020 review, so that the views of civil society can continue to play an integral role in the proceedings.

SIGNATORIES:

ACAT España Catalunya (Acción de los Cristianos para la Abolición de la Tortura)
Action Canada for Sexual Health and Rights
Aditus foundation
Advocates for Human Rights
Al-dameer Association for Human Rights
Albinism Society of Eswatini ASESWA
Alianza por los Derechos de Niñas, Niños y Adolescentes en Mexico
All human rights for all in Iran
ALTSEAN-Burma
American Civil Liberties Union (ACLU)
Americans for Democracy & Human Rights in Bahrain (ADHRB)
Amnesty International
Antenna fondation
Anti-Slavery International
Article 12 in Scotland
Asistencia Legal por los Derechos Humanos A.C. (ASILEGAL)
Asociación Pro Derechos Humanos de España (APDHE)
Assocaition pour la Protection des droits des Enfants au Tchad-défense des Enfants International (APDET-DEI TCHAD)
Associação de Reintegração dos Jovens/ Crianças na Vida Social (SCARJoV)
Association ARC-EN-CIEL
Association Des Jeunes Futurs Cadres Du Pays
Association ESE
Association for the Prevention of Torture
Association Mauritanienne Pour la Promotion des Droits de l'homme AMPDH
Association of the Survivors of Makobola Massacres (ARMMK)
Association pour la paix et le développement
AUDF Alliance pour l'universalité des Droits Fondamentaux ONG
AWID
Aye Right
Bir Duino Kyrgyzstan
Canadian Centre on Statelessness
Care Micronesia Foundation
CASACIDN
CEDAL - Centro de Derechos y Desarrollo
Center for Civil Liberties
Center for Reproductive Rights
Center for the Human Rights of Users and Survivors of Psychiatry
Central Union for Child Welfare
Centre for Independent Journalism (Malaysia)
Centre International de Conseil, de Recherche et d'Expertise en Droits de l'Homme (CICREDHO)
Centro de Políticas Públicas y Derechos Humanos-Peru EQUIDAD
Child Protection Alliance- The Gambia
Child Rights Governance Nepal
Child Rights Information Centre (CRIC) Moldova
Children's Rights Alliance for England
Chinese & Southeast Asian Legal Clinic
Citizens Commission on Human Rights New Zealand
Colectivo de Abogados "José Alvear Restrepo" - CAJAR-
Collectif Défenseurs Plus
Collectif des familles de disparus en Algérie
Collectif pour la promotion des droits des personnes en situation de handicap
Comisión Mexicana de Defensa y Promoción de los Derechos Humanos
Comisión Nacional de los Derechos Humanos
Confederacion Sordos de Venezuela
Coordinated Organizations and Communities for Roma Human Rights in Greece (SOKADRE)
Corporacion OPCION
Cyprus Confederation of Organizations of the Disabled
DEFENCE FOR CHILDREN INTERNATIONAL
Disability Rights International
ECPAT Sri Lanka
EKAMA Development Foundation
FIDH - International Federation for Human Rights
FIDH (International Federation for Human Rights)
Finnish Refugee Advice Centre
Fondazione Pangea
Forum Tunisien pour les Droits Économiques et Sociaux
FUNDACION PANIAMOR
Fundación Regional de Asesoría en Derechos Humanos, INREDH
Geneva for Human Rights
Global Campaign for Equal Nationality Rights
Global Detention Project
GRADEL-Guinée
Greek Helsinki Monitor

Grupo de Mujeres de la Argentina
Halley Movement Coalition
Hope For Children- CRC Policy Center
Human Rights Center of Azerbaijan
Human Rights Clinic, School of Law, University of Texas at Austin
Human Rights Commission of Pakistan
Human Rights in China (HRIC)
Humanist Union of Greece
Humanium
Institute for Development and Human Rights - IDDH
Intact Denmark
International Child Rights Center
International Commission of Jurists
International Council of Women
International Dalit Solidarity Network
International Federation of ACATs (FIACAT)
International Rehabilitation Council for Torture Victims (IRCT)
International School Psychology Association (ISPA)
International Service for Human Rights (ISHR)
ISDE Bangladesh
Jacob Blaustein Institute for the Advancement of Human Rights (JBI)
Japanese Workers' Committee for Human Rights - JWCHR
Kurdistan Human Rights-Geneva (KMMK-G)
Latvian Human Rights Committee
LDDH Djibouti
LEAGUE FOR DEFENCE OF HUMAN RIGHTS ROMANIA
Liga Mexicana por la Defensa de los Derechos Humanos, Limeddh
Ligue des droits de l'Homme (LDH)
MARUAH, Singapore
MENA Rights Group
Minority Rights Group-Greece
Mouvement Lao pour les Droits de l'Homme
Movimento Nacional de Direitos Humanos - MNDH Brasil
Naisasialiitto Unioni
National Secular Society (UK)
NNID Foundation
Norwegian Helsinki Committee
Observatorio Ciudadano
ODRI Intersectional rights
Ombudsman for Children, Croatia
ONG FEMMES ET ENFANTS EN DETRESSE FEED NIGER
ONG SAMBA MWANAS(Gabon)
Open Society Justice Initiative (OSJI)
People for Successful Corean Reunification (PSCORE)
Plan International
Promo-LEX Association
PROMSEX, Centro de Promocion y Defensa de Los Derechos Sexuales y Reproductivos
Purple Admiral Foundation for Community Development
Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad y sus Familias - RIADIS
REDIM
Refugee Rights Europe (RRE)
Réseau National de Défense des Droits Humains (RNDDH)
Réseau Unité pour le Développement de Mauritanie
Save the Children Finland
Save the Children International
Sisters' Arab Forum for Human Rights (SAF)
SOHRAM-CASRA Centre Action Sociale Réhabilitation et Réadaptation pour les Victimes de la Torture, de la guerre et de la violence
SOS INFORMATION JURIDIQUE MULTISECTORIELLE, SOS IJM
Synergia - Initiatives for Human Rights
Syracuse University Disability Law and Policy Program
TB-Net comprising:
- Centre for Civil and Political Rights;
- Child Rights Connect;
- Global Initiative for Economic, Social and Cultural Rights (GI-ESCR);
- International Disability Alliance;
- International Movement Against All Forms of Discrimination and Racism (IMADR);
- International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific); and
- World Organisation Against Torture (OMCT).

The Canada OPCAT Project
The Finnish League for Human Rights
The Independent Commission for Human rights CIDH
The Independent Medico-Legal Unit
The Leprosy Mission England and Wales
The Mannerheim League for Child Welfare, Finland
Together (Scottish Alliance for Children's Rights)
Trans ry
Trasek
Väestöliitto ry / the Family Federation of Finland
Validity Foundation - Mental Disability Advocacy Centre
Women´s Link Worldwide