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# REVIEW

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# HUMAN RIGHTS

A NEW AND OLD WAY TO SECURE JUSTICE

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# Using Human Rights Mechanisms of the United Nations to Advance ECONOMIC JUSTICE

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**A**s a growing number of social justice lawyers employ human rights standards and strategies to advocate for their clients, human rights mechanisms of the United Nations have become a promising way for lawyers to work toward economic justice. These mechanisms are not only an alternative to traditional litigation and administrative advocacy but also unique opportunities for collaboration among U.S. civil society groups and engagement with policymakers. Because they are grounded in international human rights norms, human rights mechanisms have the potential to deal with social and economic issues beyond the reach of traditional domestic protections. By strategically using these mechanisms, legal aid lawyers can make a larger case within local communities, with government officials, and on the international stage for their clients' concerns.

Building upon previous CLEARINGHOUSE REVIEW articles and several appearing in this issue, we draw a primer on the U.N. human rights system as a means of complementing domestic advocacy efforts on behalf of low-income and poor communities and individuals.<sup>1</sup> First, we give an overview of the U.N. mechanisms that monitor and promote human rights compliance in the United States. Second, we cite examples of how social justice organizations have engaged these mechanisms to broaden access to justice and deter violence against women, and we suggest opportunities for future engagement on a range of issues confronting clients of legal aid programs.

## I. The Mechanics of the U.N. Human Rights System

The U.N. Charter, which established the United Nations in 1945, committed the institution and its members to promote and protect human rights and fundamental freedoms.<sup>2</sup> The charter was soon followed by the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948.<sup>3</sup> The Universal Declaration of Human Rights, though not a legally enforceable document, articulates a specific and comprehensive set of rights—social, economic, cultural, civil and political rights—which all U.N. members pledge to uphold. Following the Universal Declaration of

<sup>1</sup>See Gillian MacNaughton, *Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer's Toolbox*, 44 CLEARINGHOUSE REVIEW 437 (Jan.–Feb. 2011) (sources of economic and social rights and strategies to monitor implementation of these rights); Eric Tars, *Who Knows What Lurks in the Hearts of Human Rights Violators? The Shadow Reporter Knows—Human Rights Shadow Reporting: A Strategic Tool for Domestic Justice*, 42 CLEARINGHOUSE REVIEW 475 (Jan.–Feb. 2009) (shadow reporting and the importance of civil society engagement). For an exploration of the Inter-American human rights system of complementary protections (which we do not cover here), see Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer*, 42 CLEARINGHOUSE REVIEW 581 (March–April 2009).

<sup>2</sup>U.N. Charter art. 55(c).

<sup>3</sup>Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 at 71 (Dec. 10, 1948).

Human Rights, U.N. member countries drafted, negotiated, and adopted a series of agreements, or treaties, articulating these rights in greater detail. Two types of U.N. mechanisms emerged to promote and monitor countries' compliance with human rights: U.N. treaty-based mechanisms and U.N. Charter-based mechanisms.

### A. U.N. Human Rights Treaties and Treaty-Based Mechanisms

A handful of international human rights treaties (along with regional human rights agreements) make up the core of human rights law. The Universal Declaration of Human Rights takes up the full panoply of rights; however, economic, social, and cultural rights and civil and political rights were grouped into separate core treaties for political and historical reasons related to Cold War politics and America's legacy of racial injustice.<sup>4</sup> Thus, along with the Universal Declaration of Human Rights, two key treaties form the International Bill of Rights: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>5</sup> Nine core U.N. treaties are in force to protect and promote human rights (see table 1).

The United States has ratified the International Covenant on Civil and Political Rights and signed but not ratified the International Covenant on Economic, So-

cial, and Cultural Rights. Indeed, as table 1 reflects, the United States has ratified several core U.N. human rights treaties and signed but not ratified several others. Treaties that the United States has ratified are binding under the supremacy clause.<sup>6</sup>

Although the United States has signed but not ratified the core treaties directly referring to economic and social rights, it has international obligations with respect to those treaties.<sup>7</sup> A country that has signed a treaty has a specific obligation "to refrain from acts which would defeat the object and purpose of a treaty" until the country expresses its intention not to become a party.<sup>8</sup> The treaties that the United States has ratified, in particular the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, contain antidiscrimination provisions that can be invoked to protect economic and social rights in such areas as health, education, housing, employment, and social security.<sup>9</sup> These nondiscrimination provisions have been interpreted more broadly than federal constitutional prohibitions on discrimination, such that policies that have disparate impact but not discriminatory intent may violate norms of nondiscrimination under these treaties.<sup>10</sup> Note that, because the United States ratifies most human rights treaties with a statement that they are "non-self-

<sup>4</sup>See Hope Lewis, "New" Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework, in 1 BRINGING HUMAN RIGHTS HOME 103, 115–21 (Cynthia Soohoo et al. eds., 2008).

<sup>5</sup>International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into force January 3, 1976).

<sup>6</sup>U.S. CONST. art. VI, § 2.

<sup>7</sup>Michael H. Posner, Assistant Secretary of State, Bureau of Democracy, Human Rights, and Labor, Address to the American Society of International Law: The Four Freedoms Turn 70 (Mar. 24, 2011) ("While the United States is not a party to the [International Covenant on Economic, Social, and Cultural Rights], as a signatory, we are committed to not defeating the object and purpose of the treaty."), <http://1.usa.gov/mfTONT>.

<sup>8</sup>Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331 (1969) (entered into force on Jan. 27, 1980). While the United States is not a party to the Vienna Convention, the United States recognizes that many of the convention's provisions have become customary international law; the United States has signaled its intention to abide by the principles contained in treaties it has signed (see U.S. Department of State, Vienna Convention on the Law of Treaties (n.d.), <http://1.usa.gov/E8or0>; see also Posner, *supra* note 7).

<sup>9</sup>International Covenant on Civil and Political Rights, *supra* note 5, art. 26; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, art. 5(e) (entered into force Jan. 4, 1969).

<sup>10</sup>See International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9, gen. cmt. 14.

Table 1. Core U.N. Treaties

| TREATY  | DESCRIPTION   | SIGNED BY PRESIDENT | RATIFIED BY SENATE  |
|---|---|---------------------|---|
| International Covenant on Economic, Social, and Cultural Rights   | Principal human rights treaty on economic and social rights. Protects rights to housing, work, social security, highest attainable standard of health, and continuous improvement of living conditions. Prohibits all forms of discrimination in enjoyment of these rights                          | Yes                 | No  |
| International Covenant on Civil and Political Rights  | Protects broad range of civil and political rights (e.g., right to life, freedom of association, right to be free from torture and slavery, nondiscrimination, and certain fair trial rights). Nondiscrimination provisions may be invoked to protect economic and social rights                    | Yes                 | Yes   |
| International Convention on the Elimination of All Forms of Racial Discrimination                             | Principal human rights treaty on racial discrimination. Prohibits discrimination in education, health, housing, property, social security and employment, among others  | Yes                 | Yes   |
| Convention on the Elimination of All Forms of Discrimination Against Women                                    | Principal human rights treaty on sex discrimination. Provides for women's equal access to—and equal opportunities in—private, political, and public life  | Yes                 | No  |
| Convention on the Rights of the Child   | Principal human rights treaty on rights of children. Has extensive economic and social rights provisions. Most widely ratified treaty in international human rights system (United States is one of only two U.N. member states not to have ratified it)  | Yes                 | United States has not ratified Convention on the Rights of the Child but has ratified two optional protocols to the Convention, one on Sale of Children and the other on Children in Armed Conflict |
| Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment                     | Requires states to take measures to prevent and punish torture under any circumstances (even wartime). Forbids states from sending individuals to other countries if there is reason to believe they will be tortured. Prohibits acts of cruel, inhuman, or degrading treatment by public officials | Yes                 | Yes   |
| Convention on the Rights of Persons with Disabilities   | Promotes disabled persons' rights to equal protection, equal participation, and accessibility. Provides special protection for women and children with disabilities   | Yes                 | No  |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | Stresses fundamental rights of both documented and undocumented migrants  | No                  | No  |
| International Convention for the Protection of All Persons from Enforced Disappearances                       | Most recent U.N. human rights treaty. Protects against forced disappearance   | No                  | No  |

Source: U.N. treaty documents.

executing,” ratified treaties are generally not directly enforceable in domestic courts. The U.S. Supreme Court’s recent decision in *Medellin v. Texas* underscores this point.<sup>11</sup> Nevertheless, the United States has international legal obligations to adhere to the standards that the treaties set forth and to report on American compliance periodically.<sup>12</sup>

One of the obligations that the United States accepts when it ratifies a human rights treaty is periodic reporting to a committee of independent experts. Monitoring countries’ treaty compliance, these committees (also known as treaty bodies) serve certain functions.

First, by conducting periodic reviews, they establish an accountability mechanism, if an imperfect one. As part of the review, countries must submit reports on how they are meeting their treaty commitments; this offers opportunities for advocates to engage with both their governments and the U.N. system on issues of domestic importance. In examining a country report, a treaty body may prepare a list of issues and questions for the country to answer as a supplement to and clarification of its report. The review itself is a public session, intended to serve as a productive dialogue between treaty experts and the government to identify human rights concerns and potential solutions. At the end of a review, treaty bodies issue concluding observations highlighting specific areas of concern. All treaty bodies issue general interpretations of treaty provisions; known as General Comments or General Recommendations, the interpretations have

become influential in defining the scope of treaty obligations.<sup>13</sup> Although the findings and recommendations of the treaty bodies generally are not binding, advocates may offer them as persuasive authority in U.S. courts and leverage them in domestic nonlitigation advocacy efforts.

A number of the treaty bodies can accept individual complaints or petitions. However, because the United States has not made the necessary declarations or ratified the relevant optional protocols, treaty bodies generally are not authorized to accept individual complaints or petitions directly involving U.S. practice.

Table 2 outlines the most prominent international human rights treaty bodies and U.S. obligations with regard to each.<sup>14</sup>

## B. U.N. Charter-Based Mechanisms

Besides the treaty-specific monitoring bodies described above, the United Nations human rights system has bodies created by the U.N. Charter. In particular, the Human Rights Council is an intergovernmental body comprising forty-seven countries charged with promoting and protecting human rights around the world.<sup>15</sup> It was created in 2006 to replace the U.N. Commission on Human Rights. Among the council’s monitoring and review mechanisms are the Universal Periodic Review and the appointing of “Special Procedures.”

U.N. Charter-based mechanisms may be of particular use to legal aid attorneys advocating a range of social and economic

<sup>11</sup>*Medellin v. Texas*, 552 U.S. 491, 505 (2008) (provisions of a ratified treaty are not binding domestic law unless the treaty by its terms is self-executing or Congress has enacted implementing legislation).

<sup>12</sup>See, e.g., Human Rights Committee, General Comment No. 31 [80]: The Nature of the Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., March 29, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://bit.ly/nxefV0>. Moreover, nonratified treaties and nonbinding declarations may have acquired the status of customary international law, although the U.S. suggests that customary human rights law is established in a manner different from other customary law because, historically, human rights have been a matter between a state and individuals in that state. For a distillation of the ways in which customary human rights law may be established, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 reporters’ notes (1987).

<sup>13</sup>The U.N. Universal Human Rights Index is an online tool for accessing U.N. recommendations and observations (see Universal Human Rights Index of United Nations Documents (last updated July 18, 2011), <http://bit.ly/m40sv6>).

<sup>14</sup>For a more thorough discussion of U.N. treaty monitoring bodies, see International Service for Human Rights, Simple Guide to the U.N. Treaty Bodies (last updated Oct. 27, 2010), <http://bit.ly/p9A7w0>.

<sup>15</sup>The United States won a seat on the Human Rights Council in 2009 (see General Assembly of the United Nations, Election (12 May 2009): Human Rights Council (n.d.), <http://bit.ly/nK7dW4>).

**Table 2. International Human Rights Treaty Bodies and U.S. Obligations**

| TREATY BODY   | RELEVANT TREATY   | U.S. OBLIGATION   |
|---|---|---|
| Human Rights Committee  | International Covenant on Civil and Political Rights  | Reporting every four years (but committee often varies requirement)                                       |
| Committee on the Elimination of Racial Discrimination                     | International Convention on the Elimination of All Forms of Racial Discrimination                             | Reporting every two years (often every four years as two combined periodic reports)                       |
| Committee on Economic, Social, and Cultural Rights                        | International Covenant on Economic, Social, and Cultural Rights   | No obligation (not a party)   |
| Committee on the Elimination of All Forms of Discrimination Against Women | Convention on the Elimination of All Forms of Discrimination Against Women                                    | No obligation (not a party)   |
| Committee Against Torture   | Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment                     | Reporting every four years (but committee often varies requirement)                                       |
| Committee on the Rights of the Child                                      | Convention on the Rights of the Child   | Reporting every five years on U.S. compliance with two optional protocols that United States has ratified |
| Committee on Migrant Workers  | International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families | No obligation (not a party)   |
| Committee on the Rights of Persons with Disabilities                      | Convention on the Rights of Persons with Disabilities   | No obligation (not a party)   |
| Committee on Enforced Disappearances                                      | International Convention for the Protection of All Persons from Enforced Disappearances                       | No obligation (not a party)   |

Source: U.N. treaty documents.

rights for their clients. Unlike treaty bodies, they monitor countries' compliance with the full range of rights in the Universal Declaration of Human Rights. Thus U.N. Charter-based mechanisms offer a way to measure the United States' compliance with economic, social, and cultural rights, notwithstanding its failure to ratify treaties focusing specifically on those rights.

### 1. Universal Periodic Review

The Universal Periodic Review is a mechanism by which the Human Rights Council reviews the human rights records of all U.N. member states every four years.<sup>16</sup>

Created in 2006 as an opportunity for each country to discuss actions it has taken to fulfill its human rights obligations, the Universal Periodic Review offers civil society a unique platform to advocate greater human rights protections. The United States' first Universal Periodic Review occurred in November 2010 with unprecedented civil society engagement.<sup>17</sup>

### 2. Special Procedures

Special Procedures are the mechanisms established by the United Nations to serve as its "eyes and ears" in evaluating and dealing with human rights concerns

<sup>16</sup>More information is available at U.N. Human Rights, Office of the High Commissioner for Human Rights, Universal Periodic Review (April 28, 2011), <http://bit.ly/kDr44D>.

<sup>17</sup>For an exploration of the utility of the Universal Periodic Review for economic justice advocacy, see Sarah H. Paoletti, *Using the Universal Periodic Review to Advance Human Rights: What Happens in Geneva Must Not Stay in Geneva*, in this issue.

