

Threats Posed to National Sovereignty
by the UN Human Rights Treaty System

2010 Law and Sovereignty Conference

March 13, 2010

James P. Kelly, III
Director, International Affairs
The Federalist Society for Law and Public Policy Studies
Washington, D.C.

Since the passage of the Universal Declaration of Human Rights in 1948, United Nations member states have adopted a series of international treaties expressing basic human rights and, in most instances, appointing treaty body committees to monitor the implementation of the treaties.

- 1) International Covenant on Civil and Political Rights
- 2) International Covenant on Economic, Social and Cultural Rights
- 3) UN Convention on the Rights of the Child
- 4) Convention on the Elimination of All Forms of Discrimination against Women
- 5) International Convention on the Elimination of All Forms of Racial Discrimination

The International Covenant on Economic, Social, and Cultural Rights includes:

- 1) The right to work;
- 2) The right to the enjoyment of just and favorable conditions of work;
- 3) The right to social security;
- 4) The right to an adequate standard of living (i.e., food, clothing and housing);
- 5) The right to the enjoyment of the highest attainable standard of physical and mental health;
- 6) The right to education; and
- 7) The right to enjoy the benefits of scientific progress and its applications.

Because the basic rights listed in these treaties are not explained in detail, the various treaty body committees have expanded their responsibilities to include the production of comments regarding the nature and scope of the human rights that, as adopted, were only intended to express aspirations.

Example: UN Committee on Economic, Social and Cultural Rights, General Comment 14 containing a detailed description of the various dimensions of the right to the highest attainable standard of health.

Each treaty body committee is responsible for reviewing Member States' reports on how the rights contained in the treaty are being implemented at the national level and whether the reporting State is complying with the treaty and the Comments.

In the past, these reporting sessions were private affairs, involving only the experts on the treaty body committee, the UN staff responsible for conducting the investigation, and officials from the reporting government's foreign ministry.

Now, however, instead of acting alone, the treaty body committees are acting as part of a matrix, or web, of human rights global governance networks.

Example: Committee on the Rights of the Child, which monitors UN Convention on Rights of the Child (1989)

In conducting a periodic review of a country's implementation of the CRC, the Committee will examine all aspects of child's rights.

For instance, if applicable, the CRC will examine whether the reporting country is respecting the rights of unaccompanied children who have been displaced by conflict and are residing in refugee camps in the reporting country.

In 1990- The Committee probably would not have inquired about the status of unaccompanied children as this area of human rights law had not been developed.

In 1995- The Committee would have asked about the basic conditions under which unaccompanied children in refugee camps were living.

In 2000- The Government would have reported that it was providing basic housing (tent cities), education (three hours of daily instruction at camp), health care (emergency care, but no mental health care). The Committee would have encouraged the Government to do more and include civil society organizations in the reporting process.

In 2005- The Committee would have criticized the Government for not providing the same services provided to children who are citizens of the country, including housing (apartments), education (enrollment in local schools), and health care (emergency and preventative care and mental health care). The Committee would also encourage the Government to consult with international NGOs who are experts on such matters.

In 2010, The Committee would present the Government with the findings of a “shadow” report, jointly produced by the local UN field office, UNICEF, an international NGO (i.e., Red Cross), and a group of country-level civil society organizations assembled and trained by the other members of the coalition. The shadow reporting process would be funded by a non-profit foundation such as the Ford Foundation. The Committee would ask the Government to defend itself against the criticisms contained in the shadow report and detail what actions it would be taking to remedy any cited shortcomings.

Federalist Society UN Treaty Watch Project (www.globalgovernancewatch.org)

Ken Wiltberger and Jim Kelly monitor the UN treaty committee reporting calendars and identify upcoming country reports that merit consideration for the monitoring of whether the treaty bodies are over-reaching their authority and undermining national sovereignty. UN Treaty Watch then publishes its findings on GGW (i.e., UN Committee on Economic, Social and Cultural Rights Fifth Periodic Review of Poland)

UN global governance of the economic and social rights contained in the various human rights treaties is now conducted within a matrix of human rights governance networks (the “Matrix”). The Geneva-based UNOHCHR is the architect of the Matrix.

In its role as the architect of the Matrix, the UNOHCHR encourages and facilitates the work of the agents who manage the human rights networks comprising the Matrix (the “Agents”).

Within the Matrix, the Agents cooperate to promote and protect a human rights code designed to globally govern economic and social affairs (the “Code”).

The Agents also monitor the conduct of transnational corporations (“TNCs”) and States to determine whether their economic and social activities are in line with the Code. If they are not, the Agents attempt to eliminate the offending conduct through peer pressure (i.e., naming and shaming), public pressure (i.e., boycotts), or administrative and legal proceedings.

Those TNCs and UN Member States who are willing to trade a certain degree of their freedom or sovereignty in exchange for the ambiguous protection offered to them by the Matrix energize the UN human rights system through their financial contributions and compliance.

The ten human rights governance networks comprising the Matrix include:

1. *Advocacy networks*: The networks of international human rights activists that articulate and advocate for human rights, including so-called “emerging” economic and social human rights. (i.e., the U.S. Center for Economic and Social Rights)
2. *Research networks*: The networks of social scientists and academics that conduct research on how the lack of human rights protection negatively impacts individuals and society. (i.e., the WHO’s Commission on the Social Determinants of Health)
3. *Policy networks*: The networks of government officials and other policy makers that discuss and formulate human rights policies. (i.e., UNESCO Management of Social Transformations Program and the Social Science-Policy Nexus)
4. *Standards-setting networks*: The networks of multilateral international organizations that meet to adopt treaties or declarations containing human rights norms or standards. (i.e., UNESCO Member State adoption of Universal Declaration on Bioethics and Human Rights)
5. *Interpretive networks*: The networks of human rights treaty body committees and UN-sanctioned expert committees that interpret the norms and standards contained in human rights treaties and declarations. (i.e., Treaty body General Comments)

6. *Explanatory networks*: The networks of UN agency field staff that explain the human rights interpretations to members of civil society at the local, national, and regional levels. (i.e., UNESCO Assisting Bioethics Committees)
7. *Implementation networks*: The networks of national legislatures that, upon the recommendation of the human rights experts, adopt laws promoting and protecting human rights. (i.e., UNESCO Global Ethics Observatory codifying national laws)
8. *Assessment networks*: The networks of non-governmental organizations that encourage the use of human rights impact assessments (“HRIA”) by legislatures and businesses to measure the potential human rights impact of proposed legislation or products. (i.e., Human Rights Impact Resource Centre online HRIA database)
9. *Enforcement networks*: The networks of local, national, and regional courts that decide cases involving human rights. (i.e., European Court of Human Rights)
10. *Funding networks*: The networks of governments, TNCs, and private foundations that fund the promotion and protection of human rights by supporting one or more of the other human rights governance networks. (i.e., UN Global Compact)

1. How could the signatories to these various human rights treaties have ever imagined that a mere list of human rights to which all governments should aspire would result in a matrix of human rights governance networks that would develop a detailed body of human rights norms which the countries would be held accountable for realizing?
2. How could the signatories to these treaties ever have imagined that the UN, an organization which is supposed to serve its Member States, would partner with outside NGOs to develop country-level civil society organizations who would be trained to criticize their governments for not fully realizing all human rights?
3. How could the signatories to these treaties ever have imagined that they would be required to fund the realization of human rights, the full nature and scope of which were not contemplated at the time the treaties were signed?

Frederic Bastiat- *The Law*

“Please understand that I do not dispute their right to invent social combinations, to advertise them, to advocate them, and to try them upon themselves, at their own expense and risk. But I do dispute their right to impose these plans upon us by law – by force – and to compel us to pay for them with our taxes. . . . I ask only that we be permitted to decide upon these plans for ourselves; that we not be forced to accept them, directly or indirectly, if we find them to be contrary to our best interests and repugnant to our consciences.”

4. How is normal democratic development at the national level short-circuited or interrupted by the UN's top-down management of a nation's human rights agenda?

5. Will ordinary citizens who have not participated in the pursuit of human rights at the national level or been exposed to debates about human rights in the legislature, media, or courts appreciate the importance of human rights and be prepared to defend them?

John Stuart Mill- *On Liberty*

“A State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.”