

STRATEGIC TREATY BODY LITIGATION TO ADVANCE DIGITAL RIGHTS

On November 30 and December 2, 2021, the International Center for Not-for-Profit Law (ICNL) and the International Justice Clinic at the University of California, Irvine School of Law (UCI Law) hosted online consultations for digital rights advocates and lawyers from around the world on the *Strategic Treaty Body Litigation to Advance Digital Rights Initiative*. This initiative aims to build a global network of partners to develop progressive digital rights jurisprudence through United Nations treaty bodies. Through an expert presentation from UCI Law students and interactive discussions, consultation participants:

Considered strategies to use treaty body litigation to obtain meaningful redress for digital rights violations, including how to navigate treaty body procedures and specific digital rights issues the treaty bodies are interested in addressing, including social media monitoring by governments, website blocking and internet shutdowns, and surveillance, among others.

Exchanged information on digital rights trends and litigation in their countries or regions, including current and planned legal cases on the issues mentioned above, as well as topics such as facial recognition technology, disinformation, and “cyber-patrolling” by governments to identify protesters and dissidents on social media.

The consultations gathered digital rights advocates and lawyers representing organizations working in Belarus, Brazil, Colombia, Ecuador, Germany, Mexico, Nepal, Palestine, the Philippines, and Senegal, and throughout the Middle East and North Africa (MENA) and Eastern Europe, among other locations.

DIGITAL RIGHTS LITIGATION AT UNITED NATIONS (“UN”) TREATY BODIES

Students from UCI Law’s International Justice Clinic presented findings from their research on the treaty bodies, UN committees that monitor the implementation of nine core human rights treaties.¹ These mechanisms play an important role in establishing human rights standards under international law, assessing government treaty compliance, and providing a forum for victims who are unable to obtain redress in domestic courts.

The UCI Clinic found that to date there have been few digital rights cases at the treaty body level, but that certain digital rights issues are potentially ripe for international adjudication based on the prior statements and decisions of UN mechanisms.² These issues include social media monitoring, website blocking and internet shutdowns, surveillance of journalists and human rights defenders, barriers to internet access, and online hate speech. Importantly, this list is not exhaustive and during the consultations, participants identified several additional issues to consider for future litigation.

¹ The nine core international human rights treaties are: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of Discrimination against Women (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and International Convention for the Protection of All Persons from Enforced Disappearances (CPED).

² The research on digital rights issues addressed by the treaty bodies was conducted through a thorough review of Views, Concluding Observations and General Comments by the Committee on the Elimination of Racial Discrimination, Committee on Economic, Social and Cultural Rights, Human Rights Committee (HR Committee), Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities. We largely excluded the Committee against Torture (CAT), Committee on Migrant Workers (CMW), and Committee on Enforced Disappearances (CED). CMW was excluded because its individual complaint mechanism is not yet in effect, and CAT and CED have not yet addressed digital rights in a meaningful way.

DIGITAL RIGHTS TRENDS

Following the UCI Law presentation, ICNL facilitated discussions among consultation participants to identify digital rights violations that are trending in their regions or countries. Several common digital rights trends emerged during the discussion. These included:

- *Surveillance of human rights defenders, political critics, and journalists.* This is a key digital rights issue raised by participants across regions. A participant from the MENA region, for instance, stated that the surveillance of human rights defenders by governments is the top digital rights challenge there. In Ecuador and El Salvador, the unauthorized access of governments to the email accounts and digital devices of journalists and activists is a key concern of rights advocates. A consultation participant from Colombia noted that government surveillance of human rights defenders is an ongoing challenge, including “cyber-patrolling” of social media pages by law enforcement agents to obtain information about protesters. In Brazil, public officials in Recife are using facial recognition technology for surveillance, raising concerns among activists.
- *Disinformation.* Digital rights advocates based in Latin America noted that several governments in the region have conducted online disinformation campaigns to discredit critics. For instance, in Ecuador, the government has funded and supported troll farms to implement these campaigns. The prevalence of online disinformation that is actively supported or tolerated by governments was also cited as a major challenge by advocates from Eastern Europe, who noted that governments have failed to push back against pandemic-related disinformation.
- *Doxing.* In the MENA region, governments have targeted and doxed human rights defenders who belong to marginalized groups, including the LGBTI community.
- *Internet shutdowns and website blocking.* In Sudan, the government has blocked websites and access to the internet to interfere with mass demonstrations and protest movements. In Egypt, the government has blocked almost 600 websites to halt social movements. Website blocking and regular internet shutdowns have also been used by Algeria’s government, as well as other governments in the MENA region.
- *Cybercrime laws.* Several MENA countries, including Algeria, have introduced cybercrime laws that will likely limit the freedom of expression.
- *Content Takedowns.* In Ecuador, for instance, the government has ordered the take down of online content, including public documents and photographs, arguing that this content is protected by copyright law. The government may be using copyright as a pretext to interfere with the right to access to information.

In addition to the above, participants from various regions cited digital gender violence, criminal and civil defamation actions, and the digital divide as significant rights concerns.

LITIGATION ON DIGITAL RIGHTS

Consultation participants next identified ongoing litigation in their countries on digital rights violations and examined the potential to bring these cases to UN treaty bodies. Below are representative examples of the types of domestic cases mentioned by digital rights advocates:

- In *Mexico*, digital rights advocates are currently litigating cases on several digital rights issues, including: (1) illegal surveillance of human rights defenders and journalists, (2) biometric data, (3) location data retained by banks and accessed by the government without a warrant, (4) facial recognition technology, and (5) inadequate laws protecting net neutrality.

Notably, digital rights advocates are bringing a case on illegal surveillance before the Inter-American Court of Human Rights. Advocates noted that a key challenge is to prove that the surveillance occurred, given that by its nature digital surveillance is often unknown to surveillance targets. According to a consultation participant: “it is difficult to access justice because it is hard for the victims to detect violations.” Advocates are also exploring which remedies are appropriate in a digital surveillance case, including requesting the deletion of illegally gathered data or an investigation to identify the parties responsible for the surveillance.

Consultation participants also noted that Mexico’s government has recently initiated investigations relating to the Pegasus spyware scandal and that it may be necessary to allow the case to proceed domestically before considering adjudication at the treaty body level.

- In the *Philippines*, digital rights advocates have filed administrative and civil complaints against public officials for online harassment and “red-tagging” (the practice of attacking journalists and critics of the government as communists or terrorists). Advocates noted that these actions have not resulted in redress for victims. Advocates have also filed petitions to contest the constitutionality of the Anti-Terrorism Act of 2020, which raises issues of online surveillance, data privacy rights, and a potential chilling effect on the freedom of expression.

Also in the Philippines, advocates conducted civil litigation against Internet Service Providers (ISPs) whose servers were used to launch DDoS attacks against alternative media websites. This litigation resulted in a settlement with the ISPs. In June 2021, similar DDoS attacks against the websites of human rights organizations were reportedly found to originate from a military ISP. However, rights groups have been unable to identify the specific responsible party, which has impeded litigation.

- In *Brazil*, digital rights advocates are engaged in litigation relating to government disinformation and hate speech disseminated by government online accounts.
- In *Europe*, advocates are litigating before the European Court of Human Rights in a case raising the issue of compensation for the victims of revenge porn.
- In *Nepal*, digital rights advocates plan to file a writ petition with the Supreme Court in a case relating to the right to be forgotten.

CASES PARTICIPANTS WOULD LIKE TO BRING BEFORE INTERNATIONAL MECHANISMS

Participants briefly listed broad digital rights issues they would like to bring before international mechanisms, including:

- State surveillance of independent media and human rights defenders
- Data privacy
- Academic freedom

- Cyber-patrolling
- Facial recognition
- Freedom of association issues where social media communities or website subscribers are targeted as extremist groups
- Government failure to counter online anti-vaccine disinformation (Europe)

TECHNICAL ASSISTANCE FOR TREATY BODY LITIGATION

Consultation participants concluded the discussion by identifying technical assistance, training, and knowledge products that would help advocates working on the ground to advance global digital rights jurisprudence. Advocates requested support on the following key topics:

- *Treaty body procedures*, including assistance in identifying, compiling, and drafting the documents required to bring a treaty body case. Advocates indicated that a report outlining the technical and procedural aspects (admissibility requirements, timeframe of decisions, effective remedies, etc) of treaty body litigation would be helpful.
- *Case building and evidence gathering*, including expertise on digital evidence and forensics. A challenge in Mexico, for instance, is the difficulty for victims to prove that they are or have been surveilled, and therefore the corresponding lack of effective local remedies to address such human rights violation. Advocates also indicated that they would appreciate support filing amicus briefs and in strategizing ways in which involvement in the General Comment development process can also shape the digital rights jurisprudence.
- *Support to build awareness* among domestic lawyers, activists, and the public on treaty bodies and the benefits of litigating before these mechanisms. A challenge in Algeria, for instance, is that the Human Rights Committee stopped following up on individual communications, which impacted the interest of Algerian advocates in pursuing treaty body remedies. Other participants said that advocates are often disillusioned with international mechanisms and their ability to offer meaningful redress to victims of human rights violations.
- *General resource support*, as human rights organizations often depend on grant funding that is not directed toward international litigation, which is seen by some organizations as a “luxury” compared to domestic cases.
- *Language assistance* to support collaborative case building initiatives and submissions of individual complaints and broader engagement with treaty bodies.
- *Coordination* between partners bringing strategic litigation in different countries to advance a common approach to digital rights before treaty bodies. Domestically, coordination between digital rights advocates and the broader human rights community, including promoting awareness that many human rights challenges raise digital rights issues.

Two consultation participants noted support that would be useful in current/planned litigation:

- In Nepal, the team working on the writ petition to the Supreme Court involving the right to be forgotten/privacy is interested in technical support on the legal standards that apply to these issues,

as well as support identifying a domestic remedy. In Nepal, digital rights are a “gray area” in which legal standards have not been established.

- A consultation participant’s organization in Brazil is pursuing litigation against President Bolsonaro relating to pandemic disinformation. The participant would like information on international mechanisms’ procedural rules and how a case like this could be filed and litigated at these bodies. The goal of the case would be to promote awareness at an international level in addition to any concrete redress from a treaty body.

TOPICS FOR FUTURE LITIGATION

As is clear from research and the consultations, there are a wide range of topics, treaty bodies, and legal authorities that could be focal points for digital rights litigation. Our near-term goal should continue to involve casting as wide a net as possible to identify potential cases and partners touching on the broadest range of potential litigation.

To learn more about the *Treaty Body Initiative* or to collaborate on future projects, please email ICNL at digital@icnl.org and the International Justice Clinic at UC Irvine at ijclinic@protonmail.com. A report detailing UCI Law’s research on UN Treaty Bodies is forthcoming.