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Fundamentals of International Human Rights for Legal Services and Pro Bono Attorneys

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Table of Contents

I. INTRODUCTION

Legal Aid attorneys and paralegals play a key role in providing quality legal advocacy to empower indigent, vulnerable, and underrepresented communities. An underutilized legal resource is the use of international human rights principles as a framework for progressive social change domestically. The goal of this manual is to present an overview of international human rights law and the ways in which legal services providers can incorporate this framework to give a voice and representation to clients who need help accessing justice. This manual encourages attorneys to explore creative advocacy tools implementing international human rights.

The Center for Human Rights and Constitutional Law is available to answer questions and provide technical support to legal services and pro bono attorneys assisting low-income clients. You may call Peter Schey at 213-388-8693 ext. 304 or Carlos Holguin ext. 309, or email us at pschey@centerforhumanrights.org and crholguin@centerforhumanrights.org. We prefer to receive emails explaining the case, and then to discuss the case via telephone or meeting.

Parts of this manual were adapted from "Human Rights in the U.S. – A Handbook for Legal Aid Attorneys."[1]

II. BACKGROUND ON HUMAN RIGHTS LAW

> *Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. . . . Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*
>
> *—Eleanor Roosevelt*

Legal aid attorneys and public defenders in the U.S. now more than ever need to expand their tool boxes and think creatively about their work. As the movement for "bringing human rights home" has evolved with the growth of research tools, coordinated initiatives, trainings and handbooks, and the U.S. Supreme Court has taken small but important steps to acknowledge international norms, it is important that attorneys gain training and education on brining human rights arguments in local and state courts to effectively advocate for the most vulnerable populations in the country.

As legal aid attorneys understand, recognition and protection of economic and social rights, including adequate housing, food, educations, and health care, is far from adequate in the U.S. With the exception of the right to property, economic and social rights are largely absent

[1] Center for Human Rights and Humanitarian Law at American University Washington College of Law, "Human Rights in the U.S. – A handbook for Legal Aid Attorneys" - *available at*: . http://www.wcl.american.edu/humright/center/documents/13-04-22LHRLHandbook_FullDraft.pdf

from the U.S. Constitution. Because the American legal framework is traditionally described as one that protects "negative" liberties and not "positive" rights, making the case for basic economic justice is challenging. Establishing it as a matter of right, not privilege—justice, not charity—is even more so.[2] Our federal Constitution primarily protects against harmful government action but does not create positive obligations for the government. As a result, our courts fail to provide remedies for this denial of basic social protection especially for the poor.

The Supreme Court has consistently denied claims involving the right to government services, including the right to decent housing,[3] public education,[4] medical care,[5] and welfare assistance.[6] In *DeShaney v. Winnebago County Department of Social Services*,[7] the Supreme Court held that a social service agency could not be liable for failing to remove a child from the custody of his father, despite substantial evidence of the father's violent tendencies.[8] The *DeShaney* opinion went even further, however, declaring that the Due Process Clause did not impose any affirmative obligations on state government.[9]

In contrast, international human rights law makes governments responsible for taking measured, concerted steps to respond to poverty, hunger, disease, unemployment, and other socio-economic crises. Treaties and international instruments such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Universal Declaration on Human Rights (UDHR) explicitly recognize individuals' rights to housing, food, health care, work, and education. When countries, including the United States, permit pervasive levels of poverty, injustice and underrepresentation to exist and do not take sufficient measures to curb them, they fail to meet these international standards.

Many state constitutions implement human rights law in that they explicitly incorporate "positive" rights to health, education, welfare, and housing within their own constitutions. Little attention has been paid to the idea that state law, and specifically state constitutions and legislation, might play a valuable role in developing a cogent, fair, and rational framework for enforcing internationally-recognized social and economic rights in the context of our federal

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[2] *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989) (Posner,J.).
[3] *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying a fundamental right to housing).
[4] *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (denying a fundamental right to education).
[5] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) (rejecting a claim for equal Medicaid funding for both childbirth and abortion by declaring that the government has no obligation to provide any medical funding at all).
[6] *See Dandridge v. Williams*, 397 U.S. 471, 478-83 (1970) (denying a fundamental right to minimal subsistence).
[7] 489 U.S. 189 (1989) (finding no liability under the Due Process Clause for a social service agency's decision to return a child to his father, a suspected child abuser, who inflicted severe injuries upon the child.)
[8] *Id.*
[9] *See id.* at 195 (denying that the Due Process Clause of the Fourteenth Amendment creates an affirmative right to protection).

system. Legal services providers should be prepared to utilize the strategies outlined in this manual both in state and federal courts.

III. ORIGINS OF MODERN HUMAN RIGHTS

The concepts of humanitarian intervention, self-determination, and providing relief to the wounded and other victims of armed conflicts can be viewed as the roots of human rights law. Modern international human rights law dates from World War II and its aftermath. The United Nations Charter, signed June 26, 1945, sought to acknowledge the importance of human rights and established it as a matter of international concern. Article I(3) specifically states that one of the purposes of the UN is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Articles 55 and 56 the Charter set out the basic human rights obligations of the UN and its member states.

The rights and obligations enumerated in the Charter were codified in the Universal Declaration of Human Rights. This was the first instrument to truly articulate the fundamental rights and freedoms of all people. Following the Declaration, the UN Commission on Human Rights drafted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together, these three documents (with the Optional Protocols to the International Covenant on Civil and Political Rights) comprise the International Bill of Human Rights.

IV. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

The generally recognized authoritative statement on the sources of international law is the Statute of the International Court of Justice (ICJ), Article 38, which specifies that the Court, in deciding disputes, shall apply:

- **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- **international custom**, as evidence of a general practice accepted as law;
- the **general principles of law** recognized by civilized nations;
- subject to the provisions of Article 59, **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

Conventions (treaties), custom, and principles of law are sometimes referred to as "primary sources" of international law. Judicial decisions and the teachings of publicists are sometimes referred to as "secondary sources" or evidence of international law rules.

Note that case law is considered only a "subsidiary means." Even the decisions of the ICJ itself do not create binding precedent. The decision of the Court has no binding force except between the parties and in respect of that particular case. (Article 59)

Note, also, that "teachings of publicists" now include the work of organizations such as the International Law Commission and private institutions. More recent discussions of the sources of international law, recognizing the growing role of international organizations, include the resolutions and other acts of international governmental organizations, such as the United Nations, as sources or evidence of international law.

a. International Conventions (Treaties)

Treaties are the single most important source of international law. International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (states parties).

A treaty becomes binding domestic law when a country ratifies it. Until a country ratifies a treaty, or unless a legal norm is so widely accepted that it becomes part of customary law, human rights standards are considered "soft law" and not binding obligations. Although the U.S. has ratified several key international treaties, its commitment to social and economic rights is not easily evidenced by its participation in these treaties.

Ratified treaties are enforceable in a U.S. court only if they are **self-executing** or if **implementing legislation** has been passed.[10] The Senate typically ratifies human rights treaties with "reservations", "understandings", and "declarations" ("RUD") stating that they are not "self-executing," and the courts uphold this limitation.

Treaties that the U.S. has signed, but not yet ratified, are not binding as domestic law. Nevertheless, signed-but-not-ratified treaties are important to domestic law because they create general negative obligations. A negative obligation means that a country must refrain from engaging in a violation of the rights under that treaty. Compare this to a positive obligation, which means that a country must act affirmatively to prevent a violation of a right and to secure that right. Under the Vienna Convention on the Law of Treaties (Vienna Convention), a State that has signed a treaty has an obligation "to refrain from acts which would defeat the object and purpose of a treaty," unless and until that State has expressed its intention not to become a

[10] The Supreme Court has held that some treaties require implementing legislation (domestic legislation allowing for implementation of treaty provisions in the U.S.) in order to be enforced in a U.S. court. Self-executing treaties do not require such implementing legislation; they can be enforced in a U.S. court as soon as the U.S. becomes a party. *See Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008). However, President Bill Clinton issued an executive order in 1998 ordering U.S. implementation of international human rights treaties "to which it is a party, including the ICCPR, the CAT, and the CERD." Exec. Order No. 13107, 63 Fed. Reg. 68991 (Dec. 15, 1998).

party.[11] Because the U.S. has signaled its intention to abide by the principles contained in treaties it has signed, and because the U.S. has an obligation not to violate the object and purpose of those treaties, legal aid attorneys may, when appropriate, argue that the federal/state/local government has violated them.

A treaty that the U.S. has only signed—or even a treaty that the U.S. has neither signed nor ratified—can still serve as a powerful advocacy tool in U.S. courts if it has acquired the status of customary international law through broad ratification by many other countries. For example, many of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are arguably customary international law, as the U.S. is one of the very few countries that has not ratified these treaties. Also, provisions contained within Declarations (such as the Universal Declaration of Human Rights) are relevant to domestic law if they have risen to the level of customary international law.

The U.S. has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Rights of the Child (CRC). The U.S. has ratified the Charter of the Organization of the American States (OAS) – a regional treaty that includes obligations to ensure fundamental economic and social rights (including the right to education, housing, healthcare, food, work, and social security) – but the U.S.'s obligations under this treaty have yet to be understood by U.S. courts.[12]

1. United Nations Conventions

- **International Covenant on Economic, Social & Cultural Rights (ICESCR)[13]**: This is the main human rights treaty regarding economic and social rights, which protects the right to work, to family life, to an adequate standard of living, including food, housing, and social security, to the highest attainable standard of health, to education, and to take part in cultural life, and prohibits all forms of discrimination in the enjoyment of these rights. The U.S. is a signatory, but has not ratified the treaty.

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[11] Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention's provisions have become customary international law. See, e.g., Maria Frankowska, The Vienna Convention on the Law of Treaties Before U.S. Courts, 28 VA. J. INT'L L. 281, 299-300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

[12] Pursuant to the OAS Charter, the member countries of the Inter-American system promulgated the American Declaration on the Rights and Duties of Man, which includes protections for economic and social rights. The state parties in the Inter-American System also voted, with no dissents, in favor of three resolutions explaining that the Declaration was an instrument that interpreted the OAS Charter and was binding on member states. The Inter-American Court has further clarified that the Declaration is binding, but few domestic courts have addressed the issue and the ones that have failed to understand the legal relationship between the Declaration and the Charter.

[13] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360, entered into force Jan. 3, 1976.

- **International Covenant on Civil & Political Rights (ICCPR)[14]:** This treaty is the civil and political rights counterpart to the ICESCR. This treaty commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and fair trials. As of May 2013, the Covenant had 74 signatories and 167 parties. The United States has both signed and Senate has ratified this Covenant. The ICCPR is important because it is binding on the courts and rights protected by the ICCPR—such as the prohibition of discrimination in the protection of *any* right—can be invoked to protect economic and social rights.

- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[15]:** As a State party to CAT, the U.S. must undertake to prevent acts of torture, or cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In its declarations, the U.S. stated "...nothing in this Convention requires or authorizes legislation, or other action, by the U.S. prohibited by the Constitution of the U.S. as interpreted by the United States."

- **Convention on the Rights of the Child (CRC)[16]:** This is the main human rights treaty on the rights of children, which includes extensive economic and social rights provisions. The U.S. is a signatory but has not ratified the treaty. The U.S. and Somalia are the only two countries which have not ratified the Convention, making the CRC one of the most widely ratified treaties in the international human rights system.

- **International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW)[17]:** This is the main human rights treaty on sex discrimination, which provides for women's equal access to—and equal opportunities in— private, political andpublic life, including education, health and employment. The U.S. is a signatory but has not ratified the convention.

[14] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), ratified by the U.S. Sept. 8, 1992.
[15] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20(1988); 23 I.L.M. 1027(1984), as modified by 24 I.L.M.535 (1985), ratified by the U.S. Nov. 20, 1994.
[16] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), entered into force Sept. 2, 1990.
[17] Convention on the Elimination of Discrimination Against Women, Sept. 3, 1981, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

- **International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**[18]: This is the main human rights treaty on racial discrimination. The convention prohibits discrimination in the areas of education, health, housing, property, social security, and employment. The U.S. explicitly stated in its reservations to CERD that it is not self-executing.

- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)**[19]**:** The ICRMW promotes the rights of migrant workers and their families by defining and protecting specific rights and applies through the duration of the migration process. The U.S. has not taken action on this convention.

- **International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)**[20]**:** The CRPD promotes the rights of persons with disabilities to equal protection, equal participation, and accessibility, and provides for special protections for women and children with disabilities. It entered into force in March 2008. As of January 2012, the Convention had 153 signatories, of which 109 were also parties. The U.S. is a signatory but has not ratified the convention.

2. Inter-American Conventions

In addition to the United Nations, there are also three principal regional human rights systems in the world: the Inter-American system, the European system, and the African system. In the Americas, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights operate to promote and protect human rights. The Court is based in San José, Costa Rica; the Commission is based in Washington, D.C. The Inter-American Court does not have jurisdiction to hear individual complaints brought against the U.S., as the U.S. has not ratified the American Convention on Human Rights or the Optional Protocol granting the Court jurisdiction. In contrast to the Court, the Inter-American Commission can hear individual complaints brought against the U.S. under the American Declaration—an advocacy avenue increasingly pursued by American advocates. Below is a list of sample relevant conventions for the Inter-American Human Rights System.

[18] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, ratified by the U.S. Nov. 20, 1994.
[19] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), entered into force July 1, 2003.
[20] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), 46 I.L.M. 433 (2007), entered into force May 3, 2008.

- **The Charter of the Organization of American States (OAS Charter)[21]:** The OAS Charter underscores principles of liberty, equality, justice, and continental cooperation. As an OAS member State, the U.S. is bound by the Charter.

- **The American Declaration on the Rights and Duties of Man[22]**: The American Declaration sets forth a wide spectrum of civil, political, economic, social, and cultural rights, including the obligation of States to provide special protections to vulnerable individuals, such as domestic violence survivors. Together with the OAS Charter, these instruments create obligations to guarantee all of the fundamental economic and social rights (including the right to education, housing, healthcare, food, work and social security). As an OAS member State, the U.S. is most likely bound by the provisions of the American Declaration through its ratification of the Charter.

- **American Convention on Human Rights (ACHR)[23]**: The American Convention codifies the OAS Charter. While the Convention focuses primarily on civil and political rights, it generally recognizes their interdependency with economic and social rights, and Article 26 specifically recognizes States' duties to progressive realization of those rights. The Convention recognizes that spouses have equal rights before, during and after marriage.

3. Reservations, Understandings, and Declarations (RUDs)

The U.S. Senate attaches a package of RUDs to its ratifications of all human rights treaties, which affect how the treaties are interpreted by U.S. courts. Treaty reservation law is one of the most complex parts of international law[24] and this section of the Handbook provides only a basic introduction to RUDs.

Although the U.S. Constitution does not mention RUDs to treaties, the U.S. Senate has been attaching conditions to its resolutions of advice and consent to treaties since 1795.[25] The Vienna Convention on the Law of Treaties defines a Reservation as "a unilateral statement, however phrased or named...whereby [a State] purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[26] So any kind of statement

[21] Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, ratified by the U.S. Dec. 13, 1951.
[22] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Int'l Conf. of Am. States, 9th Conf., OEA/ser.L/V/II.23 doc.21 rev.6 (May 2, 1948).
[23] American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; S. Treaty Doc. No. 95-21, 9 I.L.M. 99, entered into force July 18, 1978.
[24] *See* e.g. Edward T. Swaine, Reserving, 31 YALE J. INT'L L. 307 (2006).
[25] Robert E. Dalton, National Treaty Law and Practice: United States, American Society of International Law 6 (1999), http://www.asil.org/ files/dalton.pdf.
[26] Vienna Convention, supra note 8.

that modifies the legal effect of the treaty is technically a Reservation, regardless of whether the U.S. Senate calls it a Reservation, Declaration, or Proviso or anything else.[27]

Understandings and Declarations are different from a reservation. Instead of modifying a treaty, an Understanding is an interpretation, statement, clarification or elaboration assumed to be consistent with the obligations of the treaty as submitted.[28] Declarations are usually statements of the Senate's position, opinion or purpose relating to the subject matter of the treaty, but not to its specific provisions, and do not modify the legal effect of the treaty.

One State may officially enter an objection to a RUD entered by another state, which alters the treaty obligations only between those two parties.[29] Therefore, for example, when Pakistan objects to an RUD entered by the U.S., the objection only alters the agreement as between Pakistan and the U.S. The objection by Pakistan does not affect the U.S. being party to the treaty or otherwise affect U.S. obligations under the treaty.

Under international treaty law, only RUDs that are compatible with the object and purpose of the treaty are allowed.[30]

The following are the most common RUDs that the U.S. attaches to treaties:

1. The U.S. will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the U.S. Constitution.
2. U.S. adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
3. The U.S. will not submit to the jurisdiction of the International Court of Justice to decided disputes as to the interpretation or application of human rights conventions.
4. Every human right treaty to which the U.S. adheres should be subject to a "federalism clause" so that the U.S. could leave implementation of the convention largely to the states.
5. Every international human rights agreement should be "non-self-executing."20

The fourth principle, that the U.S. could leave implementation of the human rights convention largely to the states, has sometimes been used by human rights advocates as a tool, as opposed to a restriction, in trying to emphasize that all levels of government, including state and local, have a role in implementation.[31] In addition, the last principle, that every international

[27] Dalton, supra note 12 at 6.
[28] *Id.*; Connie de la Vega, Civil Rights During the 1990s: New Treaty Law Could Help Immensely, 65 U. CIN. L. REV. 423, 452 (1997).
[29] *Id.*
[30] See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 15 (May 28, 1951); Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent, 96 A.J.I.L. 531 (2002); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §313,325 (1987).
[31] For an example of a human rights advocate using this type of reservation in local and state advocacy, see the National Law Center on Homelessness and Poverty, Letter to New Orleans Opposing Anti-

human rights agreement should be non-self-executing is very important as it requires each human rights treaty ratified by the U.S. to have corresponding implementing legislation (domestic legislation allowing for implementation of treaty provisions in the U.S.) passed by Congress in order to be enforced in a U.S. court.[32]

b. Customary International Law

It is well established that customary international law is part of the law of the United States.[33] Therefore, lawyers in the United States may consider using international customary law. As stated in Article 38(1) of the Statute of the International Court of Justice, judges can apply "international custom, as evidence of a general practice accepted as law."[34] International customary legal obligations can be binding on States when there is evidence that amounts to a "settled practice" of the international community and a "belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

The meaning of each of the above variables—"general," "practice," and "accepted as law"—has been the subject of debate in the legal community. However, some norms in international law, such as the prohibition on torture, are widely accepted as falling within the scope of customary international law.[35]

U.S. courts have long recognized that customary international law is a part of U.S. law.[36] Moreover, both federal and state courts apply international human rights law, as well as international practices, in deciding domestic cases. Courts use international human rights law as an interpretive guide, to give content to general concepts such as standards of need and due process, and in further support of analyses under domestic law.

Camping Ordinance (April 2008), http://www.nlchp.org/content/pubs/Letter_to_New_Orleans_Opposing_Anti-camping_Ordinance_April_20081.pdf.

[32] See Medellin, supra note 5 . See also Section 2.2 of the Handbook. The only implementing legislation in existence for any of the three human rights treaties ratified by the U.S. is the Torture Victims Protection Act, P.L. 102-256, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR02092: |TOM:/ bss/d102query.html.

[33] *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980).

[34] Statute of the International Court of Justice, art. 38(1)(b), supra note 3. *See also* Restatement (Third) of Foreign Relations Law § 102, supra note 3 ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

[35] For an overview of customary international law, *see* Louid Henkin, Sarah H. Cleveland, Laurence R. Helfer, Gerald L. Neuman & Diane F. Orentlicher, Human Rights 193-97 (2d ed., Thomson Reuters/Foundation Press 2009).

[36] *See*, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice…as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations….").

Here are some examples where U.S. courts that have used human rights law as an interpretive guide:

In *In Re White*, the California Court of Appeals cited the Universal Declaration of Human Rights in support of its conclusion that both the U.S. and California Constitutions protected the right to intrastate and intramunicipal travel, a matter upon which the U.S. Supreme Court had not ruled, as well as the right to interstate travel, which a Supreme Court ruling has protected.[37] At issue in *White* was a challenge to a condition of probation imposed for prostitution; the condition barred the probationer from entering or simply being in certain defined areas of the city. The court stated: "In spite of totalitarian member states not following this democratic concept in practice, the right is even recognized at the international level. See article 13, section 1, Universal Declaration of Human Rights (1948) "Everyone has the right to freedom of movement and residence within the borders of each state." (Expressing more of a hope than existing reality.)"[38]

Courts also apply the directive to interpret domestic law to be consistent with international law by looking to human rights law as a source of content in cases where domestic legal standards are ambiguous or vague. For example, in *Boehm v. Superior Court*, indigent plaintiffs sought to prevent the reduction of general assistance benefits for indigent persons.[39] A state statute provided that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons" and required each county to adopt standards of aid and care. While the statute gave counties discretion to determine the type and amount of benefits, the court held that benefit levels must be sufficient for survival. In making the determination, the court cited the Universal Declaration of Human Rights: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[40]

In *Lareau v. Manson,* the federal district court considered whether alleged overcrowding and other prison conditions violated the due process clause of the U.S. Constitution. As part of its analysis, the court looked to the United Nations Standard Minimum Rules for the Treatment of Prisoners, a nonbinding document. The court reasoned that: "The adoption of the Standard Minimum Rules by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders and its subsequent approval by the Economic and Social Council does not necessarily render them applicable here. However, these actions constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant

[37] 97 Cal. App. 3d 141, 148-49 (Cal. App. 5th Dist. 1979).
[38] *Id.*
[39] 178 Cal. App. 3d 494, 502 (Cal. App. 5th Dist. 1986).
[40] *Id.*, *citing* Universal Declaration of Human Rights, art. 25(1), adopted Dec. 10, 1948; Gen. Assm. Res. 217A(111), U.N. Doc. A/810 (1948).

to the "canons of decency and fairness which express the notions of justice" embodied in the Due Process Clause."[41]

The court also cited the International Covenant on Civil and Political Rights, which had not then been ratified by the U.S. Nevertheless, the court considered it to have been so widely adopted that it constituted customary international law.[42] This is significant because the analysis supports the use in litigation of the International Covenant on Economic, Social and Cultural Rights, the treaty that contains the most detailed protection of the right to housing (and other economic rights) but has not yet been ratified by the U.S.

Even without a claim for customary international law, some courts have considered the practices of other countries as informative. For example, in *Washington v. Glucksberg*, the Supreme Court cited and relied on the practices of other "western democracies" when in determining the constitutionality of a state law banning assisted suicide. [43]

Recently, in *Roper v. Simmons*, the Supreme Court cited the practices of other nations, as well as international treaties, in its decision that abolished the death penalty for juveniles.[44] The Court reasoned: "It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue…Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."[45]

Further, in 2011, the Supreme Court in *Graham v. Florida,* determined whether a sentence of life imprisonment without parole for a juvenile offender constituted cruel and unusual punishment. The Court considered the practices of other nations:

> "A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice…. Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile non-homicide offenders…The State's amici stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus….These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for non-

[41] *Lareau v. Manson,* 507 F. Supp. 1177, 1189 (D. Conn. 1980).
[42] *Id.*
[43] *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997).
[44] *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005).
[45] *Id*.

> homicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions… The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it."[46]

c. General Principles & Guidelines

General principles, guidelines and draft international agreements provide secondary evidence of human rights law.[47] These documents can provide persuasive language, a distilled explanation and even authority for human rights arguments, just as a U.S. reinstatement and model code can. Moreover, these agreements can provide moral and political authority, and may be evidence of customary international law.[48]

V. INTERNATIONAL HUMAN RIGHTS AND AMERICAN LAWYERS

The third preambular paragraph of the Universal Declaration of Human Rights states that "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." This means that, in order to enable the human person fully to enjoy his or her rights, these rights must be effectively protected by domestic legal systems. The principle of the rule of law can thus also be described as an overarching principle in the field of human rights protection because, where it does not exist, respect for human rights becomes illusory. It is interesting in this respect to note that, according to article 3 of the Statute of the Council of Europe, "every Member State ... must accept the principle of the rule of law".

Consequently, judges, prosecutors and lawyers have a crucial role to fulfill in ensuring that human rights are effectively implemented at the domestic level. This responsibility requires the members of these legal professions to familiarize themselves adequately with both national and international human rights law. Whilst their access to domestic legal sources should pose no major problem, the situation is more complex in international human rights research, where there are several legal sources and influential unwritten norms. Descriptions of these legal sources that profoundly shape international human rights law follow below.

VI. APPLICATION: ENFORCING HUMAN RIGHTS IN DOMESTIC LITIGATION

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[46] *Graham v. Florida*, 560 U.S. 48, 81 (U.S. 2010).
[47] Restatement (Third) of Foreign Relations Law, §§102(4), Comment l. ("General principles are a secondary source of international law."), supra note 3.
[48] Sinai Deutch, *Are Consumer Rights Human Rights?*, 32 OSGOODE HALL L.J. 537, 564 (1994).

a. The Nexus between state law and international human rights

National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.
- Justice Ruth Bader Ginsburg

Generally, international law is as binding on state courts as it is on federal courts. Whether international law is created through ratified treaties or is customary law created through judicial opinion and nation-state practice across the globe international law is part of federal law.[49]

The Supremacy Clause of the U.S. Constitution establishes that "all treaties made, or which shall be made, under the authority of the U.S., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[50] International law therefore applies to the states through the Supremacy Clause. In fact, some state constitutions include explicit provisions to this effect. Other states adopt the U.S. Constitution and therefore the Supremacy Clause. Human rights obligations in particular bind every official and every level of government. As the U.S. State Department website notes, "human rights obligations must be "implemented at the appropriate government level – federal, state or local."[51]

Other possibly relevant U.S. legislation related to treaty implementation includes the International Religious Freedom Act, passed by Congress in 1998, which cites the UDHR and the ICCPR and states, "It shall be the policy of the U.S., as follows: (1) To condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion."[52]

In addition, President Bill Clinton issued an executive order in 1998 ordering U.S. implementation of international human rights treaties "to which it is a party, including the ICCPR, the CAT, and the CERD" which has been codified at 5 USCS § 601.[53]

Even if it proves difficult to enforce human rights treaties directly in U.S. courts, many of the principles in the human rights treaties have developed into customary international law. As

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[49] 44B Am. Jur. 2d International Law § 12 (2008); Human Rights Institute at Columbia Law School, National Economic Social Rights Initiative, Martha F. Davis a Professor of Law at Northeastern University School of Law, *Human Rights, Social Justice and State Law: A Manual for Creative Lawyering* (Spring 2008), http://www.northeastern.edu/law/pdfs/academics/phrge-manual08.pdf;
[50] Article VI, Clause 2 of the United States Constitution.
[51] http://www.state.gov/s/l/38637.htm
[52] International Religious Freedom Act of 1998, P.L. 105-292, http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02431:|TOM:/ bss/d105query.html|.
[53] Exec. Order No. 13107, supra note 5.

discussed above, customary international law does not require implementing legislation to be binding in the U.S. and is binding on U.S. courts.[54]

Also, it should be noted that human rights obligations are binding on governments, not on private actors. Therefore, legal aid attorneys must consider whether the government may be brought into the case as a party or a third party, or whether to challenge the validity of a statute or regulations capable of being enforced by government officials.

b. Cases Citing Human Rights:

International law is being cited more frequently in U.S. jurisprudence.

For example, in *Lawrence v. Texas*, the Court's explanation of its decision to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld criminal sodomy laws, cited to a 1963 report from the British Parliament recommending the repeal of laws that punish homosexual conduct, as well as a case from the European Court of Human Rights that held that proscriptions against consensual homosexual conduct in Northern Ireland were invalid under the European Convention on Human Rights.[55] The Court held: "[T]o the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[56] Further, "[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[57]

In *Grutter v. Bollinger,* Justice Ginsburg noted that the Court's observation that race-conscious programs "must have a logical end point" is in accordance with the international understanding of affirmative action, citing to CERD, art. 2(2) and CEDAW, art 4(1)).[58]

In *Atkins v. Virgina*, the Court recognized that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" in holding the practice to be unconstitutional.[59]

As Justice Kennedy pointed out in *Roper v. Simmons,*[60]

> [t]he opinion of the world community, while not controlling . . . does provide respected and significant confirmation for our own conclusions. . . . It does not lessen our fidelity

[54] Restatement (Third) of Foreign Relations Law, § 102, *supra*.
[55] *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that criminal prohibition on homosexual sexual activity was unconstitutional).
[56] *Id.*
[57] *Id.* at 572.
[58] *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).
[59] *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).
[60] *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005), discussed supra.

to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

i. Welfare Benefits

In *Moore v. Ganim*, 233 Conn. 557 (Conn. 1995), individuals eligible for general assistance benefits brought an unsuccessful action against city and city officials, challenging the constitutionality of a statute terminating general assistance benefits after nine months. In the concurrence, Justice Ellen Peters relied on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration on Human Rights (UDHR) to differ with the majority and interpret the Connecticut constitution to require a minimal social welfare safety net for the poor. She looked to the UDHR and the ICESCR, among other sources, to support her contention that "These contemporary economic circumstances and contemporary conceptions of democracy already have led the international community to incorporate a right to subsistence into the international law of human rights. For example, article 25 (1) of the Universal Declaration of Human Rights declares that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Although the United States is not a party to the ICESCR, she noted that it represented "wide international agreement on at least the hortatory goals" contained within.

- In *Boehm v. Superior Court*, 178 Cal.App.3d 494 (Cal.App. 1986), the California Court of Appeals cited the UDHR to support its interpretation of California's welfare statute. In the decision, the court relied heavily on international human rights law for guidance. Specifically, the Court of Appeals held that the statute required the county to provide for minimum subsistence and relied on the UDHR to determine what that entailed. The court concluded that "it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation, and medical care." The court added that "to leave recipients without minimum medical assistance is inhumane and shocking to the conscience."

i. Health Care

- In *American National Life Insurance Company v. Fair Employment and Housing Commission*, the California Supreme court looked to the UDHR for guidance in answering the question of whether high blood pressure could be a "physical handicap" under the California Fair Employment Practice Act.[61]

[61] 651 P.2d 1151, 1154 n.4 (Cal. 1982).

ii. Housing

Unlike the constitutions of many other countries, such as South Africa, France, and Belgium, the U.S. Constitution does not include an explicit right to housing, and the Supreme Court has been unwilling to recognize an implied one. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding there is "no constitutional guarantee of access to dwellings of a particular quality").[62] The most significant treaty protecting the right to housing is the International Covenant on Economic, Social and Cultural Rights. As a signatory, the United States is obliged under the Vienna Convention to "refrain from acts which would defeat the object and purpose of a treaty."[63]

For example, the International Covenant on Civil and Political Rights protects the "right to liberty of movement and the freedom to choose [one's] residence," both of which are relevant to challenges to laws criminalizing homelessness.

The covenant protects "equal protection of the law" and prohibits discrimination "on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This is also relevant to challenges to laws criminalizing homelessness and their unequal enforcement; such laws are often facially neutral but discriminatorily applied to homeless people based on their status— which could be considered either a property status or an "other" status of homelessness.

- *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*, 177 P.3d 884 (2008), *reversed and remanded by Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). Plaintiffs sought an injunction against defendants, arguing that sales of ceded lands would constitute a breach of trust the State owed to native Hawaiians who had claims to those lands under the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Public Law No. 103-150, 107 Stat. 1510 (1993). On appeal, the court held that plaintiffs were entitled to an injunction prohibiting the sale or transfer of ceded lands because the Resolution and

[62] *Lindsey v. Normet*, a case often cited for the proposition that there is no right to housing under the U.S. Constitution, addressed whether three provisions of the Oregon Forcible Entry and Wrongful Detainer (FED) Statute violated either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. In response to the homeless plaintiffs' claim that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are fundamental interests for the poor and that a higher level of constitutional scrutiny than minimum rationality was therefore mandated, Justice White stated that, "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions."

[63] Vienna Convention on the law of Treaties, art. 18, 1155, U.N.T.S. 331, entered into force Jan. 27, 1980.

related state legislation, including 1993 Haw. Sess. Laws 354, 359, gave rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically the ceded lands, until such time as the unrelinquished claims of the native Hawaiians had been resolved. Without an injunction, any ceded lands alienated from the public lands trust would be lost and would not be available for the future reconciliation efforts contemplated by the Resolution. The Court recognized the support that international law provided the plaintiff's claims and declined to "engage in a discussion of these issues inasmuch as our holding is grounded in Hawai'i and federal law."

iii. Prisoners' Rights

- In *Sterling v. Cupp*, 290 Or. 611 (1981), the Oregon Supreme Court looked to international legal standards regarding the treatment of prisoners to determine the standard of treatment required by the state constitution.

- In *Ransom v. Aguirre*, a solid-food hunger striking inmate brought claims under 42 U.S.C. § 1983, alleging human rights violations and torture pursuant to the ICCPR against several prison officials whom he alleged withheld his daily state issue of non-solid food items in attempts to break the strike.[64] The Court held that the plaintiff failed to state a claim under Section 1983 because the ICCPR "does not constitute rights, privileges, or immunities secured by federal law." Id.

- In *Bardales v. Duarte*, a California court of appeals held that in custody determination cases, courts have the "power to dismiss for delayed prosecution" under the Hague Convention. 181 Cal. App. 4th 1262, 1271 (Cal. Ct. App. 2010). Additionally, the court held that the Hague Convention is not violated when a court dismisses for delayed prosecution, and then proceeds to make custody determinations. *Id.*

iv. Education

- In *Commonwealth v. Sadler*, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979), a trial court reviewed the conviction of a 15-year-old youth to determine, inter alia, whether the state had violated the Pennsylvania constitution by failing to provide the defendant schooling while in custody because he was certified to be tried in adult court. The court noted that the right to education is established under the UDHR and is fundamental to American democracy and found that a "boy in custody, regardless of his status under the criminal law, is still a child and entitled to the education rights of all children."

[64] No. 1:12cv01343 AWI DLB PC, 2013 WL 1338811, at 6 (E.D. Cal. Apr. 3, 2013).

- In *C & C Construction, Inc. v. Sacramento Municipal Utility District*, the district court considered CERD's definition of discrimination after the plaintiff challenged Sacramento's affirmative action program on state constitutional grounds. 18 Cal. Rptr. 3d 715, 725 (Cal. Ct. App. 2004). While the case was pending on appeal, the California Government enacted Code 8315, which amended the definition of discrimination to accord with the CERD definition, which recognizes the necessity of measures like affirmative action to achieve equal protection and enjoyment of fundamental liberties. *Id.* at 725–26 (citing CERD). The court ultimately gave no weight to CERD's definition, agreeing with the plaintiff, and holding that the affirmative action program was violative of the plain meaning of "anti-discrimination." *Id*. at 739. The Third District Court of Appeal declined to revisit the conflict between the section 8315 definition of discrimination and that of the California constitution in *Connerly v. Schwarzenegger*. 53 Cal. Rptr. 3d 203, 213-14 (Cal. Ct. App. 2007).

- However, in *Avila v. Berkeley Unified School Dist.*, the court upheld a race-based school assignment program which desegregated the school district. No. RG03-110397, 2004 WL 793295, at 5 (Cal. Super. Ct. Alameda County Apr. 6, 2004). The court reasoned that striking the plan would be inconsistent with the California Code section 8315 definition of race, which is the same definition as that in CERD, and which endorses the use of race conscious programs. *Id.*

v. Immigration

- In *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002) (rev'd on other grounds), a federal judge in the Eastern District of New York evaluated the retroactivity of the federal immigration statute's mandatory deportation requirement in light of treaty obligations and customary international law standards that recognize the right to family integrity and the best interest of the child standard.

- In *In re White*, California's Fifth District Court of Appeal held that the state constitution protected freedom of movement, and cited to the UDHR in support of its decision.[65]

- In *U.S. v. Parada-Baños*, the district court considered whether a deportee was eligible for deferral of removal under the Convention Against Torture ("CAT") when he feared that he would be killed by gangs if he returned to El Salvador. No. CR–12–0635 EMC, 2013 WL 3187404 (N.D. Cal. June 21, 2013). Citing prior decisions of U.S courts which addressed similar defendants' claims, the court found that the defendant's claim to deferral under CAT was not plausible because high prevalence of gang violence in the defendant's home country was not alone sufficient to establish government acquiescence to torture. *Id.* at 11-15.

[65] 158 Cal. Rptr. 562, 567 n.4 (Cal. Ct. App. 1979).

- *Maria v. McElroy***,** 68 F.Supp.2d 206 (EDNY 1999). The court held that retroactive application of a law prohibiting discretionary relief from deportation for individuals convicted of "aggravated felonies" may violate customary international law and the ICCPR's article 17 prohibition against arbitrary interference with family life. Explaining that article 23's obligation to protect the family implicitly included "the right of family members to live together," the court added that deporting an individual from a country where he has close ties might also violate article 7's prohibition against cruel, inhuman or degrading treatment.

- *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997). The Board of Immigration Appeals found a Chinese man eligible for asylum based on the fact that his wife had been subjected to forced sterilization in China. A concurring opinion emphasized the fundamental nature of the rights to privacy and to have a family, under both U.S. and international law, and that interference with these rights could constitute persecution under refugee law.

- *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003). This case involved the deportation of a convicted felon whose young daughter was a U.S. citizen. The district court applied international human rights law and the appellate court summarized its reasoning: "In reaching this outcome, the district court concluded that a reading of § 212(h) that precluded relief to Beharry because of his status as an aggravated felon would contravene American obligations under international law. *Beharry*, 183 F. Supp. 2d at 603-05. As the applicable sources of international law, the court discussed the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Universal Declaration of Human Rights, and customary international law. Id. at 595-601. The court found that these sources of law might be violated by deporting Beharry without considering the impact such deportation would have on Beharry's daughter, a United States citizen; that violating international law could present a constitutional problem under the Supremacy Clause, see U.S. Const., art. VI, § 2; and that § 212(h) "should be construed in conformity with international law to avoid a constitutional issue if 'fairly possible'"[66]

vi. Asylum

The United States' obligation to persons seeking refuge from countries in which they would likely be persecuted derives not only from domestic law, but from international covenants that pre-date the principal domestic statute regulating political asylum, the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, *codified at, inter alia*, 8 U.S.C. §§ 1101(a)(42) and 1158(b)(1).

[66] *Beharry*, 183 F. Supp. 2d at 603-05 (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 76 L. Ed. 598, 52 S. Ct. 285 (1932)).

Convention Relating to the Status of Refugees, 198 U.N.T.S. 150, 176 (1951)[67]; Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 (1968).[68]

In enacting the Refugee Act of 1980 "Congress left no ambiguity about its intention to conform United States domestic law to the Protocol." *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd on other grounds*, 467 U.S. 407, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984).[69]

International standards on the adjudication of asylum claims are well established. In 1951, the United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR).[70] The UNHCR has since served as the principal international body charged with responsibility—*inter alia*—for promoting fundamental fairness in asylum adjudications.

Federal courts, as well as the Board of Immigration Appeals, have acknowledged the UNHCR's authority in interpreting the Convention and Protocol and defining signatories' obligations thereunder. *E.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 439, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987); *Matter of Rodriquez-Palma*, 17 I. & N. Dec. 465, 468 (BIA 1980).

Not surprisingly, the UNHCR has stressed Protocol signatories' obligation to ground asylum adjudications on reliable evidence: Clearly, recourse to information sources in the country of origin can, in appropriate circumstances, be a useful means of helping to establish the facts of a claim for refugee status. … *The reliability of the information gathered is another critical issue* and may depend *inter alia* upon the question and how it is asked, *who the source of information is and how he or she perceives the questioner and the purpose of the question, why the source chooses to respond and whether he or she may be under any pressure from any other quarter*.[71]

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[67] The United States is not signatory to the 1951 U.N. Convention itself, but rather to the 1967 Protocol. The Protocol, however, binds all signatories to comply with Articles 2 through 34 of the Convention. *See generally Ming v. Marks*, 505 F.2d 1170, 1171 n.1 (2d Cir. 1974), *cert. denied*, 421 U.S. 911, 43 L. Ed. 2d 776, 95 S. Ct. 1564 (1975) (history of United States' accession to Protocol and relationship of Protocol to the Convention).

[68] Chapter III, Art. 33, of the Convention provides:

> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. …

[69] The Supreme Court has noted that the Protocol is not self-executing. *Stevic*, *supra*, 467 U.S. at 426, n.22. However, the Court has also observed that "the practice of treaty signatories counts as evidence of the treaties' proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369, 109 S. Ct. 1183, 103 L. Ed. 2d 388 (1989). Although not conclusive, international standards on implementation of the Convention and Protocol, therefore, guide construction of evidentiary standards in adjudications pursuant to the Refugee Act of 1980 as well.

[70] The statute creating the UNHCR is annexed to Resolution 428(V), adopted by the General Assembly on December 14, 1950.

[71] UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation* (February 2004), *available at* www.refworld.org/docid/403b2522a.html (accessed March 4, 2014), at ¶ 37

- *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). Here, the petitioner -an alien, a native and citizen of Somalia, sought to reopen her asylum claims on the basis of her first attorney's failure to present evidence that she suffered this grave harm in the past. The court concluded that the attorney's failure to raise the issue of the genital mutilation to which the alien had been subjected as a child constituted ineffective assistance of counsel sufficient to warrant reopening. The range of procedures collectively known as female genital mutilation rose to the level of persecution within the meaning of asylum law. Because female genital mutilation was a permanent and continuing act of persecution, the presumption of well founded fear could not be rebutted. Thus, the alien was likely eligible for asylum and she was likely entitled to withholding of removal. The court considered the Convention Against Torture when analyzing her claim for protection: "Mohamed's claim for protection under the Convention Against Torture is also plausible… Moreover, as in the case of persecution, Mohamed may be entitled to protection under CAT on the ground that genital mutilation is a permanent and continuing harm. That is, to the extent that Mohamed's past genital mutilation constitutes torture, her ongoing experience may be enough to establish that she is automatically entitled, without more, to protection under CAT. Cf. Qu, 2005 U.S. App. LEXIS 3803 at *1 (holding petitioner automatically entitled to withholding on the basis of continuing persecution). Therefore, we hold that on remand the agency must consider Mohamed's CAT claim, along with her asylum and withholding claims."

- *Rranci v. Attorney General*, 540 F.3d 165 (3rd Cir. 2008). The court determined that the CATOC may prohibit the removal of a witness to a convention crime when he faced a threat of retaliation from members of the crime ring against whom he testified. The lack of implementing legislation for the convention may be irrelevant since the U.S. Executive Branch and Senate had stated that U.S. law was already in full compliance without such legislation.

vii. Disability

- *In the Matter of the Guardianship of Dameris, L.*, 38 Misc.3d 570, 576 (2012). This case involved a mother's petition to gain guardianship of her 29-year old mentally disabled daughter. The situation was complex because the daughter was expecting a child and her husband, who also had a mental disability, contested the mother's attempt to gain guardianship. The court initially assigned the mother and the husband as co-custodians of the daughter. Four years later, after significant improvements in the daughter's decision-making as well as in the relationship between the mother and the husband, the court terminated the 17-A guardianship of the daughter. The court found that: "This use of *supported* decision making, rather than a guardian's *substituted* decision making, is

(emphasis added); *see also, id*. at ¶ 24 ("[]UNHCR has used every opportunity to stress its concern not just with the collection of information, but also with its reliability and subsequent use. … Failures in this area only spur appeals, drive-up costs and generally undermine confidence in the asylum system.").

also consistent with international human rights, most particularly Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)." The Court also noted that while the CRPD does not directly affect New York's guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision making, is entitled to "persuasive weight" in interpreting laws and constitutional protections.

- *In re Mark C.H.*, 906 N.Y.S.2d 419 (N.Y. Sur. 2010), finding that granting guardianships without regular review by an independent body undermines the object and purpose of the Convention on the Rights of Persons with Disabilities, specifically article 12 which ensures equal protection before the law for persons with disabilities.

- *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034 (C.D.Cal. 2010), finding that aliens in removal proceedings who are mentally incompetent must be provided reasonable accommodation that would provide for adequate representation. Representation that met the following five requirements would be considered adequate: (1) be obligated to provide zealous representation; (2) be subject to sanction by the EOIR for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials; and (5) maintain confidentiality of information.

- *Am. Nat'l Life Ins. Co. v. Fair Employment & Housing Comm.*, 32 Cal. 3d 603 (Cal. 1982). The court cited Article 2 of the Universal Declaration for the principle of non-discrimination against the physically handicapped in deciding an employment discrimination claim.

viii. Civil Cases

- In the 1952 case *Sei Fujii v. State*, the California Supreme Court considered what effect the non-discrimination provisions of the U.N. Charter had on the California Alien Land Law.[72] Although the court noted that the charter deserved "respectful consideration by the courts," it held that it was not self-executing, and that California was not bound to abide by its terms.[73]

- In *Santa Barbara v. Adamson*, the court cited the UDHR in reviewing a California privacy law. 610 P.2d 436, 440 n.2 (Cal. 1980). In *Conservatorship of Hofferber*, the court cited U.N. hearings to support its holding that the state has "compelling interests in

[72] *See*, *e.g.*, *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952); *In re White*, 158 Cal. Rptr. 562, 567 n.4 (Cal. Ct. App. 1979); *Am. Nat'l Life Ins. Co. v. Fair Emp't and Hous. Comm'n*, 651 P.2d 1151, 1154 n.4 (Cal. 1982); *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.,* 18 Cal. Rptr. 3d 715, 725 (Cal. Ct. App. 2004).
[73] *Id.* at 622.

public safety and in humane treatment of the mentally disturbed." 616 P.2d 836, 844 n.9 (Cal. 1980).

- In *Doe v. Nestle, S.A.*, foreign plaintiffs who had been subject to forced labor on cocoa fields in Cote d'Ivoire brought a class action against several corporations under the Alien Tort Statute ("ATS"). 748 F. Supp. 2d 1057 (C. D. Cal. 2010). After finding that the plaintiffs had stated a claim and that defendants' conduct violated the International Labour Organization Forced Labor Convention of 1930 definition of forced labor, the district court considered whether corporations could be held liable under ATS for violations of international law. *Id.* at 1074. The Court stated that under the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, it must rely on international rather than domestic law. *Id.* at 1125 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)). After citing to the Geneva Convention, the Genocide Convention, the International Convention on Civil Liability for Oil Pollution Damage, the Vienna Convention on Civil Liability for Nuclear Damage, the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, the UDHR, the 1957 Treaty of Rome, the United Nations General Assembly Resolutions, and the 1998 Rome Statute of the International Criminal Court, the Court found that corporations could not be held liable for violations of international law, departing from the decisions of two leading district courts which had considered the question. Doe, 748 F. Supp. 2d at 1137-1145.[74]

- *Batista v. Batista*, 1992 Conn.Super. LEXIS 1808, *18 (Conn. Super. 1992). In a custody case, the superior court expressed "great concern and embarrassment" that the United States had not signed the CRC. The court cited Article 12 of the CRC to give "due weight" to the child's fear of her mother and award custody to the father.

- *In re Julie Anne*, 121 Ohio Misc. 2d 20, 40-47 (Ohio Ct. Common Pleas. 2002). The court relied on the CRC to prohibit a child's mother from smoking tobacco in her presence. The court further noted that the convention was "the most universally accepted human rights document in the history of the world" and "created obligations for signatory governments."

- *Bixby v. Pierno*, 4 Cal. 3d 130 (Cal. 1971). The court cited the UDHR as evidence that the right to practice one's trade is a fundamental right and any administrative agency actions that impinge on that right therefore deserve heightened court scrutiny.

- *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002). The court used international law to support the right to family integrity protected by 14th Amendment due process

[74] *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (finding that corporations may be held liable for violating international law).

rights (based on UDHR, ICCPR, CRC) in a decision granting a preliminary injunction against child welfare policy of removing children in instances where mothers were victims of domestic violence.

ix. Privacy

- In *In re Marriage Cases*, the California Supreme Court cited the ICCPR, the European Convention, the American Convention, and the constitutions of foreign countries in holding that marriage is a fundamental individual right that is protected by the privacy and due process provisions of the California state constitution. 183 P.3d 384, 426 (Cal. 2008).

- *Santa Barbara v. Adamson*, 27 Cal. 3d 123 (Cal. 1980). In striking down an ordinance prohibiting five unrelated persons from residing together in a "family residence zone" the California Supreme Court cited Article 12 of the Universal Declaration's protection of the right to privacy.

c. Sampling of California Statutes citing or relevant to human rights law:

- Sacramento, California, Resolution No. 2009-182 (2009). This resolution, entitled "Approval of Funding and Strategy to Improve and Expand Homeless Program Options (Strategy)" was adopted by the city of Sacramento in 2009 to address the rise in homelessness in the area and to give effect to the city's 2006 Ten-Year Plan to End Chronic Homelessness. Fact "A" in the "Background" section of the Resolution states, "Housing is a basic human right."

- Cal. Health & Safety Code § 1599 (2013). Section 1599 sets out the legislative intent behind the Skilled Nursing and Intermediate Care Facility Patient's Bill of Rights, which grants basic rights to adequate care to all medical patients in the state. The legislature aimed "to expressly set forth fundamental human rights which all patients shall be entitled to in a skilled nursing, intermediate care facility, or hospice facility . . . and to ensure that patients in such facilities are advised of their fundamental rights and the obligations of the facility."

- Cal. Water Code § 106.3 (2013). The California human right to water law states:

  (a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.
  (b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.

- Cal. Health & Safety Code §§ 104662 (2012). The California Healthy Food Financing Initiative calls for the legislature to take action needed to promote food access in the state, and establishes the California Healthy Food Financing Initiative Fund to expand access to healthy foods in "underserved" communities. The enacting bill's legislative findings state, "Access to healthy food items is a basic human right."

- The Uniform Child Custody Jurisdiction and Enforcement Act requires that California's courts must enforce custody determinations made in foreign countries and treat the foreign country as if it were a U.S. state, except if the child custody law of the foreign country violates fundamental principles of human rights. *See* Cal. Fam. Code § 3405 (a)-(c) (2005).

VII. CONCLUSION

For an attorney to utilize international human rights law, they must be creative and reach into unfamiliar legal doctrine to support their case. Today, human rights law is increasingly being incorporated into our legal system. Therefore, if attorneys acquaint themselves with this field they will only be at an advantage as they expand their available tools in the courtroom.

VIII. How Does an Attorney Research and Use International Human Rights?

When first starting out, researching international human rights law can be a confusing array of treaties and documents. The materials (for the most part) are not set out in a coherent, well-organized fashion. The sources of information range from recognized treaty law to more ephemeral materials from non-governmental organizations. There are a few things to keep in mind when doing human rights research: the interdisciplinary nature of the topic; the complexity of the topic and the materials; and the challenge of locating and accessing materials issued by a variety of organizations. The researcher needs to be resourceful, creative, and patient.