Human Rights in the U.S.

A Handbook for Legal Aid Attorneys

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW

LOCAL HUMAN RIGHTS LAWYERING PROJECT

ACKNOWLEDGMENTS

The Handbook was prepared by the Center for Human Rights and Humanitarian Law at American University Washington College of Law (the "Center") through its Local Human Rights Lawyering Project. We are especially grateful to the National Law Center on Homelessness and Poverty, the Human Rights Clinic and the Human Rights Institute at Columbia Law School, as well as Professor Carrie Bettinger-Lopez at the University of Miami School of Law, and Professor Martha Davis at Northeastern School of Law, for granting us permission to adapt their previously published works for sections of this Handbook. Lauren E. Bartlett, Project Director of the Local Human Rights Lawyering Project, developed the concept for the Handbook, adapted the previously published works mentioned above, compiled Sections 1, 2, 3, 4, 5.3, 5.4, 5.5, 5.9, 5.10, 5.12 and 5.13 of the Handbook, and supervised the additional research and editing of the Handbook. Other contributors to the research and drafting of the Handbook include: Lynsay Gott, Acting Director of Human Rights USA, Sections 5.1, 5.7. and 5.8; Sarah Paoletti, Director of the Transnational Legal Clinic at University of Pennsylvania School of Law, Section 5.2; Erik Pitchal, former advisory board member for the Project, Section 5.6.; Kevin Cremin, Director of Litigation for Disability and Aging Rights for MFY Legal Services, Inc., Section 5.10; Pamela Brown, Director of the Bi-National Family Violence Project of Texas RioGrande Legal Aid, Inc., Section 5.11; Professor Martha Davis at Northeastern School of Law, Risa Kaufman, Executive Director of the Human Rights Clinic at Columbia Law School, and John Pollock, Coordinator, National Coalition for a Civil Right to Counsel, Section 5.13. Rachel Schulman and Jackie Zamarrippa, members of the Center's Student Advisory Board, as well as Ilays Aden, Mary Kim, Samir Aguirre, Rob Dordan, Brittany West, and Aadika Singh, also contributed to research and drafting of the Handbook. Center staff contributed to the Handbook's design, production and editing, including: Melissa C. del Aguila, Assistant Director; Whitney Hayes, former Program Coordinator; Marc Rambeau, former Communications Fellow; Cecili Thompson Williams, former Assistant Director; and Erica Nordberg, former Dean's Fellow. Members of the Local Human Rights Lawyering Project's Advisory Board, as well as Reena Shah, Human Rights Project Director at Maryland Legal Aid, and Nelson Mock, former Human Rights Coordinator at Texas RioGrande Legal Aid, provided valuable feedback, guidance and edits for the Handbook. This Handbook was generously supported by the Ford Foundation.

ACRONYMS

ACHR	American Convention on Human Rights
ADRAM	American Declaration on the Rights and Duties of Man
AFL-CIO	Convention on the American Federation of Labor and the Congress of Industrial Organizations
CAT	Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
CATOC	Convention Against Transnational Organized Crime
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
COHRE	Centre on Housing Rights & Evictions
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CTM	Confederation of Mexican Workers
DEVAW	Declaration on the Elimination of Violence Against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEOC	Equal Employment Opportunity Commission
FLSA	Fair Labor Standards Act
GCP	UN Guidelines for Consumer Protection
HUD	US Department of Housing and Urban Development
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICCTC	UN Draft International Code of Conduct on Transnational Corporations
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRSR	International Convention Relating to the Status of Refugees
ILO	International Labor Organization

ACRONYMS

NGO	Non-governmental Organization
OAS	Organization of American State
OSHA	Occupational Safety and Health Administration
TVPA	Torture Victims Protection Act
UDHR	Universal Declaration on Human Rights
UGT	General Worker of Spain
UNDOC	UN Office on Drugs and Crime
UPR	Universal Periodic Review

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1 INTRODUCTION

Legal aid attorneys[1] fight every day to secure basic rights for the most vulnerable persons in the U.S.—among them, the poor, racial minorities, young people, the elderly and immigrants. Yet, U.S. law more often than not falls short of providing a "floor" of minimum protections for these marginalized individuals. More expansive guarantees are found under international human rights law and some advocates in the U.S., including legal services attorneys, have begun successfully incorporating human rights norms, language and strategies into their domestic work to help advocate for increased protections.

The Center for Human Rights and Humanitarian Law developed the **Local Human Rights Lawyering Project** to provide training, coaching and mentorship for legal aid attorneys in the U.S. to integrate the human rights framework into their daily work. The Center began working with Maryland Legal Aid and Texas RioGrande Legal Aid as project partners in 2012, but has since expanded and now works with legal aid attorneys across the U.S.

This Handbook is just a starting place. Moreover, it is a working document. We hope that our Project Partners, and other legal aid attorneys, will provide edits to the Handbook, add resources, useful cases, success stories, and sample pleadings. We hope to continue to add additional legal issue areas to the Handbook, as human rights arguments are made and successes are achieved, and to share strategies and arguments that resonate with judges and policymakers across the U.S. Please email **bartlett@wcl.american.edu** with comments, edits, and sample pleadings to add to the Handbook.

1.1 ABOUT THE CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW

For nearly a decade, the **Center for Human Rights & Humanitarian Law** (the "Center") has been working on various initiatives to integrate human rights into the work of lawyers and activists in the United States. The Center holds an ongoing series of workshops, conferences and trainings to build capacity with practitioners in the United States around the existence, application and use of international human rights norms in the United States. This effort, which has focused on trainings around using the UN Human Rights Treaty Bodies, writing "shadow reports," using the Inter-American Commission on Human Rights and more, is aimed at practitioners in the United States who engage in domestic social justice work. It seeks to enhance their understanding of international law and the ways that it can be applied in their work in the United States, seeking to bridge the disconnect between the United States' promotion of human rights abroad and its adherence and appreciation for international law and standards as they apply within the United States. The Local Human Rights Lawyering Project is the result of several years of research and needs assessments to consider the most effective ways to reach out to legal services organizations and build a replicable model for integration of human rights in the local lawyering context.

The Center was established in 1990 to provide scholarship and support for human rights initiatives around the world. The Center works with students, academics and practitioners to enhance the understanding and implementation of human rights and humanitarian law domestically, regionally and internationally. The Center explores emerging intersections in the law and seeks to create new tools and strategies for creative advancement of international norms.

1.2 INITIAL PROJECT PARTNERS

Maryland Legal Aid Bureau, Inc. (MDLAB) is a private, non-profit, multi-funded law firm providing free legal services to low-income people, children and the elderly since 1911. MDLAB's mission is to provide high-quality legal services to Maryland's poor through a mix of services and to bring about the changes poor people want in the

[1] For the purposes of this Project, the term "Legal Aid attorney" refers to lawyers that work for nonprofit organizations that provide free advice and legal representation to low income people in the U.S., which includes organizations that are funded by the Legal Services Corporation ("LSC"), as well as those that receive no funding from LSC.

systems that affect them. MDLAB serves Baltimore City and Maryland's 23 counties from 13 office locations. MDLAB's clients are provided necessary legal assistance to gain protection from domestic violence, retain custody of children, fight unlawful evictions, prevent foreclosures on homes, secure educational services, and obtain needed medical and disability benefits, unemployment insurance, and other forms of temporary financial assistance. Special statewide programs provide representation and assistance for children who are victims of abuse and neglect, the elderly, nursing home and assisted living residents, migrant and seasonal farmworkers, tenants working to preserve affordable housing, and home owners facing foreclosure due to predatory lending. In 2010, MDLAB adopted a human rights framework to guide its mission of finding legal remedies for the problems that afflict the poor—and to advance the recognition and protection of basic human rights.

Texas RioGrande Legal Aid, Inc. (TRLA) is a non-profit organization that provides free legal services to low-income residents in sixty-eight counties of Southwest Texas, and represents migrant and seasonal farm workers throughout the state of Texas and six southern states: Kentucky, Tennessee, Alabama, Mississippi, Louisiana and Arkansas. In addition, TRLA operates public defender programs in several Southwest Texas counties, representing the poor who are accused of felonies, misdemeanors and juvenile crimes. TRLA is the third largest legal services provider in the nation and the largest in the state of Texas. TRLA serves approximately 25,000 clients each year. However, over 2.6 million residents of Southwest Texas are considered eligible for TRLA services, a ratio of almost 21,000 potential clients per lawyer. Moreover, there are more than three dozen practice areas in which TRLA attorneys specialize, including colonias and real estate, civil rights, environmental justice, labor and employment, public benefits, disaster assistance, federally subsidized housing, foreclosure, bankruptcy, wills and estates, border issues, human trafficking, and international child abduction.

1.3 LOCAL HUMAN RIGHTS LAWYERING WORKING GROUP & LISTSERV

The Bringing Human Rights Home Lawyers' Network, in conjunction with the Local Human Rights Lawyering Project, developed a working group and listserv specifically for legal aid attorneys to share human rights case strategies, potential arguments, success stories and information about upcoming trainings and other human rights opportunities that may be of interest to legal services attorneys.

This Local Human Rights Lawyering working group is dedicated to the growing number of U.S. legal services attorneys who aim to integrate human rights into their daily work. In the past several years, many legal services attorneys have joined the Bringing Human Rights Home Lawyers' Network and attended our trainings. In addition, many legal services attorneys have participated in trainings provided by the Project and in the last year have begun using the *Human Rights in the U.S. Handbook for Legal Aid Attorneys*. The newly formed Local Human Rights Lawyering working group aims to bring together and further support this growing number of legal services attorneys interested in using human rights law in their work here in the U.S.

If you would like to join the Working Group listserv, please send an email to Greta Moseson at **greta.moseson@law.columbia.edu**.

1.4 HANDBOOK OVERVIEW AND LAYOUT

This Handbook is just a starting place and we hope that U.S. Legal Aid attorneys will add to it as they make arguments in court and become more versed in using the human rights framework. Some of the principles to be used for drafting the Handbook include:

- **Simple language:** This is not an academic treatise. We want the Handbook to be as accessible as possible. Additions to this handbook should not include a lot of legal-ese. We want legal aid attorneys to be able to easily explain to clients why and how they are integrating human rights into their work.
- **Everyday use:** This needs to be as easy to use as possible. If a Legal Aid attorney wants to put an argument and citation into a brief, he or she should be able to go to the Handbook, find the citation, and cut and paste it into her brief, all in less than five minutes. All citations must be uniform format.

- **Repetition:** The attorneys using this handbook may not read the entire handbook and may not even read an entire section of the handbook. Therefore, it is fine to repeat important concepts. Each legal issue section should standalone, providing all of the information needed or referring to a prior section.

This Handbook aims to get practical and useable human rights information into the hands of legal aid attorneys. Parts 2 and 3 of the Handbook are designed to introduce legal aid attorneys to the human rights framework and provide the background necessary to strategically integrate human rights into litigation and advocacy work. Part 4 of the Handbook is designed to give U.S. legal aid attorneys the specific information that they need to make persuasive human rights arguments in state and federal court. Part 5 of the Handbook covers specific legal issue areas, including an introduction to each issue area and the related human rights, quick statistics and resources for data, a sampling of relevant human rights law, a list of state and federal court cases citing human rights law, a sampling of relevant cases before international bodies, a sampling of relevant cases before national courts or sub-regional bodies, a sampling of treaty body and special procedures commentary and recommendations, sample arguments to add to briefs and pleadings, sample talking points to take to court, relevant case studies, links to sample briefs and petitions, and links to other potentially useful resources such as other available guides or handbooks. We encourage legal aid attorneys to cut and paste the sample arguments from Parts 4 and 5 of the Handbook into pleadings and briefs, and print the corresponding talking points to bring to court.

2 HUMAN RIGHTS LAW 101 FOR LEGAL AID ATTORNEYS

Adapted with permission from: Human Rights Clinic at Columbia Law School, Human Rights & Domestic Violence: An Advocacy Manual (2010)[*] and National Law Center on Homelessness and Poverty, Housing Rights for All: Promoting and Defending Housing Rights in the United States, Fifth Edition (2011)[**]

This section is designed to introduce legal aid attorneys to the human rights framework and provide the background necessary to strategically integrate human rights into litigation, advocacy and all legal aid work.

2.1 INTRODUCTION TO HUMAN RIGHTS

Human rights recognize and promote dignity, fairness and opportunity for all people. These norms recognize the inherent interrelationship between economic, social, cultural, civil and political rights. And, a human rights framework places a duty on governments to respect, protect and fulfill these rights.

International human rights law is part of international law, and is designed to promote and protect human rights at an international, regional and domestic level. International law is binding on state and federal courts through the Supremacy Clause of the U.S. Constitution and sources of international human rights law serve as persuasive authority in U.S. courts and can bolster arguments based on domestic law. Indeed, the U.S. Supreme Court has recognized that the laws of the U.S. should be interpreted as consistent with international law whenever possible.[2]

International law is formed by written documents as well as common practices. One widely accepted definition of international law includes "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"; and "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."[3] Each of these sources of international human rights law is introduced below: "international conventions" in Section 2.2 and corresponding "RUDs – reservations, understandings and declarations" in Section 2.3, "customary international law" in Section 2.4, "decisions of international and foreign courts" in Section 2.5, and "general guidelines and principles" in Section 2.6.

2.2 INTERNATIONAL CONVENTIONS

International human rights treaties and other human rights instruments, such as declarations, make up the core of human rights law. The U.S. has ***ratified*** (and thereby become a ***party to***) some of the treaties listed below. Throughout this Handbook there is an American Flag ( ) next to U.S.-ratified treaties each time they appear in table format to indicate visually that the U.S. has ratified.

However, for the majority of the treaties discussed below, the U.S. has ***signed*** but not ratified the treaty. The degree of legal authority or relevance that treaties have in U.S. courts depends in large part on whether the U.S. has ratified, signed, or taken no action on them.

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[*] *Available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&fileid=163703.

[**] *Available at* http://www.nlchp.org/content/pubs/2011ForumManual.pdf.

[2] *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) ("[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."). *See generally* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 81 (2006) (likening the "liberty" rights of the Fourteenth Amendment's Due Process Clause to fundamental international human rights); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) (describing the framers' and early Justices' recognition of the importance of international law).

[3] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.").

Treaties that the U.S. has ratified are binding *as a matter of domestic law* (i.e. creating obligations of the State toward its people) under the Supremacy Clause of the U.S. Constitution and *as a matter of international law* (i.e. creating obligations of the State toward other States). 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."[4] Under the Supremacy Clause, treaties, just like the U.S. Constitution and federal statutes, trump state constitutions and statutes.

However, ratified treaties are enforceable in a U.S. court only if they are ***self-executing*** or if ***implementing legislation*** has been passed.[5] The Senate typically ratifies human rights treaties with "reservations", "understandings", and "declarations" stating that they are not "self-executing," and the courts uphold this limitation. The U.S. reservations for each treaty are available along with the treaty text on the websites listed with each treaty in the charts below.[6]

Treaties that the U.S. has signed, but not yet ratified, are not binding as domestic law. Signed-but-not-ratified treaties are nevertheless relevant to domestic law because they create general ***negative obligations***.[7] 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 party.[8] 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 act in contravention of the object and purpose of those treaties, advocates 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. Similarly, provisions contained within Declarations (such as the Universal Declaration of Human Rights) are relevant to domestic law if they have developed into customary international law. *See* Section 2.4. below for more on Customary International Law. But declarations are not formal legal documents like treaties, and the Vienna Convention on the Law of Treaties does not apply to them. For more on general principles and guidelines, *see* Section 2.6 of this Handbook.

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[4] U.S. CONST. art. VI, § 2.

[5] 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).

[6] A full list of human rights treaties that the U.S. is at present, or has been, party to is listed on the Bureau of Democracy, Human Rights and Labor, of the U.S. Department of State's website, http://www.humanrights.gov/references/international/. For more on Reservations, Understandings and Declarations *see* Section 2.3 of the Handbook.

[7] A "positive obligation" refers to an obligation to act, to secure the actual and effective realization of human rights. In contrast, a "negative obligation" is an obligation to not act, to merely refrain from engaging in human rights violations.

[8] 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).

2.2.1 UNIVERSAL (UNITED NATIONS) HUMAN RIGHTS CONVENTIONS

The United Nations has created a global or "universal" system for protecting human rights. Below is a list of some of the United Nations human rights instruments. This list does not include all of the conventions and declarations.

SAMPLING OF CONVENTIONS IN THE UNIVERSAL (UNITED NATIONS) HUMAN RIGHTS SYSTEM

Treaty or Declaration	*Description and Citation*	*Date*[9]	*U.S. Action*
Universal Declaration of Human Rights (UDHR)	Adopted in 1948, the UDHR is the oldest international human rights charter. The UDHR, recognizes civil, political, social and economic rights and is a declaration, and not a binding treaty. Nevertheless, many of its provisions may be considered customary international law. The U.S. supported—indeed, was instrumental in—drafting the UDHR; Eleanor Roosevelt was the Chairman of the U.N. Commission on Human Rights, which drafted the UDHR. Full text. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).	Dec. 10, 1948	N/A
International Covenant on Civil & Political Rights (ICCPR)	The ICCPR prohibits forced marriage, torture, and cruel, inhuman or degrading treatment or punishment. It affirms the rights to self-determination; liberty and security of person; freedom of thought, conscience and religion; freedom of expression; and freedom of association. These rights are recognized without distinction of any kind, such as sex, birth or other status. Under the ICCPR, States parties undertake to ensure an effective remedy for violations, notwithstanding that the violation has been committed by persons acting in an official capacity. All persons are equal before the courts. The U.S. specifically stated in its reservations to the ICCPR that articles 1-27 are not self-executing. Full text. Reservations and Declarations. 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.	Dec. 16, 1966	Ratified and entered into force, Sep. 8, 1992.

[9] The dates listed in the column labeled "*Date*" refer to the date the instrument was opened for signature.

Treaty or Declaration	*Description and Citation*	*Date*	*U.S. Action*
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	The ICESCR is the principal human rights treaty regarding economic and social rights, and protects the equal rights of men and women to housing, work, social security, the highest attainable standard of health, and the continuous improvement of living conditions. The ICESCR prohibits all forms of discrimination in the enjoyment of these rights, and calls for special protection for mothers and children. Full text. 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.	Dec. 16, 1966	Signed only
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	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." Full text. Reservations and Declarations. 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.	Dec. 10, 1984	Ratified and entered into force on Nov. 20, 1994.
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	CERD, the principal human rights treaty on racial discrimination, affirms the equality of all persons' civil, political, economic and social rights without any distinction regarding race, color, descent, or national or ethnic origin. The U.S. explicitly stated in its reservations to CERD that it is not self-executing. Full text. Reservations and Declarations. 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.	Dec. 21, 1965	Ratified and entered into force, Nov. 20, 1994.

Treaty or Declaration	*Description and Citation*	*Date*	*U.S. Action*
Convention on the Elimination of Discrimination Against Women (CEDAW)	CEDAW is the principal human rights treaty on sex discrimination, which provides for women's equal access to—and equal opportunities in—private and public life. Full text. 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.	Sept. 3, 1981	Signed only
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	The Palermo Protocol prohibits trafficking in persons, paying particular attention to women and children, and aims to protect and assist the victims of such trafficking, with full respect for their human rights. Full text. Reservations and Declarations. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005.	Nov. 15, 2000	Ratified and entered into force, Nov. 3, 2005.
Convention on the Rights of the Child (CRC)	As the principal human rights treaty on the rights of children, the CRC establishes the best interests of the child as the primary consideration in all public and private actions concerning children. It protects the civil, political, economic and social rights of the child. 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. Full text. 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.	Nov. 20, 1989	Signed only

Treaty or Declaration	*Description and Citation*	*Date*	*U.S. Action*
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	This Optional Protocol codifies the prohibition of the sale of children, child prostitution and child pornography. States parties such as the U.S. must adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programs to prevent these offenses. Child victims of these offenses have a right to specific procedural protections adapted to their special needs. The U.S. stated in its reservations that "the Protocol shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein". Full text. Reservations and Declarations. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May 25, 2000, UN Doc. A/54/RES/263, *ratified by the U.S.* Jan. 23, 2003.	May 25, 2000	Ratified and entered into force, Jan. 23, 2003.
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	This Optional Protocol addresses the short and long-term impact of armed conflict on children, including participation in hostilities, rehabilitation, and social reintegration. In its reservations to this Optional Protocol, the U.S. states that it "reaffirm[s] that the rights of children require special protection." Full text. Reservations and Declarations. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, May 25, 2000, UN Doc. A/54/RES/263, *ratified by the U.S.* Jan. 23, 2003.	May 25, 2000	Ratified and entered into force, Jan. 23, 2003.
Abolition of Forced Labour Convention, ILO Convention No. 105	This ILO Convention prohibits any form of forced or compulsory labor as a means of political coercion, punishment for political views, and means of racial, social, national or religious discrimination. Full text. Abolition of Forced Labour Convention , 320 U.N.T.S. 291, *ratified by the U.S.* Sept. 25, 1991.	June 5, 1957	Ratified and entered into force, Sept. 25, 1991.
International Convention Relating to Status of Refugees (ICRSR)	The ICRSR defines who is a refugee and promotes the rights of asylum seekers. Full text. International Convention Relating to the International Status of Refugees, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954.	Apr. 22, 1954	N/A

Treaty or Declaration	*Description and Citation*	*Date*	*U.S. Action*
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)	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. Full text. 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.	Jul. 1, 2003	N/A
International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)	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. Full text. 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.	Mar. 30, 2007	Signed only

2.2.2 INTER-AMERICAN HUMAN RIGHTS CONVENTIONS

Besides 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. Please note that this list does not include all of the human rights conventions for the Inter-American System.

SAMPLING OF CONVENTIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Treaty or Declaration	*Description and Citation*	*Signed by President*	*Ratified*
The Charter of the Organization of American States (OAS Charter)	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. Full text of the OAS Charter. Reservations and Declarations. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.	Apr. 30, 1948	Ratified and entered into force on Dec. 13, 1951.
The American Declaration on the Rights and Duties of Man (American Declaration)	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. As an OAS member State, the U.S. is arguably bound by the provisions of the American Declaration through its ratification of the Charter. Full text of the American Declaration. 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).	Apr. 30, 1948	N/A
American Convention on Human Rights (ACHR)	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. Full text. 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.	Nov. 21, 1969	Signed only

2.3 "RUDs" – RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

2.3.1 INTRODUCTION TO RERVATIONS, UNDERSTANDINGS AND DECLARATIONS

"RUDs" is shorthand for *Reservations*, *Understandings* and *Declarations*. 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[10] and this section of the Handbook provides only a basic introduction to RUDs.[11]

The U.S. Constitution does not mention Reservations, Understandings or Declarations to treaties. However, the U.S. Senate has nonetheless been attaching conditions to its resolutions of advice and consent to treaties since 1795.[12] These conditions are sometimes called Reservations, Declarations or Understandings. 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."[13] So any kind of statement 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.[14]

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.[15] *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.[16]

One State may officially enter an objection to a RUD entered by another state, which alters the treaty obligations only between those two parties.[17] 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.[18] There is no clear definition of the object and purpose of human rights treaties, though much has been written on this topic. The Inter-American Court of Human Rights, has concluded that the object and purpose of human rights treaties are unique. The Court has stated that the unique purpose of human rights treaties is for:

> the protection of the basic rights of human beings irrespective of their nationality, both against the State of their nationality and all other contracting States…States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[19]

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[10] *See e.g.* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006).
[11] For a thorough explanation of treaty reservation law, *see e.g.* LIESBETH LIJNZAAD, RESERVATIONS TO UN HUMAN RIGHTS TREATIES (1994).
[12] Robert E. Dalton, *National Treaty Law and Practice: United States*, American Society of International Law 6 (1999), http://www.asil.org/files/dalton.pdf.
[13] Vienna Convention, *supra* note 8.
[14] Dalton, *supra* note 12 at 6.
[15] *Id.*; Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 452 (1997).
[16] *Id.*
[17] *Id.*
[18] *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).
[19] The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), ¶29, Advisory Opinion OC-2/82, Int. Am. Ct. H.R. (ser. A) No. 2 (1982).

2.3.2 SPECIFIC RUDs ATTACHED BY THE US TO RATIFIED HUMAN RIGHTS TREATIES

Professor Louis Henkin, who has often been credited with founding the study of human rights law, laid out several "principles" that he found guide the package of *Reservations*, *Understandings* and *Declarations* the U.S. attaches to its human rights 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 rights 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.[21] In addition, the last principle, that every international 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.[22] Links to the specific ratification packages for each of the core human rights treaties ratified by the U.S. can be found below.

Treaty or Declaration	*Reservations, Understandings and Declarations*
International Covenant on Civil & Political Rights (ICCPR)	Reservations, Understandings and Declarations made by the United States of America upon ratifying the International Covenant on Civil & Political Rights (ICCPR)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	Reservations, Understandings and Declarations made by the United States of America upon ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	Reservations, Understandings and Declarations made by the United States of America upon ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

[20] *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 A.J.I.L. 341 (1995).

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

[22] *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.

2.4 CUSTOMARY INTERNATIONAL LAW

Customary law is an independent source of international law, defined as "a general practice accepted as law."[23] In order for a practice to become customary international law, States must follow it out of a sense of legal obligation, not as a matter of policy or self-interest, and enough States must follow it to be considered "general practice."[24] 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.[25]

U.S. courts have long recognized that customary international law is a part of U.S. law.[26] 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. Here are some examples of 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.[27] 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.

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.[28] 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 required the county to consider the need for food, housing, transportation, clothing, and medical care and cited the Universal Declaration of Human Rights (the declaration refers specifically to these elements).[29]

A similar example of the use of international law is *Lareau v. Manson*, in which a federal district court considered whether alleged overcrowding and other prison conditions violated the due process clause of the U.S. Constitution.[30] 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 these standards constituted an authoritative international statement of basic norms of human dignity and thus could help define the "canons of

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[23] 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.").

[24] *See, e.g., North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, I.C.J. Reports 1969 41-44, http://courses.kvasaheim.com/ ps376/briefs/ojf38491brief4.pdf.

[25] For an overview of customary international law, *see* LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, HUMAN RIGHTS 193-97 (2d ed., Thomson Reuters/Foundation Press 2009).

[26] *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….").

[27] 97 Cal. App. 3d 141, 148-49 (Cal. App. 5th Dist. 1979).

[28] 178 Cal. App. 3d 494, 502 (Cal. App. 5th Dist. 1986).

[29] *Id.*

[30] 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) *aff'd in relevant part*, 651 F.2d 96 (2d Cir. 1981).

decency and fairness which express the norms of justice embodied in the Due Process Clause" and the "evolving standards of decency" relevant to evaluating Eighth Amendment challenges.[31]

Further, the court in *Lareau* noted that the standard minimum rules might have acquired the force of customary international law and thus constituted binding legal authority. 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.[32] This is particularly 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.

The practices of other nations can be also relevant even if they do not support a claim of customary international law. Courts, including the U.S. Supreme Court, cite and rely on such practices without analyzing whether they rise to the level of customary international law. For example, in a 1997 decision concerning the constitutionality of a state law banning assisted suicide, the Court cited the practices of other countries (in particular, "Western democrac[ies]").[33] Recently, the Supreme Court cited the practices of other nations, as well as international treaties, in its decision that abolished the death penalty for juveniles.[34] Several federal courts have recognized such norms in dicta,[35] and continued advocacy will increase the prominence of international human rights in domestic proceedings.

2.5 DECISIONS OF INTERNATIONAL AND FOREIGN COURTS

A number of courts around the world have built up rich jurisprudence concerning government duties and human rights, and that jurisprudence can inform U.S. judges as they reason through similar legal issues. While not all judges are equally open to looking to foreign case law to inform their decisions,[36] there is strong Supreme Court jurisprudence to support the use of foreign case law, in appropriate circumstances, as a comparative perspective on U.S. legal questions. For example, in *Roper v. Simmons,* Justice Kennedy, in a majority opinion joined by Justices Stevens, Souter, Ginsburg and Breyer, observed that "[i]t does not lessen our fidelity 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."[37] The Court has expressly looked to the laws and opinions of other nations in determining issues pertaining to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution,[38] as well as issues pertaining to the fundamental rights of freedom and privacy and universal concepts, such as "human dignity."[39]

The European Court of Human Rights is one of the most respected human rights tribunals in the world. The Court hears cases alleging violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (more commonly known as the "European Convention on Human Rights") brought against States parties to the Convention, which include the 47 member States comprising the Council of Europe. The Court's decisions and judgments are binding on States parties to the Convention. While the Court's decisions are not binding on the U.S., they may serve as persuasive authority, especially if they represent global consensus. For example, in *Lawrence v. Texas*, the Supreme Court considered jurisprudence from the European Court of Human Rights in

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[31] *Id.*
[32] *Id.*
[33] *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997).
[34] *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005); *Graham v. Florida*, 130 S. Ct. 2011; 176 L. Ed. 2d 825 (2010).
[35] *See, e.g.*, *Washington*, *supra* note 33; *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970).
[36] *See, e.g.,* Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation*, 12 TULSA J. COMP. & INT'L L. 149 (2004); Adam Liptak, *U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008.
[37] *Roper*, *supra* note 34. *See also Graham*, *supra* note 34.
[38] *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington*, *supra* note 33 at 718 n.16; *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).
[39] *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

deciding to strike down a Texas statute criminalizing private sexual activity between consenting adults of the same sex under the Fourteenth Amendment.[40]

2.6 GENERAL PRINCIPLES AND GUIDELINES

General principles, guidelines and draft international agreements provide secondary evidence of human rights law.[41] Just as a Reinstatement, Model Code or even Black's Law Dictionary in the U.S. can provide a secondary source of law in the U.S., principles and guidelines can provide a secondary source of human rights law. The Boston Principles in Section 5.7.8 and the United Nations Guidelines for Consumer Protection listed in Section 5.4.3 are examples of secondary sources of human rights law. Neither the Boston Principles nor the United Nations Guidelines for Consumer Protection are international agreements signed by countries around the world. However, 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.[42]

[40] 539 U.S. 558 (2003).
[41] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§102(4), Comment l. ("General principles are a secondary source of international law."), *supra* note 3.
[42] Sinai Deutch, *Are Consumer Rights Human Rights?,* 32 OSGOODE HALL L.J. 537, 564 (1994).

3 STRATEGIES FOR EFFECTIVELY USING INTERNATIONAL HUMAN RIGHTS IN YOUR EVERYDAY WORK

Many parts of this section were adapted with permission from: Human Rights Clinic at Columbia Law School, Human Rights & Domestic Violence: An Advocacy Manual (2010)[***] *and National Law Center on Homelessness and Poverty, Housing Rights for All: Promoting and Defending Housing Rights in the United States, Fifth Edition (2011)*[****]

Everyday human rights advocacy comes in a variety of different forms. This section is designed to provide legal aid attorneys with a variety of different strategies to apply the human rights framework in everyday work. Section 3.1 covers How to Perform Human Rights Monitoring, Documentation and Fact-Finding, which can lead to the documentation necessary to advocate on behalf of your clients with treaty monitoring bodies, covered in Section 3.2. The Human Rights Council is a specific example of an international human rights monitoring body which legal aid attorneys may advocate before, through its Universal Periodic Review, covered in Section 3.3. Advocacy before Special Procedures, covered in Section 3.4, can also be very effective. In addition, Section 3.5 covers How to Bring a Case Before the Inter-American Commission on Human Rights, which is an international treaty-monitoring body that hears individual cases brought against the U.S. for violations of human rights. Section 3.6 Human Rights Principles Applied to Interactions with Clients and Others focuses on how to apply human rights principles to interactions with clients and others. Part 4, the next chapter, will begin to explore local advocacy before state and federal courts here in the U.S.

3.1 HOW TO PERFORM HUMAN RIGHTS MONITORING, DOCUMENTATION AND FACT-FINDING

3.1.1 HUMAN RIGHTS MONITORING

Human Rights monitoring is the process of systematically tracking activities of and actions by institutions, organizations or governmental bodies. The main purpose of monitoring human rights is to determine the truth about the compliance of a government with its human rights obligations. Monitoring involves the collection of information (fact-finding) and documentation of findings for the purpose of bringing about social change. Very often, the process of monitoring can alert you to rights abuses, which can then be reported to treaty bodies or special procedures through the United Nations or Inter-American Human Rights systems, as discussed further below.

While monitoring needs to be undertaken by governments themselves, it is of vital importance that human rights organizations and activists engage in monitoring as well. "Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organisations. It is indispensable that the relevant international organisations provide the support necessary for the implementation of international instruments in this field[…]."[43]

As a human rights advocate in the U.S., you must first identify, realistically, the objectives of your monitoring activities. What do you intend to do with the documentation you gather? This will, in part, determine the types of information you gather.

[***] *Available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163703.
[****] *Available at* http://www.nlchp.org/content/pubs/2011ForumManual.pdf.
[43] Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Jan. 22-26, 1997, UN Doc. E/C.12/2000/13, http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17?Opendocument (highlighting proposals, remedies to violations and the international principles relevant to economic, social and cultural rights) [emphasis added].

Before conducting fact-finding missions, human rights monitors must make a preliminary assessment of the situation. A first step in this preparation is the analysis of relevant domestic and international legal standards that govern the particular abuse/s being monitored. This will help you determine the types of facts needed to prove abuse. It also illustrates a nation's compliance with international legal standards and allows you to identify which domestic laws are the sources of rights violations.

With this knowledge in hand, human rights monitors must begin to systematically and consistently collect information that may be related to the rights violation being monitored. Sources of information can include:

- Newspapers, magazines, and other forms of print media;
- Radio broadcasts;
- Internet websites;
- Testimony from victims and witnesses of human rights abuse, as well as of alleged perpetrators;
- Reports from human rights organizations and activists or other organizations;
- Official reports, including police reports, forensic reports, medical certificates, etc.;
- and Court records.

Information to look for while monitoring includes:

- Demographic data, such as the size and age of the affected group, particularly compared to the rest of society, race or ethnicity of the affected group, and legal status;
- Social indicators, such as housing conditions, employment, schools, etc., level and type of interaction with the local community;
- Economic data;
- Information on the local political situation; and Reports of allegations of rights abuse.

An important monitoring function is to build a network of contacts working on the ground that you can possibly look to for information and support. The results of your monitoring should answer the following:

Who did **what** to **whom**? **When**, **where**, **how** and **why**?

3.1.2 HUMAN RIGHTS DOCUMENTATION AND FACT-FINDING

Information is collected by human rights organizations and activists to determine the truth as accurately and completely as possible concerning alleged human rights violations for the purposes of monitoring human rights practices of governments. In some cases, information is also collected on alleged human rights violations committed by armed opposition groups and private citizens. Human rights organizations and activists collect first-hand information to verify the facts for themselves and to make credible reports on alleged violations of human rights.

Documentation is the process of systematically recording and organizing the information for easy retrieval and dissemination. The word documentation is normally understood as a collection of existing documents. However, human rights organizations and activists also use it to mean recording facts, including collecting documents and establishing a system for easy retrieval and dissemination.

Once a violation has been identified, the next step is to conduct an investigation to collect and document the "evidence." This is done by carrying out fact-finding activities and carefully recording the findings.

GUIDING PRINCIPLES FOR HUMAN RIGHTS FACT-FINDERS:

- **Impartiality and accuracy:** Fact-finding must be thorough, accurate and impartial. Ensure the credibility of information collected and disseminated by seeking direct and other evidence. Direct evidence includes victim and witness testimony, statements by alleged perpetrators, official reports,

including police reports, court records, medical certificates, forensic reports, etc. Other forms of evidence include media reports, government reports, and reports by NGOs, etc. Assess the reliability of the evidence gathered and pay attention to any contradictions in the information gathered. Any questions of fact will need further investigation.

- **Application of international standards:** Apply international human rights standards and constitutional rights guarantees to help identify and define what information to collect and to assess the information gathered.

- **Be prepared before entering the field:** Before entering the field, empower yourself by thoroughly researching relevant legal standards and case background. Compile a list of everything you already know about the locations, and the incident, and make a list of all the information you are missing. Create a list of questions/issues you need to address during interviews to allow a proper assessment of the issue at hand.

- **Using diverse sources of information:** Locate and use as many sources of information as possible. Interview the victims (individuals and communities) and witnesses of an event and the violator. Collect and evaluate ALL available evidence. This evidence could include periodic government budget or policy reports; legislative and judicial records; papers and studies produced by academic or research institutions; reports by or interviews with NGOs, official reports, including police reports, medical certificates, building permits, documents attesting to security of tenure, etc.

- **Respect all parties:** All efforts should be carried out within an atmosphere of utmost respect for those concerned.

- **Ensure safety/take steps against victimization:** It is very important to consider both the safety of the victims of the rights violation you are documenting, as well as your own, and to take all measures possible to avoid or prepare individuals for any backlash they might suffer as a result of agreeing to participate in your investigation and subsequent actions. Monitors and fact-finders must therefore develop a plan of action and consider the above in relation to it. Ensure that the victims and witnesses to human rights and housing rights abuses you interview understand the way you intend to use the information they provide as well as any possible repercussions they may face as a result so that they have all the facts in making their decision to co-operate. If potential interviewees agree to divulge information on a particular rights abuse after having this explained to them, proceed with your fact-finding activities. <u>If at any time you feel that either the victims of and witnesses to abuse or yourself are in danger, cease your actions immediately. The purpose of human rights monitoring and fact-finding is not to place persons in the way of further harm</u>.

3.2 TREATY MONITORING BODIES AND SHADOW REPORTS

Information and testimony about human rights violations, collected through human rights monitoring, documentation and fact-finding, as discussed above, can be reported to treaty monitoring bodies to advocate for U.S. compliance with a human rights treaty. This section provides legal aid attorneys with an introduction to treaty monitoring bodies and shadow reports.

Once a country signs and ratifies a human rights treaty, it becomes a party (also called a "State party") to the treaty. Both international and regional human rights treaties have mechanisms to ensure that States parties protect human rights not only in words but also in practice. Many international human rights treaties have ***treaty monitoring bodies*** (also called ***treaty bodies***): permanent bodies made up of independent experts charged with monitoring States parties' compliance with their legal obligations under the treaties. State compliance with regional human rights treaties is monitored by regional bodies.

Each of the human rights treaties listed in Section 2.2.1 above has a corresponding treaty body, composed of a number of international human rights experts appointed by member States, which is responsible for monitoring the compliance of States with their obligations under the treaty.

Treaty bodies conduct a ***periodic review*** of States parties' compliance with treaty obligations, establishing an accountability mechanism, albeit an imperfect one.[44] Many major international human rights treaties require States parties to submit periodic reports on their compliance with their obligations under those treaties.

A very important opportunity for advocacy action relates to the state reporting process under an international treaty. As a State Party to certain international treaties, the U.S. has to present periodic reports to a number of Committees on its compliance with its obligations under a given Convention, including CERD and the Human Rights Committee. At the same time, NGOs, activists and other interested parties are invited to present their own comments on the government's performance, calling attention to information excluded from the government report or to refute allegations made by the state that it is complying with its obligations. These written materials, submitted by NGOs and other interested parties, are commonly called ***shadow reports.*** NGOs and activists (including legal aid attorneys) can submit shadow reports to the Committees at any time.[45] Ideally NGOs and activists collaborate and jointly draft and submit shadow reports, organized around specific topics, which makes a bigger impact and allows for greater efficiency for the members of the committees reviewing the reports. In August 2013, the first joint legal aid shadow report was submitted to the U.N. Human Rights Committee in advance of the U.S. periodic peview by the committee. In addition, a shadow report was submitted in 2013 to the U.N. Human Rights Committee on Ensuring Meaningful Access to Counsel in Civil Cases in the U.S.

Ultimately, the treaty bodies issue Concluding Observations and Recommendations, which consider whether and how rights violations have taken place, provide authoritative interpretation of States parties' treaty obligations, and contribute to the development of "soft law."[46] While the findings of treaty bodies are not binding, they can be important sources of persuasive authority.

In addition to the periodic review, all treaty bodies issue general interpretations of treaty provisions, known as General Comments or General Recommendations (depending on the treaty body). These comments or recommendations have also become influential internationally in defining the scope of treaty obligations.

Some treaty bodies also take on an adjudicatory function, providing opportunities for individuals to submit complaints against States parties for violations of treaty obligations. Individual complaints can be brought only against States parties that have consented to participate in this process. The U.S. has not consented to participate in the individual complaints process of any treaty body. Nevertheless, treaty body decisions on individual complaints against other countries are relevant to U.S. advocates. Like Concluding Observations, Recommendations, General Comments and General Recommendations, treaty body decisions on individual complaints provide guidance on the interpretation of treaty provisions and may contribute to the development of soft law and customary international law.[47]

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[44] *See* Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 37-38 (2006) (discussing some criticisms of treaty bodies).

[45] For guidance on participating in the UPR process as a non-governmental organization, *see* Urban Justice Center, A Practical Guide to the United Nations' Universal Periodic Review (January 2010), http://www.hrpujc.org/documents/UPRtoolkit003.pdf.

[46] Soft law refers to quasi-legal instruments which carry legal weight, though generally less than hard law legal instruments, such as treaties. Soft law takes less time to develop than customary international law. (For a definition and discussion of customary international law, *see* Section 2.4). Soft law is often aspirational, outlining shared goals to work toward rather than obligations to be immediately imposed. The international community has not reached full consensus as to the content and legal force of soft law, but most agree that soft law includes many UN General Assembly Declarations and Resolutions, such as the Universal Declaration of Human Rights, as well as international principles, guidelines and action plans such as the Millennium Development Goals. Soft law is important not only for its legal force, but also its moral and political force; even if it cannot be enforced in a court, it can be used to name and shame in the "court" of international public opinion.

[47] For a definition and discussion of customary international law, see Handbook Section 2.4 Customary International Law.

3.3 THE HUMAN RIGHTS COUNCIL AND THE UNIVERSAL PERIODIC REVIEW

In addition to the treaty monitoring bodies for each human rights instrument described above, the United Nations human rights system also includes the Human Rights Council, a subsidiary body of the General Assembly created in 2006 to replace the now-defunct Human Rights Commission. The Council monitors human rights violations around the world and makes recommendations on how to address them. In 2009, the U.S. was elected by the General Assembly for a three-year term on the 47-seat Council. Human rights monitoring mechanisms through the Council include the Universal Periodic Review process and Special Procedures, discussed in the next section. The Human Rights Council reviews the human rights records of all 192 United Nations Member States once every four years through the ***Universal Periodic Review*** (UPR) process.[48] This mechanism, created in 2006, is meant to provide an opportunity for each State to discuss what actions it has taken to fulfill its human rights obligations, and to respond to questions and criticism by other States and civil society. The U.S. underwent its first Universal Periodic Review in 2010.[49]

The UPR is unique because it includes the opportunity for advocates to engage with the U.S. government regarding its compliance with existing human rights obligations beyond those included in ratified treaties. The review includes an assessment of compliance with both the U.N. Charter and the Universal Declaration of Human Rights, which provide protection for civil and political rights, as well as economic and social rights.

The Human Rights Council's Universal Periodic Review is based primarily on three reports. One report is submitted by the State under review and should be informed by consultations with civil society. A second report is compiled based upon the shadow reports submitted by civil society (giving legal aid attorneys an opportunity to advocate for stronger human rights protections and publicize human rights violations). The Council also relies on contributions from other U.N. bodies (including the treaty bodies, discussed above, and the Special Procedures, discussed below), which are compiled into a third report.

Having received all of these reports, the Human Rights Council conducts a three-hour interactive dialogue with representatives of the State under review. The State presents its report, answers questions, and receives recommendations from other U.N. member countries. The result of this review is an outcome document that includes an assessment of human rights compliance and recommendations made during the review.

Although the Universal Periodic Review mechanism has the potential to enable regular, comprehensive and objective monitoring of human rights in all countries, its actual effect is less clear. The Human Rights Council's recommendations are not binding on the State under review. Furthermore, the Human Rights Council is a body composed of State representatives, not independent human rights experts. This makeup of the Council can hamper its credibility when member States are perceived to be motivated by political interests rather than a genuine desire to protect human rights. Nevertheless, U.S. advocates may find it useful to cite the Council's UPR report on the U.S. Both the outcome document and the reports discussed above can also be used to educate the public and engage with government officials about applicable human rights standards, including standards pertaining to treaties to which the U.S. is not a party. In the long term, the UPR process is also a part of the development of soft law and customary international law.

3.4 SPECIAL PROCEDURES—SPECIAL RAPPORTEURS

Special Procedures are the mechanisms established through the Human Rights Council to address specific country situations or thematic issues. Special Procedures are either an individual (usually called a ***Special***

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[48] Additional general information about the UPR can be found at http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx. Documentation relating to completed and ongoing Universal Periodic Reviews, including the reports and outcome documents discussed in this subsection, are available at http://www.ohchr.org/EN/HRBODIES/UPR/Pages/Documentation.aspx. In addition, the Danish Institute for Human Rights has produced this introductory overview of the UPR, http://www.humanrights.dk/files/doc/UPR/spot_on%20%20eng.pdf.

[49] A copy of the U.S. 2010 Report to the Human Rights Council and other relevant documents can be found at http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CUSSession9.aspx.

Rapporteur, but can also be called a Special Representative, or an Independent Expert) or a working group. Each Special Procedure has its own mandate, defined by the resolution that created it. The Special Procedures are independent experts and receive information on specific human rights abuses and request relevant States' responses to the allegations.

Special Procedures also conduct country visits to investigate human rights situations first-hand.[50] There are currently 36 thematic mandates and 10 country mandates.[51] Some of the Special Rapporteurs relevant to legal issues covered in this Handbook include: the Special Rapporteur on Adequate Housing, the Special Rapporteur on Extreme Poverty and Human Rights, the Special Rapporteur on the Right to Food, the Special Rapporteur on the Right of Health, the Special Rapporteur on Racism, the Special Rapporteur on the Rights to Water and Sanitation and the Special Rapporteur on Violence Against Women. The term of a thematic Special Rapporteur lasts three years and they can serve a maximum of two terms.[52]

Special Procedures issue findings and recommendations through public reports. Special Procedures can play an important role by clarifying the content and scope of specific rights, but also can use their position to raise awareness and draw attention to specific issues. Through these mechanisms, they may even have the power to prevent widespread human rights violations.

Like the Human Rights Council's UPR recommendations discussed above, the recommendations of Special Procedures are not binding on the State under investigation, but may still be relevant to advocates as examples of international naming and shaming of particular policies and practices relating to, e.g., domestic violence. The findings and recommendations of these bodies may carry greater weight than those of the Human Rights Council because Special Procedures are independent: they do not serve on behalf of any State and they do not gain financial compensation for their work.

3.5 HOW TO BRING A CASE BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Adapted with permission from: Caroline Bettinger-López, Clearinghouse Review Journal of Poverty Law and Policy, The Inter-American Human Rights System: A Primer, Vol. 42, No. 11-12, p. 583 (2009)[*****]

Unlike the United Nations system, where the U.S. refuses to comply with individual complaint procedures under any human rights treaty, U.S. advocates can file an individual complaint on behalf of clients with the Inter-American Commission on Human Rights and the U.S. must respond and submit to the Commission's hearing process. This is an additional human rights advocacy strategy for legal aid attorneys to consider.

The Inter-American human rights system consists of the Organization of American States (OAS), the Inter-American Commission on Human Rights in Washington D.C. and the Inter-American Court of Human Rights in Costa Rica. The OAS Charter is the constitutional text of the organization and was ratified by the U.S. in 1951.[53] The human rights principles set out in the OAS Charter are further developed in the American Declaration on the Rights and Duties of Man.

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[50] For more information on Special Procedures, visit http://www2.ohchr.org/english/bodies/chr/special/index.htm.

[51] As of May 1, 2012. A list of the thematic mandates can be found at http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx. A list of the country mandates can be found at http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx.

[52] *See* International Federal for Health and Human Rights Organisations, U.N. Rapporteur on the Right to Health: A Guide for Civil Society (2009), http://www.ifhhro.org/images/stories/ifhhro/documents_UN_special_rapporteur/guide_ifhhro_special_rapporteur_2009.pdf.

[*****] *Available at* http://www.povertylaw.org/clearinghouse-review/issues/2009/2009-mar-apr/bettinger-lopez.pdf.

[53] Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer,* 42 CLEARINGHOUSE REV. 583, 583 (2009) (quoting Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S. and entered into force* Dec. 13, 1951).

The Inter-American Commission was created in 1959 to "promote the observance and defense" of human rights in OAS member states.[54] The Inter-American Commission on Human Rights carries out a variety of human rights monitoring and promotion activities, not unlike the U.N. Human Rights Council. Advocates may pursue a variety of avenues at the Inter-American Commission, including: thematic or general hearings on a particular issue or series of issues; on-site investigations and issue reports; or even Inter-American Court advisory opinions to effectuate change. However, the Inter-American Commission is the only international forum in which individuals, or nongovernmental organizations acting on behalf of individuals, may bring human rights complaints against the U.S. and have those complaints adjudicated by a decision-making body. This is an advocacy avenue increasingly pursued by advocates in the U.S. This section is designed to give legal aid attorneys the basic information they need to bring a case before the Inter-American Commission on Human Rights.

3.5.1 PETITIONER(S) MAY BE INDIVIDUAL(S) OR ORGANIZATION(S)

Individuals, groups of individuals or organizations may file a complaint with the Commission alleging that the federal government is responsible for human rights violations. In addition, the petitioner(s) may or may not be the victim(s). For example, a legal aid attorney could file a complaint on behalf of a community group alleging human rights abuses committed by the U.S. Petitions may be submitted without the victim's knowledge or authorization. The Commission accepts collective petitions, indicating numerous victims of a specific incident or practice, but not class action suits that set forth generalized harms not limited to a specific group or event.[55]

3.5.2 CASES ARE BROUGHT AGAINST A MEMBER STATE OF THE OAS

The Commission will only hear cases against member states of the OAS and not against individual persons or groups of persons for private conduct.

3.5.3 ALL APPEALS IN DOMESTIC COURTS MUST BE EXHAUSTED BEFORE BRINGING A CASE TO THE INTER-AMERICAN COMMISSION

Petitioners may turn to the Commission for relief once they have exhausted all appeals <u>or</u> if domestic procedural restrictions (such as those imposed in *Ledbetter v. Goodyear Tire and Rubber Company*) or legal precedent preclude the pursuit of remedies in U.S. courts.[56] The Commission is not designed for cases of first relief, but rather the Commission is best used as an additional avenue for putting pressure on the U.S. when other advocacy methods fail. Moreover, petitions must be filed within six months of notification of final judgment or, under certain circumstances, within a "reasonable period" of time thereafter.[57]

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[54] Statute of the Inter-American Commission on Human Rights, art. 1(1), O.A.S. Res. 447 (IX-0/79), OEA/Ser.P./IX.0.2/80, vol. 1 at 88 (1979); OAS Charter, art. 106 ("to promote the observance and protection of human rights"). *See also* TARA J. MELISH, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: DEFENDING SOCIAL RIGHTS THROUGH CASE-BASED PETITIONS, IN SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW (Malcolm Langford ed., 2009); DINAH L. SHELTON, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 127 (Hurst Hannum ed., 4th ed. 2004).

[55] For more information and for a copy of the model petition published by the Inter-American Commission on Human Rights, visit the Inter-American Commission on Human Rights website at http://www.oas.org/en/iachr/mandate/petitions.asp.

[56] *See Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618 (2007); Bettinger-López, *supra* note 53, at 586.

[57] Rules of Procedure of the Inter-American Commission on Human Rights, art. 32, OEA/Ser.L./V/I.4, rev. 12 (2008) *at* www.cidh.org/Basicos/English/Basic.TOC.htm [hereinafter "Inter-Am. C.H.R. R. Proc."]. The six-month rule does not apply, for instance, where there is a continuing violation (*Domínguez Domenichetti v. Argentina*, Case 11.819, Inter-Am. C.H.R., Report No. 51/03, OEA/Ser.L./V/II.118, doc. 70 rev. 2 ¶ 48 (2003). In considering the reasonableness of a time period under this admissibility requirement, the Commission has held that nine years after filing the last domestic appeal constitutes a "reasonable period of time" where there has been an unjustified delay in the judicial proceedings of the national courts. *See* James Judge v. Ecuador, Petition 12.393, Inter-Am. C.H.R., Report No. 10/02, at paras. 18 & 22 (Feb. 27, 2002) (holding that a nine year delay is a reasonable period of time). *See also* Evandro de Oliveira et al. v. Brazil, Case 11.694, Inter-Am. C.H.R., Report No. 36/01, at paras. 22–26 (Feb. 12, 2001) (holding that a six year delay is a reasonable period of time); Jesús Enrique Valderama Perea v. Ecuador, Petition 12.090, Inter-Am. C.H.R., Report No. 12/02, at paras. 13 & 17 (Feb. 27, 2002) (holding that a five year delay is a reasonable time period).

3.5.4 DUPLICATIVE CASES WILL NOT BE HEARD

The Commission will not consider petitions that are duplicative of cases pending before or resolved by other international tribunals, or cases that the Commission itself has already resolved.[58]

3.5.5 THE U.S. MAY BE HELD RESPONSIBLE FOR VIOLATING HUMAN RIGHTS AS A RESULT OF ACTIONS, OMISSIONS OR ACQUIESCENCE

The Commission has imputed casual responsibility to federal governments through its omission or failure to respond appropriately to private conduct that violates human rights, as well as a result of actions by the federal government or its agents.[59]

3.5.6 URGENT AND SERIOUS RELIEF MAY BE REQUESTED IN THE FORM OF PRECAUTIONARY MEASURES

The Commission considers claims for what are called ***precautionary measures***—which are akin to temporary restraining orders or injunctions—and helps negotiate "friendly settlements" between the parties in contentious cases.[60]

Examples of requests for Precautionary Measures against the U.S. Government:

Celina Adon Reyes et al v. U.S.

Gary Resil, Harry Mocombe, Roland Joseph, Evel Camelien, and Pierre Louis v. U.S.

Examples of Precautionary Measures decisions by the Commission against the U.S. Government:

Mossville Environmental Action Now v. U.S.

Gary Resil, Harry Mocombe, Roland Joseph, Evel Camelien, and Pierre Louis v. U.S.

3.5.7 RESPONSE & CASE ACCEPTANCE PROCEDURE

A panel of commissioners decides whether the petitioner has met the procedural requirements and whether the Commission has competence (akin to jurisdiction) to examine the human rights claims contained in the petition. If the Commission determines that it has competence, it registers the petition, assigns it a number, and then transmits the petition to the state in question. The state (the Department of State represents the U.S. in these matters) normally has two months to respond to the petition. The Commission may request further submissions from the parties, and the petitioner may request an admissibility hearing.[61]

Examples of U.S. Government responses to the Commission:

Response of the Government of US to the IACHR Regarding Petition of Jessica Gonzales

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[58] Id., Inter-Am. C.H.R. R. Proc., art. 33.

[59] *Jessica Lenahan (Gonzales) v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007) (recognizing the Commission's competence to consider a case involving the state duty to protect an individual from private acts of violence); *Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 ¶¶ xi, x (1985) (holding Brazil liable "for having failed to take timely and effective measures to protect the human rights of the Yanomami [Indians] … from highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in th[eir] territory").

[60] Inter-Am. C.H.R. R. Proc., art. 25, *supra* note 57.

[61] Bettinger-López, *supra* note 53, at 585; Inter-Am. C.H.R. R. Proc., art. 31, *supra* note 57.

Response of the Government of USA to the IACHR Regarding Petition of Michael Mackason et al

Examples of Admissibility decisions by the Commission against the U.S. Government:

- Admissible: **Mossville Environmental Action Now v. U.S.**
- Admissible: **Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes** v. **U.S.**
- Inadmisible: **Victor Nicolas Sanchez et al. ("Operation Gatekeeper") v. U.S.**

3.5.8 WHAT HAPPENS IF THE COMMISSION ACCEPTS A CASE?

The Commission then considers evidence presented before it and may hold hearings or even conduct investigatory field or on-site visits in which it does its own fact-finding. Petitioners may also request that key local, state, or federal government officials participate as part of the government's delegation.[62]

3.5.9 WHAT HAPPENS IF THE COMMISSION MAKES FINDINGS THAT THE U.S. VIOLATED THE HUMAN RIGHTS OF A PERSON OR GROUP OF PERSONS?

The Commission explains its decisions in published reports and recommendations. The published reports and recommendations state the Commission's findings, its determination as to whether a violation occurred, and its suggested remedies. Remedies may include the payment of damages, a public apology, an investigation into the source of a violation, and suggested changes in law, action, or policy.[63]

After the issuance of the report, petitioners may request a working meeting with the Commission and the state to discuss state progress in implementing the Commission's recommendations.[64] The Commission publishes statistics on state compliance in its Annual Report.[65]

A great resource highlighting the value of the Inter-American Human Rights System as a tool for U.S. lawyers and advocates is the Columbia Law School Human Rights Institute's **Human Rights in the United States, A Primer On Recommendations from the Inter-American Human Rights Commission and the United Nations**
The Primer offers a resource for ongoing advocacy, synthesizing the key human rights standards that apply to the range of issues that U.S. advocates have already brought before the Inter-American Commission on Human Rights.

3.6 HUMAN RIGHTS PRINCIPLES APPLIED TO INTERACTIONS WITH CLIENTS AND OTHERS

Adapted with permission from: Lauren E. Bartlett, Human Rights Principles for Legal Aid (2012).

Focusing on the intersection between human rights, ethics and professionalism, this section focuses on how to apply human rights principles to interactions with clients and others. The Human Rights Principles for Legal Aid (the "Human Rights Principles") introduced in this article are premised on the Michael Jackson's tenet: you start with the man (or woman) in the mirror if you want to make the world a better place.[66] The Human Rights Principles aim to transform the client-staff relationship and the legal aid office itself, putting the client at the

[62] Bettinger-López, *supra* note 53, at 586;
[63] *Id.*
[64] *Id.*
[65] Bettinger-López, *supra* note 53, at 587. *See* Inter-American Commission on Human Rights Annual Reports, http://www.oas.org/en/iachr/reports/annual.asp.
[66] Michael Jackson, *Man in the Mirror*, *on* BAD (Epic/CBS Records 1987).

center, both in terms of decision-making and also in terms of empowering clients to tell their own stories and to be their own advocates. For lawyers, legal codes of ethics and rules of professional conduct all too often provide only a baseline for conduct, focusing on what you absolutely cannot do as an attorney or what you need to do in order not to lose your license. As you will see, the Human Rights Principles, read alongside legal codes of ethics or rules of professional conduct, are much more aspirational. The Human Rights Principles provide very simple, yet ambitious goals, such treating all people with respect and as an equal at all times. Moreover, the Human Rights Principles are shared goals. The Human Rights Principles are not meant to apply only to licensed attorneys, but to everyone involved in legal aid work: clients, colleagues, supervisors, opposing counsel, interns, etc.—the legal aid office as a whole.

To begin, this section explains how and why the Human Rights Principles were developed. Next, the Human Rights Principles are introduced. To further demonstrate how the Human Rights Principles directly relate to the role of a legal aid attorney, in particular, this section then maps the connections between the Human Rights Principles and the American Bar Association's Model Rules of Professional Conduct. Lastly, this section makes suggestions on how to operationalize the Human Rights Principles.

3.6.1 DEVELOPMENT OF THE HUMAN RIGHTS PRINCIPLES FOR LEGAL AID

The human rights framework provides progressive goals and good examples for how people should treat each other and interact within legal systems. When the Center first began working to develop and operationalize the Local Human Rights Lawyering Project, we decided to try to articulate how to apply human rights principles to lawyering and what we ended up with, after the process described below, are the Human Rights Principles for Legal Aid.

In doing initial research on how to integrate human rights principles into legal aid, we realized quickly that there is a dearth of written materials on the topic. Martha Davis, Professor of Law at Northeastern University School of Law, recently wrote one of the few articles that is on point, entitled "Human Rights and the Model Rules of Professional Conduct: Intersection and Integration".[67] In that article Davis writes, "[h]uman rights norms, at their most basic, recite fundamental principles of morality intended to govern behavior of governments as well as individuals…Both human rights and legal ethics share common ground for implementing moral principles."[68] Davis also particularly notes specific human rights principles relevant to professional conduct, including "respect for human dignity, participation (and leadership) of those most affected in crafting solutions to their problems, and recognition of the interrelationships between the full range of human rights."[69] Davis further notes that:

> [T]he lawyer's obligation to "keep a client reasonably informed" and to "explain a matter to the extent reasonably necessary" would arise from the recognition of the client's individual dignity consistent with human rights norms, not merely from common law principles of agency…In the current Model Rules, the moderating qualification of "reasonableness" sits in tension with a human rights value—derived from the concept of human dignity—of ensuring participation and, where feasible, leadership by those most affected by rights violations. Changing the terrain underlying the requirement of "reasonableness"…to reflect…human rights norms would likely shift the content of the reasonableness standard toward greater expectations for communication and client participation.[70]

The U.N. has made efforts to address these needs by developing the Basic Principles on the Role of Lawyers which, though not binding, provide a human rights framework which can be used to examine the role of the attorney.[71] The U.N. principles state that:

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[67] 42 COLUM. HUMAN RIGHTS L. REV. 157 (2010).
[68] *Id*.
[69] *Id.* at 179.
[70] *Id.* at 179-80.
[71] Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sept.7, 1990, Havana, Cuba, U.N. Doc. A/CONF.144/28/Rev.1 (1990).

> [l]awyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession."[72]

In discussions about integrating human rights into legal aid with colleagues and our Project Partners, it became clear that there was a need to be able to articulate the specific human rights principles that apply. It was also clear that we would need to be able to explain how to relate human rights principles to legal ethics and rules of professional conduct for lawyers. A written code seemed to be the best model, which legal aid attorneys could keep on hand and reflect upon during interactions with clients by phone and in person. Using a number of social work codes of ethics which integrate and/or reflect human rights principles as models,[73] we drafted the Human Rights Principles listed below. The Human Rights Principles have since been reviewed by more than fifty practitioners (including the Local Human Rights Lawyering Project Partners and Advisory Board members, academics, students, and others) and revisions have been made to simplify and clarify the language, to tighten parallels with the rules of professional responsibility (mapped out in more detail below), and to better reflect the experiences of additional legal aid staff.

3.6.2 THE HUMAN RIGHTS PRINCIPLES FOR LEGAL AID

The human rights principles listed below outline core values which combine human rights, ethics, professional responsibility and client-centered lawyering in pursuit of a set of standards which legal aid attorneys can use both internally and externally. The Human Rights Principles are designed to be publicly displayed in legal aid offices by way of a poster, or possibly online as a meme, with accompanying colorful infographics.

1. Human Dignity

Treat all people with respect, not as a gesture of charity but as an act of justice. Respect the inherent worth of each individual, each family and their communities. Be patient, kind, and on time. Listen with empathy. Communicate with understanding and honesty. Keep private information private.

2. Participation and Self-Determination

Meaningfully involve clients in identifying problems, goals, planning and case strategy. Empower clients to tell their own story and advocate for themselves. Clearly and simply explain the law and process, clients' rights, the role of Legal Aid, and the role of the client.

3. Equality

Respect all others as your equal. Recognize strength in diversity. Take responsibility for discrimination based on your own beliefs, including but not limited to discrimination based on mental health, sexual orientation, homelessness, education level, age, political opinion, culture, source of income, and place of origin. Work to end all discriminatory acts in your office, as well as in your community.

4. Solidarity

Foster teamwork among clients and staff. Constantly challenge the traditional power structure of the client-staff relationship. Recognize your strengths and your client's strengths and invest those strengths in shared responsibilities. Stand with your clients and fellow staff members to fight poverty and expand rights for the most vulnerable.

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[72] *Id.*, Principle 14.

[73] *E.g.* UNIVERSITY OF ST. THOMAS SCHOOL OF SOCIAL WORK, SOCIAL WORK FOR SOCIAL JUSTICE: TEN PRINCIPLES (2006), http://www.stthomas.edu/socialwork/socialjustice/principles/socialJusticePrinciples.html; BRITISH ASSOCIATION OF SOCIAL WORKERS, THE CODE OF ETHICS FOR SOCIAL WORK (2012), http://cdn.basw.co.uk/upload/basw_112315-7.pdf.

5. Innovation

Pursue creative remedies towards shared goals. Litigation is only one option among many. Ask what more you can do to counsel, educate, and advocate for your clients and their communities. Encourage your client to use other tools including community education, organizing, legislation and civic participation. Consider using international and regional mechanisms such as special rapporteurs, United Nations treaty-body monitoring committees and the Inter-American Commission on Human Rights.

3.6.3 COMPARISON OF THE HUMAN RIGHTS PRINCIPLES FOR LEGAL AID AND THE MODEL RULES OF PROFESSIONAL CONDUCT

The Human Rights Principles could be compared with various codes of legal ethics, but for the sake of brevity, this article focuses on a comparison of the Human Rights Principles to the American Bar Association's Model Rules of Professional Conduct (the "Model Rules").[74]

In general, the Human Rights Principles are aspirational, as opposed to the Model Rules which provide more of a baseline for attorney conduct. The Human Rights Principles are also phrased positively, whereas the Model Rules are phrased negatively (e.g. the Human Rights Principles emphasize communicating with honesty; the Model Rules require a lawyer not to make a false statement of material fact). In addition, unlike the Model Rules, the Human Rights Principles are designed to include and apply to all staff at a legal aid organization, including administrative staff, intake workers and interns, not only the attorneys. Below is a detailed explanation of how the Human Rights Principles are related to the Model Rules, with each of the five sections of the Human Rights Principles mapped out separately.

With regard to the human rights principle of "*Human Dignity*", respect, honest communication and privacy are key. The Model Rules do not mention respect for clients except in the limited case of clients with disabilities.[75] The Model Rules do, however, require respect for the legal system, those who serve it, and for the rights of third persons.[76] The Model Rules also incorporate several other ideas related to respect, such as diligence and promptness.[77]

In terms of honest communication, the Model Rules require truthfulness in statements to others and also provide that lawyers "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[78] The Model Rules, however, allow for some delay in transmitting information to clients.[79] Client privacy or attorney-client privilege is addressed in great detail by the Model Rules; however, the Model Rules do not provide for broader privacy as the Human Rights Principles do.[80] For example, the statement about privacy in the Human Rights Principles is very broad and is meant to not only apply to the attorney-client relationship, but also to privacy between supervisors and among staff members.

The "*Participation and Self-Determination*" section of the Human Rights Principles focuses on empowering clients and placing them at the center of advocacy decisions and strategy. This is a different and almost radical approach to the client-lawyer relationship. Compare this section with the Model Rules, which state

> [i]n litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce

[74] MODEL RULES OF PROF'L CONDUCT (2012), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.
[75] *Id*. at Rule 1.14[2].
[76] *Id*. at Preamble [5]; *Id*. at Rule 4.4.
[77] *Id*. at Rule 1.3, 1.4(a)(1).
[78] *Id.* at Rule 4.1; *Id*. at Preamble [6].
[79] *Id*. at Rule 1.4 [7].
[80] *Id*. at Rule 1.6, 1.18(b).

> others. However, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail.[81]

Moreover, previous versions of the Model Rules, and the current rules of professional conduct in some states, such as Texas, include the statement, "Lawyers, as guardians of the law…"[82] The Model Rules push for a strict and narrow view of the allocation of authority between lawyer and client,[83] whereas the Human Rights Principles require the opposite approach. The Human Rights Principles require that the law and process, as well as the scope of clients' rights and the roles of all involved, must be clearly and simply explained to clients, and that clients must be meaningfully involved in the entire case process from intake to litigation strategy.

The "*Equality*" section of the Human Rights Principles is meant to inspire respect for diversity and action to end discriminatory acts. This section lays out specific, if not somewhat unusual, bases for discrimination, to try to make one think about possible personal biases that could affect behavior towards others. The Model Rules put some emphasis on discrimination within the legal system, including against the poor and persons with disabilities. For example, the Model Rules emphasize that "a lawyer should seek improvement of…access to the legal system" and "[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance."[84] The Model Rules also state that "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."[85] However, the Model Rules do not address equality and discrimination outside of those brief mentions in the context of poverty and disabilities.

The Human Rights Principles section on "*Solidarity*" requires the opposite of viewing the role of lawyers as "guardians of the law." Instead, solidarity requires teamwork between clients and staff, recognizing the strengths of clients and challenging traditional power structures. At first this may seem to conflict with the Model Rules regarding conflicts of interest.[86] However, if one recognizes that the core goal of representing each accepted client at legal aid is to fight poverty and expand the rights of the most vulnerable, then it seems much more difficult to find a true conflict of interest issue. Both the Model Rules and the Human Rights Principles emphasize access to justice for those in poverty.[87]

The "*Innovation*" section of the Human Rights Principles is likely the most controversial, requiring lawyers to step outside their traditional roles to pursue creative remedies and innovative advocacy approaches, such as civic participation and international mechanisms. The Model Rules do, however, emphasize that a lawyer performs various functions, including advisor, advocate, negotiator and evaluator.[88] The Model Rules also require that lawyers "should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession,"[89] which likely all require innovative strategies. One other important difference to keep in mind is that where the Innovation section of the Human Rights Principles asks what more you can do to counsel, educate and advocate for your clients and communities, the Model Rules require zealous advocacy, yet "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client."[90] Traditional views of zealous advocacy are much different than thinking outside of the box about how to both stand in solidarity with and empower a client to reach their own goals.

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[81] *Id*. at 1.4 [5].
[82] TEX. DISCIPLINARY RULES PROF'L CONDUCT (2005), http://www.texasbar.com/AM/Template.cfm?Section =Ethics_Resources.
[83] *Id*. at Rule 1.2.
[84] *Id*. at Preamble [6].
[85] *Id*. at Rule 1.14[2].
[86] *See Id*. Rule 1.7.
[87] *Id*. at Preamble [6].
[88] *Id.* at Preamble [2].
[89] *Id*. at Preamble [6].
[90] *Id*. Rule 1.3 [1].

3.6.4 OPERATIONALIZING THE HUMAN RIGHTS PRINCIPLES FOR LEGAL AID

Some legal aid attorneys may find that Human Rights Principles affirm how they have always interacted with their clients. Others may use the Human Rights Principles as a practice guide, or as a set of friendly reminders or goals. A legal aid organization could even integrate the Human Rights Principles into practice guides or employee protocols; the Human Rights Principles can be used as a model for a legal aid organization to develop their own human rights code with staff members. The Human Rights Principles may also form the basis of training modules wherein staff members are given fact patterns and must use the Human Rights Principles to navigate difficult situations that have arisen at intake and during interviews with clients, in the lunchroom with other staff, in salary negotiations with supervisors, in the courtroom with colleagues and otherwise. At the very least, the Human Rights Principles are meant to be a starting point for a legal aid organization that wishes to begin a much longer discussion about integrating human rights into daily work.

It is our hope that the Human Rights Principles will be used by legal aid attorneys across the United States to re-examine their roles towards greater effect. It is by no means easy to examine one's own actions and to "change your ways."[91] It is much easier to simply tell yourself you are already a good lawyer and leave it at that. However, if legal aid attorneys want to move towards using human rights in their daily work and viewing themselves as human rights attorneys, they must start first by looking in the mirror.

[91] *See* Michael Jackson, *supra* note 66.

4 HUMAN RIGHTS LITIGATION IN THE U.S.

This section of the Handbook is designed to give legal aid attorneys in the U.S. the specific information needed to make persuasive human rights arguments in state and federal court. Section 4.1 International Human Rights Law is Difficult to Enforce Directly in U.S. Courts is designed to explain why it is so difficult to enforce human rights law in U.S. courts. We encourage legal aid attorneys to use the sample arguments in Section 4.2 Human Rights Law Adds Value to Judicial Interpretation in the U.S. with Sample Arguments to supplement their current work by cutting and pasting these arguments into pleadings and briefs. Section 4.3 Special Considerations When the Government is Not a Party to the Suit provides an overview of the considerations that need to be taken to into account when the government is not a party to the suit you are litigating. Section 4.4 International Law in Project Partner State Courts provides an overview of any and all citation and interpretation of international law by state and federal courts in Maryland and Texas, where the first Local Human Rights Lawyering Project Partners are located. Section 4.5 Sample Opposition Arguments provides sample opposition arguments that have been made in real cases in response to a human rights argument. These sample opposition arguments are intended to help legal aid attorneys anticipate arguments and strategies that may be used by the opposition when litigating human rights law in state or local courts.

4.1 INTERNATIONAL HUMAN RIGHTS LAW IS DIFFICULT TO ENFORCE DIRECTLY IN U.S. COURTS

Whether created through ratified treaties or as customary law, international law is part of federal law and trumps state law.[92] International law applies to states through the Supremacy Clause of the U.S. Constitution, which defines federal law, including ratified treaties, as the supreme law of the land.[93] Some state constitutions even include explicit provisions to this effect. In Maryland and West Virginia, for example, the state constitutions expressly provide that treaties are the supreme law of the land.[94] Moreover, international obligations must be "implemented at the appropriate government level – federal, state or local."[95]

However, unless ratification includes the clear intent that the treaty be directly enforceable by the courts (i.e., "self-executing"), or unless Congress passes implementing legislation, the treaty is not judicially enforceable.[96] The Senate typically ratifies human rights treaties with "reservations" affirming that they are not "self-executing," and the courts uphold this limitation.[97] The problem is that Congress has not enacted implementing legislation for most of the human rights conventions that the U.S. has ratified. The major exceptions are the Torture Victims Protection Act ("TVPA") for the Convention Against Torture ("CAT") and the International Child Abduction

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[92] Inter-Am. C.H.R. R. Proc., art. 57, *supra* note 57.

[93] 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; 44B Am. Jur. 2d International Law § 12 (2008).

[94] U.S. CONST., art. VI, cl. 2 ("This Constitution, and the Laws of the U.S. which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

[95] U.S. CONST., art. VI, cl. 2; Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev.L. & Soc. Change 366-67 (2006).

[96] *See* U.S. State Department website, http://www.state.gov/s/l/38637.htm.

[97] *See Medellin*, *supra* note 5 ("not all international law obligations automatically constitute binding federal law enforceable in U.S. courts […] while treaties may comprise international commitments they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."); *Igartúa v. United States*, 654 F.3d 99 (11th Cir. 2011) ("The treaties in question here do not adopt any legal obligations binding as a matter of domestic law. […] the International Covenant on Civil and Political Rights, is a ratified treaty but was submitted and ratified on the express condition that it would be "not self-executing.""); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2nd Cir. 2005) ("In the context of the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, the United Nations Universal Declaration of Human Rights, 1948, G.A. Res. 217(III)A, U.N. Doc. A/810, the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, none of these sources of international law have the effect of domestic law. The ICCPR is a signed and ratified treaty, but it came with attached reservations, understandings, and declarations declaring that it is not self-executing. Self-executing treaties generally have the force of domestic law and can be directly enforced by courts. But when a treaty is not self-executing, the treaty does not provide independent, privately enforceable rights."); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001).

Remedies Act for 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").

The TVPA is the implementing legislation for the CAT, and the TVPA states it is "an act to carry out obligations of the U.S. under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."[98] However, the TVPA severely limits the scope of enforcement of CAT in the U.S.

The International Child Abduction Remedies Act is the implementing legislation for the Hague Convention and states that this legislation provides "a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions."[99] In its reservations, the U.S. specifically pointed out that it would help cover costs and expenses of representation if a legal aid program took this type of case. The Legal Services Corporation recently issued guidance to its grantees clarifying that they may represent foreign indigent parents in these cases.[100]

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."[101]

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.[102]

It is important to note here though, that however difficult it is to enforce human rights treaties directly in U.S. courts, many of the principles in the human rights treaties have risen to the level of customary international law. Customary international law does not require implementing legislation to be binding in the U.S. and is binding on U.S. courts.[103]

4.2 HUMAN RIGHTS LAW ADDS VALUE TO JUDICIAL INTERPRETATION IN THE U.S. WITH SAMPLE ARGUMENTS

In addition to customary international law, which is binding on U.S. courts, there are at least five types of arguments that can be made in state courts that human rights law has particular value for **judicial interpretation**:

ARGUMENT 1

The *first* is that the history of certain state constitutions may support, if not compel, looking to foreign and international law for legal interpretation purposes. For example, Maryland's Declaration of Rights provides in article 2 that treaties are the "Supreme Law of the State."[104] You should look to your own state constitution to see if this makes sense.

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[98] Torture Victims Protection Act, P.L. 102-256, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR02092:|TOM:/bss/ d102query.html.
[99] 42 U.S.C. § 11607 (a)(4).
[100] *See* U.S. Department of Justice, The Justice Blog, http://blogs.justice.gov/main/archives/1855.
[101] International Religious Freedom Act of 1998, P.L. 105-292, http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02431:|TOM:/ bss/d105query.html|.
[102] Exec. Order No. 13107, *supra* note 5.
[103] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102, *supra* note 3; LOUIS HENKIN, *supra* note 25.
[104] Davis, *supra* note 95 (noting that the legislative history of Section 3 of New York's constitution, granting the right to health, suggests that the framers as well as the public who ultimately approved the provision in 1938, were responding to both specific health needs of the state and an international dialogue on public health and state responsibility in which many New Yorkers participated. With respect to this legislative history, Professor Martha Davis notes: "Given this context, New York's state constitutional reference to health can only be properly understood with reference to the international law of public health."); Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational*

SAMPLE ARGUMENT 1

The legal tradition in the U.S. has long embraced looking to foreign and international precedent for guidance on domestic legal questions. Consequently, federal and state courts in the U.S. regularly look to the opinions of international bodies and colleagues in foreign jurisdictions for assistance in reaching sound conclusions under domestic law.

While international law may not, in most cases, bind U.S. courts, it nevertheless provides an important source of persuasive authority. This is true despite the Supreme Court's ruling that non-self-executing treaties require congressional legislation to bind U.S. courts. *See Medellin v. Texas*, 128 S.Ct. 1356 (2008). In fact, the U.S. Supreme Court has significantly expanded its willingness to consider international law when deciding cases in recent years. For instance, the Court has expressly looked to the laws and opinions of other nations and international bodies in determining issues pertaining to the fundamental rights of freedom, equality and privacy, *see, e.g., Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting that the European Court of Human Rights and other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct"), *Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (*citing* The International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women to provide support for affirmative action under the Constitution), as well as issues pertaining to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution. *See, e.g., Roper v. Simmons,* 543 U.S. 551, 575-78 (2005) (the Court's determination that the death penalty is disproportionate punishment for juvenile offenders "finds confirmation" in the fact that the U.S. was the only country in the world that officially sanctioned the practice); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997), *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958). In short, the Supreme Court has indicated that international law offers "respected and significant" authority of which courts should take note. *Roper*, 543 U.S. at 554.

The highest courts across the country have also increasingly looked to international law in recent years when interpreting their own constitutions and statutes. *See, e.g.*, *In re Marriage Cases*, 43 Cal. 4th 757, 819 n.41 (Cal. 2008) (*citing* the International Convention on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights in declaring that marriage is a fundamental interest of the individual and the state). *See also Grimes v. Kennedy Krieger Inst.*, 366 Md. 29, 113 (Md. 2001) (looking to the Nuremburg Code, a set of ethical standards for conducting research on human subjects, for persuasive authority in determining that scientific experimentation on minors who had been exposed to lead without their consent violated their rights under state tort law); Opportunity Agenda, Human Rights in State Courts (2011), http://opportunityagenda.org/legal_and_policy_analysis_human_rights_state_courts_2011 (surveying state courts' use of international law).

Constitutional Discourse, 65 MONT. L. REV. 15, 24 (2004) (tracing the Montana constitution's provisions on "human dignity" to origins in the Universal Declaration of Human Rights (UDHR) and noting the 1972 amendment to Montana's constitution, which included the term "human dignity," was drawn from Puerto Rico's constitution. Also noting During the drafting of Puerto Rico's constitution, "the United Nations played a key role, both in inspiring provisions based on the UDHR and as a vehicle for attempted resolution of the Commonwealth's relationship to the United States").

ARGUMENT 2

The *second* argument is that **international jurisprudence may offer precedent and models that are far more on point for the case at hand than anything in the federal system or even sister states**. Economic and social rights, with some notable exceptions, are still woefully underdeveloped in federal jurisprudence and there are other jurisdictions that have grappled with key issues, such as the relationship between courts and legislatures, the standard of review for positive health or housing rights, and appropriate remedies. Such precedents may represent the only available cases directly on point, and thus the most relevant sources of law for state courts developing economic and social rights provisions in their own constitutions.[105]

SAMPLE ARGUMENT 2

Where domestic Constitutional or statutory law is vague, courts have looked to treaties and international law for interpretive guidance. *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (stating "international law . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation. . ."); *Sosa v. Alvarez-Machain* 124 S. Ct. 2739, 2764 (2004) (declaring "[f]or two centuries we have affirmed that the domestic law of the U.S. recognizes the law of nations."); *State v. Steffen*, 1994 Ohio App. LEXIS 1973 (Ohio App. 1994) (involving claim that Ohio death penalty provision violated treaties and customary international law); *Trop v. Dulles*, 356 U.S. 86, 102, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (noting the climate of international opinion regarding acceptability of a particular punishment). S*ee also* U.S. Const. art. VI, cl. 2. (stating "[A]ll Treaties made... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."); U.S. Const. art. 1, § 8, cl. 10 ("The Congress shall have Power... [t]o define and punish... Offences against the Law of Nations."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, §§ 701, 701 cmt. e ("The U.S. is bound by the international customary law of human rights").

"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 125 S. Ct., 1183, 1200 (2005). *See, e.g., State v. Wilder*, 748 A.2d 444 (Me. 2000) (looking to European common law to support its finding of the fundamental right of parents to control the upbringing of their children).

From Leo Belanger et al v. John Mulholland sample brief, available here.

[105] Davis, *supra* note 95.

ARGUMENT 3

The *third* argument is that **state courts should interpret U.S. law as consistent with international law whenever possible.**[106]

SAMPLE ARGUMENT 3

The U.S. Supreme Court has recognized that the laws of the U.S. should be interpreted to be consistent with international law whenever possible. *See*, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.").

Moreover, under the Vienna Convention on the Law of Treaties, 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 party. Vienna Convention on the Law of Treaties art. 18, January 27, 1980, 1155 U.N.T.S. 331. 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).

ARGUMENT 4

The *fourth* argument is that **where there is no controlling U.S. law, state courts should look to customary international law for guidance for its decision**.[107]

SAMPLE ARGUMENT 4

U.S. Courts have long recognized that customary international law can provide guidance where there is no controlling domestic law. In fact, the Supreme Court stated in its 1900 decision*, The Paquete Habana*, that "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…." 175 U.S. 677, 700 (1900).

ARGUMENT 5

The *fifth* argument is that **state courts should be part of the transnational dialogue on human rights simply because it is a vital conversation that promotes universal values**. Such participation also enhances (and protects) the image and role of the U.S. in the international community. Only by participation can the U.S. legal community safeguard and build its influence globally. Moreover, participating in that "global conversation" provides an additional framework and bridge for dialogue between states on these compelling issues by offering a common language for judicial exchange.[108]

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[106] *Id*. at 366.
[107] *Id.*
[108] *Id.*

4.3 SPECIAL CONSIDERATIONS WHEN THE GOVERNMENT IS NOT A PARTY TO THE SUIT

Some, if not most, of the legal issues dealt with by legal aid attorneys do not involve the government as a party. We want legal aid attorneys to be able to make human rights arguments even when the government is not a party to the dispute in a case at hand. However, special thought must be put into human rights arguments made when the government is not a party to the dispute at issue because international human rights conventions by nature bind governments, not private parties.

There are many examples of human rights law arguments that can be made in a dispute between private parties. For example, human rights law and international norms can help a court interpret or reinterpret a local statute that is at issue in a dispute between private parties, such as a divorce case where one party might argue that a local statute discriminates against women or same sex partners. Human rights law can also come into play when a party is arguing that they are third party beneficiaries to a contract between the government and a private entity, such as a public housing contractor in an eviction case or a bank in a foreclosure case.

Because human rights obligations bind governments, legal aid attorneys must think carefully when crafting legal arguments to be sure to bring the government into the case as a party or third party, or to address the validity of a statute or regulation capable of being enforced by government officials.

4.4 INTERNATIONAL LAW IN STATE COURTS

This section is designed to provide a sampling of citations to and interpretations of human rights law by state court, as well as state law that references or cites human rights law. This sampling is no way comprehensive and advocates should proceed with their own legal research. For additional states, the Opportunity Agenda published a report in 2011 on **Human Rights in State Courts**, which lays out, state by state, court decisions that involved human rights law.

4.4.1 CALIFORNIA

SAMPLE CALIFORNIA CASES CITING OR REFERENCING HUMAN RIGHTS LAW

i. *Civil and Immigration Cases*

California courts have shown a considerable willingness to consult international human rights law in the civil context and when dealing with foreign litigants. In several instances, the courts have looked to treaties and customary international law for guidance in construing statutory provisions and the state constitution.

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. *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). 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. *Id.* at 622. In *Bixby v. Pierno,* the court cited the UDHR in support of its conclusion that the freedom to practice one's profession is protected in California. 481 P.2d 242, 251 n.9 (Cal. 1971).

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 public safety and in humane treatment of the mentally disturbed." 616 P.2d 836, 844 n.9 (Cal. 1980). 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. 651 P.2d 1151, 1154 n.4 (Cal. 1982).

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. 158 Cal. Rptr. 562, 567 n.4 (Cal. Ct. App. 1979). In *Boehm v. Superior Court*, the plaintiffs challenged Merced County's reduction of welfare benefits as a violation of the state welfare law. 223 Cal. Rptr. 716, 717 (Cal. Ct. App. 1986). The court in *Boehm* looked to the UDHR to determine whether reducing benefits to ensure only food and shelter constituted "minimum subsistence," as required by the statute. *Id.* The court stated that the UDHR guarantees "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." *Id.* at 721 (quoting UDHR, art. 25(1), adopted Dec. 10, 1948; Gen. Assm. Res. 217A(111), U.N.Doc. A/810 (1948)). In striking the planned reduction, the court stated, "it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation and medical care." *Id*.

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.*

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).

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.*

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.

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. *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).

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

ii. *Death Penalty Cases*

A substantial number of defendants in death penalty cases have argued that their convictions and sentencing violate human rights law. *See, e.g., Carpenter v. Martel*, No. C 98–2444 MMC, 2011 WL 4502621 (N.D. Cal. Sept. 28, 2011); *Bemore v. Cullen*, No. 08cv0311 LAB (WVG), 2011 WL 1044633 (S.D. Cal. March 22, 2011). However, California courts have repeatedly rejected defendants' arguments that the death penalty violates human rights law. *See, e.g., People v. Hillhouse*, 40 P.3d 754, 782 (Cal. 2002). *See also People v. Cook*, 139 P.3d 492, 531 (Cal. 2006). The California Supreme Court has stated that "[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." *People v. Verdugo*, 50 Cal. 4th 263, 312 (Cal. 2010) (*citing People v. Hillhouse*, 27 Cal. 4th 469 (2002)).

In *People v. Brown*, the California Supreme Court noted that although the U.S. is party to the ICCPR, it reserved the right to continue to use the death penalty. 93 P.3d 244, 258 (Cal. 2004). The Court has also denied defendants claims based on international law where the defendants could show no violation of state or federal law. *See People v. Taylor,* 48 Cal. 4th 574 (Cal. 2010). *See also People v. Gamache*, 48 Cal. 4th 347, 407 (Cal. 2010).

California's courts have also rejected defendants' claims that the death penalty violates international law because it is used as a "regular punishment for a substantial number of crimes." *See People v. Dykes*, 209 P.3d 1, 73 (Cal. 2009). *See also People v. Whalen*, 1152 Cal. Rptr. 3d 673 (Cal. 2013) (stating that the death penalty statute does not violate "international norms of decency"). Furthermore, the courts have rejected the argument that the death penalty is used so regularly that it violates the Eighth and Fourteenth Amendments by "violating international norms of human decency." *See People v. Lindberg*, 190 P.3d at 704 (Cal. 2008).

Some defendants have argued that because the majority of international jurisdictions have abolished the death penalty, its use in the United States violates the Eighth Amendment and customary international law. However, California courts remain firm in their stance that if an execution accords with state and federal law, international law is not violated. *See People v. Morgan*, 170 P.3d 129, 152 (Cal. 2007). *See also People v. Solomon*, 49 Cal. 4th 792 (Cal. 2010); *People v. Abel*, 53 Cal. 4th 8911, 38 Cal. Rptr. 3d 547 (Cal. 2012) (holding that the death penalty does not violate customary international law). At times the California Supreme Court has simply rejected death penalty defendants' appeals to international law, relying on precedent set by previous rejections of similar claims. *See People v. Jackson*, 199 P.3d 1098, 1124 (Cal. 2009); *People v. Bennett*, 199 P.3d 535, 572 (Cal. 2009);

People v. Doolin, 198 P.3d 11, 60 (Cal. 2009); *People v. Hovarter*, 189 P.3d 300, 333 (Cal. 2008); *People v. Parson*, 187 P.3d 1, 29, 44 Cal. 4th 332, 372 (Cal. 2008).

In *Carpenter v. Martel*, the Court called the petitioner's appeals to international law "frivolous," stating that federal habeas review is "expressly limited to claims that a petitioner is in custody 'in violation of the Constitution or laws or treaties of the United States.'" *Martel*, 2011 WL 4502621 at 12 (*citing* 28 U.S.C. § 2254(a)).

In *People v. Souza*, the California Supreme Court rejected the argument that the death penalty violates customary international law "because the United States is in the minority of nations worldwide that regularly permit capital punishment and because the [ICCPR] prohibits the arbitrary deprivation of life." 54 Cal. 4th 90, 142 (Cal. 2012).

In *Bemore v. Cullen*, the Court once again rejected these claims, citing the Supreme Court's decision in *Sosa*, which held that the UDHR does not impose obligations of international law and that the United States' ratification of the ICCPR was made with the understanding that it was not self-executing. 2011 WL 1044633 at 56 (*citing Sosa*, 542 U.S. at 734–35, 124 S.Ct. 2739 (2004)). The *Bemore* court also cited a Ninth Circuit opinion holding that legally enforceable private rights were not derivable from customary international law in the absence of a U.S. law granting jurisdiction over such claims. *Id.* at 57 (*citing Serra v. Lappin*, 600 F.3d at 1197 (9th Cir. 2010)). The Court also stated that there was no evidence to show that abolition of the death penalty has "risen to the level that the international community as a whole recognizes it as a *jus cogens* or a norm from which no derogation is permitted." *Id.* (*citing Buell v. Mitchell*, 274 F.3d 337, 373 (6th Cir. 2001)).

In C*ramer v. Tyars*, the dissent cited the UDHR in finding that requiring a defendant with "severe and irreversible mental retardation" to answer potentially incriminating questions was "cruel and degrading." 588 P.2d 793, 805 n.1 (Cal. 1979) (Newman, J., dissenting).

In *People v. Levins*, a concurring opinion agreed that the defendant had a right to a postindictment preliminary examination and noted the ACLU's amicus brief, urging the court to consider the "juridical impact" of the UDHR, the ICCPR and CERD. 586 P.2d 939, 942 (Cal. 1978) (Newman, J., concurring).

In *Carter v. Chappell*, a defendant who had been sentenced to death more than twenty years earlier petitioned for a writ of habeas corpus, contending that his execution following "a lengthy confinement under sentence of death would constitute cruel and unusual punishment and violate international law, covenants, treaties and norms." No. CV 06–4532 RGK, 2013 WL 781910, at 80. (C.D. Cal. Mar. 1, 2013). In denying the defendant's petition, the district court cited precedent holding that the repeated rescheduling of execution did not constitute cruel and unusual punishment in violation of the Eight Amendment, UDHR, or CAT. *Id.* (*citing cf. Nevius v. McDanie*l, 218 F.3d 940 (9th Cir.2000)). *See also People v. Vines*, 51 Cal. 4th 830, 124 Cal. Rptr. 3d 830 (Cal. 2011).

iii. *Other Criminal Cases*

Defendants have also brought claims under international human rights law for violations of procedural rules. In People v. Le*onard*, the defendant claimed that various errors made during his trial violated the ICCPR, the American Declaration, the American Convention, the European Convention, and the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. 157 P.3d 973, 1017 (Cal. 2007). The court dismissed the claims because the defendant did not show that international law granted him greater rights than California law. *Id. See also People v. Alfaro*, 163 P.3d 118, 157 (Cal. 2007) (denying defendant's claims under ICCPR, ADRAM, and UDHR, but assuming the defendant had standing to make such claims).

In *In re Martinez*, the defendant petitioned for a second writ of *habeas* corpus, claiming violation of his right to have a consulate official notified of his arrest under the Vienna Convention. 46 Cal. 4th 945 (Cal. 2009). Although he based the writ on the President's Memorandum instructing U.S. courts to give effect to the International Court

of Justice's decision in *Avena*, 2004 I.C.J. 12 (Mar. 2004)., the court dismissed the petition as successive. 46 Cal. 4th 945 (Cal. 2009).

In *People v. Bell*. Citing *Roper v. Simmons*, the court held that a life sentence for a juvenile does not violate international law and that *Roper* did not compel the opposite result. No. E038574, 2007 WL 1653102, at 45 (Cal. Ct. App. June 8, 2007). *See also Roper v. Simmons*, 543 U.S. 554, 575 (2007) (holding the death penalty for juveniles violates the Eighth Amendment).

Similarly, in *People v. Her*, the court declined to respond to the defendant's appeals to the Convention on the Rights of the Child ("CRC") and *Roper* in finding that a life sentence with parole for a juvenile defendant is not cruel and unusual. No. C051473, 2007 WL 4217445, at 14 n.8 (Cal. App. 3 Dist. Nov. 30, 2007).

In *People v. Dyleski*. Here, the defendant cited the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man ("American Declaration") and argued that because he was 16 when he committed the crime, a life sentence without parole violated customary international law. No. A115725, 2009 WL 1114077, at 36 (Cal. Ct. App. Apr. 27, 2009). The court disagreed, stating that California and U.S. courts were bound by neither of those treaties, nor the CRC. *Id. See also People v. See*, No. F055800, 2009 WL 4882677, 2009 Cal. App. Unpub. LEXIS 10015 (Cal. Ct. App. 5th Dec. 18, 2009) (rejecting defendant's claim that life without parole violates juvenile provisions of ICCPR).

In *People v. Pratcher*. The court recognized the international trend towards "protection and rehabilitation juvenile offenders rather than punishment and deterrence," but found no consensus on the issue and rejected the 15-year-old defendant's claim that a life sentence violates CRC and international human rights norms. No. A117122, 2009 WL 2332183 (Cal. Ct. App. July 30, 2009).

SAMPLE CALIFORNIA STATUTES CITING OR RELEVANT TO HUMAN RIGHTS LAW

I. 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."

II. 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."

III. 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.

IV. 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."

V. 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).

4.4.2 FLORIDA

SAMPLE FLORIDA CASES CITING OR REFERENCING HUMAN RIGHTS LAW

i. *Civil and Immigration Cases*

In *Toca v State*, 834 So. 2d 204 (Fla. Dist. Ct. App. 2002), the Plaintiff refused to sign court papers based upon his religious beliefs, which he claimed prohibited him from taking oaths. Toca relied in part upon the International Covenant on Civil and Political Rights (ICCPR) in his claims, but the court found that there is "scant case law nationally, and none…in Florida" that interprets the ICCPR's article on religious freedom, and decided the ICCPR was inapplicable due to the U.S. Senate's treaty reservation declaring it non-self-executing. The court also cited to an Eighth Circuit decision that had found Article 18 of the ICCPR as "furnishing no greater rights or protections than those provided in the First Amendment." *Crow v. Gullet*, 706 F. 2d 856 (8th Cir. 1983). Therefore court found that even if the ICCPR were enforceable, the plaintiff's claims would nevertheless fail on their merits under ICCPR as they had under the Constitution.

The issue of consular notifications under the Vienna Convention is a matter that has arisen in various Florida cases. In *Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000), a British national alleged violations of the Vienna Convention when the U.S. failed to inform the British Government that he had been arrested for a capital crime. The court found that Maharaj had failed to raise the issue on direct appeal, thus barring the argument. However, the court further stated that "he has failed to establish that he has standing, as treaties are between countries, not citizens." *See Matta–Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.1990). Later, in *Lugo v. State,* a U.S. citizen defendant wanted for crimes allegedly committed in the U.S. was apprehended in the Bahamas. *2 So. 3d 1, 17 (Fla. 2008)*. In an unusual argument attempting to suppress evidence resulting from the arrest, Lugo claimed that the Bahamian police's failure to contact the US Embassy in Bahamas or notify him of his right to contact them violated his rights. Procedural and other issues aside, the court also found that Lugo did not have standing as a private citizen, *citing Maharaj*. *See also, Valle v. State*, 70 So. 3d 530 (Fla. 2011).

Florida courts have also examined the Hague Convention on the Civil Aspects of International Child Abduction, 42 U.S.C.S. § 11601 et seq. For example, in *Wigley v. Hares*, 82 So. 3d 932 (Fla. Dist. Ct. App. 2011), the court looked at whether the child was "settled in the environment" under the meaning of Article 12 of the convention and determined that because the child had been hidden and not gone to daycare or school, the child had no contact with the outside world, and did not meet the meaning of "settled in the environment". *See also*, *O.D.Q. v. P.R.C.*, 917 So. 2d 935, (Fla. Dist. Ct. Dist. 2005); *Strout v. Campbell*, 864 So. 2d 1275 (Fla. Dist. Ct. App. 2004); *Quinn v. Settel*, 682 So. 2d 617 (Fla. Dist. Ct. App. 1996).

ii. *Death Penalty Cases*

Numerous death penalty cases have been heard in Florida state courts in recent years, many in which the defendants utilized international human rights law as a basis for their claims. In some of the decisions, the courts referred to human rights law. Some of the primary arguments of defendants in these cases have included questions regarding (a) whether an excessive length of time on death row constitutes cruel and unusual punishment, (b) whether particular means of execution constitute cruel and unusual punishment, and (c) whether

capital punishment is appropriate for juveniles. In most cases, the defendants have referred to the ICCPR or CAT in support of their arguments.

Regarding the first types of cases arguing that lengthy death row sentences are cruel and unusual punishment, a pivotal case is that of *Knight v. State*, 746 So. 2d 423 (Fla. 1998). In that case, the court summarily dismissed the defendant's claims that the state had forfeited its right to execute Knight under "binding norms of international law." The court does not refer to any particular treaty or convention in its decision, but bases the denial on the fact that "no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." *Knight v. State*, 746 So. 2d 423, 497 (Fla. 1998). Subsequent cases have also been denied on the same grounds and several also referred to international law, including the International Convention on Civil and Political Rights and the Convention Against Torture. *See e.g.*, *Booker v. State*, So. 2d 1079, 1096 (Fla. 2000) (where Defendant based his argument upon ICCPR and CAT). *See also Elledge v. State*, 706 So. 2d 1340, 1342 n.4, 1347 n.10 (Fla. 1997); *Johnson v State*, 27 So. 3d at 11 (Fla. 2010).

Another death penalty issue in which defendants have made reference to international human rights law is that of whether a particular means of execution amount to cruel and unusual punishment. In *Kilgore v. State*, the defendant claimed that electrocution and lethal injection violate his Constitutional rights as well as "international law." 55 So. 3d 457 (Fla. 2010). The court found that the argument was procedurally barred, but also found it to be without merit. In its decision, the court failed to refer to international law and simply based it upon precedential decisions.

In the case of *Brennan v. State*, the court struck down the juvenile death penalty. 754 So. 2d 1, 14 (Fla. 1999). Although the decision was ultimately based upon a constitutional analysis with no mention of human rights law, in a concurring opinion, a justice stated that "[t]here is also a value to us adhering to this line we have ourselves drawn, rather than turning to international human rights treaties..." While this may indicate a reluctance to turn to human rights law when constitutional or precedential legal arguments are sufficient, the footnote did explain that international human rights law did indeed support the outcome of overturning the juvenile death penalty. The footnote stated, "[t]he United States, for example, is a party to the International Covenant on Civil and Political Rights which bans the use of the death penalty for children under age eighteen. Nearly every country in the world, including those like China whose human rights practices we sometimes question, honor that ban."

iii. *Other Criminal Cases*

The Florida District Court of Appeals, in *Graham v. State*, examined whether or not to apply a *per se* ban on the use of a sentence of life without parole for juveniles and cited to the ICCPR and international community's aversion to life sentence for juveniles. 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *overruled by Graham v. Florida*, 130 S. Ct. 2011 (2010). The court in *Graham* found the "international pressure to change our existing legal system" the strongest argument for the defendant's proposition. *Id*. at 51. The court discussed at length the weight of international opinion and how it could shape the court's interpretation of the Eighth Amendment of the U.S. Constitution, but declined to apply the per se ban stating a need for balance against the "due deference owed the state legislatures of this country in matters of sentencing." *Id*. This case went to the U.S. Supreme Court and the U.S. Supreme Court held that life imprisonment was not a proper punishment for juveniles who had committed non-homicide crimes. *Graham v. Florida*, 130 S. Ct. 2011 (2011). The Court noted "that Article 37(a) of the United Nations Convention on the Rights of the Child … ratified by every nation except the United States and Somalia, prohibits the imposition of 'life imprisonment without possibility of release … for offences committed by persons below eighteen years of age." *Id*. at 2034.

In *Hurtado v. U.S. Atty. Gen.*, 401 Fed. Appx 453 (2010), the Petitioner detainee successfully argued that he was previously acquitted of similar charges in Peru and that a treaty with Peru prevented his extradition. The Petitioner detainee also tried to argue that Article 14(7) of the ICCPR barred his extradition on double jeopardy grounds. However, the court noted that the plain language of the ICCPR indicates that its

provisions govern the relationship between a State and the individuals within the State's territory, not the relationship between two sovereign States. *Id*. at 456. *See also United States v. Duarte-Acero*, 208 F.3d 1282, 1256-83 (11th Cir. Fla. 2000) ("Therefore, the ICCPR is not binding on federal courts.")

SAMPLE FLORIDA STATUTES CITING OR RELEVANT TO HUMAN RIGHTS LAW

I. Miami-Dade County, Florida, Resolution No. R-644-12 (2012). This **resolution**, entitled "Resolution Expressing the Board's Intent to Declare that the Freedom from Domestic Violence is a Fundamental Human Right", was adopted by the Board of County Commissioners of Miami-Dade County in 2012 after University of Miami School of Law Human Rights Clinic students worked with a county commissioner to introduce the bill. The charge of the Resolution reads as follows:

> Section 1. This Board expresses its intent to join world leaders and leaders with in the United States in recognition of domestic violence as a human rights concern and declares that the freedom from domestic violence is a fundamental human right.
> Section 2. This Resolution shall serve as a declaration to assure the citizens of the County that state and local governments bear a moral responsibility to secure this human right on behalf of their residents.
> Section 3. This Resolution shall serve as a charge to all local government agencies to incorporate these principles into their policies and practices…

II. Miami Springs, Florida, Resolution No. 2012-3555 (Sep. 10, 2012**)**. The language of this **resolution** is identical to that of Miami-Dade County's, as included above.

4.4.3 MARYLAND

SAMPLE MARYLAND CASES CITING OR REFERENCING HUMAN RIGHTS LAW

In *Trimble v. Maryland*, the Court of Appeals mentioned that the International Covenant on Civil and Political Rights and the American Convention on Human Rights have called for the abolition of capital punishment of juveniles, but affirmed the death penalty sentence of a minor anyway. 300 Md. 387, 478 A.2d 1143 (Md. 1984). The defendant's sentence was later vacated because he was improperly advised of his right to a jury sentencing, however, and he was sentenced to life in prison after Maryland passed a law prohibiting the death penalty for juveniles subsequent to the first case. *Trimble v. State*, 321 Md. 248, 264, 582 A.2d 794, 802 (Md. 1990). *See also* Md. Code, Art 27 § 412 (f)(1989), repealed by Acts 2002, c. 26, § 1, eff. Oct. 1, 2002.

In *Grimes v. Kennedy Krieger Institute*, the Court considered two separate negligence actions involving children who allegedly developed lead poisoning while participating in a research study with the defendant. 366 Md. 29, 782 A.2d 807 (Md. 2001). Relying on the Nuremburg Code, the Court held that informed consent can create a special relationship giving rise to greater duties, the breach of which are actionable in court. *Id*. at 858. The Court stated that the "Nuremberg Code specifically requires researchers to make known to human subjects of research 'all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.'" *Id*. at 849.

The Court of Appeals in *In re Heilig* held that the trial court had mistakenly believed that it lacked jurisdiction to make a declaration that the petitioner was no longer male and now female. 816 A.2d 68, 372 Md. 692 (Md. 2003). The Court cited the European Convention for the Protection of Human Rights and Fundamental Freedoms and *Goodwin v. United Kingdom*, [2002] 2 FCR 577, 67 BMLR 199 (European Court of Human Rights (Grand Chamber) 2002) and stated that "a person has a deep personal, social, and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become." *Id*. at 79.

In *In Diallo v. State,* the Court of Appeals affirmed the trial court's dismissal of Diallo's claim that he had diplomatic immunity through his father. 994 A.2d 820, 413 Md. 678(Md. 2009). Diallo claimed that he had diplomatic immunity through his father under the Vienna Convention on Consular Relations. *Id*. at 686. However, the Court of Appeals held that because Diallo's father was a diplomat with the United Nations, the Convention on Privileges and Immunities of the United Nations of 1946 art. V, § 19, 13 Feb. 1946, 21 U.S.T. 1418 applied. Id. at 699. Moreover, because Diallo's father was not present in the U.S. when the offense occurred, Diallo did not enjoy the "functional immunity" protection. *Id.*

In *Toland v. Futagi*, the Court of Appeals denied the father's custody claim over his nine year old daughter who lived in Japan with her maternal grandmother. A Japanese court had previously granted custody to the grandmother and the father claimed that Japan's child custody laws violated the "fundamental principles of human rights". The Court, after examining the UDHR, the Hague Convention on the Civil Aspects of Child Abduction, and Maryland law, dismissed the father's claim. 425 Md. 365, 40 A.3d 1051 (Md. 2012).

SAMPLE MARYLAND STATUTES REFERENCING OR RELEVANT TO HUMAN RIGHTS LAW

I. MD. CONST. ART 2. Maryland's Constitution requires that ratified treaties be given precedence, as it provides in article 2 that treaties are the "Supreme Law of the State." *See also* Martha Davis, *Part I: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 391-97 (2006).

II. On March 19, 2012, Baltimore City Council enacted a **resolution** following efforts by law clinic students from the University of Baltimore. The resolution declared that freedom from domestic violence is a fundamental human right.

4.4.4 NEW YORK

SAMPLE NEW YORK CASES CITING OR REFERENCING HUMAN RIGHTS LAW

In *In the Matter of the Guardianship of Dameris, L.*, 38 Misc.3d 570, 956 N.Y.S.2d 848 (2012), the court in *Dameris* found that the use of supported decision-making, rather than a guardian's substituted decision making is consistent with international human rights, citing Article 12 of the CRPD. The court also notes 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 *In re Mark C.H.*, 906 N.Y.S2d. 419 (N.Y. Sur. Ct. 2010), the court in *Mark C.H.* found 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. The court also found a basis for periodic judicial review of guardianships of persons with disabilities in the ICCPR.

In *People v. Wolfer*, 889 N.Y.S.2d 883, 872 (N.Y. Sup. Ct. June 12, 2009), the defendant Wolfer was adopted from Korea but naturalization papers were never submitted on his behalf and defendant argued that his rights under the Vienna Convention on Consular Relations had been violated. The court found that the Vienna Convention does not create any enforceable fundamental rights and found that even if a violation of the Vienna convention were to be found, it did not warrant vacating a guilty plea and conviction.

In *In the Matter of Pedro M.*, 864 N.Y.S.2d 869, 871 (N.Y. Fam. Ct. 2008), a child neglect case, the Court in footnote 8 cited to the U.N. Convention on the Rights of the Child, stating that children should be given the opportunity in matters affecting them to freely express their views during proceedings.

In *State v. Scutari*, 560 N.Y.S.2d 943 (N.Y. Dist. Ct. 1990), the defendants were accused of criminal trespass for remaining in a Congressman's office after closure to protest. The defendants argued that U.S. law incorporates international law, as well as constitutional law and treaties, and that continued U.S. aid to El Salvador violated the Geneva Accords. The court acknowledged that international law is a part of U.S. law, but found against the defendants.

In *Beck v. Mfrs. Hanover Trust Co.*, 125 Misc. 2d 771 (N.Y. Sup. Ct. 1984), the court recited the act of state doctrine, which bars American courts from inquiring into the validity of the public acts of a foreign sovereign on its own soil. The court opined in a footnote that the act of state doctrine would not apply "for acts in gross violation of accepted standards of international law," citing the Second Circuit's decision *in Filartiga v. Peña-Irala*, 630 F.2d 876(2d Cir. 1980).

In *In re Estate of Vilensky*, 424 N.Y.S.2d 821 (N.Y. Surrog. Ct. 1979), the court in *Vilensky* denied the petitioner's motion to allow testimony by the issuance of letters rogatory to a court in the Soviet Union. In its decision, the court quoted from the Helsinki Accords, "[i]n the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the U.N. Charter and with the UDHR. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound."

In *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194 (1972), the NY Court of Appeals found that the state constitution "does not confer or require legal personality for the unborn", remanding the case to the trial court. Dissenting, Judge Adrian Burke argued that "our laws should protect the unborn," pointing to the U.N. Convention against Genocide, "which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation."

In *Jamur Productions Corp. v. Quill*, 51 Misc. 2d 501, 509 (N.Y. Sup. Ct. 1966), the Plaintiffs brought a cause of action for damages, partly based upon the claim that the strike was violative of the UDHR, article 29. The Court granted the defendant-unions' motion to dismiss for plaintiff's failure to state a claim upon which relief could be granted.

In *Wilson v. Hacker*, 101 N.Y.S.2d 461 (N.Y. Sup. Ct. 1950), the NY trial court considered whether to enjoin unions from picketing a restaurant unless they agreed either to admit the women bartenders to the unions or whether to modify their demand and exempt the barmaids from the requirement that all employees be union members. The Court quoted the UDHR in its decision, condemning discrimination on the basis of gender "as a violation of the fundamental principles of American democracy." The court also stated that the provisions of the UDHR were "[i]ndicative of the spirit of our times," quoting Articles 2 and 23.

SAMPLE NEW YORK STATUTES RERFERENCING OR RELEVANT TO HUMAN RIGHTS LAW

I. N.Y. CONST. art. XIII, § 1. New York's state constitution incorporates the federal constitution through its requirement that all public officers take an oath to support the Constitution of the United States under article XIII, § 1. *See also* Davis, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 391-97 (2006).

II. N.Y. CONST. art. XVII, § 3. The New York State Constitution also states that "the protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner and by such means as the legislature shall from time to time determine." Section 3 grants the right to health, has been interpreted by New York State courts to create enforceable rights. Given the legislative history and context in which the 1938 provision was adopted, is properly understood with reference to the international law of public health. *See also* Davis, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 391-97 (2006).

III. In October 2012, the Albany County Executive, Albany City Common Council, and Albany County Legislature each passed proclamations or unanimous **resolutions** declaring that freedom from domestic violence is a fundamental human right.

IV. In January 2013, Senator Adriano Espaillat, D-Manhattan, introduced a **Farmworker's Bill of Rights**. The NY Senate Bill (S.1743) and its Assembly counterpart (A.1792), sponsored by former chairwoman of the Assembly Labor Committee Catherine Nolan, D-Queens, would reform labor practices in farms throughout the state.

4.4.5 TEXAS

SAMPLE TEXAS CASES CITING OR REFERENCING TO HUMAN RIGHTS LAW

In *Hinojosa v. Texas*, the defendant was convicted of capital murder and sentenced to death. 4 S.W.3d 240 (Tex. Crim. App. 1999). The Court of Criminal Appeals affirmed his conviction, refusing to overturn pursuant to the United Nations Charter, stating "individuals do not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute" and "[t]he preamble, the portion of the Charter upon which appellant relies, does not establish individually enforceable rights." *Id*. at 252-53. The Court stated, "[m]oreover, the Charter's terms do not mandate abolition of the death penalty." *Id.* at 252.

In *Sorto v. State*, the defendant appealed a judgment of the 184th District Court, Harris County, Texas that convicted him of capital murder and sentenced him to death. 173 S.W.3d 469 (Tex. Crim. App. 2005). The defendant argued that his death sentence violated the United Nations Convention Against Torture, Articles 6 and 14 of the International Covenant on Civil and Political Rights, and the Supremacy Clause of the United Sates Constitution. *Id*. at 490. However, the Court of Criminal Appeals held that the Senate filed reservations to both treaties stating that this language did not prohibit the U.S. from imposing capital punishment consistent with the Constitution. *Id*.

In *Ex parte Medellin*, a Mexican national was convicted of capital murder and sentenced to death. 223 S.W.3d 315 (Tex. Crim. App. 2006). The defendant filed an application for a writ of *habeas corpus*, claiming that his rights had been violated because he had not been told that he could contact a Mexican consular official after he was arrested in accordance with Article 26 of the Vienna Convention on Consular Relations. *Id*. at 321. While his application was pending the International Court of Justice (ICJ) issued its decision in the C*ase Concerning Avena and other Mexican Nationals (Mex. v. U.S.),* a case in which Mexico claimed that the U.S. had violated the Vienna Convention by failing to timely advise more than fifty Mexican nationals awaiting execution in U.S. prisons, including Medellin, of their right to talk to a consular official after they had been detained. 2004 I.C.J. No. 128, 2004 ICJ LEXIS 11 (Judgment of Mar. 31). The ICJ ruled in favor of Mexico and held that the Vienna Convention does confer individual rights and that the U.S. violated the Convention. *Ex Parte Medellin* at 322. After the Court of Appeals and the Fifth Circuit denied relief to Medellin, he appealed to the U.S. Supreme Court. *Id*. Before oral argument at the Supreme Court, the President issued a memorandum directing state courts to give effect to the *Avena* decision under the principles of comity. *Id*. The U.S. Supreme Court subsequently dismissed Medellin's writ as improvidently granted, stating that there is a possibility that "Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum . . . .". *Medellin v. Dretke*, 544 U.S. 660, 125 S. Ct. 2088, 2092, 161 L. Ed. 2d 982 (2005). The Court of Criminal Appeals in Texas then found that the ICJ *Avena* decision and the Presidential memorandum did not constitute binding federal law under the Supremacy Clause of the U.S. Constitution and dismissed Medellin's application for a writ of habeas corpus. *Ex Parte Medellin* at 352.

In the unpublished decision *Townsend v. Texas*, the defendant was found guilty of the offense of harassment for calling a law office repeatedly and intimidating the office staff. No. 14-96-01571-CR, 1999 Tex. App. LEXIS 9561 (Tex. Ct. App. Dec. 30, 1999). On appeal, the defendant argued that the statute under which he was convicted violated U.S. treaty obligations and violated *jus cogens* international law per the International Covenant on Civil

and Political Rights. *Id*. The 14th District Court of Appeals declined to address the arguments, reasoning that "appellant's complaints [did] not attack the validity of the judgment" and were "inappropriate on appeal." *Id*.

In *Dubai Petroleum Company v. Kazi*, the decedent, a citizen of India, was killed while working on an oil rig off the coast of the United Arab Emirates. 12 S.W.3d 71 (Tex. 2000). Respondents, decedent's survivors, brought a wrongful death suit in Texas district court. *Id.* The trial court agreed with the respondent corporations, who argued that the trial court lacked subject-matter jurisdiction because India did not have "equal treaty rights" with the U.S., as required under the wrongful death statute that the Kazis sued under for injuries or death in a foreign state or country, and dismissed the case. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 71.031(a) (1997)). *Id.* at 74. The court of appeals reversed, holding that the ICCPR, confers "equal treaty rights" between India and the U.S. *Id*. The Texas Supreme Court affirmed, but for different reasons. The Texas Supreme Court stated that the term "equal treaty rights" in the case at hand "simply means that the foreign country's law must, based on a treaty, afford U.S. citizens access to its courts to pursue any remedies available to its own citizens for personal injury or wrongful death." *Id*. at 80. The court stated "treaties are to be construed broadly" and then went on to interpret article 14(1) of ICCPR, looking to the U.N. Human Rights Committee, General Comment No. 13(1), U.N. Doc. HR1/GEN/Rev.1 (1984), and holding that "the language of the Covenant provides for equal access to courts and equal treatment in civil proceedings, it satisfies the Kazis' initial burden of establishing "equal treaty rights". *Id*. at 82-83. *See also Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 261–62 (Tex. App. 1999) (discussing the ICCPR in the context of equal treaty rights in a negligence suit where subject matter jurisdiction was at issue).

The Tenth District Court of Appeals of Texas in the case of *In re Sigmar*, refused to grant the petitioner's request to set aside temporary orders prohibiting him from (1) having unsupervised access to his child due to a potential risk for international abduction and (2) disposing of assets pending an evidentiary hearing. 270 S.W.3d 289 (Tex. Crim. App. 2008). The Court held that "[e]vidence regarding the legal practices and procedures of a foreign country are legislative fact." *Id*. at 302. The Court went on to state "that acts regarding another country's compliance with the Hague Convention on the Civil Aspects of International Child Abduction, or whether that country poses obstacles to the prompt return of a child taken there or poses risks to the child's safety are legislative facts about which a trial or appellate court may take judicial notice without prompting by the parties." *Id*.

In *Ex parte Nguyen,* Nguyen was a native of Vietnam who was a permanent resident alien. No. 2-08-207-CR, 2008 Tex. App. LEXIS 7153 (Tex. Ct. App. Sept. 25, 2008). He pled guilty to sexual assault but then sought a writ of habeas corpus, arguing that his guilty plea and community supervision order should be vacated because his plea was not voluntary. *Id*. He made several arguments, including that his plea was involuntary because the Vienna Consular Convention was violated. *Id*. The trial court held that any violation of the Vienna Consular Convention by law enforcement or the trial court did not violate Appellant's individual due process rights. *Id*.

Velasco v. Ayala involved a dispute over whether or not proper service was executed notifying the mother who resided in Mexico regarding an action to terminate her parental rights. 312 S.W.3d 783 (Tex. Ct. App. 2009). The Court in *Velasco* stated that "[s]ervice of process on a defendant in Mexico is governed by the Hague Service Convention […] which applies in all cases, in civil or commercial matters, where there is an occasion to transmit a judicial or extrajudicial document for service abroad." *Id*. at 792. The Court further noted that under the Hague Convention, instead of service of process by certified mail or service by publication, requests for service on a defendant within the borders of Mexico must be sent directly to Mexico's designated Central Authority and must be in Spanish or accompanied by a corresponding translation. *Id*. at 794. Because the mother was known to be a resident of Mexico, the Hague Service Convention governed service of process and there was no request for service sent to Mexico's Central Authority, the trial court did not acquire personal jurisdiction at the commencement of the suit so that the subsequent actions of the trial court were a nullity and remanded. *Id*. at 799-800.

In re Kamstra was a child custody dispute involving a mother, a U.S. citizen, who took the children from Africa, where they had been living for over 10 years for a visit to the U.S., leaving the father, a citizen of the Netherlands, behind in Africa. No. 12-09-00017-CV, 2010 Tex. App. LEXIS 1478 (Tex. Ct. App. Mar. 2, 2010). The mother then

filed for a divorce and custody of the children in Texas. *Id.* The father sought relief under the Hague Convention and the International Child Abduction Remedies Act. *Id*. The Court of Appeals stated that the Hague Convention "is based on the principle that the country of the child's habitual residence is best suited to determine questions of child custody and access." *Id*. The Court then found that the trial court correctly found that the habitual residence of the children was Burundi and since Burundi was not a signatory to the Hague Convention, the Hague Convention did not apply. *Id*.

The defendant in *Contreras v. State*, appealed judgments that convicted him of intoxication assault and failure to stop and render aid claiming that the his due process rights were violated when he was not notified of his rights as a Mexican citizen to contact the Mexican consulate and asked that breathalyzer test results be suppressed as a result. Nos. 11-09-00107-CR, 11-09-00109-CR, 2010 Tex. App. LEXIS 7454 (Tex. Ct. App. Sept. 9, 2010). Citing *Medellin*, the Court declined Contreras' request, holding that "suppression under the federal exclusionary rule is not an appropriate remedy for a violation of the Vienna Convention" and citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 362, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

4.5 SAMPLE OPPOSITION ARGUMENTS

The following is a sampling of opposition arguments that have been made in real cases and briefs in response to a human rights argument made on behalf of a U.S.-based petitioner or defendant. This section is intended to provide a sampling of opposition arguments and does not represent each and every argument that has ever been made by the opposition. These arguments are merely intended to help legal aid attorneys begin to anticipate arguments and strategies that may be used by the opposition.

OPPOSITION ARGUMENT 1: ONLY SELF-EXECUTING TREATIES ARE BINDING

The first possible argument you may hear from the opposition is that only self-executing treaties are binding on the U.S. government and since none of the human rights treaties are self-executing, none are binding on the U.S. government.

OPPOSITION ARGUMENT 1

"Petitioners principally rely on the ICCPR. The ICCPR, however, is not a self-executing treaty and therefore does not create any rights directly enforceable in the courts of the United States. See Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 735 (2004). The Court in Sosa cited the ICCPR as an example of a circumstance in which "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law." *Id*. at 728. Because "the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts," *id*. at 735, the Court explained, the ICCPR alone could not "establish the relevant and applicable rule of international law" governing litigation in a United States court, *ibid."*

From *Igartua v. United States*, 2011 U.S. Briefs 876, Brief for the Respondents.

OPPOSITION ARGUMENT 2: PRIVATE CITIZENS LACK STANDING TO ENFORCE TREATIES

The opposition may also try to argue that treaties are not privately enforceable. The opposition may try to argue that the petitioner fails to state a claim for which relief may be granted and that the complaint does not establish a cause of action.

OPPOSITION ARGUMENT 2

"Petitioners referenced a virtual patchwork quilt of other international agreements, including the American Declaration on the Rights and Duties of Man ("ADRDM"), art. I, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L./V/I.4 Rev. (1965), and the American Convention on Human Rights ("ACHR"), Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673. *See* FAP PP 40, 52, & 54; Khalid Pet. PP 48, 57, & 59; *see also* Pets. Opp. Mem., p. 23 & n.20. These documents, however, have not been ratified by the United States and therefore they do not create binding rights enforceable in habeas. *See Garza* v. *Lappin,* 253 F.3d 918, 925 (7th Cir. 2001) ("The [ADRDM] . . . is an inspirational document which, . . . did not on its own create any enforceable obligations . . . . [The U.S.] has not ratified the [ACHR], and so that document does not yet qualify as one of the 'treaties' of the United States that creates binding obligations.").

Treaties, as a general rule, are not privately enforceable. Indeed, enforcement in the final analysis is reserved to the executive authority of the governments who are parties to the treaties. *See, e.g., Comm. of the U.S. Citizens Living in Nicaragua* v. *Reagan,* 859 F.2d 929, 937-38 (D.C. Cir. 1988); *see also The Head Money Cases,* 112 U.S. 580, 598 (1884) ("A treaty . . . depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress."). Where a treaty is not self-executing, its terms give rise to a private cause of action *only* if Congress enacts authorizing legislation. *See Whitney, et al.* v. *Robinson,* 124 U.S. 190, 194 (1888) ("When the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, ..."). In the absence of a self-executing treaty and Congressional implementation, the individual does not have standing to assert the alleged violation in federal court. *See United States* v. *Tapia-Mendoza,* 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) ("[O]nly signatory nations generally have standing to enforce treaty provisions absent evidence, considering the document as a whole, that the signing parties expressly or impliedly intended the treaty to provide independent rights to citizens of either country.").

In this case, neither the CAT nor the ICCPR is a self-executing treaty. Indeed, in giving its advice and consent to ratification of both treaties, the Senate expressly declared that the provisions of both would *not* be privately enforceable. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990) (dealing with the CAT); 138 Cong. Rec. S4781-01 (April 2, 1992) (dealing with the ICCPR). Furthermore, Congress has not enacted any implementing legislation, with respect to either convention, that would authorize the petitioners to challenge the legality of their detention in federal court. *See Wesson* v. *U.S. Penitentiary Beaumont, TX,* 305 F.3d 343, 348 (5th Cir. 2002) ("Habeas relief is not available for a violation of the [ICCPR] because Congress has not enacted implementing legislation."). As a result, the petitioners cannot rely on either the CAT or the ICCPR as a viable legal basis to support the issuance of a writ of habeas corpus. Accordingly, the Court finds no viable theory based on United States treaties upon which a writ could be issued."

From *Boumediene v. Bush*, 2006 U.S. Briefs 1195, Petition for Writ of Certiorari.

OPPOSITION ARGUMENT 3: DOES NOT RISE TO THE LEVEL OF CUSTOMARY INTERNATIONAL LAW

In addition, the opposition may try to argue that the U.S. is not legally obligated to abide by overly expansive and broad interpretations of human rights treaties, nor to alleged international agreement on practices which have not reached the threshold of customary international law.

OPPOSITION ARGUMENT 3

"[A[llegations are based on extraordinarily and erroneously expansive interpretation of state commitments[,] . . . assertions are unsupported by the text of those articles[,] and rely on a systematically flawed analysis of international law. Petitioner's claim that the United States has violated customary international law is equally unfounded. Evidence of a customary norm requires indication of extensive and virtually uniform state practice that States undertake out of a sense of legal obligation (i.e., "opinion juris") North Continental Shelf Cases (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 42-43. It is not enough that certain international declarations espouse a general rule or that certain treaties include the obligation, for custom must derive from the actual repetition of acts by the community of states as a whole that are taken out of a sense of an international legal obligation apart from specific treaty obligations. To reach the level of a customary norm, state practice must "be such, or be carried out in such a way, as to be evidence that this practice is rendered obligatory by the existence of a rule of law requiring it." *Id*. at 44. As a prudential matter, when a party to a dispute asserts the existence of a rule of customary international law, the burden falls on that party to establish the clear existence of such rule."

From **Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Mossville Environmental Action Now**, Petition No 242-05 , Precautionary Measure No 25-05 (2006).

OPPOSITION ARGUMENT 4: SOVEREIGN IMMUNITY

Finally, the opposition may try to argue that the U.S. government cannot be sued without its consent or waiver of its immunity in matters.

OPPOSITION ARGUMENT 4

"The requirements for waivers of sovereign immunity are strict and clear, whether with respect to statutes or international agreements. None of the alleged sources of subject matter jurisdiction . . . meets the standards for a waiver of sovereign immunity. . . . [or] even arguably provides a waiver of sovereign immunity . . . . We should note that plaintiffs take the following positions: whatever activities the United States engages in waive sovereign immunity; that discretionary authority to settle claims waives sovereign immunity; that alleged negligence waives sovereign immunity; that having an admiralty cause of action waives sovereign immunity; that regulations (*vice* statutes) waive sovereign immunity; that bilateral agreements, not congressionally passed waives sovereign immunity, *etc*.- in short, plaintiffs argue that every action or involvement of the United States in whatever area waives sovereign immunity. No court has accepted this view. It is contrary to precedent, and wholly without support. . . . " The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Waivers of sovereign immunity are to be narrowly construed in favor of the sovereign. *McMahon v. United States*, 342 U.S. 25, 27 (1951). Because of the United States' sovereign immunity, a district court has no jurisdiction to award relief against the United States unless such relief is expressly authorized by statute. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The waiver must be "unambiguous[]," and the relevant statutory language is to be "strictly construed" in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). In addition, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.*, *citing United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.E.2d 608 (1995); *Library of Cong. V. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986); *Lehman v. Nakshian*, 452 U.S. 156, 161, 101 S.Ct. 2698, 69 L.E.2d 548 (1981).

From *Tobar v. United States*, 2007 U.S. Dist. Ct. Motions 977405, Motion to Dismiss by the Respondents.

5 SPECIFIC LEGAL ISSUE AREAS

This section of the Handbook covers specific legal issue areas, including Freedom from Domestic Violence, Labor and Employment Rights, Housing Rights, Consumer Rights, Rights to Public Assistance, Children's Rights, Immigration: Family & Border Rights, Immigration: Trafficking & Domestic Violence Issues, HIV/AIDS and Disability Rights. Each specific legal issue area section provides an introduction to the issue area and the related human rights, quick statistics and resources for data, a sampling of relevant human rights law, a list of state and federal court cases citing human rights law, a sampling of relevant cases before international bodies, a sampling of relevant cases before national courts or sub-regional bodies, a sampling of treaty body and special procedures commentary and recommendations, sample arguments to add to briefs and pleadings, sample talking points to take to court, relevant case studies, links to sample briefs and petitions, and links to other potentially useful resources such as other available guides or handbooks.

5.1 FREEDOM FROM DOMESTIC VIOLENCE

The Freedom from Domestic Violence section of the Handbook was written by Lynsay Gott.[^]

5.1.1 INTRODUCTION: *FREEDOM FROM DOMESTIC VIOLENCE*

International law imposes a duty on States to protect the rights of domestic violence victims, including, but not limited to the: 1) right to life; 2) right to privacy and home life; 3) right to be free from torture, cruel, inhuman, or degrading treatment; 4) right to non-discrimination; and 5) right to judicial remedies.[109] States must comply with the due diligence standard when protecting domestic violence victims by demonstrating effort at several levels, such as among law enforcement and within the judiciary, to uphold victims' rights.[110] States must also act with due diligence to protect women from violence by private actors such as through victim protection or thorough investigation, and States incur liability upon failing to meet this standard.[111]

U.S. domestic courts affirm that states have an obligation to protect victims of domestic violence and an interest in preventing further abuse.[112] In addition, U.S. courts have acknowledged the judiciary's obligation to "carry out the legislative goal of protecting victims" through the court system.[113] International law can be used to further define and elaborate on these domestic policy principles.

Advocates have called for the recognition of human rights principles in U.S. courts to address the lack of effective measures to prevent domestic violence. This section of the Handbook is designed to help attorneys

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[109] ICCPR, arts. 2, 4, 6, 7, 17, 24; Convention on the Elimination of Discrimination Against Women (CEDAW), art. 2, 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.

[110] *See Maria da Penha Maia Fernandes v. Brazil*, Case No. 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/ser.L./V/II.111, doc. 20 rev. at 704 (2000). *See also Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); *Yildirim v. Austria*, CEDAW Comm. No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005 (2007).

[111] *González et al. ("Cotton Field") v. Mexico*, Case No. 205, Inter-Am. Ct. H.R., ser. C (2009).

[112] *Hamilton ex rel. Lethem v. Lethem*, 260 P.3d 1148, 1162 (Hawai'i App. 2011), rev'd on other grounds *Hamilton v. Lethem,* No. SCWC-27580 (Hawai'i 2012)); *Matter of J.W.D.*, 693 A.2d 92 (N.J. 1997); *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002).

[113] *Felton v. Felton*, 679 N.E.2D 672 (Ohio 1997). *See also Coronado v. State*, 351 S.W.3d 315, 328 (Tex. Crim. App. 2011); *S.D. v. M.J.R.*, 2 A.3d 412, 430 (N.J. Super. Ct. App. Div. 2010); *Harris v. State*, 164 S.W.3d 775 (Tex. App. 2005); *Triggs v. State*, 852 A.2d 114, 128 (Md. 2004) ("The Maryland domestic violence statute reveals a strong legislative intent to protect victims."); *Coburn v. Coburn*, 674 A.2d 951 (Md. 1996).

fighting for the rights of domestic violence victims integrate human rights arguments into their state court advocacy.

5.1.2 QUICK STATISTICS & RESOURCES FOR DATA: *FREEDOM FROM DOMESTIC VIOLENCE*

More and more women are facing domestic violence and receive inadequate protection by law enforcement and the U.S. court system. Here are some quick statistics:

- One in four women (25%) has experienced domestic violence in her lifetime in the U.S.[114]
- Estimates range from 960,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend, to 3 million women who are physically abused by their husband or boyfriend per year in the U.S.[115]
- Women accounted for 85% of the victims of intimate partner violence, men for approximately 15% in the U.S.[116]
- From 2001-2005, 615,795 households in the US had intimate partner violence. Of those, 35.2% were known to have children.[117]
- It is estimated that anywhere between 3.3 million and 10 million children in the U.S. witness domestic violence annually. Research demonstrates that exposure to violence can have serious negative effects on children's development.[118]
- Fear of reprisal by the perpetrator made up 19% of the reasons females did not report their victimization to the police. About 1 in 10 male victims and fewer than 1 in 10 female victims said they did not report the crime to the police because they did not want to get the offender in trouble with the law.[119]
- Reports indicate that 86% of the women who received a protection order state the abuse either stopped or was greatly reduced.[120]
- The numbers of women or children killed by family members include:
    - 41.8% of female homicide victims are killed by an intimate or other family member.[121]
    - 12.0% of male homicide victims are killed by an intimate or other family member.[122]

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[114] The Centers for Disease Control and Prevention and The National Institute of Justice, Extent, Nature, and Consequences of Intimate Partner Violence (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf; The Commonwealth Fund, Health Concerns Across a Woman's Lifespan: 1998 Survey of Women's Health (1999), http://tinyurl.com/6q4tw5k.

[115] U.S. Department of Justice, Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends (1998), http://bjs.ojp.usdoj.gov/content/pub/pdf/vi.pdf; The Commonwealth Fund, *supra* note 114.

[116] U.S. Department of Justice, Bureau of Justice Statistics Crime Data Brief, Intimate Partner Violence, 1993-2001 (Feb. 2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf.

[117] U.S. Department of Justice, Bureau of Justice Statistics, Intimate Partner Violence 1993-2005, http://bjs.ojp.usdoj.gov/content/intimate/ipv.cfm.

[118] Sharmila Lawrence, National Center for Children in Poverty, Domestic Violence and Welfare Policy: Research Findings That Can Inform Policies on Marriage and Child Well-Being 5 (2002), http://www.nccp.org/publications/pub_604.html.

[119] Matthew R. Durose et al., U.S. Department of Justice, NCJ 207846, Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances 2 (2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs10.pdf; Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, NCJ 178247, Bureau of Justice Statistics, Special Report: Intimate Partner Violence 1, 7 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv.pdf.

[120] JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE (1999), *reviewed in* Meda Chesney-Lind, James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response*, 35 CRIME, L. & SOC. CHANGE 363 (2001).

[121] Bureau of Justice Statistics, Intimate Partner Violence 1993-2005 (2012), http://bjs.ojp.usdoj.gov/content/intimate/victims.cfm.

[122] *Id.*

- The cost of intimate partner violence in the U.S. alone exceeds $5.8 billion per year: $4.1 billion is for direct medical and health care services, while productivity losses account for nearly $1.8 billion.[123]

Resources for data related to domestic violence:

- **U.S. Department of Justice, Office of Justice Programs, National Criminal Justice Reference Service, Domestic Violence**
- **U.S. Department of Justice, Bureau of Justice Statistics**
- **UN Women (2011), Facts and Figures on Violence against Women**

5.1.3 RELEVANT HUMAN RIGHTS LAW: *FREEDOM FROM DOMESTIC VIOLENCE*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *FREEDOM FROM DOMESTIC VIOLENCE*

Treaty or Declaration	*Article/ Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 2(1) of the ICCPR**: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 2(1), 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.
	Article 3 of the ICCPR: "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." International Covenant on Civil and Political Rights, art. 3, 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.
	Article 6 of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, art. 6, 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.
	Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, art. 7, 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.

[123] U.N. Department of Public Information, UNITE to End Violence against Women Factsheet, U.N. Doc. DPI/2498 (2008), http://www.un.org/en/women/endviolence/pdf/VAW.pdf.

Treaty or Declaration	*Article/ Citation*
	Article 14 of the ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights, art. 14, 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.
	Article 17 of the ICCPR: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and 2. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 2(1) of CAT**: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), 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.
	Article 4 of CAT: "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, 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.
	Article 13 of CAT: "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13, 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.

Treaty or Declaration	*Article/ Citation*
	Article 16 of CAT: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence as a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, 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.
American Declaration on the Rights and Duties of Man (Declaration)	**Article 5 of the Declaration**: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." American Declaration of the Rights and Duties of Man, art. 5, 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).
	Article 6 of the Declaration: "Every person has the right to establish a family, the basic element of society, and to receive protection therefor." American Declaration of the Rights and Duties of Man, art. 6, 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).
	Article 24 of the Declaration: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." American Declaration of the Rights and Duties of Man, art. 24, 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).

OTHER HUMAN RIGHTS INSTRUMENTS*: *FREEDOM FROM DOMESTIC VIOLENCE*

Treaty or Declaration	*Article/ Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 3 of the ICESCR**: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." International Covenant on Economic, Social, and Cultural Rights, art. 3, 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
	Article 10 of the ICESCR: "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions..." International Covenant on Economic, Social, and Cultural Rights, art. 10, 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 2 of CEDAW**: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women." Convention on the Elimination of Discrimination Against Women, art. 2, 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.
	Article 5(a) of CEDAW: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Convention on the Elimination of Discrimination Against Women, art. 5(a), 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.
	Article 16(1) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women." Convention on the Elimination of Discrimination Against Women, art. 16(1), 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.
Convention on the Rights of the Child (CRC)	**Article 3 of CRC**: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 2 of CRC: "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 5 of CRC: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." Convention on the Rights of the Child, art. 5, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 6 of CRC: "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child." Convention on the Rights of the Child, art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 9 of CRC: "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." Convention on the Rights of the Child, art. 9, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 12 of CRC: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." Convention on the Rights of the Child, art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 16 of CRC: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks." Convention on the Rights of the Child, art. 16, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 19 of CRC: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." Convention on the Rights of the Child, art. 19, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 34 of CRC: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse…" Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 37 of CRC: "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily…" Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
American Convention on Human Rights (ACHR)	**Article 1 of ACHR**: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." American Convention on Human Rights, art. 1, 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.
	Article 8 of ACHR: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." American Convention on Human Rights, art. 8, 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.
Declaration on the Elimination of Violence Against Women (DEVAW)	**Article 4 of DEVAW**: "States should pursue by all appropriate means and without delay a policy of eliminating violence against women…" Declaration on the Elimination of Violence against Women, art. 4, Dec. 20, 1993, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993).
Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)	**Article 3 of the Convention of Belém do Pará**: "Every woman has the right to be free from violence in both the public and private spheres." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 3, June 9, 1994, 33 I.L.M. 1534 (1995).

Treaty or Declaration	*Article/ Citation*
	Article 5 of the Convention of Belém do Pará: "Every woman is entitled to free and full exercise of her civil, political, economic, social and cultural rights, and my rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 5, June 9, 1994, 33 I.L.M. 1534 (1995).
	Article 6 of the Convention of Belém do Pará: "The right of every woman to be free from violence includes, among others: a. The right women to be free from all forms of discrimination; and b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 6, June 9, 1994, 33 I.L.M. 1534 (1995).
European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Right or ECHR)	**Article 1 of the ECHR**: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.
	Article 3 of the ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953
	Article 6 of the ECHR: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *FREEDOM FROM DOMESTIC VIOLENCE*

State v. White, 668 N.W.2d 850, 856 (Iowa 2003). The court looked to a federal district court Alien Tort Statute case and the district court's interpretation of torture under the Convention Against Torture to determine that the mental and emotional anguish caused when the defendant kidnapped his estranged wife could constitute torture under Iowa law.

Nicholson v. Williams, 203 F.Supp.2d 153, 234-51 (E.D.N.Y. 2002). The federal district court looked to the UDHR, ICCPR, and CRC in holding that the right to family integrity is protected by Due Process rights under the 14th Amendment, granting a preliminary injunction against a child welfare policy to remove children from mothers who were domestic violence victims.

CASES BEFORE INTERNATIONAL BODIES: *FREEDOM FROM DOMESTIC VIOLENCE*

Jessica Lenahan (Gonzales) v. United States, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011). The Inter- American Commission on Human Rights held that the U.S. violated international obligations where police failure to enforce a restraining order against the petitioner's husband led to the kidnapping and killing of the petitioner's three daughters. The Commission stated that "a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination" and violates women's right to life. The Commission further stated that States have an affirmative duty to protect women from domestic violence. The Commission held "that the systemic failure of the U.S. to offer a coordinated and effective response to protect [the victims] from domestic violence" constituted discrimination and a breach of the obligation not to discriminate, a violation of the right to equality before the law, and a violation of the rights to life and judicial protection.

Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. (2009). The European Court of Human Rights found that Turkey's failure to exercise due diligence, such as instituting timely criminal proceedings or protective orders to prevent further domestic violence against the applicant and her mother, violated customary international law. The court concluded that Turkey's failure to comply with the right to life and right to be free from torture or ill-treatment was based on gendered discrimination.

Bevacqua and S. v. Bulgaria, App. No. 71127/01, Eur. Ct. H.R. (2008). The European Court of Human Rights concluded that excessively lengthy custody proceedings without interim protection for the child following petitioner's divorce from her abusive husband violated petitioner's right to private and family life and right to a fair hearing within a reasonable time under the ECHR. The court asserted that States have an affirmative "duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals."

Yildirim v. Austria, CEDAW Comm. No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005 (2007). The Committee on the Elimination of Discrimination against Women held that Austria violated CEDAW by failing to uphold the decedent's right to life and to physical and mental integrity where she was subjected to repeated death threats from her husband, but the prosecutor repeatedly refused to detain the husband, resulting in the decedent's murder.

A.T. v. Hungary, CEDAW Comm. No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005). The Committee on the Elimination of Discrimination against Women held that the Hungary failed to meet the due diligence standard to protect victims of domestic violence by not establishing legal mechanisms for victims to obtain restraining orders, and by leaving petitioner's husband free from imprisonment during criminal proceedings against him. The Committee held that Hungary violated the right to equality before the law, equality in marriage, and the State's duty to adopt measures to eliminate discrimination against women under CEDAW.

E. and Others v. United Kingdom, No. 33218/96, Eur. Ct. H.R. (2002). The European Court of Human Rights held that the U.K. failed to protect the victims from inhuman and degrading treatment where a man pled guilty to indecent assault of his girlfriend's children, but was not detained pending sentencing, returned to the home, and subsequently received only a two year suspended sentence after further charges of abuse.

Maria da Penha Maia Fernandes v. Brazil, Case No. 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/ser.L./V/II.111, doc. 20 rev. at 704 (2000). The Inter American Commission on Human Rights determined that Brazil failed to exercise its due diligence to protect the applicant where the criminal prosecution of her husband lasted eight years before a guilty verdict was handed down and the husband remained free during the fifteen years between his attempted murder of the applicant and the exhaustion of appeals. The Commission reasoned that a systemic failure to exercise due diligence to guarantee women's right to be free from domestic violence was equivalent to gendered discrimination, stating that Brazil had an affirmative duty to protect victims of domestic violence.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *FREEDOM FROM DOMESTIC VIOLENCE*

Nelson v. The Minister of Safety and Security & Another, (1326/04) 2006 ZANCHS 88 (S. Afr. N. Cape Div. 2006). The North Cape Division of the Supreme Court of South Africa dealt with a case in which the plaintiff's husband, with his firearm, subjected the plaintiff to domestic violence. The husband was arrested, but the firearm was returned to him. Subsequently, the husband shot the plaintiff. The Court held the defendant government agency liable for a negligent omission because of its legal duty to reasonably protect the plaintiff from domestic violence.

Carmichele v. The Minister of Safety and Security & Another, 2001 (4) SA 938 (CC) (S. Afr. 2001). In a case dealing with failure to detain a sexual assault suspect with a history of previous assault, who then attacked yet another woman, the Constitutional Court of South Africa affirmed brad State responsibility to protect women from violence and gender-based discrimination, not just those who have already been abused or are specifically in danger of imminent abuse, under both international and constitutional laws.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *FREEDOM FROM DOMESTIC VIOLENCE*

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Human Rights Council, 7th Sess., Agenda Item 3, U.N. Doc. A/HRC/7/3 (2008), discussing the application of the Convention Against Torture to violence against women and domestic violence.

Highlights:

- States that domestic violence can constitute torture. ¶44.
- "these forms of violence can amount to torture if States fail to act with due diligence…" ¶44.
- Explains how intimate partner violence can constitute torture and when a government may be liable for "acquiescence" to torture. ¶45-49.

Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. ESCOR Comm'n on Human Rights, 55th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/1999/68 (1999), discussing and defines violence in the family, the human rights implications of domestic violence, and the due diligence standard.

Highlights:

- "Violence within the family comprises, inter alia, woman-battering, marital rape, incest, forced prostitution, violence against domestic workers, violence against girls, sex-selective abortions and female infanticide, traditional violent practices against women including forced marriage, son preference, female genital mutilation and honour crimes." ¶17
- "International standards clearly prohibit violence against women in the family." ¶19
- "The principle of "due diligence" is gaining international recognition. In accordance with article 4 of the Declaration on the Elimination of Violence against Women, States must 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons'." ¶23.

Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. ESCOR Comm'n on Human Rights, 52nd Sess., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53 (1996), discussing the human rights implications and the due diligence standard, and explains how patriarchal social customs contribute to domestic violence and trigger state responsibility.

Highlights:

- "domestic violence, defined as violence that occurs within the domestic sphere perpetrated by both private and State actors, constitutes a violation of the human rights of women." ¶ 29.
- "Under international human rights law, Governments are not only obliged to refrain from committing human rights violations but also to prevent and respond to human rights abuses, without discrimination." ¶30
- "Complicity must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action. Where States do not actively engage in acts of domestic violence or routinely disregard evidence of murder, rape or assault of women by their intimate partners, States generally fail to take the minimum steps necessary to protect their female citizens' rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses." ¶33.
- "International law, as contained in, inter alia, articles 2 (1), 3 and 26 of the ICCPR, imposes a duty on States not to discriminate on a number of specified grounds, including gender, in the protection of human rights. Failure to fulfill this duty constitutes a violation of human rights. Women victims of violence, therefore, have an equal right to the enforcement and protection of the law as any other victim of violence, so that a pattern of non-enforcement amounts to unequal and discriminatory treatment on the basis of gender." ¶40.

General Recommendation 19, Violence against women, U.N. Comm. on the Elimination of Discrimination Against Women, 11th sess., U.N. Doc. A/47/38 (1993), discussing how violence against women infringes on women's fundamental rights.

Highlights:

- "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." ¶1.
- "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." ¶7.
- "Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms." ¶11.

General Recommendation 28, Equality of rights between men and women, U.N. Human Rights Comm., ¶11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) stating that domestic violence can constitute torture under the ICCPR.

Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, U.N. Human Rights Council, U.N. Doc. A/HRC/14/L.9/Rev.1 (2010), discussing duty to exercise due diligence to protect women and girls.

Highlights:

- "the duty of States to exercise due diligence to prevent violence against women and girls includes using all appropriate means of a legal, political, administrative and social nature that promote the protection of human rights and ensuring that acts of violence are considered and treated as illegal acts for which adequate, effective, prompt and appropriate punishment and remedies are available" Preamble.
- "States have the obligation to promote and protect all human rights and fundamental freedoms of women and girls, and must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girls and provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms" ¶1.

5.1.4 SAMPLE ARGUMENTS: *FREEDOM FROM DOMESTIC VIOLENCE*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not rely these arguments alone.**SAMPLE ARGUMENT 1 - Right to Non-Discrimination [Statute/regulation at issue] contravenes the right to non-discrimination.**

U.S. courts may use human rights principles to assist in the interpretation of U.S. law. Restatement (Third) of Foreign Relations Law § 701 cmt. e (1987) ("The United States is bound by the international customary law of human rights."); *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (finding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

To guarantee equal rights, international law prohibits gendered discrimination. Convention on the Elimination of Discrimination Against Women, art. 2, 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 [hereinafter CEDAW] ("State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women"). In addition, international law guarantees the right to non-discrimination by obliging States to provide equal protection of law. International Covenant on Civil and Political Rights, art. 26, 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; CEDAW, art. 2.

A State's systematic failure to exercise due diligence to guarantee women's right to be free from domestic violence is tantamount to discrimination based on sex. *Maria da Penha Maia Fernandes v. Brazil*, Case No. 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/ser.L./V/II.111, doc. 20 rev. at 704 (2000) ("[T]his violation forms a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action."); *Jessica Lenahan (Gonzales) v. United States*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011) (A "State's failure to act with due diligence to protect women from violence constitutes a form of discrimination."); *A.T. v. Hungary*, CEDAW Comm. No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005) (The State must "[a]ssure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women [and] bring the offenders to justice in accordance with international standards."). The U.S. has an international obligation to meet the due diligence standard by prohibiting discrimination on the basis of sex or gender and by implementing measures to punish offenders and to protect victims.

[Insert the important facts of this case] violates the Plaintiff's fundamental human rights under international legal norms.

SAMPLE ARGUMENT 2 - Right to Life

[Statute/ regulation at issue] should be consistent with human rights standards and reflect the right to life. Human rights law guarantees the right to life. International Covenant on Civil and Political Rights, art. 6, 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 ("Every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life."); Universal Declaration of Human Rights, art. 3, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) ("Everyone has the right to life, liberty and security of person.").

A State is required to protect victims of domestic violence and respond adequately to safeguard a woman's security. *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009) (failing to institute criminal proceedings or protective orders to prevent violence against domestic violence victims violates their right to life when the offender murders a victim); *Yildirim v. Austria*, CEDAW Comm. No. 6/2005, CEDAW/C/39/D/6/2005 (2007) (explaining that a State violates a woman's right to life when as a result of a prosecutor's repeated refusal to detain a domestic violence offender, the offender fatally stabbed the victim).

Failing to respond to domestic violence in order to protect victims from further abuse, such as by refusing to enforce a protective order, violates the right to life. *Jessica Lenahan (Gonzales) v. United States*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011) (holding the United States responsible for its failure to protect the victims of domestic violence by refusing to take reasonable measures like the enforcement of a restraining order, thereby violating their right to life under article I of the American Declaration).

[Insert the important facts of this case] violates the Plaintiff's fundamental human rights under international legal norms.

SAMPLE ARGUMENT 3 - Freedom from Torture and Cruel, Inhuman, or Degrading Treatment

[This type of ill-treatment] is incompatible with international norms.

Human rights law protects individuals from torture, cruel, inhuman, or degrading treatment. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), 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 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); International Covenant on Civil and Political Rights, art. 7, 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 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

A lack of investigation and cooperation among law enforcement violates the right to be free from inhuman and degrading treatment in the context of domestic violence when the victims are subjected to continual physical abuse. *E. and Others v. United Kingdom*, No. 33218/96, Eur. Ct. H.R. (2002), (holding the State responsible for violating the victims' right to be free from inhuman and degrading treatment by failing to protect victims subjected to years of physical abuse by the mother's live-in boyfriend); *Nelson v. The Minister of Safety and Security & Another*, 2006 ZANCHS 88 (S. Afr. N. Cape Div. 2006) (concluding that the State is constitutionally required to protect its citizens from violence and that the State failed to protect a victim from domestic violence by allowing the perpetrator to keep his firearm).

[Insert the important facts of this case] violates the Plaintiff's fundamental human rights.

SAMPLE ARGUMENT 4 - Right to Judicial Remedies

[This conduct/ statute] is prohibited by human rights law and jurisprudence.

The right to a fair trial and judicial assistance extends to the protection of domestic violence victims. Human Rights law requires that States provide access to judicial remedies to allow victims of domestic violence to seek redress. International Covenant on Civil and Political Rights, art.14, 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 ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); American Convention on Human Rights, art. 8, 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; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950); Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

States are obligated to respond and protect women from domestic violence by upholding the right to a fair hearing within a reasonable time. *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008) (holding the State responsible for its failure to exercise due diligence to adequately protect the victim of domestic violence by excessively delaying custody proceedings, thereby violating the right to a fair trial).

A State can violate the right to a fair trial by failing to detain perpetrators of domestic violence during criminal proceedings for such an offense. *Maria da Penha Maia Fernandes v. Brazil*, Case No. 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/ser.L./V/II.111, doc. 20 rev. at 704 (2000) (holding the State responsible for violating the right to a fair trial and judicial protection because of the court's order to free the perpetrator pending trial and appeals); *Jessica Lenahan (Gonzales) v. United States*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011) (emphasizing "the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence"); *E. and Others v. United Kingdom*, No. 33218/96, Eur. Ct. H.R. (2002) (requiring States to implement an effective judicial remedy such as detention pending sentencing and investigation by law enforcement of domestic violence charges).

[Insert the important facts of this case] violates the Plaintiff's fundamental human rights under international legal norms.

5.1.5 TALKING POINTS: *FREEDOM FROM DOMESTIC VIOLENCE*

TALKING POINTS #1- Right to Non-Discrimination

- U.S. courts already recognize importance of protecting victims of domestic violence
- Obligation to protect victims' rights to non-discrimination based on sex
- Lack of investigation, protection, and enforcement of court orders in domestic violence cases violates right to non-discrimination
- Ineffective action or failure to act forms a pattern of discrimination, which violates the human right to equality before the law and marriage
- Must provide domestic violence victims maximum protection of the law

- Due diligence requires prohibiting discrimination based on sex, which means to protect victims of domestic violence and punish perpetrators of DV

TALKING POINTS #2- Right to Life

- Everyone has the right to life under customary international law
- U.S. ratified the ICCPR and American Declaration
- Failure to respond to DV or protect victims violates right to life
- Must respond adequately to protect woman's security
- Must initiate criminal proceedings against perpetrator to protect victim

TALKING POINTS #3- Freedom from Torture and Cruel, Inhuman or Degrading Treatment

- U.S. ratified the ICCPR and CAT
- Physical abuse or domestic violence is cruel, inhuman, or degrading treatment
- Women have right to be protected from continued abuse
- Violation of right to life is inherently tied to violation of right to be free from torture, cruel, inhuman, or degrading treatment
- The domestic abuse in this case rises to the level of degrading and cruel

TALKING POINTS #4- Right to Judicial Remedies

- Right to fair trial and judicial assistance inherent in U.S. legal system
- Victims of DV must have access to judicial remedies like protective orders or they may face further abuse or even death, e.g. *Lenahan*
- Judicial remedies must be enforced for meaningful protection
- Right to fair trial includes detaining perpetrator of DV during the entire criminal process (pending trial/appeals/sentencing)
- Right to fair trial includes finalizing divorce within a reasonable time
- Right to fair trial includes instituting interim custody protections

5.1.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *FREEDOM FROM DOMESTIC VIOLENCE*

FAMILY VIOLENCE LITIGATION CLINIC, ALBANY LAW CLINIC & JUSTICE CENTER USES RIGHT TO FAMILY IN CUSTODY PETITION

The case, *Petitioner-Mother v. Respondent-Grandfather*, both refugees from Iraq, is a disputed custody matter brought by the Family Violence Litigation Clinic at Albany Law School on behalf of the Petitioner to regain custody of her child. The Respondent engaged in abusive behavior against the Petitioner, and the Petitioner argues that the environment does not promote the physical, emotional, and mental well-being of the child. The Petitioner derived arguments from the American Convention on Human Rights to establish her right to family. In

her Amended Petition, the Petitioner contended that it is in the best interest of the child to remain in the custody of her mother because "[r]emoving Petitioner's child from her mother will violate and deprive Petitioner of her basic human right to establish a family and receive protection for that family under the law." The court will hear the Petitioner's motion to dismiss on April 3, 2012.

CITY, COUNTY AND HUMAN RIGHTS COMMISSIONS ACROSS THE U.S. PASS FREEDOM FROM DOMESTIC VIOLENCE RESOLUTIONS

On October 5, 2011 the Cincinnati City Council enacted a resolution declaring that freedom from domestic violence is a fundamental human right and that it is a responsibility of state and local governments to secure this human right on behalf of its citizens. A link to the resolution and the supporting memorandum submitted by law students at the University of Cincinnati School of law is available **here**.

On March 19, 2012, Baltimore City Council also enacted a similar resolution following efforts by law clinic students from the University of Baltimore. A link to the Baltimore resolution is available **here**.

On July 17, 2012, the Miami-Dade County Board of Commissioners passed a resolution declaring freedom from domestic violence is a human right. A link to the Miami-Dade resolution is available **here**.

On September 6, 2012, the Seattle Human Rights Commission passed a resolution to urge the U.S. House of Representatives to pass the Senate's comprehensive version of the Violence Against Women Act (VAWA). The Seattle resolution framed violence against women issues in terms of human rights, citing the U.S.'s "international obligations to enact legislation that does not discriminate and to respect and ensure the right to be protected against violence" and making specific reference to the case of *Jessica Lenahan v. U.S.*, the UN Special Rapporteur on Violence Against Women's report on the U.S., and various human rights instruments. A copy of the Seattle resolution is available **here**.

On September 10, 2012, the City of Miami Springs, Florida, passed a resolution declaring freedom from domestic violence is a human right. The language of this resolution is identical to the resolution passed by the Miami-Dade County Board of Commissioners. A link to the Miami Springs resolution is available **here**.

On October 2, 2012, the Erie County Legislature in Buffalo, NY, passed a resolution declaring freedom from domestic violence to be a human right. The resolution is available **here**.

In October 2012, the Albany New York County Executive, Albany City Common Council, and Albany County Legislature have each passed proclamations or unanimous resolutions declaring that freedom from domestic violence is a fundamental human right. More information on the resolutions is available **here**.

Also in October 2012, City and County officials in Montgomery, Alabama, signed a Domestic Violence Awareness Month Proclamation which not only declared October Domestic Violence Awareness Month for Montgomery, but also included a declaration that freedom from domestic violence is a fundamental human right. More information on the resolution is available **here**.

On June 4, 2013, the DC Council passed a resolution declaring freedom from domestic violence to be a human right. The resolution is available **here**.

In April 2014, Travis County Commissioners Court in Texas passed a resolution declaring freedom from domestic violence to be a fundamental human right. The resolution and a legal memo submitted to the Commissioners is available **here**.

On May 7, 2014, Boston's City Council unanimously adopted a resolution declaring freedom from domestic violence to be a fundamental human right. The resolution is available **here**.

FLORIDA VISIT OF UNITED NATIONS SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN

In 2011, U.N. Special Rapporteur on Violence Against Women, Rashida Manjoo, conducted a fact-finding mission to the U.S. which included meetings with Government officials and other relevant stakeholders in Washington D.C, North Carolina, Florida, California, Minnesota and New York. In Miami, the University of Miami Law School Human Rights Clinic, alongside community groups, organized a 2-day program for Manjoo to visit immigrant women in detention in Glades Detention Center and to visit The Lodge, a domestic violence shelter. Manjoo heard from affected individuals and organizational representatives about major issues concerning violence against women in South Florida.

On a national level, the Human Rights Clinic and other NGOs and law school clinics produced civil society briefing papers on issues concerning violence against women in communities, the military, and in custodial settings: *Violence Against Women in the United States and the State's Obligation to Protect* . Manjoo incorporated many of the advocates' concerns – in some ways, verbatim – into her press statement and her subsequent country report detailing the findings of her mission. Subsequently, UM students used the momentum generated by Manjoo's visit to write op-eds in the *Miami Herald* and *El Nuevo Herald* concerning violence against women and the passage of VAWA – a hot-button issue at the time.

Building upon the collaborations carried out during the year, UM students circled back to the same community groups involved in organizing Manjoo's visit to solicit their ideas for a resolution on domestic violence and human rights. Students solicited Commissioner Sally Heyman to be the sponsor of a Miami-Dade County resolution declaring that freedom from domestic violence is a fundamental human right.

Recently, the U.S. Department of Justice's Office for Victims of Crime and Office on Violence Against Women issued an important joint statement addressing gender discrimination in policing. Because "gender bias plays a role in undermining the effective response by law enforcement to crimes against women," the statement announced that the prevention of sex-based discrimination by law enforcement is a "top priority" of the Civil Rights Division of DOJ in its oversight of law enforcement agencies. Indeed, in the last two years, DOJ launched groundbreaking investigations into departments in Puerto Rico, New Orleans, Maricopa County, AZ, and Missoula, MT to address grave concerns about their policing of domestic and sexual violence.

5.1.7 SAMPLE BRIEFS & PETITIONS: *FREEDOM FROM DOMESTIC VIOLENCE*

Nicholson v. Williams **–** Amicus Brief in Support of Appellees

Lenahan (Gonzales) v. U.S. **–** Amicus Brief in Support of Petitioner

Town of Castle Rock, Colorado v. Jessica (Gonzales) Lenahan **–** Amicus Brief in Support of Petitioner

Campo Algodonero (and others) v. Mexico **–** Amicus Brief in Support of Petitioners

5.1.8 OTHER RESOURCES: *FREEDOM FROM DOMESTIC VIOLENCE*

Human Rights & Domestic Violence: An Advocacy Manual, Columbia Law School Human Rights Clinic and Sexuality & Gender Law Clinic *(2010)*.

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.2 LABOR AND EMPLOYMENT RIGHTS

The Labor and Employment Rights section of this Handbook was co-written written by Sarah Paoletti. Aadika Singh contributed significantly to the research and drafting of the updates to this Chapter.[^]

5.2.1 INTRODUCTION: *LABOR AND EMPLOYMENT RIGHTS*

The right to decent work is enshrined in a fundamental notion set forth in the Universal Declaration on Human Rights (UDHR) that "All human beings are born free and equal in dignity and rights."[124] The fundamental rights of equality and dignity are at the core of all international human rights pertaining to the workplace.

The further enumeration of workplace rights underlying the ultimate goal of equality in dignity and rights can be categorized as follows: (a) the right to non-discrimination in the workplace, based not only on sex, race and national origin, but also language and citizenship status; (b) the right to be free from slavery or servitude and the right to be paid for all work performed; (c) the right to social security and unemployment when the need arises; (d) the right to freedom of association, and corollary rights to join and form trade unions and collective bargaining; (e) and, the right to redress before the courts when rights to employment and rights in employment are violated.

Increasingly, advocates are looking to international human rights law and mechanisms in pursuit of dignity in work and dignity through work, particularly in light of the narrow opportunities for doing so under U.S. domestic law, be it at the federal, state or administrative levels. While international and comparative law has arisen in domestic litigation primarily in the area of forced labor and labor trafficking, and corporate responsibility for the commission of grievous human rights obligations outside the U.S., this section seeks to introduce the myriad of ways in which labor and employment lawyers can incorporate human rights law into their domestic litigation practice, and can bring their experiences from domestic litigation into the international human rights arena.

5.2.2 QUICK STATISTICS & RESOURCES FOR DATA: *LABOR AND EMPLOYMENT RIGHTS.*

With the economic recession and high rates of un- and underemployment, workers are increasingly struggling to realize the promise of dignity through work:

- From 1973-2007, male union membership within the private sector declined to from 34 percent to eight percent, and for female workers, from 16 percent to six percent. Wage inequality in that same

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Aadika Singh is a law student at the University of Pennsylvania Law School (class of 2017). Before Penn Law, Singh was the policy associate for Rights Working Group (RWG), a coalition of more than 350 local, state and national organizations working in the areas of immigrant rights, national security, and criminal justice. She furthered the coalition's anti-racial profiling campaign through federal administrative and legislative advocacy. She also represented the coalition in hearings before the Inter-American Commission on Human Rights and directed RWG's efforts during the UN Universal Periodic Review of the U.S. and the UN review of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). In 2012, she was a member of the U.S. Human Rights Network's national task force on the ICCPR. Prior to her experience at RWG, Singh served in the Human Rights Program of the American Civil Liberties Union. Ms. Singh received a B.A. with highest distinction from the University of Rochester.

[124] Universal Declaration of Human Rights (UDHR), art. 1, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

time frame increased more than 40 percent.[125] In 2013, the total union membership rate—male and female, private and public sector workers—was 11.3%, about half that in the year 1983.[126]

- In 2012, the unemployment rate for blacks was 13.8%, for American Indians and Alaska Natives it was 12.3%, for Hispanics it was 10.3%, and for whites, it was 7.2%.[127]

- From 1992-2006, 11,303 Hispanic workers died from work-related injuries at a rate consistently higher than that for all U.S. workers, with the proportion of deaths among Hispanic workers increasing during that same time period.[128] The overall fatal injury rate for all Hispanic/Latino workers remained higher than the rate for all workers in the years 2006-2008.[129]

- For FY 2013, the EEOC reported 93,727 discrimination claims filed, and noted a substantial rise in the number of retaliation claims (up to 38,539).[130]

- Of the more than 16,000 workers who seek assistance from Inter-Faith Worker Justice centers across the country each year, more than 80% report wage-theft.[131]

- 38 states still allow private employers to ask applicants about their conviction history on job applications.[132]

- "Right to Work" laws—aimed at weakening trade unions threaten workers' right to freedom of association—have taken hold in half of the states, including in some of the most historically pro-union regions of the country.[133]

Here are some resources for relevant labor and employment rights data for the U.S. and worldwide:

- **U.S. Census Bureau, Reports and Publications**

- U.S. Department of Labor, Bureau of Labor Statistics maintains data on employment, unemployment, pay and benefits, as well as workplace injuries, in the U.S. Visit **U.S. Department of Labor Bureau of Labor Statistics, Subject Area Categories**.

- The **Equal Employment and Opportunity Commission** maintains a range of national statistical information addressing discrimination, including information pertaining to enforcement and litigation statistics, and employment statistics based on job patterns for minorities and women in the private industry, as well as in state and local government.

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[125] Steven Greenhouse, *Labor's Decline and Wage Inequality*, THE NEW YORK TIMES, Aug. 4. 2011, http://economix.blogs.nytimes.com/2011/08/04/labors-decline-and-wage-inequality/.

[126] United States Department of Labor Bureau of Labor Statistics, "Union Members Summary," Economic News Release (Jan. 24, 2014), http://www.bls.gov/news.release/union2.nr0.htm.

[127] U.S. Bureau of Labor Statistics, *Labor Force Characteristics by Race and* Ethnicity, 2012 (Oct. 2013*),* www.bls.gov/cps/cpsrace2012.pdf.

[128] Center for Disease Control, "Work-Related Injury Deaths Among Hispanics – United States, 1992-1996, MMWR Weekly (June 6, 2008), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5722a1.htm.

[129] Christen G. Byler, *Hispanic/Latino Fatal Occupational Injury Rates*, Bureau of Labor Statistics Monthly Labor Review (Feb. 2013), http://www.bls.gov/opub/mlr/2013/02/art2full.pdf.

[130] EEOC Charge Statistics, FY 1997 Through FY 2013, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[131] Interfaith Worker Justice, Wage Theft, http://www.iwj.org/issues/wage-theft.

[132] National Employment Law Project, *Statewide Ban the Box: Reducing Unfair Barriers to Employment of People with Criminal Records* (May 2014), http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1.

[133] Michael A. Fletcher and Sean Sullivan, *Michigan Enacts Right-to-Work Law, Dealing Blow to Unions*, THE WASHINGTON POST, Dec. 11, 2012, http://www.washingtonpost.com/business/economy/michigan-enacts-right-to-work-law-dealing-blow-to-unions/2012/12/11/bb9f8e5a-43ad-11e2-9648-a2c323a991d6_story.html.

- The **Occupational Safety and Health Administration of the US Department of Labor** similarly maintains national statistics pertaining to work-related injury and illness and inspections conducted by OSHA.

- The **International Labour Organization Department of Statistics** maintains data searchable by topic, country, publication source, and short term indicators of the labor market at LABORSTA Internet.

- Other valuable sources of data and other information to support potential human rights claims in the area of labor and employment include the **Pew Research Center**, and for reports specific to Latino and Hispanic workers, *see* **Pew Hispanic Center**. The **Economic Policy Institute**, conducts research in a range of relevant areas, including: jobs, wages, and living standards; labor policy; race and ethnicity; regulation; and, trade and globalization.

5.2.3 RELEVANT HUMAN RIGHTS LAW: *LABOR AND EMPLOYMENT RIGHTS.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *LABOR AND EMPLOYMENT RIGHTS*

Treaty or Declaration	*Article/ Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 1 of CERD**: "(1) In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (2) This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 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 [emphasis added].
	Article 2 of CERD: "(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:…(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists …" International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 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 [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notably in the enjoyment of the following rights: (...) (e) in particular (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions." International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 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 [emphasis added].
International Covenant on Civil and Political Rights (ICCPR)	**Article 2 of the ICCPR**: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 2, 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 [emphasis added].
	Article 3 of the ICCPR: "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." International Covenant on Civil and Political Rights, art. 3, 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 [emphasis added].
	Article 8 of the ICCPR: "(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3)(a) No one shall be required to perform forced or compulsory labour." International Covenant on Civil and Political Rights, art. 8, 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 [emphasis added].
	Article 22(1) of the ICCPR: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." International Covenant on Civil and Political Rights, art. 22(1), 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 [emphasis added].
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." International Covenant on Civil and Political Rights, art. 26, 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 [emphasis added].
International Convention Relating to Status of Refugees (ICRSR)	**Article 15 of ICRSR**: "As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances." International Convention Relating to the International Status of Refugees, art. 15, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 17(1) of ICRSR: "The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment." International Convention Relating to the International Status of Refugees, art. 17(1), 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].
	Article 24 of ICRSR: "1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters: (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home-work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining; (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations..." International Convention Relating to the International Status of Refugees, art. 24, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].
International Labor Organization (ILO) Convention, No. 105, Abolition of Forced Labour, 1957	**Article 1 of ILO No. 105**: "Each Member … undertakes to suppress and not to make use of any form of forced or compulsory labour – (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination." ILO Abolition of Forced Labour Convention (No. 105), art. 1, 320 U.N.T.S. 291, *entered into force* Jan. 17. 1959.
Charter of the Organization of American States (Charter)	**Article 34(g) of Charter of OAS**: "To accelerate their economic social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the Inter-American System, the Member States agree to dedicate every effort to achieve the following goals... (g) Fair wages, employment opportunities, and acceptable working conditions for all." Charter of the Organization of American States, art. 34(g), Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951 [emphasis added].
American Declaration on the Rights and Duties of Man (Declaration)	**Article 2 of Declaration:** "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." American Declaration of the Rights and Duties of Man, art. 2, 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) [emphasis added].
	Article 14 of Declaration: "Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." American Declaration of the Rights and Duties of Man, art. 14, 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) [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 15 of Declaration: "Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit." American Declaration of the Rights and Duties of Man, art. 15, 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).
	Article 16 of Declaration: "Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living." A American Declaration of the Rights and Duties of Man, art. 16, 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) [emphasis added].
	Article 22 of Declaration: "Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature." American Declaration of the Rights and Duties of Man, art. 22, 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) [emphasis added].

OTHER HUMAN RIGHTS INSTRUMENTS*: *LABOR AND EMPLOYMENT RIGHTS.*

International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 6(1) of the ICESCR**: "(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." International Covenant on Economic, Social, and Cultural Rights, art. 6(1), 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 [emphasis added].
	Article 7 of the ICESCR: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays." International Covenant on Economic, Social, and Cultural Rights, art. 7, 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 [emphasis added].

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
	Article 8 of the ICESCR: "(1) The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others…" International Covenant on Economic, Social, and Cultural Rights, art. 8, 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 [emphasis added].
International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 11 of CEDAW:** "(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. (2) In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them." Convention on the Elimination of Discrimination Against Women, art. 11, 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 [emphasis added].
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 9(1) of CRPD**: "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures… shall apply to...workplaces;" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 9(1), 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 [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 27 of CRPD: "(1) States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: a….k." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 27, 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 [emphasis added].
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (ICRMW)	**Article 7 of ICRMW: "**States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 7, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
	Article 25 of ICRMW: "1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment. 2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article. 3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 25, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
	Article 26(1) of ICRMW: "States Parties recognize the right of migrant workers and members of their families: (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned; (c) To seek the aid and assistance of any trade union and of any such association as aforesaid." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 26(1), Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 27 of ICRMW: "1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm. 2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 27, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
	Article 28 of ICRMW: "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 28, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
	Article 32 of ICRMW: "Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 32, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
	Article 33 of ICRMW: "1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning: (a) Their rights arising out of the present Convention..." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, art. 33, Jul. 1, 2003, G.A. Res. 45/158, U.N. Doc. Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* Jul. 1, 2003 [emphasis added].
Universal Declaration of Human Rights (UDHR)	**Article 23 of the UDHR**: "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests." Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 24 of the UDHR: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." Universal Declaration of Human Rights, art. 24, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Universal Declaration of Human Rights, art. 24, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 25 of the UDHR: "Everyone has the right to a standard of living adequate for the health and well-being of himself (or herself) and of his (or her) 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 (or her) control." Universal Declaration of Human Rights, art. 25, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
The American Convention on Human Rights (ACHR)	**Art. 6 of ACHR:** "(1) No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. (2) No one shall be required to perform forced or compulsory labor." American Convention on Human Rights, art. 6, 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 [emphasis added].
	Art. 16(1) of ACHR: "(1) Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes." American Convention on Human Rights, art. 16(1), 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 [emphasis added].
	Art. 26 of ACHR: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." American Convention on Human Rights, art. 26, 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 [emphasis added]. Included among those rights are, "Fair wages, employment opportunities, and acceptable working conditions for all." *See also* Charter of the Organization of American States, art. 34(g).

Treaty or Declaration	*Article/ Citation*
ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration)	The International Labour Organization is a tripartite entity comprised of governments, labor, and business representatives, and its mission is to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.[134] The ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998)[135] commits all ILO Member States (of which the U.S. is one), regardless of ratification of the underlying treaty provisions, including: ▪ freedom of association and the effective recognition of the right to collective bargaining, as set forth in the ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87),[136] and the ILO Right to Organize and Collective Bargaining Convention (No. 98)[137]; ▪ elimination of all forms of forced or compulsory labor, as provided for in the ILO Forced Labour Convention (No. 29),[138] and the ILO Abolition of Forced Labor Convention (No. 105)[139]; ▪ effective abolition of child labor, as set forth in the ILO Minimum Age Convention (No. 138),[140] and the ILO Worst Forms of Child Labour Convention (No. 182)[141]; and, ▪ elimination of discrimination in respect of employment and occupation, as set forth in the ILO Equal Remuneration Convention (No. 100),[142] and the ILO Discrimination (Employment and Occupation) Convention (No. 111).[143]
International Labor Organization (ILO) Convention, No. 189, Decent Work for Domestic Workers, 2011 (ILO Decent Work for Domestic Workers Convention)	**Article 3(2) of ILO No. 189**: "Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation." ILO Decent Work for Domestic Workers Convention (No. 189), art. 3(2), 53 I.L.M. 255, *entered into force* September 5, 2013.
	Article 3(3) of ILO No. 189: "In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing." ILO Decent Work for Domestic Workers Convention (No. 189), art. 3(3), 53 I.L.M. 255, *entered into force* September 5, 2013.

[134] For more information on the ILO, visit http://www.ilo.org/global/about-the-ilo/lang--en/index.htm.
[135] International Labour Conference, ILO Declaration, 86th Session, Geneva, June 18, 1998. *See* The ILO Declaration on Fundamental Principles and Rights at Work, http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm.
[136] ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), July 4, 1950, 68 U.N.T.S. 17, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C087.
[137] ILO Right to Organize and Collective Bargaining Convention (No. 98), http://www.ilo.org/ilolex/english/convdisp1/htm.
[138] ILO Forced Labour Convention (No. 29), June 28, 1930, 39 U.N.T.S. 55, http://www.ilo.org/ilolex/english/convdisp1.htm.
[139] ILO Abolition of Forced Labour Convention (No. 105), June 26, 1957, 320 U.N.T.S. 291, http://www.ilo.org/ilolex/english/convdisp1.htm.
[140] ILO Minimum Age Convention (No. 138), June 19, 1976, http://www.ilo.org/ilolex/english/convdisp1/htm.
[141] ILO Worst Forms of Child Labour Convention (No. 182), June 17, 1999, 38 I.L.M. 1207, http://www.ilo.org/ilolex/english/convdisp1/htm.
[142] ILO Equal Remuneration Convention (No. 100), June 6, 1941, 165 U.N.T.S. 303, http://www.ilo.org/ilolex/english/convdisp1/htm.
[143] ILO Discrimination (Employment and Occupation) Convention (No. 111), June 15, 1960, 362 U.N.T.S. 31, http://www.ilo.org/ilolex/english/convdisp1/htm.

Treaty or Declaration	*Article/ Citation*
	Article 6 of ILO No. 189: "Each Member shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy "ILO Decent Work for Domestic Workers Convention (No. 189), art. 6, 53 I.L.M. 256, *entered into force* September 5, 2013.
	Article 10(1) of ILO No. 189: "Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work." ILO Decent Work for Domestic Workers Convention (No. 189), art. 10(1), 53 I.L.M. 257, *entered into force* September 5, 2013.
	Article 11 of ILO No. 189: "Each Member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex." ILO Decent Work for Domestic Workers Convention (No. 189), art. 11, 53 I.L.M. 257, *entered into force* September 5, 2013.
	Article 14(1) of ILO No. 189: "Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity." ILO Decent Work for Domestic Workers Convention (No. 189), art. 14(1), 53 I.L.M. 257, *entered into force* September 5, 2013.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *LABOR AND EMPLOYMENT RIGHTS.*

Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461, 473 (N.Y. Sup. Ct. 1950), invoking the Universal Declaration of Human Rights and holding that excluding women from bartending was unlawful.

Am. Nat'l Ins. Co. v. Fair Employment & Hous. Com., 32 Cal. 3d 603, 609, 651 P.2d 1151 (1982), citing to the Universal Declaration of Human Rights in deciding an employment discrimination case where the plaintiff had a non-physical handicap.

Estate of Rodriguez v. Drummond Co., 256 F.Supp. 2d 1250, 1264 (N.D. Ala. 2003), denying motion to dismiss complaint brought under the Alien Tort Claims Act and the Torture Victim Protection Act, for alleged murder by Columbian paramilitaries of union organizers in Columbia mine, wherein the court "reluctantly found that the fundamental rights to associate and organize support actionable torts under ATCA."

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999), extending cause of action for claims of slave labor under the Alien Tort Statute to private individuals and corporations.

Moore v. Ganim, 233 Conn. 557, 637 (Conn. 1995), finding minimal state obligation to provide basic assistance, but denying motion to enjoin state from imposing nine month limit on receipt of general assistance benefits. Peters, C.J. (concurring): "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.'"

CASES BEFORE INTERNATIONAL BODIES: *LABOR AND EMPLOYMENT RIGHTS.*

Principle of Equality and Non-Discrimination

Konstantin Markin v. Russia, App. No. 30078/06, Eur. Ct. H.R. (2012). The European Court held that Russia's refusal to grant parental leave to a military serviceman on the same basis as his female counterparts constituted impermissible discrimination under the European Convention on Human Rights and Fundamental Freedoms. The Court explained that the Convention does not obligate states to provide parental leave but that if a state does create a parental leave scheme, it must do so in a manner compatible with Article 14 (prohibition of discrimination) (para. 130) . . . "in so far as parental leave and parental leave allowances are concerned, men are in an analogous situation to women (para. 132)."

Wage claims, Forced Labor and Labor Trafficking[144]

Paulet v. The United Kingdom, App. No. 6219/08, Eur. Ct. H.R. (2014). The European Court found a violation of Article 1 of Protocol 1 of the European Convention on Human Rights (protection of property) in a case concerning the confiscation of the petitioner's wages following his conviction for obtaining employment with a false passport. The court noted, "An interference with Article 1 of Protocol No. 1 will be disproportionate where the property-owner concerned has had to bear 'an individual and excessive burden,' such that 'the fair balance which should be struck between the protection of the right of property and the requirements of the general interest' is upset." (para. 65).

Siliadin v. France, App. No. 733316/01, Eur. Ct. H.R. (2005). State has an obligation to take affirmative measures to protect against and servitude and forced labor. In determining existence of servitude, Court found she was performing work under "menace of threat," giving consideration to her youth, and that "[h]er freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegally, and she had also been kept by Mr. and Mrs. B in a state of fear that she would be arrested and expelled." It further assessed whether her decision to work was "voluntary" and assessed the whether the services she provided were done through the use of coercion.

Prosecutor v. Kmojelac, Case No. IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, ¶195 (Sept. 17, 2003), finding the climate of fear in a detention camp to be great enough to establish a finding of forced labor, and holding, "Given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation negated any possibility of free consent…. The climate of fear made the expression of free consent impossible, and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for forced labour to be established."

Prosecutor v. Kunerac, Case No. IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), ¶177 (Jun. 12, 2002), noting evolution of concepts of "chattel slavery" under the 1926 Slavery Convention "to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership…. [where] there is some destruction of the juridical personality."

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[144] For a comprehensive compilation of decisions from international, regional and non-U.S. courts addressing forced labor and human trafficking, *see* INTERNATIONAL LABOUR ORGANIZATION, FORCED LABOUR AND HUMAN TRAFFICKING: CASEBOOK OF COURT DECISIONS, A TRAINING MANUAL FOR JUDGES, PROSECUTORS AND LEGAL PRACTITIONERS (2009), http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_106143/lang--en/index.htm.

Individual Direct Request concerning Convention No. 29, Forced Labour, 1930 Saudi Arabia, ILO Comm. of Experts on the Application of Conventions and Recommendations (1998). The committee noted that foreign workers and workers such as agricultural and domestic workers not covered by domestic labor legislation are subjected to condition that "transform their employment into a situation of near slavery. First, the employer, or the employing agency, routinely takes possession of the worker's passport. The justification is that it is for 'safekeeping', but the result is that the passport holder can no longer exercise her or his freedom of movement and certainly cannot leave the country or change employers freely. A second common occurrence is the non-remuneration of work, often for months on end. The worker cannot afford to seek other employment without risking the loss of all her or his earnings. These practices effectively turn migrant workers into bonded labourers."

Unemployment

S.W.M. Broeks v. Netherlands**,** Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2, 196, ¶¶ 12.5, 14-16 (1990). Ms. Broeks, who was married at the time of the termination of her unemployment benefits, challenged the termination of those benefits contending sex discrimination because married women were only deemed eligible for benefits if determined she was a "breadwinner" in the household, and were then calculated proportionate to her earnings as to those of her husband, a provision that applied only to the women and not to men (a provision amended subsequent to the date the claim arose, but prior to the Committee's consideration). The U.N. Human Rights Committee ruled art. 26 of the ICCPR extended the prohibition of discrimination to the Netherlands' economic, social and cultural rights obligations undertaken through its ratification of the ICESCR, concluding "12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands, but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination." The Committee concluded the "breadwinner" provision placed married women "at a disadvantage compared with married men" and stated that "[s]uch as differentiation is not reasonable."

Freedom of Association

Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), ILO Comm. on Freedom of Association, Case. No. 2227, Report No. 332 (2003). In a complaint filed following the U.S. Supreme Court decision in the case of *Hoffman Plastic Compounds, Inc. v. NLRB*, the ILO Committee on Freedom of Association found the failure to provide a remedy to undocumented workers whose rights to freedom of association were violated were effectively denied the underlying right.

Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT), ILO Comm. on Freedom of Association, Case No. 2121, Report No. 327 (2002). "Irregular" foreign workers must be granted the same rights to organize and strike, freedom of assembly and association, and to demonstrate and collective bargaining, as is granted to citizen workers.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *LABOR AND EMPLOYMENT RIGHTS.*

The Public Prosecution Service v. The Accused, No. 07.976405-06, District Court of Zwolle (April 2008), The Netherlands). In considering the case of undocumented Indian workers employed in a tofu factory who worked long hours and were not paid overtime, and relying on criteria set forth in the Fifth Report of the Dutch National Rapporteur on Trafficking in Human Beings and which drew upon the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ILO Forced Labour Convention, the Court ultimately held that the situation did not amount to unlawful exploitation.

Vishaka et al. v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India). In considering a petition for the enforcement of the fundamental rights of working women, in particular, the right to be free from sexual harassment, the Court relied on international norms and resolutions pertaining to violence and equality at work in developing norms and procedures aimed at eradicating sexual harassment in the workplace.

Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 803 (India), establishing a rebuttable presumption of a finding of bonded labor, when forced labor for no wage or a nominal wage has been paid.

People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473 (1982, India). In considering a petition alleging the sub-minimum wage payment of workers on construction projects for the Asian Games, in particular considering the application of a forced labor provision, the Court considered ILO Convention 29, the European Convention on Human Rights and the ICCPR and concluded that work performed for less than minimum wage can constitute forced labor.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *LABOR AND EMPLOYMENT RIGHTS.*

Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United States of America, U.N. Human Rights Committee, ¶14, U.N. Doc. CCPR/C/USA/CO/4 (April 23, 2014):

> "While acknowledging the measures taken by the State party to address the issue of trafficking in persons and forced labour, the Committee remains concerned about cases of trafficking of persons, including children, for purposes of labour and sexual exploitation, and criminalization of victims on prostitution-related charges. It is concerned about the insufficient identification and investigation of cases of trafficking for labour purposes and notes with concern that certain categories of workers, such as farm workers and domestic workers, are explicitly excluded from protection under labour laws, thus rendering those categories of workers more vulnerable to trafficking. The Committee is also concerned that workers entering the United States of America under the H-2B work visa programme are also at a high risk of becoming victims of trafficking and/or forced labour (arts. 2, 8, 9, 14, 24 and 26).
>
> The State party should continue its efforts to combat trafficking in persons, inter alia, by strengthening its preventive measures, increasing victim identification and systematically and vigorously investigating allegations of trafficking in persons, prosecuting and punishing those responsible and providing effective remedies to victims, including protection, rehabilitation and compensation. The State party should take all appropriate measures to prevent the criminalization of victims of sex trafficking, including child victims, insofar as they have been compelled to engage in unlawful activities. The State party should review its laws and regulations to ensure full protection against forced labour for all categories of workers and ensure effective oversight of labour conditions in any temporary visa programme. It should also reinforce its training activities and provide training to law enforcement and border and immigration officials, as well as to other relevant agencies such as labour law enforcement agencies and child welfare agencies."

General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), U.N. Human Rights Committee, ¶ 31, U.N. Doc HRI/GEN/1/Rev.9 at 234 (2000):

> "The Committee has also often observed in reviewing States parties' reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value. States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields,

for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services."

General Recommendation No. 18: Non-discrimination, U.N. Human Rights Committee, ¶12, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

> "While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant."

General Comment No. 15: The Position of Aliens Under the Covenant, U.N. Human Rights Committee, ¶¶ 1-2 and 7, U.N. Doc HRI/GEN/1/Rev.9 at 190 (1986):

> "1. … [E]ach State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
>
> 2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.
>
> 7. Aliens thus … may [not] be held in slavery or servitude. … Aliens may not be imprisoned for failure to fulfil a contractual obligation. … Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of … rights and obligations in a suit at law. … Aliens receive the benefit of the right of peaceful assembly and of freedom of association. … Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."

Concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination: United States of America, U.N. Committee on the Elimination of All Forms of Racial Discrimination, ¶28, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008):

> " The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including Hoffman Plastics Compound, Inc. v. NLRB (2007), Ledbetter v. Goodyear Tire and Rubber Co. (2007) and Long Island Care at Home, Ltd. v. Coke (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of

discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses (arts. 5 (e) (i) and 6).

The Committee recommends that the State party take all appropriate measures, including increasing the use of "pattern and practice" investigations, to combat de facto discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention. The Committee further recommends that the State party take effective measures, including the enactment of legislation, such as the proposed Civil Rights Act of 2008, to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer."

General Recommendation No. 30: Discrimination Against Non-Citizens, U.N. Committee on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

Gen. Rec. No. 30 notes that while ICERD allows for differentiation between citizens and non-citizens (in Article 1, paragraph 2), that provision, "2. should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights." In further elaborates on what is permissible and impermissible differentiation based on citizenship status, as follows:

"(3) Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

"(4) Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim […]

(29) Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health; […]

(33) Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;

(34) Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

(35) Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated."

General Recommendation No. 26: Women Migrant Workers, U.N. Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/2009/WP.1/R (2008).

"(26) States parties in countries where migrant women work should take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers, including in their own communities."

"26(b) Legal protection for the rights of women migrant workers: States parties should ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate . . . In particular, they should ensure that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations."

"26(l) Protection of undocumented women migrant workers: the situation of undocumented women needs specific attention. Regardless of the lack of immigration status of undocumented women migrant workers, States parties have an obligation to protect their basic human rights. Undocumented women migrant workers must have access to legal remedies and justice in cases of risk to life and of cruel and degrading treatment, or if they are coerced into forced labour, face deprivation of fulfilment of basic needs, including in times of health emergencies or pregnancy and maternity, or if they are abused physically or sexually by employers or others."

Recommendation No. 201: Decent Work for Domestic Workers, General Conference of the International Labour Organization (2011).

"(2) In taking measures to ensure that domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members should:
identify and eliminate any legislative or administrative restrictions or other obstacles to the right of domestic workers to establish their own organizations or to join the workers' organizations of their own choosing and to the right of organizations of domestic workers to join workers' organizations, federations and confederations;"

"(10) Members should take measures to ensure that domestic workers are entitled to suitable periods of rest during the working day, which allow for meals and breaks to be taken."

"(11)(1) Weekly rest should be at least 24 consecutive hours."

"(14) When provision is made for the payment in kind of a limited proportion of remuneration, Members should consider:

(a) establishing an overall limit on the proportion of the remuneration that may be paid in kind so as not to diminish unduly the remuneration necessary for the maintenance of domestic workers and their families;
(b) calculating the monetary value of payments in kind by reference to objective criteria such as market value, cost price or prices fixed by public authorities, as appropriate;
(c) limiting payments in kind to those clearly appropriate for the personal use and benefit of the domestic worker, such as food and accommodation;
(d) ensuring that, when a domestic worker is required to live in accommodation provided by the household, no deduction may be made from the remuneration with respect to that accommodation, unless otherwise agreed to by the worker; and
(e) ensuring that items directly related to the performance of domestic work, such as uniforms, tools or protective equipment, and their cleaning and maintenance, are not considered as payment in kind and their cost is not deducted from the remuneration of the domestic worker."

Recommendation No. 151: Migrant Workers Recommendation, General Conference of the International Labour Organization (1975).

"2. Migrant workers and members of their families lawfully within the territory of a Member should enjoy effective equality of opportunity and treatment with nationals of the Member concerned in respect of--

(a) access to vocational guidance and placement services;

(b) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in the country of employment;
(c) advancement in accordance with their individual character, experience, ability and diligence;
(d) security of employment, the provision of alternative employment, relief work and retraining;
(e) remuneration for work of equal value;
(f) conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment;
(g) membership of trade unions, exercise of trade union rights and eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in undertakings;
(h) rights of full membership in any form of co-operative;
(i) conditions of life, including housing and the benefits of social services and educational and health facilities."

"8. (2) Migrant workers whose position has been regularised should benefit from all rights which, in accordance with Paragraph 2 of this Recommendation [see above], are provided for migrant workers lawfully within the territory of a Member."

"8. (3) Migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights."

Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Addendum: Mission to the United States of America, U.N. Doc. A/HRC/7/12/Add.2 at 27 (March 5, 2008):

"Improved health and safety conditions should be ensured in places that are known to employ migrant workers, compensation for workers and health care for injured migrant workers should be provided, and the significant incidences of wage theft combated."

"Local law enforcement and federal immigration authorities must cease harassing and racially profiling migrant workers. Law enforcement should instead focus on helping to promote the rights of workers, including the rights of migrant workers."

Rights of Undocumented Workers, Advisory Opinion OC-18/03, Inter. Am. C.H.R., OEA OC-18 (2003). The Inter-American Commission held that the principle of equality and non-discrimination is a *jus cogens* norm imposing upon all States the affirmative obligation to ensure equality and protect against discrimination, in the enjoyment of fundamental rights, including due process of law and access to justice. It then applied that principle to all migrant workers, regardless of legal status, recognizing the following fundamental rights: "157. … the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation."

5.2.4 SAMPLE ARGUMENTS: *LABOR AND EMPLOYMENT RIGHTS.*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not rely these arguments alone.

SAMPLE ARGUMENT 1 - RIGHT TO NON-DISCRIMINATION IN THE ENJOYMENT OF JUST AND FAVOURABLE CONDITIONS OF WORK

The Universal Declaration of Human Rights [hereinafter "UDHR"] provides that "[a]ll persons are born free and equal in dignity and rights," art. 1, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and the principle of equality and non-discrimination in the enjoyment of workplace rights and access to the courts for the realization and enforcement of those rights is well-established under international law. *See, e.g.,* International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 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 (hereinafter, "CERD"); International Covenant on Civil and Political Rights, art. 2, 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 (extending the rights provided for in the Covenant to all persons "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"); ICCPR, art. 3 (obligating States to "ensure the equal rights of men and women"); ICCPR, art. 26 (providing that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law," and requiring the law to "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). *See also* American Declaration of the Rights and Duties of Man, art. 2, 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) (providing that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.").

The principle of equality and non-discrimination applies to the workplace through the right under international law to the free and full enjoyment of just and favourable conditions of work. *See, e.g.,* CERD, art. 5(e)(i)-(ii) (extending the protections against discrimination to "(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions."); UDHR, art. 23(1) (providing for the right to "just and favourable conditions at work"). *See also* Rights of Undocumented Workers, Advisory Opinion OC-18/03, Inter. Am. C.H.R., OEA OC-18, ¶157 (2003) (extending the principle of equality and non-discrimination to the fundamental workplace rights, including: "the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation.").

The right to non-discrimination and equality under international law differs from U.S. constitutional protections both in terms of the scope of protected classes, and also – importantly – in that it recognizes discrimination in fact, and not just intent. Therefore, statutes, regulations or policies that employ neutral language but have a disparate impact on protected categories, are prohibited. *See*, CERD, art. 2 (mandating States Parties to "amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.").

[Potential claims – recognizing that it is governments and not private actors (i.e., employers) who are bound by the provisions of international law: failure to adequately protect against injury or other health hazards in the workplace that result in disparate rates of injury based on one of the protected categories; failure to enforce or guard against wage theft in industries or for individuals of a protected category; failure to recognize de facto discrimination, even where the plaintiff may not be able to meet the burden of proving de jure discrimination;

LSC restrictions denying H-2B and undocumented workers access to legal aid; discriminatory terms and conditions of employment for guestworkers; discriminatory impact of mandatory welfare-to-work programs, and denial of work based on criminal records checks, where the denial of employment is disproportionate or not related to earlier criminal activity; denial of access to job training programs for persons of limited or non-English proficiency].

[Insert the important facts of this case] violates the Plaintiffs' fundamental human right to enjoy just and favorable conditions of work without discrimination under established principles of international law.

SAMPLE ARGUMENT 2 - RIGHT TO JUST AND FAVORABLE REMUNERATION FOR WORK PERFORMED, AND RIGHT TO BE FREE FROM FORCED LABOUR, SERVITUDE AND HUMAN TRAFFICKING

The concept of the right to decent work is clearly set forth in the Universal Declaration of Human Rights, which provides: "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. The right to be paid for work performed is a fundamental concept in international law, grounded in the prohibition of slavery, servitude, and forced labor, as well as the right to just and favorable terms and conditions of work, including the right to just and equal remuneration." Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

These enumerated rights are reiterated in several other international and regional human rights documents. *See, e.g.*, American Declaration of the Rights and Duties of Man, art. 14, 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) (providing for the "right to work, under proper conditions," and guaranteeing "right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family."); Charter of the Organization of American States, art. 34(g), APR. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951 (calling upon all member States, including the United States, to take "every effort to achieve… fair wages, employment opportunities, and acceptable working conditions for all.").

In addition to providing for the right to fair wages and employment opportunities, international law clearly prohibits discrimination in the enjoyment of those rights. [See above, Model Argument #1 - RIGHT TO NON-DISCRIMINATION IN THE ENJOYMENT OF JUST AND FAVOURABLE CONDITIONS OF WORK].

Furthermore, the failure to ensure payment of all wages for work performed, impermissible deductions from pay, and other acts that violate the notion of "just and favourable terms and conditions of work," risk violating clearly established norms under international law prohibiting slavery, servitude, and forced or compulsory labor. *See, e.g.*, International Covenant on Civil and Political Rights, art. 2, 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; Abolition of Forced Labour Convention, art. 105, 320 U.N.T.S. 291, *ratified by the U.S.* Sept. 25, 1991.

International tribunals have recognized the differing ways in which control is exercised over individuals to compel their labor, and consider the totality of the circumstances when making a determination as to whether the work environment has deteriorated to a situation of servitude or other forms of prohibited forced or compulsory labor. *See, e.g.*, *Siliadin v. France*, App. No. 733316/01, Eur. Ct. H.R. (2005), http://www.unhcr.org/refworld/docid/4406f0df4.html (in which the Court considered the worker's youth, the fact that her passport had been confiscated, her precarious immigration status, and the state of fear brought on by statements by her employer that she would be arrested and expelled, as well as coercion through fraud in her "voluntary" decision to accept employment, in its ultimate finding of prohibited servitude). *See also* ILO Committee of Experts on the Application of Conventions and Recommendations, Individual Direct Request concerning Convention No. 29,

Forced Labour, 1930 Saudi Arabia (1998) (noting migrant workers employed in domestic and agricultural work, excluded from coverage under labor legislation, and often required to work for extended periods of time without pay, who risk losing all of her earnings if she seeks other employment, are effectively "bonded labourers.").

[Insert the important facts of this case] violates the Plaintiffs' fundamental human right to enjoy just and favourable conditions of work without discrimination under established principles of international law. [These actions further give rise to violations of the Torture Victim Protection Act, and allow for additional causes of action in tort].

SAMPLE ARGUMENT 3 - RIGHT TO UNEMPLOYMENT AND SOCIAL SECURITY

Human rights law clearly recognizes the right to social security in the case of unemployment. The Universal Declaration of Human Rights provides: "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Article 25 of the UDHR: "Everyone has the right to a standard of living adequate for the health and well-being of himself (or herself) and of his (or her) 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 (or her) control." Universal Declaration of Human Rights, art. 25, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (emphasis added). *See also* American Declaration of the Rights and Duties of Man, art. 16, 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) ("Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living."); Rights of Undocumented Workers, Advisory Opinion OC-18/03, Inter. Am. C.H.R., OEA OC-18, ¶15, (2003), http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html (recognizing as a fundamental right, the right to social security).

While international tribunals recognize the progressive nature of the right to unemployment and are reluctant to impose an affirmative obligation on a State in guaranteeing the right to unemployment, it is clearly established under international human rights norms that unemployment and social security must be provided in a manner consistent with a State's obligation to ensure all persons are equal before the law and in the enjoyment of all rights and benefits provided for under international law, and under the laws of the State in question. *See* 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 (providing in article 2 that "all persons, without distinction, are entitled to the equal enjoyment of the rights contained in the Covenant" and in article 26 that "all persons are equal before the law and are entitled to equal protection of the law). *See also S.W.M. Broeks v. Netherlands*, Comm. No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196, ¶¶ 12.5, 14-16 (1990), http://www1.umn.edu/humanrts/undocs/newscans/172-1984.html (finding that rights contained within the International Covenant on Economic Social and Cultural Rights must be provided for in a manner consistent with Articles 2 and 26 of the International Covenant on Civil and Political Rights).

[Insert the important facts of this case] violates the Plaintiffs' fundamental human right to enjoy just and favorable conditions of work without discrimination under established principles of international law.

SAMPLE ARGUMENT 4 - RIGHT TO FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

The right to freedom of association is recognized in numerous international and regional human rights documents. *See, e.g.,* International Covenant on Civil and Political Rights, art. 22, 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 (guaranteeing the right to freedom of association and to form and join trade unions), American Declaration of the Rights and Duties of Man, art. 22, 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) (providing for the "right to associate with others to promote, exercise, and protect his legitimate interests of a ... economic,… professional, labor union or other nature."). *See also* International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(ii), 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 [hereinafter CERD] (guaranteeing the right to form and join trade unions without discrimination).

The rights to freedom of association and the effective recognition of the right to collective bargaining have long been viewed as core to the realization of the right to decent work. As a means towards achieving human rights at work, the ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998) commits all ILO Member States (of which the United States is one), regardless of ratification of the underlying treaty provisions, to the ensure the right to freedom of association and the effective recognition of the right to collective bargaining, as set forth in the ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), and the ILO Right to Organize and Collective Bargaining Convention (No. 98), regardless of the status of ratification of the identified core ILO treaties. *See* International Labour Conference, ILO Declaration, 86th Session, Geneva, June 18, 1998. *See* The ILO Declaration on Fundamental Principles and Rights at Work, http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm.

[Insert the important facts of this case] violates the Plaintiffs' fundamental human rights under international legal norms. The failure of to guarantee the right to freedom of association and collective bargaining, and the right to form and join trade unions, with full access to individualized redress and remedies when those rights have been violated, runs directly counter to its obligations under international law.

The failure to guarantee the right to freedom of association and the effective recognition of the right to collective bargaining [may implicate / directly implicates] the right to non-discrimination in the enjoyment of terms and conditions of work, in further violation of international human rights guarantees non-discrimination and equality in the right to just and favourable conditions of work found in the CERD at art. 5(e)(i) (extending the protections against discrimination to "(i) [t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration"), and the Universal Declaration of Human Rights, art. 23(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (providing for the right to "just and favourable conditions at work"). Interference with the right to collective bargaining [may have / has] a disproportionate impact on persons of color and women, particularly those employed in lower-wage sectors. [Fill in statistical data, if relevant.]

The National Labor Relations Board / state Labor Relations Board is bound under international law to ensure protection for workers engaged in those rights, and provide adequate redress to the individual workers when their rights to freedom of association and collective bargaining are violated. *See, e.g.*, ILO Committee of ILO Committee on Freedom of Association, Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case. No. 2227, Report No. 332 (2003) (holding that the U.S. Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB denying the remedy of back-pay, the only remedy available to the individual whose right to freedom of association is violated under the NLRA, was an impermissible denial of the underlying right).

5.2.5 TALKING POINTS: LABOR AND EMPLOYMENT RIGHTS.

TALKING POINTS #1- RIGHT TO NON-DISCRIMINATION IN THE ENJOYMENT OF JUST AND FAVOURABLE CONDITIONS OF WORK

- The right to non-discrimination in the workplace has been well-established by the civil rights laws in the U.S., but U.S. law falls short of the full guarantees set forth under international law.
- The Inter-American Court on Human Rights has held that the principle of equality and non-discrimination is a *jus cogens* principle, and as such, creates binding obligations on the U.S. (through its judiciary, legislative, and executive branches) to ensure both *de jure* and *de facto* non-discrimination. In doing so, it relied on the numerous international and regional human rights treaties, declarations and related documents, as well as decisions of international and regional tribunals and UN treaty bodies.
- Where domestic Constitutional or statutory law is vague, international human rights norms regarding non-discrimination should be applied to interpret U.S. law in a way that comports with international principles and norms of equality and non-discrimination.
- In the recent abolition of juvenile death penalty case, Roper v. Simmons, the U.S. Supreme Court looked to international human rights norms and to the jurisprudence of other countries when it was interpreting U.S. law and making its decision as to whether to abolish the juvenile death penalty. The U.S. Supreme Court similarly looked to international human rights norms and jurisprudence of other countries when it ruled laws prohibiting sodomy violated the right to privacy.
- U.S. obligations under CERD reach beyond those found in Title VII and other anti-discrimination statutes both in terms of the categories of protected persons, and in creating an affirmative obligation on the part of the government to combat discrimination, both in fact and in law.
- The CERD and the ICCPR, both treaties ratified by the U.S., extend the protection against discrimination (on account of gender, language, race, national origin, ethnicity, property or other social status) to both the rights contained within the respective treaty, as well as to all rights provided for under law.
- Furthermore, the ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998) calls upon all members (of which the U.S. is one) to ensure the realization of decent work, and recognized as one of the fundamental principles the elimination of discrimination in respect of employment and occupation.

TALKING POINTS #2 - FAILURE TO ENSURE DECENT WORKING CONDITIONS AND FULL PAYMENT OF FAIR WAGES AND EXERCISE OF POLICIES AND PRACTICES THAT CONTRIBUTE TO SERVITUDE AND FORCED LABOR ARE INCOMPATIBLE WITH INTERNATIONAL NORMS

- The right to be paid for work performed is well established under both U.S. and international law, through the prohibition of slavery, indentured servitude and other forms of forced or coerced labor.
- International human rights norms go further in recognizing the right to all persons the right to decent work and to fair and just remuneration. And, as a member of the Organization of American States, the U.S. is called upon to take “every effort to achieve… fair wages, employment opportunities, and acceptable working conditions for all."
- Where domestic Constitutional or statutory law is vague, international human rights norms regarding non-discrimination should be applied to interpret U.S. law in a way that comports with international principles and norms of equality and non-discrimination.

- For example, in the recent abolition of juvenile death penalty case, Roper v. Simmons, the U.S. Supreme Court looked to international human rights norms and to the jurisprudence of other countries when it was interpreting U.S. law and making its decision as to whether to abolish the juvenile death penalty. The U.S. Supreme Court similarly looked to international human rights norms and jurisprudence of other countries when it ruled laws prohibiting sodomy violated the right to privacy.

In claims of forced labor and servitude:

- In interpreting the 13th Amendment of the U.S. Constitutional and its prohibition of slavery, courts can look to international and foreign law sources in its interpretation of forced labor and "modern day" slavery.

In wage claims:

- The U.S. ratified the ICCPR in 1992, and the ICERD in 1994, and it is bound to act in a manner consistent with the obligations set forth therein.
- Article 2 of the ICCPR obligates states to ensure equal enjoyment of all rights contained under both our international treaty obligations (ICCPR, art. 2) and under domestic law (ICCPR, art. 26). Article 5 of the ICERD extends the right to equality and non-discrimination (both in law and in effect) to the enjoyment of rights to decent work, fair remuneration, and equal pay for equal work.
    - Therefore, U.S. obligations to ensure equality under the law and non-discrimination should be used as the lens through which to examine claims brought under domestic law, including claims brought under FLSA and other state and federal wage payment and collection laws, as well as contract law

TALKING POINTS #3 - RIGHT TO UNEMPLOYMENT AND SOCIAL SECURITY

- The use international human rights norms to assist in interpretation and the development of U.S. law is well established.
- While the U.S. has not ratified the International Covenant on Economic, Social and Cultural Rights, it ratified the ICCPR in 1992, and the CERD in 1994, and it is bound to act in a manner consistent with the obligations set forth therein.
- Article 2 of the ICCPR obligates states to ensure equal enjoyment of all rights contained under both our international treaty obligations (ICCPR, art. 2) and under domestic law (ICCPR, art. 26). Article 5 of the CERD extends the right to equality and non-discrimination (both in law and in effect) to decent work and to social security in the case of unemployment for any reason outside of that individual's control.
- Furthermore, as a member of the Organization of American States, the U.S. is obligated under the OAS Charter and under the American Declaration of the Rights and Duties of Man to act in a manner that is not regressive in the implementation of the rights contained therein.
- Therefore, U.S. obligations to ensure the progressive realization of the rights contained in the American Declaration, and its obligations to ensure equality under the law and non-discrimination should be used as the lens through which to assess an individual's right to unemployment benefits.

TALKING POINTS #4- RIGHT TO FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

- The right to freedom of association is recognized in state and federal law in the U.S. and is guaranteed in numerous international and regional human rights documents.

- The U.S. ratified the ICCPR in 1992 and the CERD in 1994, both of which guarantee the right to freedom of association to form and join trade unions, without discrimination, and provide for equality before the law to ensure the realization of those rights.

- In addition, the U.S. is a member of the International Labor Organization, and is therefore bound by the ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998), which commits all ILO Member States (of which the U.S. is one), regardless of ratification of the underlying treaty provisions, to the ensure the right to freedom of association and the effective recognition of the right to collective bargaining, as set forth in the ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), and the ILO Right to Organize and Collective Bargaining Convention (No. 98).

- Furthermore, the impact of the denial of the right to freedom of association and the effective recognition of the right to collective bargaining [may implicate / directly implicates] the right to non-discrimination in the enjoyment of terms and conditions of work, in further violation of international human rights guarantees non-discrimination and equality in the right to just and favourable conditions of work.

- The National Labor Relations Board / state Labor Relations Board is bound under international law to ensure protection for workers engaged in those rights, and provide adequate redress to the individual workers when their rights to freedom of association and collective bargaining are violated.

5.2.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *LABOR AND EMPLOYMENT RIGHTS*

MARYLAND LEGAL AID SPEARHEADS JOINT LEGAL AID COMPLAINT ON ACCESS TO JUSTICE FOR MIGRANT FARMWORKERS

On December 13, 2012, Maryland Legal Aid, spearheaded a complaint submitted to Magdalena Sepúlveda Carmona, U.N. Special Rapporteur on extreme poverty and human rights, by a coalition of 28 legal services, healthcare, workers' rights, anti-trafficking organizations, and other community service programs that serve migrant farmworkers, representing all 50 states. The joint legal aid complaint called upon the Special Rapporteur to examine the United States' failure to ensure human rights defenders' and healthcare workers access to migrant farmworker labor camps. The group alleged that the lack of legal protections guaranteeing migrant labor camp access violates basic human rights, including the right to freedom of assembly and association, right to freedom from arbitrary arrest, right to personal security, right to due process, right to healthcare, right to nondiscrimination, and right to access to legal counsel. In late December 2012, the U.N. Special Rapporteur on extreme poverty and human rights joined with the U.N. Special Rapporteur on the rights of human rights defenders and the U.N. Special Rapporteur on the human rights of migrants in a letter to the United States, available here, raising many of the issues in the joint legal aid submission.

The same group of legal services and farmworker organizations also submitted a shadow report to the U.N. Human Rights Committee in Fall 2013 for the US review under the International Covenant on Civil and Political Rights, arguing that the denial of migrant labor camp access violated the workers' rights to freedom of association, and interfered with their right of access to the courts and equality under the law. They did so in coordination with a coalition of advocates who had submitted a shadow report on Freedom of Association and the Right to Equality and Non-Discrimination in Work. The Human Rights Committee's concluding observations for the U.S. noted concern for the "insufficient identification and investigation of cases of trafficking for labour purposes" and its concern for the continued exclusion of farm workers from protection under certain labour laws. It further noted with concern the high rates of trafficking and forced labor that occur under the H-2B program. The Committee also called on the U.S. to take steps to ensure the provision of legal aid to immigrants in the U.S. subject to deportation.

The now growing coalition of legal aid and other advocates also submitted a thematic hearing request on the migrant camp access issue to the Inter-American Commission on Human Rights and another shadow report was submitted by the group to the U.N. Committee on the Elimination of Racial Discrimination in Summer 2014. The advocacy continues, and is working to link the issue of migrant labor camp access to call attention to the right of legal aid attorneys and other service workers as human rights defenders under international law, and the workers whose rights they are seeking to protect.

5.2.7 SAMPLE BRIEFS & PETITIONS: *LABOR AND EMPLOYMENT RIGHTS*

Petition on Labor Law Matters Arising in the United States: Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws, Promote Compliance with Minimum Employment Standards, and Protect Migrant Workers, submitted to the National Administrative Office of Mexico under the North American Agreement on Labor cooperation (September 19, 2011). Visit **here**, for additional information on the Petition and Petitioners.

Request for Hearing on the Human Rights Situation of Meat and Poultry Processing Workers in the United States, submitted to the Inter-American Commission on Human Rights (June 25, 2013). Visit **here**, for additional information on the Petition and Petitioners.

Petition Alleging Violations by the United States of America of the Human Rights of Domestic Workers Employed by Diplomats, submitted to the Inter-American Commission on Human Rights (November 15, 2007). Visit **here**, for additional information on the Petition and Petitioners.

Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, submitted to the Inter-American Commission on Human Rights (November 1, 2006). Visit **here**, for additional information on the Petition and Petitioners.

5.2.8 OTHER RESOURCES: *LABOR AND EMPLOYMENT RIGHTS*

Tobacco's Hidden Children: Hazardous Child Labor in United States Tobacco Farming, Human Rights Watch (May 14, 2014).

At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States, Human Rights Watch (November 12, 2013).

Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment, Human Rights Watch (May 16, 2012).

Human Rights in the United States: Legal Aid Alleges that Denying Access to Migrant Labor Camps is a Violation of the Human Right to Access Justice, Reena K. Shah and Lauren E. Bartlett (2012).

Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania *(Sept. 2, 2011)*, setting forth a human rights analysis of the following allegations as reported by J-1 Student visa holders employed at a packing plant for Hershey: fraud and coercion in recruitment and contracting; failure to pay fair remuneration and unlawful pay deductions; failure to provide safe and decent working conditions, free from abusive, exploitative and discriminatory treatment; interference with the right to freely choose one's place of work; interference with workers' right to organize and freedom of association; threats, intimidation, coercion and retaliation.

Failing its Families: Lack of Paid Leave and Work-Family Supports in the United States, Human Rights Watch (February 23, 2011).

Fields of Peril: Child Labor in US Agriculture, Human Rights Watch (May 5, 2010).

United States: The Employee Free Choice Act, A Human Rights Imperative, Human Rights Watch (January 27, 2009).

Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants, Human Rights Watch (January 25, 2005).

Submission to the United Nations Human Rights Committee on the Fourth Periodic Report of the United States of America (September 2013) – Deporting the Evidence: Migrant Workers in the South Expose How U.S. Immigration Enforcement Against Human Rights Defenders Violates the International Covenant on Civil and Political Rights, submitted by the New Orleans Workers' Center for Racial Justice and the Stuart H. Smith Law Clinic and Center for Social Justice Human Rights Project at the Loyola University New Orleans College of Law, and addressing the use of threats of arrest, detention, and deportation by the Department of Homeland Security to limit the rights to non-discrimination and freedom of association, including the right to form and join trade unions.

Submission to the United Nations Human Rights Committee on the Fourth Periodic Report of the United States of America (September 2013) – Troubling Gaps in the U.S. Response to Human Trafficking Under the International Covenant on Civil and Political Rights, submitted by the International Human Rights Clinic at Santa Clara University School of Law, and addressing the U.S. government's failure to identify and investigate labor trafficking cases and the exclusion of farm workers and domestic workers from U.S. labor law protections, which renders these classes of workers vulnerable to human trafficking.

Submission to the United Nations Human Rights Committee on the Fourth Periodic Report of the United States of America (September 2013) – United States' Compliance with the International Covenant on Civil and Political Rights Freedom of Association and Right to Equality and Non-Discrimination in Work, submitted by a coalition of organizations and institutions committed to ensuring that the rights to non-discrimination and freedom of association, particularly the right to form and join a trade union, is available to all workers, including those who are currently excluded from protections under U.S. law (public-sector workers, agricultural and domestic workers, independent contractors, and undocumented migrant workers).

Submission to the United Nations Universal Periodic Review Ninth Session of the Working Group on the UPR (November 2010) – United States of America: Labor Rights, submitted by a coalition of trade unions, union representatives, and organizations and individuals dedicated to ensuring workplace rights through the protection and promotion of the right to freedom of association and collective bargaining for all workers.

Submission to the United Nations Universal Periodic Review Ninth Session of the Working Group on the UPR (November 2010) – United States of America: Gender and Racial Inequalities in the Right to Decent Work, submitted by a coalition of stakeholder dedicated to ensuring the government takes steps to ensure the human right to work, accounting for the needs of women and racial and ethnic minorities in securing decent work.

Submission to the United Nations Universal Periodic Review Ninth Session of the Working Group on the UPR (November 2010) – United States of America: Migrant Labor Rights, submitted by a coalition of organizations, entities and individuals committed to ensuring that all individuals regardless of the industry in which they work and regardless of their migration status, are entitled to all workplace rights and other fundamental rights connected to their status as migrant workers, without discrimination.

Submission to the Committee on the Elimination of All Forms of Racial Discrimination, Labor and Employment Rights in the United States: A Critical Look at U.S. Compliance with the Convention on the Elimination of All Forms of Racial Discrimination, prepared by the US Human Rights Network Labor Caucus (February 2008), and addressing the intersection of labor policies, immigration policies and racialized workplace discrimination in the United States, as well as *de jure* and *de facto* discrimination in the protection and promotion of the right to

freedom of association, and calling attention to the particularized vulnerabilities under the law of guestworkers, day laborers, and domestic workers.

International Trade and Workers' Rights: Practical Tools for Reading Labor Rights Provisions of Free Trade Agreements, prepared by Local Human Rights Lawyering Project Advisory Board member R. Michael Waller in 2004, this article aims to make Free Trade Agreement (FTA) texts more accessible and to provide a critical tool with which to analyze FTAs.

5.3 HOUSING RIGHTS

The Housing Rights section of this Handbook was written by Lauren E. Bartlett.[^]

5.3.1 INTRODUCTION: *HOUSING RIGHTS.*

The right to housing is a universal right, recognized at the international level and in more than one hundred national constitutions throughout the world.[145]

The right to housing should not be interpreted strictly as shelter or narrowly as a single family home. Rather, the right to housing should be seen as the right to live somewhere in security, peace and dignity, and, like all other basic human rights, the right to adequate housing applies to everyone. Additionally, the right to housing refers not just to housing, but to *adequate* housing. The following aspects of the right are to be taken into consideration when considering adequacy of housing: (a) Legal security of tenure; (b) Availability of services, materials, facilities and infrastructure; (c) Affordability; (d) Habitability; (e) Accessibility; (f) Location; and (g) Cultural adequacy.[146]

Advocates have begun calling for the recognition of a right to housing in the U.S. to address the ongoing severe housing crisis. This section of the Handbook will provide legal aid attorneys with model written and oral arguments with statistics and resources for relevant data, arguments to use in litigation, a list of relevant international and U.S. law, and case studies of legal aid attorneys fighting for housing rights.

5.3.2 QUICK STATISTICS & RESOURCES FOR DATA: *HOUSING RIGHTS.*

- Today, more than 828 million people worldwide live in slums and more than 1 billion people worldwide live in inadequate housing.[147]
- Between 2007 and 2008, close to 4.5 million people worldwide faced eviction, and over 15 million people worldwide are displaced by economic development each year.[148]
- Here in the U.S, in 2009, over 17 million people confronted serious housing problems or had no housing at all.[149]

[^] Lauren E. Bartlett is director of the Center's Local Human Rights Lawyering Project. From 2008-2011, Ms. Bartlett worked as a legal services attorney at Southeast Louisiana Legal Services in the foreclosure prevention unit. She taught a housing law and policy course at Loyola University New Orleans College of Law and served on the board of the ACLU of Louisiana. In 2007, she co-founded the Louisiana Justice Institute, a nonprofit civil rights legal advocacy organization. During law school, Lauren focused on gaining a strong background in international law and human rights. She was an articles editor for the Human Rights Brief, participated in a research program in Geneva, Switzerland for the U.N. Committee Against Torture, and was an Executive Board Member of the student group Action for Human Rights. She also served as a summer associate with the group Advocates for Environmental Human Rights, based in New Orleans, Louisiana. Before law school, Ms. Bartlett worked with non-profit organizations in California, Nepal, Ghana, Bangladesh and India, alongside advocates fighting for social and environmental justice.

[145] A sampling of constitutions which recognize a right to housing include: Argentina, Const. Arg., § 14 ("the States shall grant . . . access to worthy housing"); Belgium, art. 23(3) ("Everyone has the right to lead a life in conformity with human dignity . . . includ[ing], in particular, the right to decent accommodation."); Ecuador, art. 13 ("Every person enjoys the following guarantees . . . the right to a standard of living that assures health, food, clothing, housing, medical assistance and the necessary social services…"); Mali, art. 16 ("Education, instruction, formation, work, housing, leisure, health and social protection shall constitute recognized rights."); Mexico, Const. D.O., art. 4 ("Every family has the right to enjoy decent and proper housing."); Panama, art. 113 ("The state shall establish a national housing policy with the purpose of ensuring the enjoyment of this social right to all of the population, especially low-income groups.")

[146] General Comment 4, Committee on Economic, Social, and Cultural Rights, U.N. Doc. E/1992/23, ¶ 6, (1991), http://www.unhcr.org/refworld/docid/47a7079a1.html.

[147] United Nations Development Programme, The Millennium Development Goals Report 2010, http://bit.ly/c2YLPa.

[148] United Nations Habitat Programme, State of the World's Cities 2010/2011 (2011).

[149] Centers for Disease Control and Prevention, Inadequate and Unhealthy Housing 2007 and 2009 (2011), http://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a4.htm.

- On a single night in January 2011, 636,017 people were homeless in the U.S.[150]
- More than 1.02 million people used homeless shelters in 2010.[151]
- The number of people in the U.S. in poverty jumped to 15.1% in 2010, a 17-year high.[152]

Here are some resources for data related to housing in the U.S. and worldwide:

- **U.S. Census Bureau**
- **U.S. Department of Housing and Urban Development (HUD)**
- **Annual U.S. Conference of Mayors Hunger and Homelessness Survey**
- **National Law Center on Homelessness and Poverty (NLCHP)**
- **U.N. Development Programme, Annual Millennium Development Goals Reports**
- **U.N. Habitat Programme, Land and Housing Publications**
- **Annual Reports of the United Nations Special Rapporteur on the Right to Adequate Housing to the Commission on Human Rights and to the Human Rights Council**
- **Centre on Housing Rights & Evictions (COHRE)**

5.3.3 RELEVANT HUMAN RIGHTS LAW: *HOUSING RIGHTS.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *HOUSING RIGHTS.*

Treaty or Declaration	*Article/Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 3 of CERD**: "State Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 3, 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.

[150] HUD (U.S. Department of Housing and Urban Development), The 2011 Point-in-Time Estimates of Homelessness: Supplement to the Annual Homelessness Assessment Report, http://www.hudhre.info/documents/PIT-HIC_SupplementalAHARReport.pdf.
[151] HUD (U.S. Department of Housing and Urban Development), Annual Homelessness Assessment Report to Congress (2010), http://www.hudhre.info/documents/2010HomelessAssessmentReport.pdf.
[152] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2010, http://www.census.gov/prod/2011pubs/p60-239.pdf.

Treaty or Declaration	*Article/Citation*
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notability in the enjoyment of the following rights: (...) (e) in particular (...) (iii) the right to housing." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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 [emphasis added].
International Covenant on Civil and Political Rights (ICCPR)	**Article 2 of the ICCPR**: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 2, 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.
	Article 3 of the ICCPR: "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." International Covenant on Civil and Political Rights, art. 3, 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.
	Article 6 of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, art. 6, 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.
	Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, art. 7, 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.
	Article 17 of the ICCPR: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and 2. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.

Treaty or Declaration	*Article/Citation*
International Convention Relating to Status of Refugees (ICRSR)	**Article 21 of ICRSR**: "As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances." International Convention Relating to the International Status of Refugees, art. 21, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954.
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 16 of CAT**: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence as a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, 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.
Charter of the Organization of American States (Charter of OAS)	**Article 34(k) of Charter of OAS**: "To accelerate their economic social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the Inter-American System, the Member States agree to dedicate every effort to achieve the following goals... (k) Adequate housing for all sectors of the population." Charter of the Organization of American States, art. 34(k), Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951 [emphasis added].
American Declaration on the Rights and Duties of Man (Declaration)	**Article 8 of Declaration:** "Every person has the right to fix his residence within the territory of the state of which he is a national, to move freely within such territory, and not to leave it except by his own will." American Declaration of the Rights and Duties of Man, art. 8, 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) [emphasis added].
	Article 11 of Declaration: "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care to the extent permitted by the public and community resources." American Declaration of the Rights and Duties of Man, art. 11, 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) [emphasis added].
	Article 23 of Declaration: "Every person has the right to own such property as meets the essential needs of decent living and helps maintain the dignity of the individual and of the home." American Declaration of the Rights and Duties of Man, art. 23, 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) [emphasis added].

OTHER HUMAN RIGHTS INSTRUMENTS*: *HOUSING RIGHTS*

Treaty or Declaration	*Article/Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 11(1) of the ICESCR**: "The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself (or herself) and for his (or her) family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." International Covenant on Economic, Social, and Cultural Rights, art. 11(1), 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 [emphasis added].
International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 14(2) of CEDAW:** "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right (...) (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." Convention on the Elimination of Discrimination Against Women, art. 14(2), 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 Rights of the Child (CRC)	**Article 27(1) of CRC:** "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. (...) 3. State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." Convention on the Rights of the Child, art. 27(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 9(1) of CRPD**: "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Mar. 30, 2007, art. 9(1), 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/Citation*
	Article 28(1) of CRPD: "To an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Mar. 30, 2007, art. 28(1), 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 [emphasis added].
	Article 28(2) of CRPD: "States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including …To ensure access by persons with disabilities to public housing programmes." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Mar. 30, 2007, art. 28(2), 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 [emphasis added].
The American Convention on Human Rights (ACHR)	Through the Convention, States parties agree to "undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." These rights include the right to life and the right to property, among others. 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.
Universal Declaration of Human Rights (UDHR)	**Article 25(1) of the UDHR**: "Everyone has the right to a standard of living adequate for the health and well-being of himself (or herself) and of his (or her) 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 (or her) control." Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *HOUSING RIGHTS.*

***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). 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."

American National Life Insurance Company v. Fair Employment and Housing Commission, 651 P.2d 1151, 1154 n.4 (Cal. 1982) (*citing* UDHR to construe the definition of "physical handicap" in an antidiscrimination statute); *see also Wong v. Tenneco*, 702 P.2d 570, 581 (Cal. 1985) (Mosk, J., dissenting) (*citing* UDHR); *Perez v. Sharp*, 198 P.2d 17, 29–30 (Cal. 1948) (Carter, J., concurring) (*citing* U.N. Charter).

Santa Barbara v. Adamson, 610 P.2d 436 (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.

CASES BEFORE INTERNATIONAL BODIES: *HOUSING RIGHTS*.

Hajrizi Dzemajl et al. v. Yugoslavia, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002). The U.N. Committee Against Torture found forced evictions of Roma families identified with cruel, inhuman and degrading treatment in cases of individual complaint examined by the CAT Committee. The government was found guilty of not having protected the attacked families.

The Mayagna (Sumo) Awas Tingni Community v. Nicaragua**,** Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). The Inter-American Court on Human Rights found in favor of the indigenous families, concluding that the Nicaraguan government had violated their right to property and to legal protection. It ruled that the ancestral lands should be clearly delimited and that the government should, in the future, protect the right to property and to housing against all violation.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES. *HOUSING RIGHTS.*

Victoria (City) v. Adams, BCSC 1363 (B.C. 2008). The Supreme Court of British Columbia held that the City of Victoria's prohibition on "taking a temporary abode" constituted an interference with the life, liberty and security of the person of homeless people, citing the IESCR and the UDHR.

European Roman Rights Centre v. Greece, Complaint No. 15/2003 (2004). The European Committee on Social Rights held that a significant number of Roma living in conditions that fail to meet minimum standards was a breach of the obligation to promote the right of families to adequate housing. The Committee further held that Greece violated the right to housing by not providing infrastructure at Roma camping sites.

Minister of Public Works & Ors. V. Kyalami Ridge Environmental Association & Ors, 1 LRC 139, 3 CHRLD 313 (S. Afr. 2002). The Constitutional Court of South Africa upheld the government's establishment of a transit camp for flood victims without consultation with the area's residents association. The government's constitutional obligations with respect to the right to housing includes "the need to facilitate access to temporary relief for people who [have] no access to land, no roof over their heads, for people living in intolerable conditions and for people who were in crisis because of natural disasters such as floods and fires, or because their home was under threat of demolition."

Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (S. Afr. 2001). The Constitutional Court of South Africa held that state housing policy failed to meet the reasonable provision of services standard under Chapter 2, Section 26 of the South African Constitution. S. AFR. CONST., ch. II, §26.

Shantistar Builders v. Narayan Khimalal Totame, Civil Appeal No. 2598/1989, 1 S.C.C. 520 (India 1990). The Supreme Court of India held that the right to life includes "the right to a decent environment and a reasonable accommodation to live in." Shelter has to be a suitable accommodation that allows a human being to grow and develop in physical and mental aspects.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *HOUSING RIGHTS*

U.N. Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, U.N. Doc. A/HRC/13/20/Add 4 (Feb. 12, 2010).

In 2010, the U.N. Special Rapporteur on Adequate Housing**,** after a mission in the U.S., made recommendations regarding housing law and policy in the U.S. The U.N. Special Rapporteur recommended that:

"86. Additional funding be provided to properly maintain and restore the remaining public housing, and legislation on health standards for subsidized buildings, including proper maintenance and pest control, should be strengthened.

87. The Special Rapporteur considers that, given the crisis in affordable housing, an immediate moratorium be declared on the demolition and disposition of public housing until one-for-one replacement housing is secured, and the right of return is guaranteed to all residents. Housing be made available for displaced residents prior to the demolition of any unit.

90. More resources be devoted to Section 8 vouchers and legislative action be taken to encourage extension of Section 8 contracts and affordable housing programs involving private landlords.

92. Tenant protection legislation should be further strengthened for renters of foreclosed properties. The Helping Families Save Their Home Act (P.L. 111-22): Protecting Tenants at Foreclosure Act (Title VII) should be extended beyond 2012 and become permanent protection.

95. The Interagency Council on Homelessness develop constructive alternatives to the criminalization of homelessness. Homeless persons should be permitted to shelter in public areas when there is no other shelter available.

96. The administration and Congress should encourage the expansion of the definition of homelessness to include those living with family or friends due to economic hardship. The Department of Housing and Urban Development (HUD) should ensure that households living with others due to economic hardship are eligible for rental and other assistance, including from the Emergency Shelter Grant programme.

103. A national prohibition be declared on housing discrimination based on source of income.

104. The Special Rapporteur recommends that the U.S. federally prohibit the use of criteria such as drug tests and criminal records, for gaining access to subsidized housing."

Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

In 2008 the U.N. Committee on the Elimination of Racial Discrimination expressed several concerns and made recommendations regarding U.S. compliance with the Convention on the Elimination of All Forms of Discrimination.

"9. The Committee also notes with satisfaction the *California Housing Element Law* of 1969, which requires each local jurisdiction to adopt a housing element in its general plan to meet the housing needs of all segments of the population, including low-income persons belonging to racial, ethnic and national minorities.

16. "The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterized by sub-standard housing conditions."

31. The Committee "remains concerned about the disparate impact that [Hurricane Katrina] continues to have on low income African American residents, many of whom continue to be displaced after more than two years after the hurricane.""

The Committee further recommended that the U.S.:

"16. Support the development of public housing complexes outside poor, racially segregated areas, eliminate obstacles that limit affordable housing choice and mobility for beneficiaries of the Section 8 Housing Choice Voucher Program, and ensure the effective implementation of legislation at the federal and state

levels to combat discrimination in housing including the phenomenon of "steering" and other discriminatory practices carried out by private actors.

22. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs – such as housing, health care, or child custody – are at stake.

26. The Committee recommends that the State party increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, *inter alia* by: (i) setting up and adequately funding prevention and early assistance centres, counseling services and temporary shelters;

31. Facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence."

Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant of the ICCPR, Concluding Observations, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006). In 2006, the UN Human Rights Committee expressed several concerns regarding U.S. compliance with the ICCPR and made several recommendations:

> 22. "That some 50% of homeless people are African American although they constitute only 12% of the U.S. population."
>
> 26. "That poor people and in particular African Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit the U.S. of America, and continue to be disadvantaged under the reconstruction plans."
>
> 26. The Committee recommended that the U.S. […] "Review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect…In the aftermath of Hurricane Katrina, it should increase its efforts to ensure that the rights of poor people and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing."

More Treaty Body and Special Procedures Commentary and Recommendations on Housing Rights are available on the National Law Center on Homelessness and Poverty's Website here.

5.3.4 SAMPLE ARGUMENTS: *HOUSING RIGHTS*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not to rely these arguments alone.

SAMPLE ARGUMENT 1 - RIGHT TO NON-DISCRIMINATION IN HOUSING

[STATUTE/REGULATION AT ISSUE] CONTRAVENES THE RIGHTS TO HOUSING AND TO NON-DISCRIMINATION IN HOUSING

International law recognizes that all persons have the right to adequate housing. *See, e.g.*, Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948) ("[e]veryone 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."); International Covenant on Economic, Social, and Cultural Rights, art. 11(1), 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 ("recogniz[ing] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing."). *See also* International Convention Relating to the International Status of Refugees, art. 21, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 ("Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... access to housing.").

Adequate housing is universally viewed as one of the most basic human needs. U.N. Office of the High Comm'r for Human Rights, Fact Sheet No. 21, The Human Right to Adequate Housing, http://www.ohchr.org/__Documents/Publications/FS21_rev_1_Housing_en.pdf. While some countries like South Africa have taken on domestic obligations to provide government-supported housing to all needy residents, international law currently sets a lower bar. *See* S. Afr. Const. 1996 §26(1)-(2). International law recognizes that, while governments are not generally obligated to provide housing, governments must protect, inter alia, equal access for all to adequate shelter.

Like all other basic human rights, the right to adequate housing applies to everyone and enjoyment of this right must not be subject to any form of discrimination. International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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.; International Covenant on Civil and Political Rights, art. 26, 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; Committee on Economic, Social, and Cultural Rights, General Comment 4 ¶ 6, U.N. Doc. E/1992/23 (1991), http://bit.ly/HZcv4z.

[Insert the important facts of this case] violates the Plaintiffs' fundamental human right to be free from discrimination in housing under international legal norms.

SAMPLE ARGUMENT 2 - RIGHT TO HOUSING, SANITATION, AND WATER

[STATUTE/REGULATION AT ISSUE] SHOULD BE CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW STANDARDS BY REFLECTING THE RIGHT TO ADEQUATE HOUSING, WATER, AND SANITATION

The right to adequate housing, as defined by international law, is comparable [or incompatible] with the [statute/regulation at issue] under domestic law. Under human rights law, the mere fact that the plaintiffs had a roof over their heads is not enough. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which has been signed by the U.S., guarantees everyone the right to "an adequate standard of living for himself and his family, including adequate food, clothing and housing..." art. 11(1), 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.

While specifying that the right to adequate housing does not merely mean "having a roof over one's head," the U.N. Committee in charge of monitoring and implementing the ICESCR, discussed various elements of the right to adequate shelter. Committee on Economic, Social, and Cultural Rights, General Comment 4 , U.N. Doc. E/1992/23 (1991), http://bit.ly/IPyRWr. These elements include the availability of services, materials, facilities, and infrastructure like safe drinking water, sanitation and washing facilities, the habitability of the shelter, and its cultural adequacy. *Id*. Therefore, the term 'adequate housing' has an expansive interpretation and "…should be seen as the right to live somewhere in security, peace and dignity." *Id*. These words starkly contrast with the Plaintiffs circumstances.

Moreover, in September 2010, the U.N. Human Rights Council, an inter-governmental body tasked with promoting and protecting human rights, affirmed "that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity." G.A Res. A/HRC/15/L.14, U.N. HRC, 15th Sess., (2010), http://bit.ly/JXhIt3.

[Insert the important facts of this case] violates the Plaintiffs' fundamental human rights under international legal norms.

SAMPLE ARGUMENT 3 - SELF-HELP EVICTION IS INCOMPATIBLE WITH INTERNATIONAL NORMS

Self-help eviction is incompatible with international human rights norms, which define the right to adequate housing to include "legal security of tenure", which means that a person's housing cannot be arbitrarily taken away from her. The Committee on Economic, Social, and Cultural Rights, the body that monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR), observed that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats." General Comment 4, U.N. Doc. E/1992/23 (1991), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a9378221c12563ed0053547e?Opendocument.

Moreover, self-help evictions fail to provide those legal protections and are fairly characterized as "forced evictions" under international law. Forced evictions are "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection." Committee on Economic, Social, and Cultural Rights, General Comment 7, U.N. Doc. E/1998/22 annex IV at 113 (1997), http://www.unhchr.ch/tbs/doc.nsf/0/959f71e476284596802564c3005d8d50?Opendocument.

The International Covenant on Civil and Political Rights, which was ratified by the U.S. on June 2, 1992, similarly affirms that "[n]o one shall be subjected to arbitrary or unlawful interference with his[/her]…home…Everyone has the right to the protection of the law against such interference or attacks." art. 17, 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. Self-help evictions do not provide such due process protections such as notices, services of process, hearings, affidavit requirements and rights to appeal.

The court should update state law to forbid self-help eviction, consistent with international human rights law norms.

5.3.5 TALKING POINTS FOR ORAL ARGUMENTS: *HOUSING RIGHTS*

TALKING POINTS #1- RIGHT TO NON-DISCRIMINATION IN HOUSING

- Housing discrimination is illegal, both under domestic law (Fair Housing Act) and human rights law (CERD, ICCPR)
- ICCPR art. 17: "No one" shall be subjected to arbitrary or unlawful interference with his[/her]…home.
- CERD and ICCPR, signed by the U.S. and ratified by the Senate, are the Supreme law of the Land
- Human rights law includes non-discrimination protection for the LGBT community and the elderly.

TALKING POINTS #2- RIGHT TO HOUSING, SANITATION AND WATER

- You can use human rights law to help interpret vague, ambiguous or state law.
- E.g. *Roper v. Simmons*: the U.S. Supreme Court looked to human rights law. Court discussed whether or not other countries apply the death penalty to juveniles. Human rights law helped the Court make its decision to put an end to sentencing juveniles with the death penalty.
- Human rights law provides that just having a roof over your head is not enough to satisfy the right to adequate housing.
- The right to adequate housing has various elements, including:
    - Available safe drinking water and sanitation facilities
    - Available washing facilities
    - Habitability of the shelter, including its cultural adequacy
- Human dignity requires housing to include running water and a bathroom that works.

TALKING POINTS #3- SELF-HELP EVICTION INCOMPATIBLE WITH HUMAN RIGHTS LAW

- First, make your due process arguments under U.S. Constitution, state constitution, state law.
- To follow, argue that few U.S. states allow self-help evictions.
- Then, add the human rights argument: self-help eviction is also contrary to human rights law; forced evictions are specifically prohibited under ICCPR.
- The U.S. signed the ICCPR and the Senate ratified the ICCPR in 1992. The U.S., therefore, is bound by its obligations under the ICCPR.

5.3.6 CASE STUDIES OF LEGAL AID ATTORNEYS. *HOUSING RIGHTS.*

PINE TREE LEGAL SERVICES' RIGHT TO HOUSING VICTORY IN DECEMBER 2011

The case, *Leo Belanger et al v. John Mulholland,* was brought by attorney Judy Plano of Pine Tree Legal Services on behalf of by tenants who lived in a trailer for several months without running water or a functioning toilet after the water pipes were damaged. When asked by the tenants to fix the water pipes, the landlord told the tenants that he had no obligation to make the repairs. As a result, the tenants were forced to buy bottled

water and haul out sewage for several months. On behalf of the tenants, Attorney Judy Plano brought an action against the landlord alleging breach of implied warranty of habitability, and she included human rights arguments encouraging the judge to interpret the Maine warranty of habitability statute through a human rights lens; that the right to housing includes availability of services and infrastructure. The National Law Center on Homelessness and Poverty assisted Judy Plano in drafting the human right to housing arguments. The Superior Court, Kennebec County, awarded tenants $2,500 in damages. Attorney Plano appealed on behalf of her tenant-clients to the Supreme Court of Maine. In its ruling in December 2011, the Supreme Court of Maine agreed that tenants have a right to water and sanitation, and that a dwelling without running water is unfit for human habitation. According to the court, any agreement for rental of a dwelling unit comes with a warranty that the dwelling is fit for human habitation. Therefore, any condition that threatens human health, such as lack of running water and a functioning toilet, constitutes a breach of this warranty. The Court did not specifically cite to human rights law in its decision; however, the human rights law arguments did not deter the judge from granting relief on behalf of the plaintiffs.

MARYLAND LEGAL AID USES RIGHT TO HOUSING ARGUMENTS IN A POST-FORECLOSURE SELF-HELP EVICTION CASE

In *Nickens v. Mount Vernon Realty Group, LLC*, the Maryland Legal Aid filed an amicus brief in support of a challenge to a post-foreclosure self-help eviction. The house that the tenant had been renting was foreclosed on, and he was negotiating a move-out date with the foreclosure purchaser when he returned home one day to find the foreclosure purchaser had locked him out of his home without notice, with all of his personal belongings still inside. The tenant, who was represented by private counsel, sued the purchaser in circuit court. The court held that the eviction was legal under Maryland's right to conduct a "peaceable self-help" eviction without the Sheriff. The tenant appealed to the Maryland Court of Special Appeals and the Public Justice Center joined the case as counsel for the tenant. Maryland Legal Aid filed an amicus brief which was joined by Civil Justice, Inc., St. Ambrose Housing Aid Center, and the National Law Center on Homelessness & Poverty. The amicus brief made three arguments for overturning the doctrine of self-eviction: 1) self-help eviction is incompatible with developments in international human rights law, which clearly forbids forced evictions without due process of law; 2) the economic and foreclosure crises exacerbated problems with self-help evictions, as more and more landlords and foreclosure purchasers are taking non-judicial shortcuts to oust residents while failing to inform them of their rights and 3) while the doctrine of self-help eviction may have had its place in 14th century England, where it began, in the subsequent centuries, conditions have changed, e.g. Maryland already prevents self-help eviction in the landlord-tenant context, and 23 states prevent it in all contexts. The Maryland Court of Special Appeals ruled against the tenant in early December 2011 in an unreported decision. As of March 2012, a Petition for Certiorari has been filed with Maryland's highest court.

LEGAL SERVICES OF NORTHERN CALIFORNIA USES RIGHT TO HOUSING ADVOCACY SUCCESSFULLY, ON BEHALF OF HOMELESS CAMPERS IN SACRAMENTO, CA

Legal Services of Northern California (LSNC) launched an advocacy campaign in 2008, which included litigation and municipal advocacy on behalf of people transitioning from homelessness, particularly focusing on tent cities in Sacramento, California, and working with a community group called SafeGround. The National Law Center on Homelessness and Poverty introduced LSNC to the idea of using a human rights approach to homelessness advocacy. In February 2011, LSNC and their clients, met with Catarina de Albuquerque, the U.N. Special Rapporteur on Access to Water and Sanitation. de Albuquerque spent part of her 2011 U.S. fact-finding mission in Northern California and took testimony at the California state capitol from groups who lacked adequate access to water and sanitation. LSNC then submitted a formal complaint on behalf of SafeGround to the U.N. Special Rapporteur on Extreme Poverty against the City of Sacramento, California, alleging human rights abuses on behalf of homeless clients whose access to clean water and sanitation was blocked by both government action and inaction. In January 2012, the Rapporteur sent a letter to Sacramento Mayor Kevin Johnson stating that the city's systematic elimination of bathrooms and clean water sources near homeless

encampments may constitute "cruel, inhumane, and degrading treatment" under international law. For media coverage of the Rapporteur's letter, please visit **here**.

Though there is much work left to be done, LSNC says they have already seen the benefits of using a human rights framework in homeless advocacy, especially with respect to the empowering and validating nature of such a framework for their homeless clients and raising attention to the issue with City officials and other public officials who dislike the idea of their actions and inactions being brought to light before entire world. For more on LSNC's work, *see* Clearinghouse Review, *Toward a Human Rights Framework in Homelessness Advocacy: Bringing Clients Face-to-Face with the United Nations* (Sept. 2011).

LEGAL AID SOCIETY OF CLEVELAND REFERENCES HUMAN RIGHTS LAW IN FORECLOSURE CASE

Phil Althouse, an attorney in the Consumer Unit at the Legal Aid Society of Cleveland referenced human rights law and land tenure security in a foreclosure case before a local magistrate. In that case, a spouse had recently passed away, the surviving spouse fell behind on the mortgage payments, and a foreclosure action had been initiated. The surviving spouse was able to negotiate an assumption agreement with the mortgage company, but the signature of the deceased spouse was required on the assumption agreement. Attorney Althouse argued before the court that the foreclosure action should be dismissed and leaned heavily on the equity power of the court. He also argued that both state and federal public policy, as well as human rights law, emphasize the importance of land tenure security and continuing interest in real property. Attorney Althouse's argument was successful and he submitted this **order** to the magistrate.

5.3.7 SAMPLE BRIEFS & PETITIONS: *HOUSING RIGHTS*

Nickens v. Mount Vernon Realty Group, LLC – Amicus Brief in Support of Appellants

Curtis v. U.S. Bank National Association – Amicus Brief in Support of Appellants

Leo Belanger et al v. John Mulholland – Brief for Appellants

5.3.8 OTHER RESOURCES: *HOUSING RIGHTS*

Housing Rights for All: Promoting and Defending Housing Rights in the United States, Fifth Edition, National Law Center on Homelessness and Poverty (2011).

Treaty Body and Special Procedures Commentary and Recommendations on Housing Rights, National Law Center on Homelessness and Poverty (2011).

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.4 CONSUMER RIGHTS

The Consumer Rights section of the Handbook was written by Lauren E. Bartlett.[^]

5.4.1 INTRODUCTION: *CONSUMER RIGHTS*

The U.N. has recognized that consumers often face imbalances in economic terms, education levels, and bargaining power, as well as the need for governments to ensure consumer protection at a national level.[153] Moreover, the constitutions of at least 54 countries, on all continents except Antarctica, guarantee economic or financial rights.[154] U.S. consumer protection laws fails to protect from hazards such as fraud, predatory lending, deceptive acts and practices. Evidence of this would include the recent foreclosure crisis, malfeasance on Wall Street and the over 1.8 million identity theft complaints that the U.S. Federal Trade Commission received in 2009-11.[155] This is also seen in more than one-third of states in the U.S. where debtors' prison is still legal.[156]

Consumer rights include but are not limited to: 1) freedom to contract; 2) rights to be free from deceptive acts and practices in sales and contracting; 3) freedom from unfair, predatory and fraudulent banking practices; 4) freedom from unfair debt collection practices; 5) rights to access to credit; 6) bankruptcy rights; 7) rights to privacy; and 8) freedom from debtors' prison. More controversial consumer rights include the freedom to consume and the duty of corporate social responsibility.

Human rights law can be invaluable to advocates who wish to push the envelope to protect and venerate the rights of consumers in U.S. courts.

5.4.2 QUICK STATISTICS & RESOURCES FOR DATA: *CONSUMER RIGHTS*

Quick statistics regarding consumer issues in the U.S. and worldwide:

- Among homeowners who received home loans between 2004 and 2008, 2.7 million households, or 6.4 percent, had already lost their homes to foreclosure as of February 2011.[157]
    - Borrowers of color are more than twice as likely to lose their home to foreclosure as white households. These higher foreclosure rates reflect the fact that African Americans and Latinos were consistently more likely to receive high-risk loan products, even after accounting for income and credit status. Approximately one quarter of all Latino and African-American

[^] Lauren E. Bartlett is director of the Center's Local Human Rights Lawyering Project. From 2008-2011, Ms. Bartlett worked as a legal services attorney at Southeast Louisiana Legal Services in the foreclosure prevention unit. She taught a housing law and policy course at Loyola University New Orleans College of Law and served on the board of the ACLU of Louisiana. In 2007, she co-founded the Louisiana Justice Institute, a nonprofit civil rights legal advocacy organization. During law school, Lauren focused on gaining a strong background in international law and human rights. She was an articles editor for the Human Rights Brief, participated in a research program in Geneva, Switzerland for the U.N. Committee Against Torture, and was an Executive Board Member of the student group Action for Human Rights. She also served as a summer associate with the group Advocates for Environmental Human Rights, based in New Orleans, Louisiana. Before law school, Ms. Bartlett worked with non-profit organizations in California, Nepal, Ghana, Bangladesh and India, alongside advocates fighting for social and environmental justice.

[153] United Nations Guidelines for Consumer Protection, Apr. 16, 1985, GA Res. 39/248, 39th Sess., Agenda Item 12, U.N. Doc. A/RES/39/248, http://www.unctad.org/en/docs/poditcclpm21.en.pdf.

[154] Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079 (2010).

[155] Federal Trade Commission, Consumer Sentinel Network Data Book for January-December 2011, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2011.pdf.

[156] Jillian Berman, *Debtors' Prison Legal in More Than One-Third of U.S. States*, HUFFINGTON POST, November 11, 2011, http://www.huffingtonpost.com/2011/11/22/debtors-prison-legal-in-more-than-one-third-of-us-states_n_1107524.html.

[157] Center for Responsible Lending, Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures, Center for Responsible Lending, http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-exec-summary.pdf.

borrowers have lost their home to foreclosure or are seriously delinquent, compared to just under 12 percent for white borrowers.[158]

- In 2010, more than 1.5 million bankruptcy petitions were filed by individuals with predominantly nonbusiness debt, an increase of 9 percent over the number of filings in calendar year 2009.[159]
- Consumers reported fraud losses of over $1.1 billion to the Consumer Financial Protection Bureau between July 21 and December 31, 2011.[160]
- Europe has seen an increase in bankruptcies each year since 2008, with more than a 25% increase each year, in some countries such as France.[161]

Here are some resources for data related to consumer rights in the U.S. and worldwide:

- **Consumer Financial Protection Bureau**
- **Federal Trade Commission**
- **Center for Responsible Lending**
- **National Consumer Law Center**
- **Public Citizen**
- **U.S. Courts Statistics Division**
- **Harvard's Corporate Social Responsibility Initiative**
- **U.S. Public Interest Research Group**
- **Consumers Union**
- **Consumers International**

[158] *Id.*
[159] Office of Judges Programs, Statistics Division, Administrative Office of the United States Courts, 2010 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2010/2010BAPCPA.pdf.
[160] PoliSource, Consumer Protection, http://www.polisource.com/consumer-protection.shtml.
[161] Credit Reform, Insolvencies in Europe 2009/10, http://www.creditreform.de/English/Creditreform/index.jsp.

5.4.3 RELEVANT HUMAN RIGHTS LAW: *CONSUMER RIGHTS*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *CONSUMER RIGHTS*

Treaty or Declaration	*Article/ Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 3 of CERD**: "State Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 3, 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.
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notability in the enjoyment of the following rights: (...) (e) Economic, social and cultural rights, in particular…" International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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.
International Convention on Civil and Political Rights (ICCPR)	**Article 17 of the ICCPR:** "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.
International Convention Relating to Status of Refugees (ICRSR)	**Article 13 of ICRSR:** "The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property." International Convention Relating to the International Status of Refugees, art. 13, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].

Treaty or Declaration	*Article/ Citation*
Charter of the Organization of American States (Charter of OAS)	**Article 34 of Charter of OAS:** "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: b) Equitable distribution of national income; f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice; m) Promotion of private initiative and investment in harmony with action in the public sector." Charter of the Organization of American States, art. 34, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.
	Article 45 of Charter of OAS: "The Member States…agree to dedicate every effort to the application of the following principles and mechanisms: a) human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security… e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community…" Charter of the Organization of American States, art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951 [emphasis added]

OTHER HUMAN RIGHTS INSTRUMENTS*: *CONSUMER RIGHTS*

Treaty or Declaration	*Article/ Citation*
International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 13 of CEDAW:** "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: …(b) The right to bank loans, mortgages and other forms of financial credit." Convention on the Elimination of Discrimination Against Women, art. 13, 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 [emphasis added].
	Article 14(2) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:…(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes." Convention on the Elimination of Discrimination Against Women, art. 14(2), 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 12(5) of CRPD:** "Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 12(5), 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.
Universal Declaration of Human Rights (UDHR)	**Article 22 of the UDHR:** "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Universal Declaration of Human Rights, art. 22, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
United Nations Guidelines for Consumer Protection (GCP)	**Objectives (1) of the GCP**: "Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection, these guidelines for consumer protection have the following objectives: (a) To assist countries in achieving or maintaining adequate protection for their population as consumers." United Nations Guidelines for Consumer Protection, Objectives (1), Apr. 16, 1985, GA Res. 39/248, 39th Sess., Agenda Item 12, U.N. Doc. A/RES/39/248.
	General principles (2) of the GCP: "Governments should develop or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Government should set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures." United Nations Guidelines for Consumer Protection, General principles (2), Apr. 16, 1985, GA Res. 39/248, 39th Sess., Agenda Item 12, U.N. Doc. A/RES/39/248.
	Guidelines (15) of the GCP: "Government policies should seek to enable consumers to obtain optimum benefit from their economic resources. They should also seek to achieve the goals of satisfactory production and performance standards, adequate distribution methods, fair business practices, informative marketing and effective protection against practices which could adversely affect the economic interests of consumers and the exercise of choice in the market place." United Nations Guidelines for Consumer Protection, Guidelines (15), Apr. 16, 1985, GA Res. 39/248, 39th Sess., Agenda Item 12, U.N. Doc. A/RES/39/248.

Treaty or Declaration	*Article/ Citation*
U.N. Draft International Code of Conduct on Transnational Corporations (ICCTC)	**Article 13 of the ICCTC: "**In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment." United Nations Draft International Code of Conduct on Transnational Corporations, art. 13, 1983, U.N. Doc. E/C.10/1984/S/5 , 23 I.L.M. 626 (1984).
	Article 37 of the ICCTC: "Transnational corporations shall/should also perform their activities with due regard to relevant international standards, so that they do not cause injury to the health or endanger the safety of consumers or bring about variations in the quality of products in each market which would have detrimental effects on consumers." United Nations Draft International Code of Conduct on Transnational Corporations, art. 37, 1983, U.N. Doc. E/C.10/1984/S/5, 23 I.L.M. 626 (1984).
	Article 38 of the ICCTC: "Transnational corporations shall/should, in respect of the products and services which they produce or market or propose to produce or market in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by these authorities, all relevant information concerning: Characteristics of these products or services which may be injurious to the health and safety of consumers including experimental uses and related aspects; Prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on grounds of health and safety protection on these products or services." United Nations Draft International Code of Conduct on Transnational Corporations, art. 38, 1983, U.N. Doc. E/C.10/1984/S/5, 23 I.L.M. 626 (1984).
	Article 39 of the ICCTC: "Transnational corporations shall/should disclose to the public in the countries in which they operate all appropriate information on the contents and, to the extent known, on possible hazardous effects of the products they produce or market in the countries concerned by means of proper labeling, informative and accurate advertising or other appropriate methods. Packaging of their products should be safe and the contents of the product should not be misrepresented." United Nations Draft International Code of Conduct on Transnational Corporations, art. 39, 1983, U.N. Doc. E/C.10/1984/S/5, 23 I.L.M. 626 (1984).

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW. *CONSUMER RIGHTS.*

- None available yet -

CASES BEFORE INTERNATIONAL BODIES: *CONSUMER RIGHTS*

- None available yet -

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *CONSUMER RIGHTS*

- None available yet -

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *CONSUMER RIGHTS*

- None available yet -

5.4.4 SAMPLE ARGUMENTS: *CONSUMER RIGHTS*

- Not yet completed-

5.4.5 TALKING POINTS: *CONSUMER RIGHTS*

- Not yet completed-

5.4.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *CONSUMER RIGHTS*

- None available yet -

5.4.7 SAMPLE BRIEFS & PETITIONS: *CONSUMER RIGHTS*

- None available yet -

5.4.8 OTHER RESOURCES: *CONSUMER RIGHTS*

European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [Official Journal L 281 of 23.11.1995], provides privacy protection for consumers above and beyond what U.S. laws and regulations provide. Legal aid attorneys in the U.S. could look to this directive for ideas on how to expand U.S. consumer protection laws around privacy.

U.S. – E.U. Safe Harbor Framework, U.S. Department of Commerce in consultation with the European Commission developed a "Safe Harbor" framework so that U.S. organizations trading with Europe can comply with EU Directive 95/36/EC.

5.5 RIGHTS TO PUBLIC ASSISTANCE

The Rights to Public Assistance section of the Handbook was written by Lauren E. Bartlett.[^]

5.5.1 INTRODUCTION: *RIGHTS TO PUBLIC ASSISTANCE*

The rights to public or social assistance, including cash, food, and medical assistance, are universal rights, recognized at the international level.[162]

The right to public assistance in the U.S. includes access to public benefits such as SNAP (Food Stamps), TANF, Medicare, Medicaid, State Medical Programs, Emergency Medical Assistance, WIC, LIHEAP, Unemployment, Veteran's benefits and Social Security. Access to such public assistance, can make the difference between health and hunger, housing and homelessness, and heat or freezing temperatures, for many people across the U.S., and especially for children.[163]

Almost all people agree that food and medical assistance should be provided to the most needy. It is hard to argue that a child deserves to go hungry or that a pregnant mother should be denied prenatal care. The disagreement comes when other factors are thrown in, such as the child is an illegal immigrant or the pregnant mother is a drug addict. U.S. law is inadequate to protect the rights of even the most needy from hunger or disease. Advocates for public assistance can use human rights law to supply judges and policymakers with guidance especially in the case of public assistance.

Please note that public housing assistance is covered in the Housing Rights section and unemployment is covered in the Labor and Employment Rights section of this Handbook.

5.5.2 QUICK STATISTICS & RESOURCES FOR DATA: *RIGHTS TO PUBLIC ASSISTANCE*

Here are some quick statistics:

- Hunger in America exists for nearly 49 million people in the U.S. – including more than 1 in 5 children.[164]
- In 2010, more than 17 million households in the U.S. faced food insecurity.[165]
- Over 15% of people in the U.S. live below the official poverty line.[166]

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[162] UDHR, art. 22; Office of the High Commissioner for Human Rights, Human Rights of Older Persons: International human rights principles and standards, Background Paper (2011), http://www.ohchr.org/Documents/Issues/OlderPersons/OHCHRBackgroudpaper2011.pdf.

[163] Social Security Administration, Benefits Paid by Type of Beneficiary December 2011, http://www.ssa.gov/OACT/ProgData/icp.html; U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2010, 14 (2011), *at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

[164] Feedingamerica.org website, http://feedingamerica.org/hunger-in-america.aspx.

[165] U.S. Department of Agriculture, Household Food Security in the U.S. in 2010, http://www.ers.usda.gov/Publications/ERR125/ERR125.pdf.

[166] U.S. Census Bureau, *supra* note 163 at 14. *See also* Rourke L. O'Brien & David S. Pedulla, Beyond the Poverty Line, Stanford Social Innovation Review (Fall 2010), http://www.ssireview.org/articles/__entry/beyond_the_poverty_line/; Howard Glennerster, US Poverty Studies and Poverty Measurement: The past 25 years, LSE STICERD Research Paper No. CASE 042 (2000), http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper42.pdf (critiquing the U.S. poverty guidelines).

- 22% of children in the U.S. live below the official poverty line.[167]
- Over 18% of people in the U.S. do not have health insurance.[168]
- Over 60 million people in the U.S. received social security or supplementary security income in December 2011.[169]
- 15% of people in the U.S. who receive social security benefits are disabled workers, and 64% are retired workers.[170]
- The number of retired workers receiving social security benefits has nearly doubled since 1970.[171]

Here are some resources for data related to public assistance in the U.S. and worldwide:

- **Department of Health and Human Services (TANF, SCHIP)**
- **Food and Nutrition Service, U.S. Department of Agriculture (SNAP, WIC)**
- **U.S. Social Security Administration**
- **Directory of Public Benefit Providers by State**
- **National Center for Health Statistics, Centers for Disease Control and Prevention**
- **Income and Benefits Policy Center, The Urban Institute**
- **U.N. Office of the High Commissioner for Human Rights**
- **Center for Economic and Social Rights**
- **U.S. Census Bureau, Poverty Data**
- **Kaiser Family Foundation** (studies, statistics, and other information related to health care access)
- **State Health Facts** (maintained by the Kaiser Foundation)

5.5.3 RELEVANT HUMAN RIGHTS LAW: *RIGHTS TO PUBLIC ASSISTANCE.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

[167] *Id.* at 15.
[168] Centers for Disease Control and Prevention, Early Release of Selected Estimates Based on Data From the 2010 National Health Interview Survey, http://www.cdc.gov/nchs/fastats/hinsure.htm.
[169] Social Security Administration, Monthly Statistical Snapshot December 2011, http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/.
[170] Social Security Administration, *supra* note 169.
[171] Social Security Administration, Social Security Beneficiary Statistics, http://www.ssa.gov/OACT/STATS/OASDIbenies.html

RATIFIED HUMAN RIGHTS INSTRUMENTS: *RIGHTS TO PUBLIC ASSISTANCE*

Treaty or Declaration	*Article/ Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 5 of CERD**: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (e) Economic, social and cultural rights, in particular: . . . (iv) The right to public health, medical care, social security, and social services[.] "International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 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.
International Covenant on Civil and Political Rights (ICCPR)	**Article 26 of ICCPR**: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.
International Convention Relating to Status of Refugees (ICRSR)	**Article 23 of ICRSR**: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals." International Convention Relating to the International Status of Refugees, art. 23, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].
	Article 24(1) of ICRSR: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters; . . . (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme)[.]" International Convention Relating to the International Status of Refugees, art. 24(1), 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954 [emphasis added].
	Article 24(2) of ICRSR: "The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State." International Convention Relating to the International Status of Refugees, art. 24(2), 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954.
	Article 24(3) of ICRSR: "The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question." International Convention Relating to the International Status of Refugees, art. 24(3), 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954.

Treaty or Declaration	*Article/ Citation*
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 16 of CAT**: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence as a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, 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.
Charter of the Organization of American States (Charter of OAS)	**Article 34 of Charter**: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: . . . (i) Protection of man's potential through the extension and application of modern medical science; (j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food; . . . (l) Urban conditions that offer the opportunity for a healthful, productive, and full life[.]" Charter of the Organization of American States, art. 34, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.
	Article 45 of Charter: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: . . . (h) Development of an efficient social security policy[.]" Charter of the Organization of American States, art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.
American Declaration on the Rights and Duties of Man (Declaration)	**Article 1 of Declaration**: "Every Human being has the right to life, liberty and the security of his person." American Declaration of the Rights and Duties of Man, art. 1, 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).
	Article 7 of Declaration: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." American Declaration of the Rights and Duties of Man, art. 7, 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).
	Article 11 of Declaration: "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." American Declaration of the Rights and Duties of Man, art. 11, 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).
	Article 16 of Declaration: "Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living." American Declaration of the Rights and Duties of Man, art. 16, 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).

Treaty or Declaration	*Article/ Citation*
	Article 23 of Declaration: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." American Declaration of the Rights and Duties of Man, art. 23, 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).

OTHER HUMAN RIGHTS INSTRUMENTS*: *RIGHTS TO PUBLIC ASSISTANCE*

Treaty or Declaration	*Article/ Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 9 of the ICESCR**: "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." International Covenant on Economic, Social, and Cultural Rights, art. 9, 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.
	Article 10(2) of the ICESR: "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits." International Covenant on Economic, Social, and Cultural Rights, art. 10(2), 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.
	Article 11(1) of the ICESCR: "The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself (or herself) and for his (or her) family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." International Covenant on Economic, Social, and Cultural Rights, art. 11(1), 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.
	Article 12 of the ICESCR: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." International Covenant on Economic, Social, and Cultural Rights, art. 12, 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 11(1) of CEDAW: "**States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:[…](e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave[.]" Convention on the Elimination of Discrimination Against Women, art. 11(1), 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
	Article 11(2) of CEDAW: **"**In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: . . . (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances[.]" Convention on the Elimination of Discrimination Against Women, art. 11(2), 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.
	Article 12 of CEDAW: "(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation." Convention on the Elimination of Discrimination Against Women, art. 12, 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.
	Article 13 of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (a) The right to family benefits[.]" Convention on the Elimination of Discrimination Against Women, art. 13, 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.
	Article 14 of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . . (c) To benefit directly from social security programme[.]" Convention on the Elimination of Discrimination Against Women, art. 14, 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 Rights of the Child (CRC)	**Article 6 of CRC**: "(1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child." Convention on the Rights of the Child, art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 18(2) of CRC: "For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children." Convention on the Rights of the Child, art. 18(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 23 of CRC: "(2) States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. (3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development." Convention on the Rights of the Child, art. 23, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 24(1) of CRC: "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." Convention on the Rights of the Child, art. 24(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 26(1) of CRC: "States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law." Convention on the Rights of the Child, art. 26(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 25 of CRPD**: "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes; (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons[.]" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 25, 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.

Treaty or Declaration	*Article/ Citation*
	Article 28(1) of CRPD: "To an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 28(1), 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.
	Article 28(2) of CRPD: "States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: . . . (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes; (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counseling, financial assistance and respite care; . . . (e) To ensure equal access by persons with disabilities to retirement benefits and programmes." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 28(2), 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.
Universal Declaration of Human Rights (UDHR)	**Article 22 of UDHR**: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Universal Declaration of Human Rights, art. 22, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 23(3) of UDHR: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Universal Declaration of Human Rights, art. 23(3), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 25(1) of UDHR: "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." Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 25(2) of UDHR: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Universal Declaration of Human Rights, art. 25(2), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Treaty or Declaration	*Article/ Citation*
The American Convention on Human Rights (ACHR)	**Article 26 of ACHR**: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." American Convention on Human Rights, art. 26, 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.
The European Social Charter (Social Charter)	**Article 12 of Social Charter**: "With a view to ensuring the effective exercise of the right to social security, the Parties undertake: to establish or maintain a system of social security; to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; to endeavour to raise progressively the system of social security to a higher level; to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties." European Social Charter, art. 12, 529 U.N.T.S. 89, *entered into force* Feb. 26, 1965.
	Article 13 of Social Charter: "With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;(2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want ". European Social Charter, art. 13, 529 U.N.T.S. 89, *entered into force* Feb. 26, 1965.
	Article 14 of Social Charter: "With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake: (1) to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; (2) to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services." European Social Charter, art. 14, 529 U.N.T.S. 89, *entered into force* Feb. 26, 1965.

Treaty or Declaration	*Article/ Citation*
	Article 17 of Social Charter: "[T]he Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (1) (a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; (b) to protect children and young persons against negligence, violence or exploitation; (c)to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support[.]" European Social Charter, art. 17, 529 U.N.T.S. 89, *entered into force* Feb. 26, 1965.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *RIGHTS TO PUBLIC ASSISTANCE*

Moore v. Ganim, 233 Conn. 557, 637 (Conn. 1995), finding minimal state obligation to provide basic assistance, but denying motion to enjoin state from imposing nine month limit on receipt of general assistance benefits. Peters, C.J. (concurring): "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.'"

CASES BEFORE INTERNATIONAL BODIES: *RIGHTS TO PUBLIC ASSISTANCE*

Alyne da Silva Pimentel v. Brazil, Communication No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011). A health center in Brazil failed to give timely access to emergency obstetric care, resulting in the death of a pregnant woman. This was part of a broader health-care access problem, and the U.N. Committee on the Elimination of Discrimination against Women found Brazil to be in violation of Article 12 of CEDAW. Brazil was found directly responsible for health-care institutions regardless of its decision to outsource to private institutions.

International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 13/2003, Eur. Comm. S.R. Dec. (2004). Challenges were made based on the European Social Charter to France's policy of not exempting low income illegal immigrants from medical treatment charges. The European Committee on Social Rights found that foreign nationals, even if in a state illegally, were entitled to medical assistance under Article 17 of the Charter. According to the Committee, France did not violate this because after three months it did provide medical assistance to illegal immigrants. However, France did violate the rights of children to protection under Article 17 because children's rights are more expansive.

Case of the "Five Pensioners" v. Perú, Case 12/034, Inter-Am. Ct. H.R. (2003). The Inter American Commission on Human Rights dealt with a group of retired citizens who worked for a state agency in Peru had their pensions reduced to one fifth or one sixth of their value. The citizens alleged violations of the rights to private property and judicial protection under the American Convention on Human Rights. The Court found that arbitrarily reducing the pensions violated these rights.

F. H. Zwaan-de Vries v. the Netherlands, Communication No. 182/1984, U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987). United Nations Human Rights Committee dealt with legislation in the Netherlands giving unemployment benefits to married men but not married women was challenged as prohibited discrimination. The Committee found that this legislation violated rights of equality under Article 26 of the International Covenant on Civil and Political Rights.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *RIGHTS TO PUBLIC ASSISTANCE*

Case No. 2009-43-01 On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009 – 2012 (Lat. 2009). Pensioners made a constitutional challenge to a law decreasing pensions in a time of economic decline. The Constitutional Court of the Republic of Latvia found the law was an unconstitutional denial of the right to a pension because less restrictive alternatives were not considered, there was no transition period, and there was no plan for future compensation for the reductions. The Court found a right to a pension was a part of the fundamental right to social security based on the Latvian Constitution as well as Article 9 of the International Covenant on Economic, Social, and Cultural Rights.

Reyes Aguilera, Daniela v. Argentina, R. 350. XLI. (Arg. 2007). The Supreme Court of Argentina held that a requirement to prove 20 years of residence in Argentina to qualify for a disability pension was unconstitutional. The judges' reasoning was split—some referenced the right to social security and others the right to equality before the law and non-discrimination.

People's Union for Civil Liberties v. Union of India & Ors, Writ Petition (Civil) No.196 of (India 2001). Deaths from starvation were occurring, but excess grain was being held and food distribution schemes were failing. The People's Union for Civil Liberties sought to have grain released and other relief to address the starvation crisis. The Supreme Court of India found a right to food derived from the right to life, and ordered numerous forms of relief including implementation of India's Famine Code and increased financial support for food distribution.

V. v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern, BGE/ATF 121 I 367 (Switz. 1995). Three brothers lived illegally in Switzerland, but could not be expelled because their citizenship in the Czech Republic had been rescinded. The brothers were denied social support and welfare because of their illegal status, and they challenged this as an unconstitutional denial of their rights. The Highest Court in Switzerland found that this violated an implied constitutional right to a basic minimum level of subsistence which was derived from rights to life, dignity, and equality.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS. *RIGHTS TO PUBLIC ASSISTANCE.*

- None available yet -

5.5.4 MODEL ARGUMENTS: *RIGHTS TO PUBLIC ASSISTANCE*

- Not yet completed-

5.5.5 TALKING POINTS: *RIGHTS TO PUBLIC ASSISTANCE*

- Not yet completed-

5.5.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *RIGHTS TO PUBLIC ASSISTANCE*

MARYLAND LEGAL AID USES DISABILITY RIGHTS ARGUMENT IN A MEDICAID TERMINATION CASE

Here

5.5.7 SAMPLE BRIEFS & PETITIONS: *RIGHTS TO PUBLIC ASSISTANCE*

Cronhardt v. Dept. of Health Services et al. – Memorandum of Law

5.5.8 OTHER RESOURCES: *RIGHTS TO PUBLIC ASSISTANCE*

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.6 CHILDREN'S RIGHTS

The Children's Rights section of the Handbook was written by Lauren E. Bartlett and Erik Pitchal.[^]

5.6.1 INTRODUCTION: *CHILDREN'S RIGHTS*

Children's rights have been recognized in the U.S. since colonial times and are now recognized by over 190 countries internationally.[172]

Children's rights are limited by the definition of a child–every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.[173] However, beyond that limitation, children's rights are broad and include all human rights. Moreover, because children are particularly vulnerable and have special needs, priority and special rights are given to children. Children are to be viewed as individuals, not property of their parents but as equal members of the family, with responsibilities appropriate to his or her age and stage of development. Children's rights include the emphasis on the parents and the family, who bear the primary responsibility for providing care and guidance for their children. States are obliged to prevent children from being separated from their families unless the separation is necessary for the child's best interests. Children must be provided for and when primary caregivers cannot meet children's needs, it is up to society to fill the gap.[174]

Children's advocates in the U.S. have begun calling for the broad recognition of children's rights to encompass all aspects of a child's life and the child's relationship to others. Specifically, children's rights should cover: 1) protection from abuse and exploitation; 2) access to justice; 3) access to provision of services (including education, health care, nutrition, housing and economic support); 4) right to remain with the family unit and an emphasis on parental responsibilities, unless the separation is necessary for the child's best interests; and 4) freedom for children to participate in national life.

This section of the Local Lawyering Human Rights Project Handbook will provide legal aid attorneys with model written and oral arguments with statistics and resources for relevant data, arguments to use in litigation, a list of relevant international and U.S. law, and case studies.

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When this section was written, Erik Pitchal was currently working as an independent consultant to child-serving non-profit organizations, offering strategic advice, professional training, and program evaluation

[172] Stacy I. Strong, *Children's Rights in Intercountry Adoption*, 13 B.U. INT'L L.J. 163 (1995); JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION (1991); Convention on the Rights of the Child (CRC), art. 24(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

[173] CRC, art. 1.

[174] UNICEF, Convention on the Rights of the Child web page, http://www.unicef.org/crc.

5.6.2 QUICK STATISTICS & RESOURCES FOR DATA: *CHILDREN'S RIGHTS*

Here are some quick statistics related to children's issues:

- Children in the U.S., but also all over the world, suffer from poverty, homelessness, abuse, neglect, preventable diseases, unequal access to education, and justice systems that do not recognize their special needs.[175]

- Violence against children exists in every country of the world, cutting across culture, class, education, income and ethnic origin.[176]

- Children are particularly vulnerable to and often more affected by stress than adults in similar situations. For example, children represent a disproportionate share of the poor in the U.S.; they are 24 percent of the total population, but 36 percent of the poor population.[177]

- Severe childhood stress causes long term effects which last through adulthood, including increased risk of depression, drug and alcohol abuse, and even heart disease.[178]

- 408,425 children were in foster care in the U.S. in September 2010.[179]
- While most children in foster care live in family settings, a substantial minority — 16 percent— live in institutions and group homes.[180]

- Nearly half of all children in foster care have chronic medical problems and up to 80 percent of all children in foster care have severe emotional problems.[181]

- As of January 26, 2012, 677,221 children in the U.S. are victims of abuse and neglect.[182]

- African-American children are twice as likely to enter foster care then White children, despite equal rates of abuse and neglect for children of all races.[183]

- More than 35 states in the U.S. do not require that a child have an attorney present at child protective proceedings. Yet, more than 30 countries around the world have no child protective proceedings provided for by law.[184]

Here are some resources for data related to children's rights issues in the U.S. and worldwide:

- **U.S. Census Bureau, Reports and Publications**

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[175] UNICEF, Publications and Reports, http://www.unicef.org.
[176] Report of the independent expert for the United Nations study on violence against children (2007), http://www2.ohchr.org/english/bodies/crc/study.htm.
[177] University of Michigan, National Poverty Center, Poverty in the United States, http://www.npc.umich.edu/poverty/.
[178] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, The Effects of Childhood Stress on Health Throughout the Lifespan (2009), http://www.cdc.gov/ncipc/pub-res/pdf/childhood_stress.pdf.
[179] U.S. Department of Health and Human Services, Administration for Children and Families, Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2010 data (October 1, 2009 through September 30, 2010), http://www.acf.hhs.gov/programs/cb/resource/afcars-report-18.
[180] *Id.*
[181] American Academy of Pediatrics, Testimony of Laurel K. Leslie, MD MPH FAAP on behalf of the American Academy of Pediatrics before the House Ways and Means Subcommittee on Income Security and Family Support (May 2008), http://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/HearingontheUtilizationofPsychotropicMedicationforChildreninFosterCare.pdf.
[182] Children's Defense Fund, 2012 Children in the United States, http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/children-in-the-states.html.
[183] U.S. Government Accountability Office, African American Children in Foster Care, Additional HHS Assistance Needed to Help States Reduce the Proportion in Care, GAO-07-816 (Jul. 11, 2007), http://www.gao.gov/products/GAO-07-816.
[184] Yale Law School, Representing Children Worldwide, a survey (2005), http://www.law.yale.edu/rcw/index.htm.

- **U.S. Department of Health and Human Services, Administration for Children and Families, Child Welfare Information Gateway**
- **UNICEF, Statistics and Monitoring**
- **Committee on the Convention on the Rights of the Child**
- **Children's Rights, Issues and Resources, Reports and Fact Sheets**
- **Children's Defense Fund, Research Library**

5.6.3 RELEVANT HUMAN RIGHTS LAW. *CHILDREN'S RIGHTS.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *CHILDREN'S RIGHTS.*

Treaty or Declaration	*Article/Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 14(1) of the ICCPR**: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." International Covenant on Civil and Political Rights, art. 14(1), 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 [emphasis added].
	Article 18(4) of the ICCPR: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." International Covenant on Civil and Political Rights, art. 18(4), 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.
	Article 23(4) of the ICCPR: "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children." International Covenant on Civil and Political Rights, art. 23(4), 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 [emphasis added].

Treaty or Declaration	*Article/ Citation*
	Article 24(1) of the ICCPR: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." International Covenant on Civil and Political Rights, art. 24(1), 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.
	Article 24(2) of the ICCPR: "Every child shall be registered immediately after birth and shall have a name." International Covenant on Civil and Political Rights, art. 24(2), 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.
	Article 24(3) of the ICCPR: "Every child has the right to acquire a nationality." International Covenant on Civil and Political Rights, art. 24(3), 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.
International Convention Relating to Status of Refugees (ICRSR)	**Article 4 of the ICRSR**: "The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children." International Convention Relating to the Status of Refugees, art. 4, 189 U.N.T.S. 150, *entered into force* April 22, 1954.
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 1 of CAT:** "[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, 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.
	Article 2 of CAT: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, 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.
Charter of the Organization of American States (Charter of OAS)	**Article 49 (a) of Charter of OAS**: "Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge." Charter of the Organization of American States, art. 34, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.

Treaty or Declaration	*Article/ Citation*
American Declaration on the Rights and Duties of Man (Declaration)	**Article 7 of the Declaration**: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." American Declaration of the Rights and Duties of Man, art. 7, 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).
	Article 30 of the Declaration: "It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it." American Declaration of the Rights and Duties of Man, art. 30, 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).
	Article 31 of the Declaration: "It is the duty of every person to acquire at least an elementary education." American Declaration of the Rights and Duties of Man, art. 31, 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).
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional Protocol)	**Article 8 of the Optional Protocol:** "1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: …. 2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim. 3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration. 4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol. 5. States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences. 6. Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial." Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* January 18, 2002.

Treaty or Declaration	*Article/Citation*
	Article 9 of the Optional Protocol: "1. States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to such practices. 2. States Parties shall promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their obligations under this article, States Parties shall encourage the participation of the community and, in particular, children and child victims, in such information and education and training programmes, including at the international level. 3. States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery. 4. States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible. 5. States Parties shall take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol." Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 9, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* January 18, 2002.

OTHER HUMAN RIGHTS INSTRUMENTS*: CHILDREN'S *RIGHTS*

Treaty or Declaration	*Article/Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 10 (1) of the ICESCR**: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. International Covenant on Economic, Social, and Cultural Rights, art. 10(1), 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.
	Article 10(3) of the ICESCR: Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law. International Covenant on Economic, Social, and Cultural Rights, art. 10(3), 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/Citation*
	Article 13(3) of the ICESCR: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions." International Covenant on Economic, Social, and Cultural Rights, art. 13(3), 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 5(b) of CEDAW**: "States parties States Parties shall take all appropriate measures… [t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases." Convention on the Elimination of Discrimination Against Women, art. 5(b), 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.
	Article 9(2) of CEDAW: "States Parties shall grant women equal rights with men with respect to the nationality of their children." Convention on the Elimination of Discrimination Against Women, art. 9(2), 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.
	Article 16(1) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:…(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount." Convention on the Elimination of Discrimination Against Women, art. 16(1), 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.
	Article 16(2) of CEDAW: "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory." Convention on the Elimination of Discrimination Against Women, art. 16(2), 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.
Declaration on the Rights of the Child (Declaration on Child)	**Principle 2 of the Declaration on Child**: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." Declaration of the Rights of the Child, principle 2, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

Treaty or Declaration	*Article/Citation*
	Principle 3 of the Declaration of the Rights of the Child: "The child shall be entitled from his birth to a name and a nationality." Declaration of the Rights of the Child, principle 3, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 4 of the Declaration of the Rights of the Child: "The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services." Declaration of the Rights of the Child, principle 4, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 5 of the Declaration of the Rights of the Child: The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition. Declaration of the Rights of the Child, principle 5, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 6 of the Declaration of the Rights of the Child: "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable." Declaration of the Rights of the Child, principle 6, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 7 of the Declaration of the Rights of the Child: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right." Declaration of the Rights of the Child, principle 7, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 8 of the Declaration of the Rights of the Child: "The child shall in all circumstances be among the first to receive protection and relief." Declaration of the Rights of the Child, principle 8, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

Treaty or Declaration	*Article/ Citation*
	Principle 9 of the Declaration of the Rights of the Child: "The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development." Declaration of the Rights of the Child, principle 9, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
	Principle 10 of the Declaration of the Rights of the Child: "The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men." Declaration of the Rights of the Child, principle 10, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
International Convention on the Rights of the Child (CRC)	**Article 2(2) of the CRC**: "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Convention on the Rights of the Child, art. 2(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 3(1) of the CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 3(3) of the CRC: "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." Convention on the Rights of the Child, art. 3(3), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 6(2) of the CRC: "States Parties shall ensure to the maximum extent possible the survival and development of the child." Convention on the Rights of the Child, art. 6(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 9(1) of the CRC: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence." Convention on the Rights of the Child, art. 9(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 9(2) of the CRC: "In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known." Convention on the Rights of the Child, art. 9(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 9(3) of the CRC: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." Convention on the Rights of the Child, art. 9(3), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 9(4) of the CRC: "Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned." Convention on the Rights of the Child, art. 9(4), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 10(1) of the CRC: "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family." Convention on the Rights of the Child, art. 10(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 12(1) of the CRC: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Convention on the Rights of the Child, art. 12(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 12(2) of the CRC: "[T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." Convention on the Rights of the Child, art. 12(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 19(1) of the CRC: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." Convention on the Rights of the Child, art. 19(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 19(2) of the CRC: "Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement." Convention on the Rights of the Child, art. 19(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 20(1) of the CRC: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." Convention on the Rights of the Child, art. 20(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 20(2)-(3) of the CRC: "States Parties shall in accordance with their national laws ensure alternative care for such a child. (3)Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." Convention on the Rights of the Child, art. 20(2)(3), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 23(1) of the CRC: "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community." Convention on the Rights of the Child, art. 23(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 23(2)(3) of the CRC: "States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development." Convention on the Rights of the Child, art. 23(2)(3), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 23(4) of the CRC: "States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries." Convention on the Rights of the Child, art. 23(4), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 24(1) of the CRC: "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." Convention on the Rights of the Child, art. 24(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 28(1) of the CRC: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates." Convention on the Rights of the Child, art. 28(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 28(2) of the CRC: "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention." Convention on the Rights of the Child, art. 28, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 34 of the CRC: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse." Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

Treaty or Declaration	*Article/ Citation*
	Article 37 of the CRC: "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. [maltreatment in care] Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 7 of the CRPD**: "1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 7, 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 American Convention on Human Rights (ACHR)	**Article 11(2) of the ACHR: "**No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." American Convention on Human Rights, art. 11(2), 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(1969).
	Article 17(1) of the ACHR: The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. American Convention on Human Rights, art. 17(1), 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.
The Universal Declaration of Human Rights (UDHR)	**Article 18 of the UDHR:** "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration of Human Rights, art. 18, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 25(2) of the UDHR: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Universal Declaration of Human Rights, art. 25(2), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Treaty or Declaration	*Article/ Citation*
The European Convention on Human Rights (ECHR)	**ARTICLE 8(1) OF THE ECHR:** "Everyone has the right to respect for his private and family life, his home and his correspondence." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950).
	ARTICLE 8(2) OF THE ECHR: **"**There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950).

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *CHILDREN'S RIGHTS*

- None available yet –

CASES BEFORE INTERNATIONAL BODIES: *CHILDREN'S RIGHTS*

Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Inter-Am Ct. H.R. (Ser. C) No. 77 (2001). Inter-American Court on Human Rights Petition related to the death of five street children and the right to life. Court concluded the State had failed to comply with its obligation to adopt special measures to protect children whose rights are under threat or violated (*cf*. Art. 19 ACHR).

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES. *CHILDREN'S RIGHTS.*

Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape, 2011 (5) SA 87 (WCC); 18678/2007 (S. Afr. 2010). Complaint regarding children's right to education, alleging the only available education for children who are severely and profoundly intellectually disabled occurs at "Special Care Centers" operated by non-governmental organizations. The Constitutional Court of South Africa considers both the positive and negative dimensions of the right to education and ultimately concludes that the State policy violated children's rights in both respects.

International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 13, Eur. Comm. S.R. (2003). Claim that France had violated the right to medical assistance (Article 13 of Revised European Social Charter) by ending the exemption of illegal immigrants, with very low incomes, from charges for medical and hospital treatment. European Committee on Social Rights found the rights of children, but not adult immigrants, had been violated (Article 17 - right of children to protection - of Revised European Social Charter).

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *CHILDREN'S RIGHTS*

General Comment Nº 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, U.N. Doc. CRC/C/GC/8, ¶18 (2006). **"**Article 37 of the Convention requires States to ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment". This is complemented and extended by article 19, which requires States to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". There is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."

General Comment Nº 12 (2009): The right of the child to be heard, U.N. Doc. CRC/C/GC/12, ¶18 (Jul. 20, 2009). **"**States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."

Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Doc. A/63/175 (2008).

- "[T]here can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment" (¶ 55)
- "[P]rolonged solitary confinement and seclusion of persons may constitute torture or ill-treatment." (¶ 56)
- "Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture…Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment." (¶ 63)

5.6.4 SAMPLE ARGUMENTS: *CHILDREN'S RIGHTS*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not to rely these arguments alone. The Children's Rights Sample Arguments were originally drafted by Erik Pitchal.

SAMPLE ARGUMENT 1 - RIGHT TO BE FREE FROM RESTRAINTS, SECLUSION, AND FORCED MEDICATION WHILE IN STATE CUSTODY AS A FOSTER CHILD IN STATE CUSTODY, [NAME OF CHILD] IS ENTITLED TO BE FREE FROM PHYSICAL RESTRAINTS, SECLUSION, AND FORCED MEDICATION.

International law recognizes the special place of children in human life and consistently provides for their protection. 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 (hereinafter "CRC"); American Declaration of the Rights and Duties of Man, art. 7, 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).

Children in state custody and those who are disabled are granted even greater protection by human rights law. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 7, 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. *See* CRC Art. 23(1) ("a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community").

Placing children in physical restraints or in seclusion, or forcing them to take psychotropic medication without their informed consent, violates the basic command of international law to offer minors special considerations as well as more specific prohibitions against cruel, inhuman treatment – and even torture. "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." CRC Art. 37(1). Any and all forms of legalized violence against children are affronts to international human rights norms. *See* Committee on the Rights of the Child, ¶18, General Comment Nº 8, U.N. Doc. CRC/C/GC/8 (2006), http://www2.ohchr.org/english/bodies/crc/comments.htm.

Indeed, "The child shall have the right to adequate . . . recreation and medical services." Declaration of the Rights of the Child, principle 4, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). Placing a child in seclusion or restraints violates her right to recreation, and forcing her to take mind-altering drugs without her informed consent deprives her of the right to adequate medical services.

[insert facts of this case] rise to the level of torture. According to the Convention Against Torture, which the U.S. has signed and ratified, and enacted implementing legislation (Torture Victims Protection Act, Pub.L. 102-256, H.R. 2092, 106 Stat. 73, enacted March 12, 1992), "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, 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. "There can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment." Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Doc. A/63/175, ¶ 55 (2008), www.un.org/disabilities/images/A.63.175.doc. Moreover, prolonged solitary confinement and seclusion of persons may constitute torture or ill-treatment. jj. ¶ 56. With respect to the provision of psychotropic medications without the informed consent of the patient, the Special Rapporteur on Torture has declared: "Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture. . . Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment." *Id.* ¶ 63.

[Insert the important facts of this case] violates the Plaintiffs' fundamental human right to be free from torture. Because the U.S. has ratified the Convention Against Torture, the United States is obligated to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." *Id*. art. 2 (emphasis added). Thus, [insert your specific request of the court in this case].

SAMPLE ARGUMENT 2 - RIGHT TO PLACEMENT AND CONTACT WITH SIBLINGS, AND/OR RIGHT TO PLACEMENT WITH RELATIVE CARETAKERS AND/OR RIGHT TO ONGOING CONTACT WITH PARENTS AND REUNIFICATION SERVICES

Human rights law recognizes the critically important role that families play in raising children and places supreme importance on the maintenance of family ties. 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 [hereinafter "CRC"]; International Covenant on Economic, Social, and Cultural Rights, art. 10(1), 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. [hereinafter "IESCR"]; Declaration of the Rights of the Child, principle 6, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) [hereinafter "Declaration"]. "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother." Declaration, principle 19.

In order for children to be separated from their parents, international law requires governments to provide due process. "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." CRC, Art. 9(1). When children must be removed from their parents, they are still entitled to maintain the parent-child relationship, so long as doing so is not contrary to their best interests. *See* CRC Art. 9(3). This is true even if the parent is incarcerated. *See* CRC Art. 9(4) (requiring governments to "upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child").
Human rights law supports the concept of preventive and/or reunification services. "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." IESCR, art 10(1). Additionally, the CRC recognizes the rights of disabled children – which could be defined broadly to include many, if not most, children in foster care – to special care. *See* CRC Art. 23(2). The CRC requires nations to provide services and aid "which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child." *Id*.

Children in foster care should be provided every opportunity to maintain family ties, in accordance with human rights principles. Because of the importance of family relationships, international law places special obligations on governments to ensure that children whose families have been disrupted are able to maintain as many aspects of their family life and relationships as possible. Children "shall, wherever possible, grow up in the care and under the responsibility of [their] parents. . .Society and the public authorities shall have the duty to extend particular care to children without a family." Declaration, principle 6. If the parents are not able to care for children themselves, then consideration should be given to making other relatives the primary caretakers – and governments should provide them the adequate support to do so. *Id*. *See also* IESCR, art. 10(1). Moreover, children's relationships with their siblings should be protected. *See Id*. *See also* American Convention on Human Rights, Art. 17(1), Art. 11(2), 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 (1969).

[Insert name of child] has the right to placement/contact with his/her siblings / placement with relatives / a service plan that gives his/her parents a meaningful opportunity to reunify the family.

SAMPLE ARGUMENT 3 - RIGHT TO FREE EXERCISE OF RELIGION

[NAME OF CHILD] HAS THE RIGHT TO PRACTICE HER/HIS OWN RELIGION WHILE IN STATE CUSTODY AND/OR NOT TO BE FORCED TO PRACTICE A RELIGION NOT OF HIS/HER CHOICE.

Parents are entitled to raise children in their own religion, and children are entitled to practice their religion freely. Signatories to the International Covenant on Civil and Political Rights have "undertake[n] to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." International Covenant on Civil and Political Rights, art. 18(4), 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. [hereinafter "ICCPR"]. For example, the right to choose a private, religiously-based school is protected by international law. *See* International Covenant on Economic, Social, and Cultural Rights, art. 13(3), 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.

Non-discrimination principles, which are so central to international human rights norms, also extend to children. "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. ICCPR, art. 24(1). Governments must "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." 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 [hereinafter "CRC"]. This is because of the imperative to raise all children "in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that [their] energy and talents should be devoted to the service of [their] fellow [human beings]." Declaration of the Rights of the Child, principle 10, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

Children in state custody and those who are disabled are granted even greater protection by human rights law. "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." CRC, art. 20(1). Specifically, when children are placed in foster care, international law continues to protect their right to practice their chosen religion. "When considering [foster care placements], due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." CRC, art. 20(2)(3). Disabled children – who constitute an overwhelming majority of foster children when the term is defined broadly – have additional protections, as they have the right under international law to the full enjoyment "of all human rights and fundamental freedoms on an equal basis with other children." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 7, 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 practices of [insert name of facility] in this case violate [insert name of child]'s right to practice his/her own religion, by forcing him/her to [insert facts].

5.6.5 TALKING POINTS: *CHILDREN'S RIGHTS*

The Children's Rights Talking Points below were originally drafted by Erik Pitchal.[^]

TALKING POINTS #1- RIGHT TO BE FREE FROM RESTRAINTS, SECLUSION, AND FORCED MEDICATION WHILE IN STATE CUSTODY

- Human rights law protects the dignity of every human being, most importantly children.
- Human rights law and also provides special protections for children because children are vulnerable.
- Human rights norms make the best interests of children the most important factor to consider.
- Children in state custody and children with disabilities must be provided even greater protections.
- Under international law, children are entitled to adequate recreation and medical care. The use of seclusion and restraints, and the provision of psychotropic medication without informed consent, violate these rights.
- Certain practices in group homes, residential treatment centers, and psychiatric facilities which may or may not be disfavored under state or federal law are considered inhumane and can be considered under international law.
- Depending on the circumstances, seclusion, restraints, and forced medication can be considered torture.

TALKING POINTS #2- RIGHT TO PLACEMENT AND CONTACT WITH SIBLINGS, AND/OR RIGHT TO PLACEMENT WITH RELATIVE CARETAKERS AND/OR RIGHT TO ONGOING CONTACT WITH PARENTS AND REUNIFICATION SERVICES

- Human rights law makes the family the primary unit of society and requires governments to protect family life.
- The state may interfere with family life only when absolutely necessary to protect children.
- International norms require states to provide support and assistance to families in the task of raising children.
- If children must be separated from their parents into foster care, human rights law requires states to preserve their family ties as much as possible, by, for example, placing them with relatives and/or siblings, permitting them to visit their parents if not contrary to their best interests, and otherwise supporting the maintenance of established family relationships.
- When children are placed with relatives, those relatives should receive the same kind of support that parents would otherwise have been entitled to receive, in order to maintain that placement as a nurturing and stable family home.

TALKING POINTS #3- RIGHT TO FREE EXERCISE OF RELIGION

- Certain rights are so fundamental that they are enshrined not only in our federal and state constitutions, but also in international law.

[^] When this section was written, Erik Pitchal was currently working as an independent consultant to child-serving non-profit organizations, offering strategic advice, professional training, and program evaluation.

- One of these is the right to free exercise of religion.
- International law provides that children are rights-holders of certain human rights, including the right to free exercise of religion.
- Disabled children and children in foster care are entitled to special protections under international law.
- Non-discrimination on the basis of religion is a critically important universal value that applies to children throughout the world, and especially vulnerable children who are in state custody and do not have their parents to advocate for them.

5.6.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *CHILDREN'S RIGHTS*

- None available yet –

5.6.7 SAMPLE BRIEFS & PETITIONS: *CHILDREN'S RIGHTS*

- None available yet –

5.6.8 OTHER RESOURCES: *CHILDREN'S RIGHTS*

Together with Children – for Children: A guide for non-governmental organizations accompanying children in the Convention on the Rights of the Child, NGO Group for the Convention on the Rights of the Child (2011). A practical guide for NGOs to facilitate children's engagement in all aspects of the CRC reporting process.

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.7 IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES

The Immigration: Family & Border Rights section of the Handbook was written by Lynsay Gott.[^]

5.7.1 INTRODUCTION: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

Numerous international human rights principles are applicable to immigration proceedings. This section focuses on those principles most relevant to family unity and certain border-rights issues.

Under human rights law, everyone has a right to family life, the right to found a family, and the right to state protection of their family rights. While "family" is not specifically defined in any treaty, it should be interpreted flexibly to encompass modern social norms.[185] Decisions regarding admissibility, removal, and detention can all potentially result in interference with family rights. While migrants do not have an automatic right to enter or remain in a country simply because they have family present there, in the circumstances of a particular case an individual's family rights interests may outweigh a state's interest in upholding its immigration policies.[186]

Migrants attempting to enter the United States often face other human rights violations, including racial profiling and arbitrary detention.[187] The principles of non-discrimination,[188] right to liberty,[189] right to a fair hearing and access to courts,[190] and freedom from arbitrary detention[191] are also fundamental international human rights norms. All the rights enshrined in international instruments must be guaranteed to migrants and citizens alike without any distinctions such as the race, national origin, religion or immigration status of the person in question.[192] Immigration-related judicial or administrative decisions may not be based on such grounds. An individual's detention may be arbitrary, and thus in violation of international law, if based on discriminatory grounds, if it severely infringes on the right to family life, or if it is not necessary in all the circumstances of a particular case.[193]

This section of the Local Human Rights Lawyering Project Handbook will provide legal aid attorneys with model written and oral arguments with statistics and resources for relevant data, arguments to use in litigation, a list of relevant international and U.S. law, and case studies of legal aid attorneys fighting for the rights of immigrant clients and their families.

[^] Lynsay Gott is an Associate Attorney with WMR Immigration Law Group. Ms. Gott received her J.D. from University of Cincinnati College of the Law, and was the recipient of an Equal Justice Works Fellowship upon graduation in 2007. Her fellowship project, carried out at Human Rights USA, involved working to close the loopholes in U.S. law that limited the availability of asylum protections for trafficked persons and mandated the return of some to the countries of origin where they were originally victimized. She remained with Human Rights USA upon completion of the fellowship, eventually becoming the Acting Executive Director, and her work expanded to pursuing civil remedies for survivors of human rights abuses. She joined WMR Immigration Law Group in 2012 and currently helps clients receive humanitarian protection such as asylum, as well as other forms of immigration relief. Ms. Gott is a member of the Maryland and District of Columbia Bars.

[185] General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17), U.N. H.R. Comm., 32d Sess., ¶ 5 (1988), http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd?Opendocument.

[186] *Warsame v. Canada*, Comm. No. 1959/2010, U.N. H.R. Comm., 102d Sess., U.N. Doc. A/66/40 (Vol. II, Part One) 601 (2011), http://www2.ohchr.org/english/bodies/hrc/docs/A.66.40_vol.II_partI.pdf; *Shevanova v. Latvia*, App. No. 58822/00, Eur. Ct. H.R. (2007).

[187] Report on Immigration in the United States: Detention and Due Process, Inter-Am. C.H.R., OEA/Ser.L/V/II. Doc. 78/10, ¶ 98 (2010), http://cidh.org/countryrep/USImmigration/TOC.htm; Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-Am Court H.R. (2003), http://www.unhcr.org/refworld/docid/425cd8eb4.html.

[188] *See*, *e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 5, 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; ICCPR, art. 2.

[189] *See*, *e.g.*, ICCPR, art. 9(1); American Declaration of the Rights and Duties of Man (ADHR), art. 25, 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).

[190] *See*, *e.g.*, ICCPR, art. 14(1); CERD, art. 6., ADHR, art. 18.

[191] *See*, *e.g.*, ICCPR, art. 9(1); UDHR, art. 9.

[192] *See*, *e.g.*, ICCPR, art. 2; ADHR, art. 2.

[193] Report on Immigration in the United States, *supra* note 187, at ¶¶ 39, 45, 49, 94-95; *A & Ors. v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, ¶¶ 68-69, 73 (Eng. H.L. 2004), http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm.

5.7.2 QUICK STATISTICS & RESOURCES FOR DATA. *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

Here are some quick statistics related to immigration, family and border rights issues:

- The United States removed 387,242 individuals in 2010.[194]
- 74.7% of cases before Immigration Judges in 2010 ended in removal orders.[195]
- Approximately 5 million children living in the United States have an undocumented parent, including 3 million children born in the United States.[196]
- Between 1998 and 2007, 108,434 of the individuals removed from the United States had U.S. citizen children.[197] Only about half of these removals were based on aggravated felony convictions.[198]
- Asylum denial rates are extremely high for individuals of certain nationalities, approaching 100% for Jamaican applicants.[199]

Resources for data related to family and border rights issues within immigration enforcement:

- **Department of Homeland Security, Yearbooks of Immigration Statistics**
- **TRAC Immigration**
- **Executive Office for Immigration Review, U.S. Department of Justice Statistical Yearbooks**
- **Congressional Research Service Reports on Homeland Security**
- **International Organization for Migration, World Migration Report**
- **U.N. Office of the High Comm'r for Refugees, *Statistics and Operational Data***

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[194] U.S. Department of Homeland Security, 2010 Yearbook of Immigration Statistics, Table 36, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

[195] Executive Office for Immigration Review, U.S. Department of Justice, 2010 Statistical Yearbook, D2 (2010), http://www.justice.gov/eoir/statspub/fy10syb.pdf. *See also* TRAC Immigration, U.S. Deportation Outcomes by Charge, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

[196] Dorsey & Whitney LLP & The Urban Institute, *Severing a Lifeline: the Neglect of Citizen Children in America's Immigration Enforcement Policy,* 20 (2009), http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf.

[197] Office of Inspector General, Dep't of Homeland Security, Removals Involving Illegal Alien Parents of United States Citizen Children, 4 (2009).

[198] *Id*. at 10.

[199] TRAC Immigration, Asylum Denial Rates by Nationality, http://trac.syr.edu/immigration/reports/240/include/nationality_denial.html.

5.7.3 RELEVANT HUMAN RIGHTS LAW: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS. *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

Treaty or Declaration	*Article/Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 2 of CERD**: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 2, 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.
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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.
	Article 6 of CERD: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 6, 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.
International Covenant on Civil and Political Rights (ICCPR)	**Article 2 of the ICCPR**: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, <u>without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status</u>." International Covenant on Civil and Political Rights, art. 2, 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 [emphasis added].
	Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, art. 7, 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.

	Article 9(1) of the ICCPR: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." International Covenant on Civil and Political Rights, art. 9(1), 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 [emphasis added].
Treaty or Declaration	*Article/Citation*
	Article 12(2) of the ICCPR: "Everyone shall be free to leave any country, including his own." International Covenant on Civil and Political Rights, art. 12(2), 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 [emphasis added].
	Article 14(1) of the ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights, art. 14(1), 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 [emphasis added].
	Article 17 of the ICCPR: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home…; and 2. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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 [emphasis added].
	Article 23 of the ICCPR: "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; and 2. The right of men and women of marriageable age to marry and to found a family shall be recognized International Covenant on Civil and Political Rights, art. 23, 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 [emphasis added].
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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 [emphasis added].
International Convention Relating to Status of Refugees (ICRSR)	**Article 3 of ICRSR**: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." International Convention Relating to the Status of Refugees, art. 3, 189 U.N.T.S. 150, *entered into force* April 22, 1954.
	Article 33(1) of ICRSR: "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." International Convention Relating to the Status of

Refugees, art. 33(1), 189 U.N.T.S. 150, *entered into force* April 22, 1954.

Treaty or Declaration	*Article/Citation*
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 3(1) of CAT**: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), 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.
American Declaration on the Rights and Duties of Man (Declaration)	**Article 2 of the Declaration**: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." American Declaration of the Rights and Duties of Man, art. 2, 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) [emphasis added].
	Article 5 of Declaration: "Every person has the right to the protection of the law against abusive attacks upon … his private and family life." American Declaration of the Rights and Duties of Man, art. 5, 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) [emphasis added].
	Article 6 of Declaration: "Every person has the right to establish a family, the basic element of society, and to receive protection therefor." American Declaration of the Rights and Duties of Man, art. 6, 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) [emphasis added].
	Article 18 of Declaration: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." American Declaration of the Rights and Duties of Man, art. 18, 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) [emphasis added].
	Article 25 of Declaration: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." American Declaration of the Rights and Duties of Man, art. 25, 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) [emphasis added].
	Article 27 of Declaration: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements." American Declaration of the Rights and Duties of Man, art. 27, 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).

OTHER HUMAN RIGHTS INSTRUMENTS*: IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES

Treaty or Declaration	*Article/Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 10 of the ICESCR**: "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children; (…) and 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." International Covenant on Economic, Social, and Cultural Rights, art. 10(1), 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 [emphasis added].
International Convention on the Rights of the Child (CRC)	**Article 3 of CRC:** "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990 [emphasis added].
	Article 10(1) of CRC: "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." Convention on the Rights of the Child, art. 10(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
The American Convention on Human Rights (ACHR)	**Article 7 of the ACHR**: "1. Every person has the right to personal liberty and security; and 3. No one shall be subject to arbitrary arrest or imprisonment." American Convention on Human Rights, art. 7, 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 (1969) [emphasis added].
	Article 17(1) of the ACHR: "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state*." American Convention on Human Rights, art. 17(1), 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 (1969) [emphasis added].
	Article 22(2) of the ACHR: "*Every person has the right to leave any country freely, including his own*." American Convention on Human Rights, art. 22(2), 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 (1969) [emphasis added].

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/Citation*
	Article 22(7),-(8) of the ACHR: "7. Every person has the right to seek and be granted asylum in a foreign territory…; and 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." American Convention on Human Rights, art. 22(7)-(8), 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 (1969).).
	Article 24 of the ACHR: "*All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law*." American Convention on Human Rights, art. 24, 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 (1969) [emphasis added].
The Universal Declaration of Human Rights (UDHR)	**Article 2 of the UDHR**: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 7 of the UDHR: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Universal Declaration of Human Rights, art. 7, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 8 of the UDHR: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 9 of the UDHR: "No one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 10 of the UDHR: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 12 of the UDHR: "No one shall be subjected to arbitrary interference with his privacy, family, [or] home…. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights, art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 16 of the UDHR: "1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family (…); and 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Universal Declaration of Human Rights, art. 16, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].

Treaty or Declaration	*Article/Citation*
The European Convention on Human Rights (ECHR)	**Article 8 of the ECHR**: "1. Everyone has the right to respect for his private and family life, his home and his correspondence; and 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950) [emphasis added].
	Article 14 of the ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950) [emphasis added].
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (ICRMW)	**Article 7 of the ICPRM**: "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7, UN Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* July 1, 2003 [emphasis added].
	Article 14 of the ICPRM: "No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family,[or] home.... Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 14, UN Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* July 1, 2003 [emphasis added].
	Article 16(4) of the ICPRM: "Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 16(4), UN Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* July 1, 2003 [emphasis added].
	Article 17(6) of the ICPRM: "Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 17(6), UN Doc. A/RES/45/158, 30 I.L.M. 1517 (1990), *entered into force* July 1, 2003 [emphasis added].

Treaty or Declaration	*Article/Citation*
Boston Principles on the Economic, Social and Cultural Rights of Noncitizens (**Boston Principles**)	**Principle 5 of the Boston Principles**: "All persons subject to immigration enforcement actions and proceedings have the right to full protection of the core human rights at stake in such actions and proceedings, including the right to life, security and bodily integrity, physical and mental health, family unity, livelihood, and education. Humanitarian factors, including length of residence in the United States and family ties, should be given due consideration in any proceeding that may result in deportation." Boston Principles on The Economic, Social and Cultural Rights of Noncitizens (2011).
The Charter of the Organization of American States (OAS Charter)	**Article 45 of the OAS Charter**: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms….Adequate provision for all persons to have due legal aid in order to secure their rights." Charter of the Organization of American States, art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW. *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES.*

***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. *See also Beharry v. Reno*, 183 F.Supp.2d 584 (EDNY 2002) *reversed on other grounds by Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

***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.

CASES BEFORE INTERNATIONAL BODIES. IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES.

***Warsame v. Canada*,** Comm. No. 1959/2010, U.N. H.R. Comm., 102d Sess., U.N. Doc. A/66/40 (Vol. II, Part One) 601 (2011). The U.N. Human Rights Committee stated that separating an individual from his family through deportation "could be regarded as an arbitrary interference with the family and a violation of article 17 [of the ICCPR] if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal."

***Smith, et al. v. U.S.*,** Case 12.562, Inter-Am. Ct. H.R., Report No. 81/10 (2010). The Inter American Court held that immigration authorities must weigh the state's interest in immigration control against an individual's right to family life, which includes consideration of the best interests of the individual's children.

***Shevanova v. Latvia*,** App. No. 58822/00, Eur. Ct. H.R. (2007). The European Court of Human Rights held that deporting a woman who had lived in Latvia for several decades, married, and had a child there would violate the ECHR's article 8 protection for family life. Although a state has a sovereign right to control the entry and residence of non-nationals in its territory, an individual's deportation may be disproportionate under article 8, "where the individual concerned has strong personal or family ties within the country."

Advisory Opinion on Juridical Conditions and Rights of the Undocumented Migrants, OC-18/03, Inter-Am Court H.R. (2003). Mexico requested an advisory opinion which was provided by the Inter-American Court of Human Rights on the human rights of migrant workers, especially with respect to the principles of legal equality, non-discrimination and the equal and effective protection of the law.

Advisory Opinion on Condition and Human Rights of the Child, No. OC-17/02, Inter-Am Court H.R., Series A No. 17, ¶¶ 62-77, 92-103 (2002). The Inter-American Commission on Human Rights requested an advisory opinion from the Inter-American Court of Human Rights regarding interpretation of Articles 8 and 25 of the American Convention, and their compatibility with some measures that states had adopted for regarding minors including: separating children from their family because their families were unable to afford their education or maintenance; and proceedings without guarantees for the right of the minor to be personally heard and failure to take into account the opinion and preferences of the minor in such determination.

Airey v. Ireland, App. No. 6289/73, Eur. Ct. H.R. (1979). The European Court of Human Rights determined that the right to a fair hearing may sometimes require States to provide legal counsel to indigent plaintiffs in civil proceedings. *See also*, *Steel and Morris v. The United Kingdom*, App. No. 68416/01, Eur. Ct. H.R. (2005) (statute denying legal aid in defamation cases violated the rights to counsel and a fair hearing); *Aerts v. Belgium*, App. No. 25357/94, Eur. Ct. H.R. (1998) (stating that denial of legal aid to qualifying citizens constituted denial of the right to a tribunal).

CASES BEFORE NATIONAL COURTS OR OTHER SUB-REGIONAL BODIES. *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES.*

***R v. Secretary of State for the Home Department* ex parte *Quila & Anor*,** [2011] UKSC 45 (Eng. 2011). The court invalidated a law prohibiting grants of marriage-based visas when either spouse was under age 21. The fact that "the refusal to grant marriage visas either condemned both sets of spouses to live separately… or condemned the British citizens in each case… to live with their spouses" abroad was "a colossal interference" with the right to family life. Under international law "anyone of marriageable age is free to marry whom they choose….Married couples also have the right to live together."

***VW (Uganda) v. Secretary of State for the Home Department*,** [2009] EWCA Civ 5 (Eng. and Wales A.C. 2009). The court held that a woman's deportation would violate her right to family life, as well as that of her partner and UK citizen child since it was unreasonable to expect her partner to relocate to a country to which he had no connection to keep the family together, and it was likely the child would remain in the United Kingdom as well. This "enforced break-up of this family…[was] not justified by the legitimate demands of immigration control."

***Okoloubu v. Canada (Minister of Citizenship and Immigration)*,** 2008 F.C.A. 326 (Can. Fed. Ct. 2008). Immigration officials considering claims for relief based on family hardship must consider the principles enshrined in the ICCPR, including "non-interference in family life in Article 17, the importance of a family unit and protection thereof by society and the State in Article 23, as well as the child's 'right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State' in Article 24 of the ICCPR."

***A & Ors. v. Sec'y of State for the Home Dep't*,** [2004] UKHL 56 (Eng. H.L. 2004). The English House of Lords invalidated a law authorizing the detention of suspected terrorists who were not UK nationals. By discriminating between suspected terrorists who were UK nationals and those who were not, the law violated the non-discrimination provisions in article 14 of the ECHR and article 26 of the ICCPR.

***R v. Immigration Officer at Prague Airport & Anor.* ex parte *European Roma Rights Centre & Ors.*,** [2004] UKHL 55 (Eng. H.L. 2004). The fact that a disproportionate number of those migrants who traveled to the United Kingdom from the Czech Republic with no intention of returning to their home country were ethnic Roma did not justify racial profiling in decisions regarding admission of Czech nationals to the United Kingdom. Since Roma seeking to travel to the United Kingdom were, "routinely treated with more suspicion and subjected to more intensive and

intrusive questioning than non-Roma," the immigration authorities' actions unlawfully discriminated on racial grounds in violation of UK and international law.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

***Criminalisation of Migrants in Europe*,** CommDH/IssuePaper (2010) 1 (2010). The Council of Europe Commissioner for Human Rights stressed that "the actions of states at borders on many occasions may have human rights consequences." For instance, while there is no automatic right to enter another country, some of the actions taken by states to prevent undocumented immigrants entering their territory may implicate the right to leave one's country freely. The Commissioner also emphasized that border control operations "may engage a duty not to discriminate against one foreigner in comparison with another," and that "the conditions under which individuals are refused access to states or admission may [implicate] the prohibition on torture, inhuman or degrading treatment or punishment."

Report on Immigration in the United States: Detention and Due Process, Inter-Am. C.H.R., OEA/Ser.L/V/II. Doc. 78/10, ¶ 98 (2010). Report by the Inter-American Commission on Human Rights on immigrant detention and due process in the U.S., along with recommendations for conforming immigration practices in the U.S. with international human rights standards.

Concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination: UNITED STATES OF AMERICA, U.N. CERD Comm., U.N. Doc. CERD/C/USA/CO/6, ¶22 (May 8, 2008):

> "The Committee also notes with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).
>
> ….The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings."

General Comment No. 32: Right to equality before courts and tribunals and to a fair trial, U.N. Human Rights Comm., 19th Sess., U. N. Doc. CCPR/C/GC/32, ¶ 13 (2007):

> "The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision. The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."

General Recommendation No. 29: Descent, U.N. CERD Comm., U.N. Doc. A/57/18, ¶ 21, at 111 (2002):

> "Recommends that the States parties, as appropriate for their particular circumstances, adopt some or all of the following measures….Take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid."

Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev., ¶ 162 (2000). Inter-American Commission on Human Rights report and recommendations on the Canadian system aimed at meeting the needs of persons fleeing persecution.

General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), U.N. CERD

Comm., U.N. Doc. A/51/18, annex VIII at 124, ¶ 3 (1996):

> "Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens."

General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), U.N. H.R. Comm., 39th Sess., ¶ 5 (1990). U.N. Human Rights Committee comment on Article 23, which recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

General Comment No. 15: The position of aliens under the Covenant, U.N. Human Rights Comm., 27th Sess., ¶¶ 5, 7 (1986). U.N. Human Rights Committee comment on equal rights of aliens under the ICCPR.

5.7.4 SAMPLE ARGUMENTS: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not to rely these arguments alone.

SAMPLE ARGUMENT 1 - RIGHTS TO FAMILY LIFE AND PROTECTION OF THE FAMILY

[STATUTE/REGULATION AT ISSUE] SHOULD BE READ CONSISTENTLY WITH INTERNATIONAL HUMAN RIGHTS LAW STANDARDS BY BALANCING THE GOVERNMENT'S INTEREST WITH THE RIGHTS TO FAMILY LIFE AND PROTECTION OF THE FAMILY

Under international law, all persons have a right to protection of the law against arbitrary interference with their family life. International Covenant on Civil and Political Rights, art. 17, 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; American Declaration of the Rights and Duties of Man, art. 5, 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); Universal Declaration of Human Rights, art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). An interference with family life may be arbitrary if it is "disproportionate to the objectives of the" State. *Warsame v. Canada*, Comm. No. 1959/2010, U.N. H.R. Comm., 102d Sess., U.N. Doc. A/66/40 (Vol. II, Part One) 601 (2011), http://www.unhcr.org/refworld/country,,HRC,,CAN,,4ee0f0302,0.html. *See also Shevanova v. Latvia*, App. No. 58822/00, Eur. Ct. H.R. ¶76 (2007).

The right to family life is a fundamental right that applies to citizens and migrants alike, and may give rise to the right to enter or remain in a foreign territory regardless of eligibility to immigrate under the domestic law of that state. General Comment No. 15: The position of aliens under the Covenant, U.N. Human Rights Comm., 27th Sess., ¶¶ 5, 7 (1986), http://www.unhcr.org/refworld/docid/45139acfc.html; Criminalisation of Migrants in Europe, CommDH/IssuePaper (2010)1, (2010), https://wcd.coe.int/ViewDoc.jsp?id=1579605 ("the fact that a person never arrived regularly on the territory of a state does not exclude the fact that his or her family life in the state may preclude expulsion").

Although states have a sovereign right under international law to set immigration policies and control entry into their territory, states must weigh this interest with the degree to which a decision regarding admissibility or removability interferes with an individual's right to family life. *Shevanova v. Latvia*, at ¶ 76; Smith, et al. v. U.S., Case 12.562, Inter-Am. Ct. H.R., Report No. 81/10 (2010), https://wcd.coe.int/ViewDoc.jsp?id=1010461&Site=COE; Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev., ¶ 162 (2000), http://www.cidh.org/countryrep/Canada2000en/table-of-contents.htm.

Due to the fundamental nature of the right to family life and the potential harm resulting from separation of

family members, states are obligated to determine the reasonableness of any interference on a case-by-case basis, and should only justify that interference "where necessary to meet a pressing need to protect public order" based on "very serious" factors. Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System, at ¶ 166.

[Insert the important facts of this case] violates/would violate Respondent's/Plaintiff's fundamental human rights under international law.

SAMPLE ARGUMENT 2 - Right to Establish a Family

[DECISION AT ISSUE] VIOLATES/WOULD VIOLATE INTERNATIONAL HUMAN RIGHTS NORMS.

The right to establish a family is a fundamental principle of international law. *See, e.g.*, International Covenant on Civil and Political Rights, art. 23(2), 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 [hereinafter "ICCPR"]; American Declaration of the Rights and Duties of Man, art. 6, 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) [hereinafter "American Declaration"]; Universal Declaration of Human Rights, art. 16(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter "UDHR"]. The family is recognized under international law as "the natural and fundamental group unit of society" and is entitled to state protection. ICCPR, art. 23(1). *See also* UDHR, art. 16(3); American Declaration, art. 6; International Covenant on Economic, Social, and Cultural Rights, art. 10(1), 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 ("The widest possible protection and assistance should be accorded to the family").

Implicit in the right to found a family is "the possibility to procreate and live together." General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), U.N. H.R. Comm., 39th Sess., ¶ 5 (1990), http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80. This in turn obligates states to create measures "to ensure the unity or reunification of families." *Id*.
In the immigration context, to comply with international law states must consider the family rights of individuals in removal proceedings or petitioners for family-based status, as well as the rights of their family members. *Stewart v. Canada*, Comm. No. 538/1993, U.N. H.R. Comm. 58th Sess., U.N. Doc. CCPR/C/93/D/1513/2006, ¶ 12.10 (1996), http://www1.umn.edu/humanrts/undocs/538-1993.html. This is particularly true when children are involved. The best interests of a migrant's children must be considered in removal proceedings, regardless of whether the children are also facing removal. Advisory Opinion on Condition and Human Rights of the Child, No. OC-17/02, Inter-Am Court H.R., Series A No. 17, ¶¶ 62-77, 92-103 (2002), http://www.unhcr.org/refworld/docid/4268c57c4.html; Report on Immigration in the United States: Detention and Due Process, Inter-Am. C.H.R., OEA/Ser.L/V/II. Doc. 78/10, ¶ 98 (2010), http://cidh.org/countryrep/USImmigration/TOC.htm.

The U.N. Human Rights Committee, the European Court of Human Rights, and the IACHR have repeatedly considered numerous factors in the effort to balance a state's interest in immigration control against an individual's right to enter or remain in a host country. Among these factors are "the age at which the non-citizen immigrated to the host state; the non-citizen's length of residence in the host state; the non-citizen's family ties in the host state; the extent of hardship the non-citizen's deportation poses for the family in the host state; the extent of the non-citizen's links to the country of origin; the non-citizen's ability to speak the principal language(s) of the country of origin..." *Smith, et al. v. U.S.*, Case 12.562, Inter-Am. Ct. H.R., Report No. 81/10 (2010), www.cidh.org/annualrep/2010eng/USPU12562EN.DOC.

By separating [or threatening to separate] the Respondent/Petitioner/Plaintiff's family, [the decision at issue] implicates the right to family life. Based on [insert the important facts of this case], the rights of Respondent/Petitioner/Plaintiff and her family outweigh the government's interest in effective immigration control.

SAMPLE ARGUMENT 3 - Right to Non-Discrimination

[DECISION/ACTION AT ISSUE] VIOLATES/WOULD VIOLATE INTERNATIONAL HUMAN RIGHTS NORMS.

Under international law, States may not discriminate on the basis of immigration status, nor may they apply immigration policy in a discriminatory manner. The principle of non-discrimination is a fundamental element of international human rights law that obligates states to protect individuals from discrimination and to refrain from applying laws in a discriminatory manner. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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; International Covenant on Civil and Political Rights, arts. 2, 26, 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 [hereinafter "ICCPR"].

The widespread acceptance of the non-discrimination principle and its centrality to the entire scheme of international human rights law and the domestic law of many nations has rendered the principle a *jus cogens* norm. Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03 (Ser. A) No. 18, ¶101 (2003), http://www.unhcr.org/refworld/docid/425cd8eb4.html; *R v. Secretary of State for the Home Department ex parte Quila & Anor*, [2011] UKSC 45 (Eng. 2011). Importantly, this principle is non-derogable, even in times of national emergency, meaning that immigration measures cannot be applied in a manner that discriminates on the basis of race, ethnicity, nationality, religion, immigration status, or other protected grounds even in the context of anti-terrorism issues or other national security concerns. Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., ¶¶ 343, 351, 375 (2002), http://www.cidh.org/terrorism/eng/toc.htm; *A & Ors. v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, ¶¶ 68-69, 73 (Eng. H.L. 2004), http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm.

The U.N. Human Rights Committee has made clear that the non-discrimination principle applies to individuals outside their country of citizenship, and that all the provisions of the ICCPR "must be guaranteed without discrimination between citizens and aliens." General Comment No. 15: The position of aliens under the Covenant, U.N. H.R. Comm., 27th Sess., ¶ 2 (1986), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument; Juridical Condition and Rights of the Undocumented Migrants, at ¶ 118.

Further, the U.N. General Assembly has called on all States to ensure their immigration laws and practices "are free of racial discrimination and compatible with their obligations under international human rights instruments." G.A. Res. 195, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/195, Agenda Item 107, at ¶ I.6 (2002). In carrying out border control operations, State have "a duty not to discriminate against one foreigner in comparison with another". Criminalisation of Migrants in Europe, CommDH/IssuePaper (2010)1, (2010), https://wcd.coe.int/ViewDoc.jsp?id=1579605. Additionally, while migrants do not have an automatic right to enter or reside in another state's territory, "considerations of non-discrimination" may give rise to a right to remain in a particular case. U.N. Human Rights Comm., General Comment No. 15, at ¶ 5. For any distinction based on race or other grounds enumerated under international human rights instruments to be justified, "states must provide an especially weighty interest and compelling justification for the distinction." Inter-Am. Cm. H.R., Report on Terrorism and Human Rights, at ¶ 412.

[Insert the important facts of this case] violates/violated international human rights law by impermissible discriminating on the basis of [insert relevant ground(s)].

5.7.5 TALKING POINTS: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

TALKING POINTS #1- Right to Family Life

- U.S. ratified the ICCPR.
- Moreover, the U.S. Supreme Court has recognized that the laws of the U.S. must be construed to be consistent with international law whenever possible.
- Under the ICCPR, in removal proceedings the government's interest must be balanced with the reasonableness of impairing the family rights of the respondent and his/her family members.
- The court can construe U.S. law to comply with ICCPR by interpreting the eligibility requirements for cancellation of removal or waivers of admissibility to allow for consideration of the family rights of the respondent and his/her family.

TALKING POINTS #2- Right to Establish a Family

- Respondent's removal would impair his/her and family's rights under international law.
- ICCPR and American Declaration ratified by U.S.
- ICCPR and American Declaration prohibit arbitrary interference with family life and require states to protect the right to establish a family.
- Right to establish family includes right of family members to live together.
- Severe infringement of respondent's and family's rights caused by separating the family is disproportionate to the government's interest in respondent's removal.

TALKING POINTS #3- Right to non-discrimination

- The principle of non-discrimination is a key element of the international human rights framework with the status of binding law on all nations.
- The non-discrimination principle underlies all other rights guaranteed by international law.
- CERD and ICCPR ratified by U.S.
- CERD and ICCPR both prohibit racial discrimination; ICCPR also prohibits discrimination based on "color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
- International norms expressly prohibit discrimination between citizens and migrants and discrimination in enforcement of immigration laws.
- No government may ever derogate from the non-discrimination principle under international law.
- National security concerns, including the threat of terrorism, are not justifications for discrimination.

5.7.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

- None available yet -

5.7.7 SAMPLE BRIEFS & PETITIONS: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

Beharry v. Ashcroft, Brief of Petitioner-Appellee

***Beharry v. Ashcroft*,** Amicus Brief in Support of Petitioner-Appellee

5.7.8 OTHER RESOURCES: *IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES*

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.8 IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES

The Immigration: Trafficking and Domestic Violence section of the Handbook was written by Lynsay Gott.[^]

5.8.1 INTRODUCTION: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Human trafficking and domestic violence are issues of great concern under international law. Numerous treaties, declarations, and other international materials make clear that States are obligated to end slavery, human trafficking and all forms of violence against women, and to protect those who suffer from these abuses.[200]

For immigrant victims of trafficking or domestic violence, the most important protection may be relief from removal. Removing a trafficked person who faces retaliation from traffickers in her country of origin, or other forms of harm as a result of having been trafficked, can violate many human rights, including the right to life, the right to be free from slavery,[201] the right to protection against persecution and torture,[202] as well as specific international law provisions regarding the protection of trafficked persons.[203] Removing a victim of domestic violence can also implicate many human rights, including the right to life,[204] the right to freedom from gender-based discrimination[205] and the right to protection against persecution[206] and torture.[207]

International law provisions regarding discrimination and violence against women, slavery and trafficking can be useful in defining the United States' responsibility to immigrant victims of these forms of harm. In certain cases, these provisions may intersect with international refugee law and strengthen claims for asylum or protection under the Convention Against Torture. This section of the Local Human Rights Lawyering Project Handbook will provide legal aid attorneys with model written and oral arguments with statistics and resources for relevant data, arguments to use in litigation, a list of relevant international and U.S. law, and case studies.

[^] Lynsay Gott is an Associate Attorney with WMR Immigration Law Group. Ms. Gott received her J.D. from University of Cincinnati College of the Law, and was the recipient of an Equal Justice Works Fellowship upon graduation in 2007. Her fellowship project, carried out at Human Rights USA, involved working to close the loopholes in U.S. law that limited the availability of asylum protections for trafficked persons and mandated the return of some to the countries of origin where they were originally victimized. She remained with Human Rights USA upon completion of the fellowship, eventually becoming the Acting Executive Director, and her work expanded to pursuing civil remedies for survivors of human rights abuses. She joined WMR Immigration Law Group in 2012 and currently helps clients receive humanitarian protection such as asylum, as well as other forms of immigration relief. Ms. Gott is a member of the Maryland and District of Columbia Bars.

[200] *See*, *e.g.*, ICCPR, art. 8; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005; American Convention on Human Rights, art. 6, 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; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953; CEDAW art. 4, Dec. 20, 1993, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993).

[201] *See*, *e.g.*, ICCPR, art. 8; ACHR, art. 6; ECHR art. 4.

[202] ICCPR, art. 7; International Convention Relating to the Status of Refugees [hereinafter "ICRSR"], art. 33, 189 U.N.T.S. 150, *entered into force* April 22, 1954; CAT, arts. 2(1), 3(1); ACHR, art. 5(2); ECHR, art. 3.

[203] Convention Against Transnational Organized Crime, arts. 24(1), 25(1), G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) 2225 U.N.T.S. 209 (Sep. 29, 2003), http://www.unhcr.org/refworld/docid/3b00f55b0.html; Palermo Protocol, arts. 2, 9(1).

[204] ICCPR, art. 6(1); ADHR, art. 1; ACHR, art. 4(1); UDHR, art. 3.

[205] ICCPR, art. 3;ACHR, art. 22(8); UDHR, art. 2; CEDAW, art. 2.

[206] ICRSR, art. 33.

[207] ICCPR, art. 7; CAT, arts. 2(1), 3(1); ACHR, art. 5(2); ECHR, art. 3.

5.8.2 QUICK STATISTICS & RESOURCES FOR DATA: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Here are some quick statistics related to immigration, trafficking and domestic violence issues:

- U.S. government estimates vary regarding the number of people trafficked into the U.S. annually from 14,500 to 50,000.[208]
- Between 2002 and 2010, USCIS has received 2968 applications for T visas; 1862 have been approved.[209]
- In 2009 and 2010, USICS received 18,126 applications for U visas; 10,712 have been approved.[210]
- 59.5% of married immigrant women in the U.S. experience domestic abuse, compared to 49.8% of unmarried immigrant women.[211]
- The U.S. received the highest number of asylum applications of any industrialized country in 2010 at 55,500.[212]
- Of the 55,500 asylum applications received by the U.S. in 2010, only 21,113 were granted.[213]
- Only 35% of the defensive asylum applications filed in 2010 were granted.[214]
- Data shows that domestic violence rates are three times higher among couples with a U.S. citizen husband and immigrant wife than in the general U.S. population.[215]
- A study of asylum seekers in Texas indicated that women's claims were 472% less likely to be granted.[216]

Resources for relevant data related to forms of relief for immigrant victims of trafficking and domestic violence:

- **U.N. Office of the High Commissioner for Refugees, Statistics and Operational Data**
- **U.S. Department of Homeland Security, Yearbook of Immigration Statistics**
- **U.S. Department of Justice, Executive Office for Immigration Review, Statistics and Publications**
- **Congressional Research Service Reports**

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[208] Congressional Research Service, Trafficking in Persons: U.S. Policy and Issues for Congress, 22 (2010), http://www.fas.org/sgp/crs/row/RL34317.pdf.
[209] *Id*. at 27.
[210] *Id*. at 30.
[211] Mary Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications,* 7 GEO. J. ON POVERTY L. AND POL'Y 245 (2000). *See also* Family Violence Prevention Fund, *The Facts on Immigrant Women and Domestic* Violence (2006), http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Immigrant.pdf.
[212] U.N. Office of the High Comm'r for Refugees, Asylum Levels and Trends in Industrialized Countries, 3 (2010), http://www.unhcr.org/4e9beaa19.pdf.
[213] U.S. Department of Homeland Security, Yearbook of Immigration Statistics, Table 16 (2010), http://www.dhs.gov/files/statistics/publications/YrBk10RA.shtm.
[214] U.S. Department of Justice, 2010 Statistical Yearbook, K2 (2010), http://www.dhs.gov/yearbook-immigration-statistics.
[215] Giselle Aguilar Hass et al., Battered Immigrants and U.S. Citizen Spouses, Legal Momentum, at 5 (2006), http://www.legalmomentum.org/assets/pdfs/wwwbatteredimmsanduscspouses.pdf. *See also* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1696 (2007).
[216] Linda Camp Keith & Jennifer S. Holmes, *A Rare Examination of Typically Unobservable Factors in US Asylum Decisions*, 22 J. REFUGEE STUD. 224, 237 (2009).

- **Polaris Project, National Human Trafficking Resource Center, Hotline Statistics**

5.8.3 RELEVANT HUMAN RIGHTS LAW: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Treaty or Declaration	*Article/Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 3 of the ICCPR**: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." International Covenant on Civil and Political Rights, art. 3, 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.
	Article 6(1) of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law." International Covenant on Civil and Political Rights, art. 6(1), 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.
	Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, art. 7, 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.
	Article 8 of the ICCPR: "1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited; 2. No one shall be held in servitude; and 3.(a) No one shall be required to perform forced or compulsory labour." International Covenant on Civil and Political Rights, art. 8, 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.
International Convention Relating to Status of Refugees (ICRSR)	**Article 33(1) of ICRSR**: "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." International Convention Relating to the Status of Refugees, art. 33(1), 189 U.N.T.S. 150, *entered into force* April 22, 1954.
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 2(1) of CAT:** "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), 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.

Treaty or Declaration	*Article/Citation*
	Article 3(1) of CAT: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), 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.
American Declaration on the Rights and Duties of Man (Declaration)	**Article 1 of the Declaration**: "Every human being has the right to life, liberty and the security of his person." American Declaration of the Rights and Duties of Man, art. 1, 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).
	Article 27 of Declaration: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements." American Declaration of the Rights and Duties of Man, art. 27, 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).
Convention Against Transnational Organized Crime (CATOC)	**Article 24(1) of the CATOC:** "Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them." Convention Against Transnational Organized Crime, art. 24(1), Nov. 15, 2000, 2225 U.N.T.S. 209, U.N. Doc. A/45/49 (Vol. I), *ratified by the U.S.* Nov. 3, 2005.
	Article 25(1) of the CATOC: "Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation." Convention Against Transnational Organized Crime, art. 25(1), Nov. 15, 2000, 2225 U.N.T.S. 209, U.N. Doc. A/45/49 (Vol. I), *ratified by the U.S.* Nov. 3, 2005.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)	**Article 2 of the Trafficking Protocol**: "The purposes of this Protocol are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights" Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), art. 2, UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005.

Treaty or Declaration	*Article/Citation*
	Article 8(2) of the Trafficking Protocol: "When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary." Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), art. 8(2), UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005.
	Article 9(1) of the Trafficking Protocol: "States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization." Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), art. 9(1), UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005.

OTHER HUMAN RIGHTS INSTRUMENTS*: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Treaty or Declaration	*Article/Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 10 of the ICESCR**: "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children; (…) and 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." International Covenant on Economic, Social, and Cultural Rights, art. 10, 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 [emphasis added].
International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 2 of CEDAW**: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." Convention on the Elimination of Discrimination Against Women, art. 2, 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/Citation*
International Convention on the Rights of the Child (CRC)	**Article 3 of CRC:** "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990 [emphasis added].
The American Convention on Human Rights (ACHR)	**Article 4(1) of the ACHR:** "Every person has the right to have his life respected. This right shall be protected by law." American Convention on Human Rights, art. 4(1), 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 (1969).
	Article 5(2) of the ACHR: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention on Human Rights, art. 5(2), 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 (1969).
	Article 6 of the ACHR: "1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women; and 2. No one shall be required to perform forced or compulsory labor." American Convention on Human Rights, art. 6, 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 (1969).
	Article 22(7),-(8) of the ACHR: "7. Every person has the right to seek and be granted asylum in a foreign territory…; and 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." American Convention on Human Rights, art. 22(7)-(8), 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 (1969).).
	Article 24 of the ACHR: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." American Convention on Human Rights, art. 24, 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 (1969) [emphasis added].
The Universal Declaration of Human Rights (UDHR)	**Article 2 of the UDHR**: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 3 of the UDHR: "Everyone has the right to life, liberty and security of person." Universal Declaration of Human Rights, art. 3, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Treaty or Declaration	*Article/Citation*
The European Convention on Human Rights (ECHR)	**Article 3 of the ECHR**: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950).
	Article 4 of the ECHR: "1. No one shall be held in slavery or servitude; and 2. No one shall be required to perform forced or compulsory labour." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950).
Declaration on the Elimination of Violence Against Women (DEVAW)	**Preamble of DEVAW**: "Affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms." Declaration on the Elimination of Violence against Women, preamble, Dec. 20, 1993, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993) [emphasis added].
	Preamble of DEVAW: "Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men." Declaration on the Elimination of Violence against Women, preamble, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993) [emphasis added].
	Article 2 of the DEVAW: "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs." Declaration on the Elimination of Violence against Women, art. 2, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993)
	Article 3 of the DEVAW: "Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Declaration on the Elimination of Violence against Women, art. 3, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993).

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

***Mohammed v. Gonzales*,** 400 F.3d 785 (9th Cir. 2005). The court looked to international law and United Nations materials to determine whether the harm the respondent suffered constituted persecution and whether her proposed particular social group was valid.

***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.

CASES BEFORE INTERNATIONAL BODIES: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

***Rantsev v. Cyprus & Russia*,** Case no. 25965/04, [2010] ECHR 22, 51 EHRR 1 (2010). The European Court of Human Rights held that the ECHR's article 4 prohibition on slavery and forced labor has to be considered in light of the international obligations created by the Trafficking Protocol and European Anti-Trafficking Convention. Thus, failure to adequately protect a victim or potential victim of trafficking could place a state in violation of the prohibition against slavery and forced labor.

CASES BEFORE NATIONAL COURTS OR OTHER SUB-REGIONAL BODIES: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

AZ (Trafficked women) Thailand v. Secretary of State for the Home Department, CG [2010] UKUT 118, (Eng. IAC. 2010). The Upper Tribunal of the Immigration and Asylum Chamber in the United Kingdom held that a trafficked person's experiences constituted persecution, and that members of the social group of "young females who have been victims of trafficking for sexual exploitation" were at risk of additional forms of persecution in Thailand.

Joseph v. Canada (Solicitor Gen.), No. IMM-1981-05, 2006 FC 165 (Can. 2006). The court held that gender-based violence can constitute persecution, explaining that the fact that violence against women is universal is irrelevant. The issues in determining whether persecution has occurred are whether the discrimination suffered constitutes a serious human rights violation and whether it resulted from a failure of state protection. The court stressed that "women have an internationally protected right to protection from domestic violence and failure to provide such protection constitutes a form of gender-related discrimination."

VXAJ v. Minister for Immigration & Anor, [2006] FMCA 234 (Austl. 2006). In a case involving a fear of persecution in the form of trafficking, the court accepted that "sex workers in Thailand constituted a particular social group because their occupation is a unifying characteristic that sets them apart in society."

Hoxha & Anor. v. Sec'y of State for the Home Dep't, [2005] UKHL 19, 1 WLR 1063, (Eng. H.L. 2005). The House of Lords held that "women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment. They are certainly capable of constituting a particular social group under the Convention."

***Minister for Immigration v. Khawar*,** [2002] HCA 14, 187 ALR 574 (Austl. 2002). The Australian High Court held that "women in Pakistan" could constitute a particular social group, noting that this conclusion found support in decisions of foreign courts and statements by the U.N. High Commissioner for Refugees. Furthermore, the court held that domestic violence could constitute persecution when coupled with "state tolerance or condemnation of domestic violence, and systematic discriminatory implementation of the law." The court emphasized that the ICCPR and CERD "are obviously important in expressing the concept of women's equality before the law and the unacceptability of the state and its agencies discriminating unjustly against women solely by reason of their sex."

McPherson v. Sec'y Of State For Home Dep't, [2001] EWCA Civ 1955, [2002] INLR 139 (Eng. & Wales 2001). A refugee claim based on domestic violence could not be defeated merely by a showing that the applicant's country had laws in place to address domestic violence. If an applicant can show "that the remedies provided under the law…against domestic violence are unlikely to be an effective deterrent," then her removal to that country would violate the ECHR's article 3 prohibition on torture and other inhuman or degrading treatment.

Li v. Canada (Minister of Citizenship and Immigration), No. IMM-932-00, 2000 CanLII 16776 (Can. 2000). The Canadian high court determined that trafficking could constitute persecution, and that the applicants' fear was well-founded since their families were still in debt to the traffickers.

Islam v. Sec'y of State for the Home Dep't*, & *R v. Immigration Appeal Tribunal,* ex parte *Shah, [1999] UKHL 20, 2 AC 629 (Eng. H.L. 1999). The House of Lords held that women can constitute a particular social group under the Refugee Convention in societies which severely discriminate against women. This decision was "simply a logical application" of the reasoning put forward by the U.S. Board of Immigration Appeals. Furthermore, while domestic violence would not constitute persecution in every country, it rose to the level of persecution in Pakistan since "the State was unwilling or unable to offer [domestic violence victims] any protection."

X (Re), CRDD T98-06186, 1999 CanLII 14662 (Can. 1999) (Bousfield, Milliner (dissenting)). The Canadian Immigration and Refugee Board held that persecution could occur on account of membership in the particular social group of "women and/or former sex trade workers," the court explained that "[t]he fact that this claimant is a woman *is* a major cause of her predicament; not the only cause, but a major one."

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N.H.C.R., U.N. Doc. HR/Pub/10/2, at 175 (2010). This analysis of both general principles of international law and the specific rules that relate directly to trafficking was published by the U.N. High Commissioner for Refugees.

Annual Reports of the Special Rapporteur on trafficking in persons, especially women and children, (2005-2011). These reports provide an overview of the activities of the Special Rapporteur on Trafficking and also analysis of the rights and recommendations for trafficked persons.

Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N.H.C.R., U.N. Doc. HCR/GIP/02/01 (2002). These guidelines were issued by the U.N. High Commissioner for Refugees to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

Council Framework Decision on Combating Trafficking in Human Beings, Official Journal of the European Communities, European Union, No. L 203/1, ¶ 3 (2002). "This framework aims to approximate the laws and regulations of European Union (EU) countries in the field of police and judicial cooperation in criminal matters relating to the fight against trafficking in human beings. It also aims to introduce common framework provisions at European level in order to address issues such as criminalisation, penalties and other sanctions, aggravating circumstances, jurisdiction and extradition."

Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. Doc. E/CN.4/1999/68 (1999). This report by the Special Rapporteur on violence against women examines policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women.

General Recommendation 19, Violence against women, U.N. Committee on the Elimination of Discrimination against Women, U.N. Doc. A/47/38 (1992).

5.8.4 SAMPLE ARGUMENTS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not to rely these arguments alone.

SAMPLE ARGUMENT 1 - Domestic Violence and Asylum

DOMESTIC VIOLENCE CAN BE GROUNDS FOR ASYLUM UNDER INTERNATIONAL LAW.

Domestic violence can constitute persecution under international law. International norms "prohibit violence against women in the family." Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. Doc. E/CN.4/1999/68 (1999), http://daccess-ods.un.org/TMP/9911468.62506866.html. Violence against women, including domestic violence, is a serious human rights violation that serves to further impair women's enjoyment of their other human rights. General Recommendation 19, Violence against women, U.N. Committee on the Elimination of Discrimination against Women, U.N. Doc. A/47/38 at 1, ¶ 1 (1992), http://www.bayefsky.com/general/a_47_38_1992.pdf.

States are required under international law to prevent gender-based discrimination. *See* International Covenant on Civil and Political Rights, arts. 3, 26, 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; Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); International Covenant on Economic, Social, and Cultural Rights, art. 3, 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; Declaration on the Elimination of Violence against Women, art. 3, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993). Implicit in this duty is an obligation to prevent gender-based violence, which is fueled by systemic discrimination. *See, e.g.*, General Recommendation 19, CEDAW, ¶ 24(t); Report of the Special Rapporteur on violence against women, its causes and consequences, ¶¶ 26, 40.

The jurisprudence of fellow signatories to the Refugee Convention is illustrative in determining whether a U.S. asylum seeker meets the requirements of the Convention. *See Air France v. Saks*, 470 U.S. 392, 404 (1985) (finding the "opinions of our sister signatories to be entitled to considerable weight"). Courts around the world have held that when a state systematically fails in its obligation to protect women from domestic violence, a woman's experience of domestic violence in that state may accurately be described as persecution under the Refugee Convention. *See, e.g.*, Joseph v. Canada (Solicitor Gen.), No. IMM-1981-05, 2006 FC 165 (Can. 2006); *Minister for Immigration v. Khawar*, [2002] HCA 14, 187 ALR 574 (Austl. 2002); *Islam v. Sec'y of State for the Home Dep't, & R v. Immigration Appeal Tribunal, ex parte Shah*, [1999] UKHL 20, 2 AC 629 (Eng. 1999). *See also* Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N.H.C.R., U.N. Doc. HCR/GIP/02/01, ¶ 9 (2002), http://www.unhcr.org/refworld/docid/3d36f1c64.html.

Furthermore, domestic violence can occur on account of membership in a particular social group. Domestic violence often occurs at least in part because the abuser believes he has a right or responsibility to control or punish his spouse or children; the spouse or child's inferior status is a partial motivation for the abuse. Report of the Special Rapporteur on violence against women, its causes and consequences, ¶ 26. *See also* Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, U.N. H.R.C., U.N. Doc. A/HRC/14/L.9/Rev.1 (2010), http://www.unhcr.org/refworld/docid/4c2b155f2.html ("Recognizing that power imbalances and structural inequality between men and women are among the root causes of violence against women"); DEVAW, preamble ("Recognizing that violence against women is a manifestation of historically unequal power relations between men and women").

Courts in other signatory countries have also recognized social groups defined, at least in part, by female gender, often citing the inferior status held by women in the country in question. *See, e.g.*, *Khawar*, at ¶¶ 32-33 ("women in Pakistan" can constitute a valid social group and the potentially large size of that group is

irrelevant); *Islam v. Sec'y of State for the Home Dep't, & R v. Immigration Appeal Tribunal, ex parte Shah*; *X (Re),* CRDD T98-06186, 1999 CanLII 14662 (Can. 1999) (Bousfield, Milliner (dissenting)) ("The fact that this claimant is a woman is a major cause of her predicament; not the only cause, but a major one"). *See also* Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶¶ 6, 7, 12, 15.
Given [insert the important facts of this case], domestic violence rises to the level of persecution in [insert country] under international law, and the violence the Respondent suffered occurred on account of her social group membership.

SAMPLE ARGUMENT 2 - Trafficking and Asylum

HUMAN TRAFFICKING CAN BE GROUNDS FOR ASYLUM UNDER INTERNATIONAL LAW.

Human trafficking is a severe form of exploitation that "represents the denial of virtually all human rights: the right to liberty and integrity and security of the person; the right to freedom from torture and other cruel, inhuman or degrading treatment; the right to freedom of movement; the right to home and family; the right to the highest attainable standard of health; the right to education." Report of the Special Rapporteur on trafficking in persons, especially women and children, U.N. Doc. E/CN.4/2005/71, ¶ 9 (2005), http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx. *See also* Council Framework Decision on Combating Trafficking in Human Beings, Preamble, Official Journal of the European Communities, European Union, No. L 203/1, ¶ 3 (2002), http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/l33137_en.htm.

The United Nations High Commissioner for Refugees has stated that trafficking involves numerous forms of harm which can constitute persecution. Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, U.N.H.C.R., U.N. Doc. HCR/GIP/06/07, ¶ 15, (2006), http://www.unhcr.org/refworld/docid/443679fa4.html. Trafficked persons may also face additional forms of persecution as a result of the trafficking experience. *Id*. at ¶¶ 18-19. Additionally, UNHCR's guidelines explain that trafficking can occur on account of social group membership, since traffickers typically target people based on specific characteristics, such as gender, ethnicity, or social status. *Id*. at ¶¶ 32, 38. A social group could also be defined as "former victims of trafficking" for asylum seekers who fear additional forms of persecution as a result of having been trafficked. *Id*. at ¶ 39.

The jurisprudence of fellow signatories to the Refugee Convention is also illustrative in determining whether a U.S. asylum seeker meets the requirements of the Convention. *See* Air France v. Saks, 470 U.S. 392, 404 (1985) (finding the "opinions of our sister signatories to be entitled to considerable weight"). Courts around the world have recognized that survivors of trafficking may be eligible for asylum under the Refugee Convention. *See, e.g.*, *VXAJ v. Minister for Immigration & Anor.*, [2006] FMCA 234 ¶¶ 25, 26 (Austl. 2006) (social group defined as "sex workers in Thailand"); *Li v. Canada (Minister of Citizenship and Immigration),* IMM-932-00, 2000 CanLII 16776, ¶¶ 23, 26 (Can. 2000) (noting that trafficking can constitute persecution); *AZ (Trafficked women) Thailand CG, UK Immigration and Asylum Chamber*, [2010] UKUT 118, ¶¶ 140-42, 146-54 (Eng. 2010) (holding that the social group of "young females who have been victims of trafficking for sexual exploitation" were at risk of additional forms of persecution in Thailand).

Given [insert the important facts of this case], Respondent's past experiences and feared future harm constitute persecution under international law, and this persecution occurred or will occur on account of her social group membership.

SAMPLE ARGUMENT 3 - Duty to Protect Trafficked Persons

UNDER INTERNATIONAL LAW, THE U.S. MUST PROVIDE RELIEF FROM REMOVAL TO TRAFFICKED PERSONS WHO FACE RETALIATION OR RE-TRAFFICKING IN THEIR COUNTRY OF ORIGIN.

Under international law, states have a duty to provide protection from retaliation for victims of transnational organized crime, as well as witnesses to such crimes who provide testimony to law enforcement. Convention Against Transnational Organized Crime, arts. 1, 24(1), Nov. 15, 2000, 2225 U.N.T.S. 209, U.N. Doc. A/45/49 (Vol. I), *ratified by the U.S.* Nov. 3, 2005.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) expressly applies the provisions of the CATOC to the crime of human trafficking, and calls on states to protect survivors of trafficking from re-victimization. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, arts. 1, 9(1), UN Doc. A/55/383, amended by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *ratified by the U.S.* Nov. 3, 2005. The Trafficking Protocol also requires that states take "due regard for [a person's] safety" when repatriating trafficked persons, adding that repatriation should be voluntary. *Id.* at art. 8(2).

Survivors of trafficking often have legitimate fears of violent retaliation or other harm at the hands of their traffickers if repatriated. *See* Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N.H.C.R., U.N. Doc. HR/Pub/10/2, 175 (2010), http://www.unhcr.org/refworld/docid/4d2eb7cf2.html. This is especially true for those who cooperate with law enforcement efforts. According to the UNHCHR, individuals who cooperate with law enforcement are often, as a result, in greater danger than they faced while in the original trafficking situation. *Id*. at 143-44. Thus, states have an even greater duty to protect victims who participate in the criminal justice process than to trafficked persons generally. *Id*. at 153. *See also* Report of the Special Rapporteur on trafficking in persons, especially women and children, U.N. Doc. A/64/290, ¶ 46 (2009), www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx.

The United Nations Office on Drugs and Crime ("UNODC"), the U.N. agency charged with overseeing states' compliance with the CATOC, explains that states parties to the Trafficking Protocol must consider protection and assistance needs "in all dealings with actual and potential victims of trafficking." UNODC, Toolkit to Combat Trafficking in Persons 349 (2008), http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf. Failing to effectively provide for victim protection can undermine a state's anti-trafficking efforts by helping to perpetuate the trafficking cycle. *Id*. at 325. *See also Rantsev v. Cyprus & Russia*, Case no. 25965/04, [2010] ECHR 22, 51 EHRR 1 (2010), http://bit.ly/zpnkD3. The UNODC also emphasizes that articles 24 and 25 of the CATOC are mandatory provisions, and that the Trafficking Protocol broadens the CATOC's protection requirements by obliging states to protect victims from re-trafficking or other re-victimization. UNODC, Legislative Guides for the implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto 167, 285, 297 (2004), http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf. *See also* Report of the Working Group on Contemporary Forms of Slavery on its twenty-ninth session, U.N. Doc. E/CN.4/Sub.2/2004/36, ¶ 29(a) (2004) ("Calls upon all states to ensure…No victim of trafficking is removed from the host country if there is a reasonable likelihood that she will be re-trafficked or subjected to other forms of serious harm."). Even after a criminal investigation or trial has concluded, states may still have a duty to protect victims from "from reprisal attacks by traffickers and their allies." Report of the Special Rapporteur on trafficking in persons, especially women and children, at ¶ 46. *See also* Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, at 156.

U.S. law provides numerous avenues for upholding the obligation to protect trafficked migrants: the T visa, the U visa, asylum and withholding of removal. The latter two forms of relief are mandatory for individuals who

meet the eligibility requirements, in recognition of the international obligation of nonrefoulement under the Refugee Convention and the Convention Against Torture (CAT). *See* International Convention Relating to the Status of Refugees, art. 33, 189 U.N.T.S. 150, *entered into force* April 22, 1954; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), 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.

Trafficked persons who can show it is more likely than not they will face retaliation or re-trafficking if removed must be granted protection in compliance with the CATOC, the Refugee Convention, and the CAT. Those who can show a likelihood of such harm, even if not enough to meet the "more likely than not" standard, still trigger the U.S.'s obligations under the CATOC and potentially the Refugee Convention. Adjudicators must consider trafficked persons' claims for T visas, U visas, asylum or withholding of removal in light of the international obligation to protect survivors of trafficking who face further harm in their home country.

In light of [insert important facts of case], the United States has a duty under international law to protect the Respondent/Petitioner; the United States can comply with this obligation by granting Respondent/Petitioner's claim/petition for [insert form of relief].

5.8.5 TALKING POINTS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

TALKING POINTS #1- Trafficking, Domestic Violence, and Asylum

- The Supreme Court has stated that treaty interpretations of other signatory nations should be given considerable weight by U.S. courts interpreting that treaty.
- Courts in numerous states parties to the Refugee Convention have held that [trafficking/domestic violence] can rise to the level of persecution under the Convention.
- These courts have also held that [trafficking/domestic violence] can occur on account of social group membership.
- In societies with severely unequal balances of power between men and women, women are often regarded as an inferior class unworthy of protection from violence.
- Under international norms, violence against women occurring in such societies can constitute persecution on account of social group membership.

TALKING POINTS #2- Protection from Domestic Violence

- International law requires governments to protect women from discrimination and ensure men and women's equal enjoyment of their human rights.
- The prohibition on gender-based discrimination found in the ICCPR implicitly requires states parties to prevent violence against women.
- Severe societal discrimination fuels violence against women, and a state's failure to adequately protect women from gender-based violence is a violation of the right to freedom from gender-based discrimination.
- International law norms are broader than the ICCPR's prohibition on gender-based discrimination and expressly require states to prevent gender-based violence and protect victims of such violence.
- Under international law, domestic violence is a form of violence against women.

- A state's systematic failure to protect women from domestic violence is a violation of international law and can be considered persecution.

TALKING POINTS #3- Protection from Trafficking

- At international law, states are obligated to protect trafficked persons and witnesses to trafficking crimes from retaliation or further harm at the hands of traffickers
- The Trafficking Protocol specifically states that the provisions of the CATOC apply to transnational trafficking crimes
- U.S. ratified CATOC and Trafficking Protocol and took significant role in drafting of Protocol
- Retaliation and re-trafficking are common occurrences for escaped or rescued victims.
- Cooperation with law enforcement can significantly enhance the danger faced by victim-witnesses, thus states have a heightened duty to protect victims who cooperate with law enforcement, including after the conclusion of the criminal justice process.
- Failure to protect victims and witnesses undermines a state's entire anti-trafficking scheme as victims get absorbed back into the cycle.
- The respondent is not claiming that the adjudicator must create a new form of relief under CATOC; U.S. law already has provisions that render it compliant and provide avenues for upholding obligations to trafficked persons under international law
- If an individual can show their risk of further harm is more likely than not, he/she must be granted some form of withholding or deferral of removal, as required by multiple treaties and the non-derogable principle of nonrefoulement.
- Individuals who can show a lesser likelihood of harm may be eligible for asylum (or a U visa or T visa); the CATOC and Protocol obligations heighten the U.S.'s responsibility to thoroughly analyze the individual's claim for eligibility for relief.

5.8.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

HUMAN RIGHTS USA'S VICTORY IN A FORCED MARRIAGE/DOMESTIC VIOLENCE-BASED ASYLUM CASE

Human Right's USA brought an affirmative asylum claim on behalf of a Cameroonian woman who fled a forced marriage after enduring two decades of brutal domestic violence. The petitioner had been sold in marriage by her father as an adolescent to a much older man. The man raped and beat her repeatedly, psychologically abused her, and forbade her to continue attending school or to have a job. On behalf of the petitioner, attorneys at Human Rights USA filed an asylum petition and a memorandum of law including international human rights arguments discussing the right to choose one's spouse, the right to be free from slavery, the right to be free from domestic violence, and categorizing this violence as persecution and torture under international law. In November 2008, the Arlington Asylum Office granted the petition for asylum.

JACKSONVILLE AREA LEGAL AID USES INTERNATIONAL LAW IN A TRAFFICKING-BASED ASYLUM CASE.

Jacksonville Area Legal Aid filed this asylum and withholding of removal case in Immigration Court on behalf of a survivor of trafficking who had testified against his traffickers in criminal court. The respondent had been unable to receive a T visa, and challenged his deportation based on his fear of being persecuted or tortured by members of the trafficking ring if he were returned to his country of origin. A staff attorney at Jacksonville Area Legal Aid filed the respondent's asylum petition and a legal brief arguing that the Convention Against Transnational Organized Crime (CATOC) prohibited the removal of a witness in a criminal prosecution against an organized trafficking ring who faced retaliation in his home country as a result of his testimony. In July 2011, the Immigration Judge (IJ) granted the withholding of removal claim on other grounds without considering the CATOC argument. The Department of Homeland Security appealed the grant, and the attorney cross-appealed for the failure to consider the CATOC argument. The Board of Immigration Appeals remanded the case to the IJ for reconsideration, and the attorney renewed her prior arguments, supported by an amicus brief filed by Americans for Immigrant Justice and Human Rights USA. The amicus brief elaborated on the CATOC argument, emphasizing the United States' international obligation to protect trafficked persons and witnesses in organized crime prosecutions, and explaining the interplay between these obligations, the international prohibition against returning an individual to a situation of persecution or torture, and domestic U.S. law. The IJ denied the claim in January 2012.

5.8.7 SAMPLE BRIEFS & PETITIONS: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Matter of P-M-, Arlington Asylum Office, (Nov. 18, 2008) – Brief in Support of Petitioner

Matter of J-P-L-, Orlando Immigration Court, (Jan. 23, 2012) – Amicus Brief in Support of Respondent

5.8.8 OTHER RESOURCES: *IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES*

Human Rights & Domestic Violence: An Advocacy Manual, Columbia Law School Human Rights Clinic and Sexuality & Gender Law Clinic *(2010)*.

Toolkit to Combat Trafficking in Persons, U.N. Office on Drugs and Crime (2008).

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.9 HIV/AIDS

The HIV/AIDS section of the Handbook was written by Lauren E. Bartlett.[^]

5.9.1 INTRODUCTION: *HIV/AIDS*.

The need to protect and advance the human rights of all persons in response to the international HIV/AIDS crisis is recognized at the international level and by more than 186 countries throughout the world.[217] Human rights violations fuel the epidemic, increasing vulnerability to infection. Human rights violations also follow infection and people living with HIV and AIDS can be subjected to discrimination, ill-treatment, and even torture.[218]

The human rights relevant to HIV/AIDS-law are broad and include the rights of persons living with HIV/AIDS, such as the right to life, freedom from discrimination, privacy rights, and the right to healthcare, the right to an adequate standard of living, and the right to housing. Also relevant here are the rights to state protection for persons at risk of contracting HIV/AIDS.

5.9.2 QUICK STATISTICS & RESOURCES FOR DATA: *HIV/AIDS*

Some statistics which can be used connect the HIV/AIDS-law movement in the U.S. to the international crisis:

- Over one million people in the U.S. are living with HIV.[219]
    - One in five (20%) are unaware of their infection.[220]

- HIV disproportionately affects persons with less access to prevention and treatment services, which often leads to poorer health outcomes.[221]
    - Blacks represent 14% of the U.S. population, but account for 46% of people living with HIV as of 2008.[222]
    - Hispanics/Latinos make up 16% of the U.S. population, but account for 17% of people living with HIV as of 2008.[223]

- In the U.S., 16 states require some form of disclosure of HIV/AIDS status by public officials or health care providers.[224]

- HIV has claimed over 25 million lives around the world in the past three decades.[225]

[^] Lauren E. Bartlett is director of the Center's Local Human Rights Lawyering Project. From 2008-2011, Ms. Bartlett worked as a legal services attorney at Southeast Louisiana Legal Services in the foreclosure prevention unit. She taught a housing law and policy course at Loyola University New Orleans College of Law and served on the board of the ACLU of Louisiana. In 2007, she co-founded the Louisiana Justice Institute, a nonprofit civil rights legal advocacy organization. During law school, Lauren focused on gaining a strong background in international law and human rights. She was an articles editor for the Human Rights Brief, participated in a research program in Geneva, Switzerland for the U.N. Committee Against Torture, and was an Executive Board Member of the student group Action for Human Rights. She also served as a summer associate with the group Advocates for Environmental Human Rights, based in New Orleans, Louisiana. Before law school, Ms. Bartlett worked with non-profit organizations in California, Nepal, Ghana, Bangladesh and India, alongside advocates fighting for social and environmental justice.

[217] Joint United Nations Programme on HIV/AIDS (UNAIDS), UNAIDS Report on the Global AIDS Epidemic (2012), http://www.unaids.org/__documents/20101123_globalreport_slides_chapter5_em.pdf.

[218] *See e.g.,* Open Society Foundation, http://www.soros.org/reports/human-rights-and-hivaids-now-more-ever.

[219] U.S. Department of Health & Human Services, aids.gov website, http://www.aids.gov/.

[220] *Id*.

[221] *Id*.

[222] *Id*.

[223] I*d.*

[224] Center for HIV Law & Policy, Resources (2009), http://www.hivlawandpolicy.org/resources/view/182.

[225] World Health Organization, Fact sheet N°360 (Nov. 2011), http://www.who.int/mediacentre/factsheets/fs360/en/index.html

- Approximately 34 million people around the world were living with HIV in 2010.[226]

- 97% of people living with HIV reside in low- and middle-income countries.[227]
    - More than 67 percent (22.4 million people) of those infected are in sub-Saharan Africa.[228]
    - In Asia, an estimated 4.7 million people were living with HIV in 2008.[229]
    - In Latin America, there were an estimated 2 million people living with HIV/AIDS in 2008.[230]
    - In Eastern European & Central Asia, there were 1.5 million people living with HIV/AIDS.[231]

5.9.3 RELEVANT HUMAN RIGHTS LAW: *HIV/AIDS*.

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *HIV/AIDS.*

Treaty or Declaration	*Article/Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 6 of the ICCPR**: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, art. 6, 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.
	Article 17 of ICCPR: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 26 of ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.

[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*

Treaty or Declaration	*Article/Citation*
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 16 of CAT**: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, 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. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, 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.
Committee on the Elimination of Racial Discrimination (CERD)	**Article 5 of CERD**: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (c)(iv) The right to marriage . . . (3) Economic, social and cultural rights . . . (iv) The right to public health, medical care, social security and social services[.] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 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.

OTHER HUMAN RIGHTS INSTRUMENTS*: *HIV/AIDS.*

Treaty or Declaration	*Article/Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 2(2) of ICESCR**: "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. International Covenant on economic, Social, and Cultural Rights, art. 2(2), 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.
	Article 9 of ICESCR: "The State Parties to the present Covenant Recognize the right of everyone to social security, including social insurance." International Covenant on economic, Social, and Cultural Rights, art. 9, 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/Citation*
	Article 12 of ICESCR: "(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . . (c) The Prevention, treatment, and control of epidemic, endemic, occupational and other diseases[.]" International Covenant on economic, Social, and Cultural Rights, art. 12, 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 11(1) of CEDAW**: "State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave[.]" Convention on the Elimination of Discrimination Against Women, art. 11(1), 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.
	Article 12 of CEDAW: "(1) State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Convention on the Elimination of Discrimination Against Women, art. 12, 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.
	Article 14(2) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure . . . to such women the right: . . . (b) To have access to adequate health care facilities, including information, counseling and services in family planning; (c) To benefit directly from social security programmes[.]" Convention on the Elimination of Discrimination Against Women, art. 14(2), 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.
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 5 of CRPD**: "(1) State Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 5, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 25 of CRPD: "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services . . . In particular, States Parties shall: . . . (e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance . . . (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 25, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *HIV/AIDS.*

- None available yet -

CASES BEFORE INTERNATIONAL BODIES: *HIV/AIDS.*

D v. United Kingdom, 30240/96 Eur. Ct. H.R. (1997). The applicant, a St. Kitts national diagnosed with AIDS and ordered removed to his home country, applied to the United Kingdom for leave to remain on compassionate grounds arguing that removal would entail the loss of medical treatment he was receiving and thereby shorten his life expectancy. The court held removal would expose him to a real risk of dying under distressing circumstances and thus amounts to inhuman treatment and a violation of Article 3 of the European Convention on Human Rights.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *HIV/AIDS.*

Patricia Asero Ochieng, Maurine Atieno and Joseph Munyi vs Republic, H.C.C.C. Petition No. 409 of 2009 (Kenya, 2009). HIV+ petitioners challenge the Anti-Counterfeit Act of 2008 as interfering with their right to the highest attainable standard of health due to its limiting access to affordable drugs, including generic drugs for the treatment of HIV/AIDS. The Court held the Act violative of the fundamental right to life, human dignity and health in Articles 26(1), 28 and 43(1) of the Kenyan Constitution.

Azanca Alhelí Meza García, Expte. N.° 2945-2003-AA/TC (Peru, 2004). Petitioner, an HIV/AIDS positive individual without the financial means to pay for his medical treatment, submitted an amparo action for HIV/AIDS treatment. The Court accepted the amparo petition and ordered government agencies to provide full treatment in compliance with Article 8 of Law 2662, noting the State's obligation to realize a citizen's right to health regardless of financial resources.

Minister of Health v Treatment Action Campaign (TAC), (2002) 5 SA 721 (CC). Right to healthcare challenge to restrictions on the provision of anti-retroviral drugs to HIV positive pregnant women, allegedly resulting in tens of thousands of unnecessary infections and deaths. The Constitutional Court of South Africa ordered the government to immediately extend availability of the anti-retroviral drugs to hospitals and clinics, provide counselors, and take reasonable measures to extend the testing and counseling facilities throughout the public health sector.

Cruz del Valle Bermúdez y otros vs. MSAS s/amparo, Expediente N° 15.789. Sentencia N° 196 (Ven. 1999). Group of citizens living with HIV/AIDS filed an amparo action to obtain HIV/AIDS treatment drugs, claiming a violation of their rights to life, health, personal freedom and security, non-discrimination and the benefits of science and technology guaranteed in the Venezuelan constitution, the International Covenant on Economic, Social and Cultural Rights, and other international instruments. The Court granted the amparo action, ordered the government to supply the applicants with drug treatments and all required medical tests.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *HIV/AIDS.*

Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, U.N. General Assembly Resolution, U.N. Doc. A/RES/65/277 (2011).

¶39 [R]ecognize that addressing stigma and discrimination against people living with, presumed to be living with or affected by HIV, including their families, is also a critical element in combating the global HIV epidemic, and recognize also the need, as appropriate, to strengthen national policies and legislation to address such stigma and discrimination;

¶42. Recognize the importance of strengthening health systems, in particular primary health care and the need to integrate the HIV response into it, and note that weak health systems, which already face many challenges, including a lack of trained health workers and a lack of retention of skilled health workers, are among the biggest barriers to accessing HIV and AIDS-related services;

¶84. Commit to address, according to national legislation, the vulnerabilities to HIV experienced by migrant and mobile populations and support their access to HIV prevention, treatment, care and support;

Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254 (2011).

¶56. The provision of comprehensive education and information on sexual and reproductive health [including HIV/AIDS] is an essential component of the right to health and to the realization of other rights, such as the right to education and access to information. Criminal and other laws restricting access to comprehensive education and information on sexual and reproductive health are thus incompatible with the full realization of the right to health and should be removed by States.

Report submitted by Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/65/255 (2010).

16. Drug use may have harmful health consequences, but the Special Rapporteur is concerned that the current drug control approach creates more harm than the harms it seeks to prevent. Criminalization of drug use, designed to deter drug use, possession and trafficking has failed. Instead, it has perpetuated risky forms of drug use, while disproportionately punishing people who use drugs. Its ramifications for the health of the wider community, particularly in relation to HIV/AIDS, are no less severe: the 2010 Vienna Declaration notes that the criminalization of illicit drug users is fuelling the HIV epidemic. Millennium Development Goal 6 requires States to commit to halting and beginning to reverse the spread of HIV/AIDS by 2015 (see General Assembly resolution 55/2), but continuing criminalization directly contradicts several multilateral health policies.

¶18. Criminalization of drug use and possession are implicated in violation of several human rights, including the right to health[.]

5.9.4 SAMPLE ARGUMENTS: *HIV/AIDS.*

SAMPLE ARGUMENT 1 - [HIV/AIDS DISCLOSURE LAW] IS INCONSISTENT WITH INTERNATIONAL STANDARDS

"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 125 S. Ct., 1183, 1200 (2005). *See also*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (Noting that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and by the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (*citing* The International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women to provide support for affirmative action under the Constitution); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

The international community agrees that medical information regarding HIV/AIDS status deserves absolute protection, under both the human right to privacy and freedom from discrimination. *See* The International Guidelines on HIV/AIDS and Human Rights, 22(d), U.N. Doc. E/CN.4/1997/150 (1997), http://www.ohchr.org/EN/Issues/HIV/Pages/InternationalGuidelines.aspx. *See also* International Covenant on Civil and Political Rights, art. 17, 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, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Just last year the

United Nations General Assembly, which consists of representatives of all member nations, officially recognized that "addressing stigma and discrimination against people living with, presumed to be living with or affected by HIV, including their families, is also a critical element in combating the global HIV epidemic, and recognize also the need, as appropriate, to strengthen national policies and legislation to address such stigma and discrimination". Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, U.N. General Assembly Resolution, U.N. Doc. A/RES/65/277 (2011), http://www.un.org/depts/dhl/resguide/r65.shtml. The [HIV/AIDS disclosure law] stands in stark contrast to international community agreement, actually allowing disclosure by government officials.

This [HIV/AIDS disclosure law] fails to protect the privacy of persons living with HIV and AIDS in any significant way. Moreover, the law also does not help combat the global HIV epidemic because it discourages treatment and testing by those at risk of HIV, who worry that their HIV-positive status would be disclosed to third parties such as their employer, neighbors or complete strangers. Even more than failing to combat the global HIV epidemic, the [HIV/AIDS disclosure law] actually perpetuates stigma and discrimination against people living with HIV and AIDS.

SAMPLE ARGUMENT 2 - [CRIMINALIZATION OF HIV/AIDS LAW] SHOULD BE CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW

The U.S. Supreme Court has recognized that U.S. law should be interpreted to be consistent with international law whenever possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.") *See Sosa v. Alvarez-Machain* 124 S. Ct. 2739, 2764 (2004) (declaring "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."). S*ee also* U.S. Const. art. VI, cl. 2. (stating "[A]ll Treaties made... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."); U.S. Const. art. 1, § 8, cl. 10 ("The Congress shall have Power... [t]o define and punish... Offences against the Law of Nations."); Restatement (Third) of Foreign Relations, §§ 701, 701 cmt. e ("The United States is bound by the international customary law of human rights.")

The U.S. is a signatory to and has ratified the International Covenant on Civil and Political Rights (ICCPR), which has 167 state parties. State parties to the ICCPR have each agreed to ensure that that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law…the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as…other status [including HIV/AIDS status under health status]." International Covenant on Civil and Political Rights, art. 26, 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. *See* Right to the highest attainable standard of health, General Comment No. 14, U.N. Comm. on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/4 (2000), http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En. Moreover, the international community has agreed to prioritize addressing stigma and discrimination against people living with HIV and AIDS as a critical element in combating the global HIV epidemic. U.N. General Assembly Resolution, U.N. Doc. A/RES/65/277 (2011), http://www.un.org/depts/dhl/resguide/r65.shtml. *See* Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254 (2011), http://daccess-ods.un.org/TMP/6107590.79456329.html ("[c]riminal and other laws restricting access to comprehensive education and information on sexual and reproductive health are thus incompatible with the full realization of the right to health and should be removed by States").

Not only does the [Criminalization of HIV/AIDS law] deter people living with and at risk of HIV and AIDS from seeking information regarding prevention, testing, and treatment, the law is also incompatible with the goal of addressing stigma and discrimination against people living with HIV and AIDS to combat the HIV epidemic. The [Criminalization of HIV/AIDS law] spreads false information about the real risks of transmission of HIV and AIDS

(e.g. there is no real risk of transmitting HIV via biting and spitting) which, in turn, perpetuates fear and causes stigma and discrimination.

5.9.5 SAMPLE TALKING POINTS: *HIV/AIDS.*

TALKING POINTS 1 - HIV/AIDS DISCLOSURE LAW

- International human rights law requires that HIV/AIDS status deserves absolute privacy protection.
- Fails to protect the privacy of persons living with HIV and AIDS.
- Does not help combat the HIV epidemic.
- Perpetuates stigma and discrimination against people living with HIV and AIDS.

TALKING POINTS 2 - CRIMINALIZATION OF HIV/AIDS LAW

- U.S. law should be interpreted as consistent with international law whenever possible.
- U.S. ratified International Convention on Civil and Political Rights.
- Convention shows international agreement to protect persons with HIV and AIDS against discrimination on the basis of their health status.
- This statute fails to protect against discrimination and likely causes stigma.
- Discourages those at risk from seeking information regarding prevention and testing.
- Deters those with HIV and AIDS from seeking treatment.

5.8.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *HIV/AIDS.*

- None available yet -

5.8.7 SAMPLE BRIEFS & PETITIONS: *HIV/AIDS.*

- None available yet -

5.9.8 OTHER RESOURCES: *HIV/AIDS.*

International Guidelines on HIV/AIDS and Human Rights, Nonbinding, drafted to show evidence of international agreement on the rights and state obligations relevant to HIV/AIDS-law.

HIV/AIDS & Human Rights in a Nutshell, Program on International Health and Human Rights, François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health and the International Council of AIDS Service Organizations (ICASO).

Resource Bank, The Center for HIV Law & Policy: The National Legal Resource and Strategy Center for HIV Advocacy, Free database of quality memoranda, research, reports, legal guides, court and agency decisions, pleadings and briefs, policy analyses and recommendations, and other materials on topics of importance to people living with HIV and their advocates.

The White House, The National HIV/AIDS Strategy for the United States, 36 (2010), "To be free of discrimination on the basis of HIV status is both a human and a civil right."

5.10 DISABILITY RIGHTS

The Disability Rights section of the Handbook was written by Lauren E. Bartlett, with assistance from Kevin Cremin.[^]

5.10.1 INTRODUCTION: *DISABILITY RIGHTS*

Disability is a natural part of the human condition[232] and almost everyone will be temporarily or permanently disabled at some point in his or her life.[233] Those who are lucky enough to survive to old age will experience increasing disability.[234]

The definition of "disability" is an evolving concept.[235] The human rights framework views disability as an interaction between persons with impairments and barriers that hinder their full and effective participation in society on an equal basis with others.[236] Rather than thinking of disability as an attribute of a person, who is then treated as an object of charity, provided with medical treatment, and social protection, progress towards full social participation for all persons with disabilities can be made by addressing and removing the barriers which hinder their day to day lives.[237] The human rights framework requires treating persons with disabilities as rights holders, able to claim those rights through active participation in society.[238]

The full scope of human rights, including civil, political, economic, social, and cultural rights, applies to persons with disabilities. Moreover, human rights law provides for special protections for persons with disabilities, and

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Kevin Cremin is the Director of Litigation for Disability and Aging Rights for MFY Legal Services, Inc. (MFY). He supervises MFY's Adult Home Advocacy Project and coordinates MFY's affirmative advocacy and litigation involving the rights of people who are elderly or have disabilities. Mr. Cremin has litigated numerous cases in federal, state, and local courts, including, with co-counsel, DISABILITY ADVOCATES, INC. V. PATERSON, which resulted in a finding that New York State discriminated against approximately 4,300 individuals with disabilities. In 2006, Mr. Cremin received a fellowship to conduct a study to determine whether law and public policy should be reformed to facilitate better community-based services for individuals with psychiatric disabilities in India. He has also worked for the West Side SRO Law Project and Legal Services NYC. After clerking for a federal district court judge and a federal appellate court judge, he was a Trial Attorney for the Civil Rights Division of the United States Department of Justice. Mr. Cremin is a graduate of the University of Chicago and Yale Law School. He has published numerous articles on the rights of individuals with disabilities, and he is an adjunct at Cardozo Law School and Columbia Law School.

[232] First attributed to Robert Burgdorf, disability rights attorney, drafter of first version of the Americans with Disabilities Act.

[233] World Health Organization & Word Bank, World Disability Report 3 (2011), http://whqlibdoc.who.int/publications /2011/9789240685215_eng.pdf [hereinafter World Disability Report].

[234] *Id*.

[235] *Id*.

[236] *See* International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Preamble, 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 [hereinafter CRPD].

[237] *See id*.

[238] *See* Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities (Dec. 5, 2006), http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm; Statement by Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Commentary at a High-Level Dialogue held in association with the Signature Ceremony of the Convention, From Vision to Action: The Road to Implementation of the Convention on the Rights of Persons with Disabilities in New York (Mar. 30, 2007).

especially women and girls with disabilities.[239] Governments have a duty to protect, respect, and fulfill the human rights of persons with disabilities, including the rights to non-discrimination, access to healthcare, workers' rights, education, political participation and to independent living.[240]

5.10.2 QUICK STATISTICS AND RESOURCES FOR DATA: *DISABILITY RIGHTS*

About 1 billion people in the world currently live with some form of disability and among those at least 200 million experience considerable difficulty in functioning.[241] Here are some specific statistics regarding persons with disabilities in the U.S. and globally:

- The prevalence of disabilities worldwide is increasing due to the aging world population and the higher incidence of disability in older people.[242]
- In addition, the global increase in chronic health conditions such as diabetes, cardiovascular disease, cancer and mental health disorders mean that disability will be an even greater concern in coming years.[243]
- The global literacy rate is as low as one per cent for women living with disabilities.[244]
- More than 54 million people, including 27 million women, in the U.S. are living with disabilities.[245]

Here are some resources for relevant disability rights data for the U.S. and worldwide:

- **DISTAT**, The United Nations Disability Statistics Database, Human Functioning and Disability
- **World Health Organization**
- **Centers for Disease Control and Prevention**
- **U.S. Department on Health and Human Services, Office on Disability**

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[239] *See* Universal Declaration of Human Rights, art. 25, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); American Declaration of the Rights and Duties of Man, art. 16, 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); CRPD art. 6, 7.

[240] *Id.*; World Disability Report, *supra* note 233 at 9; Michael Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent* (Constitutionalism and Judicial Review in a Rifted Democracy: Symposium on Jeremy Waldon's Law and Disagreement), 39 Is. L. Rev. 74-75 (2006).

[241] World Disability Report, *supra* note 233; *See also* DISTAT, The United Nations Disability Statistics Database, Human Functioning and Disability, http://unstats.un.org/unsd/demographic/sconcerns/disability/disab2.asp.

[242] World Disability Report, *supra* note 233 at xl.

[243] *Id.*

[244] United Nations, Enable, http://www.un.org/disabilities/default.asp?id=1514#footnote 3 (*citing* Arthur O'Reilly, *Employment barriers for women with disabilities, The Right to Decent Work of Persons with Disabilities*, Skills Working Paper No. 14, Geneva, International Labour Organization (2003)).

[245] U.S. Census Bureau, Americans with Disabilities 3 (2005), http://www.census.gov/prod/2008pubs/p70-117.pdf.

5.10.3 RELEVANT HUMAN RIGHTS LAW: *DISABILITY RIGHTS*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *DISABILITY RIGHTS*

Treaty or Declaration	*Article/ Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 1 of ICCPR**: "(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, art. 1, 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.
	Article 7 of ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights, art. 7, 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.
	Article 16 of ICCPR: "Everyone shall have the right to recognition everywhere as a person before the law." International Covenant on Civil and Political Rights, art. 16, 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.
	Article 17 of ICCPR: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 26 of ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.

Treaty or Declaration	*Article/ Citation*
International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)	**Article 2 of CAT**: "(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, 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.
	Article 16 of CAT: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture…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." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, 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.
International Convention on the Elimination of Racial Discrimination (CERD)	**Article 5 of CERD**: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (c)(iv) The right to marriage . . . (3) Economic, social and cultural rights . . . (iv) The right to public health, medical care, social security and social services[.] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 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.

OTHER HUMAN RIGHTS INSTRUMENTS*: *DISABILITY RIGHTS.*

Treaty or Declaration	*Article/ Citation*
Convention on the Rights of Persons with Disabilities (CRPD)	**Article 4 of CRPD**: "States Parties undertake: 1. … (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes; (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention; (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise; (f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention… (g) To undertake or promote research and development of, and to promote the availability and use of new technologies… (h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities; (i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights…" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 4(1), Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 5 of CRPD: "(1) [A]ll persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 5, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
	Article 6 of CRPD: "(1) States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. (2) States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 6, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 7 of CRPD: "(1) States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. (2) In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. (3) States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 7, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 9 of CRPD: "(1) To enable persons with disabilities to live independently and participate fully in all aspects of life, State Parties shall take appropriate measures to ensure persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 9, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 13 of CRPD: "(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 13, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.

Treaty or Declaration	*Article/Citation*
	Article 14 of CRPD: "(1) States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. (2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 14, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 17 of CRPD: "Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 17, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 25 of CRPD: "[P]ersons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes…" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 25, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
	Article 25 of CRPD: "…(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance… (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 25, Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GOAR, 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.
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 2(2) of ICESCR**: "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. International Covenant on economic, Social, and Cultural Rights, art. 2(2), 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.

Treaty or Declaration	*Article/Citation*
	Article 11 of ICESCR: "(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." International Covenant on economic, Social, and Cultural Rights, art. 11, 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.
	Article 13 of ICESCR: "(1) The States Parties to the present Covenant recognize the right of everyone to education." International Covenant on economic, Social, and Cultural Rights, art. 13, 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 11(1) of CEDAW**: "State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave[.]" Convention on the Elimination of Discrimination Against Women, art. 11(1), 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.
	Article 12 of CEDAW: "(1) State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Convention on the Elimination of Discrimination Against Women, art. 12, 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.
	Article 14(2) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure . . . to such women the right: . . . (b) To have access to adequate health care facilities, including information, counseling and services in family planning; (c) To benefit directly from social security programmes[.]" Convention on the Elimination of Discrimination Against Women, art. 14(2), 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.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *DISABILITY RIGHTS.*

In the Matter of the Guardianship of Dameris, L., 38 Misc.3d 570, 956 N.Y.S.2d 848 (2012), finding that the use of supported decision making rather than a guardian's substituted decision making is consistent with international human rights, citing Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). The Court also notes 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.

CASES BEFORE INTERNATIONAL BODIES: *DISABILITY RIGHTS.*

Mihailovs v Latvia, 35939/10 Eur. Ct. H.R. (2013). Petitioner, a man with a psychosocial disability, was placed under guardianship of his wife, who forcibly institutionalized Petitioner. Petitioner, still institutionalized, brings this case alleging arbitrary detention and forced treatment for more than ten years. The European Court of Human Rights found that Petitioner's detention, as well as lack of proper initial and ongoing medical assessment violated article 5 §1 of the European Convention.

Alajos Kiss v. Hungary, 38832/06 Eur. Ct. H.R. (2010). Petitioner was diagnosed with manic depression in 1991 and placed under partial guardianship in 2005. Under the civil code in Hungary, his partial guardianship denied the Petitioner his right to vote. The European Court of Human Rights found that the indiscriminate bar of voting rights in the Hungarian civil code, without an individualized evaluation, was a violation of Article 2 of Protocol No. 1 of the European Convention.

Glor v. Switzerland, 13444/04 Eur. Ct. H.R. (2009). Petitioner challenged a state tax assessed based on inability to serve in the military because of a disability. The Court found discrimination under Article 14 of the European Convention on Human Rights on the basis of a disability. This is the first case where the Court recognized discrimination based on disability as such and referred to reasonable accommodation for the disability. The Court also mentions the CRPD in its decision.

Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc.7 rev. at 475, para. 54 (1998). Petitioner was charged with robbery and assault and placed in detention. Allegedly, Petitioner showed signs of a mental disorder and was placed in an isolation cell. A guard then attacked Petitioner, both mentally and physical, and was not given medical treatment and instead returned to the isolation cell. More than a week later, Petitioner's condition deteriorated and he was finally transferred to a hospital for care, but died shortly thereafter of malnutrition, hydroelectrolitic imbalance, and heart and lung failure. The Inter-American Court of Human Rights found Ecuador responsible for violation of the rights to life (Article 4), to humane treatment (Article 5(1) (2)), and to judicial protection (Article 25), set forth in the American Convention.

Hamilton v. Jamaica, Comm. No. 616/1995, U.N. Doc. CCPR/C/66/D/616/1995 (Jul. 23, 1999).
Petitioner was convicted of murder and sentenced to execution. After his trial, he was shot by a police officer in his lower spine and was paralyzed from the waist down. Petitioner was given no special accomodations for his disability in prison and even had to pay other inmates to move his waste from his cell (usually prisoners were required to conduct this physical activity themselves). The Human Rights Committee found violations of the Optional Protocol to the ICCPR arts. 10, paras. 1, 9, 3, 14, and para. 3(c) of the ICCPR.

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *DISABILITY RIGHTS.*

O'Donoghue v. Minister for Health & Ors, [1996] 2 I.R. 20 (Ir.). After being denied full-time admission to several state funded pre-school facilities due to their inability to accommodate the severity of his mental disability, Petitioner (mother on behalf of her son) sued the Minister for Health, the Minister for Education, and the Attorney General requiring free primary education. The high court of Ireland followed an earlier Supreme Court definition of education as being "the teaching and training of a child to make the best possible use of his inherent and potential

physical, moral, and mental capacities, a definition in harmony with other definitions established by the United Nations and the European Convention on Human Rights". In addition, the court recognized a violation of Article of the Constitution, which guaranteed free primary education to all, interpreting primary education as principal advice, instruction, and teaching necessary to help each child achieve their "fullest possible social integration and individual development".

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *DISABILITY RIGHTS*.

U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Report to the U.N. Human Rights Council, 23, ¶89, U.N. Doc A/HRC/22/53 (Feb. 1, 2013).

"¶89. The Special Rapporteur calls upon all States to:

(a) Review the anti-torture framework in relation to persons with disabilities in line with the Convention on the Rights of Persons with Disabilities as authoritative guidance regarding their rights in the context of health-care;

(b) Impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short term application. The obligation to end forced psychiatric interventions based solely on grounds of disability is of immediate application and scarce financial resources cannot justify postponement of its implementation;

(c) Replace forced treatment and commitment by services in the community. Such services must meet needs expressed by persons with disabilities and respect the autonomy, choices, dignity and privacy of the person concerned, with an emphasis on alternatives to the medical model of mental health, including peer support, awareness-raising and training of mental health-care and law enforcement personnel and others;

(d) Revise the legal provisions that allow detention on mental health grounds or in mental health facilities, and any coercive interventions or treatments in the mental health setting without the free and informed consent by the person concerned. Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished."

U.N. Committee on the Elimination of Discrimination Against Women, Report on the 30th and 31st Sessions, General Recommendation No. 25: Article 4, Paragraph 1: Temporary Special Measures, 78, ¶12, U.N. Doc. A/59/38 (2004).

"¶12. Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them."

U.N. Committee on Economic, Social and Cultural Rights, Report on the 28th and 29th Sessions, Ireland: Suggestions & Recommendations, 32-34, ¶128, 129, 135, 139, 140, 148, U.N. Doc. E/2003/22 (2002).

"¶128. The Committee regrets that the Disability Bill does not adopt a human rights-based approach, as recommended in its previous concluding observations…

…

¶129. The Committee is concerned about the persistence of discrimination against persons with physical and mental disabilities, especially in the fields of employment, social security benefits, education and health. The Committee is particularly concerned that people with disabilities, including those working in sheltered workshops, do not have the status of employees and therefore do not qualify for the minimum wage arrangements; if, however, they do benefit from minimum wage arrangements, they are liable to lose their rights to free medical care.
...
¶135. The Committee is concerned that a large number of persons with mental disabilities whose state of health would allow them to live in the community are still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings.
...
¶139. The Committee strongly recommends that the State party adopt a human rights-based approach in the Disability Bill. In particular, the Committee recommends that the clause in section 47 of the Disability Bill, which purports to deny people with disabilities the right to judicial redress, be removed.

¶140. The Committee recommends that the State party conduct and complete as soon as possible a thorough review of the sheltered workshops for the disabled and consider adopting measures, legislative or otherwise, allowing people with disabilities to work with full employment status and to retain the right to free medical care.
...
¶148. The Committee reiterates the recommendation it made in 1999 that the State party speed up the process of transferring persons with mental disabilities who are not suffering from serious psychiatric illness and who are still living in psychiatric hospitals, to more appropriate care settings."

U.N. Committee on the Rights of the Child, Report on the 26th Session, General Comment 1: The Aims of Education, on Article 29 (1), 151, ¶10, U.N. Doc. CRC/C/103 (2001).

"¶10. Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter which relates to article 28 of the Convention, there are many ways in which failure to comply with the principles contained in article 29 (1) can have a similar effect...Discrimination against children with disabilities is also pervasive in many formal educational systems and in a great many informal educational settings, including in the home.
Children with HIV/AIDS are also heavily discriminated against in both settings. All such discriminatory practices are in direct contradiction with the requirements in article 29 (1) (a) that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential."

U.N. Committee on Economic, Social and Cultural Rights, Report on the 22nd, 23rd and 24th Sessions, General Comment 14: Article 12: The Right to the Highest Attainable Standard of Health, 128, ¶12(b)(ii), 22, 26, U.N. Doc. E/2001/22 (2000).

"¶12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:
...
(*b*) *Accessibility*...Accessibility has four overlapping dimensions:
...
(ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS...Accessibility further includes adequate access to buildings for persons with disabilities;
...

Children and adolescents

¶22. Article 12, paragraph 2 (*a*), of the Covenant outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children...Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.
...
Persons with disabilities

¶26. The Committee reaffirms paragraph 34 of its General Comment No. 5 (1994) on persons with disabilities, in particular the issue of persons with disabilities and the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities."

U.N. Committee on the Elimination of Discrimination Against Women, Report on the 20th and 21st Sessions, General Recommendation No. 24: Article 2: Women and Health, 3, ¶6, 25, U.N. Doc. A/54/38/Rev.1 (1999).

"¶6. [S]pecial attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as…women with physical or mental disabilities.
…
¶25. Women with disabilities, of all ages, often have difficulty with physical access to health services. Women with mental disabilities are particularly vulnerable, while there is limited understanding, in general, of the broad range of risks to mental health to which women are disproportionately susceptible as a result of gender discrimination, violence, poverty, armed conflict, dislocation and other forms of social deprivation. States parties should take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity."

U.N. Committee on Economic, Social and Cultural Rights, Report on the Tenth and Eleventh Sessions, General Comment No. 5 (1994) Persons with Disabilities, 99 ¶1-38, U.N. Doc. E/1995/22 (1994).

"¶1. The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community…

¶5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated...will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability…"

5.10.4 SAMPLE ARGUMENTS: *DISABILITY RIGHTS*.

SAMPLE ARGUMENT 1 - [STATE/LOCAL LAW REGARDING COURT WEBSITE ACCESSIBILITY FOR PERSONS WITH DISABILITIES] IS INCONSISTENT WITH INTERNATIONAL DISABILITY RIGHTS STANDARDS.

The [State Law/Policy Regarding Court Website Accessibility for Persons with Disabilities] is inconsistent with U.S. Federal law, as explained in detail above, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794d requires Federal Court websites to be accessible for persons with disabilities. Moreover, the [State Law/Policy Regarding Court Website Accessibility for Persons with Disabilities] is inconsistent with international human rights standards.

The U.S. Supreme Court has recognized that U.S. law should be interpreted to be consistent with international law whenever possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.") *See Sosa v. Alvarez-Machain* 124 S. Ct. 2739, 2764 (2004) (declaring "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."). S*ee also* U.S. Const. art. VI, cl. 2. (stating "[A]ll Treaties made... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."); U.S. Const. art. 1, § 8, cl. 10 ("The Congress shall have Power... [t]o define and punish... Offences against the Law of Nations."); Restatement (Third) of Foreign Relations, §§ 701, 701 cmt. e (1987) ("The United States is bound by the international customary law of human rights.")

The International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 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. 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* [hereinafter "CRPD]. Specifically, the CRPD urges governments to "take appropriate measures to ensure persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas." CRPD, art. 9. In addition, the CRPD urges governments to "ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants…" CRPD art. 13. The U.S. is one of 155 countries around the world that have signed the Convention in 2009, and the U.S. Senate attempted to ratify the Convention in 2012. *See* U.S. State Department, Human Rights Website, http://www.humanrights.gov/references/international/; Brian Montopoli, *UN treaty on disabilities falls short in senate*, CBS News, Dec. 4, 2012, http://www.cbsnews.com/8301-250_162-57557077/u.n-treaty-on-disabilities-falls-short-in-senate/ (last visited Feb. 5, 2013).

The information provided on a court website may make the difference between attending or missing a hearing, winning and losing a case, keeping a roof over your head or being homeless, achieving visitation rights for your children, or for crime victims, knowing when the perpetrator of a crime is released from jail. Pro se and self-help centers are located in some court houses, yet do not all have staff who are fluent in American Sign Language or who can provide other accommodations for persons with disabilities. In this day and age with more and more people turning to the internet for basic information such as location, hours, and procedural questions, a court website needs to be accessible to all people, especially persons with disabilities who are often the most vulnerable in our society.

SAMPLE ARGUMENT 2 - INTERNATIONAL NORMS REQUIRE THAT SPECIAL ATTENTION BE PAID TO THE RIGHTS OF WOMEN LIVING WITH DISABILITIES WHEN ISSUING A TEMPORARY RESTRAINING ORDER

"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 125 S. Ct., 1183, 1200 (2005). *See also*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and by the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (*citing* The International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women to provide support for affirmative action under the Constitution); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

International human rights law recognizes that special attention must be paid to persons with disabilities, but especially women with disabilities, who are often among the most vulnerable in society. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 6(1), 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* [hereinafter "CRPD]; U.N. Committee on the Elimination of Discrimination Against Women, Report on the 20th and 21st Sessions, General Recommendation No. 24: Article 2: Women and Health, 3, ¶6, 25, U.N. Doc. A/54/38/Rev.1 (1999), http://www.un.org/womenwatch/daw/cedaw/reports/21report.pdf ("¶6. [S]pecial attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as…women with physical or mental disabilities.")

Moreover, international norms call for governments to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programs. CRPD, art 1(c) (emphasis added). This would include when a court is making an important decision about whether or not to issue a Temporary Restraining Order. In addition, the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment urges governments to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2(1) , 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, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx [hereinafter "CAT"]. The circumstances of abuse in the case herein may or may not amount to torture, and yet the Convention still urges governments "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture…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." *Id*., art. 16. The CRPD goes further and requires judicial measures to prevent persons with disabilities from being subjected to cruel treatment. *See also* CRPD, art. 15(2) ("take all effective…judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment").

For more on the domestic violence-side of the argument, *see* Handbook section 5.1.4 Sample Arguments: *Freedom From Domestic Violence*, Sample Argument 4 – Right to Judicial Remedies.

5.10.5 TALKING POINTS: *DISABILITY RIGHTS.*

TALKING POINTS 1 - [STATE/LOCAL LAW REGARDING COURT WEBSITE ACCESSIBILITY FOR PERSONS WITH DISABILITIES] IS INCONSISTENT WITH INTERNATIONAL DISABILITY RIGHTS STANDARDS

- The law at issue is inconsistent with both federal law and international human rights norms
- The Supreme Court has held that US law should be interpreted to be consistent with international law whenever possible.
- The Convention on the Rights of Persons with Disabilities is an international treaty dedicated to promoting the rights of persons living with disabilities.
- The U.S. is one of 155 countries around the world that have signed the Convention on the Rights of Persons with Disabilities.
- The Convention urges governments to ensure persons with disabilities have equal access to information and communications systems, like court websites.
- The court's website should be accessible to everyone, but especially persons with disabilities who are often the most vulnerable in our society.

TALKING POINTS 2 - INTERNATIONAL NORMS REQUIRE THAT SPECIAL ATTENTION BE PAID TO THE RIGHTS OF WOMEN LIVING WITH DISABILITIES

- U.S. Courts have looked to international human rights law, not as controlling, but as respected confirmation of their own conclusions.
- Similar to looking to other state courts to see what decisions have been made on the same issue.
- International human rights law recognizes that special attention must be paid to persons with disabilities.
- And even greater attention for women with disabilities, who are often among the most vulnerable in society.
- Governments should take into account the protection and promotion of the human rights for women with disabilities in all policies and programs, including when considering whether or not to grant a temporary restraining order.
- Governments should take all effective measures to prevent persons with disabilities from being subjected to torture and/or cruel, inhuman or degrading treatment.

5.10.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *DISABILITY RIGHTS.*

- None available yet -

5.10.7 SAMPLE BRIEFS AND PETITIONS: *DISABILITY RIGHTS.*

Cronhardt v. Dept. of Health Services et al. – Memorandum of Law

5.10.8 OTHER RESOURCES: *DISABILITY RIGHTS.*

International and Comparative Disability Law Web Resources at the Syracuse University College of Law.

Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No.49, Annex, at 188-92, U.N. Doc. A/46/49 (1991).

U.N. Special Rapporteur on Disability of the Commission for Social Development.

Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities, Human Rights Education Series. A training manual for "persons who care about the human rights of persons with disabilities to become effective educators and advocates on human rights and disability, able to share both their passion and their knowledge."

U.S. Human Rights Online Library, provides sample briefs, pleadings and non-litigation advocacy materials on the domestic implementation of human rights law, hosted by Columbia University Human Rights Institute.

5.11 INTERNATIONAL CHILD ABDUCTION

5.11.1 INTRODUCTION: *INTERNATIONAL CHILD ABDUCTION.*

OVERVIEW

International child abduction presents a unique opportunity for legal aid practitioners to step into both private and public international law arenas. Private international law governs matters of private law (family law, rights of contracts, etc.) of an international nature. Over the years, the Hague Conference on Private International Law has developed internationally agreed upon approaches to issues such as jurisdiction of the courts, service of process, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.[246]

Public international law concerns the conduct of sovereign states, and includes a comprehensive system of international conventions, treaties and organizations devoted to the protection of human rights. This portion of the handbook will seek to describe where these two areas intersect in cases related to international child abduction and/or custody and provide some tools for advocates to rely upon when advancing arguments for individual parties involved in these disputes. It is important to note at the outset that the issue of international child abduction sets up a potential conflict between individuals' (parents and children) exercise of their respective human rights.

The members of the Hague Conference on Private International Law addressed the issue of international child abduction in 1980 in response to a growing problem of international custody disputes where one parent removed the children to another country in derogation of the other parent's rights of custody or access to the children with the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter, the "Hague Convention on Child Abduction").[247] The Hague Convention on Child Abduction , has as its primary purpose the prompt return children who have been abducted from their country of habitual residence or wrongfully retained in another country that is not their habitual residence.[248] It also seeks to ensure that the rights of custody under the laws of one country are effectively respected in another.[249] The Hague Child Abduction Convention does not provide substantive rights but rather provides an expeditious method to restore the status quo child custody arrangement prior to the wrongful removal. In ensuring the immediate return of the child, it seeks deter parents from crossing international boundaries in search of a more sympathetic court.[250] As of September 2013, 90 countries, including the U.S., have become parties to the Convention.[251]

In drafting the Convention, the signatories declared as their primary motivation their desire "to protect children internationally from the harmful effects of their wrongful removal or retention."[252] Thus, the Convention sets forth as its premise that the removal itself is harmful to the child. However, in making this assumption, the

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[246] Hague Conference on Private International Law, Overview, http://www.hcch.net/index_en.php?act=text.display&tid=26.
[247] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 1343 U.N.T.S. 89, Dec. 1, 1983, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 [hereinafter Hague Convention on Child Abduction].
[248] Hague Convention on Child Abduction, Preamble.
[249] *Id*.
[250] The Hague Convention on Child Abduction is the primary legal mechanism relied upon internationally to address the issue. However, there are similar analogous regional agreements that either directly or indirectly address the issue. These include the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, E.T.S. No. 105, Jan. 9, 1983, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=105&CM=1&CL=ENG [hereinafter "European Convention Concerning Custody of Children"] and the Inter-American Convention on the International Return of Children, .O.A.S.T.S. 70Nov. 4, 1994, http://www.oas.org/juridico/english/treaties/b-53.html [hereinafter "Inter-American Convention on Return of Children"].
[251] Hague Conference on Private International Law, Status Table, 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, http://www.hcch.net/index_en.php?act=conventions.status&cid=24.
[252] *Id*.

drafters failed to fully consider the circumstances in which a removal of a child may be precisely the opposite, i.e., an important measure to protect the interests of children and/or their caretakers.

THE HAGUE CONVENTION ON CHILD ABDUCTION AND ITS APPLICATION IN THE U.S.

The U.S. Congress has not only ratified the Hague Child Abduction Convention, in 1988 it passed implementing legislation, the International Child Abduction Remedies Act (known as I.C.A.R.A.), 42 U.S.C. § 11601, et. seq. In the U.S. the Convention and ICARA together provide the essential framework for resolving these often highly charged international custody disputes. Pursuant to the Convention and ICARA, a parent seeking return of his or her child who has been 'abducted' by the other parent to the U.S. must file a civil action in the state or federal court located in the state where the child is located.[253]

To prove her case under the Hague, a left behind parent must establish that she had 'custody rights' to the child, was exercising those custody rights, and that the child was 'wrongfully taken' from his country of habitual residence or wrongfully retained in the destination country.[254] According to ICARA, she must carry her burden on all elements by a preponderance of the evidence.[255]

The Convention also provides some limited defenses to return of the child, but in furtherance of the premise that the unilateral removal of a child from his country of habitual residence is harmful, these have generally been interpreted fairly narrowly. Thus, a court may refuse to return a child when it finds that:

(a) Petitioner (left behind parent) was not "actually exercising custody rights at the time of the removal or retention"[256]; or

(b) Petitioner "had consented to or acquiesced in the removal or retention"[257]; or

(c) more than one year has passed from the time of wrongful removal or retention until the date of the filing of the action in court AND the child is now well settled in his new environment[258]; or

(d) the child objects to his return and the court finds that he has reached the age of maturity to take into account his views;[259] or

(e) "there is grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;"[260] or

(f) return "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."[261]

Significantly, ICARA provides that all but two of these defenses must be proved by a preponderance of the evidence.[262] In order to prevail under the defenses set forth in Articles 13b (that return would subject the child to grave risk of physical or psychological harm, etc.) and 20 (that return would violate human rights, etc.), the taking

[253] 42 U.S.C. §11603 (a) and (b).
[254] Hague Child Abduction Convention, art. 3.
[255] 42 U.S.C. §11603 (e)1.
[256] Hague Child Abduction Convention, art. 13.
[257] *Id*.
[258] Hague Child Abduction Convention, art. 12.
[259] Hague Child Abduction Convention, art. 13.
[260] Hague Child Abduction Convention, art. 13b.
[261] Hague Child Abduction Convention, art. 20.
[262] 42 U.S.C. §11603 (e) 2.

parent must sustain the very high burden of clear and convincing evidence.[263] Thus, the two exceptions that arguably are most directly related to human rights carry the highest burden of proof.[264]

The U.S. State Department justified this approach when it provided its legal analysis of the Convention to Congress when the latter was considering the treaty for ratification.[265] Noting in particular that Article 20, the public policy or human rights provision, has "no known precedents in other international agreements to serve as a guide as to its interpretation," and was "intended to be restrictively interpreted and applied and not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed."[266]

Indeed, the U.S. State Department's Legal Analysis of Article 20 has proven to completely undermine the viability of the defense. As noted by Professor Merle Weiner,[267] a leading expert on the Hague Child Abduction Convention, Article 20 was dealt a significant blow when the U.S. State Department informed Congress that "the defense should only apply when the return of a child 'would utterly shock the conscience of the court or offend all notions of due process.' [citation omitted]."[268]

Similarly, the U.S. State Department's Legal Analysis set the standard for the narrow interpretation of Article 13b exception to return that has since been followed fairly consistently by U.S. courts. "Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place him in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk is grave, not merely serious."[269] Moreover, in describing the type of situation that would give rise to a finding that a child's return might be refused because he would be placed in an 'intolerable situation', the Department clarified that the term "was not intended to encompass a return to a home where money is in short supply or where educational or other opportunities are more limited…" The Department then provides an example of an "intolerable situation" as "one in which a custodial parent sexually abuses the child,"

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[263] *Id*.

[264] On the other hand, this is one of the rare provisions in U.S. domestic law that actually mentions human rights.

[265] U.S. Department of State, International Parental Abduction, The Hague Convention on the Civil Aspects of International Child Abudction: Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10494, 10510 (1986), http://travel.state.gov/pdf/Legal_Analysis_of_the_Convention.pdf.

[266] *Id*. *See* Elisa Perez-Vera, Explanatory Report by E. Perez-Vera, Hague Conference on Private International Law, Actes et documents de la Quatorzieme session, vol. III 416 (1980), http://www.haguejudicialresources.org/Hague_Judicial_Resources/Perez-Vera_Report.html (recognized by the Conference as the official history and commentary of the Convention and is a source of background on the meaning of its provisions). *See also*, A.E. Anton, *The Hague Convention on International Child Abduction*, 30 I.C.L.Q. 537, 551-2 (Jul. 1981),(stating that article 20's "acceptance may in part be due to the fact that it states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions" and that the 'fundamental principles of the requested State' make it clear that the reference is not one to international conventions or declarations concerned with the protection of human rights or fundamental freedoms which have been ratified or accepted by the Contracting States. It is rather to the fundamental principles of the laws of the requested state in such matters"). Author's note: This explanation seems convenient for those contracting states desiring to minimize the impact of an international human rights analysis on the issue at hand. However, even Professor Anton acknowledges that if this were the way Article 20 were to be interpreted, it would largely be superfluous since most countries judicial systems would not permit their courts to apply an interpretation that would be contrary to their constitutional principles. And, since under Article 31 of the Vienna Convention on the Law of Treaties a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," it seems at least arguable that the Article 20 defense can be interpreted to include human rights principles as generally understood in the leading human rights treaties along with customary international law. Vienna Convention on the Law of treaties, 1155 U.N.T.S. 331, Jan. 27, 1980.

[267] Any serious discussion of the Hague Child Abduction Convention and human rights must include a review of Professor Weiner's extensive scholarship on this topic, including, *Strengthening Article 20*, 38 U.S.F.L. REV. 701 (2004) and *Using Article 20*, 38 FAM. L. Q. 583 (2004). For other work on the Hague Convention by Professor Weiner, some of which touches upon international human rights, *see International Child Abduction and the Escape from Domestic Violence,* 69 FORDHAM L.R.. 593 (2000); *The Potential and Challenge of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AMER. U. J. OF GENDER, SOC. POL. & L. 747 (2002); *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RTS. L. REV. 275 (2002); *Half-truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, UTAH L. REV. 221 (2008); *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases,* 58 AM. U. L. REV. 335 (2008); and, Uprooting Children in the Name of Equity, 33 FORDHAM INT'L L. J. 409 (2010).

[268] *Strengthening Article 20*, *supra* note 267.

[269] *Id*.

explaining that "[i]f the other parent then removes or retains the child to safeguard it from further victimization, and then the abusive parent then petitions for the child's return under the Convention, the Court may deny the petition."[270]

Perhaps the most conspicuous omissions from the Hague Child Abduction framework, however, are any discussions of the impact of domestic violence on custody disputes.[271] Indeed, the absence of recognition of the role intimate partner violence often plays in removal of children from households and sometimes countries has generated much of the debate about the unintended consequences of the Convention's operation in practice.[272] And, as set forth *infra*, advocates will find that this area proves to be most fertile for advancing clients' interests based on human rights claims and principles.

Thus, it is in this context that the law of international child abduction has developed where it gives a nod to human rights but often fails to incorporate human rights principles in practice. However, as increasing international attention is given to the failure of the Convention to serve the best interests of children and their primary caretakers, this area is ripe for advocacy promoting human rights principles.

PREVENTION OF INTERNATIONAL CHILD ABDUCTION

Since the National Conference of Commissioners on Uniform State Laws created the Uniform Child Abduction Prevention Act (ÚCAPA) in 2006, there has been additional attention paid to preventing international child abduction in the context of child custody disputes. Within a year of UCAPA's approval, six states adopted it. However, the momentum soon slowed as family violence advocates and others began highlighting their concerns with the legislation.[273] Currently 13 states and the District of Columbia have adopted UCAPA or a version of it: Alabama, Colorado, Florida, Kansas, Louisiana, Mississippi, Nebraska, Nevada, New Mexico, South Dakota, Tennessee, Texas and Utah.

Legal Aid Advocates in those states were UCAPA has been adopted in some form have seen the realization of predictions that it would be a double-edged sword for survivors of domestic violence and their children. See sample arguments below.

5.11.2 QUICK STATISTICS & RESOURCES FOR DATA: *INTERNATIONAL CHILD ABDUCTION.*

FAMILY ABDUCTIONS OF CHILDREN IN THE U.S.

Statistics regarding family abductions in the U.S. are hard to find. The U.S. Department of Justice funded the most recent analysis of child abductions, and it was published in 2002.

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[270] *Id*.

[271] In contrast, the Inter-American Convention, entered in force *after* the Hague Child Abduction Convention and apparently modeled thereon, includes a defense that is arguably broader than either Article 13 or 20: "A child's return under this Convention may be refused where it would be manifestly in violation of the fundamental principles of the requested state recognized by universal and regional instruments on human rights or on the right of children." Inter-American Convention on Return of Children, art. 25. The United States has not signed the Inter-American Convention on Return of Children.

[272] *International Child Abduction and the Escape from Domestic Violence*, *supra* note 267, detailing how at the time the Hague Child Abduction Convention was drafted, the common understanding was that most of the abducting parents were fathers who had lost or feared losing custody to the children's mothers. *See also* Sudha Shetty, Jeffery L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, VIOLENCE AGAINST WOMEN, 11, 115 – 138 (2005) (arguing that "as the weight of the emerging social science evidence and U.S. public policy change brings about expanded definitions of a child's best interest, so too must there be an interpretation of the Hague Convention that prevents a battered mother from being compelled to return her children to an abusive father in a country which did not protect her or her children").

[273] Merle Weiner and Darren Mitchell, *The Uniform Parental Abduction Prevention Act: Understanding the Basics*, 13 Synergy 2 (Summer 2009), Newsletter for the National Council of Family and Juvenile Court Judges.

- Over 260,000 child abductions occur each year, and family members perpetrate over 90% of abductions, often as an extension of domestic disputes.[274]

- In 1995, a study found that nearly 49% of parental kidnapping cases involved allegations of domestic violence made by the abducting parent or by the left-behind.[275]

- A 1993 study of child abduction found that approximately half of the parental abductors had been violent toward the other parent during marriage, more than half of the parents in the study were victims of violence, and that almost half of the parents who were contemplating abducting their children were motivated by the perceived need to protect the child from physical, sexual and emotional abuse.[276]

- 27% of women who abduct their children are "nonviolent shared custodians."[277]

- Yet another 1993 study found that at least 34% of abusers threaten to kidnap their children, and 11% actually abduct them.[278]

INTERNATIONAL ABDUCTIONS OF CHILDREN

Statistics on international child abductions are compiled Permanent Bureau of the Hague Conference on Private International Law's statistics database, **INCASTAT.**

- In 2008, during the last statistical analysis of Hague Convention applications, the Permanent Bureau of the Hague Conference on Private International Law found that 69% of Hague Convention applications, the taking persons were mothers, a figure that has stayed virtually constant throughout past surveys at 68% in 2003 and 69% in 1999.[279]

- In 2008, 28% of the taking persons were fathers and the remaining 3% comprised grandparents, institutions or other relatives.[280]

- In 2008, a total of 2,705 children were involved in the 1,961 Hague Convention applications, making an average of 1.38 children per application.[281]

- In 2008, a large majority of applications (69%) involved a single child and there were close to equal numbers of boys and girls with 51% of children being male and 49% female. The average age of a child involved in a return application was 6.4 years, but 6.0 years if taken by a mother and 7.2 years if by a father.[282]

- In 2008, the overall return rate was 46%, lower than the 51% recorded in 2003 and 50% in 1999, and comprised 19% voluntary returns and 27% judicial returns.[283]

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[274] David Finkelhor, Heather Hammer, and Andrea J. Sedlak, *National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice 6 (Oct. 2002), https://www.ncjrs.gov/html/ojjdp/nismart/04/.

[275] Eva J. Klain, Parental Kidnapping, *Domestic Violence and Child Abuse: Changing Legal Responses to Related Violence*, AMERICAN PROSECUTORS RESEARCH INSTITUTE 23 (Mar. 1995).

[276] GEOFFREY L. GREIF AND REBECCA L. HEGAR, WHEN PARENT KIDNAP: THE FAMILIES BEHIND THE HEADLINES 59 (1993).

[277] *Id*.

[278] Marsha B. Liss and Geraldine Butts Stahly, *Domestic Violence and Child Custody*, BATTERING AND FAMILY THERAPY, 175, 183 (1993).

[279] Statistical analysis of applications made in 2008 under the Hague Child Abduction Convention, Parts I-III (National, Regional and Global Reports), http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=24.

[280] *Id*.

[281] *Id*.

[282] *Id*.

[283] *Id*.

- In 2008, the USA received the most incoming return applications (283), while England and Wales received 200, Mexico 168 and Germany 115.[284]

- In 2008, the greatest increase in the number of applications received by a single State was in Mexico where the Central Authority received an extra 141 return applications compared with the 27 recorded in the last survey (a 522% increase).[285]

- A 2006 an NGO report estimated that 70% of Hague Convention applications involve children removed, or retained by their primary caregivers, usually their mothers, but without the permission of, and in breach of the legal rights of, the other parent.[286]

5.11.3 RELEVANT HUMAN RIGHTS LAW: *INTERNATIONAL CHILD ABDUCTION.*

The language from the treaties listed below is merely a sampling. This is not an exhaustive list of treaties or the relevant articles in each treaty that are available. There may be language or another treaty not yet listed that is more relevant to your case at hand. Please be sure to review the full treaty text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *INTERNATIONAL CHILD ABDUCTION.*

Treaty or Declaration	*Article/ Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 3 of the ICCPR**: "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." International Covenant on Civil and Political Rights, art. 3, 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.
	Article 6 of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, art. 6, 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.
	Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, art. 7, 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.
	Article 12 (1), (2) of the ICCPR "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own." International Covenant on Civil and Political Rights, art. 12 (1), (2), 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.

[284] *Id.*
[285] *Id.*
[286] Reunite International Child Abduction Center, Mediation in International Parental Child Abduction: the Reunite Mediation Pilot Scheme 4 (2006), http://www.reunite.org/library.asp?section=reunite+Publications&library_submit=Find.

Treaty or Declaration	*Article/ Citation*
	Article 14 of the ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." International Covenant on Civil and Political Rights, art. 14, 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 [emphasis added].
	Article 17 of the ICCPR: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and 2. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.
	Article 23 of the ICCPR*: "*1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. International Covenant on Civil and Political Rights, art. 23, 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.
	Article 24 of the ICCPR: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. International Covenant on Civil and Political Rights, art. 24, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.

Treaty or Declaration	*Article/ Citation*
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 2 of CERD**: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 2, 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.
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, 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.
	Article 6 of CERD: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 6, 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.
The Charter of the Organization of American States (OAS Charter)	**Article 45 of the OAS Charter**: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms….Adequate provision for all persons to have due legal aid in order to secure their rights." Charter of the Organization of American States, art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.

OTHER HUMAN RIGHTS INSTRUMENTS*: *INTERNATIONAL CHILD ABDUCTION.*

Treaty or Declaration	*Article/ Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 3 of the ICESCR**: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." International Covenant on Economic, Social, and Cultural Rights, art. 3, 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.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
	Article 10 of the ICESCR: "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children; (…) and 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." International Covenant on Economic, Social, and Cultural Rights, art. 10(1), 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 [emphasis added].
	Article 10(3) of the ICESCR: Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law. International Covenant on Economic, Social, and Cultural Rights, art. 10(3), 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.
	Article 13(3) of the ICESCR: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions." International Covenant on Economic, Social, and Cultural Rights, art. 13(3), 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	**Article 5(b) of CEDAW**: "States parties States Parties shall take all appropriate measures… [t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases." Convention on the Elimination of Discrimination Against Women, art. 5(b), 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.
	Article 9(2) of CEDAW: "States Parties shall grant women equal rights with men with respect to the nationality of their children." Convention on the Elimination of Discrimination Against Women, art. 9(2), 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.
	Article 16(1) of CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:…(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount." Convention on the Elimination of Discrimination Against Women, art. 16(1), 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.

Treaty or Declaration	*Article/ Citation*
	Article 16(2) of CEDAW: "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory." Convention on the Elimination of Discrimination Against Women, art. 16(2), 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 Rights of the Child (CRC)	**Article 3 of CRC:** "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990 [emphasis added]. **Article 9(1) of the CRC: "**States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence." Convention on the Rights of the Child, art. 9(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 9(2) of the CRC: "In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in proceedings and make their views known. "Convention on the Rights of the Child, art. 9(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
	Article 10(1) of CRC: "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." Convention on the Rights of the Child, art. 10(1), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.
Declaration on the Elimination of Violence Against Women (DEVAW)	**Article 4 of DEVAW**: "States should pursue by all appropriate means and without delay a policy of eliminating violence against women…" Declaration on the Elimination of Violence against Women, art. 4, Dec. 20, 1993, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (1993).

Treaty or Declaration	*Article/ Citation*
Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)	**Article 3 of the Convention of Belém do Pará**: "Every woman has the right to be free from violence in both the public and private spheres." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 3, June 9, 1994, 33 I.L.M. 1534 (1995).
	Article 5 of the Convention of Belém do Pará: "Every woman is entitled to free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 5, June 9, 1994, 33 I.L.M. 1534 (1995).
	Article 6 of the Convention of Belém do Pará: "The right of every woman to be free from violence includes, among others: a. The right women to be free from all forms of discrimination; and b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 6, June 9, 1994, 33 I.L.M. 1534 (1995).
American Declaration on the Rights and Duties of Man (Declaration)	**Article 5 of the Declaration**: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." American Declaration of the Rights and Duties of Man, art. 5, 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).
	Article 6 of the Declaration: "Every person has the right to establish a family, the basic element of society, and to receive protection therefor." American Declaration of the Rights and Duties of Man, art. 6, 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).
	Article 24 of the Declaration: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." American Declaration of the Rights and Duties of Man, art. 24, 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).
	Article 30 of the Declaration: "It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it." American Declaration of the Rights and Duties of Man, art. 30, 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).

Treaty or Declaration	*Article/ Citation*
The American Convention on Human Rights (ACHR)	**Article 1 of ACHR**: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." American Convention on Human Rights, art. 1, 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.
	Article 7 of the ACHR: "1. Every person has the right to personal liberty and security; and 3. No one shall be subject to arbitrary arrest or imprisonment." American Convention on Human Rights, art. 7, 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 (1969) [emphasis added]. **Article 8 of ACHR**: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." American Convention on Human Rights, art. 8, 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.
	Article 17(1) of the ACHR: "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state*." American Convention on Human Rights, art. 17(1), 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 (1969) [emphasis added].
	Article 22(2) of the ACHR: "*Every person has the right to leave any country freely, including his own*." American Convention on Human Rights, art. 22(2), 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 (1969) [emphasis added]. **Article 24 of the ACHR**: "*All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law*." American Convention on Human Rights, art. 24, 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 (1969) [emphasis added].
The Universal Declaration of Human Rights (UDHR)	**Article 2 of the UDHR**: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 7 of the UDHR: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Universal Declaration of Human Rights, art. 7, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Treaty or Declaration	*Article/ Citation*
	Article 8 of the UDHR: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 9 of the UDHR: "No one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 10 of the UDHR: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 12 of the UDHR: "No one shall be subjected to arbitrary interference with his privacy, family, [or] home…. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights, art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
	Article 16 of the UDHR: "1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family (…); and 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Universal Declaration of Human Rights, art. 16, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [emphasis added].
European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Right or ECHR)	**Article 1 of the ECHR**: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.
	Article 3 of the ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953
	Article 6 of the ECHR: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.

Treaty or Declaration	*Article/ Citation*
	Article 8 of the ECHR: "Everyone has the right to respect for his private and family life, his home and his correspondence……There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953
	Article 14 of the ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950) [emphasis added].
International Convention Relating to Status of Refugees (ICRSR)	**Article 3 of ICRSR**: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." International Convention Relating to the Status of Refugees, art. 3, 189 U.N.T.S. 150, *entered into force* April 22, 1954.
	Article 33(1) of ICRSR: "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." International Convention Relating to the Status of Refugees, art. 33(1), 189 U.N.T.S. 150, *entered into force* April 22, 1954.

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *INTERNATIONAL CHILD ABDUCTION.*

ARTICLE 20 IN U.S. COURTS

Not surprisingly, there is not one reported decision from a U.S. court where a taking parent has prevailed on the basis of an Article 20 "human rights" defense. Taking the State Department's Legal Analysis as their guide, U.S. federal courts have in essence cast the defense aside, rendering it virtually meaningless.[287] Sadly, its moribund status has become self-perpetuating as courts have even based their decisions to not apply it on the fact that it has not been relied on by courts in prior decisions.[288] Others have limited its application by wrongly concluding "Article 20 and Article 13b appear to be redundant. If the return of a child would violate fundamental U.S. principles relating to human rights, it would also involve returning him to an intolerable situation."[289]

***Habrzyk v. Habrzyk*,** 759 F.Supp. 2d 1014 (N.D. IL 2011). Respondent mother invoked an Article 20 defense claiming that her daughter should not be returned because domestic violence is a serious problem in Poland that is often unaddressed. The court granted summary judgment for Petitioning father on this defense, giving three

[287] One commentator notes that Article 20 has "nearly faded without a trace." P.R. BEAUMONT & P.E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 172 (1999). Others have noted that this may be because Article 20 and Article 13b appear to be redundant. If the return of a child would violate fundament principles relating to human rights, it would also involve returning him to an intolerable situation.
[288] *Hazbun Escaf v. Rodriguez*, 200 F.Supp.2d. 603 (E.D. Va. 2002).
[289] *Id*. at 614. (citation omitted).

reasons: 1) the court found that the mother failed to show that the purported prevalence of domestic violence in Poland meetings the "shocks the conscience" standard required to fall under the Article 20 exception; 2) that the child faces the threat of being a victim of domestic violence if she returned to Poland is more properly addressed by the "grave risk" exception; 3) the Convention requires that the fundamental principles of the State *not permit* the return of the child; merely offending principles espoused in Illinois laws is insufficient.

***Aldinger v. Segler*,** 263 F. Supp. 2d 284, 290 (D.P.R. 2003). Court declined to find that a respondent mother has sustained her burden to establish an Article 20 defense when petitioner father sought their children's return to Germany, nothing that "Article 20 . . . is directed to concerns about harms arising from the child's return to a particular country. Article 20 envisioned a limited situation where human rights concerns, most likely defined within the parameters of other international agreements, would prohibit return.") (citing Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 28-9 (1994)).

De Los Rios Carmona v. Melendez, 141 D.P.R. 282 (P.R. 1996)). In overturning the trial court's decision granting return of child from Puerto Rico to Mexico, the Puerto Rico Supreme Court found Respondent had provided sufficient evidence to sustain her burden on both Article 13b and Article 20 defenses. The court noted that the command to apply narrow interpretation to these defenses, should not result in the abdication of judicial discretion in reviewing them. The Court pointed out that the international community had issued resolutions and signed treaties and conventions repudiating domestic violence and had tried to get global solutions to the problem, citing the Declaration on the Elimination of Violence against Women and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

Also, in recent years, there have been several cases where a taking parent has failed to prevent return of children to Mexico based on Article 20.[290]

[290] *Stirzaker v. Beltran,* 2010 U.S. Dist. LEXIS 33692 (D. Idaho 2010) (court rejected argument that Mexican legal system is corrupt and impartial and would fail to protect the interests of U.S. citizen child). *See also Vazquez v. Estrada*, 2011 U.S. Dist. LEXIS 5083, 2011 WL 196164 (N.D. Tex. Jan. 19, 2011) and *Castro v. Martinez*, 872 F. Supp. 2d 546 (W.D. Tex.2012) (courts rejected arguments that prevalence of drug cartel violence in the community to which child would be returned would violate fundamental principles of human rights).

ARTICLE 13B IN U.S. COURTS

As noted above, from the inception of the Convention's adoption, courts have applied a narrow interpretation of Article 13b ("grave risk of harm"), concerned that to do otherwise would cause the exception to consume the Convention's rule of return. The drafters acknowledged the delicate balance of requiring expeditious return with consideration of factors that would make return untenable. However, for the first twenty years of its application, courts around the world applied an extremely narrow interpretation of Article 13b defenses, giving rise to the "notion that the integrity of the Convention as a whole requires that the well-being of individual children in hard cases must be sacrificed for the greater good of maintaining the integrity of the Hague Convention process."[291]

However, thanks in large part to the scholarship of Professors Merle Weiner and Carol Bruch, and others, the human rights issues attendant these cases have been gaining attention in the courts.[292] Below are synopses of some of the leading U.S. cases in which Article 13b defenses were considered. And while it's apparent that since 2000, courts have become increasingly willing to make the connection between intimate partner violence and its impact on children, as can be seen below, courts continue to issue decisions that hastily minimize or even dismiss the issue.

Article 13b in U.S. Courts: Leading Cases Denying Return

***Blondin v. Dubois*,** 238 F.3d 153 (2d Cir. 2001). The 2d Circuit affirmed the district court's denial of a petition to return children to France based on the Article 13(b) affirmative defense of grave risk of harm. The children's mother was regularly abused in front of the children and the father threatened the children, and in at least one instance physically abused his older child. The district court considered, under the umbrella of Article 13(b), whether the children were settled in their new environment and whether the older child, age 8, objected to being returned. The circuit court held that these factors may be considered under an Article 13(b) analysis, as long as they do not form the sole basis of a finding of a grave risk of harm. The district court found, based on the testimony of a psychiatrist presented by the mother, that no undertakings would be sufficient because simply being returned to France would trigger a recurrence of traumatic stress disorder in the children, which would be entirely beyond France's control. The circuit court held that in cases of serious abuse, a court must still examine any options that would allow repatriation of the children, but in the instant case no options are available. The court pointed out that this decision did not imply that a court must refuse to send children back in cases involving abuse and emphasized an absence of testimony contradicting the psychiatrist's conclusions.

Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000). The father petitioned for the return of his children to Ireland after his wife fled to the United States with them. Father had beat mother for the majority of their relationship, and assaulted her in violation of a protection order. In therapy in the U.S., the daughter exhibited fear of her father, both for herself and her mother. Doctors diagnosed her with post-traumatic stress disorder and indicated that return to Ireland would cause a relapse. The district court granted father's petition finding no "immediate, serious threat to the children's safety that cannot be dealt with by the proper Irish authorities". However, the court did require multiple undertakings of the father and mother. The 1st Cir. found that the district court raised the bar too high for the article 13(b) defense and that Mother proved by clear and convincing evidence that the children would face grave risk of physical or psychological harm should they be returned to Ireland. Notwithstanding the abuse of the children themselves, the district court should have considered the effect on the children of witnessing the abuse of their mother and the likelihood that the children would be physically abused in future. In addition, based on the father's past adherence to court orders, the court found that the likelihood that he would abide by the promised undertakings is not great.

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[291] JEREMY D. MORLEY, HAGUE INTERNATIONAL CHILD ABDUCTION CASES: THE FUTURE OF THE GRAVE RISK OF HARM DEFENSE, THE MATRIMONIAL STRATEGIST (2007).

[292] *See* Weiner articles, *supra* note 267. *See also*, Carol S. Bruch, *The Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 28 FAMILY LAW QTRLY 3 (2004); Shetty and Edleson, *supra* note 272.

Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004). The 1st Circuit affirmed the district court's findings that there would be a grave risk of harm to and an intolerable situation for the two daughters of a father who had petitioned for return to Sweden. The district court determined that the younger daughter had been sexually abused by the father. The court also found that no undertakings allow return because being returned at all would be detrimental to their psychological well-being.

Van de Sande v. Van de Sande, 431 F.3d 567 (7th Cir. 2005). The circuit court reversed and remanded a district court's grant of a father's petition to return his children to Belgium after their mother removed them to the United States. The circuit court felt that the extreme physical and psychological abuse inflicted upon the mother in front of her children and the probability that this abuse would one day be visited upon the children constituted a grave risk of harm.. The court also found undertakings to be insufficient since the purpose of undertakings is to return the situation to the status quo, which would be inappropriate in a situation involving abuse.

Elyashiv v. Elyashiv, 353 F.Supp.2d 394 (E.D.N.Y. 2005). The District Court found that the respondent mother had proved by clear and convincing evidence that returning the children to Israel would result in grave psychological trauma to the three children where an expert testified that the two oldest children suffered from PTSD and the oldest daughter had suicidal ideations resulting from the petitioner father's severe physical and verbal abuse of the mother and children. Even though the youngest daughter had never been abused, the Court held that the fact that she was terrified of being separated from her mother was enough of a harm to qualify under the Article 13b defense. The District Court further determined that there were no conditions under which the grave harm would be mitigated if the children were returned to Israel, not the least of which was the fact that the father was unlikely to obey any type of restraining order.

In re Application of Adan, 437 F.3d 381 (3d Cir. 2006). The appellate remanded the case for more specific findings of the facts relevant to the mother's defense of grave risk of harm. The Court of Appeals specifically endorsed the determination in *Walsh* that abuse against a mother may well create grave risk of harm to her child.: "We note that the evidence of Adan's [the father] abuse of Avans [the mother] is relevant to the District Court's determination of whether returning Arianna [the child] to Argentina would expose the child to a grave risk of harm."

Khan v. Fatima, 680 F.3d 781, 784 (7th Cir.2012). Grant of return to the father in Canada by the District Court was reversed and the case was remanded for further findings of fact regarding the history of family violence. "The essential point is that the evidentiary hearing was inadequate. Rule 52(a) was violated; there were no findings of fact on the key issues,", specifically the facts surrounding the Article 13(b) defense. The mother and father both presented conflicting testimony, mother stating that she had been physically abused on many occasions, and the father alleging "physical or mental cruelty" by the mother; however, the hearing lasted only one day, the judge denied a request by the mother to have the child evaluated by a psychologist, and he made no finding of facts with respect to any of these issues. Essentially, the majority warned that the Convention should not be viewed as a mere venue statute, while the dissent vigorously asserted the Convention is exactly that.

Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007). The Circuit Court reversed and remanded the district court's order for return which had been conditioned upon compliance with certain undertakings. The district court had found that the left-behind husband in Mexico was physically and verbally abusive to his wife and children, and the children suffered from some level of post-traumatic stress as a result of such abuse. On remand, the district court was to look at whether or not the undertakings would actually be enforceable and protect the children while awaiting the outcome of the custody case. If there were no undertakings that would ensure the safety of the children, return might not be the appropriate remedy.

Baran v. Beatty, 479 F. Supp. 2d 1257 (S.D. Ala. 2007). The district court denied a father's petition to return his son to Australia based on the mother's assertion that the father, prone to outbursts of uncontrollable rage, had abused her and endangered her son. The court declined to address the possibility of undertakings, saying it was unwilling to become involved in custody matters or to send the child back under conditions that may or may not be followed by Australian courts.

Article 13b in U.S. courts: Sampling of Cases ordering return

Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995). The mother fled to the United States from Mexico claiming that her husband physically, sexually, and verbally abused her and that she feared for the safety of her child. The circuit court felt that these problems were between the parents and were therefore irrelevant to an Article 13(b) inquiry which is meant to determine the effects of return on the child, not on the mother. The Court suggested that that the baby could be returned and be institutionalized during the pendency of the Mexican custody proceedings and thus eradicate a grave risk of harm.

Janakakis-Kostun v. Janankakis, 6 S.W.3d 843 (Ky. Ct. App. 1999). After being presented with evidence of some spousal and child abuse, including the testimony of a child psychologist, the court found this type of evidence not relevant in a 13(b) hearing, pertaining more to custody rather than to the abduction. While the mother claimed that the Greek judicial system was incapable of resolving the issue fairly, the court disagreed.

Dalmasso v. Dalmasso, 269 Kan. 752 (2000). Despite incidents of violence against his wife and a suicide attempt, the court agreed with the father that his children did not face a grave risk of harm by being returned to France after their mother took them to the United States. The court felt that the violence was irregular and directed toward his wife, not his children.

Mendez-Lynch v. Mendez-Lynch, 220 F.Supp.2d 1347 (M.D. Fl. 2002). The father petitioned for the return of his two sons to Argentina after his wife made clear that what she had originally characterized as a vacation was in fact a permanent move to the United States. The mother raised all affirmative defenses, including Article 13(b), none of which the district court found applicable. Despite the mother's assertion that the father physically abused her, after which the court makes note that the children were never abused, in the court's analysis it only addresses the conditions in Argentina as whole and does not address conditions in the home.

***Belay v. Getachew*,** 272 F. Supp.2d 553 (D. Md. 2003). A mother removed her daughter to the United States from Sweden claiming her husband had been verbally and physically abusive to her, though not at all to their daughter. The court ordered the return of the child to Sweden, declining to apply the Article 13(b) defense because no showing was made that Sweden was unable to respond to claims of child abuse, the abuse of the mother will never occur again because the parties are now divorced, and mere witnessing of spousal abuse is not sufficient to apply the defense.

Flynn v. Borders, 472 F.Supp.2d 906 (E.D. Ky. 2007). Drunken behavior, smoking marijuana, slapping, and an otherwise unhappy home life were insufficient to qualify as a grave risk of harm because the court felt it should only consider physical abuse, rather than psychological.

Norinder v. Fuentes, 657 F.3d 526 (7th Cir. 2011). The court cited the concern with comity among nations argues for a narrow interpretation of the Article 13 b 'grave risk of harm' defense, noting that "[b]ecause the court in this sort of case is responsible for determining which country's courts should adjudicate the domestic dispute and not resolving the dispute itself, we have stressed that the risk of harm must truly be grave. The respondent must present clear and convincing evidence of this grave harm because any more lenient standard would create a situation where the exception would swallow the rule."

***Avendano v. Smith*,** 806 F. Supp. 2d 1149 (2011) (memo op.) The District Court granted return of the children to Mexico. "Although Mexico is more dangerous than the United States at this time, intolerable situation was not meant to encompass return to a home where living conditions are less palatable." In addition, while the court credited the respondent mother's testimony that the petitioner father at times drank to excess and committed acts of domestic violence towards her, because the father never directed the acts of violence towards his children, such behavior did not give rise to a grave risk of harm to the children.

Vazquez v. Estrada, No. 3:10-CV-2519-BF, 2011 U.S. Dist. LEXIS 5083 (N.D. Tex. Jan. 19, 2011) (memo op.). Evidence that there was a "surge of violent activity in Monterrey due to drug cartel activity and that the neighborhood where Petitioner lives [was] dangerous," was not sufficient to establish that Monterrey was a "zone of war" that would give rise to an Article 13b "grave risk" defense.

Sanchez v. Sanchez, et. al, 743 F.3d 945 (Fifth Cir. 2014). The district court had ordered return of the children to mother in Mexico despite children's claims of abuse by mother's boyfriend, and fact that children had pending application for political asylum. Court stayed execution of order pending appeal. In the interim, the Immigration Court granted them asylum. The Fifth Circuit remanded holding 1) the children had standing to appeal an order that they be returned to Mexico; 2) the director of a foster care agency that placed the children was a proper defendant in an action seeking the return of the children under ICARA; 3) the failure to name the Office of Refugee Resettlement (ORR) as a defendant was not a meaningful jurisdictional defect; 4) the children were entitled to the appointment of counsel and a guardian ad litem; 5) the District Court did not clearly err in determining that the children would not be subject to psychological harm on return to Mexico; and 6) the District Court was required to consider evidence from a subsequent asylum proceeding on remand.

Sourtegar v. Fair, 720 F.3d 96 (2d Cir. 2013). The Second Circuit affirmed the order to return a four year old boy to Singapore with his father, despite also finding that the father committed spousal abuse against the mother, including "shouting and offensive name-calling," and several incidents of physical abuse in which he "kicked, slapped, grabbed, and hit" her. In deciding that mother had failed to prove an Article 13b defense, the court cited the fact that there was no credible evidence of any harm directed against the child.

Vujicevic v. Vujicevic, 2013 U.S. Dist. LEXIS 82110 (W.D. Wash 2013). Father petitioned to return child to Croatia. Court ordered return despite mother's assertion of an Article 13b defense, based on among other things fact that father was convicted of domestic violence and had directly harmed the child. Court acknowledged that the father engaged in a pattern of physical abuse that plagued the family, and concluded that there was clearly evidence from which one could conclude that the possibility of harm to the child exists. Nevertheless, court concluded that the child "could return to Croatia under circumstances that would minimize the potential of harm, either physical or psychological. Because the mere possibility of harm does not establish an Article 13(b) defense to an action for the return of a child, the Court finds that the grave risk exception does not apply." More disturbing is the court's statement that it was "convinced that [mother] would be in grave danger of physical harm if she were to return to Croatia and attempt to work cooperatively with [father], but that is not the issue here."

Aly v. Aden, 2013 U.S. Dist. LEXIS 19981 (D. MN 2013) Court ordered return of child to Canada despite mother's assertion of Article 13b defense. The court minimized the father's violent propensity stating that his "outbursts of rage" were short-lived, and after becoming physically violent he would immediately become calm and resume normal life activities. Finally, and most importantly, the Court finds that these incidents of violence have not directly impacted [the child]. This violence was not perpetrated against [the child], and only one incident allegedly occurred in [the child's] presence. Accordingly, the Court finds that, although regrettable, the instances of physical abuse perpetrated by [father] against [mother] are insufficient to demonstrate by clear and convincing evidence that [the child] will be subjected to a grave risk of harm."

CASES DECIDED BY THE U.S. SUPREME COURT: INTERNATIONAL CHILD ABDUCTION

***Abbott v. Abbott*,** 560 U.S. 1 (2012). The Supreme Court held that under the Hague Child Abduction Convention, a left behind parent can only seek return of the child to the child's habitual residence if the left behind parent has "rights of custody." If the left behind parent only had "rights of access" or rights of visitation, they can only seek to enforce those visitation rights and not request the child's return. In *Abbott*, the mother had been awarded full care and custody of her son, while father was granted weekend visitation and partial summer possession of the child. A Chilean family court entered a decree with a *ne exeat* order prohibiting either parent from removing the child from Chile. However, after the father went to court to expand his visitation rights, the mother left Chile with her son, returning to her native U.S. The father filed a Petition to return the child under the Hague Abduction Convention. In reversing the Fifth Circuit, the Supreme Court determined that a *ne exeat* right, i.e., the right to veto or prevent the child from leaving the country, was a custody right, and father could proceed with his Petition to Return the Child to Chile. The majority relied other countries' approach to the issue, stating that in interpreting any treaty, the opinions of the United States' sister signatories are entitled to considerable weight. The principle applies with special force with regard to the Hague Convention on Child Abduction, for Congress has directed that uniform international interpretation of the Convention is part of the Convention's framework. 42 U.S.C.S. § 11601(b)(3)(B).

***Chafin v. Chafin*,** 133 S. Ct. 1017 (2013), holding that the return of a child to a foreign country pursuant to an order under the Hague Child Abduction Convention does not render an appeal of that order moot.

Lozano v. Alvarez, 809 F. Supp. 2d 197 (S.D.N.Y., 2011), cert granted, 133 S. Ct. 2851 (2013). Article 12 of the Convention mandates that an abducted child be returned if the left-behind parent's petition for the child's return is filed within one year of the abduction, unless one of the limited exceptions apply. The Court may still order the child's return if the petition is filed after one year, but the taking parent will then have available to him an additional defense—he can show that the child is now well-settled in his new environment and thus should not be returned. However, several Circuit courts have held that the one year period may be equitably tolled if the taking parent is actively concealing the child, thus thwarting the left-behind parent's ability to file the petition within one year. The Supreme Court upheld the 2nd Circuit, holding that the Article 12 well-settled defense is not subject to equitable tolling, and thus, even if a child is effectively concealed for more than a year, the courts cannot toll the one year period, and the taking parent can argue that the child is now well settled in his new environment and thus should not be returned.

CASES BEFORE INTERNATIONAL BODIES: *INTERNATIONAL CHILD ABDUCTION.*

The European Court on Human Rights ("ECHR Court") has been in the spotlight of late for a wave of decisions it has issued interpreting the Hague Child Abduction Convention in light of the European Convention on the Protection of Human rights and Fundamental Freedoms. While the European Court had for a long time applied a very restrictive interpretation of the grave risk of harm defense, it has now opted to give greater emphasis to the positive obligations imposed on Council of Europe Member States arising from the European Convention on Human Rights, particularly Article 8 (right to family life), effectively inserting a best interest inquiry into the analysis of abduction cases along with a consideration of the rights of the abducting parent.[293]

[293] The Cases and Analysis cited in this section are wholly adopted from http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1. In 1999, to promote mutual understanding, consistent interpretation and thereby the effective operation of the 1980 Convention, the Permanent Bureau of the Hague Conference on Private International Law established the International Child Abduction Database (INCADAT). The database makes accessible leading decisions concerning the 1980 Hague Child Abduction Convention, as well as other decisions relevant to international child abduction. INCADAT comprises searchable summaries of decisions, links to the full texts of judgments and compendia of legal analysis in English, French and Spanish. Continually updated, INCADAT is used by judges, Central Authorities, legal practitioners, researchers and others interested in this rapidly developing branch of law.

In the following cases, the ECHR Court dismissed challenges by parents who had claimed that the summary return mechanism or the strict interpretation of the Article 13 exceptions has led to a breach of their right to a family life:

Paradis v. Germany, App. No. 4783/03, Eur. Ct. H.R. (2003).

Maumousseau and Washington v. France, App. No. 39388/05, Eur. Ct. H.R. (2007).
The mother had refused to return to the USA after a trip to France to which the father had agreed. The first applicant argued that the child's return to the USA (as ordered by a court in the State of New York) was not in her interest and placed her in an intolerable situation as she was still an infant. She further alleged that the police intervention at the child's nursery school for the purpose of enforcing the return order would leave her daughter with major psychological trauma. The Court held that there had been **no violation of Article 8** (right to respect for private and family life) of the Convention. It took the view that the French courts had taken into account the child's "best interests", namely that she should promptly reintegrate her habitual environment, after carrying out a general and in-depth examination of the situation and allowing the applicants to assert their rights in full.

Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009).
In 2010, all 17 judges found that insufficient consideration had been given to the best interests of the individual child in a case where grave risk of harm, Article 13(1)b), was at issue. Furthermore the Court accepted that the abducting mother would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel. In the light of these findings, Switzerland, which had relied on the reasoning previously employed in *Maumousseau and Washington v. France*, was found to have breached Article 8 of the ECHR.

Raban v. Romania, App. No. 25437/08, Eur. Ct. H.R. (2010) (upholding the revised interpretation of *Neulinger & Shuruk v. Switzerland*).

Deak v. Romania and the United Kingdom, App. No. 19055/05, Eur. Ct. H.R. (2008) (finding a Contracting State to have breached Article 6(1) ECHR where Hague Convention related proceedings were not processed with the requisite degree of expediency).

The ECHR Court has upheld challenges against States deemed not to have taken all necessary steps to facilitate the execution of Hague Convention return orders:

Ignaccolo-Zenide v. Romania, App. No. 31679/96, Eur. Ct. H.R. (2001).

Sylvester v. Austria, App. Nos. 36812/97 and 40104/98, Eur. Ct. H.R. (2003).

H.N. v. Poland, App. No. 77710/01, Eur. Ct. H.R. (2007).

Karadžic v. Croatia, App. No. 35030/04, Eur. Ct. H.R. (2007).

P.P. v. Poland, App. no. 8677/03, Eur. Ct. H.R. (2008).

The ECHR Court will have regard to the circumstances of the case and the action taken by the national authorities. A delay of 8 months between the delivery of a return order and enforcement was held not to have constituted a breach of the left behind parent's right to family life. *See Couderc v. Czech Republic*, App. No.54429/00, Eur. Ct. H.R. (2001).

The ECHR Court has dismissed challenges by parents who have argued that enforcement measures, including coercive steps, have interfered with their right to a family life. *See Paradis v. Germany*, App. No. 4783/03, Eur. Ct.

H.R. (2003); *A.B. v. Poland,* App. No. 33878/96, Eur. Ct. H.R. (2007); *Maumousseau and Washington v. France*, App. No. 39388/05, Eur. Ct. H.R. (2007).

The positive obligation to act when faced with a child abduction was equally applied in a case involving a non-Contracting State of the 1980 Hague Convention. *See Bajrami v. Albania*, App. No. 35853/04, Eur. Ct. H.R. (2008).

The ECHR Court has also upheld a challenge where all necessary steps were not taken to protect a parent's right of access in a case where Article 21 of the Hague Convention was invoked. *See LaFargue v. Romania*, App. No. 37284/02, Eur. Ct. H.R. (2006).

This positive obligation was equally applied in a case involving a non-Contracting State of the 1980 Hague Convention. *See Hansen v. Turkey*, App.No. 36141/97, Eur. Ct. H.R. (2004).

However, where an applicant parent has contributed to delay this will be a relevant consideration, see as regards the enforcement of a custody order following upon an abduction. *See Ancel v. Turkey*, App. No. 28514/04, Eur. Ct. H.R. (2009).

The ECHR Court has also upheld challenges against States deemed not to have taken adequate and effective efforts to enforce a parent's right to the return of his or her child:

Iglesias Gil & A.U.I v. Spain, App. No. 56673/00, Eur. Ct. H.R (2005).

Maire v. Portugal, App. No. 48206/99, Eur. Ct. H.R (2006).

Monory v. Hungary & Romania, App. No. 71099/01, Eur. Ct. H.R (2005) (court found that there had been a breach of the right to family life in Article 8 of the ECHR where the Romanian courts had so misinterpreted Article 3 of the Hague Convention that the guarantees of the latter instrument itself were violated).

Karadžic v. Croatia, App. No. 35030/04, Eur. Ct. H.R (2005).

Iosub Caras v. Romania, App. No. 7198/04, Eur. Ct. H.R (2008). The ECHR court ruled that Article 8 ECHR had been breached where the Romanian authorities had failed to prevent a decision on the merits of the right to custody being taken in the State of refuge and where the requisite degree of urgency was not used with regard to the Convention proceedings.

Bianchi v. Switzerland, App. No. 7548/04, Eur. Ct. H.R. (2006). The Court ruled that the requisite degree of urgency was not used with regard to the Convention proceedings.

Sneersone and Kampanella v. Italy, App. No. 14737/09 Eur. Ct. H.R. (2011). Relying to some extent on the analysis set forth in *Neulinger and Shuruk v. Switzerland*, the ECHR effectively overruled an Italian court's decision to order the return of a young boy living in Latvia to his father in Italy. Procedurally, this case is interesting because after the Latvian courts denied the child's return to Italy under the Hague Convention, the father petitioned the Italian courts based on the 2003 European Council Regulation No2201/2003 which ultimately ordered that the child be returned to Latvia. Latvia then brought an action against Italy before the European Commission in connection with the return proceedings, claiming that Italy had respected neither the Regulations nor the decisions of the Latvian courts concerning the child. The Commission, however, found for Italy stating that it had not violated theRegulations nor the general principles of community law. The mother then applied for relief with the ECHR alleging that return would violate her Article 8 rights (right to respect for private and family life) under the European Convention on Human Rights, and the ECHR agreed.

B. v. Belgium, App. No. 4320/11, Eur. Ct. H.R. (2012). The case concerned a decision to order the return of a child to the USA after her mother had taken her to Belgium without the agreement of the father or the US

court. The European Court of Human Rights had indicated an interim measure (under Rule 39 of the Rules of Court) to the Belgian Government not to send the child back to the United States for the duration of the proceedings before the Court. The Court held that there had been a **violation of Article 8** (right to respect for private and family life) of the Convention. It found in particular that the Court of Appeal, in ordering the child's return to the USA, had not sufficiently sought to assess the risk that a return to her father represented; it should also have taken into account the passage of time and the child's integration in Belgium.

X v. Latvia, App. No. 27853/09, Eur. Ct. H.R. 26 (2013). The case concerned the procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and five months, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the Convention. The Court held that there had been a violation of Article 8 (right to respect for family life) of the Convention. It considered that the European Convention on Human Rights and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8 of the European Convention, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

In *Carlson v. Switzerland*, App. No. 49492/06, Eur. Ct. H.R. (2008), the elapse of 3 ½ months between the issue of the return proceedings and the decision of the trial court was held to be a contributing factor in finding a breach of Article 8. Attention was also drawn to the breach of Article 16 by the trial court, which also led to delays in the handling of the case. The Court also relied on the failure of the Swiss authorities to deal appropriately with the trial judge's misapplication of the Article 13(1) *a)* exception, where the burden of proof was erroneously placed on the applicant father. This was found to create an inequality of arms for the father.

Article 8 ECHR does not however create an obligation on the part of the State of the child's habitual residence to assist the left behind parent in bringing proceedings in the State of refuge. *See Deak v. Romania and the United Kingdom*, App. No. 19055/05, Eur. Ct. H.R. (2008).

The ECHR Court has shown an increasing willingness to evaluate and comment upon the interpretation of Convention Articles. In *Monory v. Hungary & Romania*, No. 71099/01, Eur. Ct. H.R. (2005), the Court found that there had been a breach of the right to family life in Article 8 ECHR where the Romanian courts had so misinterpreted Article 3 of the Hague Convention that the guarantees of the latter instrument itself were violated.

For academic commentary on the inter-relationship of the Hague Convention on Child Abduction and the ECHR, *see* A. Fiorini, *Enlèvements internationaux d'enfants - solutions internationales et responsabilités étatiques,* 51 McGill L.J. 279-326 (2006); Andrea Schulz, *The 1980 Hague Convention and the European Convention on Human Rights,* 12 T.L.C.P. 355 (2002).

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *INTERNATIONAL CHILD ABDUCTION.*

Pollastro v. Pollastro (1999), 43 O.R. 3d 485 (Can. Ont.). The Ontario Court of Justice (trial court) held that a continued pattern of escalating emotional and physical abuse, combined with threats against the mother and her family, were sufficient to create an intolerable situation for the child and on that basis denied father's petition to return the child to California under Article 13b.

A.M.R.I. v. K.E.R., (2011) ONCA 417 (Can. Ont. C.A.). The Ontarian Court of Appeals considered the question of the rights of affected parties on an application under the Hague Convention for the return of a child to her country of origin, when the child had been accepted in Canada as a Convention refugee by reason of abuse by her mother.

The court held that when a child has been recognized as a Convention refugee by the IRB (Canada's Immigration and Refugee Bureau), a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence. Based on this, the court remanded the case to the lower court to, among other things, ensure the child had representation in accordance with Article 12 (1) and 12 (2) of the Convention on the Rights of the Child, declaring, "[e]xpediency will never trump fundamental human rights." The Court also clarified that the principle of *non-refoulement* is "complemented, and enlarged beyond its application to refugees, by inter-national human rights law prohibitions on the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm," citing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1); the International Covenant on Civil and Political Rights , art. 7; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3.[294]

Borisovs v. Kubiles, (2013) ONCJ 85 (Can. Ont.). Applicant father sought return of the child to Latvia. The trial court found that an Article 20 defense had been established where the father who sought the child's return had committed domestic violence against the mother. Citing the tension between the Hague Abduction Convention's purpose to deter child abduction with Canada's international obligation to protect refugee children from removal to a territory where they run a risk of being subjected to human rights violations, the Court found that there was sufficient evidence that Latvia authorities could not protect the child and thus, "[o]rdering the child's return in these circumstances is not permitted by fundamental Canadian principles relating to the protection of human rights and fundamental freedoms."

Wood v Wood-Hosig, (2006). Applicant father sought the return of the children from Switzerland to Australia. Mother asserted an Article 13b defense, alleging abuse toward the children. Nonetheless, her children were forcibly removed from her and institutionalized for a year until they could be returned to Australia. After being forced onto a plane to Australia, they were again placed in foster care upon their arrival there since the father as unable to care for them. The mother did not return to Australia because she faced a criminal action there for the abduction. Because it took some time for the Australian court to issue a custody decision, the children experienced several Australian foster homes. Eventually, the Australian court gave the mother custody and allowed the children to return to Switzerland.[295]

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *INTERNATIONAL CHILD ABDUCTION.*

N/A

[294] *See also Sanchez v. Sanchez*, *et. al*, 743 F.3d 945 (Fifth Cir. 2014).

[295] The *Wood* case drew much attention at the Fifth Special Commission meeting to review the Hague Child Abduction Convention at the Hague Academy, held in 2006, as was detailed by Professor Weiner in her article, I*ntolerable Situations And Counsel For Children: Following Switzerland's Example In Hague Abduction Cases*, *supra* note 267. At that meeting, the Swiss delegate argued forcefully, though unsuccessfully, for an amendment to the Convention clarifying Article 13b to not permit the return of children when it would manifestly not be in their best interest. The Swiss argued that this change was timely, given the worldwide adoption of the Convention on the Rights of the Child and "of the prominence given to the overriding interests of the child in everything that concerns it."

5.11.4 SAMPLE ARGUMENTS: *INTERNATIONAL CHILD ABDUCTION.*

SAMPLE ARGUMENT 1 –WHEN REPRESENTING THE TAKING PARENT WHO IS A VICTIM OF FAMILY VIOLENCE (PARTICULARLY FROM AN OAS MEMBER COUNTRY)

It is a violation of Article 20 of the Hague Child Abduction Convention to force a domestic violence victim to litigate custody where her safety is at risk. It is also contrary to article 3 of the ICCPR, which states that "[t]he State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and article 6, which states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, arts. 3,6, 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. Moreover, it is contrary to article 5 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which states that "[e]very woman is entitled to free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights." Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), art. 5, June 9, 1994, 33 I.L.M. 1534 (1995).

In addition, the Court should consider the principles enshrined in the ICCPR, including non-interference in family life in article 17, the importance of a family unit and protection thereof by society and the State in Article 23, as well as the child's 'right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State' in article 24. *See* International Covenant on Civil and Political Rights, art. 17, 23, and 24(1), 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.

SAMPLE ARGUMENT 2 – RIGHT TO JUDICIAL REMEDIES

The Hague Convention on Child Abduction proceedings are expedited proceedings and courts often provide respondents with little or no time to prepare their defenses, which is a violation of human rights law. Human Rights law requires that States provide access to judicial remedies and a fair and complete hearing of her defenses. International Covenant on Civil and Political Rights, art.14, 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 ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); American Convention on Human Rights, art. 8, 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 ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature"). In addition, the Court should consider the principles enshrined in the ICCPR, including non-interference in family life in article 17, the importance of a family unit and protection thereof by society and the State in Article 23, as well as the child's 'right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State' in article 24. *See* International Covenant on Civil and Political Rights, art. 17, 23, and 24(1), 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.

SAMPLE ARGUMENT 3 – CHILDREN'S BEST INTEREST SHOULD BE THE PRIMARY CONSIDERATION

It is not in the child's best interest to return him to a country or parent who will not protect him. Where domestic violence occurs, often so does child maltreatment. Child abuse and domestic violence co-occur 30 to 60 percent of the time, for a median of 41 percent. Sudha Shetty, Jeffery L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN, 115, 126 (2005). *See also*, Convention on the Rights of the Child, art. 32, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990, http://www.cirp.org/library/ethics/UN-convention ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration").

SAMPLE ARGUMENT 4 – CHILDREN HAVE A RIGHT TO PARTICPATE IN THE PROCEEDING

Children have the right to be represented and/or otherwise participate in Hague proceedings. Though not specifically authorized by the Hague Child Abduction Convention or ICARA, it is not prohibited. Providing children with representation is consistent with international legal norms as established in the Convention on the Rights of the Child. Convention on the Rights of the Child, art. 9(2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990. (In any proceedings to determine with which parent the child should reside, children as interested parties, "shall be given the opportunity to participate in the proceedings and make their views known").

SAMPLE ARGUMENT 5 – WHEN REPRESENTING THE LEFT BEHIND PARENT WHO IS A VICTIM OF FAMILY VIOLENCE AND WHO IS NOT PERMITTED TO ENTER THE U.S. TO LITIGATE HER ABDUCTION CASE. ON A MOTION FOR APPEARANCE BY VIDEO CONFERENCE OR BY SKYPE FOR A VIDEO DEPOSITION IN LIEU OF LIVE TESTIMONY

Not only do courts here in the United States recognize video depositions as an alternative means to eliminate hardship for a foreign party to appear before a court, internationally this is recognized as an access to justice issue as well. Under human rights law, states are obligated to eliminate barriers to courts that prevent individuals from seeking redress. See Universal Declaration of Human Rights, arts. 7-8, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); General Comment 32: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. H.R. Comm., 19th Sess., ¶ 9, U.N. Doc. CCPR/C/GC/32 (2007); Report of the Special Rapporteur on Extreme Poverty and Human Rights, U.N. Doc. A/67/278 (Aug. 9, 2012); Access to Justice as a Guarantee of Economic, Social and Cultural Rights, A Review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.129 (2007) ("One aspect that affects the extent of the right of access to justice has to do with economic or financial obstacles in access to the courts and with the scope of the positive obligation of the State to remove those obstacles in order to ensure an effective right to a hearing by a tribunal."). Additionally, the Inter-American Court on Human Rights has found that any measure that limits an individual's access to the courts through high costs or other means is contrary to the right to a fair trial. *Cantos Case*, Inter-Am. Ct. H.R. (Ser. C) No. 97, ¶ 50 (2002) (finding that exorbitant fees effectively obstructed the petitioner's access to the courts).

SAMPLE ARGUMENT 6 – WHEN REPRESENTING A PERSON SEEKING TO PREVENT THE POTENTIAL ABDUCTION OF A FEMALE CHILD TO A COUNTRY WHERE EQUAL RIGHTS OF WOMEN ARE NOT RECOGNIZED

a) **If the country to which the child may be taken is a signatory of the Hague Child Abduction Convention:**
Article 13 b and Article 20 both prohibit the return of children to a country where they face grave risk of harm and/or where to do so would violate fundamental human rights principles. *See also* International Covenant on Civil and Political Rights, art. 3, 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 ("The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant").

b) **If the country to which the child could be taken is not a Hague Child Abduction Convention signatory. Article 3 of the ICCPR:**
International Covenant on Civil and Political Rights, art. 3, 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 ("The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant").

SAMPLE ARGUMENT 7 – WHEN REPRESENTING AN IMMIGRANT WHO MAY BE SUBJECT TO HAVING HER CUSTODY RIGHTS TO HER CHILDREN SEVERELY CURTAILED DUE TO PERCEIVED RISK OF ABDUCTION BASED ON HER STATUS AS AN IMMIGRANT

"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention……" International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 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.

The Court should also consider the principles enshrined in the International Covenant on Civil and Political Rights (ICCPR), including 'non-interference in family life' in Article 17, the importance of a family unit and protection thereof by society and the State in Article 23, as well as the child's 'right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State' in Article 24 of the ICCPR. International Covenant on Civil and Political Rights, arts. 17, 23, and 24, 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.

5.11.5 TALKING POINTS FOR ORAL ARGUMENTS: *INTERNATIONAL CHILD ABDUCTION.*

N/A

5.11.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *INTERNATIONAL CHILD ABDUCTION.*

N/A

5.11.7 SAMPLE BRIEFS & PETITIONS: *INTERNATIONAL CHILD ABDUCTION.*

- ***Abbott v. Abbott*** - Brief for the University of Cincinnati and College of Law Domestic Violence and Civil Protection Order Clinic in Support of Respondent
- ***Abbott v. Abbott*** - Brief for the Domestic Violence Legal Empowerment & Appeals Project (DV Leap), the Battered Women's Justice Project – Domestic Abuse Intervention Programs, Inc., The National Coalition Against Domestic Violence, Legal Momentum, and The National Network To End Domestic Violence in Support of Respondent
- ***Abbott v. Abbott*** **-** Brief for Reunite International Child Abduction Center in Support of Neither Party
- ***Abbott v. Abbott*** **-** Brief for Eleven Law Professors in Support of Respondent
- ***Abbott v. Abbott*** **–** Brief of the S&W International Childfind Program, the Massachusetts Society For The Prevention Of Cruelty To Children, Justice For Children, Pathways For Children, Children's Law Center Of Los Angeles, And Emerge, in Support Of Reversal

5.11.8 OTHER RESOURCES: *INTERNATIONAL CHILD ABDUCTION.*

The Hague Conference on Private International Law, Child Abduction Section

U.S. Department of State, Bureau of Consular Affairs, **International Child Abduction Website**

U.S. Department of State, Bureau of Consular Affairs, **Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (Apr. 2013)**

JEREMY MORLEY, THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR FAMILY LAWYERS (2012)
The National Center for Missing and Exploited Children

TARYN LINDHORST, JEFF L. EDLESON, BATTERED WOMEN, THEIR CHILDREN AND INTERNATIONAL LAW, THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION (2012)

Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 I.A.L.R. 1 (2008)

NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, THE IMPACT OF PARENTAL KIDNAPPING LAWS AND PRACTICE ON DOMESTIC VIOLENCE SURVIVORS (Aug. 2005)

5.12 RIGHT TO A HEALTHY ENVIRONMENT

5.12.1 INTRODUCTION: *RIGHT TO A HEALTHY ENVIRONMENT.*

Today, the right to a healthy environment is widely recognized under international law, by individual countries around the world, and by several U.S. states.[296] Yet, the right to a healthy environment is not found in human rights documents, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Moreover, the first country to adopt a right to a healthy environment in its constitution was Portugal, but not until 1976, many years after the drafting of the Universal Declaration of Human Rights and other key human rights documents.[297] The 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), contains a first attempt at a universal definition of the right to a healthy environment, stating that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".[298] Although communities around the world have long recognized human dependence on the environment, it took a while longer for us to realize how much damage human activities could cause to the environment and, in turn, to ourselves.

Once the environmental movement began to gather force, the world moved quickly towards establishing a right to a health environment. To date, virtually every country in the world has enacted domestic laws aimed at reducing air and water pollution, regulating toxic substances, and conserving natural resources, among other goals.[299] At the international level, countries have negotiated a vast number of agreements to address environmental challenges, including trade in endangered species, conservation of biological diversity, transportation and disposal of hazardous substances, marine pollution, depletion of the ozone layer and climate change.[300]

In 2012, the U.N. Human Rights Council appointed its first-ever Independent Expert on Human Rights and the Environment, John Knox. In his first report to the Council, Mr. Knox stated that "[a] healthy environment is fundamentally important to the enjoyment of human rights, and the exercise of human rights is necessary for a healthy environment."[301] Mr. Knox also underscored the fact that human rights and the environment are interdependent and interrelated, and attempted to set out a framework for the human rights implicated under a right to a healthy environment.[302]

In terms of the framework for the human right to a healthy environment, Mr. Knox has described some substantive rights which are more susceptible than others to certain types of environmental harm, including the rights to life, health, food, water, sanitation, housing, non-discrimination and self-determination. Second, Mr. Knox has described some procedural rights whose implementation is vital to environmental protection, including the rights to freedom of expression and association, rights to receive information and participate in

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[296] David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENVIRONMENT MAGAZINE, July-August 2012, http://www.environment magazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html.

[297] United Nations Human Rights Council, Report of the Independent Expert on the issue of human rights obligation relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf.

[298] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Principle 1, U.N. Doc. A/Conf.48/14/Rev.1 (1972), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.

[299] Boyd, *supra* note 297. *See also* United Nations Human Rights Council, *supra* note 297 at 5.

[300] *See e.g.,* United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, *entered into force* Mar. 21, 1994; Convention on Biological Diversity, 1760 U.N.T.S. 79, *entered into force* Dec. 29, 1993; Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 U.N.T.S. 3, *entered into force* Jan. 1, 1989; Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 996 U.N.T.S. 245, *entered into force* Dec. 21, 1975.

[301] UN Office of the High Commissioner, News and Events, *Environment and human rights: the link is there, and so is the States' obligation to protect them – UN expert*, Mar. 7, 2013, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13089&LangID=E.

[302] United Nations Human Rights Council, *supra* note 297 at 5.

decision-making processes, and rights to legal remedies. Mr. Knox stated that when these procedural rights are exercised and directed at environmental issues, this "results in policies that better reflect the concerns of those most concerned, and, as a result, that better safeguard their rights to life and health, among others, from infringement through environmental harm."[303]

5.12.2 QUICK STATISTICS & RESOURCES FOR DATA: *RIGHT TO A HEALTHY ENVIRONMENT.*

Here are some quick statistics related to the right to a healthy environment:

- As of 2012, 177 of the 193 U.N. member nations recognized the right to a healthy environment through their national constitution, environmental legislation, court decisions, or ratification of an international agreement.[304]

- Since the mid-1970s, 92 countries have granted constitutional status to the right to a healthy environment. Constitutional law experts observe that recognition of environmental rights has grown more rapidly over the past 50 years than any other human right.[305]

- Seven U.S. states recognize the right to a healthy environment: Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, Rhode Island, and Washington. Furthermore, the City of Santa Monica, California, has passed a Sustainability Rights Ordinance and the State of California has passed a right to clean water and sanitation statute.[306]

- There are 780 million people worldwide who lack clean water.[307]

- In the U.S., 13 percent of American Indian/Alaska Native homes on reservations lack safe drinking water and sanitation sewage disposal, compared with 1 percent of the overall U.S. population.[308]

- In 2011, the U.S. Department of Agriculture tested 372 random groundwater samples from school/childcare sites and found that 76% of the samples contained 1-17 pesticides.[309]

- In 2010, China was ranked number one in the world for CO_2 emissions and the U.S. was ranked number two.[310]

- In the U.S., about 56 percent of the nine million people who live in neighborhoods within three kilometers of large commercial hazardous waste facilities are people of color.[311]

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[303] *Id*. at 10. *See* Office of the U.N. High Commissioner of Human Rights, Special Procedures of the U.N. Human Rights Council, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment**,** Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination, Report No. 3, Prepared for the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment (Dec. 2013), http://ieenvironment.org/wp-content/uploads/2014/03/CERD-25-Feb-final1.docx.

[304] Boyd, *supra* note 297.

[305] David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

[306] HAW. CONST. art. 11, § 9; ILL. CONST. art. 11, § 2; MASS. CONST. art. XLIX; MONT. CONST. art. II, § 3; PA. CONST. art. I, § 27; RI. CONST. art. I, § 17; Rev. Code Wash. (ARCW) § 70.105D.010 (1988); City of Santa Monica Sustainability Rights Ordinance, Apr. 9, 2013, http://www.smgov.net/departments/council/agendas/2013/20130409/s20130409_07A1.htm; Cal Wat Code § 106.3 (2013).

[307] Water.org, The Crisis, Water Facts, http://water.org/water-crisis/water-facts/water/.

[308] U.S. National Library of Medicine, National Institutes of Health, Health & Human Services, Native Voices, Timeline, Renewing Native Ways (2009), http://www.nlm.nih.gov/nativevoices/timeline/616.html

[309] U.S. Department of Agriculture, Pesticide Data Program, Annual Summary, Calendar Year 2011, 26 (2011), http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=stelprdc5102692.

[310] Carbon Dioxide Information Analysis Center, Fossil-Fuel CO_2 Emissions, Ranking of the world's countries by 2010 total CO2 emissions from fossil-fuel burning, cement production, and gas flaring (2010), http://cdiac.ornl.gov/trends/emis/top2010.tot.

Here are some resources for data related to the right to a healthy environment in the U.S. and worldwide:

U.S. Environmental Protection Agency

U.S. Department of Agriculture

U.S. Department of Health and Human Services

Carbon Dioxide Information Analysis Center (primary climate change data and information analysis center of the U.S. Department of Energy)

U.N. Environment Programme

U.N. Documentation Centre on Water & Sanitation

The Center for International Environmental Law

Earthjustice

Greenpeace International

International Climate Action Network

5.12.3 RELEVANT HUMAN RIGHTS LAW: *RIGHT TO A HEALTHY ENVIRONMENT.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *RIGHT TO A HEALTHY ENVIRONMENT.*

Treaty or Declaration	*Article/ Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 6 of the ICCPR**: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, art. 6, 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.
	Article 17(1) of the ICCPR: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2): Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, 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.

[311] Robert D. Bullard, et al., Toxic Wastes and Race at Twenty: Grassroots Struggles to Dismantle Environmental Racism in the United States X (Feb. 2007), http://www.snre.umich.edu/sites/all/files/Toxic%20Wastes%20and%20Race%20at%20Twenty%20Rpt%20%282%29.pdf.

Treaty or Declaration	*Article/ Citation*
	Article 23 of the ICCPR: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." International Covenant on Civil and Political Rights, art. 23, 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.
	Article 24 of the ICCPR: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." International Covenant on Civil and Political Rights, art. 24, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	**Article 2 of CERD**: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 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.
	Article 5 of CERD: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:… e) Economic, social and cultural rights, in particular: …(iv) The right to public health, medical care, social security and social services." International Convention on the Elimination of All Forms of Racial Discrimination, art 5. 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.
	Article 6 of CERD: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 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.

OTHER HUMAN RIGHTS INSTRUMENTS*: *RIGHT TO A HEALTHY ENVIRONMENT.*

Treaty or Declaration	*Article/ Citation*
International Covenant on Economic, Cultural and Social Rights (ICESCR)	**Article 11 of the ICESCR:** "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." International Convention on Economic, Social and Cultural Rights, art. 11, 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.
	Article 12 (1),(2) of the ICESCR: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, occupational and other diseases; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness." *(Also, see general comment 15).* International Convention on Economic, Social and Cultural Rights, art. 12(1),(2), 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.
Convention on the Elimination of Discrimination Against Women (CEDAW)	**Article 14 (2)(h) of CEDAW**: Obliges States parties to eliminate discrimination against women, particularly in rural areas, to ensure that women "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." 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 Rights of the Child (CRC)	**Article 24 (1),(2) of the CRC**: "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health […] 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:[…] (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;[…] (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents." Convention on the Rights of the Child, arts. 24(1), (2), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sept. 2, 1990.

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
The Universal Declaration of Human Rights (UDHR)	**Article 25 (1) of the UDHR**: "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." Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
The American Declaration on the Rights and Duties of Man (American Declaration)	**Article V of the American Declaration**: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." American Declaration of the Rights and Duties of Man, art. v., 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).
	Article IX of the American Declaration: "Every person has the right to the inviolability of his home." American Declaration of the Rights and Duties of Man, art. ix., 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).
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) (Protocol of San Salvador)	**Article 10 of the Protocol of San Salvador**: "(1.) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. (2) In order to ensure the exercise of the right to health, the States Parties agree to recognise heath as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction; (c) Universal immunisation against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable." American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 10, Nov. 16, 1999, O.A.S. T.S. No. 69.
	Article 11 of the Protocol of San Salvador: " 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services" and "2. The States parties shall promote the protection, preservation and improvement of the environment." American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 16, 1999, O.A.S. T.S. No. 69.
African Charter on Human and Peoples' Rights (African Charter)	**Article 16 of the African Charter**: "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." African Charter on Human and Peoples' Rights, art. 16, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
	Article 24 of the African Charter: "All peoples shall have the right to a general satisfactory environment favorable to their development." African Charter on Human and Peoples' Rights, art. 24, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Treaty or Declaration	*Article/ Citation*
European Convention on Human Rights (ECHR)	**Article 2 of the ECHR: "**Everyone's right to life shall be protected by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.
	Article 8 of the ECHR: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953.
Charter of Fundamental Rights of the European Union (Charter)	**Article 37 of the Charter**: "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Charter of Fundamental Rights of the European Union, O.J. 2000/C 364/01 (Dec. 7, 2000).
ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)	**Article 4(1) of the ILO Convention No. 169:** "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned**."** ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), art. 4(1), Sept. 5, 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).
	Article 7(4) of the ILO Convention No. 169: "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit." ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), art. 7(4), Sept. 5, 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).
	Article 15(1) of the ILO Convention No. 169: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), art. 15(1), Sept. 5, 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).
	Article 30(1) of the ILO Convention No. 169: "Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention." ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), art. 30(1), Sept. 5, 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

Treaty or Declaration	*Article/ Citation*
Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Arhaus Convention)	**Preamble of the Arhaus Convention:** "Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, Preamble, Oct. 30, 2001, 2161 UNTS 447; 38 ILM 517 (1999).
U.N Declaration on the Rights of Indigenous Peoples (Declaration)	**Article 29 of the Declaration**: "1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. Declaration on the Rights of Indigenous Peoples, art. 29, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).
	Article 32(3) of the Declaration: "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." Declaration on the Rights of Indigenous Peoples, art. 32(3), G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

U.S. STATE AND FEDERAL COURT CASES CITING HUMAN RIGHTS LAW: *RIGHT TO A HEALTHY ENVIRONMENT.*

Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1430 (9th Cir. Haw. 1989). The court refused to recognize the right to a healthy environment under the U.S. constitution in the context of equal protection. In doing so the court noted that "it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity."

***Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 988 P.2d 1236, ¶63** (Mont. 1999). At issue before the Court was which level of scrutiny applies when the right to a clean and healthful environment guaranteed by the Montana State Constitution, Article II, Section 3, is implicated. The Court concluded that "the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights…and that any statute or rule which implicates that right must be strictly scrutinized."

***Beanal v. Freeport-McMoran*, Inc., 197 F.3d 161** (5th Cir. La. 1999). A citizen of Indonesia brought suit under the Alien Tort Claims Act (ATCA) against U.S.-owned corporations operating in Indonesia, alleging that their mining activities caused damage to human health and to the environment in violation of customary international law. The Plaintiff relied on several resolutions of the United Nations, an affidavit of an international law professor, and the Rio Declaration on Environment and Development. The Fifth Circuit held that the plaintiff had not demonstrated that these treaties and agreements enjoy universal acceptance in the international community and therefore had not shown the existence of customary international law around damages to human health and the environment.

***Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 240** (2d Cir. N.Y. 2003). Peruvian plaintiffs brought suit against a U.S. copper mining corporation operating in Peru, alleging that pollution resulting from the defendant's operations caused their severe lung disease. Plaintiffs claimed that the defendant's conduct violated customary international law by infringing upon their "right to life," "right to health," and "right to sustainable development." After an examination of the sources and evidence of these rights as customary international law, the Court held that the asserted rights were insufficiently definite to constitute rules of customary international law.

U.S. LOCAL, STATE, AND FEDERAL LAW CITING AND/OR RELEVANT TO HUMAN RIGHTS LAW: *RIGHT TO A HEALTHY ENVIRONMENT.*

Executive Order Number 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (February 11, 1994). President Clinton issued this executive order to focus attention on the environmental and human health conditions in minority and/or low-income communities with the goal of achieving environmental justice. Executive Order 12898 directs the Environmental Protection Agency and other federal agencies to make environmental justice part of their mission to the greatest extent practicable and permitted by law.

California's Right to Safe Drinking Water & Sanitation Statute, Cal Wat Code § 106.3 (2013). California has legislated the human right to safe drinking water and sanitation. Assembly Bill 685 states that "every human being has the right to clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes, that is adequate for the health and well-being of the individual and family." The bill limits the state's obligation to provide water to developing state policy, however, and does not require that the state provide safe drinking water and sanitation to every resident.

Hawaii's Right to a Clean and Healthy Environment, HRS Const. Art. XI, § 9 (1978). Hawaii's state constitution states that "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

Illinois' Right to a Healthful Environment, Illinois Const., Art. XI, § 1 (1971-72). Illinois' state constitution provides that "[t]he public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."

Massachusetts' Right to Clean Air and Water & Right to Conservation of Natural Resources, ALM Constitution Amend. Art. XLIX (1972). Massachusetts state constitution provides that "[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose."

Montana's Right to a Clean and Healthful Environment, Mont. Const., Art. II § 3 (1972). Montana's state constitution provides that "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

New Mexico's Right to a Clean and Healthful Public Environment, N.M. Const. Art. XX, § 21 (1971). New Mexico's state constitution provides that "[t]he protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural

resources of this state, consistent with the use and development of these resources for the maximum benefit of the people."

Louisiana Attorney General Opinion 12-0223, 2013 La. AG 16. In this Attorney General Opinion relating to Louisiana's right to seek relief for the oil spill caused by the sinking of the Deepwater Horizon, the Attorney General cited to sections of the Seafood Safety, Marketing, and Tourism Memorandum of Understanding (MOU). In the MOU, Louisiana reserves the right to claims against BP arising from the oil spill, including claims in international law.

Pennsylvania's Right to Clean Air, Pure Water and to the Preservation of the Environment, Pa. Const. Art. I, § 27 (1971). Pennsylvania's constitution provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

Washington's Fundamental and Inalienable Right to a Healthy Environment, Rev. Code Wash. (ARCW) § 70.105D.010 (1988). Washington State's Toxics Control Act provides that "[e]ach person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations."

City of Santa Monica Sustainability Rights Ordinance (2013). The Santa Monica Sustainability Rights Ordinance provides that "The peoples' rights include, but are not limited to: the right to affordable and accessible water from sustainable water sources for human consumption, cooking, and sanitary purposes, as referenced in Calif. AB 685 (2012); the right to a sustainable energy future based on sustainable renewable energy sources; the right to a sustainable natural climate unaltered by fossil fuel emissions; the right to sustainable, comprehensive waste disposal systems that do not degrade the environment; the right to clean indoor and outdoor air, clean water and clean soil that pose a negligible health risk to the public; and the right to a sustainable food system that provides healthy, locally grown food to the community…"

INTERNATIONAL STATUTES: *RIGHT TO A HEALTHY ENVIRONMENT.*

European Seveso II Directive, 2012/18/EU (2012). This law enacted by the European Union requires a safe distance between residential areas and industrial facilities in order to protect people from industrial hazards, a requirement that is non-existent in U.S. environmental laws.

CASES BEFORE INTERNATIONAL Bodies: *RIGHT TO A HEALTHY ENVIRONMENT.*

N/A

CASES BEFORE REGIONAL BODIES OR NATIONAL COURTS: *RIGHT TO A HEALTHY ENVIRONMENT.*

This is a sampling of relevant cases. For a full list, see the UN Independent Expert on Human Rights and the Environment's website or in the UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases.

***Kolyadenko & Others v. Russia*,** App. No. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Eur. Ct. H.R. (2012). In this case emanating from the release of water from a reservoir by local officials which caused extensive flooding and deaths in a local municipality, the European Court of Human Rights held that proof of

negligence is not necessary to find liability for natural damage emanating from non-natural activities. The Court rejected the Federation of Russia's submission that that their alleged infringement of rights were "the result of natural disaster, in the form of exceptional rain, which they could have not have foreseen and could therefore not be imputed to the State". The Court concluded that, irrespective of weather conditions, "the authorities had positive obligations under Article 2, protecting the right to life, to assess all the potential risks inherent, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risk".

Hardy and Maile v. United Kingdom, App. No. 31965/07 Eur. Ct. H.R. (2012). This case concerned challenges to planning permits which had been granted for the operation of liquefied natural gas terminals because the relevant authorities had failed to properly assess the risks to the marine environment by the operation of these terminals and had also failed to make all relevant information available to the public. The European Court of Human Rights chose only to analyze the case under Article 8, which protects the right to respect private and family life. The Court determined that there was a comprehensive legislative and regulatory framework in place governing the activities, and that extensive reports and studies had been executed to the satisfaction of the planning and hazardous substances authorities and domestic courts. Therefore, the Court held there was no Article 8 violation.

Affaire di Sarno et Autres c. Italia, App. No. 30765/08 Eur. Ct. H.R. (2012). For many years the region of Campania, Italy, was under a state of emergency because of serious problems with waste collection, disposal and treatment. The applicants argued for violations of Articles 2, 6, 8, and 13. The Court rejected their claim under Article 2 by stating that none of the applicants have suffered any disease because of their exposure to waste, and scientific studies were inconsistent about the relationship between exposure to waste and any increase in diseases, preventing it to conclude that the life and health of the applicants had been threatened. However, the Court did find a violation of Article 8, the right to respect for private and family life, as well as a violation of Article 13, the right to an effective remedy.

Zammit Maempel v. Malta, App. No. 24202/10 Eur. Ct. H.R. (2012). The applicants alleged that the permits provided for fireworks that were set off near their homes in Malta during two feasts per year violated their rights under Articles 6, 8, and 14. The court decides to analyze the claims under article 8, the right to respect for private and family life, and article 14, non-discrimination, as it relates to article 8 alone, and also notes that the applicants acquired the property while aware of the situation of which they now complained. The court holds that the authorities did not fail to strike a fair balance between the rights of the individuals to respect for their private life and home and the conflicting interests of others and of the community as a whole.

Mossville Environmental Action Now v. United States**,** Inter-Am. C.H.R., Report No. 43/10, Petition 242-05 (2010), admissibility decision. Advocates for Environmental Human Rights, a non-profit organization, filed a petition on behalf of the residents of Mossville, Louisiana and Mossville Environmental Action Now, a community organization whose members were current or former Mossville residents, with the Inter-American Commission on Human Rights. The petitioners argued that they were put at risk for a multitude of health problems caused by the toxic pollution released by 14 chemical-producing industrial facilities surrounding the small community. They alleged that they were subject to "environmental racism," in breach of their right to equality before the law, guaranteed under Article 2 of the American Declaration because permits for polluting facilities were granted disproportionately for the Mossville area. They also argued that the U.S. was responsible for violations of the rights to life, health, privacy, inviolability of the home, equal protection and freedom from discrimination, and right to property. As part of its response, the U.S. argued that there is no such right as the right to a healthy environment, either directly, or as a component of The Commission found the petition admissible on all accounts except Article 23 (right to property). The merits of the case are still pending before the Commission.

Ngöbe Indigenous Communities v. Panama, Inter-Am. C.H.R., Report No. 75/09, Petition 286-08 (2009). Petitioners alleged that the State permitted the construction of a hydroelectric dam within Ngöbe ancestral lands causing serious damage to the land, the environment and to the Ngöbe way of life. The petitioners also alleged the illegal resettlement of Ngöbe families and the presence of police forces in the area to control any opposition to the hydroelectric project. They claimed violations under Article 5, 7, 8, 13, 19, 21, 22, 23, and 25 of the American

Convention on Human Rights. Precautionary measures were granted to petitioners in 2010, but the merits of the case are still pending before the Commission.

***Saramaka People v. Suriname*,** Inter-Am. Ct. H.R., ser c. No. 172 (2007). The petitioners, the Saramaka people, are a tribe of the Maroons, descendants of African slaves, who have occupied inland Suriname since the early 1700s. The Association of Saramaka Authorities and twelve Saramaka captains submitted a petition to the Inter-American Commission in October 2000. They alleged that Suriname had granted logging and mining concessions within the tribal territory without consulting them and that these acts violated the Community's property rights. In 2006, the Inter-American Commission referred the case to the Inter-American Court, claiming a violation Articles 21 and 25 of the American Convention due to the State's failure to recognize the Community's right to enjoyment of the lands they had traditionally occupied and to provide access to justice or legislation to secure this right. The Court interpreted of Article 21 of the Convention to include the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, and stated this includes the right to enjoy the particular spiritual relationship with the territory they have traditionally used and occupied. The court held that Suriname therefore had a duty to take special measures to protect the communal property rights of the Saramaka. For a case with somewhat similar facts, *see Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., No. 79 (2001).

Okyay and Others v. Turkey, App. No. 36220 Eur. Ct. H.R. (2006). Applicants were ten Turkish nationals who were lawyers living and practicing within 250km from the site of three thermal power stations that had been polluting the local environment for several years. After several years of fighting in the administrative courts of Turkey, the applicants applied to the European Court of Human Rights, asserting that their right to effective judicial protection under Articles 6(1) had been infringed upon. The Court found for the applicants and held that there was a constitutional right in Turkish law to live in a healthy and balanced environment, enabling the applicants to claim that they were entitled to protection under domestic law against damage to the environment caused by the power plants' hazardous activities.

Lopez-Ostra v. Spain, App. No. 16798 Eur. Ct. H.R. (1994). This landmark case from the European Court dealt with a tannery waste treatment plant near the applicant's home which endangered his and his daughter's health. The Court decided that Article 8 (privacy and family life) creates a positive duty for the State to regulate and protect people from environmentally noxious activities. According to the court, severe environmental pollution may affect an individual's well-being and prevent that person from enjoying his or her home even though the pollution does not seriously endanger that person's health. In short, the European Court interpreted the right to a healthy environment as derivative of the right to privacy.

Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v. Nigeria, 155/96 Afr. C.H.P.R. (2001). The African Commission on Human and Peoples Rights found that the Nigerian government violated the right to health and a right to a clean environment by directly contaminating water, soil, and air, harming the health of the Ogoni people, and failing to protect them from the harm caused by the oil companies. The Commission underlined that the right to a clean and safe environment is enshrined under Article 24 of the African Charter. The Commission noted the right to a clean environment is extremely critical to the enjoyment of economic, social, and cultural rights.

TREATY BODY AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *RIGHT TO A HEALTHY ENVIRONMENT.*

"[E]nvironmental degradation can and does adversely affect the enjoyment of a broad range of human rights." Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ¶17, U.N. Doc. A/HRC/22/43 (2013).

"Human rights law includes obligations relating to the environment. Those obligations include procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies. The obligation to facilitate public participation includes obligations to safeguard the rights of freedom of expression and association against threats, harassment and violence." Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ¶79, U.N. Doc. A/HRC/22/53 (2013).

"[H]uman rights law sets out certain procedural and substantive obligations on States in relation to the enjoyment of a safe, clean, healthy and sustainable environment, which include: (*a*) To respect and protect the right to seek, receive and impart information and to provide information on and for assessments concerning environmental impacts on human rights; (*b*) To respect and protect the rights of freedom of expression, association and peaceful assembly, including by facilitating and providing for meaningful opportunities to participate in decision-making processes; (*c*) To ensure access to effective remedies where human rights and fundamental freedoms are violated; (*d*) To adopt and implement laws and other measures to ensure that human rights are respected and protected in the context of environmental policies; (*e*) To protect against non-State human rights abuses, including by enforcing environmental laws that directly or indirectly contribute to the protection of human rights". U.N. Human Rights Council Resolution on Human Rights and the Environment, U.N. Doc. A/HRC/25/L.31 (2014).

"[C]ertain aspects of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment require further study and clarification." U.N. Human Rights Council Resolution on Human Rights and the Environment, U.N. Doc. A/HRC/RES/19/10 (2012).

"[P]olicies, practices and the lack of enforcement of certain laws perpetuate racial discrimination, 'environmental racism' and other forms of oppression which violate the rights to freedom, equality and adequate access to basic needs such as clean water, food, shelter, energy, health and social care[...and] some negative aspects of globalization, including unbalanced economic growth, unfair terms of trade, unabated production and consumption, land and water pollution, displacements of people, the hoarding of natural resources and mismanagement of external debt, all undermine efforts to combat racial discrimination at national and international levels." Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixtieth and Sixty-first session, Decisions, Statements and General Recommendations: Statement by the Committee to the World Summit on Sustainable Development, U.N. Doc. A/57/18 (2002).

"There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development." Committee on the Elimination of Discrimination Against Women, Equality in marriage and family relations, General Recommendation No. 21 (13th session, 1994).

5.12.4 SAMPLE ARGUMENTS: *RIGHT TO A HEALTHY ENVIRONMENT.*

These sample arguments should be used to supplement your state and federal-law based claims and defenses. Do not to rely on human rights arguments alone.

SAMPLE ARGUMENT 1 –THE FAILURE TO ADEQUATELY PROTECT THE ENVIRONMENT VIOLATES RIGHTS TO LIFE AND HEALTH

The United States has failed to protect the rights to life and health of Mossville residents. Mossville residents have an inherent right to life and health pursuant to Articles I and XI, respectively, of the American Declaration of the Rights and Duties of Man which binds the United States through its membership in the OAS. Article I of the American Declaration provides that "[e]very human being has the right to life, liberty and the security of his person." Article XI of the American Declaration provides that "[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

The Commission has recognized the interrelationship between the rights to life and health in the context of environmental degradation, explaining that:

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.
>
> The American Declaration of the Rights and Duties of Man, which continues to serve as a source of international obligation for all member states, recognizes the right to life, liberty and personal security in Article I, and reflects the interrelationship between the rights to life and health in Article XI, which provides for the preservation of the health and well-being of the individual.

Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1, ch. VIII at "The Applicable Legal Framework, 2. Relevant Inter-American Law" (1997).

With respect to the relevant rules of other international law applicable to the United States, the right to life is also protected by the International Covenant on Civil and Political Rights ("ICCPR"), which has been ratified by the United States. Similar to the Commission, the Human Rights Committee235 has observed that an environmental danger created by government "raises serious issues, with regard to the obligation of the State parties to protect human life (Article 6(1))." *EHP v. Canada*, U.N. Human Rights Committee, Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982). In *EHP v. Canada*, the Committee found that a complaint against the Canadian government's storage of nuclear waste near a residential area constituted a *prima facie* case of a violation of the right to life of the ICCPR. Furthermore, according to the Committee, the right to life:

> has been too often narrowly interpreted . . . . [It] cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.

Human Rights Committee, *General Comment No. 6: The Right to Life (art. 6) Covenant on Civil and Political Rights*, 16th Session (1982).

With respect to the relevant rules of other international law applicable to the United States, the right to health is also protected by the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which has been ratified by the United States. Pursuant to CERD, the Committee on the Elimination of Racial Discrimination has recommended that the United States pay particular attention to the right to health . . .

which may be infringed upon by activities threatening . . . [the] environment." CERD, *Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America*, U.N. doc. CERD/C/USA/DEC/1 at ¶ 8 (April 11, 2006). The Committee determined that activities by the federal government threatening the environment of Western Shoshone people – such as efforts to open a nuclear waste repository, and to process permits allowing open pit gold mining and geothermal energy production on Western Shoshone ancestral lands, among other harms – should be stopped in order to find resolution pursuant to CERD. *Id*. at ¶ 10.

Thus, it is well established by the Commission that the rights to life and health set forth in the American Declaration are intrinsically linked to the environment, and that States have the obligation to protect these rights by preventing environmental degradation. The Commission's interpretation is reinforced by decisions of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination regarding the protection of the rights to life and health, which the United States is obligated to uphold pursuant to its ratification of the ICCPR and CERD.

As set forth above in the "Introduction" and "Background" sections of this petition, the United States has violated Articles I and XI of the American Declaration by issuing environmental permits to toxic industrial facilities knowing that this would subject the Petitioners and all other residents of Mossville, Louisiana to life-threatening industrial operations and severe health problems associated with toxic chemical exposures.

From **Mossville Environmental Action Now Petition to the Inter-American Commission on Human Rights**

SAMPLE ARGUMENT 2 – THE ACTION AT ISSUE VIOLATES PETITIONER'S RIGHT TO A HEALTHY ENVIRONMENT

"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 125 S. Ct., 1183, 1200 (2005). *See also*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (Noting that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and by the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (*citing* The International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women to provide support for affirmative action under the Constitution); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

Above and beyond the violations of state and federal law discussed above, the Defendant's actions violate petitioner's right to a healthy environment, which has recently begun to be widely recognized under international law, but has long been recognized by individual countries around the world and by several U.S. states. *See, e.g., Lopez-Ostra v. Spain*, App. No. 16798 Eur. Ct. H.R. (1994), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57905; UN Office of the High Commissioner, News and Events, *Environment and human rights: the link is there, and so is the States' obligation to protect them – UN expert*, Mar. 7, 2013, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13089&LangID=E; UN Human Rights Council, Report of the Independent Expert on the issue of human rights obligation relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf. *See also, e.g.,* Hawai'i Const. Art. XI, § 9 (1978); Illinois Const., Art. XI, § 1 (1971-72); Mont. Const., Art. II § 3 (1972)**.**

The [regulation/policy at issue] should be struck down in favor of a policy that better safeguards the rights to life and health, and the right to a healthy environment, which is interrelated to the rights to life and health. [ADD FACTS OF YOUR CASE & ANALYSIS]

5.12.5 TALKING POINTS FOR ORAL ARGUMENTS: *RIGHT TO A HEALTHY ENVIRONMENT.*

TALKING POINTS #1-

1. The realization of the right to life, and to privacy, physical security, and integrity, is related to and dependent upon one's physical environment.

2. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, right to life is implicated.

3. The American Declaration of the Rights and Duties of Man, which is the overarching human rights instrument in the Inter-American region, recognizes the right to life, liberty and personal security. The American Declaration also reflects the interrelationship between the rights to life and health, in Article 11, which provides for the preservation of the health and well-being of the individual.

4. The U.N. Committee on the Elimination of all forms of Racial Discrimination has also recommended that the U.S. pay particular attention to the right to health as infringed upon by activities threatening the environment.

5. This Commission should find that the United States has violated the petitioners' rights to life, health, and non-discrimination, among others, by issuing environmental permits to toxic industrial facilities knowing that this would subject the Petitioners and all other residents of Mossville, Louisiana to life-threatening industrial operations and severe health problems associated with toxic chemical exposures.

TALKING POINTS #2-

1. Defendant's actions violate petitioner's right to a healthy environment [ADD FACTS OF YOUR CASE & ANALYSIS]

2. The right to a healthy environment has recently been widely recognized under international law

3. The right to a healthy environment has long been recognized by individual countries around the world and by several U.S. states.

4. The opinions of international bodies, and sister states, while not binding on this court, provide comparative illustrative examples of how other courts and policymakers treat this issue.

5. We urge this court to take note of human rights law in this case, not because you are bound to enforce it, but because it provides an alternate framework that you could use to help make your decision.

5.12.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *RIGHT TO A HEALTHY ENVIRONMENT.*

N/A

5.12.7 SAMPLE BRIEFS & PETITIONS: *RIGHT TO A HEALTHY ENVIRONMENT.*

Mossville Environmental Action Now v. United States, Second Amended Petition to the Inter-American Commission on Human Rights

5.12.8 OTHER RESOURCES: *RIGHT TO A HEALTHY ENVIRONMENT.*

Advocates for Environmental Human Rights

Journal of Human Rights and the Environment

RighttoEnvironment.org

U.N. Independent Expert John H. Knox, UN Mandate on Human Rights and Environment

U.S. Government Environmental Justice Interagency Working Group & Resource Page

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, UNEP COMPENDIUM ON HUMAN RIGHTS AND THE ENVIRONMENT: SELECTED INTERNATIONAL LEGAL MATERIALS AND CASES (2014)

INTERNATIONAL HUMAN RIGHTS AND THE ENVIRONMENT: BIBLIOGRAPHY OF SECONDARY SOURCES (2012).

ALYSSA JOHL & SÉBASTIEN DUYCK, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *PROMOTING HUMAN RIGHTS IN THE FUTURE CLIMATE CHANGE REGIME* (2012)

ARTICLE 19, CHANGING THE CLIMATE FOR FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: HUMAN RIGHTS RESPONSES TO CLIMATE CHANGE (Dec. 2009) (discussing the human right to information and climate change)

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *CLIMATE CHANGE AND HUMAN RIGHTS: PRACTICAL STEPS FOR IMPLEMENTATION* (2009)

EARTHJUSTICE AND CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *GLOBAL WARMING AND HUMAN RIGHTS* (2009)

GREENPEACE, *HUMAN RIGHTS AND THE CLIMATE CRISIS: ACTING TODAY TO PREVENT TRAGEDY TOMORROW* (2009)

OXFAM INTERNATIONAL, *CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY* (2008)

EARTHJUSTICE, *ENVIRONMENTAL RIGHTS REPORT: HUMAN RIGHTS AND THE ENVIRONMENT* (2005)

Janelle Eurick Bauer, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185 (Spring, 2001).

5.13 RIGHT TO COUNSEL

The Right to Counsel section of the Handbook was compiled by Lauren E. Bartlett, with much of the research credit due to the great work of Martha F. Davis and Risa E. Kaufman.[^]

5.13.1 INTRODUCTION: *RIGHT TO COUNSEL*

The right to counsel for individuals facing criminal charges has long been settled under human rights law.[312] There is an emerging international consensus that there is also a human right to counsel in civil cases involving important human rights, such as the right to housing, children's rights, freedom from domestic violence, the right to food and the right to health.[313]

The right to counsel refers to access to lawyers and free legal services in order to protect and establish rights, and to defend against violations of rights. The scope of the right to counsel includes the right to call upon the assistance of a lawyer of his or her own choice, the right to free legal assistance for the poor and other disadvantaged persons (e.g. for children, persons with disabilities, etc.), and the right to communicate with counsel freely and confidentially at all stages of the proceedings. The right to counsel implicates, is interconnected and interdependent with, and indeed can be argued to be a core component of several other procedural rights regarding access to justice including: 1) right to a fair and public hearing by a fair and impartial tribunal, in the determination of his rights and obligations; 2) right to equality and fairness before the courts; 3) right to equal protection of the law; 4) right to an effective remedy; 5) right to civic engagement; and 6) right to participation in public institutions. Human rights law recognizes the right to counsel as a means to an end; the right to counsel is essential to fair, equal, and meaningful access to justice.[314]

5.13.2 QUICK STATISTICS & RESOURCES FOR DATA: *RIGHT TO COUNSEL*

In the U.S., more than 50 years have passed since the landmark Supreme Court decision of *Gideon v. Wainwright*, that guaranteed counsel for criminal defendants.[315] Yet the same protection has not been extended

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[312] *See* U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1, U.N. Doc. E/CN.15/2012/L.14/Rev.1 (2012), http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.15/2012/L.14/Rev.1 ("States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution."); Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Principle 1, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), http://www1.umn.edu/humanrts/instree/i3bprl.htm ("All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."). *See also*, ICCPR, art. 14(1); UDHR, art. 10.

[313] *See* Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 148 (2009).

[314] *See Id*.

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Martha F. Davis is Professor of Law at Northeastern University School of Law and faculty director for the law school's Program on Human Rights and the Global Economy. Ms. Davis has written widely on women's rights, poverty and human rights. Professor Davis holds an A.B. from Harvard University, an M.A. from Oxford University and a J.D. from the University of Chicago.

Risa E. Kaufman is the executive director of the Human Rights Institute (HRI) at Columbia Law School and a Lecturer-in-Law. At HRI, she works to develop and advance international human rights norms and strategies in the United States through research, advocacy, network building, and training, and oversees the overall functioning of the Institute. Her advocacy and research focus on state and local implementation of human rights, access to justice, and economic, social, and cultural rights. Ms. Kaufman has published extensively on human rights, local

to the civil side. The U.S. Supreme Court has repeatedly declined to find a federal constitutional right to counsel in civil cases, even when litigants have faced total severance of parental rights or extended jail time.[316] While most states have established a right to counsel by statute, court rule, and/or constitutional decision for civil cases involving child welfare or restrictions on physical liberty (such as institutional commitment for mental illness or quarantine),[317] states generally do not guarantee counsel for civil cases involving basic human needs such as shelter, sustenance, safety, health, or child custody. As a consequence, only a small fraction of the legal problems experienced by low-income people in the U.S. (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.[318] And tens of thousands of immigrant children face deportation proceedings in the coming year and there is no right to counsel for immigrants in detention.[319]

Yet, there is growing evidence that providing counsel in civil cases, such as housing and child custody cases, saves courts time, frustration, and money, and also significantly improves the outcomes for litigants.[320] Internationally, 47 countries in Europe, as well as Canada, Australia, New Zealand, Zambia, Brazil, Madagascar, and South Africa, have statutes or a constitutional provision that ensure free civil counsel for indigent people.[321] The United Kingdom has guaranteed the right to counsel in civil cases for over five centuries.[322]

Here are some quick statistics related to the right to counsel:

- Fewer than 20 percent of indigent people in the U.S. are able to attain the legal assistance that they need.[323]

- Every year, roughly one million cases brought to Legal Services Corporation-funded programs are turned away due to lack of resources.[324]

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government and access to justice and is the co-author of the forthcoming course book on Human Rights Advocacy in the United States (with Martha Davis and Johanna Kalb). In addition, Ms. Kaufman supervises students in Columbia Law School's Human Rights Clinic and teaches a seminar on domestic human rights advocacy. Ms. Kaufman has extensive experience in public interest litigation, advocacy and legal education with a special focus on poverty law, access to justice and women's rights. Prior to joining HRI, she engaged in impact litigation, policy initiatives, direct services, and public education as associate counsel for the Community Service Society of New York, as a Gibbons Fellow in Public Interest and Constitutional Law at the law firm of Gibbons, P.C., and as a Skadden Fellow at NOW Legal Defense and Education Fund (now Legal Momentum). Ms. Kaufman holds a J.D. from New York University School of Law, where she was a Root-Tilden-Snow Scholar, and clerked for Judge Ira DeMent in the U.S. District Court in Montgomery, Alabama. She holds a B.A. from Tulane University.

[315] 372 U.S. 335 (1963) (establishing a right to counsel for defendants charged with serious criminal offenses and that the state must provide a lawyer for the accused who cannot afford to hire a private attorney).

[316] *See* John Pollock, *"You Have a Right to a Lawyer ... If You Can Afford It": A Look at the History of the Right to Counsel in Civil Cases and the Current Efforts to Expand It*, BLOOMBERG CNA Vol. 81 No. 48 at 1797 (June 18, 2013), http://civilrighttocounsel.org/pdfs/RTChistory_Bloomberg.pdf (describing *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18 (1981) and *Turner v. Rogers*, 131 S.Ct. 2507 (2011), which found no categorical right to counsel in termination of parental rights and civil contempt proceedings, respectively).

[317] John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L.J. 763 (Spring 2013), http://students.law.drake.edu/lawReview/docs/lrVol61-3-pollock.pdf; Laura Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 245 (2006), http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf; Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 186 (2006), http://civilrighttocounsel.org/pdfs/pastore_lassiter.pdf.

[318] LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW INCOME AMERICANS (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf

[319] Joel Millman and Miriam Jordan, *Flow of Unaccompanied Minors Tests U.S. Immigration Agencies*, WALL ST. J., Jan. 29, 2014, http://online.wsj.com/news/articles/SB10001424052702303743604579351143226055538.

[320] Matthew Desmond, *Tipping the Scales in Housing Court*, N.Y. TIMES, Nov. 29, 2012, http://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html?_r=2&; National Legal Aid & Defender Association, *Economic Incentives in Legal Reform*, 4 PERSPECTIVES 2 (2003), http://www.nlada.org/DMS/Documents/1195243338.44/World%20Bank%20Economic%20Impact%20and%20Legal%20Aid%20-%20Owen%20and%20Portillo.pdf. *See also, e.g.*, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urb. L.J. 37, 40-41 n.7 (2010); Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 Seattle J. Soc. Just. 139, 151-53 (2010), http://www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf.

[321] Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World,* CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 288, 292 (2006), http://www.civilrighttocounsel.org/pdfs/lidman.pdf.

[322] *Id*. at 9.

[323] DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, LEGAL SERVICES CORP. 1, 9 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

- As of 2009, counting all legal aid programs in the U.S., there is only one lawyer available for every 6,415 indigent people; however, there is one lawyer for every 535 people in the general population.[325]

- Only 63% of states in the U.S. mandate the appointment of counsel for a child in dependency proceedings.[326]

- In many housing courts in the U.S., 90% of landlords are represented in eviction cases and 90% of tenants are not.[327]

- England has provided civil attorneys to indigent defendants for more than five centuries, and spends over 200 billion pounds per year, and until recently, provided 29% of the population with legal aid.[328]

- 47 countries in Europe, as well as Canada, Australia, New Zealand, Zambia, Brazil, Madagascar, and South Africa, have statutes or a constitutional provision that ensure free civil counsel for indigent people.[329]

Here are some resources for data related to the right to counsel in the U.S. and worldwide:

Legal Services Corporation

American Bar Association's Standing Committee on Legal Aid and Indigent Defense

National Legal Aid and Defender Association

National Coalition for a Civil Right to Counsel

National Center for Access to Justice

U.N. Development Programme, Access to Justice and Rule of Law

World Justice Project Rule of Law Index Reports

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[324] *Id*. at 1.
[325] *Id*.
[326] A CHILD'S RIGHT TO COUNSEL, CHILDREN'S ADVOCACY INSTITUTE (2009), www.caichildlaw.org/misc/final_rtc_2nd_edition_lr.pdf.
[327] Desmond, *supra* note 319.
[328] Anna Richey Allen, *Passport for Civil Gideon: European Perspectives on the Civil Right to Counsel*, LEGAL SCHOLARSHIP FOR EQUAL JUST. (2009), http://www.lsej.org/LocalResources.cfm?pagename=NewPageName1. For more on recent changes to legal aid in the U.K, *see e.g., Legal aid cuts: six lawyers on why they damage our legal system*, THE GUARDIAN (Apr. 1, 2014), http://www.theguardian.com/law/2014/apr/01/legal-aid-six-lawyers-damage-legal-system.
[329] Lidman, *supra* note 320.

5.13.3 RELEVANT HUMAN RIGHTS LAW: *RIGHT TO COUNSEL.*

The language from the treaties and other human rights instruments listed below is merely a sampling. This is not an exhaustive list of instruments or the relevant articles in each instrument that are available. There may be language or another human rights instrument not yet listed that is more relevant to your case at hand. Please be sure to review the full text, which is available by clicking on the links below.

RATIFIED HUMAN RIGHTS INSTRUMENTS: *RIGHT TO COUNSEL.*

Treaty or Declaration	*Article/ Citation*
International Covenant on Civil and Political Rights (ICCPR)	**Article 2(3)(a) of the ICCPR**: requires that each State "ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy…" International Covenant on Civil and Political Rights, art. 2(3)(a), 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.
	Article 2(3)(b) of the ICCPR: requires that each State "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State..." International Covenant on Civil and Political Rights, art. 2(3)(b), 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.
	Article 2(3)(b) of the ICCPR: requires that each State "ensure that the competent authorities shall enforce such remedies when granted." International Covenant on Civil and Political Rights, art. 2(3)(c), 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.
	Article 14 of the ICCPR: "All persons shall be equal before the courts and tribunals. In determination of… his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights, art. 14, 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.
	Article 26 of the ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, art. 26, 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.
International Convention on the Elimination of Racial Discrimination (CERD)	**Article 5 of CERD**: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice." International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 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.

Treaty or Declaration	*Article/ Citation*
	Article 6 of CERD: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 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.
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	**Article 14 of CAT**: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation..." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, 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.
The Charter of the Organization of American States (OAS Charter)	**Article 45 of the OAS Charter**: "The Member States[…] agree to dedicate every effort to the application of the following principles and mechanisms: (i) Adequate provision for all persons to have due legal aid in order to secure their rights." Charter of the Organization of American States, art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951.

OTHER HUMAN RIGHTS INSTRUMENTS*: *RIGHT TO COUNSEL.*

Treaty or Declaration	*Article/ Citation*
Universal Declaration of Human Rights (UDHR)	**Article 6 of the UDHR**: Everyone has the right to recognition everywhere as a person before the law. Universal Declaration of Human Rights, art. 6, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 7 of the UDHR: All are equal before the law and are entitled without any discrimination to equal protection of the law. Universal Declaration of Human Rights, art. 7, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 8 of the UDHR: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
	Article 10 of the UDHR: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

*This section includes treaties not ratified by the U.S., but also declarations and other human rights instruments that do not require ratification. Please refer to Chapter 2 of this Handbook for more information on treaties, declarations, principles , and how to use different types of human rights instruments in advocacy.

Treaty or Declaration	*Article/ Citation*
International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)	**Article 5(1) of the CRPD**: "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law." International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities**,** art. 5(1), 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.
	Article 12 of the CRPD: "1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity…" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 12, 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.
	Article 13 of the CRPD: Access to Justice - "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others…" International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 13, 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 American Declaration on the Rights and Duties of Man (American Declaration)	**Article II of the American Declaration**: "All persons are equal before the law…" American Declaration of the Rights and Duties of Man, art. II, 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).
	Article XVIII of the American Declaration: "Every person may resort to the courts to ensure respect for his legal rights…" American Declaration of the Rights and Duties of Man, art. XVIII, 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).
American Convention on Human Rights (ACHR)	**Article 8 of the ACHR**: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. American Convention on Human Rights, art. 8, 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.
	Article 23 of the ACHR: Every citizen shall enjoy the following rights and opportunities: […] (c) to have access, under general conditions of equality, to the public service of his country. American Convention on Human Rights, art. 23, 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.

Treaty or Declaration	*Article/ Citation*
	Article 24 of the ACHR: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law. American Convention on Human Rights, art. 24, 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.
	Article 25 of the ACHR: Article 24 of the ACHR: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted. American Convention on Human Rights, art. 25, 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.
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights (Protocol to the African Charter)	**Article 10(2) of the Protocol**: "Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require." Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, art. 10(2), OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (Jun. 9, 1998).
Basic Principles on the Role of Lawyers (Basic Principles)	**Principle 1 of Basic Principles on the Role of Lawyers**: "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Principle 1, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
	Principle 3 of Basic Principles on the Role of Lawyers: "Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources." Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Principle 3, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principles & Guidelines on Access to Legal Aid in Criminal Justice Systems)	**Introduction: U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems:** "Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process." U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Introduction, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶A.1. (2012).

Treaty or Declaration	*Article/ Citation*
	Principle 2 of U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: "The State should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider." U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 2, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶16 (2012).
	Principle 4 of U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: "Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime." U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 4, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶24 (2012).
	Principle 10 of U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: "Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum-seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of these groups, including gender-sensitive and age-appropriate measures." U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 10, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶32 (2012).
	Guideline 2 of the U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: **"**In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that: (a) Information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means…" U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 2, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶42 (2012).
	Guideline 8 of the U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: "States should, where appropriate, provide legal aid to witnesses." U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 2, U.N. Doc. E/CN.15/2012/L.14/Rev.1 ¶42 (2012).

U.S. LOCAL, STATE, AND FEDERAL COURT CASES CITING AND/OR RELEVANT TO HUMAN RIGHTS LAW: *RIGHT TO COUNSEL.*

In re Marriage of King, 174 P.3d 659, 668-69 (Wash. 2007). In this custody case, the father was represented by private counsel throughout the proceedings while the mother, who was indigent, had tried unsuccessfully to obtain counsel and was not appointed counsel at trial. After the trial, the lower court entered granted primary residential care of the children to the father and the mother filed a motion for a new trial, which was denied. On appeal, the mother claimed a fundamental parental liberty interest under the state constitution that was at stake. She argued that this custody case was a complex adversarial proceeding involving critical interests and that she should have a right to counsel. Amici weighed in with an international human rights argument as to why the right to counsel was important in this case. The Supreme Court of Washington held that neither the federal nor state

constitution guaranteed a right to counsel in custody proceedings. However, a dissenting opinion noted that a parent's right to custody is more precious to many than the right to life. See below for link to the amicus brief submitted in support of mother by international law scholars.

N.J. Div. of Youth & Family Services v. B.R., 929 A.2d 1034, 1036 (2007). The lower court terminated the mother's parental rights due to persistent abuse and neglect of her children, and held that a claim of ineffective assistance of counsel was legally inapplicable to the civil proceeding. On appeal, the New Jersey Supreme Court disagreed and stated, "the right to counsel in a termination case has constitutional as well as statutory bases. Either way, the performance of that counsel must be effective." It also reiterated its prior holding that courts should assign counsel without costs in cases involving either a temporary or permanent loss in custody or parental rights, because counsel should be required where a "consequence of magnitude" is at issue.

***Poll v. Poll*,** 588 N.W.2d 583, 587 (Neb. 1999), overruled in part on other grounds, *Gibilisco v. Gibilisco*, 637 N.W.2d 898 (Neb. 2002). The Nebraska Supreme Court held that a litigant had no federal due process right to court appointed counsel in a post-dissolution proceeding to adjust parental visitation. However, it broadly stated that "in either a criminal or a civil action, due process may require appointment of counsel where a significant right is at stake in a case ordinarily brought on by the State or where a deprivation of liberty is threatened."

Mead v. Batchlor, 460 N.W.2d 493, 504-05 (Mich. 1990). The court noted that an indigent defendant may not be incarcerated if he or she has been denied counsel in a contempt proceeding for nonsupport. Further, the court suggested, in considering the potential for expanding the right to counsel, that the appointment of attorneys in some cases will likely save the government jail housing costs, among other expenses.

In re T.W., 551 So. 2d 1186, 1196 (Fla. 1989): The Florida Supreme Court held that in proceedings for a minor to bypass parental consent for an abortion, "wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy [by obtaining an abortion], counsel is required under our state constitution." The court noted that the provision of counsel in a prior case involving termination of parental rights was based on the fact that "an individual's interest in preserving the family unit and raising children is fundamental," and thus since "a woman's right to decide whether or not to continue her pregnancy constitutes a fundamental constitutional right," counsel is similarly required whenever one can be deprived of the authority to exercise that right.

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (W.Va. 1980). The Supreme Court of Appeals of West Virginia found a right to counsel in paternity cases under the state constitution where the state is the plaintiff. It led off by holding, "[o]ur state constitutional due process right to counsel requires court-appointed attorneys in criminal and civil actions which may constrain one's liberty or important personal rights." The Court also pointed out its prior holdings refused to draw a line between criminal and civil cases, as well as a case that had held that for criminal contempt proceedings, "if the penalty to be imposed is more than 'trivial,' certain basic procedural due process requirements applicable in ordinary criminal cases are equally applicable in contempt proceedings." It then took this holding out of the contempt context, restating the holding to be broadly that "where the penalty is not trivial as determined from the facts of the case, due process requires appointed counsel for indigents."

Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979*)*. The Alaska Supreme Court held that *i*n a private child custody proceeding, if one parent is represented by counsel appointed by a public agency, and the other spouse is indigent, then the indigent spouse has a right to court- appointed counsel pursuant to the due process clause of the Alaska Constitution. In reaching this holding, the Court held that the due process clause of the Alaska Constitution is flexible and the "concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding."

Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971). Indigent defendants claimed the right to counsel after being charged with a disorderly person offense. The trial court denied right to an appointed counsel. The appellate court affirmed, but meanwhile discussed the right to counsel in detail and noted that "considerations of fairness dictate that appropriate steps be taken to protect unrepresented indigent defendants against injustices which may result from their inability to cope fairly with municipal court charges against them."

U.S. STATUTES: *RIGHT TO COUNSEL.*

California's Sargent Shriver Civil Counsel Act, Assembly Bill 590, Chapter 457, Section 1 (2009). The California legislature recognizes that the right to counsel is a fundamental right in this act (but did not actually provide for or effectuate a right to counsel).

> "The Legislature hereby finds and declares all of the following:
>
> (h) Equal access to justice without regarding to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It is also essential to the public's confidence in the legal system and its ability to reach just decisions.
>
> (j) Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.
>
> (l) The state has an interest in providing publicly funded legal representation and nonlawyer advocates or self-help advice and assistance, when the latter is sufficient, and doing so in a cost-effective manner by ensuring the level and type of service provided is the lowest cost type of service consistent with providing fair and equal access to justice. .."

San Francisco's Right to Counsel in Civil Matters, San Francisco Administrative Code Article 58, Sections 58.1-58.3 (Mar. 6, 2012). San Francisco also recognized the right to counsel in civil proceedings as an important right, and pledged its full commitment towards creating a right to counsel. However, this ordinance also does not provide for or effectuate a right to counsel.

> "This title is intended to represent the City and County's firm commitment to creating a local judicial system that provides representation to all residents involved in civil proceedings that could deny them basic human needs, such as child custody, shelter, sustenance, safety or health, regardless of their income or ability to pay."

INTERNATIONAL STATUTES: *RIGHT TO COUNSEL.*

Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, ¶19, OJ 2013 L 294 (Oct. 6, 2013) (*e.g.* "Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay in accordance with this Directive").

Rome Statute (The ICC's legal framework provides for an accused to be represented by counsel at both trial and investigation stage of the proceedings before the Court).

An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 11 Hen. 7, c. 12 (1494), *reprinted in* 2 Statutes of the Realm 578 (1993) (spelling modernized) established a right to counsel for indigent civil plaintiffs with meritorious causes of action, requiring a court to "assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same …." The right later was expanded to include civil defendants as well as plaintiffs.

CASES BEFORE INTERNATIONAL BODIES: *RIGHT TO COUNSEL.*

N/A

CASES BEFORE OTHER NATIONAL COURTS OR SUB-REGIONAL BODIES: *RIGHT TO COUNSEL.*

Airey v. Ireland, 2 Eur. Ct. H.R. 305 (1979). Ms. Airey, an indigent Irishwoman, could not afford to hire a lawyer and was seeking a judicial separation from her husband, as well as financial support for herself and her children. The European Court of Human rights found that article 6 of the convention providing a right to a fair trial in civil cases necessitates the right to free counsel when needed to provide for effective access to justice. The court stated that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial…" The court held that Mrs. Airey was not provided with an *effective* right to a fair trial without assistance of counsel "by reason of by reason of the complexity of the procedure or of the case."

Steel v. United Kingdom, 22 Eur. Ct. H.R. 403 (2005). The European Court of Human Rights was not persuaded by the UK's argument that the judge had helped the unrepresented defendants sued by McDonald's Corporation for defamation or that the defendants had benefited from periodic assistance from pro bono lawyers. The Court concluded that these measure were not sufficient to substitute for assistance of counsel The court introduced another factor into its analysis of the right to a fair trial, looking at whether there was an "equality of arms" between the parties, as it stated was important and necessary for a fair and equal legal process.

TREATY BODY, CHARTER-BASED BODY, AND SPECIAL PROCEDURES COMMENTARY AND RECOMMENDATIONS: *RIGHT TO COUNSEL.*

Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, ¶80, U.N. Doc. A/HRC/25/54 (Dec. 30, 2013). The U.N. Special Rapporteur on the right to adequate housing included ensuring access to justice in her guiding principles on security of tenure for the urban poor, particularly noting that:

> "[t]he urban poor face significant barriers in accessing justice, owing to, inter alia…prohibitive costs of legal representation… States should take all measures to remove these barriers and ensure that the urban poor can access effective remedies through a range of judicial and administrative mechanisms… States should establish, fund and enable legal aid and assistance for the urban poor, in order to address power asymmetries that pervade conflicts over land and obstruct access to justice."

Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, ¶69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012). The U.N. Special Rapporteur on adequate housing noted that access to effective legal remedies is an important protection against eviction and that legal aid may be required.

Report of the Special Rapporteur on the independence of judges and lawyers, Summary, ¶1, 27, 29, U.N. Doc A/HRC/23/43 (Mar. 15, 2013). This whole report is dedicated to encouraging States to develop and implement effective and sustainable legal aid schemes.

> Summary: "The Special Rapporteur considers that legal aid should be ensured both in criminal and in non-criminal cases, and encompass all stages of judicial or extrajudicial procedures, thus contributing to the elimination of obstacles that hamper access to justice through the provision of assistance to people otherwise unable to afford legal counsel, representation and access to the court system."

¶1: "1. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice."

¶27: Noting the right to free legal assistance applies in "any judicial or extrajudicial procedure aimed at determining rights and obligations."

¶29: "legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel".

Report of the Special Rapporteur on extreme poverty and human rights, Report on access to justice for people living in poverty, ¶60-2, U.N. Doc. A/67/278 (Aug. 9, 2012).

"The right to legal assistance, enshrined in many major global and regional human rights instruments, is essential for ensuring due process and equality before the courts. The provision of free and competent legal advice and assistance to those who are otherwise unable to afford it is a fundamental prerequisite for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms…

…free legal aid should not only be provided in criminal matters, but also in civil matters when individuals do not have sufficient resources to pay for legal assistance and, without such assistance, they are prevented from asserting their rights. For example, when domestic law requires that individuals be represented by counsel to access judicial protection, the failure to provide free legal aid to persons without financial means would constitute a violation of the right to a fair trial and to effective judicial protection…

… Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions. Indeed, exclusion of certain categories of claims from the scope of free legal aid, such as housing or immigration proceedings, or exclusion from representation before quasi-judicial tribunals, such as welfare or employment appeal boards, discriminates against the poor. Moreover, the legal processes which relate to such civil matters are often extremely complex and their requirements onerous, creating insurmountable obstacles for those without the assistance of a lawyer, particularly if the State or other party enjoys such assistance. This is particularly troubling with respect to civil matters involving the most vulnerable groups, such as indigenous peoples, persons with disabilities and ethnic minorities, who often face serious deprivations and violations of their rights, and lack the means or ability to contest them."

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 65/199, ¶10, U.N. Doc. A/HRC/18/44 (Jul. 21, 2011).

"[L]egal aid provided to victims or programmes to steer youth away from right-wing extremist groups by offering vocational training and relocation opportunities are welcomed."

Report on Immigration in the United States: Detention and Due Process, Inter-Am. Comm'n on Human Rights, ¶418, OEA/Ser.L/V/11. Doc. 78/10 (Dec. 20, 2010).

> "…. Another concern the IACHR sets forth in this report is the impact of detention on due process, mainly with respect to the right to legal counsel which directly impacts the right to seek release. To ether guarantee the right to legal representation and, ultimately, to due process, the IACHR considers that stronger progress offering alternatives to dentition are needed and the Legal Orientation Program must be expanded nationwide."

Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. Comm'n on Human Rights, at 1–2, OEA/Ser.L./V/II.129 Doc. 4 (Sept. 7, 2007).

> "[T]he IACHR has not only recognized the general standard establishing the obligation of the state to provide free legal assistance to persons without means, but also identified a series of criteria by which to determine its propriety in specific cases…the Inter-American Commission has identified the following factors for the purposes of such a determination: a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved."

Concluding Observations – United States of America, U.N. Committee on the Elimination of Racial Discrimination, ¶22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

> "The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake."

Concluding Observations – United States of America, U.N. Committee on the Elimination of Racial Discrimination, ¶22, U.N. Doc. CERD/C/USA/CO/7-9 (Sept., 25, 2014).

> "While welcoming the steps taken by the State party to improve access to justice by indigent persons, such as the Access to Justice Initiative launched in March 2010, the Committee remains concerned at the ongoing challenges faced by indigent persons belonging to racial and ethnic minorities to effectively access legal counsel in criminal proceedings in practice. It also reiterates its concern at the lack of a generally recognized right to counsel in civil proceedings (CERD/C/USA/CO/6, para.22), which disproportionately affects indigent persons belonging to racial and ethnic minorities to seek an effective remedy in matters such as evictions, foreclosures, domestic violence, discrimination in employment, termination of subsistence income or medical assistance, loss of child custody, and deportation (art. 6).
>
> The Committee ... recommends that the State party allocate sufficient resources to ensure effective access to legal representation for indigent persons belonging to racial and ethnic minorities in civil proceedings, particularly with regard to proceedings that have serious consequences for their security and stability, such as evictions, foreclosures, domestic violence, discrimination in employment, termination of subsistence income or medical assistance, loss of child custody, and deportation proceedings."

Report of the Special Rapporteur on violence against women, its causes and consequences, ¶46, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

> **"**There are many measures undertaken by States in terms of their due diligence obligation to protect, which consist mainly of provision of services to women, such as telephone hotlines, health care, counselling centres, legal assistance, shelters, restraining orders and financial aid to victims of violence."

Report of the Special Rapporteur on violence against women, its causes and consequences, ¶90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003).

> "States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including … legal aid."

Report of the Special Rapporteur on the Human Rights of Migrants, Annual Report to the Committee on Human Rights, Human Rights Council, ¶24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002).

> "When the migrant must take the initiative for such review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice."

General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Human Rights Committee, ¶10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

> "The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so…"

Kennedy v. Trinidad and Tobago, Communication No. 845/1998, U.N. Doc. CCPR/C/67/D/845/1998 (1998). The U.N. Human Rights Committee found a violation under Article 14 of the ICCPR due to the denial of legal aid in a death penalty case. The Committee specifically noted that

> "the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interests of justice so require…It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation …to make the remedies in the Constitutional Court…available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court… the Committee considers that the denial of legal aid constituted a violation…"

Borisenko v. Hungary, Communication No. 852/1999, U.N. Doc. CCPR/C/76/D/852/1999 (1997). The U.N. Human Rights Committee found in this case that

> "In its previous jurisprudence, the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation. It recalls its prior jurisprudence that legal assistance should be available at all stages of criminal proceedings. Consequently the Committee finds that the facts before it reveal a violation of article 14, paragraph 3 (d) of the Covenant."

Currie v. Jamaica, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994). In this death penalty case, the U.N. Human Rights Committee again found that

> "[W]here a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14, paragraph 1, juncto article 2, paragraph 3."

5.13.4 SAMPLE ARGUMENTS: *RIGHT TO COUNSEL.*

These sample human rights arguments should be used to supplement your local, state and federal-law based claims and defenses. Do not rely on these arguments alone.

SAMPLE ARGUMENT 1 – RESPECT FOR THE RIGHT TO CIVIL COUNSEL CAN BE FOUND WITHIN OUR COMMON LAW TRADITION AND WITHIN OTHER LEGAL SYSTEMS.

The status of the right to counsel under transnational law is highly relevant to this Court's consideration of the scope of the right to counsel in [jurisdiction / e.g. Washington State]. The persuasive value of such law has been accepted by U.S. courts at all levels. These legal authorities are particularly relevant to state court jurisprudence, since our federal system accords states the primary responsibility for fulfilling many of our international human rights obligations.

In this instance, the value of looking to foreign and international law is especially relevant. It was a family law case in which the European Court of Human Rights (ECtHR) made the landmark decision that a "fair trial" often may require the assistance of counsel. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979). That decision reflected the jurisprudence of two-thirds of the then member states of the Council of Europe (COE). The right to publicly provided civil legal counsel extends back centuries in some countries and across diverse legal, cultural, and political traditions. Forty nine member countries of the COE are implementing *Airey* and its progeny. [Plaintiff/Defendant] commends to this court the respect accorded the right to civil counsel within our common law tradition and within other legal systems.

***From* Brief of International Law Scholars as Amici Curiae in Support of Appellant, *In re Marriage of King*, 174 P.3d 659 (Wash. 2007) (No. 79978-4).**

SAMPLE ARGUMENT 2 – THE RIGHT TO COUNSEL SHOULD BE GUARANTEED IN THIS CASE BECAUSE THE RIGHTS AT ISSUE ARE SO FUNDAMENTAL AND DESERVE THE HIGHEST PROTECTION

The opinions of other national courts and by international bodies, like sister states, while not binding on this court, provide comparative illustrative examples of how other courts and policymakers treat this issue. *See Roper v. Simmons*, 125 S. Ct., 1183, 1200 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."). *See also*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and by the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (citing The International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women to provide support for affirmative action under the Constitution); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

Forty-seven countries in Europe, as well as Canada, Australia, New Zealand, Zambia, Brazil, Madagascar, and South Africa, have statutes or a constitutional provision that ensure free civil counsel for indigent people. Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 148 (2009). While the right to counsel for individuals facing criminal charges has long been settled under human rights law, there is now a growing international consensus that there is a right to counsel in civil legal proceedings involving important human needs. *Id*. *See also* U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1, U.N. Doc. E/CN.15/2012/L.14/Rev.1 (2012), http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.15/2012/L.14/Rev.1 ("States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution."); Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Principle 1, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), http://www1.umn.edu/humanrts/instree/i3bprl.htm ("All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."); American Bar Association Resolution on Right to Counsel in Civil Proceedings (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

Human rights law recognizes the right to counsel as a means to an end; the right to counsel is essential to fair, equal, and meaningful access to justice. *See* International Covenant on Civil and Political Rights ("ICCPR"), arts. 2, 14, 26, 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; International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), arts. 5,6, 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; Charter of the Organization of American States ("OAS Charter"), art. 45, Apr. 30, 1948, 119 U.N.T.S. 3, *ratified by the U.S.* Dec. 13, 1951. *See* General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Human Rights Committee, ¶10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), http://tbinte rnet. ohchr. org/_layouts/treatybody external/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en;
Moreover, human rights law recognizes that the lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty. *See* Report of the Special Rapporteur on Extreme Poverty and Human Rights, Report on access to justice for people living in poverty**,** ¶60-2, U.N. Doc. A/67/278 (Aug. 9, 2012), http://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx.

[Insert the important facts of this case]. Plaintiff/Defendant should be guaranteed access to counsel in this proceeding because the rights at issue are so fundamental and involve important human needs. In addition, the proceedings at hand are complicated and she/he will be unable to adequately represent her/himself interests without legal representation and Plaintiff/Defendant will be denied his/her right to meaningfully access justice. Not only does state law support the right to counsel in cases such as this one, but adjacent sister states as well as countries such as South Africa, Zambia, and 47 countries in Europe, all recognize a right to legal representation in cases such as these.

5.13.5 TALKING POINTS FOR ORAL ARGUMENTS: *RIGHT TO COUNSEL.*

These talking points, to be used for oral advocacy and motions practice, correspond with the sample arguments above.

TALKING POINTS #1-

1. The persuasive value of human rights law and law from other countries is recognized by U.S. courts at all levels.

2. The the European Court of Human Rights made a landmark decision in 1979 that a "fair trial" may require the assistance of legal counsel in a civil case like the one at issue.

3. Today, forty-seven countries in Europe, as well as other countries, recognize the right to counsel in civil legal proceedings.

4. [Plaintiff/Defendant] commends to this court the respect accorded the right to civil counsel within our common law tradition and within other legal systems.

TALKING POINTS #2-

1. The opinions of international bodies are not binding on this court, but they can provide examples of how other courts and policymakers treat an issue.

2. There is a growing international consensus that there is a right to counsel in civil legal proceedings involving important human needs, such as the case at hand.

3. 47 countries in Europe, as well as Canada, Australia, New Zealand, Zambia, Brazil, Madagascar, and South Africa, all recognize the right to counsel in civil cases.

4. Human rights law recognizes that the lack of legal representation can seriously prejudice the rights and interests of persons living in poverty, and exacerbates the impacts of racial disparities in access to basic human necessities.

5. In this case, Plaintiff/Defendant should be guaranteed the right to counsel, because the rights at issue are so fundamental and involve important human needs.

6. Without legal representation Plaintiff/Defendant will be denied his/her fundamental right to access justice.

5.13.6 CASE STUDIES OF LEGAL AID ATTORNEYS: *RIGHT TO COUNSEL.*

LEGAL SERVICES AND FARMWORKER GROUPS JOIN TOGETHER AND USE INTERNATIONAL MECHANISMS TO ADVOCATE FOR THE RIGHT TO COUNSEL FOR MIGRANT FARMWORKERS

With Maryland Legal Aid leading the charge, a total of 30 legal services and farmworker rights organizations submitted the first-ever joint legal aid complaint to Magdalena Sepúlveda Carmona, the UN Special Rapporteur on Extreme Poverty and Human Rights, on December 13, 2012. The joint legal aid complaint called upon the Special Rapporteur to examine the United States' failure to ensure human rights defenders' and healthcare workers access to migrant farmworker labor camps. The group alleged that the lack of legal protections guaranteeing migrant

labor camp access violates basic human rights, including the right to freedom of assembly and association, right to freedom from arbitrary arrest, right to personal security, right to due process, right to healthcare, right to nondiscrimination, and right to access to legal counsel. A copy of that complaint can be found here. In late December 2012, the U.N. Special Rapporteur on extreme poverty and human rights joined with the U.N. Special Rapporteur on the rights of human rights defenders and the U.N. Special Rapporteur on the human rights of migrants in a letter to the United States, available here, raising many of the issues in the joint legal aid submission.

The same group of legal services and farmworker organizations also submitted a shadow report to the U.N. Human Rights Committee in Fall 2013, and Nathaniel Norton, Farmworker Attorney at Maryland Legal Aid, attended the U.N. Human Rights Committee review of the U.S. in Geneva in March 2014. He spoke to the Committee members directly about this issue while in Geneva, and the Committee specifically recommended that the U.S. take measures to ensure immigrants have access to legal representation in its concluding observations.

The group is also pursuing advocacy on these issues before the Inter-American Commission on Human Rights, as well as before the U.N. Committee on the Elimination of Racial Discrimination through the filing of a shadow report.

5.13.7. SAMPLE BRIEFS & PETITIONS: *RIGHT TO COUNSEL.*

Brief of International Law Scholars as Amici Curiae in Support of Appellant, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 79978-4)

Comment to Petition 10-08, Submitted to Wisconsin Supreme Court in Response to Proposed Changes to Rule 11.02, Northeastern University School of Law Program on Human Rights & Global Economy, (Sept. 12, 2011)

Comment to Petition 10-08, Submitted to Wisconsin Supreme Court in Response to Proposed Changes to Rule 11.02, Earl Johnson, Jr., Assoc. Justice (retired), Cal. Court of Appeal, Second Appellate District (Sept. 9, 2011)

5.13.8 OTHER RESOURCES: *RIGHT TO COUNSEL.*

National Coalition for a Civil Right to Counsel Webpage

Toolkit for a Right to Counsel in Civil Proceedings, American Bar Association (2010) (includes a model access act and basic principles on the right to counsel in civil proceedings).

Resolution on Right to Counsel in Civil Proceedings, American Bar Association (2006)

Closing the Justice Gap Webpage, Brennan Center for Justice at New York University School of Law

Good Governance and Human Rights Webpage, U.N. Office of the High Commissioner for Human Rights

Access to Justice and Rule of Law Webpage, U.N. Development Programme

ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES: RESPONSE TO THE FOURTH PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE, COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC, (2013)

ACCESS TO CIVIL JUSTICE: RACIAL DISPARITIES AND DISCRIMINATORY IMPACTS ARISING FROM LACK OF ACCESS TO COUNSEL IN CIVIL CASES: A RESPONSE TO THE 2007 PERIODIC REPORT OF THE UNITED STATES OF AMERICA ON COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, NORTHEASTERN UNIVERSITY SCHOOL OF LAW PROGRAM ON HUMAN RIGHTS & GLOBAL ECONOMY (2007).

A Right to a Lawyer? Momentum Grows, 40 CLEARINGHOUSE REV. (July-August 2006), special issue on the civil right to counsel.

Risa E. Kaufman, Martha F. Davis & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel,* 45 COLUM. HUM. RTS. L. REV. 732 (2014).

Martha Davis, Participation, *Equality and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260 (2013).

Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147 (2009).

Martha F. Davis, Race and Civil Counsel in the United States: A Human Rights Report, 64 SYRACUSE L. REV. 447 (2014)

Sarah Paoletti, *Deriving Supporting from International law for the Right to Counsel in Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 651 (2006).

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Version 7/21/14