ACKNOWLEDGMENTS

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<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>ADRAM</td>
<td>American Declaration on the Rights and Duties of Man</td>
</tr>
<tr>
<td>AFL-CIO</td>
<td>Convention on the American Federation of Labor and the Congress of Industrial Organizations</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CATOC</td>
<td>Convention Against Transnational Organized Crime</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<tr>
<td>CERD</td>
<td>Convention on the Elimination of Racial Discrimination</td>
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<td>COHRE</td>
<td>Centre on Housing Rights &amp; Evictions</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>CTM</td>
<td>Confederation of Mexican Workers</td>
</tr>
<tr>
<td>DEVAW</td>
<td>Declaration on the Elimination of Violence Against Women</td>
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<tr>
<td>EEOC</td>
<td>Equal Employment Opportunity Commission</td>
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<tr>
<td>FLSA</td>
<td>Fair Labor Standards Act</td>
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<td>GCP</td>
<td>UN Guidelines for Consumer Protection</td>
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<tr>
<td>HUD</td>
<td>US Department of Housing and Urban Development</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICCTC</td>
<td>UN Draft International Code of Conduct on Transnational Corporations</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
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<tr>
<td>ICRMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
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<td>ICRSR</td>
<td>International Convention Relating to the Status of Refugees</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>NGO</td>
<td>Non-governmental Organization</td>
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<tr>
<td>OAS</td>
<td>Organization of American State</td>
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<td>OSHA</td>
<td>Occupational Safety and Health Administration</td>
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<tr>
<td>TVPA</td>
<td>Torture Victims Protection Act</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>UGT</td>
<td>General Worker of Spain</td>
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<tr>
<td>UNDOC</td>
<td>UN Office on Drugs and Crime</td>
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<td>UPR</td>
<td>Universal Periodic Review</td>
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1 INTRODUCTION

Legal aid attorneys1 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 by working with Maryland Legal Aid and Texas RioGrande Legal Aid as founding partners for the project in 2012, but plans to expand the project to include legal aid attorneys from 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

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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.
legal services to Maryland’s poor through a mix of services and to bring about the changes poor people want in the 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.

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.

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.” 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 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.

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.” 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. 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.

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. 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. 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 Medellín 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.
### 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.

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Description and Citation</th>
<th>Date(^9)</th>
<th>U.S. Action</th>
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<tbody>
<tr>
<td><strong>Universal Declaration of Human Rights (UDHR)</strong></td>
<td>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).</td>
<td>Dec. 10, 1948</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>International Covenant on Civil &amp; Political Rights (ICCPR)</strong></td>
<td>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.</td>
<td>Dec. 16, 1966</td>
<td>Ratified and entered into force, Sep. 8, 1992.</td>
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</table>

\(^9\) The dates listed in the column labeled “Date" refer to the date the instrument was opened for signature.
<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Description and Citation</th>
<th>Date</th>
<th>U.S. Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Economic, Social, and Cultural Rights (ICESCR)</td>
<td>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.</td>
<td>Dec. 16, 1966</td>
<td>Signed only</td>
</tr>
<tr>
<td>Convention Against Torture and Other Cruel, Inhuman or Degradating Treatment or Punishment (CAT)</td>
<td>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.</td>
<td>Dec. 10, 1984</td>
<td>Ratified and entered into force on Nov. 20, 1994.</td>
</tr>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</td>
<td>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.</td>
<td>Dec. 21, 1965</td>
<td>Ratified and entered into force, Nov. 20, 1994.</td>
</tr>
<tr>
<td>Treaty or Declaration</td>
<td>Description and Citation</td>
<td>Date</td>
<td>U.S. Action</td>
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<tr>
<td>Convention on the Rights of the Child (CRC)</td>
<td>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.</td>
<td>Nov. 20, 1989</td>
<td>Signed only</td>
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<tr>
<td>Treaty or Declaration</td>
<td>Description and Citation</td>
<td>Date</td>
<td>U.S. Action</td>
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<tr>
<td>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography</td>
<td>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.</td>
<td>May 25, 2000</td>
<td>Ratified and entered into force, Jan. 23, 2003.</td>
</tr>
<tr>
<td>Abolition of Forced Labour Convention, ILO Convention No. 105</td>
<td>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.</td>
<td>June 5, 1957</td>
<td>Ratified and entered into force, Sept. 25, 1991.</td>
</tr>
<tr>
<td>International Convention Relating to Status of Refugees (ICRSR)</td>
<td>The ICRSR defines who is a refugee and promotes the rights of asylum seekers. Full text.</td>
<td>Apr. 22, 1954</td>
<td>N/A</td>
</tr>
<tr>
<td>Treaty or Declaration</td>
<td>Description and Citation</td>
<td>Date</td>
<td>U.S. Action</td>
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<td><strong>International</strong></td>
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<tr>
<td>Convention on the</td>
<td>The ICRMW promotes the</td>
<td>Jul. 1, 2003</td>
<td>N/A</td>
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<tr>
<td>Protection of the</td>
<td>rights of migrant</td>
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<td>Rights of All Migrant</td>
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<td>Workers and Members</td>
<td>families by defining</td>
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<td>of Their Families</td>
<td>and protecting specific</td>
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<td>(<strong>ICRMW</strong>)</td>
<td>rights and applies</td>
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<td>through the duration of</td>
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<td></td>
<td>the migration process.</td>
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<tr>
<td><strong>International</strong></td>
<td>The CRPD promotes the</td>
<td>Mar. 30, 2007</td>
<td>Signed only</td>
</tr>
<tr>
<td>Convention on the</td>
<td>rights of persons with</td>
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<td>Protection and</td>
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<td>Promotion of the</td>
<td>protection, equal</td>
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<td>Rights and Dignity of</td>
<td>participation, and</td>
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<tr>
<td>Persons with Disabilities (<strong>CRPD</strong>)</td>
<td>accessibility, and provides for special protections for</td>
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<td>provides special</td>
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<td>protections for women</td>
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<td>and children with</td>
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<td>disabilities. It entered</td>
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<td>into force in March 2008</td>
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<td>As of January 2012, the</td>
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<td>Convention had 153</td>
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<tr>
<td></td>
<td>signatories, of which</td>
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<tr>
<td></td>
<td>109 were also parties.</td>
<td></td>
<td></td>
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<td></td>
<td>Full text.</td>
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</table>
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.

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Description and Citation</th>
<th>Signed by President</th>
<th>Ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>The American Declaration on the Rights and Duties of Man (American Declaration)</td>
<td>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.</td>
<td>Apr. 30, 1948</td>
<td>N/A</td>
</tr>
<tr>
<td>American Convention on Human Rights (ACHR)</td>
<td>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.</td>
<td>Nov. 21, 1969</td>
<td>Signed only</td>
</tr>
</tbody>
</table>

2.3 “RUDs” – RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

2.3.1 INTRODUCTION TO RESERVATIONS, 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 and this section of the Handbook provides only a basic introduction to RUDs.

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. 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." 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.

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. Declarations are usually statements of the Senate’s position, opinion or purpose relating to the subject matter of the treaty, but not to its specific provisions, and do not modify the legal effect of the treaty.

One State may officially enter an objection to a RUD entered by another state, which alters the treaty obligations only between those two parties. 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. 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.

For a thorough explanation of treaty reservation law, see e.g. Liesbeth Lijnzaad, Reservations to UN Human Rights Treaties (1994).
Vienna Convention, supra note 8.
Dalton, supra note 12 at 6.
Id.
Id.
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.

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Reservations, Understandings and Declarations</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil &amp; Political Rights (ICCPR)</td>
<td>Reservations, Understandings and Declarations made by the United States of America upon ratifying the International Covenant on Civil &amp; Political Rights (ICCPR)</td>
</tr>
<tr>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</td>
<td>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)</td>
</tr>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</td>
<td>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)</td>
</tr>
</tbody>
</table>


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.nlchnp.org/content/pubs/Letter_to_New_Orleans_Opposing_Anti-camping_Ordinance_April_20081.pdf.

2.4 CUSTOMARY INTERNATIONAL LAW

Customary law is an independent source of international law, defined as “a general practice accepted as law.”\(^\text{23}\) 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.”\(^\text{24}\) 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.\(^\text{25}\)

U.S. courts have long recognized that customary international law is a part of U.S. law.\(^\text{26}\) 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.\(^\text{27}\) 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.\(^\text{28}\) 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).\(^\text{29}\)

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.\(^\text{30}\) 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

\(^{23}\) 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.”).


\(^{26}\) 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...”).


\(^{29}\) Id.

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

31 Id.
32 Id.
37 Roper, supra note 34. See also Graham, supra note 34.
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

41 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§102(4), Comment l. (“General principles are a secondary source of international law.”), supra note 3.
3 STRATEGIES FOR EFFECTIVELY USING INTERNATIONAL HUMAN RIGHTS IN YOUR EVERYDAY WORK


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[...].”

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.
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. 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.

### 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. 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. 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 review 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.” 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.

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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**

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. There are currently 36 thematic mandates and 10 country mandates. 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.

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


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. The human rights principles set out in the OAS Charter are further developed in the American Declaration on the Rights and Duties of Man.

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.
The Inter-American Commission was created in 1959 to “promote the observance and defense” of human rights in OAS member states. 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.

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 or 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. 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.


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.


57 Rules of Procedure of the Inter-American Commission on Human Rights, art. 32, OEA/Ser.L./V/l.14, 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 Domíñchetti 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 causal 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.**

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

- **Mossville Environmental Action Now 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**

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 the[ir] territory”).
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.

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


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 center, both in terms of decision-making and also in terms of empowering clients to tell their own stories and to be

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62 Bettinger-López, supra note 53, at 586;
63 Id.
64 Id.
66 Michael Jackson, Man in the Mirror, on Bad (Epic/CBS Records 1987).
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”. 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.” 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.”

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.

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. The U.N. principles state that:

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68 Id.
69 Id. at 179.
70 Id. at 179-80.
[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.\textsuperscript{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,\textsuperscript{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.

5. **Innovation**

\textsuperscript{72} Id., Principle 14.


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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 TO 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”).

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. The Model Rules do, however, require respect for the legal system, those who serve it, and for the rights of third persons. The Model Rules also incorporate several other ideas related to respect, such as diligence and promptness.

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.” The Model Rules, however, allow for some delay in transmitting information to clients. 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. 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...
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.

81 Id. at 1.4 [5].
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.” 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.
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...

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.”

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.” 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.

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.”

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 USC § 601.

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.

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.” You should look to your own state constitution to see if this makes sense.

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 Nuremberg 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”).

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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). See 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.

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\(^{105}\) 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.\(^\text{106}\)

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.\(^\text{107}\)

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.\(^\text{108}\)

\(^{106}\) 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);
In 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 Cramer 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 Eighth Amendment, UDHR, or CAT. Id. (citing cf. Nevius v. McDaniel, 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. Leonard, 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).


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).


**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**


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 REFERENCING OR RELEVANT TO HUMAN RIGHTS LAW**


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 States 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 *Case 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 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.*

OPOSITION 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.

OPOSITION 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.”

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.

“...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).

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.¹

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

¹ 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.


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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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.\textsuperscript{123}

Resources for data related to domestic violence:

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

\textbf{5.1.3 RELEVANT HUMAN RIGHTS LAW: \textit{FREEDOM FROM DOMESTIC VIOLENCE}}

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.

\textbf{RATIFIED TREATIES: \textit{FREEDOM FROM DOMESTIC VIOLENCE}}

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<tr>
<td>\textbf{International Covenant on Civil and Political Rights (ICCPR)}</td>
<td>\textbf{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), \textit{ratified by the U.S.} Sept. 8, 1992.</td>
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<td><strong>Article 14 of the ICCPR:</strong> &quot;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.&quot;</td>
<td>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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 17 of the ICCPR:</strong> &quot;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.&quot;</td>
<td>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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 26 of the ICCPR:</strong> &quot;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.&quot;</td>
<td>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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 4 of CAT:</strong> “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.”</td>
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<td><strong>Article 13 of CAT:</strong> “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.”</td>
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## Human Rights Instruments Not Ratified by the U.S.: Freedom from Domestic Violence

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<td><strong>Article 10 of the ICESCR</strong>: “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.</td>
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<td>International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</td>
<td><strong>Article 2 of CEDAW</strong>: “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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td><strong>Article 5(a) of CEDAW</strong>: “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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td><strong>Article 2 of CRC</strong>: “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td>Article 5 of CRC: &quot;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.&quot;</td>
<td>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.</td>
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<td>Article 9 of CRC: &quot;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.”</td>
<td>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.</td>
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<td>Article 12 of CRC: &quot;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.&quot;</td>
<td>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.</td>
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<td>Article 16 of CRC: &quot;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.”</td>
<td>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.</td>
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<td>Article 19 of CRC: &quot;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.”</td>
<td>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.</td>
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<td><strong>Treaty or Declaration</strong></td>
<td>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.</td>
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<td><strong>American Convention on Human Rights (ACHR)</strong></td>
<td>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.</td>
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<td><strong>American Convention on Human Rights (ACHR)</strong></td>
<td>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.</td>
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<td><strong>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)</strong></td>
<td>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).</td>
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**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 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.


**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 the 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**


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.


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.


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.


**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.


**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”).


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


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.


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.


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.

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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](#).

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](#).

**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*

5.2 LABOR AND EMPLOYMENT RIGHTS

The Labor and Employment Rights section of this Handbook was written by Sarah Paoletti. *

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 time frame increased more than 40 percent. 125
- In February 2010, the unemployment rate for African Americans was 15.8%, for Hispanics it was 12.4%, and for whites, it was 8%. 126

*Sarah Paoletti directs the Transnational Legal Clinic at the University of Pennsylvania Law School. Students enrolled in the clinic engage in direct legal representation of individual and organizational clients in a myriad of cases and projects that require them to grapple with international and comparative legal norms in settings that cut across cultures, borders, languages, and legal systems. Before Penn Law, Paoletti taught in the International Human Rights Law Clinic at American University Washington College of Law and she also taught a seminar on the labor and employment rights of immigrant workers. Her areas of specialty include international human rights, migrant and immigrant rights, asylum law, and labor and employment. She has presented on the rights of migrant workers before the United Nations and the Organization of American States, and also works closely with advocates seeking application of international human rights norms in the United States. Ms. Paoletti holds a J.D. from American University Washington College of Law and a B.A. from Yale University.

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.127

For FY 2011, the EEOC reported an increase in discrimination claims filed, with nearly 100,000 claims filed, and noted a substantial rise in the number of retaliation claims (up to 37,334).128

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.129

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

- **U.S. Census Bureau, Reports and Publications**
- The [Occupational Safety and Health Administration of the US Department of Labor](http://www.osha.gov) similarly maintains national statistics pertaining to work-related injury and illness and inspections conducted by OSHA.
- The [International Labour Organization Department of Statistics](http://www.i laboro.org) 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](http://www.pewresearch.org), and for reports specific to Latino and Hispanic workers, see [Pew Hispanic Center](http://www.pewhispanic.org). The [Economic Policy Institute](http://www.epi.org) 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 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.

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127 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](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5722a1.htm).
### RATIFIED TREATIES: LABOR AND EMPLOYMENT RIGHTS

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
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<tr>
<td><strong>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</strong></td>
<td><strong>Article 1 of CERD:</strong> &quot;(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.&quot; 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, <em>ratified by the U.S.</em> Nov. 20, 1994 [emphasis added].</td>
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<td><strong>Article 2 of CERD:</strong> &quot;(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.&quot; 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, <em>ratified by the U.S.</em> Nov. 20, 1994 [emphasis added].</td>
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<td><strong>Article 5 of CERD:</strong> &quot;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: (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.&quot; 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, <em>ratified by the U.S.</em> Nov. 20, 1994 [emphasis added].</td>
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<tr>
<td><strong>International Covenant on Civil and Political Rights (ICCPR)</strong></td>
<td><strong>Article 2 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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<td><strong>Article 8 of the ICCPR</strong>: &quot;(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.&quot; 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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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<tr>
<td><strong>Article 22(1) of the ICCPR</strong>: &quot;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.&quot; 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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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<tr>
<td>International Convention Relating to Status of Refugees (ICRSR)</td>
<td><strong>Article 15 of ICRSR</strong>: &quot;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.&quot; International Convention Relating to the International Status of Refugees, art. 15, 189 U.N.T.S. 137, <em>entered into force</em> Apr. 22, 1954 [emphasis added].</td>
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<td><strong>Article 17(1) of ICRSR</strong>: “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, <em>entered into force</em> Apr. 22, 1954 [emphasis added].</td>
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<td><strong>Article 24 of ICRSR</strong>: “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, <em>entered into force</em> Apr. 22, 1954 [emphasis added].</td>
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<td>International Labor Organization (ILO) Convention, No. 105, Abolition of Forced Labour, 1957</td>
<td>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.</td>
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<td>Charter of the Organization of American States (Charter)</td>
<td>Article 34(g) of Charter of OAS: &quot;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.&quot; 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].</td>
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<tr>
<td>American Declaration on the Rights and Duties of Man (Declaration)</td>
<td>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].</td>
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<td>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].</td>
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<td>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).</td>
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<td>Article 16 of Declaration: &quot;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.&quot; 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].</td>
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<td>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].</td>
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<td>International Covenant on Economic, Cultural, and Social Rights (ICESCR)</td>
<td>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].</td>
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<td>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].</td>
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<td>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].</td>
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<td><strong>International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</strong></td>
<td><strong>Article 11 of CEDAW:</strong> “(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].</td>
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<td><strong>Convention on the Rights of Persons with Disabilities (CRPD)</strong></td>
<td><strong>Article 9(1) of CRPD:</strong> “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].</td>
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<td><strong>Article 27 of CRPD:</strong> “(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].</td>
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<td><strong>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (ICRMW)</strong></td>
<td><strong>Article 7 of ICRMW:</strong> “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), <em>entered into force</em> Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 25 of ICRMW:</strong> “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), <em>entered into force</em> Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 26(1) of ICRMW:</strong> “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), <em>entered into force</em> Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 27 of ICRMW:</strong> “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. A/RES/45/158, 30 I.L.M. 1517 (1990), entered into force Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 28 of ICRMW:</strong> “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. A/RES/45/158, 30 I.L.M. 1517 (1990), entered into force Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 32 of ICRMW:</strong> “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. A/RES/45/158, 30 I.L.M. 1517 (1990), entered into force Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 33 of ICRMW:</strong> “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. A/RES/45/158, 30 I.L.M. 1517 (1990), entered into force Jul. 1, 2003 [emphasis added].</td>
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<td><strong>Article 23 of the UDHR:</strong> “(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].</td>
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<td><strong>Article 25 of the UDHR:</strong> “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].</td>
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<tr>
<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Art. 6 of ACHR:</strong> “(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].</td>
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<td><strong>Art. 16(1) of ACHR:</strong> “(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].</td>
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<td><strong>Art. 26 of ACHR:</strong> “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).</td>
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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.\(^{130}\) The ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998)\(^ {131}\) 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),\(^ {132}\) and the ILO Right to Organize and Collective Bargaining Convention (No. 98)\(^ {133}\);
- elimination of all forms of forced or compulsory labor, as provided for in the ILO Forced Labour Convention (No. 29),\(^ {134}\) and the ILO Abolition of Forced Labor Convention (No. 105)\(^ {135}\);
- effective abolition of child labor, as set forth in the ILO Minimum Age Convention (No. 138),\(^ {136}\) and the ILO Worst Forms of Child Labour Convention (No. 182)\(^ {137}\); and,
- elimination of discrimination in respect of employment and occupation, as set forth in the ILO Equal Remuneration Convention (No. 100),\(^ {138}\) and the ILO Discrimination (Employment and Occupation) Convention (No. 111).\(^ {139}\)

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

**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.”


**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

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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

Petrovic v. Austria, 11 Eur. Ct. H.R. Rep. 588, ¶¶37-38 (1998). In a challenge to Austria’s Unemployment Benefit Act 1977 denying fathers parental leave benefits (subsequently amended), the European Court noted that “very weighty reasons would be need for such a difference in treatment to be compatible with the Convention,” but ultimately concluded, “the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.”

Wage claims, Forced Labor and Labor Trafficking

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.”

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.**

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

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.”


“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.”


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.”


“ 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.”
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.

<table>
<thead>
<tr>
<th>SAMPLE ARGUMENT 1 - RIGHT TO NON-DISCRIMINATION IN THE ENJOYMENT OF JUST AND FAVOURABLE CONDITIONS OF WORK</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.”).</td>
</tr>
<tr>
<td>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.”).</td>
</tr>
<tr>
<td>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.”).</td>
</tr>
<tr>
<td>[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;</td>
</tr>
</tbody>
</table>
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), http://bit.ly/Jv8ngL (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.I/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.

Version 9/25/13
SAMPLE ARGUMENT 4 - RIGHT TO FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING


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 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 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 complaint argues that the practice of denying farmworkers the right to have visitors and social services providers the right to meaningful access to migrant farmworker labor camps is a violation of human rights law.

5.2.7 SAMPLE BRIEFS & PETITIONS: LABOR AND EMPLOYMENT RIGHTS


5.2.8 OTHER RESOURCES: LABOR AND EMPLOYMENT RIGHTS

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.


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. 141

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. 142

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. 143
- 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. 144
- Here in the U.S., in 2009, over 17 million people confronted serious housing problems or had no housing at all. 145

^ 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.

141 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.”).


On a single night in January 2011, 636,017 people were homeless in the U.S.\textsuperscript{146}

More than 1.02 million people used homeless shelters in 2010.\textsuperscript{147}

The number of people in the U.S. in poverty jumped to 15.1% in 2010, a 17-year high.\textsuperscript{148}

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 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.

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<tr>
<th>Treaty or Declaration</th>
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| International Convention on the Elimination of All Forms of | Article 3 of CERD: "State Parties particularly condemn racial segregation and apartheid and
| Racial Discrimination (CERD)                               | 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      |


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<td><strong>Article 5 of CERD:</strong> &quot;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.&quot; 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, <em>ratified by the U.S. Nov. 20, 1994</em> [emphasis added].</td>
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<td><strong>International Covenant on Civil and Political Rights (ICCPR)</strong></td>
<td><strong>Article 2 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S. Sept. 8, 1992</em>.</td>
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<td><strong>Article 6 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S. Sept. 8, 1992</em>.</td>
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<td><strong>Article 7 of the ICCPR:</strong> &quot;No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.&quot; 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), <em>ratified by the U.S. Sept. 8, 1992</em>.</td>
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<td><strong>Article 17 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S. Sept. 8, 1992</em>.</td>
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<td><strong>Article 26 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S. Sept. 8, 1992</em>.</td>
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<td><strong>International Convention Relating to Status of Refugees (ICRSR)</strong></td>
<td>Article 21 of ICRSR: &quot;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.&quot; International Convention Relating to the International Status of Refugees, art. 21, 189 U.N.T.S. 137, entered into force Apr. 22, 1954.</td>
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<td><strong>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</strong></td>
<td>Article 16 of CAT: &quot;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.&quot; 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.</td>
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<td><strong>Charter of the Organization of American States (Charter of OAS)</strong></td>
<td>Article 34(k) of Charter of OAS: &quot;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,&quot; 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].</td>
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<td><strong>American Declaration on the Rights and Duties of Man (Declaration)</strong></td>
<td>Article 8 of Declaration: &quot;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.&quot; 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/serr.L/V/II.23 doc.21 rev.6 (May 2, 1948) [emphasis added].</td>
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<td>Article 11 of Declaration: &quot;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.&quot; 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/serr.L/V/II.23 doc.21 rev.6 (May 2, 1948) [emphasis added].</td>
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<td>Article 23 of Declaration: &quot;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.&quot; 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/serr.L/V/II.23 doc.21 rev.6 (May 2, 1948) [emphasis added].</td>
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**HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: HOUSING RIGHTS**

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<tr>
<td><strong>International Covenant on Economic, Cultural and Social Rights (ICESCR)</strong></td>
<td>Article 11(1) of the ICESCR: &quot;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.&quot; 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].</td>
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<td><strong>International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</strong></td>
<td>Article 14(2) of CEDAW: &quot;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.&quot; 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.</td>
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<td><strong>International Convention on the Rights of the Child (CRC)</strong></td>
<td>Article 27(1) of CRC: &quot;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.&quot; 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.</td>
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<td><strong>Convention on the Rights of Persons with Disabilities (CRPD)</strong></td>
<td>Article 9(1) of CRPD: &quot;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&quot; 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.</td>
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### Treaty or Declaration  
**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.”


### 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.”**


### 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).*

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**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.”


*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.


**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.”


**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


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.”


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 rely on 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


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.


[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.

Version 9/25/13
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](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.


[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%29/469f4d91a93782221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a93782221c12563ed0053547e?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](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](http://www.unhchr.ch/tbs/doc.nsf/0/959f71e476284596802564c3005d8d50?Opendocument).

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).

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


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. Moreover, the constitutions of at least 54 countries, on all continents except Antarctica, guarantee economic or financial rights. U.S. consumer protection laws fail 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. This is also seen in more than one-third of states in the U.S. where debtors’ prison is still legal.

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.
  - 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

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^ 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.


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

- 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.  

- Consumers reported fraud losses of over $1.1 billion to the Consumer Financial Protection Bureau between July 21 and December 31, 2011.  

- 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.

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

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154 Id.  
### 5.4.3 RELEVANT HUMAN RIGHTS LAW: CONSUMER RIGHTS

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 TREATIES: CONSUMER RIGHTS

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<thead>
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<th>Treaty or Declaration</th>
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<td><strong>International</strong></td>
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<td><strong>Elimination of All</strong></td>
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<td><strong>Forms of Racial</strong></td>
<td>Article 5 of CERD: &quot;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...&quot; 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, <strong>ratified by the U.S. Nov. 20, 1994.</strong></td>
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<td><strong>Discrimination</strong></td>
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<td><em>(CERD)</em></td>
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<td><strong>International</strong></td>
<td>Article 17 of the ICCPR: &quot;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.&quot; 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), <strong>ratified by the U.S. Sept. 8, 1992.</strong></td>
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<td><strong>Convention on Civil</strong></td>
<td>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.&quot; 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), <strong>ratified by the U.S. Sept. 8, 1992.</strong></td>
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<td><strong>and Political Rights</strong></td>
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<td><em>(ICCPR)</em></td>
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<td><strong>International</strong></td>
<td>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, <strong>entered into force Apr. 22, 1954</strong> [emphasis added].</td>
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<td><strong>Convention Relating</strong></td>
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<td><strong>Refugees</strong> <em>(ICR</em>*</td>
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<td>Charter of the Organization of American States (Charter of OAS)</td>
<td>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, <em>ratified by the U.S.</em> Dec. 13, 1951.</td>
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<td>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, <em>ratified by the U.S.</em> Dec. 13, 1951 [emphasis added].</td>
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**HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: CONSUMER RIGHTS**

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<th>Treaty or Declaration</th>
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<td>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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td>Universal Declaration of Human Rights (UDHR)</td>
<td>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).</td>
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<td>United Nations Guidelines for Consumer Protection (GCP)</td>
<td>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.</td>
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<td>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.</td>
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<td><strong>Article 37 of the ICCTC:</strong> “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).</td>
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<td><strong>Article 38 of the ICCTC:</strong> “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).</td>
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<td><strong>Article 39 of the ICCTC:</strong> “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).</td>
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**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


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. 158

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. 159

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. 160
- In 2010, more than 17 million households in the U.S. faced food insecurity. 161
- Over 15% of people in the U.S. live below the official poverty line. 162

^ 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.


159 Social Security Administration, Benefits Paid by Type of Beneficiary December 2011, http://www.ssa.gov/OACT/ProgData/icp.html; U.S. Census Bureau, supra note 148 at 14.


• 22% of children in the U.S. live below the official poverty line.\textsuperscript{163}
• Over 18% of people in the U.S. do not have health insurance.\textsuperscript{164}
• Over 60 million people in the U.S. received social security or supplementary security income in December 2011.\textsuperscript{165}
• 15% of people in the U.S. who receive social security benefits are disabled workers, and 64% are retired workers.\textsuperscript{166}
• The number of retired workers receiving social security benefits has nearly doubled since 1970.\textsuperscript{167}

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 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.

\textsuperscript{163} Id. at 15.
\textsuperscript{164} Centers for Disease Control and Prevention, Early Release of Selected Estimates Based on Data From the 2010 National Health Interview Survey, \texttt{http://www.cdc.gov/nchs/fastats/hinsure.htm}.
\textsuperscript{165} Social Security Administration, Monthly Statistical Snapshot December 2011, \texttt{http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/}.
\textsuperscript{166} Social Security Administration, supra note 159.
\textsuperscript{167} Social Security Administration, Social Security Beneficiary Statistics, \texttt{http://www.ssa.gov/OACT/STATS/OASDibenies.html}
### RATIFIED TREATIES: RIGHTS TO PUBLIC ASSISTANCE

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
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<tr>
<td><strong>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</strong></td>
<td><strong>Article 5 of CERD:</strong> “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, <em>ratified by the U.S. Nov. 20, 1994.</em></td>
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<tr>
<td><strong>International Covenant on Civil and Political Rights (ICCPR)</strong></td>
<td><strong>Article 26 of ICCPR:</strong> “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), <em>ratified by the U.S. Sept. 8, 1992.</em></td>
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<tr>
<td><strong>International Convention Relating to Status of Refugees (ICRSR)</strong></td>
<td><strong>Article 23 of ICRSR:</strong> “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, <em>entered into force Apr. 22, 1954</em> [emphasis added].</td>
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<td><strong>Article 24(1) of ICRSR:</strong> “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, <em>entered into force Apr. 22, 1954</em> [emphasis added].</td>
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<td><strong>Article 24(2) of ICRSR:</strong> “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, <em>entered into force Apr. 22, 1954.</em></td>
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<td><strong>Article 24(3) of ICRSR:</strong> “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, <em>entered into force Apr. 22, 1954.</em></td>
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| **International**  
Treaty or Declaration  
Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)  
(Convention Against Torture and Other Cruel, Inhuman or 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. |
| **American**  
Declaration on the Rights and Duties of Man (Declaration) | **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). |
| **American**  
Declaration on the Rights and Duties of Man (Declaration) | **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). |
| **American**  
Declaration on the Rights and Duties of Man (Declaration) | **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). |
| **American**  
Declaration on the Rights and Duties of Man (Declaration) | **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**
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**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).

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**HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: RIGHTS TO PUBLIC ASSISTANCE**

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<td><strong>Article 11(1) of the ICESCR</strong>: &quot;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.&quot; 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, <em>entered into force</em> Jan. 3, 1976.</td>
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<tr>
<td><strong>International Convention on the Elimination of All Forms of Discrimination Against Women</strong> (<a href="#">CEDAW</a>)</td>
<td><strong>Article 11(1) of CEDAW</strong>: “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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td>Article 11(2) of CEDAW:</td>
<td>&quot;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.</td>
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<td>Article 12 of CEDAW:</td>
<td>&quot;(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.</td>
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<td>Article 14 of CEDAW:</td>
<td>“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.</td>
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<td><strong>Article 23 of CRC</strong>: “(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.</td>
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<td><strong>Article 26(1) of CRC</strong>: “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.</td>
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<td><strong>Convention on the Rights of Persons with Disabilities (CRPD)</strong></td>
<td><strong>Article 25 of CRPD</strong>: “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.</td>
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<td><strong>Article 28(2) of CRPD:</strong></td>
<td>“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.</td>
</tr>
<tr>
<td>Universal Declaration of Human Rights (UDHR)</td>
<td><strong>Article 22 of UDHR:</strong> “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).</td>
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<td><strong>Article 23(3) of UDHR:</strong> “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).</td>
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<td><strong>Article 25(1) of UDHR:</strong> “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).</td>
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<td><strong>Article 25(2) of UDHR:</strong> “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).</td>
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<td><strong>The European Social Charter (Social Charter)</strong></td>
<td><strong>Article 12 of Social Charter:</strong> “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.</td>
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<td><strong>Article 13 of Social Charter:</strong> “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.</td>
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<td><strong>Article 14 of Social Charter:</strong> “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.</td>
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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.
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.¹

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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰

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.

¹ 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.

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


¹⁶⁹ CRC, art. 1.

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. 171

- Violence against children exists in every country of the world, cutting across culture, class, education, income and ethnic origin. 172

- 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. 173

- Severe childhood stress causes long term effects which last through adulthood, including increased risk of depression, drug and alcohol abuse, and even heart disease. 174

- 408,425 children were in foster care in the U.S. in September 2010. 175

- While most children in foster care live in family settings, a substantial minority — 16 percent — live in institutions and group homes. 176

- 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. 177

- As of January 26, 2012, 677,221 children in the U.S. are victims of abuse and neglect. 178

- African-American children are twice as likely to enter foster care than White children, despite equal rates of abuse and neglect for children of all races. 179

- 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. 180

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**

176 Id.
180 Yale Law School, Representing Children Worldwide, a survey (2005), [http://www.law.yale.edu/rcw/index.htm](http://www.law.yale.edu/rcw/index.htm).
5.6.3 RELEVANT HUMAN RIGHTS LAW. CHILDREN’S RIGHTS.

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 TREATIES: CHILDREN’S RIGHTS.

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Article/Citation</th>
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<tr>
<td>International Covenant on Civil and Political Rights (ICCPR)</td>
<td><strong>Article 14(1) of the ICCPR</strong>: “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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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<td><strong>Article 23(4) of the ICCPR</strong>: “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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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<td><strong>Article 24(1) of the ICCPR:</strong> “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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<tr>
<td><strong>International Convention Relating to Status of Refugees (ICRSR)</strong></td>
<td><strong>Article 4 of the ICRSR:</strong> “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, <em>entered into force</em> April 22, 1954.</td>
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<tr>
<td><strong>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</strong></td>
<td><strong>Article 1 of CAT:</strong> “[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), <em>as modified by</em> 24 I.L.M.535 (1985), <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>Charter of the Organization of American States (Charter of OAS)</strong></td>
<td><strong>Article 49 (a) of Charter of OAS:</strong> “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, <em>ratified by the U.S.</em> Dec. 13, 1951.</td>
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<td>American Declaration on the Rights and Duties of Man</td>
<td><strong>Article 7 of the Declaration:</strong> “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).</td>
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<td>(Declaration)</td>
<td><strong>Article 30 of the Declaration:</strong> “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).</td>
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<td><strong>Article 31 of the Declaration:</strong> “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).</td>
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| 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. 
### 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.

### HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: CHILDREN’S RIGHTS

#### International Covenant on Economic, Cultural and Social Rights (ICESCR)

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<td><strong>Article 10 (1) of the ICESCR:</strong> “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.</td>
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<td><strong>Article 10(3) of the ICESCR:</strong> 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.</td>
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<td>Article 13(3) of the ICESCR:</td>
<td>“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, <em>entered into force</em> Jan. 3, 1976.</td>
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<td>Article 5(b) of CEDAW:</td>
<td>“States parties shall take all appropriate measures... to 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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td>Principle 2 of the Declaration on Child:</td>
<td>“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).</td>
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<td><strong>Principle 4 of the Declaration of the Rights of the Child:</strong> “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).</td>
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<td><strong>Principle 6 of the Declaration of the Rights of the Child:</strong> “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).</td>
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<td><strong>Principle 7 of the Declaration of the Rights of the Child:</strong> “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).</td>
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<td><strong>Principle 9 of the Declaration of the Rights of the Child:</strong> “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).</td>
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<td><strong>Principle 10 of the Declaration of the Rights of the Child:</strong> “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).</td>
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<tr>
<td><strong>International Convention on the Rights of the Child (CRC)</strong></td>
<td><strong>Article 2(2) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 3(1) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 3(3) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 9(1) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td>Article 9(2) of the CRC:</td>
<td>“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.</td>
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<tr>
<td>Article 9(3) of the CRC:</td>
<td>“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.</td>
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<tr>
<td>Article 9(4) of the CRC:</td>
<td>“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.</td>
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<td>Article 10(1) of the CRC:</td>
<td>“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.</td>
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<td>Article 12(1) of the CRC:</td>
<td>“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.</td>
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<td>Article 12(2) of the CRC:</td>
<td>“[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.</td>
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<td>Article 19(1) of the CRC:</td>
<td>“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.</td>
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<td><strong>Article 19(2) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 20(1) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 20(2)-(3) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 23(2)(3) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 23(4) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 24(1) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 28(1) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>Article 28(2) of the CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td>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.</td>
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<td>The American Convention on Human Rights (ACHR)</td>
<td>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).</td>
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<td><strong>The Universal Declaration of Human Rights (UDHR)</strong></td>
<td>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).</td>
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<td><strong>The Universal Declaration of Human Rights (UDHR)</strong></td>
<td>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).</td>
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<td>ARTICLE 8(2) OF THE ECHR: “[T]here 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).</td>
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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.


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.”


- “[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 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.


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


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.


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


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. ^ 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. 

Migrants attempting to enter the United States often face other human rights violations, including racial profiling and arbitrary detention. The principles of non-discrimination, right to liberty, right to a fair hearing and access to courts, and freedom from arbitrary detention 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. ^ 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.

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.

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^ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, art. 2; ICCPR, art. 2; ADHR, art. 2.
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.\(^ {190}\)
- 74.7% of cases before Immigration Judges in 2010 ended in removal orders.\(^ {191}\)
- Approximately 5 million children living in the United States have an undocumented parent, including 3 million children born in the United States.\(^ {192}\)
- Between 1998 and 2007, 108,434 of the individuals removed from the United States had U.S. citizen children.\(^ {193}\) Only about half of these removals were based on aggravated felony convictions.\(^ {194}\)
- Asylum denial rates are extremely high for individuals of certain nationalities, approaching 100% for Jamaican applicants.\(^ {195}\)

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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\(^{194}\) TRAC Immigration, Asylum Denial Rates by Nationality, [http://trac.syr.edu/immigration/reports/240/include/nationality_denial.html](http://trac.syr.edu/immigration/reports/240/include/nationality_denial.html).
5.7.3 RELEVANT HUMAN RIGHTS LAW: IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES

RATIFIED TREATIES. IMMIGRATION: FAMILY & BORDER RIGHTS ISSUES

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<thead>
<tr>
<th>Treaty or Declaration</th>
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<td>International Covenant on Civil and Political Rights (ICCPR)</td>
<td>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, <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td>International Covenant on Civil and Political Rights (ICCPR)</td>
<td>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), <em>ratified by the U.S.</em> Sept. 8, 1992 [emphasis added].</td>
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*Human Rights in the United States: A Handbook for Legal Aid Attorneys*
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<tr>
<td><strong>Article 14(1) of the ICCPR:</strong> “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), <strong>ratified by the U.S. Sept. 8, 1992</strong> [emphasis added].</td>
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<tr>
<td><strong>Article 17 of the ICCPR:</strong> “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), <strong>ratified by the U.S. Sept. 8, 1992</strong> [emphasis added].</td>
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<td><strong>Article 23 of the ICCPR:</strong> “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), <strong>ratified by the U.S. Sept. 8, 1992</strong> [emphasis added].</td>
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<td><strong>Article 26 of the ICCPR:</strong> “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), <strong>ratified by the U.S. Sept. 8, 1992</strong> [emphasis added].</td>
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<td><strong>Article 3 of ICRSR:</strong> “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, <strong>entered into force April 22, 1954.</strong></td>
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<td><strong>Article 33(1) of ICRSR:</strong> “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, <strong>entered into force April 22, 1954.</strong></td>
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<td><strong>International</strong></td>
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<tr>
<td>Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</td>
<td>Article 3(1) of CAT: “No State Party shall expel, return (&quot;refouler&quot;) 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), <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>American Declaration on the Rights and Duties of Man (Declaration)</strong></td>
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<td>Article 2 of the Declaration: “All persons are <em>equal before the law</em> 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].</td>
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<td>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].</td>
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<td>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].</td>
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<td>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].</td>
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<td>Article 25 of Declaration: “<em>No person may be deprived of his liberty</em> 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].</td>
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<td>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).</td>
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# Human Rights Instruments Not Ratified by the U.S.: Immigration: Family & Border Rights Issues

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<tr>
<td><strong>International Covenant on Economic, Cultural and Social Rights (ICESCR)</strong></td>
<td><strong>Article 10 of the ICESCR:</strong> “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, <em>entered into force</em> Jan. 3, 1976 [emphasis added].</td>
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<tr>
<td><strong>International Convention on the Rights of the Child (CRC)</strong></td>
<td><strong>Article 3 of CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990 [emphasis added].</td>
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<tr>
<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Article 10(1) of CRC:</strong> “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), <em>entered into force</em> Sept. 2, 1990.</td>
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<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Article 7 of the ACHR:</strong> “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].</td>
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<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Article 17(1) of the ACHR:</strong> “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].</td>
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<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Article 22(2) of the ACHR:</strong> “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].</td>
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<td><strong>The American Convention on Human Rights (ACHR)</strong></td>
<td><strong>Article 22(7)-(8) of the ACHR:</strong> “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).</td>
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<td><strong>Article 24 of the ACHR:</strong> “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].</td>
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<td><strong>The Universal Declaration of Human Rights (UDHR)</strong></td>
<td><strong>Article 2 of the UDHR:</strong> “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].</td>
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<tr>
<td><strong>Article 7 of the UDHR:</strong> “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).</td>
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<td><strong>Article 8 of the UDHR:</strong> “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).</td>
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<td><strong>Article 9 of the UDHR:</strong> “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].</td>
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<td><strong>Article 10 of the UDHR:</strong> “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).</td>
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<td><strong>Article 12 of the UDHR:</strong> “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].</td>
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<td><strong>The European Convention on Human Rights (ECHR)</strong></td>
<td><strong>Article 8 of the ECHR:</strong> “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].</td>
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<td>Article 14 of the ECHR: “The enjoyment of the rights and freedoms set forth in this</td>
<td>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].</td>
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<tr>
<td>International Convention on the Protection of the Rights of All Migrant Workers and</td>
<td>Members of their Family (ICPRM)</td>
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<td>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].</td>
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<tr>
<td>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].</td>
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<td>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].</td>
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<td>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].</td>
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<td>Boston Principles on the Economic, Social and Cultural Rights of Noncitizens (Boston Principles)</td>
<td>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).</td>
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Treaty or Declaration | Article/Citation
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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.


*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
Constitution, 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.


**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...
“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.”


“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.”


“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.”


“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.”


“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.


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


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”).


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.


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.


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/USPU12562ENG.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.**


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, [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

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. 

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, the right to protection against persecution and torture, as well as specific international law provisions regarding the protection of trafficked persons. Removing a victim of domestic violence can also implicate many human rights, including the right to life, the right to freedom from gender-based discrimination and the right to protection against persecution and torture.

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.


See, e.g., ICCPR, art. 8; ACHR, art. 6; ECHR art. 4.

ICCPR, art. 7; International Convention Relating to the Status of Refugees [hereinafter “ICRISAR’’], 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.


ICCPR, art. 6(1); ADHR, art. 1; ACHR, art. 4(1); UDHR, art. 3.

ICCPR, art. 3; ACHR, art. 22(8); UDHR, art. 2; CEDAW, art. 2.

ICRISAR, art. 33.

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. 204
- Between 2002 and 2010, USCIS has received 2968 applications for T visas; 1862 have been approved. 205
- In 2009 and 2010, USICS received 18,126 applications for U visas; 10,712 have been approved. 206
- 59.5% of married immigrant women in the U.S. experience domestic abuse, compared to 49.8% of unmarried immigrant women. 207
- The U.S. received the highest number of asylum applications of any industrialized country in 2010 at 55,500. 208
- Of the 55,500 asylum applications received by the U.S. in 2010, only 21,113 were granted. 209
- Only 35% of the defensive asylum applications filed in 2010 were granted. 210
- 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. 211
- A study of asylum seekers in Texas indicated that women’s claims were 472% less likely to be granted. 212

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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205 Id. at 27.
206 Id. at 30.
5.8.3 RELEVANT HUMAN RIGHTS LAW: IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES

**RATIFIED TREATIES: IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES**

<table>
<thead>
<tr>
<th>Treaty or Declaration</th>
<th>Article/Citation</th>
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<tbody>
<tr>
<td>International Covenant on Civil and Political Rights (ICCPR)</td>
<td>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), <strong>ratified by the U.S. Sept. 8, 1992.</strong></td>
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<tr>
<td>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</td>
<td>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), <strong>ratified by the U.S. Sept. 8, 1992.</strong></td>
</tr>
<tr>
<td>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</td>
<td>Article 33(1) of ICRSR: “No Contracting State shall expel or return (&quot;refoulé&quot;) 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, <strong>entered into force</strong> April 22, 1954.</td>
</tr>
<tr>
<td>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</td>
<td>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), <strong>as modified by</strong> 24 I.L.M.535 (1985), <strong>ratified by the U.S. Nov. 20, 1994.</strong></td>
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<td>Article 3(1) of CAT</td>
<td>“No State Party shall expel, return (&quot;refouler&quot;) 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.</td>
</tr>
<tr>
<td>American Declaration on the Rights and Duties of Man (Declaration)</td>
<td>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).</td>
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<tr>
<td>Article 27 of Declaration</td>
<td>“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).</td>
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<td>Article 25(1) of the CATOC</td>
<td>“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.</td>
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**HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES**

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<td><strong>International Covenant on Economic, Cultural and Social Rights (ICESCR)</strong></td>
<td><strong>Article 10 of the ICESCR</strong>: “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, <em>entered into force</em> Jan. 3, 1976 [emphasis added].</td>
</tr>
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**Treaty or Declaration** | **Article/Citation**
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**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].

**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).


**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)


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**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.
Ranci 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.”


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.


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.


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](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.


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.unhchr.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 Rantssev 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

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


5.8.8 OTHER RESOURCES: IMMIGRATION: TRAFFICKING AND DOMESTIC VIOLENCE ISSUES


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. 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.

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.
  - One in five (20%) are unaware of their infection.

- HIV disproportionately affects persons with less access to prevention and treatment services, which often leads to poorer health outcomes.
  - Blacks represent 14% of the U.S. population, but account for 46% of people living with HIV as of 2008.
  - Hispanics/Latinos make up 16% of the U.S. population, but account for 17% of people living with HIV as of 2008.

- In the U.S., 16 states require some form of disclosure of HIV/AIDS status by public officials or health care providers.

- HIV has claimed over 25 million lives around the world in the past three decades.

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^ 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.

216 Id.
217 Id.
218 Id.
219 Id.
220 Id.
221 Center for HIV Law & Policy, Resources (2009), http://www.hivlawandpolicy.org/resources/view/182.
• Approximately 34 million people around the world were living with HIV in 2010.\textsuperscript{222}

• 97% of people living with HIV reside in low- and middle-income countries.\textsuperscript{223}
  
  - More than 67 percent (22.4 million people) of those infected are in sub-Saharan Africa.\textsuperscript{224}
  - In Asia, an estimated 4.7 million people were living with HIV in 2008.\textsuperscript{225}
  - In Latin America, there were an estimated 2 million people living with HIV/AIDS in 2008.\textsuperscript{226}
  - In Eastern European & Central Asia, there were 1.5 million people living with HIV/AIDS.\textsuperscript{227}

5.9.3 RELEVANT HUMAN RIGHTS LAW: HIV/AIDS.

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 TREATIES: HIV/AIDS.**

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<th>Treaty or Declaration</th>
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<tr>
<td><strong>International Covenant on Civil and Political Rights (ICCPR)</strong></td>
<td><strong>Article 6 of the ICCPR:</strong> &quot;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.&quot; 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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 17 of ICCPR:</strong> &quot;(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.&quot; 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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 26 of ICCPR:</strong> “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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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\textsuperscript{222} Id. 
\textsuperscript{223} Id. 
\textsuperscript{224} Id. 
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<td><strong>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment</strong> (CAT)</td>
<td><strong>Article 16 of CAT</strong>: “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), <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>Committee on the Elimination of Racial Discrimination</strong> (CERD)</td>
<td><strong>Article 5 of CERD</strong>: “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, <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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**TREATIES NOT RATIFIED BY THE U.S.: HIV/AIDS.**

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<td><strong>International Covenant on Economic, Cultural and Social Rights</strong> (ICESCR)</td>
<td><strong>Article 2(2) of ICESCR</strong>: “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, <em>entered into force</em> Jan. 3, 1976.</td>
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**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.
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<td>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.</td>
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**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.


¶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;


¶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.


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**


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.”). See 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.”)


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 POINT 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 POINT 2 - CRIMINALIZATION OF HIV/AIDS LAW

- U.S. law should be interpreted as consistent with international law whenever possible.
- 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.


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.¹

5.10.1 INTRODUCTION: DISABILITY RIGHTS

Disability is a natural part of the human condition²²⁸ and almost everyone will be temporarily or permanently disabled at some point in his or her life.²²⁹ Those who are lucky enough to survive to old age will experience increasing disability.²³⁰

The definition of “disability” is an evolving concept.²³¹ 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.²³² 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.²³³ The human rights framework requires treating persons with disabilities as rights holders, able to claim those rights through active participation in society.²³⁴

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.

²²⁸ First attributed to Robert Burgdorf, disability rights attorney, drafter of first version of the Americans with Disabilities Act.


²³¹ Id.

²³² Id.


especially women and girls with disabilities. 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.

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. 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.
- 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.
- The global literacy rate is as low as one per cent for women living with disabilities.
- More than 54 million people, including 27 million women, in the U.S. are living with disabilities.

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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238 World Disability Report, supra note 229 at xl.
239 Id.
5.10.3 RELEVANT HUMAN RIGHTS LAW: DISABILITY RIGHTS

### RATIFIED TREATIES: DISABILITY RIGHTS

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<thead>
<tr>
<th>Treaty or Declaration</th>
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<td><strong>Article 7 of ICCPR:</strong> “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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 17 of ICCPR:</strong> “(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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<td><strong>Article 26 of ICCPR:</strong> “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), <em>ratified by the U.S.</em> Sept. 8, 1992.</td>
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<tr>
<td>International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)</td>
<td><strong>Article 2 of CAT:</strong> “(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), <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>Article 16 of CAT:</strong> “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), <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>Committee on the Elimination of Racial Discrimination (CERD)</strong></td>
<td><strong>Article 5 of CERD:</strong> “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, <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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**TREATIES NOT RATIFIED BY THE U.S.: DISABILITY RIGHTS.**

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<td><strong>Convention on the Rights of Persons with Disabilities (CRPD)</strong></td>
<td><strong>Article 4 of CRPD:</strong> “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), <em>entered into force</em> May 3, 2008.</td>
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<td><strong>Article 7 of CRPD:</strong></td>
<td>“(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.</td>
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<td><strong>Article 14 of CRPD:</strong> “(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.</td>
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<td><strong>International Covenant on Economic, Cultural and Social Rights (ICESCR)</strong></td>
<td><strong>Article 2(2) of ICESCR:</strong> “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, <em>entered into force</em> Jan. 3, 1976.</td>
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<td><strong>International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</strong></td>
<td><strong>Article 11(1) of CEDAW:</strong> “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, <em>entered into force</em> Sept. 3, 1981.</td>
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<td><strong>Article 14(2) of CEDAW:</strong> “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, <em>entered into force</em> Sept. 3, 1981.</td>
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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.
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 accommodations 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.**


“¶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.”
“¶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.”


“¶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.”


“¶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.”


“¶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.”


“¶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.”


“¶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."). *See 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 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**


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](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.

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.242

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”).243 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.244 It also seeks to ensure that the rights of custody under the laws of one country are effectively respected in another.245 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.246 As of September 2013, 90 countries, including the U.S., have become parties to the Convention.247

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.”248 Thus, the Convention sets forth as its premise that the removal itself is harmful to the child. However, in making this
assumption, the 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.249

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.250 According to ICARA, she must carry her burden on all elements by a preponderance of the evidence.251

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”252; or

(b) Petitioner “had consented to or acquiesced in the removal or retention”253, 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 environment254; 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;255 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,”256 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.”257

Significantly, ICARA provides that all but two of these defenses must be proved by a preponderance of the evidence.258 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

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249 42 U.S.C. §11603 (a) and (b).
250 Hague Child Abduction Convention, Article 3.
251 42 U.S.C. §11603 (e)1.
252 Hague Child Abduction Convention, art. 13.
253 Id.
254 Hague Child Abduction Convention, art. 12.
255 Hague Child Abduction Convention, art. 13.
256 Hague Child Abduction Convention, art. 13b.
257 Hague Child Abduction Convention, art. 20.
258 42 U.S.C. §11603 (e) 2.
taking parent must sustain the very high burden of clear and convincing evidence. Thus, the two exceptions that arguably are most directly related to human rights carry the highest burden of proof.

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. 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.”

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, 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.’”

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.” 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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259 Id.
260 On the other hand, this is one of the rare provisions in U.S. domestic law that actually mentions human rights.
262 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.
265 Strengthening Article 20, supra note 263.
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.”

Perhaps the most conspicuous omissions from the Hague Child Abduction framework, however, are any discussions of the impact of domestic violence on custody disputes. 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. 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 (UCAPA) 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. 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 where 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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266 Id.
267 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, Article 25. The United States has not signed the Inter-American Convention on Return of Children.
268 International Child Abduction and the Escape from Domestic Violence, supra note 263, 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”).
• Over 260,000 child abductions occur each year, and family members perpetrate over 90% of abductions, often as an extension of domestic disputes. 270

• 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. 271

• 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. 272

• 27% of women who abduct their children are "nonviolent shared custodians." 273

• Yet another 1993 study found that at least 34% of abusers threaten to kidnap their children, and 11% actually abduct them. 274

INTERNATIONAL ABDUCTIONS OF CHILDREN

Statistics on international child abductions are compiled Permanent Bureau of the Hague Conference on Private International Law’s statistics database, INCAS TAT.

• 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. 275

• In 2008, 28% of the taking persons were fathers and the remaining 3% comprised grandparents, institutions or other relatives. 276

• 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. 277

• 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. 278

• 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. 279


273 Id.

274 Marsha B. Liss and Geraldine Butts Stahly, Domestic Violence and Child Custody, BATTERING AND FAMILY THERAPY, 175, 183 (1993).


276 Id.

277 Id.

278 Id.

279 Id.
In 2008, the USA received the most incoming return applications (283), while England and Wales received 200, Mexico 168 and Germany 115.  

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).  

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.

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.

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<td>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.</td>
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### 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.
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<td><strong>Article 5 of CERD:</strong> “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, <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>Article 6 of CERD:</strong> “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, <em>ratified by the U.S.</em> Nov. 20, 1994.</td>
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<td><strong>The Charter of the Organization of American States (OAS Charter)</strong></td>
<td><strong>Article 45 of the OAS Charter:</strong> “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, <em>ratified by the U.S.</em> Dec. 13, 1951.</td>
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**HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY THE U.S.: INTERNATIONAL CHILD ABDUCTION.**

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<td><strong>Article 10 of the ICESCR:</strong></td>
<td>“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].</td>
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<tr>
<td><strong>Article 10(3) of the ICESCR:</strong></td>
<td>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.</td>
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<td><strong>Article 13(3) of the ICESCR:</strong></td>
<td>“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.</td>
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<td><strong>International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</strong></td>
<td><strong>Article 5(b) of CEDAW:</strong> “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.</td>
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<td><strong>Article 16(1) of CEDAW:</strong></td>
<td>“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.</td>
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<td>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.”</td>
<td>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].</td>
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<td>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.”</td>
<td>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.</td>
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<td>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.”</td>
<td>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.</td>
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<td>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.”</td>
<td>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.</td>
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<td><strong>Article 5 of the Convention of Belém do Pará</strong></td>
<td>“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).</td>
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<td><strong>Article 6 of the Convention of Belém do Pará</strong></td>
<td>“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).</td>
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<td><strong>American Declaration on the Rights and Duties of Man</strong></td>
<td><strong>Article 5 of the Declaration</strong></td>
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<tr>
<td><strong>Article 6 of the Declaration</strong></td>
<td>“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).</td>
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<td><strong>Article 24 of the Declaration</strong></td>
<td>“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).</td>
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<td><strong>Article 30 of the Declaration</strong></td>
<td>“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).</td>
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<td><strong>The American Convention on Human Rights</strong></td>
<td><strong>Article 1 of ACHR</strong></td>
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<td><strong>Article 7 of the ACHR</strong></td>
<td>“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].</td>
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<td>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.</td>
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<td>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].</td>
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<td>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].</td>
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<td>The Universal Declaration of Human Rights (UDHR)</td>
<td>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].</td>
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<tr>
<td>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).</td>
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<td>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).</td>
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<td>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].</td>
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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].

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

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].
Treaty or Declaration | Article/ Citation
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International Convention Relating to Status of Refugees (ICR SR) | 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.

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**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.283 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.284 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.”285

*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 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

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283 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 fundamental principles relating to human rights, it would also involve returning him to an intolerable situation.


285 Id. at 614. (citation omitted).
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. 286

| 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.” 287

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. 288 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
day 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,


288 See Weiner articles, supra note 263. 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 268.
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.

**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 13(b) 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, 2012 U.S. Dist. LEXIS 109074 (W.D. Tex. 2012), appeal pending 5th Cir. Docket 12-50783, argued Sept. 5, 2013, The district court 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 will now consider whether the grant of asylum status has an impact on the court’s finding that they would not face grave risk of psychological or physical harm under Article 13 b should they be returned to their mother’s care in Mexico.

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 (Feb. 19, 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 (U.S., 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. 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 Second Circuit, however, held that the Article 12 well-settled defense is not subject to equitable tolling. It also held that the child and/or parent’s lack of legal immigration status is not dispositive, but is one of several factors district courts should consider, in determining whether the child is now well settled in their new environment. The Supreme Court granted cert to determine whether the Article 12 well settled defense is subject to equitable tolling. It did not grant cert on the impact of immigration status on whether a child can be well settled.

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.289

289 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.

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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:


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.


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:


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 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).

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:


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)


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)


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.


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.

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. 3.290

*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 was 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.291

290 See also Sanchez v. Sanchez, supra.
291 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, *Intolerable Situations And Counsel For Children: Following Switzerland’s Example In Hague Abduction Cases*, supra note 263. 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”).

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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:
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


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


The National Center for Missing and Exploited Children


