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Human Rights in the Trenches: Using International Human Rights Law in “Everyday” Legal Aid Cases

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International human rights law is increasingly used in domestic advocacy. The U.S. Supreme Court has cited foreign and international law with some frequency, particularly in cases involving the death penalty.¹ Many state courts and lower federal courts have followed suit.² Law school clinics have a growing focus on international human rights matters.³ Several public interest organizations systematically use international human rights approaches in their work within the United States.⁴

But while lofty international human rights principles and ringing phrases such as “human dignity” may seem appropriate references in appellate cases challenging serious and systemic wrongs, they can seem tone-deaf—and perhaps even counter-productive—in the halls of housing court or in a fair hearing. When domestic public interest lawyers participate in training on using international human rights as an advocacy tool, this question almost always comes up: Can advocacy of international human rights principles really play a useful role in run-of-the-mill legal aid cases?

¹See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (Clearinghouse No. 55,786). See also *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

²See, e.g., The Opportunity Agenda, Human Rights in State Courts: An Overview and Recommendation for Legal Advocacy (2007), www.opportunityagenda.org/site/c.mwL5KkNOLvH/b.1405941/k.99A0/Policy_Briefs_Publications.htm; Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn from Their Children”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 NEW YORK UNIVERSITY LAW REVIEW 1633 (2004); *Roe v. Bridgestone Corporation*, 2007 U.S. Dist. LEXIS 46697 (S.D. Ind.) (litigation under Alien Tort Statute); *Ciaprazi v. Senkowski*, 2003 U.S. Dist. LEXIS 23914 E.D.N.Y.) (citing the International Covenant on Civil and Political Rights in resolving issue of judicial bias); *Sherman v. Kasotakis*, 314 F. Supp. 2d 843 (N.D. Iowa 2004) (citing Convention on the Elimination of Racial Discrimination in Title VII race discrimination case); *State v. Romano*, 114 Haw. 1 (2007) (citing Convention on the Elimination of All Forms of Discrimination Against Women to support prostitution conviction).

³See Deena Hurwitz, *Lawying for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE JOURNAL OF INTERNATIONAL LAW 505, 524 (2003); my *The Pendulum Swings Back: Poverty Law in the New and Old Curriculum*, 34 FORDHAM URBAN LAW JOURNAL 101 (2007); BRANDT GOLDSTEIN, *STORMING THE COURT* (2005) (describing law school clinic’s litigation challenging U.S. government’s detention of Haitian refugees at Guantanamo).

⁴See generally Scott Cummings, *The Internationalization of Public Interest Law* 59–60 (University of California, Los Angeles, School of Law Research Paper No. 06-41, 2006), <http://ssrn.com/abstract=944552>. E.g., the National Center on Homelessness and Poverty in Washington, D.C., employs a human rights attorney to work on human rights in housing. The American Civil Liberties Union has a Human Rights Working Group in its national office. The National Economic and Social Rights Initiative provides technical assistance to U.S. groups interested in using human rights principles in their work. The U.S. Human Rights Network serves as a national umbrella organization for groups and individuals pursuing domestic application of human rights principles.

It would be nice to respond with a simple, resounding “yes.” But the question deserves a more nuanced answer. Certainly, from a “big picture” view of legal work on behalf of low-income clients, international human rights are relevant to even the most mundane and local case. When lawyers take on individual benefit cases, for example, they contribute to a larger effort to protect the economic and social rights of individuals—rights seldom recognized under U.S. law but central to international human rights law.⁵ Expanding the understanding of human rights law within the United States and enforcing the government’s accountability under international human rights law can only enhance the status of these economic and social rights domestically. In the long run, then, antipoverty advocates’ jobs might get a bit easier if international human rights norms were better integrated into domestic law.

But long-term considerations, however persuasive, may not pass the smirk test in the short term. Perhaps you’re in housing court challenging a landlord’s failure to correct code violations, or in family court disputing a termination of parental rights. Why resort to the blunderbuss of international human rights law when narrowly focused, local landlord-tenant law or family law would work just as well?

There are two responses, and both suggest that the conscientious legal aid lawyer, in addition to intimate knowledge of local landlord-tenant law, government benefits, family law, domestic violence, and other specialized areas, should have at least some familiarity with international human rights law. If the lawyer then determines that a case is not the right one in which to raise international human rights issues, she will have made the decision after full consideration of the potential arguments.

First, whether a matter is resolved through litigation or another kind of advocacy, understanding the global dimensions of and alternative approaches to the issue may change the way the lawyer thinks about the case from the outset. In a litigation context, for example, understanding international law’s approach to government accountability may tweak and strengthen a lawyer’s framing of the issue in a domestic context.

Similarly, knowledge of human rights principles may help a lawyer see beyond the constraints of domestic litigation to new approaches to a thorny problem. Rather than always, or even usually, focusing on litigation, human rights principles may serve as a potent organizing tool, a source of empowerment for clients, a vehicle for public education, a centerpiece for legislation, or a mechanism for initiating a conversation. For example, parent groups in Los Angeles and New York City have used principles of “human dignity” drawn from international human rights standards to organize and advocate more humane disciplinary protocols in the public schools. These activists have not relied on litigation at all but have used the moral and legal force of human rights principles to bring parents together to get the attention of school officials.⁶ In Los Angeles the result has been a new and productive dialogue with school administrators—and, already, policy changes. In another example, in the 1980s New York advocates concerned about prisoner abuse worked with the legislature to incorporate into state law internationally accepted minimum standards for treatment of prisoners. Without resorting to litigation, these advocates brought international standards into the state-law interpretive framework.⁷

Second, in any kind of advocacy, lawyers should have the full range of potential legal arguments at their fingertips. Many

⁵See, e.g., International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Jan. 3, 1976).

⁶See NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS (2007). The complete report is available at http://nesri.org/programs/dignity_report.html.

⁷See Vanita Gupta, *The Pioneering Career of Gay McDougall: Blazing a Path From Civil Rights to Human Rights*, in 1 BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo et al. eds., forthcoming 2008).

judges are interested in and receptive to international human rights arguments. But judges have scarce resources, and their failure to cite international human rights law *sua sponte* may reflect inadequate access to information rather than hostility to international law’s relevance. Even Justice Breyer has specifically asked lawyers before the Supreme Court to file briefs addressing relevant international law, indicating that without such briefs his clerks may not have time to research the issues.⁸ Some lower-court judges feel similarly. For example, at a recent legal aid conference in Maryland, a trial court judge noted the Maryland Court of Appeals’ frequent citations of foreign law and announced that she, also, was interested in receiving briefing on the international human rights law relevant to the cases before her.⁹

Not surprisingly given the bench’s demand for this information, judicial education on the substantive law of international human rights is growing rapidly. For instance, the American Society of International Law created an international law research and education tool specifically geared to judges at all levels and distributed it to more than two thousand state and federal judges.¹⁰ Lawyers should be ready to exploit judges’ receptivity to international human rights law.

Certainly, lawyers and advocates who are unfamiliar with international human rights principles will not use them, even if judges or policymakers are receptive and the principles would dovetail with and support client organizing efforts. Once familiarity is achieved, however, lawyers and advocates will have addi-

tional tools to use creatively on the right occasions.

So what are the right occasions? How can you use human rights in day-to-day practice? While no legal aid case is “generic,” I describe a few representative cases below. The first three are taken, with some modifications, from annual reports of legal aid organizations. Each was resolved favorably for the client. The fourth example is *King v. King*, a case concerning the civil right to counsel in a child custody proceeding.¹¹ That litigation started as a “run-of-the-mill” legal aid matter but then developed into test case. As of this writing, it is pending before the Washington Supreme Court.

In none of these matters did lawyers raise international human rights issues in the first instance, although international and comparative law were addressed in an *amicus* brief in *King v. King* in the final stage of the litigation.¹² But in each case lawyers could have raised international human rights principles much earlier and, by doing so, enhanced and extended the victories obtained. After describing each case I review the relevant international human rights law and suggest how a human rights approach might have been helpful, perhaps yielding an even more favorable resolution or laying the groundwork for future advocacy. I also suggest specific resources that might aid advocates in developing human rights arguments in particular cases. There is no need to reinvent the wheel—background information and more specific assistance are readily available to advocates who want to draw on this rich body of human rights principles.¹³

⁸Stephen Breyer, *Keynote Address*, 97 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 265, 267–68 (2003).

⁹Cathy Serrette, Assoc. Judge, Prince George’s County Cir. Ct., Remarks at the Maryland Partners for Justice Conference, Baltimore, Md. (May 3, 2007).

¹⁰See AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES (2003), www.asil.org/judicial/handbook.html.

¹¹*King v. King*, No. 57831-6-1 (Wash. Sup. Ct. Argued May 31, 2007) (Clearinghouse No. 56,032).

¹²The brief is available at www.slaw.neu.edu/clinics/phrge_pubs.html and in the Sargent Shriver National Center on Poverty Law’s Poverty Law Library, www.povertylaw.org/poverty-law-library/case/56000/56032.

¹³As a first step, for more information on a range of efforts to use international human rights in domestic advocacy, join the Human Rights section of Pro Bono Net, www.probono.net.

Government Benefits: Work, Education, and Training

Case Example: Ms. P, a 24-year-old single mother of two, approached a legal aid office for help. A survivor of domestic violence, she had escaped a life-threatening situation only to be faced with hunger and poverty after her public assistance application was denied. She needed to obtain the benefits to which she was entitled and, because she lacked skills, to participate in an education and training program in place of a work assignment.

Analysis: Given the benefits law relating to education and training, access to such programs may be severely restricted. Ms. P’s ability to continue receiving benefits while participating in such programs will likely turn on an administrator’s discretion or, if the matter is appealed, on a judge’s interpretation of state law. However, relevant international human rights standards could (1) frame the issues sympathetically, (2) encourage a judge or administrator to exercise discretion favorably and, or instead, to interpret the relevant statute generously, and (3) lay the groundwork for systemic change in policies that limit access to education and training.

First, as a domestic violence survivor, Ms. P has particular international law claims that enhance her arguments for access to education and training. Over the last twenty-five years, the United Nations has

clarified that the United Nations Charter and the Universal Declaration of Human Rights (recognized by the United States as a definitive statement of international law) recognize the right of women and children to be free from domestic violence and nations’ affirmative obligation to protect that right.¹⁴ The United States has ratified at least one international human rights treaty—the International Covenant on Civil and Political Rights—that recognizes the right to government protection from and remedies for domestic violence perpetrated by private actors.¹⁵ Two even more widely accepted treaties—signed but not ratified by the United States—similarly protect women and children: the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.¹⁶ Through its ratification of the Charter of the Organization of American States, the United States is held to the standards of the American Declaration of the Rights and Duties of Man as well as the charter. The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, a regional treaty implementing the Declaration which the United States has yet to ratify, also recognizes women’s right to be free from domestic violence and requires governments to take measures to prevent, investigate, and punish such acts.¹⁷

While these treaties hold national governments directly accountable for deal-

¹⁴The 1948 Universal Declaration of Human Rights states that “all are equal before the law and are entitled without any discrimination to equal protection of the law” and “everyone has the right to an effective [domestic] remedy ... for acts violating the fundamental rights granted [] by the constitution or by law.” Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., arts. 3–8, 12, 16–19, 22–24 at 71, U.N. Doc. A/810 (1948).

¹⁵International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 2 (entered into force March 23, 1976). The Office of the High Commission on Human Rights reports that 153 nations, as of November 2004, had ratified this treaty; see www.ohchr.org/english/law/ccpr-ratify.htm. The Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, both of which the United States has ratified, also require governments to take steps to prevent private violence—including domestic violence—that falls within the parameters of those treaties.

¹⁶Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) (entered into force Sept. 3, 1981) (ratified by 185 nations; see www.un.org/womenwatch/daw/cedaw/states.htm); Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1990) (entered into force Sept. 2, 1990) (ratified by 192 nations; see www.unicef.org/crc/index_30229.html). Even without ratification, as a signatory the United States “is obliged to refrain from acts which would defeat [its] object and purpose.” See Vienna Convention on the Law of Treaties, art. 18. Only the United States and Somalia have signed but not ratified the Convention on the Rights of the Child.

¹⁷Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

ing with domestic violence, states and localities also have obligations under international law. As an initial matter, under international human rights law each national government subject to a treaty must ensure that treaty principles are implemented throughout its political subdivisions.¹⁸ In the United States the principal mechanism for ensuring compliance with ratified treaties is the Supremacy Clause. Many state constitutions explicitly acknowledge the supremacy of ratified treaties and impose an independent obligation on state governments to implement a treaty’s provisions once the national government takes action to adopt it.¹⁹

The International Covenant on Civil and Political Rights, the Convention on Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Inter-American treaty, which establish nations’ obligation to adopt affirmative measures to combat and remedy domestic violence, offer considerable support for adequate welfare benefits and for education and training programs to ensure that women have the economic means to end violent relationships and to protect their children from the dire impact of violence. In Ms. P’s case, however, the government apparently did little or nothing to prevent the violence in the first place and is now compounding its initial failure by making it difficult for Ms. P to achieve the economic independence that she needs to support her family without further reliance on the batterer.

At the very least, this inaction violates the government’s obligation to bring its system into compliance with the International Covenant on Civil and Political Rights, which the United States has ratified, and the Convention on the Rights of the Child, many provisions of which

U.S. courts have recognized as customary international law. For example, the International Covenant on Civil and Political Rights recognizes domestic violence as a form of sex discrimination and accordingly requires that governments take affirmative steps to curtail it in order to achieve greater social equality.²⁰ Similarly, Article 26 of the Convention on the Rights of the Child specifically deals with a child’s right to benefit from social security, “taking into account the resources and the circumstances of the child,” including the potential for domestic violence in the home.²¹ A lawyer representing Ms. P might want to use these international human rights principles as a way to frame the issues, particularly to underscore the government’s role in perpetuating the impact of the violence and aggravating Ms. P’s current problems.

Second, even aside from her experiences of domestic violence, Ms. P can cite international law to support her argument for access to adequate education and training. While the United States has ratified none of the relevant treaties, and therefore is not legally bound by them, the treaties nevertheless contribute to the weight that should be given to Ms. P’s claims.

International human rights law deals extensively with vocational education and training as a component of both the right to work and the right to a basic education. As early as 1946, the Universal Declaration of Human Rights provided that “[t]echnical and professional education shall be made generally available.”²² The International Covenant on Economic, Social and Cultural Rights, completed in 1966, expanding on the Universal Declaration’s earlier formulation and addressing the right to work, provides that “the full realization of this right shall include

¹⁸RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207(b) (1986).

¹⁹See my *The Spirit of Our Times: State Constitutions and Human Rights*, 30 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 359 (2006).

²⁰International Covenant on Civil and Political Rights arts. 2(1), 3, 26.

²¹Covenant on the Rights of the Child art. 26.

²²Universal Declaration of Human Rights art. 26(1).

technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”²³

Article 13 of this covenant, dealing with the right to education, also refers to vocational training programs. Further, under the general comment issued by the Committee on Economic, Social, and Cultural Rights in 1999 to elucidate the meaning of these provisions, “[t]echnical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6 (2)).... [T]he Committee takes the view that [technical and vocational education] forms an integral element of all levels of education.”²⁴

The committee stated that vocational and professional training programs “should be understood as a component of general education” and that such training is needed because, among other reasons, “[i]t enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party’s economic and social development.”²⁵ The committee particularly noted the relationship between vocational training and the anti-discrimination provisions found elsewhere in the International Covenant on Economic, Social, and Cultural Rights, supporting “programmes which promote the [technical and vocational education] of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.”²⁶

In Ms. P’s case, a legal aid advocate might seek exercise of discretion under state

law to permit Ms. P to pursue education and training. Combined with a range of equitable arguments and possible domestic legal authority—such as a state constitutional provision on education, state antidiscrimination laws that extend to victims of domestic violence, and policy pronouncements favoring workforce development made by the state legislature and state program administrators—international human rights law’s strong statements about the fundamental nature of training and education may help Ms. P individually and may lay the groundwork for more general advocacy.

The posture of Ms. P’s case presents an opportunity to raise international human rights principles affirmatively. In an initial submission appealing to her caseworker’s discretion or in a petition seeking a review of denial of access to education and training, an advocate might cite the international law making government accountable for failing to eliminate the violence confronting Ms. P and then use that framework to strengthen her claim for services in the wake of the domestic violence. Reference to the human rights status of education and training may also highlight the significance of this issue and show that Ms. P’s claims are entirely consistent with needs that are recognized globally, particularly for families disrupted by violence.

The human rights law relating to education and training may also support more generalized advocacy on the issue. Several grassroots groups around the nation have focused their efforts on expanding welfare recipients’ access to education and training, particularly postsecondary education.²⁷ International human rights principles offer the groups an additional tool as they seek policy changes that would expand access to these programs. For example, proponents of educational

²³International Covenant on Economic, Social, and Cultural Rights art. 6

²⁴U.N. Committee on Economic, Social, and Cultural Rights, General Comment 13: The Right to Education (Art. 13), U.N. Doc. E/C.12/1999/10 (1999), ¶ 15.

²⁵*Id.* ¶ 16.

²⁶*Id.* ¶ 16(e).

²⁷See, e.g., Low-Income Families’ Empowerment Through Education (Lifetime), <http://geds-to-phds.org>; Welfare Rights Initiative, www.wri-ny.org.

options for benefit recipients might appeal to international bodies such as the Human Rights Committee (perhaps through the shadow reporting process), the U.N. Special Rapporteur on the Right to Education, the U.N. Special Rapporteur on Violence Against Women, or the Inter-American Commission Rapporteur on the Rights of Women, as a way to put additional pressure on states and the federal government to expand access to education and training.²⁸ Advocates could also seek a general hearing on the issue before the Inter-American Commission on Human Rights. Merely focusing on Ms. P’s individual circumstances, without appeal to broader international human rights principles, will have little impact on the many clients who share her concerns. Enlisting international human rights law in support of Ms. P’s case may also contribute to broader efforts on behalf of legal aid clients who need access to education and training programs in order to leave poverty permanently.

More information on domestic violence and international human rights law may be obtained from the ACLU Women’s Rights Project, the Columbia Law School Human Rights Clinic, or the International Women’s Human Rights Clinic at CUNY Law School, headed by Prof. Rhonda Copelon.²⁹ More specific information on welfare and human rights as well as the human right to education is available from the National Economic and Social Rights Initiative.³⁰

Housing

Case Example: Ms. G, a Latina, had been living with her three children in a rent-subsidized apartment for over ten years when they were evicted. For several years,

the landlord had been illegally charging increased rent, which Ms. G had not been able to pay. Ms. G wants to regain possession of her home.

Analysis: At first blush, this appears to be a purely private dispute between the landlord and Ms. G—to be resolved by using domestic landlord-tenant law and possibly a Fair Housing Act claim of race discrimination.³¹ However, the landlord’s recalcitrance or inability to make the plaintiff whole, or evidence that Ms. G’s predicament represents a systemic problem, may be reasons to try to bring the government to the table as well. Here international human rights law is “value-added”—it can uniquely support a theory of government accountability for Ms. G’s years of illegal rent payments. These same provisions will also bolster a holding against the landlord for violating an implied or express covenant of quiet enjoyment. Further, international human rights law may support a finding of race discrimination in housing, although international human rights law may not in the end help Ms. G return to the residence from which she was evicted, particularly if it has been rerented.

International law starts with a lofty principle—a universal right to housing—that is virtually foreign to U.S. law.³² With few exceptions, states are not required to house their residents. State constitutional law on housing is meager and poorly developed, and the federal constitution shies away from protecting economic rights. International human rights law, in contrast, requires that governments provide affordable, accessible, culturally sensitive, and minimally habitable housing to their constituents. The Universal Declaration on Human Rights

²⁸“Shadow reports” are prepared by nongovernmental organizations and presented to international monitoring bodies in response and as a counterweight to official reports periodically filed by governments reporting on their compliance with international standards. E.g., a shadow report prepared in 2006 by a large coalition of organizations in response to the United States’ report on its compliance with the International Coalition on Civil and Political Rights is available at www.ushrnetwork.org/page229.cfm.

²⁹See www.aclu.org/womensrights/humanrights/index; www.law.columbia.edu/focusareas/clinic/humanrights; www.law.cuny.edu/app/clinics/offerings/iwhr.jsp.

³⁰See www.nesri.org.

³¹Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619, 3631.

³²See Maria Foscarinis et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REVIEW 97 (July–Aug. 2004).

enshrines the right to adequate housing, as follows: “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....”³³

Further, the International Covenant on Civil and Political Rights, which the United States has ratified, protects the right to life—a right that has been construed to encompass a right to housing: “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.”³⁴

Although international human rights law might inform federal or state constitutional construction, arguing for an absolute right to housing in Ms. G’s case is unlikely to yield a favorable result. Instead international human rights arguments are better deployed to support finding the landlord liable under domestic law and the government accountable for responsibilities that the state has assumed through statute or regulation—here, provision of rent-subsidized housing. In fact, on several occasions, the U.N. Human Rights Committee that monitors government compliance with the International Covenant on Civil and Political Rights has construed Article 6 of that treaty to require the government to take positive measures to alleviate housing inadequacy.³⁵ In short, under international law, governments must act affirmatively to protect housing as well as to provide it.

One question is whether Ms. G had adequate means to enforce her existing housing rights under state law. The International Covenant on Civil and Po-

litical Rights requires participating governments to offer adequate processes for individuals to protect and enforce their rights—each ratifying nation must “ensure that any person whose rights or freedoms herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”³⁶ In Ms. G’s case, the facts related to the government’s participation in her eviction, and the availability of a remedy, are murky. Did she have access to a complaint procedure to challenge excess rent? If so, did she make a complaint? If not, was that because adequate information was not provided in Spanish or because the procedure was otherwise inaccessible? Were the landlord’s rent charges reported to the government through some other means (e.g., regular filings) so that by failing to correct the situation, the authorities tacitly participated in the illegal rent hikes and ultimately in an illegal eviction? Pointing to the International Covenant on Civil and Political Rights and the Universal Declaration Human Rights to support these claims of government accountability may support domestic legal theories that are otherwise difficult to sustain in the face of governmental immunity and the absence of a fundamental constitutional right to housing.

Given her membership in a protected class, Ms. G may also want to explore a claim of racial discrimination in violation of the federal Fair Housing Act.³⁷ She would file such a claim against the individual landlord, but, as in all discrimination claims, the mode for establishing discriminatory intent would be critical. Although the U.S. Supreme Court has never squarely addressed the

³³Universal Declaration of Human Rights art. 25(1).

³⁴International Covenant on Civil and Political Rights art. 6. The International Covenant on Economic, Social, and Cultural Rights and the jurisprudence implementing it also address the right to housing in some depth. While the United States has not ratified the latter covenant, these sources may be cited as persuasive authority. For an in-depth discussion, see NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES* (2d ed. 2006).

³⁵NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 34, at 33.

³⁶International Covenant on Civil and Political Rights art. 2.

³⁷42 U.S.C. §§ 3601 *et seq.* (Title VIII of the Civil Rights Act of 1968). A similar claim might be available under a state law analog to Title VIII.

issue, lower courts have held that housing discrimination claims, like employment discrimination alleged under Title VII, may proceed based on a theory of disparate impact without evidence of disparate treatment and specific intent to discriminate.³⁸ But Title VII’s disparate-impact theory has been under attack, and the approach has been rejected as a matter of constitutional antidiscrimination law.³⁹ In the face of this uncertainty, international human rights law can support a broader approach to proving discriminatory intent. In particular, the United States has ratified the Convention on the Elimination of All Forms of Racial Discrimination, which, among other provisions, decries race discrimination in housing and has been interpreted to permit proof of such discrimination based on statistical evidence of disparate impact as well as individualized proof of intent.⁴⁰

Indeed, the international community has shown a particular interest in race and housing in the United States. In its 2006 concluding observations on the most recent U.S. compliance report filed under the International Covenant on Civil and Political Rights, the U.N. Human Rights Committee stated:

The Committee is concerned by reports that some 50% of homeless people are African American although they constitute only 12% of the U.S. population. The State party should take measures, including adequate and adequately implemented policies, to ensure the cessation of this form of de facto and historically generated racial discrimination.⁴¹

If Ms. G’s lawyers view their client’s concerns as evidence of a systemic problem of discrimination, the Human Rights Committee’s language may support a broader view of the issues in court or as a basis for developing legislative solutions.

In Ms. G’s case, international human rights law could be used both affirmatively and responsively. Ms. G can raise domestic law claims that are against the landlord and against the local housing agency and would not arise under international law but might nevertheless cite the relevant international law on security of tenure, thereby underscoring the seriousness of the violations. Further, in the event that the housing agency seeks to dismiss the claims against it, human rights law will be particularly useful in a responsive brief to explain the rationale for and to support government accountability. Likewise, international human rights law will be quite useful in the fair housing claim if, after Ms. G files her initial complaint, the defendants seek a motion to dismiss or for summary judgment based on lack of evidence of specific intent to discriminate.

Of course, the appropriate use of international human rights law will depend a great deal on the specific facts and the relevant domestic law. More detailed guidance for legal aid housing advocates is available from the National Law Center on Homelessness and Poverty (www.nlchp.org) and the Centre on Housing Rights and Evictions (www.cohre.org), both of which have produced a number of savvy guides to using human rights analyses in both litigation and legislative advocacy.⁴² Columbia Law School’s Human Rights Institute, the National Economic and Social Rights Initiative,

³⁸See generally Jennifer C. Johnson, *Race-Based Housing for Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOYOLA JOURNAL OF PUBLIC INTEREST LAW 97 (2007). See also David Bonelli, *If You Build It, “They” Will Come: Intentional Discrimination and Disparate Impact Theory in Buckeye Community Hope Foundation v. City of Cuyahoga Falls—Does a Municipality’s Use of Referendum to Block an Approved Housing Project Violate Equal Protection and Title VIII?*, 26 HAMLINE LAW REVIEW 631 (2003).

³⁹*Washington v. Davis*, 426 U.S. 229 (1976).

⁴⁰Convention on the Elimination of Racial Discrimination Committee, General Recommendation XIV on Definition of Discrimination (art. 1¶ 1), 42d Sess., 1993, U.N. Doc. A/48/18.

⁴¹Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee ¶ 22 (2006).

⁴²See www.nlchp.org and www.cohre.org.

and Northeastern Law School are preparing a state-court litigation handbook that involves international human rights law and includes examples drawn from housing litigation.

Domestic Violence and Child Custody

Case Example: Ms. D was physically and emotionally abused by her husband, the father of her two daughters. When she sought an order of protection to exclude him from the marital apartment, he petitioned the family court and was awarded temporary custody of the children.

Analysis: As discussed above, domestic violence is deemed to be a violation of human rights under several international documents and treaties, and to comply with international law a government must take concrete steps to curtail such violence. In Ms. D’s case, the state’s failure to grant the order of protection is compounded by a taint of gender bias in the court, which awarded custody of two children to a male batterer and apparently failed to recognize how such a court order could play into the dynamics of domestic violence. In particular, batterers may use the court system strategically to exhaust their victim’s financial resources, limit the victim’s options, and essentially perpetuate the abuse.⁴³

The U.S. Supreme Court ruled in *Castle Rock v. Gonzales* that a local government was not liable for failing to enforce a valid order of protection.⁴⁴ In that tragic case a battered mother frantically sought to enforce an order of protection against her estranged husband on the night that the husband allegedly murdered the couple’s three daughters. A decision grounded in international human rights law would likely reach a different result and hold the government to a much higher standard. The American Civil Liberties Union

is now representing the mother, Jessica Gonzales, before the Inter-American Commission for Human Rights. Among the arguments made there are that the U.S. Supreme Court’s decision to absolve a local government of liability for failing to enforce an order of protection against a domestic violence perpetrator contradicts the United States’ obligations under the Charter of the Organization of American States to ensure sex equality.⁴⁵ Even if the Inter-American Commission rules in Gonzales’s favor, however, it may simply direct the United States to implement fairer and more equitable procedures for protecting domestic violence victims, with minimal teeth to enforce the order. More domestic advocacy will be necessary to ensure that the order is taken seriously by state, local, and federal authorities.

In any event, Ms. D or her advocate is unlikely to use her situation as a test case to challenge the U.S. Supreme Court’s recent ruling in *Gonzales* or to pursue the issue before the Inter-American Commission. Instead an advocate who is “in the trenches” representing Ms. D might opt to challenge the custody award to the batterer by raising both the potential harm to the children as evidence that the judge misapplied the “best interests” test and the possibility of gender bias in the decision. International human rights law supports both contentions.

The “best interests of the child” test is the touchstone of the Convention on the Rights of the Child’s provisions on child custody—a role that the test also plays under U.S. law.⁴⁶ According to Article 3 of the convention, “[i]n 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.”⁴⁷

⁴³CARRIE CUTHBERT ET AL., WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS’ TESTIMONY PROJECT, BATTERED MOTHERS SPEAK OUT (2002). A copy of the complete report can be purchased online from the Wellesley Centers for Women, www.wcwonline.org.

⁴⁴*Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (Clearinghouse No. 55,895).

⁴⁵The briefs filed in the case are available at www.law.columbia.edu/focusareas/clinics/humanrights.

⁴⁶Convention on the Rights of the Child arts. 3, 9, 18

⁴⁷*Id.* art. 3.

The Convention on the Rights of the Child also mandates that states “shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse ...”⁴⁸ The custodial order in Ms. D’s case raises serious questions about whether granting custody to the batterer served the children’s best interests as well as the state’s affirmative efforts to protect the child from abuse. While the United States has not ratified the convention, several domestic courts have recognized that the “best interests” test constitutes customary international law and thus has the weight of Supreme Law.⁴⁹ By reiterating the importance of the children’s interests in the custody decision, the convention’s provisions lend weight to a challenge to the custodial order entered in Ms. D’s case.

The International Covenant on Civil and Political Rights, also specifically addressing the needs of children upon marital dissolution, mandates that, “[i]n the case of [marital] dissolution, provision shall be made for the *necessary protection* of the children.”⁵⁰ That binding standard was arguably not met here in violation of U.S. obligations under international human rights law.

More pertinent to a claim of gender bias in the courts is the covenant’s statement that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁵¹ The covenant abhors the notion that courts themselves might be biased and obligates states to ensure that “[a]ll persons shall be equal before the courts and tribunals.”⁵² While statistical evidence that women are systematically disfavored in child custody proceedings would not be sufficient to sustain an actionable claim of bias under U.S. consti-

tutional law, such evidence is cognizable under international law and would support a claim that Ms. D’s human rights were violated. Even if Ms. D does not directly pursue vindication of her human rights, merely leveling and supporting that charge can be effective in adding weight to the relevant domestic claims.

For Ms. D, international human rights law might be most effective if raised affirmatively. Specifically, Ms. D may file a motion to reconsider the child custody order or challenge it on appeal. In either instance, noting the international importance given to children’s best interests and the need to protect children from violence will lend weight to her claims. Likewise, should she decide to raise the tough-to-litigate issue of judicial bias on appeal, citing international law (along with such domestic sources as judicial gender bias task force reports) may add gravitas and context to her domestic claim.

If Ms. D’s problem represents systemic bias against women in the particular court system, a nonlitigation approach, imbued with human rights principles, may also be warranted. The Wellesley Centers for Women mounted just such a project when the centers organized battered women in Massachusetts to speak out about their treatment by the state courts, including frequent granting of child custody to batterers. Using a human rights lens to analyze the information, the centers issued a report entitled *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Court*.⁵³ The project has been replicated in Arizona and Minnesota. Although Massachusetts family court judges predictably denied the report’s claims about human rights violations and particularly

⁴⁸*Id.* art. 19.

⁴⁹See, e.g., *Beharry v. Ashcroft*, 183 F. Supp. 2d 504 (E.D.N.Y. 2002), rev’d and remanded on other grounds, 329 F.3d 51 (2d Cir. 2003); *Batista v. Batista*, 1992 Conn. Super. LEXIS 1808.

⁵⁰International Covenant on Civil and Political Rights art.23(4).

⁵¹*Id.* art. 26.

⁵²*Id.* art. 14.

⁵³See *supra* note 43.

criticized its methodology, the report’s recommendations have influenced subsequent discussions about family court management in Massachusetts.⁵⁴

Right to Counsel

Case Example: Brenda Leone King, a stay-at-home mother with a ninth-grade education, could not find an attorney to represent her in a complicated custody dispute with her former husband. The trial court denied her motion for court-appointed counsel. During a five-day trial, with counsel representing her former husband, King represented herself and lost primary custody of her three children. On appeal, King argued that the Washington State Constitution should be construed to require appointed counsel in certain adversarial proceedings where basic human needs are at stake, one such proceeding being child custody, where counsel is necessary to ensure meaningful access to the courts.

Analysis: The domestic law on the right to counsel in civil cases is sparse, and in *Lassiter v. Department of Social Services* the Supreme Court set an extremely high standard for requiring courts to appoint such counsel.⁵⁵ As a result, appointment of counsel in civil matters is generally reserved to the trial court’s discretion and is seldom granted. But precisely because the appointment of civil counsel is usually discretionary, both international human rights law and comparative foreign law may help convince judges to exercise their discretion in favor of unrepresented litigants. In the unusual cases that proceed beyond an initial level of appeal, where (as in *King v. King*) a litigant argues a constitutional right to counsel, these international sources can add legal weight to the litigant’s arguments.

International law is particularly helpful in advocating a civil right to counsel be-

cause domestic law is so sparse and because the nations that have adopted and developed this right are those to which U.S. courts frequently look for guidance. In the *King v. King* oral argument, one of the Washington State Supreme Court justices asked a question that might have been raised by judges considering this issue at any level of the U.S. court system: “Has any of the highest courts of any of the fifty states found a constitutional right identical to or similar to what you’re advancing here?” King’s counsel responded correctly, “None has. But one can always be first.” The questioner then asked, “What cases do you think provide the most support?” The discussion quickly turned to tangentially related criminal matters where appointed counsel had been required.

This colloquy might have gone differently. Had Brenda King’s attorney been more familiar with the relevant international and foreign law on the civil right to counsel, she could have responded that while no state supreme court had upheld the right, the European Court of Human Rights, the German Constitutional Court, Switzerland’s Supreme Court, and other high courts internationally had explicitly recognized the right.⁵⁶ A state court upholding this right would not be breaking new ground but rather would be taking inspiration from these other high courts.

But international law principles relating to a civil right to counsel are relevant not only before courts of last resort. In a run-of-the-mill civil case where a trial court is simply being asked to exercise discretion to appoint counsel, or an initial appellate court is reviewing a denial of counsel, the exemplary weight given the civil right to counsel in Europe and elsewhere may be persuasive authority. Significantly the International Covenant on Civil and Political Rights and the Con-

⁵⁴See the discussion in my *International Human Rights from the Ground Up: The Potential for Subnational Human Rights-Based Reproductive Health Advocacy in the United States*, in *WHERE HUMAN RIGHTS BEGIN: ESSAYS ON HEALTH, SEXUALITY AND WOMEN, TEN YEARS AFTER VIENNA, CAIRO AND BEIJING* (Ellen Chesler & Wendy Chavkin eds., 2005).

⁵⁵*Lassiter v. Department of Social Services*, 425 U.S. 18 (1981).

⁵⁶*Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 1979; *Steel and Morris v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005); Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 17, 1953, 26 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2, (F.R.G.); Tribunal federal Suisse 1937, 63 Arrêts du Tribunal Federal Suisse [ATF] 1 (Switz).

vention on the Elimination of All Forms of Racial Discrimination, both of which the United States has ratified, stress the need for access to counsel in civil matters, particularly when an opposing party has representation and appointed counsel is necessary to level the playing field. The convention on racial discrimination also emphasizes minority group members’ need for access to civil counsel in order to challenge discrimination. Absent more direct support in domestic law, these international judgments and treaties can demonstrate that the appointment of civil counsel is a legal issue that should be taken seriously—and other courts have done so.

Of course, a *pro se* litigant cannot be expected to raise international and comparative law arguments when seeking appointed counsel in the first instance. As a practical matter, these supportive materials will always be raised on appeal, when a later counsel seeks to reopen a trial conducted by a previously unrepresented client. At that stage, given the standard for obtaining appointed counsel, raising the international human rights issues affirmatively in the initial appeal briefs makes sense.

But if the current system is to change, trial judges also need this information. As with the other examples I present, litigation is not the only context in which

international human rights principles may be useful. In particular, including the considerable body of international human rights law and foreign law on the right to civil counsel in judicial education programs can help ensure that frontline trial judges are aware of the alternative frameworks adopted by peer nations around the globe. Likewise, this material may bolster action in state legislatures.⁵⁷



No, there are no slam-dunk winning arguments hidden in the annals of international human rights law. Raising human rights law in domestic advocacy will not likely turn the tide of antipoverty work in the United States. But, as these analyses indicate, human rights law may support judges and administrators seeking to do the right thing, may inspire policymakers to undertake bolder initiatives, and may support clients in organizing to protect their own human rights, thus changing the power dynamics in a community. Particularly in the current climate facing legal aid practitioners, all poor people’s advocates should be in a position to utilize these tools.

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⁵⁷A *Right to a Lawyer? Momentum Grows*, the July–August 2006 special issue of CLEARINGHOUSE REVIEW on the civil right to counsel, is a substantial resource in this effort, as is *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, a Northeastern Law School report available at www.slw.neu.edu/clinics/RightToCounsel.pdf.