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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 counterproductive—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.mwLSKkN0LvHb.1405941k.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); *Claprazi 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, *Lawyering 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.slw.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).