

HUMAN RIGHTS & DOMESTIC VIOLENCE

An Advocacy Manual

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Preface

Though international law is traditionally called “the law of nations,” it governs far more than relations between the countries of the world. International human rights law pushes the boundaries of State responsibility and allows individuals to directly demand accountability for both governmental action and inaction that violates basic human rights. International human rights treaties declare the minimum standards by which States (i.e. nation-states, or countries) are expected to comply. The theme of the 2010 Fourteenth Annual Domestic Violence Conference at Fordham Law School, “Expanding Our Vision: Human Rights, Victims’ Rights, and Approaches to Diverse Families,” for which this manual was created, underscores the growing interest amongst domestic violence lawyers and advocates in international human rights law strategies to address client needs as well as larger advocacy goals.

This Manual offers guidance on how relevant human rights treaties, instruments, jurisprudence, and other sources may be useful for domestic violence advocacy. Divided into seven chapters, it aims to serve as a quick reference for busy advocates.

Chapter I offers an introduction to human rights and international law, explaining the sources of law, international mechanisms for claiming human rights violations, and the bodies that monitor countries’ compliance with their human rights obligations. Chapters II through VI each explore the dimensions of state responsibility and individual rights in the context of a different thematic issue. Chapter II provides an overview of physical, sexual and psychological abuse from a human rights perspective. Chapter III focuses on child custody issues in the context of domestic violence, and Chapter IV deals with housing discrimination against and forced eviction of domestic violence victims and survivors. Chapter V addresses female genital mutilation (FGM), and the individual rights and state obligations implicated by the practice. Chapter VI explores issues concerning domestic violence in the LGBT community. Finally, Chapter VII discusses the human rights law relevant to trafficking in the domestic violence context. With certain exceptions, each thematic section generally begins with relevant definitions under international law and then addresses standards concerning individual rights, State obligations, and relevant legislation and case law.

While each Chapter examines a particular thematic issue, there are common themes linking all the chapters that reinforce the power of a human rights approach for addressing a wide spectrum of domestic violence issues. The right to equality and the prohibition on discrimination, for example, are particularly salient concerns in the context of child custody and LGBT rights, in protecting individuals from physical, sexual, and emotional abuse, including FGM and trafficking, and in ensuring access to housing. Similarly, the human right to bodily integrity and to security of the person is relevant to many of the issues facing victims of domestic violence addressed in this Manual. Victims of physical, sexual, or emotional abuse have the right to be free from torture, as do victims of FGM; states have an obligation to protect trafficked persons and ensure their physical safety. In addressing child custody disputes, states have an obligation to protect children’s rights to be free from physical and mental violence.

The requirement of special protection for children under international human rights law represents another synergy between the various issues addressed by this Manual: consideration of the best interests of the child must dominate resolution of child custody issues; moreover, states are required to adopt special measures to protect children, both at a general policy level and in particular with regard to eradicating FGM. Finally, international human rights law, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), places an obligation of due diligence upon States; accordingly, States must prevent, investigate, and punish acts of violence against women and domestic violence, whether those acts are perpetrated by the State or by private persons. International human rights law thus obligates states to affirmatively protect the substantive rights of domestic violence victims and survivors, and obligates governments to play a central role in preventing domestic violence.

We recognize that human rights strategies are not a magic bullet for resolving the complex and myriad dilemmas posed by domestic violence, but hopefully, offer an additional tool in an advocate's toolkit. At the very least, it is our hope that this Manual may start a conversation about the relevance of international human rights law to everyday domestic violence advocacy. Even more so, we hope that you will find this Manual helpful in choosing the best advocacy strategy for your clients, cases, initiatives, and campaigns.

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I. Introduction to International Human Rights Law for Domestic Violence Advocates

Many sources of international human rights law serve as persuasive authority in U.S. courts and can bolster arguments based on domestic law. Indeed, the United States Supreme Court has recognized that the laws of the United States should be construed to be consistent with international law whenever possible.¹

This Chapter provides an introduction to international human rights law and is intended as a general reference to be read in conjunction with Chapters II through VI, which address specific themes in domestic violence advocacy. This Chapter seeks to highlight sources of international human rights law that a domestic violence (DV) advocate in the U.S. might find particularly relevant and useful, either because they represent global consensus or because they directly implicate domestic violence. For example, the standards set forth in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified by almost every country in the world (the U.S. being a prominent exception), are especially salient for DV advocacy, particularly when these CEDAW standards parallel themes addressed by U.S. domestic law. Additionally, the recent pronouncement by the Committee Against Torture that domestic violence may constitute torture can provide useful guidance for DV lawyers and advocates in the U.S.²

International law is established 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

¹ 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 United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”). See generally 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); Sandra Day O’Connor, *Federalism of Free Nations*, reprinted in *International Law Decisions in National Courts* 13, at 15-16 (Thomas M. Franck & Gregory H. Fox eds.) (1996); 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).

² The Committee Against Torture stated that “where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.” Committee Against Torture, *General Comment No. 2*, para. 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *CAT General Comment No. 2*].

means for the determination of rules of law.”³ Each of these sources of international human rights law is introduced below: “international conventions” (treaties, declarations, and other human rights instruments) in Section A, “international custom” (customary international law) in Section B, and “judicial decisions” (decisions of foreign courts) in Section C.

A. TREATIES, DECLARATIONS, AND OTHER HUMAN RIGHTS INSTRUMENTS

1. International and regional treaties, declarations, and other human rights instruments

A handful of international and regional human rights treaties and instruments make up the core of human rights law. The following tables are not exhaustive, but they cover all of the international human rights documents the United States has *ratified* (and thereby become a *party to*) or *signed*. The U.S. has ratified some of the treaties in the following tables. 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 United States has ratified, signed, or taken no action on them.

Treaties that the United States has ratified are binding *as a matter of domestic law* (i.e. creating obligations of the State toward its people) under the Supremacy Clause and *as a matter of international law* (i.e. creating obligations of the State toward other States). The Supremacy Clause establishes that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”⁴ Treaties, like the U.S. Constitution and federal statutes, trump state constitutions and statutes. It is important to note, however, that ratified treaties are enforceable in a U.S. court only if they are *self-executing* or if *implementing legislation* has been passed.⁵

Treaties that the United States 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*.⁶ 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.⁷ Because the U.S. has signaled its intention to abide by the

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.”).

⁴ U.S. Const. art. VI, § 2.

⁵ Most 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.

⁶ 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.

⁷ Vienna Convention on the Law of Treaties art. 18, January 27, 1980, 1155 U.N.T.S. 331. While the United States 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*

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, domestic violence advocates practicing in U.S. courts may, when appropriate, invoke the standards articulated in those treaties and argue that the federal/state/local government has violated them.

A treaty that the United States 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 law⁸ 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 United States 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. But declarations are not formal legal documents like treaties, and the Vienna Convention on the Law of Treaties does not apply to them.

United States 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).

⁸ For a definition and discussion of customary international law, see Section B of this Chapter.

Treaties in the Universal (United Nations) Human Rights System

<i>Treaty or Declaration</i>	<i>Description</i>	<i>Signed by President</i>	<i>Ratified by Senate</i>
Universal Declaration of Human Rights (UDHR)	Adopted in 1948, the UDHR is the oldest international human rights charter. The UDHR, which recognizes civil, political, social and economic rights, serves as a joint charter from which the twin international covenants, ICESCR and ICCPR (see below), were born. The UDHR is a declaration, and not a binding treaty. Nevertheless, many of its provisions may be considered customary international law. The United States supported—indeed, was instrumental in—drafting the UDHR.	N/A	N/A
International Covenant on Civil & Political Rights (ICCPR)	The ICCPR prohibits forced marriage, torture, and cruel, inhuman or degrading treatment or punishment. It affirms the rights to self-determination; liberty and security of person; freedom of thought, conscience and religion; freedom of expression; and freedom of association. These rights are recognized without distinction of any kind, such as sex, birth or other status. Under the ICCPR, States parties undertake to ensure an effective remedy for violations, notwithstanding that the violation has been committed by persons acting in an official capacity. All persons are equal before the courts.	1977	1992
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	The ICESCR is the principal human rights treaty regarding economic and social rights, and protects the equal rights of men and women to housing, work, social security, the highest attainable standard of health, and the continuous improvement of living conditions. The ICESCR prohibits all forms of discrimination in the enjoyment of these rights, and calls for special protection for mothers and children.	1977	Not ratified
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	As a State party to CAT, the U.S. must undertake to prevent acts of torture, or cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Committee has stated that domestic violence may constitute torture.	1988	1994
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	CERD, the principal human rights treaty on racial discrimination, affirms the equality of all persons' civil, political, economic and social rights without any distinction regarding race, color, descent, or national or ethnic origin. The United States is a party to CERD.	1966	1994

<i>Treaty or Declaration</i>	<i>Description</i>	<i>Signed by President</i>	<i>Ratified by Senate</i>
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	CEDAW is the principal human rights treaty on sex discrimination, which provides for women’s equal access to—and equal opportunities in—private and public life. CEDAW recognizes the equality of spouses’ rights and responsibilities with regard to marriage and children. The CEDAW Committee has found gender-based violence to constitute sex discrimination. As of November 2009, 186 nations were parties to CEDAW. The U.S. has not yet ratified CEDAW.	1980	Not ratified
Convention on the Rights of the Child (CRC)	As the principal human rights treaty on the rights of children, the CRC establishes the best interests of the child as the primary consideration in all public and private actions concerning children. It protects the civil, political economic and social rights of the child. Under the CRC, States must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence. The United States is one of only two countries that have not ratified the Convention, making the CRC one of the most widely ratified treaties in the international human rights system.	1995	Not ratified
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	This Optional Protocol codifies the prohibition of the sale of children, child prostitution and child pornography. States parties such as the U.S. must adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programs to prevent these offenses. Child victims of these offenses have a right to specific procedural protections adapted to their special needs.	2000	2002
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	This Optional Protocol addresses the short and long-term impact of armed conflict on children, including participation in hostilities, rehabilitation, and social reintegration. As a State party to this Optional Protocol, the U.S. “reaffirm[s] that the rights of children require special protection.”	2000	2002
Convention on the Rights of Persons with Disabilities (CRPD)	The CRPD promotes the rights of disabled persons to equal protection, equal participation, and accessibility, and provides special protection for women and children with disabilities. It entered into force in March 2008. As of November 2009, the Convention had 143 signatories, of which 74 were also parties.	2009	Not ratified

Treaties in the Regional (Inter-American) Human Rights System

<i>Treaty or Declaration</i>	<i>Description</i>	<i>Signed by President</i>	<i>Ratified by Senate</i>
The Charter of the Organization of American States (OAS Charter) & The American Declaration on the Rights and Duties of Man	The OAS Charter underscores principles of liberty, equality, justice, and continental cooperation. 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 bound by the Charter; it is also arguably bound by the provisions of the American Declaration through its ratification of the Charter.	1948 N/A	1951 N/A
American Convention on Human Rights (American Convention)	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.	1979	Not ratified

2. Monitoring bodies

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.

a. International treaty monitoring bodies

As discussed above, the ICCPR, the ICESCR, CERD, CEDAW, and the CRC are some of the most relevant treaties for domestic violence advocates. Each of these treaties 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. These treaty bodies generally meet in Geneva twice a year for a few weeks each time, and they serve several important functions.

First, treaty bodies conduct a *periodic review* of States parties' compliance with treaty obligations, establishing an accountability mechanism, albeit an imperfect one.⁹ Many major international human rights treaties, such as the ICCPR and CERD, require States parties to submit periodic reports on their compliance with their obligations under those treaties. Through the periodic review process, treaty bodies receive official human rights reports from States and "shadow reports" from civil society. 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*.¹⁰ While the findings of treaty bodies are not binding, they can be important sources of persuasive authority.

Second, all treaty bodies issue general interpretations of treaty provisions, known as *General Comments* or *General Recommendations* (depending on the treaty body), which have become influential internationally in defining the scope of treaty obligations.

Third, some treaty bodies 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 United States 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.¹¹

The following table outlines the most prominent international human rights treaty monitoring bodies that are relevant to domestic violence advocacy, and U.S. obligations with regard to each. The list is not exhaustive; these bodies are included because their decisions are persuasive authority in areas relevant to domestic violence advocacy, such as torture and cruel, inhuman or degrading treatment, and the rights of women and children.

⁹ See Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 Hum. Rts. L. Rev. 27, 37-38 (2006), available at <http://hrhr.oxfordjournals.org/cgi/reprint/6/1/27>, for a discussion of some criticisms of treaty bodies.

¹⁰ 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 B of this Chapter.) 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.

¹¹ For a definition and discussion of customary international law, see Section B of this Chapter.

Monitoring Bodies in the Universal (United Nations) Human Rights System

<i>Treaty Body</i>	<i>Relevant Treaty</i>	<i>Description</i>	<i>U.S. Obligations</i>
Human Rights Committee	ICCPR	The Human Rights Committee is the oldest and most established international human rights treaty monitoring body in the UN. In addition to reviewing compliance by individual States with the ICCPR, the Human Rights Committee issues General Comments interpreting the provisions of the ICCPR. An Optional Protocol authorizes the Committee to hear individual complaints against consenting States (which do not include the U.S.).	U.S. is required to submit a report to the Committee concerning its compliance with the ICCPR approximately every 4 years.
Committee Against Torture	CAT	The CAT Committee reviews State parties' reports, makes recommendations, and issues General Comments concerning state obligations under the CAT Convention. An Optional Protocol authorizes the Committee to hear individual complaints against consenting States (which do not include the U.S.).	U.S. is required to submit a report to the Committee concerning its compliance with the CAT every 4 years.
Committee on the Elimination of Racial Discrimination	CERD	The CERD Committee publishes General Comments and organizes thematic discussions in addition to reviewing country-specific practices. An Optional Protocol authorizes the Committee to hear individual complaints against consenting States (which do not include the U.S.).	U.S. is required to submit a report to the Committee concerning its compliance with the CERD every 2 years.
Committee on Economic, Social, and Cultural Rights	ICESCR	The ICESCR, CEDAW and CRC Committees review reports from States parties and make recommendations on issues needing greater attention. They also issue General Comments detailing the Committees' interpretation of the relevant treaties. The Committees are unable to hear individual complaints against the U.S. because the U.S. is not a State party to ICESCR, CEDAW or CRC, and has not recognized the competence of the Committees to hear individual complaints.	None (U.S. is not a party)
Committee on the Elimination of All Forms of Discrimination Against Women	CEDAW		
Committee on the Rights of the Child	CRC		
Committee on the Rights of Persons with Disabilities	CRPD	The CRPD Committee is the newest human rights treaty monitoring body. As of November 2009, it has not yet begun its substantive work.	None (U.S. is not a party)

b. Regional bodies

There are three principal regional human rights systems in the world: the Inter-American system, the European system, and the African system. Like the universal human rights system, each regional system has a corresponding human rights body (bodies) that functions as a mechanism to ensure accountability.¹²

¹² See discussion of the European Court of Human Rights below. The African regional system includes the African Court on Human and Peoples' Rights. There is currently no regional human rights system for Asia.

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 United States, as the United States 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 United States under the American Declaration—an advocacy avenue increasingly pursued by American advocates.¹³ The following table describes the major regional human rights treaty monitoring bodies of the Americas and their relation to the United States.

¹³ For more information on the Inter-American Commission, see <http://www.cidh.org>. For information on how U.S. advocates use the Inter-American human rights system, see Caroline Bettinger-López, “The Inter-American Human Rights System: A Primer,” *in* *Clearinghouse Review* (Spring 2009), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=161723.

Monitoring Bodies in the Regional (Inter-American) Human Rights System

<i>Regional Body</i>	<i>Description</i>	<i>Relation to the U.S.</i>
Inter-American Commission on Human Rights	The Washington D.C.-based Inter-American Commission was created in 1959 in order to “further respect” for human rights among OAS member States. Commission members serve in their personal capacity on a part-time basis, and are elected by the OAS General Assembly for a period of 4 years. The Commission has the authority to examine alleged violations of the rights listed in the American Declaration and the American Convention, to request information from States, make recommendations, and publish its findings. The Commission can hear petitions from individuals, groups, and NGOs; over the last 10 years, the number of individual petitions has increased steadily. The Commission may also refer cases to the Inter-American Court (see below), for those States that have accepted the Court’s contentious jurisdiction.	The Commission can hear petitions from individuals and groups in the U.S. alleging specific human rights violations or addressing general themes in human rights. It has no formal mechanism to enforce its decisions against the U.S., but its hearings and decisions are public and may therefore serve to name-and-shame.
Inter-American Court of Human Rights	The Inter-American Court has both contentious and advisory jurisdiction, though its contentious jurisdiction extends only to those states that ratified the American Convention <i>and</i> affirmatively accepted the Court’s jurisdiction (the U.S. has done neither). For those States that have accepted its contentious jurisdiction, decisions of the Inter-American Court are binding. For U.S. judges, the Court’s decisions may provide a source of persuasive authority.	The Court can issue advisory opinions regarding the compatibility of U.S. law with the American Convention or other human rights treaties at the request of another OAS member State, or as a means of fleshing out obligations under a given treaty more generally.

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 United States, 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 deciding to strike down a Texas statute criminalizing private homosexual activity between consenting adults under the Fourteenth Amendment.¹⁴

B. CUSTOMARY INTERNATIONAL LAW

Customary law is an independent source of international law, defined as “a general practice accepted as law.”¹⁵ In order for a norm to become customary international law, States

¹⁴ See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

¹⁵ Statute of the International Court of Justice, art. 38(1)(b); see also Restatement (Third) of Foreign Relations Law § 102 (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

must follow it out of a sense of legal obligation, not as a matter of policy or self-interest, and enough States must follow the norm for it to be considered “general practice.”¹⁶ 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.¹⁷ U.S. courts have long recognized that customary international law is a part of American law and should be looked to for guidance in determining issues that fall within its scope.¹⁸

Customary international law can emerge in a variety of ways. As discussed in Section A of this Chapter, provisions of treaties and declarations can achieve the status of customary international law when ratified by many countries. Like the treaty monitoring bodies discussed in Section A, the United Nations Human Rights Council and international conferences can contribute to the development of customary international law by identifying shared principles and common State practices.

1. United Nations Human Rights Council mechanisms

In addition to the treaty monitoring bodies 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.

a. Universal Periodic Review

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.¹⁹ 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 United States will undergo its first Universal Periodic Review in 2010.

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.

¹⁶ See, e.g., *North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 41-44 (Feb. 20).

¹⁷ For an overview of customary international law, see Louis Henkin, Sarah H. Cleveland, Laurence R. Helfer, Gerald L. Neuman & Diane F. Orentlicher, *Human Rights*, 193-97 (Thomson Reuters 2009).

¹⁸ 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....”).

¹⁹ Additional general information about the UPR is available at <http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx>. Documentation relating to completed and ongoing Universal Periodic Reviews, including the reports and outcome document discussed in this subsection, are available at <http://www.ohchr.org/EN/HRBODIES/UPR/Pages/Documentation.aspx>.

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 civil society reports (giving non-governmental organizations an opportunity to advocate for stronger human rights protections and publicize human rights violations).²⁰ 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 forthcoming UPR report on the United States if it contains findings and recommendations specifically addressing domestic violence. 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, such as CEDAW, the CRC, ICESCR, and others. In the long term, the UPR process is also a part of the development of soft law and customary international law.

b. Special Procedures

Special Procedures are the mechanisms established through the Human Rights Council to address specific country situations or thematic issues.²¹ Special Procedures are either an individual (usually called a *Special Rapporteur*, 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 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.

Like the Human Rights Council's UPR recommendations discussed above, the recommendations of Special Procedures are not binding on the State under investigation, but

²⁰ For guidance on participating in the UPR process as a non-governmental organization, see Urban Justice Center, *A Practical Guide to the United Nations' Universal Periodic Review* (January 2010), available at http://www.hrupjc.org/documents/UPRtoolkit_003.pdf.

²¹ For more information on Special Procedures, see <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.

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.

One Special Procedure addressing a thematic issue likely to be relevant to U.S. domestic violence advocates is the Special Rapporteurship on Violence Against Women, Its Causes and Consequences.²² The position is currently held by Rashida Manjoo, a South African lawyer and women's rights advocate. This Special Rapporteur's mandate was first established in 1994, and was most recently extended for a three-year period in 2008. Domestic violence is explicitly within the purview of this Special Rapporteur.²³ Accordingly, domestic violence has been addressed in many of the reports produced by previous Special Rapporteurs. For example, in 1996, then-Special Rapporteur Radhika Coomaraswamy proposed a framework for model legislation on domestic violence,²⁴ and in 2002 she published a report on cultural practices in the family that are violent towards women.²⁵ More recently, former Special Rapporteur Yakin Erturk has reexamined the due diligence framework for addressing violence against women.²⁶

2. Reports of international conferences

A number of international conferences organized by the United Nations have produced influential documents interpreting States' human rights obligations. One example relevant to domestic violence advocates is the Fourth World Conference on Women, held in Beijing in 1995, which was attended by representatives from governments, intergovernmental organizations, and non-governmental organizations from around the globe.²⁷ In the Beijing Declaration, governments participating in the Conference stated they were "determined to... [p]revent and eliminate all forms of violence against women and girls," and the accompanying

²² For more information on this Special Rapporteur, including reports and contact information, see <http://www2.ohchr.org/english/issues/women/rapporteur/index.htm>.

²³ In its 2008 Resolution extending the mandate of the Special Rapporteur, the Human Rights Council "*Strongly condemn[ed]* all acts of violence against women and girls, whether these acts are perpetrated by the State, private persons or non-State actors, and calls for the elimination of all forms of gender-based violence in the family, within the general community and where perpetrated or condoned by the State..." Human Rights Council Res. 7/24, U.N. Doc. A/HRC/RES/7/24 (Mar. 28, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_24.pdf.

²⁴ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A Framework for Model Legislation on Domestic Violence*, U.N. Doc. E/CN.4/1996/53/Add.2 (Feb. 2, 1996), available at <http://www2.ohchr.org/english/issues/women/rapporteur/issues.htm>.

²⁵ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2001/49: Cultural Practices in the Family that are Violent Towards Women*, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002), available at <http://www2.ohchr.org/english/issues/women/rapporteur/issues.htm>.

²⁶ Special Rapporteur on Violence Against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006), available at <http://www2.ohchr.org/english/issues/women/rapporteur/annual.htm>.

²⁷ More information on the World Conferences on Women is available at: <http://www.un.org/womenwatch/daw/beijing/index.html>.

Platform for Action identified “violence against women,” “inequality in economic structures and policies, in all forms of productive activities and in access to resources,” and “inequality between men and women in the sharing of power and decision-making at all levels” as “critical areas of concern.”²⁸ Following the Fourth World Conference, progress in implementing the Beijing Declaration and Platform for Action has been assessed at five-year intervals; the next such assessment will be undertaken in 2010.

C. DECISIONS OF FOREIGN COURTS

A number of courts around the world have built up rich jurisprudence concerning positive government obligations, 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,²⁹ 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. 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.”³⁰ 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,³¹ as well as issues pertaining to the fundamental rights of freedom and privacy and universal concepts such as “human dignity.”³²

Drawing support from foreign courts to resolve a U.S. legal question can be controversial, and advocates are well advised to proceed with caution. Nevertheless, the experience of other countries and jurisdictions may provide insight as to how to approach, interpret and analyze the applicable legal questions and standards. Later Chapters of this Manual cite many foreign cases related to specific topics such as Physical, Sexual and Psychological Abuse (Chapter II) and Female Genital Mutilation (Chapter V). Further examples of comparative jurisprudence related to domestic violence can be found in an amicus brief submitted to the Inter-American Commission in support of the petitioner in *Jessica Gonzales v. United States*,³³ and in

²⁸ Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, para. 44 (Sept. 15, 1995), available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

²⁹ See, e.g., Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation*, 12 *Tulsa J. Comp. & Int'l L.* 149 (2004); Adam Liptak, *U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations*, N.Y. Times, Sept. 18, 2008.

³⁰ *Roper v. Simmons*, 543 U.S. 551, 578 (2005). But see *Roper v. Simmons*, 543 U.S. at 627 (Scalia, J., dissenting) (“[T]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”).

³¹ *Roper v. Simmons*, 543 U.S. at 575-78; *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).

³² See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003), *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

³³ Brief for The National Centre for Domestic Violence et al. as Amici Curiae Supporting Petitioner, *Jessica Ruth Gonzales v. United States of America*, Petition No. P-1490-05, Inter-Am. C.H.R. (2007), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=16676 (considering domestic violence law and policy in other common law countries: the UK, Canada, Australia, and New Zealand).

a list compiled by the Columbia Human Rights Institute, originally published in *Human Rights, Social Justice, and State Law: A Manual For Creative Lawyering*.³⁴

³⁴ Northeastern University School of Law Program on Human Rights and the Global Economy, National Economic and Social Rights Initiative, & Columbia Law School Human Rights Institute, *Human Rights, Social Justice and State Law: A Manual for Creative Lawyering* (2008), available at www.nesri.org/fact_sheets_pubs/legal_training%20manual.pdf.

II. Physical, Sexual and Psychological Abuse

Despite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women.³⁵ As described in Chapter VI however, domestic violence is also a serious problem in the LGBT Community, with similar patterns of abuse to those reflected in the context of violence against women.

This Chapter lays out the international human rights law standards pertaining to physical, sexual and psychological abuse. Part A lays out in general terms how human rights law categorizes domestic violence, specifically with respect to physical, psychological, and sexual abuse. Part B looks at the definitions of domestic violence that include physical, psychological, and sexual abuse. Part C examines state responsibility in cases of domestic violence and in particular the standard of due diligence. Part D describes the individual human rights violated in cases of domestic violence. Part E looks at cases decided by international tribunals and courts. Part F compares U.S. law with that from two foreign jurisdictions where the courts have defined state responsibility in a way that closely accords with international human rights standards.

A. DOMESTIC VIOLENCE UNDER INTERNATIONAL HUMAN RIGHTS LAW

Under international law, domestic violence is treated as:

- **Discrimination against women** and a violation of women's human rights. The gender-specific nature of domestic violence requires that domestic violence be classified as violation of the human right to equality, rather than as a mere domestic criminal justice concern.
- **Torture** in the private sphere. At its most complex, domestic violence exists as a powerful tool of oppression of the victim.³⁶ International law in this area has developed considerably over the years. In 1996, the UN Special Rapporteur on violence against women (VAW), its causes and consequences stated that: "the argument that domestic violence should be understood and treated as a form of torture and, when less severe, ill-

³⁵ In 1999, the New York State Division of Criminal Justice Services received over 55,000 police reports of family offenses involving adult intimate partners. An adult female was identified as the victim in 84% of these reports. Approximately 26% of American women and 8% of men report having been assaulted by an intimate partner in their lifetime. In fact, between one and five million women in the United States suffer nonfatal violence at the hands of an intimate each year, with physical abuse being the principal cause of injuries in women between the ages of 14 and 45. Approximately one third of female murder victims and five percent of male murder victims are killed by an intimate partner. Women from minority and migrant communities face added intersectional problems. See New York City Shadow Report submitted by the Urban Justice Center to the Committee on the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in relation to the United States Government's 4th, 5th and 6th Periodic Report dated 1st May 2007

³⁶ Report of the UN Special Rapporteur on violence against women, its causes and consequences E/CN.4/1996/53 dated 6 February 1996

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c41d8f479a2e9757802566d6004c72ab?Opendocument> accessed on Feb. 10, 2010.

treatment, is one that deserves consideration.”³⁷ In 2000, the Human Rights Committee indicated that domestic violence (including marital rape) can give rise to violations of the right to be free from torture or ill-treatment under article 7 of the ICCPR.³⁸ In 2008, both the CAT Committee, as well as the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, recognized that domestic violence could constitute torture.³⁹

- A violation of the **right to life/quality of life and right to family life**. Domestic violence affects the economic, social, and cultural rights of women. This gives rise to cross-cutting state obligations under the ICESCR to eliminate gender discrimination.⁴⁰

B. DOMESTIC VIOLENCE AS A SEXUAL, PHYSICAL AND PSYCHOLOGICAL HARM

The United Nations General Assembly resolution on the Elimination of Domestic Violence against Women recognizes that domestic violence can take many different forms, including physical, psychological and sexual violence as well as economic deprivation and isolation.⁴¹ Such conduct may cause imminent harm to the safety, health or well-being of women.

General Recommendation 19 issued by the CEDAW Committee defines domestic violence to include that which inflicts physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Article 1 of the Declaration on the Elimination of Violence against Women, defines violence against women as “*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*”⁴²

Similarly the Inter-American Convention on the Prevention of Punishment, Eradication and Prevention of Violence against Women (also known as the Convention of Belém do Pará, and which the U.S. has not signed or ratified) states that violence within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman shall be understood as “*any act or conduct, based on*

³⁷ *Id.*

³⁸ General Comment No. 28: Equality of rights between men and women (article 3) of the Human Rights Committee: 29/03/2000 CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments) dated 29 March 2000 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument) accessed December 10, 2009.

³⁹ General Recommendation No. 2, CAT/C/GC/2 dated 24 January 2008 and Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3 dated 15 January 2008.

⁴⁰ General Comment No. 16, E/C.12/2005/4 dated 11 August 2005 [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7c6dc1dee6268e32c125708f0050dbf6/\\$FILE/G0543539.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7c6dc1dee6268e32c125708f0050dbf6/$FILE/G0543539.pdf)

⁴¹ Dated 19 February 2004, <http://www.undemocracy.com/A-RES-58-147.pdf>, accessed Feb. 10, 2010.

⁴² A/RES/48/104 passed at the 85th plenary meeting on 20 December 1993.

*gender, which causes death or physical, sexual or psychological harm or suffering to women.”*⁴³ The Protocol to the Human Charter of Human and People’s Rights on the Rights of Women in Africa defines “violence against women” as *all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms.*⁴⁴

The Council of Europe⁴⁵ adds that the protection of the family includes protection of all its members from any act or omission which prejudices the life, the physical or psychological integrity or the liberty of a person or which seriously harms the development of his or her personality. In *Opuz v Turkey*⁴⁶, the European Court of Human Rights recently observed that the physical injuries and psychological pressure suffered by the applicant were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has compared intimate partner violence to torture in the public sphere.

“Battered wives may be beaten with hands and objects, kicked, strangled, stabbed or burned. Rape and other forms of sexual abuse are used by intimate partners as well as by prison guards or police officers. In both scenarios, physical violence is usually accompanied by *insults, varied forms of humiliation, and threats to kill or harm the victim or her family members* (often children). Domestic violence, as well as torture, tends to escalate over time, sometimes resulting in death or leaving women’s bodies mutilated or permanently disfigured. Women who experience such violence, whether in their homes or in a prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture as well as by victims of rape. Another parallel between privately battering women and torture, which refers back to the element of *powerlessness, is the intention to keep the victim in a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy with the ultimate aim of achieving total control.*”⁴⁷

C. STATE RESPONSIBILITY

⁴³ Articles 1 and 2, Inter-American Convention on the Prevention of Punishment, Eradication and Prevention of Violence against Women (Convention of Belém do Pará)

<http://www.oas.org/cim/english/convention%20violence%20against%20women.htm> accessed November 10th 2009.

⁴⁴ <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> accessed November 10th 2009.

⁴⁵ Recommendation No. R (85) 4 of the Committee of Ministers to Member States on Violence in the Family adopted 26th March 1985 <http://polis.osce.org/library/f/2668/467/CoE-FRA-RPT-2668-EN-Recommendation%20No.%20R%2885%29%204.pdf> accessed November 10th 2009.

⁴⁶ Application no. 33401/02 dated 9 June 2009, European Court of Human Rights.

⁴⁷ Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3 dated 15 January 2008.

States' obligations in relation to violence against women include the obligation to respect, protect, fulfill and promote human rights with regard to violence against women. It also encompasses the responsibility to prevent, investigate and prosecute all forms of, and protect women from, such violence and to hold perpetrators accountable.⁴⁸

States are responsible under international law for human rights violations and acts of violence against women not only from actions perpetrated by the State or any of its agents, but also from omissions and failure to take positive measures to protect and promote rights. This means that States must refrain from committing human rights violations through their own agents and prevent human rights violations by non-State actors. They must investigate allegations of violations, punish wrongdoers and provide effective remedies to victims. In this regard, States are obligated for the actions of non-State actors if they fail to act with due diligence to prevent, investigate or punish such acts and provide an effective remedy.⁴⁹

The United Nations General Assembly resolution on the Elimination of Domestic Violence against Women states that domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence.⁵⁰ The First UN Special Rapporteur on Violence against Women its causes and consequences (“UN Special Rapporteur on VAW”) notes that intimate partner violence is deeply ingrained in culture and linked to male supremacy and ideology. Because of this, domestic violence is a human rights concern rather than as a mere domestic criminal justice concern and therefore it is the duty of States to ensure that there exists no impunity for the perpetrators of such violence.⁵¹

1. Standard of due diligence

The due diligence standard is articulated in CEDAW Committee's General Recommendation No. 19 and in international and regional legal and policy instruments and jurisprudence. General Recommendation 19 notes, “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

In *Velázquez Rodríguez v. Honduras*⁵², the Inter-American Court of Human Rights held that a State must take action to prevent human rights violations committed by non-State actors, investigate allegations of violations, and punish wrongdoers. The standard is not one of strict liability, in which the State would be held accountable for acts of violence against women regardless of the circumstances, but rather one of reasonableness. It is based on principles of non-discrimination and good faith in application. The standard of due diligence therefore

⁴⁸ In-depth study on all forms of violence against women Report of the Secretary-General A/61/122/Add.1 6th July 2006.

⁴⁹ *Opuz v Turkey*, (Application no. 33401/02), European Court of Human Rights, Judgment 9th June 2009, *Maria Da Penha v Brazil* (Case 12.051) (Report o 54/01) Inter-American Commission of Human Rights, Judgment dated 16th April 2001

⁵⁰ Declaration on the Elimination of Violence against Women, A/RES/48/104 dated 20 December 1993.

⁵¹ Report of the UN Special Rapporteur on Violence against Women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1996/53 dated 6 February 1996.

⁵² Judgment dated July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

requires a State to act with the existing means at its disposal to address both individual acts of violence against women and the structural causes so as to prevent future violence.

The standard of due diligence was more clearly particularized by the UN Special Rapporteur on VAW, Yakin Ertuk, in her 2006 report. In her report, the Special Rapporteur notes that due diligence should not be limited only to a State's duty to respond to violence when it occurs, namely to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence but also to combat violence to ensure that the root causes and consequences of violence against women are tackled at all levels. "The multiplicity of forms of violence against women as well as the fact that this violence frequently occurs at the intersection of different types of discrimination makes the adoption of multifaceted strategies to effectively prevent and combat this violence a necessity."⁵³

The CAT Committee further made clear that,

where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.⁵⁴

This principle applies to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking (see *infra*). The State's indifference or inaction provides a form of encouragement and/or de facto permission.⁵⁵

The UN Special Rapporteur on Torture has also expressed concern over "the subtle disguise" for "civil laws that appear to have little to do with [domestic] violence" but "impact on women's ability to protect themselves and assert their rights:"

Laws that restrict women's right to divorce or inheritance, or that prevent them from gaining custody of their children, receiving financial compensation or owning property, all serve to make women dependent upon men and limit their ability to leave a violent situation." The Special Rapporteur considers that States should be held accountable for complicity in violence against women, whenever they create and implement discriminatory laws that may trap women in abusive circumstances. State responsibility may also be engaged if domestic laws fail to provide adequate protection against any form of torture and ill-treatment in the home.⁵⁶

⁵³ The Due Diligence Standard as a Tool for the Elimination of Violence against Women, E/CN.4/2006/61 dated 20th January 2006.

⁵⁴ General Recommendation No. 2, CAT/C/GC/2 of the Committee against Torture dated 24 January 2008

⁵⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendation No. 2, CAT/C/GC/2 dated 24 January 2008.

⁵⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3 dated 15 January 2008.

Apart from ensuring legal access to victims of violence, the Committee of Ministers of the Council of Europe stated, inter alia, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims (including against revenge), support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention. States should also take measures to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalize all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol for operation by the police, medical and social services.⁵⁷

D. INDIVIDUAL RIGHTS

Most international mechanisms require that the victim exhaust domestic procedures prior to filing his/her claim with a monitoring body. If a domestic violence survivor has exhausted domestic remedies, she could, for instance, bring the claim to the Inter-American Commission of Human Rights, as in the case of *Jessica Gonzales v. United States* (discussed *infra*). There are also possibilities for raising the issue in shadow reports submitted to the UN treaty bodies during the periodic reporting processes (note that, as discussed *supra*, individual complaints cannot be filed against the U.S. before the UN treaty bodies, since the U.S. has not ratified the relevant optional protocols).

The recent case of *In Re Campo Algodonero* (see *infra*) highlights some of the core individual rights at stake in the context of violence against women. There, the Inter-American Court found that violence against women by private actors violates international legal obligations under the American Convention and the Convention Belém do Pará. The rights and freedoms that the Court deemed violated included:

- (a) The right to life and personal integrity;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to due process / equal protection under the law;
- (f) The right to equality in the family; and
- (g) The right to the highest standard attainable of physical and mental health.

Where a woman has suffered physical, sexual, or emotional violence from an intimate partner or relative, she could allege violations of the following international human rights obligations of States:

⁵⁷ Recommendation Rec(2002) 5 of 30 April 2002 on the protection of women against violence.

1. Freedom from gender-based violence

Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social, and cultural rights under the ICESCR. Victims of domestic violence should be provided with access to safe housing (see *infra*), as well as remedies and redress for physical, mental and emotional damage.

2. Discrimination against women

Articles 2, 5, and 16 of CEDAW prohibit discrimination against women. General Recommendation No. 12 provides that women must be protected against violence of any kind occurring within the family. General Recommendation No. 19 provides, *inter alia*, that gender-based violence in the family impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under international law, and constitutes discrimination within the meaning of Article 1 of the Convention.

3. The right to a family

General recommendation 19 of the ICCPR protects the family and equality of the spouses. Both general recommendation 18 and 19 ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.⁵⁸ Articles V and VI of the American Declaration on the Rights and Duties of Man also address the right to family and private life.⁵⁹

4. Freedom from torture and right to humane treatment

The Committee against Torture acknowledged that domestic violence may constitute torture or ill-treatment under CAT⁶⁰ as well as violate the right not to be subjected to torture or ill-treatment under Article 7 of the ICCPR.

The European Court also held that a victim has a right to be free from inhumane or degrading treatment and to privacy under the European Convention.⁶¹

E. INTERNATIONAL CASES

*Maria Da Penha v. Brazil*⁶² is a case involving domestic violence perpetrated by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in her attempted murder. As a result of this aggression, Maria da Penha suffered

⁵⁸ [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcde12563ed004c3881?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcde12563ed004c3881?Opendocument), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument) accessed February 1st, 2010

⁵⁹ <http://www.unhcr.org/refworld/type,RESOLUTION,OAS,,3ae6b3710,0.html> accessed December 29th 2009

⁶⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendation No. 2, CAT/C/GC/2 dated 24 January 2008.

⁶¹ *M.C. v. Bulgaria*, 2003-I Eur. Ct. H.R. 646.

⁶² Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

from irreversible paraplegia and other ailments. The petitioner maintained that the State had condoned the violence for more than 15 years by failing to take effective measures required to prosecute and punish the aggressor, despite repeated complaints.

The Inter-American Commission on Human Rights found the State's failure to exercise due diligence to prevent and investigate a domestic violence complaint committed by private individuals warranted a finding of State responsibility under the American Convention, American Declaration, and the Convention of Belém do Pará.⁶³ It also found that Brazil had violated the rights of the applicant and failed to carry out its duty (inter alia, under Article 7 of the Convention of Belém do Pará).

... tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women. Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”

In *A. T. v. Hungary*,⁶⁴ a case before the CEDAW Committee, A.T. claimed that she was subjected to regular severe domestic violence and serious threats, constituting a continuum of violence, by her common law husband, L.F. A.T. did not go to a shelter because none were equipped to take in A.T.'s fully disabled child. There was no protection order or restraining order available under Hungarian law. L.F. was also granted access to the family apartment jointly owned by A.T. and L.F.. Consequently A.T.'s physical integrity, physical and mental health, and life were placed at serious risk and she lived in constant fear. There were two ongoing criminal procedures against L.F., one that began in 1999 and the second that began in 2001. L.F. was never detained and no action was ever taken by the Hungarian authorities to protect A.T.

Recalling General Recommendation 19, the Committee held that States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”⁶⁵ The Committee directed Hungary to take measures “to guarantee the physical and mental integrity of the applicant and her family,” as well as to ensure that she was provided with a safe place to live with her children, and that she received child support, legal assistance and compensation in

⁶³ *Id.*, at 7.

⁶⁴ Communication No.: 2/2003, Ms. A.T. v. Hungary (Views adopted by the CEDAW Committee on 26 January 2005, thirty-second session under the Optional Protocol to CEDAW).

⁶⁵ General Recommendation No. 19 of the Committee on the Elimination of All Forms of Discrimination against Women (11th session, 1992) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed December 29th 2009.

proportion to the harm sustained and the violation of her rights.⁶⁶ The Committee also made several general recommendations to Hungary on improving the protection of women against domestic violence, such as establishing effective investigative, legal and judicial processes, and increasing treatment and support resources.⁶⁷

In *Fatma Yıldırım v. Austria*,⁶⁸ another case before the CEDAW Committee, Irfan Yıldırım threatened to kill the deceased, Fatma Yıldırım and her daughter, if Fatma Yıldırım divorced him. Fatma Yıldırım applied to the local court for an interim injunction. Upon further complaints of violence, the police “spoke” to Irfan Yıldırım. The court finally issued an interim injunction until end of the divorce proceedings. However, in the same month, Irfan Yıldırım followed Fatma Yıldırım home and fatally stabbed her.

The CEDAW Committee found that the State Party had breached its due diligence obligation to protect Fatma Yıldırım. It concluded that the State Party had violated its obligations under Article 2 (a) and (c) through (f), and Article 3 of the CEDAW read in conjunction with Article 1 of the CEDAW and General Recommendation 19 of the Committee and the corresponding rights of Fatma Yıldırım to life and to physical and mental integrity.⁶⁹

In *Opuz v. Turkey*,⁷⁰ a case before the European Court of Human Rights, the applicant claimed that the State authorities had failed to protect her and her mother from domestic violence by her husband, H.O. H.O had beaten the applicant severely, including injuring the applicant and her mother with a knife (for which the prosecutor found insufficient evidence to prosecute) and later running over the applicant and her mother with his car as well as well as issuing death threats against the applicant and her mother. H.O. was charged twice but each time the complaints were withdrawn. The applicant’s mother filed an application saying she and the applicant were forced to withdraw their earlier complaints by H.O. and asked that H.O. be detained on remand. The applicant filed for divorce. While the applicant and her mother prepared to leave for another town, H.O. fatally shot the mother. Taking into account that he had acted under provocation, the domestic criminal court sentenced H.O. to 15 years and 10 months and a

⁶⁶*Id.*, at 60, para. 9.3.

⁶⁷*Id.*, at 60, para. 9.6

⁶⁸ Communication No.: 6/2005, submitted by The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased), *Fatma Yildirim v. Hungary* (Views adopted by the CEDAW Committee on 6 August 2005, thirty-ninth session under the Optional Protocol to CEDAW).

⁶⁹ Article 2 of CEDAW provides that States Parties shall 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; ... (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; ... (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Article 3 provides that States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. General Recommendation 19 focuses on violence against women.

⁷⁰ *Supra* n.9

fine and released him pending appeal. H.O. continued to threaten the applicant, forcing her to move constantly. Only on the European Court's request did the police issue instructions to arrest H.O.

The Court found that that the local authorities could have foreseen a lethal attack by H.O. Failure to take reasonable measures that could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State, the Court found. The Court held that the authorities' consideration that the dispute concerned a "private matter" was incompatible with the State's positive obligations to secure the enjoyment of the applicants' rights. In domestic violence cases, the Court found, perpetrators' rights could not supersede victims' human rights to life and to physical and mental integrity. The authorities also could not rely on the victim's attitude or their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.

The Court found that Article 1 of the Convention, taken together with Article 3,⁷¹ required States to take measures to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. State response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question. The domestic judicial decisions in this case revealed a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O. Even after the applicant's mother's killing, the violence suffered by the applicant had not come to an end and the authorities had continued to display inaction. The State was thus ordered to pay the applicant, damages, cost and expense.⁷²

In *Osman v. United Kingdom* and *E and Others v. United Kingdom*, the European Court held that the Convention implied, under certain circumstances, a positive obligation on the authorities to take preventive operation measures to protect an individual whose life is at risk from the criminal acts of another individual.⁷³

The test as laid in *Osman* of "real and immediate risk" was applied in the latest decision of *In re. Campo Algodonero* (delivered in December 2009), concerning three in a series of hundreds of unsolved and poorly investigated disappearances, rapes, and murders of young (predominantly migrant) women and girls in Ciudad Juárez (on the U.S.-Mexico border) over the past fifteen years. The Court found Mexico in violation of the American Convention of Human Rights and the Convention Belém do Pará and ordered Mexico to comply with a broad set of remedial measures including a national memorial, renewed investigations, reparations of over \$200,000 each to the families in the suit, and a mandate to include a gender perspective in future investigative protocols. The decision is important for a number of reasons, including the fact that, for the first time, the Court considers States' affirmative obligations to respond to violence against women by private actors, looks at the cases at issue in the context of mass violence

⁷¹ Article 1 of the European Convention on Human Rights provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

⁷² *Id.* 9 para. 207 - 214

⁷³ *Osman v. the United Kingdom*, § 115, *Reports* 1998-VIII, European Court of Human Rights Judgment dated 28 October 1998

against women and structural discrimination. Moreover, the Court reiterates the elements of due diligence originally articulated in *Velásquez Rodríguez* case, when considering state responsibility for human rights violations committed by private actors – the duties to prevent, investigate, punish, and compensate – and finds that gender-based violence can constitute sex discrimination.⁷⁴

The scope of the due diligence obligation in the context of domestic violence is also the issue presented in the case of *Jessica Gonzales v. United States*, currently before the Inter-American Commission on Human Rights. The case, which was filed after Ms. Gonzales lost *Town of Castle Rock v. Gonzales* before the Supreme Court, concerns the responsibility of the police to respond to emergency domestic violence-related calls and to protect individuals identified as at-risk in a restraining order.⁷⁵ It is the first time a domestic violence survivor has ever brought an international human rights case against the United States. A decision on the merits of the claim is anticipated in 2010.

F. FOREIGN CASES

The decisions from foreign common law jurisdictions may also assist in providing persuasive arguments in U.S. courts. Many of these foreign cases are in direct conflict with the landmark cases of *U.S. v. Morrison*, *DeShaney v. Winnebago County*, and *Town of Castle Rock v. Gonzales* (see *supra*).⁷⁶ In both South Africa and India, the courts have affirmed State responsibility for “positive inaction” (India) and dereliction of duty through inaction by enforcement officers. In some of the Indian cases particularly, if such inaction results in violations of constitutional rights to life, liberty, and property, the Courts reject the State defense of sovereign immunity, even if the inaction was in the face of third party actions (e.g. acts by a mob or terrorist).

In *Carmicheal v. The Minister of Safety and Security & anor* (South African Constitutional Court),⁷⁷ the Plaintiff was injured and attacked by Coetzee. The Plaintiff claimed that the respondents were liable for the wrongful acts or omissions of the police and prosecutors who did not oppose Coetzee’s release on his own recognizance nor inform the magistrate of his previous convictions in an earlier rape trial. The Court found that,

“It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes rights (i.e. the rights contained in the Bill of Rights). In some circumstances there would also be a positive component through laws and structures designed to afford such protection to everyone. ... constitutional obligations are now placed on the State to respect, protect, promote

⁷⁴ The duty to investigate and punish would also affect investigations such as rape kit processing, which has been subject of considerable scrutiny and reform. See *Is Rape Serious?* New York Times, April 9, 2009 at <http://www.nytimes.com/2009/04/30/opinion/30kristof.html> and *Testing Justice*, Human Rights Watch (2009) at <http://www.hrw.org/en/node/81825/section/1>, both accessed on February 1st, 2010.

⁷⁵ *Supra*, n. 22.

⁷⁶ 529 U.S. 598, 120 S. Ct. 1740; 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); and 545 U.S. 748, 125 S.Ct. 2796 U.S., 2005 respectively.

⁷⁷ [2001] ZACC 22.

and fulfill the rights in the Bill of Rights, and in particular, the right of women to have their safety and security protected. ...

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.”

In *Suzette Irene Elmarie Nelson v. The Minister of Safety and Security & anor* (South African High Court),⁷⁸ the Plaintiff was abused by her husband and threatened by him with his firearm. Pursuant thereto, he was arrested and the firearm temporarily seized but subsequently returned to him. On the Plaintiff’s application, a protection order was issued but his firearm was not seized. The Plaintiff was subsequently shot (not fatally) by husband. The Court held that the State is constitutionally obliged to afford its citizens protection from violence. Defendants’ servants must fulfill not only constitutional duties but also statutory duties. Plaintiff is not liable as joint wrongdoer.” The Court also approved the dicta in *Minister of Safety and Security v. van Duivenboden*,⁷⁹ which held that a negligent omission is culpable if a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it and a negligent omission is unlawful when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the legal convictions of the community require that it should be regarded as unlawful.”

India has a string of cases where the State was found responsible for omission to act on the part of the State. For example, in *J.K. Traders v. State of Andhra Pradesh*,⁸⁰ the Indian Court held that the constitutional mandate enjoins the State to protect the person and property of every citizen. There was failure on the part of the State machinery in preventing an unruly mob from destroying or damaging the property of a citizen when the Plaintiff’s property was destroyed by a mob in the wake of the assassination of former Prime Minister Sri Rajhiv Gandhi. The State cannot claim sovereign immunity in the guise of discharge of sovereign functions in the case of tortious acts of its employees, the court held. It was also held that where there was positive inaction on the part of the police in taking proper security measures and where there was violation of the fundamental rights of the citizens, the State is liable to pay compensation. The Court also found that the police appeared to have been mere spectators to the incident and therefore they were responsible for not arresting the damage to the property although the owner had intimated to the police about the possibility of attack.

G. COMPARISON TO U.S. CASES

⁷⁸ [2006] ZANCHS 88.

⁷⁹ 2002 (6) SA 431 (SCA).

⁸⁰ W.P. NO. 15050 (1993).

The international cases may be of persuasive value particularly in light of *DeShaney v. Winnebago County Dept. of Social Servs.*, *Town of Castle Rock, Colo. v. Gonzales*, *United States v. Morrison*, and *Okin v. Cornwall on Hudson*.⁸¹

In *DeShaney*, Chief Justice Rehnquist held that the State had no constitutional duty to protect a child from his father after receiving reports of possible abuse. With certain exceptions (i.e. where there is a “state-created danger”), the “substantive” component of the Due Process Clause does not “requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.” In *Castle Rock*, the Court held that “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its “substantive” manifestations.” In *Morrison*, the Court held that the Constitution does not extend to provide civil remedies to the victims of gender-based violence. The decisions in all these cases are incongruent with the international standards of due diligence, described *supra*.

Not only are these decisions incongruent with international standards of due diligence, they conflict with the United States’ own standards for granting asylum to foreign victims of domestic violence seeking asylum in the United States. In April 2009, the United States Department of Homeland Security (DHS) submitted a supplemental brief to the Board of Immigration Appeals in the *Matter of LR* where it conceded that, in some cases, victims of domestic violence may constitute a particular social group under U.S. asylum law and thus might be eligible for asylum on that basis (where other requirements were also met).⁸² DHS explained that if *LR* (a Mexican victim of domestic violence) can meet all of the evidentiary requirements relevant to her particular social group membership and can show that the government of Mexico was unable or unwilling to protect her from this violence, she may qualify for protection as a refugee. However, if the government of Mexico was able or willing to protect her she would not be able to establish eligibility for asylum. Thus, DHS implicitly recognizes State responsibility to protect its citizens without discrimination—including in cases involving domestic violence—because in the absence of such protection, asylum is merited.

Maria Da Penha v. Brazil also obliged the State to put into place procedures that respond to domestic violence in a timely manner. The court held that a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors convinced the people the case involved not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. The patterns of negligence by the State created a climate that was conducive to domestic violence and the State should take effective action to sanction domestic violence.

In contrast, in the South African and Indian cases, States were held responsible when they failed to intervene adequately when they had the opportunity in circumstances a reasonable person in the position of the State would not only have foreseen the harm but would also have acted to avert it. In *Nelson*, South Africa was held responsible for failure to seize the perpetrator’s firearm despite the victim’s application to court. In *J.K. Traders*, the State was

⁸¹ 489 U.S. 189 (1989); 545 U.S. 748 (2005); and 577 F.3d 415 (2009), *respectively*.

⁸² See Dep’t of Homeland Security, Supplemental Brief submitted to BIA in *Matter of LR*, April 19, 2009, at 14.

similarly held responsible for not protecting the Plaintiff's property despite being alerted of the possibility of attack.

As explained above, the United States Supreme Court held in *DeShaney* that state officials' failure to protect an individual against private violence generally does not violate due process as the State has no duty to provide members of the public with protective services.⁸³

DeShaney left room for exception from this general rule where there is a "state-created" danger; that is, public officials can be liable for a failure to protect an individual from private violence "if they affirmatively created or enhanced the danger of private violence."⁸⁴ In *Okin v. Cornwall on Hudson*, a domestic violence victim brought suit against her police department, as well as individual police officers, alleging due process and equal protection violations because the police failed to respond effectively to her complaints of abuse. Evidence in *Okin* suggested that the police discussed football with the abuser during their response to the domestic violence complaint, and never filed a domestic violence report, interviewed the abuser, or made an arrest during any of the numerous occasions that the police responded to complaints. In overturning the District Court's grant of summary judgment to the police department, the Second Circuit held that a genuine issue of material fact existed as to whether the police officers, in taking actions such as discussing sports with the abuser during their response to a complaint, implicitly but affirmatively encouraged the domestic violence.⁸⁵ The court found that an allegation that the officers assisted in creating or increasing the danger to the plaintiff would implicate her due process rights under the state-created danger theory.⁸⁶

The international cases as well as South African and Indian cases also show that States are responsible for failure to exercise due diligence to prevent and investigate a domestic violence complaint. Consequently States can be held to have condoned an "entire system that only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women". States may also be responsible for failure to ensure that a domestic violence victim is provided with adequate services and legal structure to enable her to leave a violent situation through the provision of a "safe place to live with her children, and that she received child support, legal assistance and compensation in proportion to the harm sustained and the violation of her rights" or for allowing the perpetrators' rights to supersede the victims' human rights to life and to physical and mental integrity in domestic violence cases.

H. CONCLUSION

International human rights law provides a rich resource in the formulation and understanding of domestic violence, violations of human rights in the event of domestic violence and state responsibility (including the standard of due diligence). Often we can see similarities between international human rights law and US law but at other times, we can see how US law has diverged from these international standards and the standards of other nations.

⁸³ *DeShaney*, 489 U.S. at 189.

⁸⁴ *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 428 (2d Cir. 2009).

⁸⁵ *Id.* at 430.

⁸⁶ *Id.* at 428.

In a shrinking world where foreign and international case laws and comparative jurisprudence is available on the click of a mouse, we can expect that our jurisprudence will be scrutinized as closely as we scrutinize the laws and policies of other nations. Indeed our courts have indeed shown a willingness to accept and be persuaded by international jurisprudence. Referring to international human rights law and foreign judgments does not mean a loss of trust and pride in the laws of the US. Rather, it reflects our confidence that our cherished constitutional vision cannot be corrupted from our examination of international legal developments. It demonstrates our earnestness in forging a common understanding of domestic violence specifically and civil rights generally and in finding a place to graft our ideals onto and influence international jurisprudence as well as learn from international jurisprudence. Finally it manifests our intention to ensure that the jurisprudence we create today will serve as an example for the world tomorrow.

III. Child Custody

This Chapter provides an overview of international human rights law relating to child custody issues, focusing particularly on child custody in the context of domestic violence. The Chapter provides information on relevant definitions, state obligations, individual rights, and examples of a human rights framework applied domestically. This Chapter does not address the often-related subject of international child abductions, which are governed by the Hague Convention on the Civil Aspects of International Child Abduction, and certain provisions of the Convention on the Rights of the Child. The Chapter instead aims to provide information that can be useful to advocates seeking to use a human rights approach to domestic child custody cases. Such an approach can be used in a variety of contexts, including court custody or visitation determinations, the granting of child support, providing housing and shelter to children and parents, and enabling access to financial, educational and social welfare resources for children and parents who are victims of abuse.

A. RELEVANT INSTRUMENTS

The relevant international conventions are the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), all of which the United States has signed, but not ratified.⁸⁷ Also relevant is the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, and the Universal Declaration of Human Rights (UDHR). The CRC, when speaking of child custody issues, uses the terms “residence” and “contact” to replace the U.S. concepts of “custody” and “visitation/access.”⁸⁸

B. STATE OBLIGATIONS & INDIVIDUAL RIGHTS

The United States has signed but not ratified the CRC, CEDAW, and ICESCR. As a signatory, a country is still arguably obligated to refrain from acts that would defeat the object or purpose of the agreement, per Article 18 of the Vienna Convention on the Law of Treaties.⁸⁹ There is a colorable argument that since ratification of the CRC and CEDAW are so widespread, their provisions have become part of customary international law, with which the U.S. is obligated to comply with.⁹⁰ Such customary international law includes the provisions of the

⁸⁷ Though the United States has not ratified the CRC, domestic courts have treated the provisions of the CRC as customary international law because of the CRC’s widespread acceptance by other countries. *See* Cabrera-Alvarez v. Gonzales, 423 F.3d 1006 (9th Cir. 2005).

⁸⁸ Jay G. Silverman et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 Am. J. Public Health 951 (2004).

⁸⁹ United Nations. *The Vienna Convention on the Law of Treaties*. 1155 UNTS 331 (Article 18); 1980; *see also* Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women 1367, 1373 (2005), available at <http://justice4mothers.files.wordpress.com/2008/10/lundy-bancroft-violence-against-women.pdf>. The United States has signed but not ratified the Vienna Convention.

⁹⁰ *See* Cabrera-Alvarez v. Gonzales, 423 F.3d 1006 (9th Cir. 2005) (discussing the status of CRC provisions as customary international law).

Universal Declaration of Human Rights (UDHR).⁹¹ The United States has ratified the ICCPR and is bound by its provisions.

States are obligated under international human rights treaties to respect, protect, and promote human rights.⁹² To respect rights requires states to refrain from taking actions to interfere with rights, an obligation which is implicated in the child custody arena by, for example, state probation officers or child welfare services workers whose actions must not abrogate any parties' human rights. The obligation to protect rights requires states to "prevent, investigate, punish and ensure redress for the harm caused by abuses of human rights by third parties."⁹³ This obligation is directly implicated in child custody cases involving domestic violence, where states have an obligation to protect the victims of such violence regardless of the fact that the harm is committed by third parties – the abusers – and not the government itself. International human rights law thus places this affirmative obligation on states, which is particularly relevant in the child custody context, where the primary rights violations will often be at the hands of third parties. State actors such as judges, probation officers, welfare services officers, and law enforcement officials must all strive to protect the rights of children in custody determinations when they face the risk of abuse from parents or other third parties.

The obligation to take affirmative measures requires legislative, judicial, and administrative actions to ensure the complete realization of human rights.⁹⁴ Such an obligation can be discharged progressively over time, and includes such duties as ensuring individuals have access to courts and legal resources to vindicate their rights. This obligation is relevant in the child custody context because states must ensure that domestic violence victims have the resources to fully engage in court proceedings, and that their physical safety and economic and social needs are provided for. State action cannot end with court decisions but must involve affirmative actions by probation officers, law enforcement officials, and welfare services workers to make sure that parents and children who have suffered from domestic violence have their rights fulfilled.

The human rights framework contains several specific state obligations and individual rights that are implicated in the child custody process, especially for victims of domestic violence. These can be described as the obligation of states to consider the best interests of the

⁹¹ See Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 *Violence Against Women* 1367, 1373-74 (2005), available at <http://justice4mothers.files.wordpress.com/2008/10/lundy-bancroft-violence-against-women.pdf>.

⁹² See Amnesty International USA, *Human Rights For Human Dignity*, at <http://www.amnestyusa.org/demand-dignity/report-human-rights-for-human-dignity/3-obligations-under-international-law/page.do?id=1102190#duties> (citing General Comments of the Committee on Economic, Social and Cultural Rights; Inter-American Court of Human Rights, *Case Velázquez Rodríguez*, Judgment of 29 July 1988, Series C, No. 4; *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, October 2001).

⁹³ Human Rights Committee, General Comment 31 on Article 2, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. HRI/GEN/1/Rev.6, para 8.

⁹⁴ See Committee on Economic, Social and Cultural Rights, General Comment 3, *The Nature of States Parties' Obligations*, UN Doc. E/1991/23.

child, the obligation of due diligence, and the obligations to respect, promote, and protect the individual rights to bodily integrity, nondiscrimination, and economic and social rights.⁹⁵

1. Consideration of the best interests of the child – CRC

The CRC requires states to protect children from abuse and to consider the best interests of the child when taking any actions concerning a child. The CRC has numerous provisions that address the issue of child custody and domestic violence.⁹⁶

Article 3 requires that: “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.” Article 9 lays out the standard for child custody determinations and provides that

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.

Article 9 also states that a child should maintain “personal relations and direct contact” with a parent from whom she is separated unless that would go against her best interests. The Constitutional Court of Slovenia, in a case challenging domestic custody laws, framed Article 9 of the CRC as a *child's* right to maintain relations with a separated parent.⁹⁷ The focus of the court in that case was on ensuring domestic laws enabled children to exercise such rights. However, the decision emphasized the notion that Article 9 is not a parental rights provision, but enshrines a child's right to maintain relations; such a framing of the right also gives more force to the exception when such relations go against a child's best interests.

Article 19 requires the state to take affirmative action 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.” Such harms can include exposure to domestic violence in the home, when one parent is abusing the other. In its response to the Russian Federation's Third Periodic Report on its obligations under the CRC, the Committee on the Rights of the Child recognized the link between the best-interests-of-the-child requirement and family violence, by stating it was “concerned that abused children who are exposed to violence within the family and in institutions do not always receive sufficient care and assistance and that not enough is being done with regard to prevention (and preventive interventions) and awareness-raising in this

⁹⁵ Jay G. Silverman et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 Am. J. Public Health 951 (2004).

⁹⁶ United Nations. *Convention on the Rights of the Child*. GA Res 44/25, annex, 44 UN GAOR Supp (No. 49) at 167, UN Doc A/44/49; 1989.

⁹⁷ See Maja Drevo et al. v. Slovenia, Constitutional Court of Slovenia, U-I-312/00, Official Gazette RS, No. 42/2003; ILDC 414 (2003).

area.”⁹⁸ The Committee’s comments on Russian practice came in the aftermath of a Russian Supreme Court decision that had found the definition of violence against children, including physical and mental violence, *did not* include indirect exposure to domestic abuse in the home, where a child is not directly abused.⁹⁹

The CRC also provides examples of how states should discharge the Article 19 obligation to protect, through “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.”

The European Court of Human Rights (ECHR) has held that investigations conducted by child protective or welfare services are among the practical measures envisioned by Article 19 to *prevent* the abuse and neglect of children.¹⁰⁰ *K.T. v. Norway* was a case where two children were living with their father after their parents’ separation. When the mother reported to police that the father abused intoxicating substances and was placing the children at risk of violence, the Norwegian child protective services opened a series of investigations against the father, leading the father to file suit that such investigations were legally baseless. The case analyzed the various provisions of the CRC that protect children’s rights against Article 8 of the European Convention on Human Rights, which protects the right to private and family life, and which the father claimed protected him from state interference. The court stated:

If it were to be a prerequisite that all such [complaints of potential violence], even those that appear credible on their face, should be verified in advance, it would risk delaying such investigations, deflecting attention and resources away from the real problems and reducing their effectiveness and hampering efforts in instances where it was paramount to establish urgently and without delay whether a child was living under conditions that may harm his or her health or development. In this connection, the Court cannot but note the emphasis placed on effectiveness in Article 19 of the UN Convention on the Rights of the Child....¹⁰¹

The ECHR ruled that the investigation at issue was permissible government intervention because of the state’s CRC obligations to prevent harm to children, finding that the evidentiary standard to launch such an investigation should be based on a “low” threshold.¹⁰²

⁹⁸ Committee on the Rights of the Child, *Concluding Observations: Russian Federation, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention on the Rights of the Child*, CRC/C/RUS/CO/3, at ¶ 46 (Nov. 23, 2005).

⁹⁹ See Christina Misner-Pollard, *Domestic Violence in Russia: Is Current Law Meeting the Needs of Victims and the Obligations of Human Rights Instruments?*, 3 Colum. J. E. Eur. L. 145, 185-188 (2009) (arguing the CRC Committee’s response can be seen as implicitly recognizing the link between harms to children and indirect exposure to domestic violence).

¹⁰⁰ See Case of *K.T. v. Norway*, 49 Eur. Ct. H.R. 4 (2009).

¹⁰¹ *Id.* at ¶ 67.

¹⁰² *Id.* at ¶ 63. This case is also of relevance to the right to family life enshrined in the ICESCR, discussed *infra*.

Article 12 of the CRC provides that a “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.” The provision has been interpreted by the Committee on the Rights of the Child to apply in proceedings involving, among other things, parental separation, custody, care and adoption, and child victims of physical or psychological violence, sexual abuse or other crimes.¹⁰³

The Committee’s General Comment on Article 12 provides greater detail on how the child’s right to be heard can be realized. There are two elements to the right: one is the assurance that every child “capable of forming his or her own views” shall be heard, and the second is the obligation of a state to give “due weight in accordance with age and maturity” to any such views expressed. States are to presume that a child is capable of forming her own views, and the Convention imposes no minimum age limits. However, the Committee does caution against an “inconsiderate practice” of any such right in “cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment” because of the potential negative consequences of doing so.¹⁰⁴ When evaluating age and maturity for the purposes of what weight to give a child’s opinion, the Committee suggests a case-by-case approach that takes into account “the capacity of a child to express her or his views on issues in a reasonable and independent manner” and the fact that the “greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child.”¹⁰⁵

While the Committee encourages judicial and administrative bodies to hear from children directly, the child can also be heard through a representative or appropriate body, which may include a parent, lawyer, or other person such as a social worker. However, the “representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons,” including parents. The representative must “transmit[] correctly” the views of the child, and the Committee does not discuss the role of a representative in substituting his or her judgment for that of the child’s. Overall, the thrust of the Committee’s approach is to encourage the direct participation of children in all hearings affecting them, with a particular focus on children who are marginalized and may not have their voices heard. As an example, the Committee has unequivocally stated that

Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child. The intervention may be initiated by a complaint from a child, another family member or a member of the community alleging abuse or neglect in the family.¹⁰⁶

¹⁰³ Committee on the Rights of the Child, *General Comment: The Right of the Child to be Heard* (2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

However, the right in Article 12 can be tempered by reference to the Committee’s caution about cases involving abuse, such as domestic violence situations, where a child’s ability to speak freely and independently may be compromised.

2. Obligation of due diligence – CEDAW

CEDAW creates a “due diligence” obligation for states. The Convention mandates that states “exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹⁰⁷ A government may be responsible where it “fails systematically to provide protection from private actors who deprive any person of his/her human rights, or where the government condones a pattern of abuse through pervasive nonaction.”¹⁰⁸ Thus, in the child custody context, states must ensure that any custody determinations take into account the need to investigate, prevent, and punish acts of violence by any parent seeking access to a child.

3. Right to bodily integrity – UDHR, ICCPR, and CRC

The UDHR provides that “Everyone has the right to life, liberty and security of person” (Article 3) and that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Article 5), which together are known as the right to bodily integrity.¹⁰⁹ Article 9 of the ICCPR similarly provides the right to bodily integrity.¹¹⁰ Such a right can also be inferred from the CRC’s requirement that states protect a child’s right to be free from physical and mental violence. The United Nations Children’s Fund (UNICEF) has defined mental violence to include the indirect harm a child experiences by “witnessing physical abuse directed towards someone else in the house.”¹¹¹

4. Right to nondiscrimination – UDHR, ICCPR, CEDAW, and ICESCR

Article 2 of the UDHR and Article 2 of the ICCPR guarantee people their human rights “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” CEDAW provides that states must take affirmative measures to promote the equality of women with men (Article 2).¹¹²

The ICCPR additionally requires states to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the

¹⁰⁷ United Nations. *Declaration on the Elimination of Violence Against Women*. GA Res 104, UN Gaor, 48th Sess, Supp No. 49, UN Doc A/48/49; 1993.

¹⁰⁸ Jay G. Silverman et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 Am. J. Public Health 951 (2004).

¹⁰⁹ United Nations. *Universal Declaration of Human Rights*. GA Res 217A (III), UNGAOR, Res 71, UN Doc A/810; 1948.

¹¹⁰ United Nations. *International Covenant on Civil and Political Rights*. GA Res 2200, UN GAOR, 21st Sess, Supp No. 16, at 52, UN Doc A/6316, 999 UNTS 171; 1996.

¹¹¹ See Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. Miami L. Rev. 867, 904-905 (2003) (citing United Nations Children's Fund (UNICEF), *Implementation Handbook for the Convention on the Rights of the Child* 240 (1998)). Though UNICEF has no formal authority in interpreting the CRC, its status as a UN body and its expertise in children’s issues make it a source of persuasive authority on the CRC.

¹¹² United Nations. *Declaration on the Elimination of Violence Against Women*. GA Res 104, UN Gaor, 48th Sess, Supp No. 49, UN Doc A/48/49; 1993.

case of dissolution, provision shall be made for the necessary protection of any children” (Article 23).¹¹³ The Human Rights Committee, a body of independent experts charged with interpreting the ICCPR, has stated that “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority” violates the ICCPR.¹¹⁴

The ICESCR also embodies a non-discrimination principle, with the Committee on Economic, Social and Cultural Rights specifically noting that the “Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.”¹¹⁵

5. Economic and social rights – UDHR and ICESCR

The human rights framework holds that civil and political rights are indivisible from the enjoyment of social and economic rights. The UDHR, for example, treats both sets of rights as equal, though the United States has argued that economic and social rights should be treated as aspirational goals rather than legal state obligations.¹¹⁶ The ICESCR provides for a range of positive economic and social rights which must be “progressively” realized through concrete, targeted steps.¹¹⁷ These include the rights to work under just and favorable conditions, social security, family life, an adequate standard of living (including adequate food, clothing, housing, and a “continuous improvement of living conditions”), health, education, and participation in cultural life.¹¹⁸ These rights are necessarily implicated in custody determinations involving domestic violence, as parents and children cannot meaningfully leave abusive situations without the ability to provide for themselves. Although there is limited case law in New York holding that a parent’s receipt of public assistance should not affect a custody determination, e.g. *Tangen v. Tangen*,¹¹⁹ the ability to provide financially for children is often part of the best interests of the child analysis. Advocates can use international human rights law to argue that because states have an obligation to assist parents in realizing the basic economic and social rights of children, the parent’s own financial status should take a lesser role in custody determinations.

Of particular relevance is the right to family life and the protection of children, stated in Article 10 of the Covenant, which provides that “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” and that “children and young persons should be

¹¹³ United Nations. *International Covenant on Civil and Political Rights*. GA Res 2200, UN GAOR, 21st Sess, Supp No. 16, at 52, UN Doc A/6316, 999 UNTS 171; 1996.

¹¹⁴ Human Rights Committee, General Comment 19, *Protection of the Family, the Right to Marriage, and Equality of the Spouses (Article 23)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003), para. 9.

¹¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2(2))* (2009).

¹¹⁶ Center for Economic and Social Rights, “United States,” at <http://www.cesr.org/article.php?list=type&type=26> (last visited Nov. 20, 2009).

¹¹⁷ Amnesty International USA, *Human Rights For Human Dignity*, at <http://www.amnestyusa.org/demand-dignity/report-human-rights-for-human-dignity/3-obligations-under-international-law/page.do?id=1102190#duties>.

¹¹⁸ United Nations. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; 1976.

¹¹⁹ 277 A.D. 827, 97 N.Y.S.2d 429 (3d Dep’t 1950).

protected from economic and social exploitation.”¹²⁰ However, the European Court of Human Rights has held that a parent’s right to family life cannot trump CRC obligations to protect children from abuse and exploitation, in a case where a father’s potentially violent behavior necessitated state intervention through an investigation.¹²¹

The right to housing may also be implicated, if children or parents are left homeless as a result of domestic abuse, or in decisions regarding visitation rights or child support. The Committee on Economic, Social and Cultural Rights has stated that such a right must be granted without discrimination and “should be seen as the right to live somewhere in security, peace and dignity.”¹²² Similarly, the rights to health and education are relevant when courts consider the best interests of a child in making custody determinations, and when states allocate welfare and other social services to children who are victims of domestic abuse.

C. USES OF A HUMAN RIGHTS FRAMEWORK IN THE UNITED STATES

1. Battered Mother’s Testimony Project

The Battered Mother’s Testimony Project (BMTP), housed at the Wellesley Centers for Women, involved a 3-year survey of women who had litigated child custody with an abusive ex-partner in Massachusetts family court. The project was most likely the “first human rights initiative to address child custody and domestic violence issues”¹²³ and thus provides a useful model for how domestic violence advocates can approach custody issues using a human rights framework. The Arizona Coalition Against Domestic Violence followed the BMTP model in publishing its own report on custody determinations.¹²⁴

The project culminated in a report in 2002 entitled *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts*,¹²⁵ which found that Massachusetts family courts consistently violated human rights during custody proceedings. The chief justice of the Massachusetts Family and Probate Courts, Sean Dunphy, criticized the report for focusing only on women who were dissatisfied with their rulings, and stated the report’s human rights approach “may work well for systems in Third World countries, but not for a court in the United States,”¹²⁶ demonstrating the continuing resistance to such approaches in domestic courts.

¹²⁰ United Nations. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; 1976.

¹²¹ See *Case of K.T. v. Norway*, 49 Eur. Ct. H.R. 4 (2009) (where the right to family life at issue was from the European Convention on Human Rights).

¹²² Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (art. 11(1))* (1991).

¹²³ Wellesley Centers for Women, *Women’s Rights Network 2000-2004*, at <http://www.wcwonline.org/wrn/batteredreport.html> (last visited Nov. 20, 2009).

¹²⁴ See Arizona Coalition Against Domestic Violence, *Battered Mothers’ Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003).

¹²⁵ Carrie Cuthbert et al., *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* (2002).

¹²⁶ Kristen Lombardi, “Custodians of Violence,” *Boston Phoenix*, Jan. 9, 2003, available at <http://www.stopfamilyviolence.org/info/custody-abuse/custody-news/custodians-of-abuse>.

The BMTP report focused specifically on several identifiable human rights violations, which are summarized below:¹²⁷

1) Failure to protect battered women and children from abuse: The report found that when state actors grant joint or sole physical custody to abusive ex-partners, they “violate women’s and children’s human rights to freedom from violence and, in some circumstances, their rights to freedom from torture and to nondiscrimination.” The report also found that “Massachusetts family courts failed to do due diligence when, for example, they refused to investigate allegations of partner or child abuse or granted custody of children to a batterer who may also have abused the children. In such instances, the family court system failed to exercise due diligence both through its actions and its failures to act.”

2) Discrimination and bias against battered women: The report noted that when “state actors in the Massachusetts family courts exhibit bias and discrimination against battered mothers, they violate their human rights to nondiscrimination, equal protection of the law, equality in judicial proceedings, due process, and due diligence.” Instances of such discrimination and bias included the degrading treatment of women in the court system, and the denial of due process to battered women by abrogating their rights to fair hearings and freedom of speech (by preventing them from testifying, for example). Women in the study also reported state actors conducting investigations and writing evaluations in a biased manner, noting instances where guardians ad litem “sided actively with the fathers, refused to look at evidence that supported the mother’s claims of abuse, conducted interviews in a way that favored fathers, and distorted facts to benefit the fathers.” The report also found that many state actors in the family court system “do not find battered women credible as a general rule,” and will thus dismiss their allegations of abuse outright.

3) Allowing the batterer to continue the abuse through the family courts: The report found that the court system was often used by abusers to harass or retaliate against women and children, such as through aggressive litigation tactics. The report stated that “the courts’ tolerance of such tactics amounts to a failure to exercise due diligence to prevent this form of partner abuse. By allowing this abuse to continue, the courts are violating battered mothers’ and children’s human rights to due process, equality in judicial proceedings, and an adequate standard of living. It also violates children’s rights to receive economic support from their parents.”

4) Failure to respect the economic rights of battered women and children: When judges make “unfair or unreasonable child support orders, fail[] to hold batterers accountable for nonpayment of child support, and allow[] batterers to continue their financially draining litigation abuse tactics,” the economic rights of women and children are violated. The report further noted that state actors fail “to meet their human rights obligations to enable a standard of living adequate for children’s development and to take all appropriate measures to secure economic support for the child from parents or others having financial responsibility for the child” and that a “battered mother’s inability to hire an attorney may also compromise her due process and equal protection rights.”

¹²⁷ Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 *Violence Against Women* 1367, 1373 (2005), available at <http://justice4mothers.files.wordpress.com/2008/10/lundy-bancroft-violence-against-women.pdf>.

In addition to highlighting specific Massachusetts court practices that violated international human rights laws, the report provided recommendations for improvement that could create systematic change and enable the state to discharge its affirmative obligations to protect human rights.

2. Inter-American Commission Petition

A group of ten women and one child, along with national and state organizations such as the National Organization for Women and Family Violence Prevention Fund, filed a petition in 2007 with the Inter-American Commission on Human Rights, charging the United States with failing to protect the life, liberty, security, and other human rights of abused women and children by frequently granting child custody to abusers.¹²⁸

The petition summarized academic studies showing the prevalence of domestic courts awarding custody to batterers; it also summarized experiential studies, including the BMTP and Arizona Coalition reports, which demonstrated that bias against women exists in U.S. courts, especially with regards to child custody. The petition then alleged specific violations of the Charter of the Organization of American States (OAS), and the American Declaration on the Rights and Duties of Man (ADRDM), and also looked to provisions of the American Convention on Human Rights (which the United States has not ratified and is therefore not bound by, but which serves as persuasive authority in interpreting the OAS and ADRDM).¹²⁹ The Commission has the power to issue non-binding recommendations to states.

3. U.S. state court cases

Advocates can cite to international law in support of their arguments in U.S. domestic courts. An example of one decision where a court making a child custody determination referred to international human rights instruments is *Batista v. Batista*, where the Connecticut Superior Court cited Article 12 of the Convention on the Rights of the Child for the principle that the child in the case was entitled to “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.”¹³⁰ The court considered the child’s statement that she feared her mother when deciding to award temporary physical custody to the father. In *In re Adoption of Peggy*, the Massachusetts court found that the CRC was not binding, but nonetheless stated that it was acting consistently with CRC provisions in ending a father’s parental rights. It found the CRC “best interests of the child” standard and Article 19 duty to protect the child from all forms of abuse counseled in favor of

¹²⁸ StopFamilyViolence.org, Full Text of IACHR Petition, available at <http://www.stopfamilyviolence.org/info/custody-abuse/legal-documents/petition-to-inter-american-commission-on-human-rights/full-text-of-iachr-petition> (last visited Nov. 20, 2009).

¹²⁹ See text of the petition, available at http://www.stopfamilyviolence.org/sites/documents/0000/0096/Web_Petition-C.pdf.

¹³⁰ 1992 Conn. Super. LEXIS 1808, at *18 (Conn. Super. Ct. 1992) (“Of significance to this court is Article 12 of the United Nations Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989. It is of great concern and embarrassment that the United States of America is not a signator to that convention.”).

divesting a father of parental rights where the child had undergone female genital mutilation while in her father's custody.¹³¹

A human rights approach to child custody allows the violations at issue to be re-framed from acts of individual responsibility to acts of state responsibility, and child custody determinations can be seen as consisting of an interlocking web of civil and economic rights. International human rights law obligates states to affirmatively protect the substantive rights of abused women and children. The human rights framework of analysis allows advocates to argue that the government must be a central actor in creating systemic change to prevent domestic violence and protect children in custody disputes.

¹³¹ 436 Mass. 690 (Mass. 2002).

IV. Housing Discrimination and Forced Eviction¹³²

Domestic violence is a leading cause of homelessness among women.¹³³ Approximately 1.3 million women experience physical assault by an intimate partner each year.¹³⁴ Of 24 cities surveyed in 2005, 50% identified domestic violence as a primary cause of homelessness among women.¹³⁵ Between 22 percent and 57 percent of homeless women have reported that domestic violence is the immediate cause of their homelessness in varying regions,¹³⁶ and between 50 percent and 100 percent of homeless women have experienced domestic or sexual violence at some point in their lives.¹³⁷ In Minnesota, one in every three homeless women was homeless due to domestic violence in 2003 and 46% of homeless women said that they had stayed in abusive relationships because they had nowhere else to go.¹³⁸ Shelter providers in Virginia

¹³² Much of the information and data presented in this chapter is excerpted from several excellent publications on domestic violence and housing, including: Beyond Shelter, et. al., *A Report to the Committee on the Elimination of Racial Discrimination on Racial Discrimination in Homelessness and Affordable Housing in the United States*, December 10, 2007, http://www.nlchp.org/content/pubs/CERD_Housing_Report_20071.pdf; *Homelessness and United States Compliance with the International Covenant on Civil and Political Rights, Report Submitted to the Human Rights Committee by the National Law Center on Homelessness & Poverty*, May 31, 2006; National Law Center on Homelessness and Poverty and Centre on Housing Rights and Evictions, *Housing Rights for All: Promoting and Defending Housing Rights in the United States* (3d ed. 2007), <http://www.nlchp.org/content/pubs/2007%20Forum%20Human%20Rights%20Manual%20FINAL1.pdf>; Emily J. Martin & Naomi S. Stern, *Domestic Violence and Public and Subsidized Housing: Addressing the Needs of Battered Tenants Through Local Housing Policy*, 38 *Clearinghouse Rev.* 551 (2005), <https://www.aclu.org/FilesPDFs/ACF831B.pdf>.

¹³³ Much of the data regarding homelessness varies regionally and locally. Nevertheless, national data collected in 1996 indicated that while women made up a minority of both currently homeless individuals (32 vs. 68 percent) and formerly homeless individuals (46 vs. 54 percent), women made up a distinct majority of those homeless individuals who never had been homeless in the past (61 vs. 39 percent). See MARTHA BURT ET AL., *HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING?* 225, table 8.1 (2001).

¹³⁴ NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *DOMESTIC VIOLENCE AND HOUSING*, (2005).

¹³⁵ U.S. CONFERENCE OF MAYORS, *HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, A 24-CITY SURVEY* 64, available at <http://www.sodexhousa.com/HungerAndHomelessnessReport2004.pdf>.

¹³⁶ See Martin and Stern, *supra* at 552 (citing Wilder Research Center, *Homeless in Minnesota 2003*, at 22 (2004); Center for Impact Research, *Pathways to and from Homelessness: Women and Children in Chicago Shelters* 3 (2004); National Center on Family Homelessness and Health Care for the Homeless Clinicians' Network, *Social Supports for Homeless Mothers* 14, 26 (2003); Institute for Children and Poverty, *The Hidden Migration: Why New York City Shelters Are Overflowing with Families* (2004); Homes for the Homeless & Institute for Children and Poverty, *Ten Cities 1997–1998: A Snapshot of Family Homelessness Across America* 3 (1998); Virginia Coalition for the Homeless, *1995 Shelter Provider Survey* (1995), cited in National Coalition for the Homeless, *Domestic Violence and Homelessness: NCH Fact Sheet No. 8* (1999); ACLU Women's Rights Project, *Domestic Violence and Homelessness*, www.aclu.org).

¹³⁷ See Martin and Stern, *supra* at 552 (citing *supra* note 5 and Missouri Association for Social Welfare, *Homelessness in Missouri: The Rising Tide* (2002); Homes for the Homeless, *The Other America: Homeless Families in the Shadow of a New Economy: Family Homelessness in Kentucky, Tennessee, and the Carolinas* 3 (2000); Richard Douglass, *The State of Homelessness in Michigan: A Research Study* (1995), cited in National Coalition for the Homeless, *supra* note 5; Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 *Clearinghouse Review* 420 (1991) (citing 1990 study)).

¹³⁸ American Civil Liberties Union, Women's Rights Project, *Domestic Violence and Homelessness*, (2004), available at www.aclu.org.

report that 35% of their clients are homeless because of family violence.¹³⁹ This same survey found that more than 2,000 women seeking shelter from domestic violence facilities were turned away. A recent study in Massachusetts reports that 92% of homeless women had experienced severe physical or sexual assault at some point in their life and 63% were victims of violence by an intimate partner.¹⁴⁰ Moreover, another study found that 38% of all domestic violence victims typically become homeless at some point in their lives.¹⁴¹

Currently, women experiencing domestic violence suffer in severe shortage of both short and long-term housing availability.¹⁴² On average, 1,740 people a day are not provided emergency shelter and 1,422 are not provided transitional shelter.¹⁴³ Moreover, shelters are frequently filled to capacity and must turn away battered women and their children. An estimated 32% of requests for shelter by homeless families were denied in 2006 due to lack of resources.¹⁴⁴ In December 2009, the New York City Housing Authority (NYCHA) rescinded 3,018 Section 8 vouchers. As the Violence Against Women Organizing Project has explained, “[f]or most of the 407 survivors of domestic violence inclusive of this group, losing their Section 8 rental subsidy also means losing their lifeline.”¹⁴⁵

Some domestic violence survivors and their families lose their homes when they flee abuse. Others become homeless after being evicted on account of the domestic violence.¹⁴⁶ As observers have noted, “[e]xacerbating this crisis is the severe shortage of affordable housing for low income individuals and families in the United States. Over five million households have ‘worst case’ housing needs: living in substandard housing, doubled up, or paying over one-half of their income for rent, according to a 2003 HUD report.¹⁴⁷ Federal housing assistance

¹³⁹ Virginia Coalition for the Homeless, 1995 Shelter Provider Survey, (1995).

¹⁴⁰ National Alliance to End Homelessness, *Fact Checker: Domestic Violence* (2007), National Alliance to End Homelessness, available at <http://www.naeh.org>.

¹⁴¹ Charlene K. Baker et al., *Domestic Violence and Housing Problems: A Contextual Analysis of Women’s Help-Seeking, Received Informal Support, and Formal System Response*, *Violence Against Women* 9(7) 754-783 (2003).

¹⁴² In this chapter, we refer to victims and survivors of domestic violence as women because women disproportionately experience this type of violence. See CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, CRIME DATABRIEF: INTIMATE PARTNER VIOLENCE, 1993–20011 (NCJ-197838, Feb. 2003); CALLIE MARIE RENNISON & SARAH WELCHANS, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 1 (NCJ-178247, May 2000); BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS: VIOLENCE BETWEEN INTIMATES 2 (NCJ-149259, Nov. 1994). We recognize that men in opposite-sex relationships are sometimes victims and that intimate partner violence also occurs in same-sex relationships of either sex.

¹⁴³ National Network to End Domestic Violence, *Domestic Violence Counts: A 24-hour census of domestic violence shelters and services across the United States*, (2007).

¹⁴⁴ MAYORS REPORT, *supra* note 1, at 59.

¹⁴⁵ Battered Women’s Resource Center, Voices of Women Organizing Project, VOW’s Response: NYCHA’s Section 8 Voucher Crisis (2010), at http://www.vowbwrc.org/pdf/voucher_crisis.pdf.

¹⁴⁶ See, e.g., U.S. Department of Housing and Urban Development v. Rucker, Nos. 00-1771 & 00-1871 (U.S. filed 2001) (brief of amici curiae National Network to End Domestic Violence et al.); United States ex rel. Alvera No. CV 01-; Warren v. Ypsilanti Housing Commission (E.D. Mich. 2003), www.aclumich.org/pdf/briefs/Comp8feb02.pdf; Raney v. Crawford/Katica Inc. (W.D. Wash. filed 2004) (complaint available from Northwest Women’s Law Center, www.nwwlc.org; Winsor v. Regency Property Management, No. 94 CV 2349) (Wis. Cir. Ct. 7, 1995) (memorandum opinion).

¹⁴⁷ Office of Policy Development and Research Information Service, U.S. Department of Housing and Urban Development, Trends in Worst Case Needs for Housing, 1978–1999, Plus Update on Worst Case Needs in 2001 xix (2003), www.huduser.org/publications/pdf/trends.pdf.

programs, including public housing, housing subsidy programs, transitional and supportive housing, and emergency shelter programs, are all underfunded, under increasing political attack, and insufficient to meet the rapidly growing need. For an individual who is in a violent relationship and already living in poverty, this harsh reality often means that she must choose between life with her abuser or life on the streets.”¹⁴⁸

Domestic violence victims and survivors, the vast majority of whom are women, face widespread obstacles and discrimination in all aspects of housing, land, and property, including significant risk of homelessness, sexual harassment in housing and the eviction of and denial of housing. These disproportionate burdens call for the specific recognition of women’s rights to adequate housing and women’s rights to security of tenure and person. Some groups of women are particularly vulnerable to homelessness and other housing rights violations – widows, households and families headed by women, low-income women, women who are victims of domestic violence, women of color, disabled women, immigrant women, and indigenous women. It is critical, therefore, that any response is steeped in the recognition that international human rights law accords to all women.¹⁴⁹

This Chapter aims to lay out the international human rights regime applicable with regard to housing rights and forced eviction of domestic violence survivors in the United States. This Chapter first offers definitions and sources of the human rights terms involved. The second part discusses the individual human rights potentially affected by the situations described above, and the third part describes how these rights give rise to state obligations in the area of housing and forced eviction of domestic violence survivors.

A. RELEVANT DEFINITIONS

The Right to Housing

The right to housing is one of six categories of basic economic and social rights, which include: health, housing, education, decent work, food, and social security. Each of these categories has core components that further define the right, as spelled out in “General Comments” issued by United Nations committees created to oversee the implementation of human rights treaties.¹⁵⁰

¹⁴⁸ See Martin and Stern, *supra* at 552.

¹⁴⁹ See generally *Study by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Commission on Human Rights, U.N. ESCOR, U.N. Doc. E/CN.4/2005/43 (2005) (citing recommendations for governments on overcoming the prevalent crisis of women’s rights to housing); *Women and adequate housing, Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, Miloon Kothari*, E/CN.4/2006/118, 27 February 2006, <http://wiki.nlchp.org/download/attachments/852071/MiloonWomen2006-E.CN.4.2006.118.pdf?version=1&modificationDate=1194031747000>.

¹⁵⁰ For a collection of relevant General Comments, see *Human Rights, Social Justice, and State Law: A Manual for Creative Lawyering* (Spring 2008), http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=15299. See *Id.* for information and charts pertaining to the social and economic rights listed above.

Under international human rights law, the right to housing ensures access to a safe, secure, habitable, and affordable home with freedom from forced eviction as well as security of tenure. In order for housing to be adequate it must provide more than just four walls and a roof over one's head; it must, at a minimum, include certain elements, which follow in the chart below. The significance of each aspect for domestic violence victims and survivors is discussed in greater detail later in this Chapter.

**** While recognizing housing rights does not mean that the government is obligated to build housing for the entire population, or to provide housing at no cost, it does require that adequate and affordable housing be available in accordance with the above standards.***

The South African Constitutional Court has grappled with what constitutes *accessibility* in the midst of an overwhelming housing crisis faced by a government with severely limited resources. *The Government of the Republic of South Africa vs. Grootboom*¹⁵¹ involved the forcible eviction of complainants from land they had been occupying when alternative housing was simply not available. Using international standards as a guide, the Constitutional Court found that the government's housing policy violated the right to housing, not because it failed to build housing for all homeless, but because it *failed to make any provisions for relief for those*

<i>The right to housing ensures access to a safe, secure, habitable, and affordable home with freedom from forced eviction.*</i>		
Legal Security of Tenure. Governments must provide protection against arbitrary forced eviction, harassment and other threats.	Availability of Services, Materials, Facilities, and Infrastructure. Available housing must allow access to natural and common resources, contain facilities essential for health, security, comfort and nutrition, provide access to safe drinking water, energy (for cooking, heating and lighting), sanitation systems, means of food storage, the disposal of refuse, drainage, and emergency services.	Affordability. Housing-related costs should be commensurate with income levels and states should establish housing subsidies for those unable to obtain affordable housing. Tenants should be protected against unreasonable rent levels or rent increases.
Habitability. Homes must contain adequate space and function to protect from cold, damp, heat, rain, wind or other threats to health and physical safety, structural hazards and disease.	Accessibility. Housing must be made accessible to all, on a non-discriminatory basis, and disadvantaged groups (such as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups) should be ensured some degree of priority consideration in the housing sphere.	Location. Housing should be located in areas with access to employment options, health care services, schools, childcare centers and other social facilities.
		Cultural Adequacy. Housing must appropriately enable the expression of cultural identity. Activities geared towards development or modernization of housing should ensure that the cultural dimensions of housing are not sacrificed, while simultaneously ensuring modern technical facilities.

151 *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000 (11) BCLR 1169 (Constitutional Court of South Africa, October 4, 2000).

most desperately in need. The Court recognized that the government was not obligated to go beyond its available resources to build housing and ensure access immediately, but found that the right to housing required that, in allocating its resources, the government must take into account the most desperate.

Forced Evictions

The treaty body of the International Covenant on Economic, Social and Cultural Rights (which the U.S. has neither signed nor ratified), has defined the term “forced evictions” as “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.”¹⁵² However, the Committee has explained, “the prohibition on forced evictions does not . . . apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.”¹⁵³ These provisions include the prohibition of discrimination. Possibly justifiable evictions could take place in case of “persistent non-payment of rent or of damage to rented property without any reasonable cause.”¹⁵⁴ However, in such cases the authorities have to ensure that the evictions “are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.”¹⁵⁵

Housing Discrimination

All the major international human rights treaties prohibit discrimination on the basis of, *inter alia*, sex, race, national origin, and other factors.¹⁵⁶ Importantly, discrimination under international human rights law encompasses not only intentional (disparate treatment) discrimination, but also unintentional discrimination that has a disproportionate effect on a protected class of individuals (disparate impact discrimination). CEDAW, for instance, states that “[f]or the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex *which has the effect* or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective

¹⁵² Committee on Economic, Social, and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions*, para. 3 (May 20, 1997), available at:

<http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*, para. 11.

¹⁵⁵ *Id.*

¹⁵⁶ International Covenant on Civil and Political Rights, Art. 2(1) and 26, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter *ICCPR*]; International Covenant on Economic, Social and Cultural Rights, Art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter *ICESCR*]; Convention on the Elimination of All Forms of Discrimination Against Women, Art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www2.ohchr.org/english/law/cedaw.htm> [hereinafter *CEDAW*]; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 2, Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www2.ohchr.org/english/law/cerd.htm> [hereinafter *CERD*]; American Convention on Human Rights, Art. 1(1) and 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/English/treaties/b-32.html> [hereinafter *ACHR*]; Universal Declaration of Human Rights, Art. 2, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter *UDHR*]; Convention on the Rights of the Child, Art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/crc.htm> [hereinafter *CRC*]; Convention on the Rights of Persons with Disabilities, Art. 5(1), Dec. 13, 2006, 46 I.L.M. 333, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> [hereinafter *CRPD*].

of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”¹⁵⁷ The Human Rights Committee, the treaty body of the International Covenant on Civil and Political Rights (ICCPR, which the U.S. has ratified), defines discrimination in a similar way: “the Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference* which is based on any *ground such as* race, color, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁵⁸ Given that the majority of domestic violence victims are women, an argument can be made under international human rights law, as has been made in U.S. courts under the Fair Housing Act, that discrimination against a domestic violence victim, even if unintentional, constitutes unlawful sex discrimination, on account of the disparate effect of the discriminatory act or policy on women.

B. INDIVIDUAL RIGHTS

When a landlord evicts a woman on account of her partner’s violent acts, or when public housing authorities fail to provide adequate protections to ensure the housing rights of domestic violence survivors, the victim may be able to claim violations of her human rights. Here, we suggest relevant human rights provisions and illustrate how they have been invoked before international tribunals.

1. The right to adequate housing

As described above, one international human rights instrument that is particularly pertinent to the question of housing discrimination and forced eviction of domestic violence survivors is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Although the U.S. has not ratified the ICESCR, and the international community has not reached agreement on the scope of state obligations under the ICESCR, the rights guaranteed by the ICESCR are widely recognized in principle. The ICESCR codifies the right to adequate housing.

Article 11 of the ICESCR provides, “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family,¹⁵⁹ 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.”¹⁶⁰ Similarly, Article 25(1) of the Universal Declaration of Human Rights states that: “Everyone has the right to a standard of living adequate for the health and well-being of himself

¹⁵⁷ CEDAW, *supra* note 78, Art. 1 (emphasis added).

¹⁵⁸ Human Rights Committee, *General Comment No. 18: Non-Discrimination*, para 7 (Nov. 10, 1989), available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (emphasis added).

¹⁵⁹ The treaty body of ICESCR clarified that that the wording ‘himself and his family’ cannot be read as implying any limitations upon applicability of the right to individuals or female-headed households. Committee on Economic, Social, and Cultural Rights, *General Comment 4: The Right to Adequate Housing*, para. 6 (Dec. 13, 1991) available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm> .

¹⁶⁰ ICESCR, *supra* note 78, Art. 11 (emphasis added).

and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of ... circumstances beyond his control.”¹⁶¹

The treaty body of the ICESCR stated in its General Comment 4 on the right to adequate housing that Article 11 must be in accordance with Article 2 (non-discrimination); that is to say, the right to adequate housing must not be subject to any form of discrimination.¹⁶²

Even though the right to adequate housing does not include an obligation for states parties to the ICESCR to provide housing to everyone, it does include an absolute prohibition on discrimination. As we have examined above, since women are disproportionately affected by domestic violence, violation of the non-discrimination provision in the ICESCR occurs when the right to adequate housing is denied to domestic violence victims. Survivors of domestic violence might also be discriminated against in the right to adequate housing or forcibly evicted because of their status as poor, minority, immigrant, or otherwise marginalized women. Such discrimination is a violation of their right to adequate housing.

The CRC explicitly mandates that “States Parties . . . 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 . . . , particularly with regard to nutrition, clothing, and housing.”¹⁶³ Thus, the right to adequate housing for both domestic survivors and children is firmly established in international law.

The case of *A.T. v. Hungary*¹⁶⁴ illustrates the close linkage between housing and domestic violence. In *A.T.*, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) found a violation of articles 2 (a), (b) and (e), and article 5 (a) in conjunction with article 16 of CEDAW, in that the Hungarian authorities did not provide the petitioner with protection from being subjected to regular violence by her ex-husband for four years. Despite civil and criminal court proceedings against him, the ex-husband had not been barred from entering the petitioner’s apartment, nor had the petitioner and her two children been provided with an optional safe shelter. The Committee recommended, *inter alia*, that Hungarian authorities take immediate and effective measures to guarantee the physical and mental integrity of the author and her family, and ensure that she is given a safe home to live with her children.

As described above, with regard to forced evictions, the treaty body of the ICESCR concluded in its General Comment 4 that “forced evictions are prima facie incompatible with the requirements of the Covenant.” However, in certain situations, forced evictions may be permissible under the Covenant if they are “carried out in accordance with the law and in conformity with the International Covenants on Human Rights.”¹⁶⁵ However, even in cases of forced evictions the provision of non-discrimination applies; women who are domestic violence survivors have the right to non-discrimination in the case of forced eviction. If domestic violence

¹⁶¹ UDHR, *supra* note 78, Art. 25(1).

¹⁶² Committee on Economic, Social, and Cultural Rights, *General Comment 4, supra*.

¹⁶³ CRC, *supra*, Art. 27(3).

¹⁶⁴ CEDAW Communication No. 2/2003, Views adopted on 26 January 2005.

¹⁶⁵ Committee on Economic, Social, and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions*, para. 3 (May 20, 1997), available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

is the reason for forced eviction, the right to non-discrimination may be violated because domestic violence (and therefore eviction caused by it) affects women disproportionately.

2. The right to privacy and non-interference

Another right relevant to the forced eviction context is the right to privacy and non-interference codified in Article 17 of the ICCPR and Article V of the American Declaration on the Rights and Duties of Man. As the treaty body of ICESCR points out in its General Comment 7, Article 17 of the ICCPR recognizes the right to be protected against “arbitrary or unlawful interference” with one’s home. This Article, by interpretation, also covers the prohibition of forced evictions¹⁶⁶ because forced evictions are an arbitrary or unlawful interference with one’s home. The Human Rights Committee also stated that an eviction “should be, in any event, reasonable in the particular circumstances.”¹⁶⁷ Therefore, in a case of an eviction of a DV-survivor, Article 17 might be invoked, especially when the principles of reasonableness and proportionality do not seem to be respected. An eviction based on domestic violence can hardly be called “reasonable in the particular circumstances.”

3. Right to non-discrimination

International human rights bodies have recognized domestic violence and other forms of gender-based violence as a form of prohibited discrimination that violates fundamental human rights.¹⁶⁸

Most of the human rights treaties grant an exclusively accessory right to non-discrimination. These accessory discrimination provisions can only be invoked together with a claim of a violation of a right guaranteed in the relevant treaty. However, the American Convention on Human Rights (Article 24) and the ICCPR (Article 26) contain stand-alone prohibitions on discrimination. The general right to non-discrimination codified in the ICCPR Article 26 reads as follows: “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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶⁹

In its General Comment 18, the Human Rights Committee clearly stated that the prohibition of discrimination provided by Article 26 is not limited to the rights enumerated in the ICCPR; rather, Article 26 is a general prohibition of discrimination on grounds such as – but not limited to – race, color, sex, language, religion, political or other opinion, national or social

¹⁶⁶ Elisabeth Wickeri and Anil Kalhan, Institute for Human Rights and Business, *Land Rights Issues in International Human Rights Law*, p. 6.

¹⁶⁷ Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, para. 4 (Apr. 8, 1988).

¹⁶⁸ See CERD Committee General Recommendation 25; See also Violence Against Women, CEDAW, General Recommendation 19, U.N. Doc. A/47/38 at 1 (1993), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 246 U.N. Doc. HRI/GEN/1/Rev.6 (2003) (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.) [hereinafter *CEDAW General Comment No. 19*].

¹⁶⁹ ICCPR, *supra* note 78, Art. 26.

origin, property, birth or other status.¹⁷⁰ In the case of *Zwaan-de Vries v. The Netherlands*, the Human Rights Committee defined Article 26 as prohibiting “discrimination in law or in practice in any field regulated and protected by public authorities.”¹⁷¹ Therefore, Article 26 of the ICCPR covers discrimination in the spheres of economic, social and cultural rights as well as civil and political rights.

Similarly, in General Comment 16, the treaty body of ICESCR notes with regard to the right to adequate housing that the implementation of Article 3 (non-discrimination) combined with Article 11 (housing) requires that women have a right to own, use or otherwise control housing on an equal basis with men, and to access necessary resources to do so.¹⁷²

Moreover, as discussed earlier, “a violation of Article 26 [of the ICCPR] can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.”¹⁷³ Thus, there is no need to prove intent in order to demonstrate discrimination in violation of international human rights law. If the result of a certain policy or conduct is discriminatory, it is in violation of Article 26 of the ICCPR. Note, however, that the Human Rights Committee has found that “such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the [ICCPR] if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁷⁴ Since women are disproportionately affected by domestic violence and the housing discrimination and forced evictions that may ensue, these cases are covered by Article 26 of the ICCPR.

The prohibition of discrimination is also embodied in other international human rights instruments.¹⁷⁵ One of the most widely known and accepted set of rules is the Universal Declaration of Human Rights, which prohibits discrimination with respect to the rights set forth in it. Many international human rights experts view the Declaration as a cornerstone of customary international law and find its principles to be binding on all governments. The UDHR only directly addresses discrimination with regard to rights embodied in it, as do many other international human rights instruments.¹⁷⁶ However, one right enumerated in the UDHR is the right to an adequate standard of living, including housing. Any policy or practice of housing discrimination against women survivors of domestic violence that impinges the equal right of women to adequate housing is thus contrary to the UDHR.

¹⁷⁰ Human Rights Committee, *General Comment No. 18: Non-Discrimination* (Nov. 10, 1989), available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹⁷¹ Human Rights Committee, *F. H. Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987), para. 12.3.

¹⁷² *Id.*, para 28.

¹⁷³ Human Rights Committee, *Rupert Althammer et al. v. Austria*, para 10.2, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001 (2003),

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., U.N. Charter, preamble and arts. 1(3) and 55 (prohibiting discrimination in the enjoyment of economic, social and cultural rights).

¹⁷⁶ See, e.g., CEDAW, *supra* note 78; CERD, *supra* note 78; ICESCR, *supra* note 78.

4. Other potentially pertinent rights to be invoked

The UDHR guarantees a right to protection of the family (art. 16 (3)) and a right to property (art. 17); the latter may be violated in cases of forced evictions. Similar provisions exist in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.¹⁷⁷ Since women who are denied housing or evicted from their homes because of domestic violence regularly become homeless, there is an argument to be made that such actions also violate the right to security of the person (art. 9 ICCPR). As the treaty body of the ICESCR writes in its General Comment 7, women are particularly vulnerable to acts of violence and sexual abuse when rendered homeless.¹⁷⁸ Therefore, it could be argued that women domestic violence victims' right to security of their person has been violated when they become homeless through housing discrimination or forced eviction.

C. STATES' OBLIGATIONS

Individual rights—such as the rights outlined above—give rise to state obligations. Under international human rights law, states have the duty to respect, protect and fulfill the human rights of the people under their jurisdiction. That is to say, states should not interfere with human rights, they should protect human rights from being violated by a third party, and they should take positive action to facilitate the enjoyment of human rights.

With regard to domestic violence survivors, there are few explicitly stated obligations for states in the area of housing and forced eviction. The treaty body tasked with monitoring state compliance with the International Covenant on Economic, Social and Cultural Rights has stated that Article 3 of the Covenant, read together with Article 10, “requires states parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage....”¹⁷⁹

Moreover, states have obligations to reduce and prevent discrimination. These obligations include positive obligations with regard to non-discrimination. As the treaty body of CEDAW states in its General Recommendation 19: “...discrimination under the Convention is not restricted to action by or on behalf of Governments ...” and “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹⁸⁰ Thus, states must act with due diligence to prevent discrimination committed by private individuals as well as by public entities. This standard applies to all forms of discrimination, including in the context of housing and forced evictions. As the treaty body of ICESCR notes in its General Comment 7 on forced evictions, states have an obligation to take appropriate measures to ensure that, where evictions take place, no form of

¹⁷⁷ UDHR, *supra* note 78, Art. 16 (3) and 17; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, OEA/ser.L./V./II.23, doc. 21 rev. 6 (May 2, 1948), *available at* <http://www.cidh.org/basicos/english/Basic2.American%20Declaration.htm>; ACHR, *supra* note 78.

¹⁷⁸ CESCR General Comment No. 7, *supra* note 74, at para. 10.

¹⁷⁹ Committee on Economic, Social, and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, para. 27, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), *available at* <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

¹⁸⁰ CEDAW General Comment No. 19, *supra* note 97, at para. 9.

discrimination is involved. The same General Comment states that this obligation applies independent of the nature of the actor carrying out the eviction. Thus, the state also has an obligation to enforce the prohibition of non-discrimination if a private actor carries out the forced eviction.

Under the ICESCR, States Parties' obligations with regard to domestic violence survivors go even further. As the treaty body of the ICESCR states in its General Comment 16, Article 3 of the ICESCR, read together with Article 10, “requires states parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage...”¹⁸¹ Article 10 of the ICESCR reflects States Parties' shared recognition that the “widest possible protection and assistance should be accorded to the family” and Article 3 guarantees the equal right of men and women to the enjoyment of all economic, social and cultural rights. Since States Parties are also under the obligation to take positive action to fulfill the guarantees of the ICESCR and specifically to ensure that women are equally protected under international human rights law, it follows that States Parties are required under Article 10 to provide this “widest possible protection and assistance” to women victims of domestic violence. This state obligation could be invoked by advocates, in a case of housing discrimination against a domestic violence survivor, to argue that the State should provide the victim (and her children) with access to housing in the well-recognized interest of the protection of the family. If such state support is unrealistic, an advocate may argue that the State, at least, needs to ensure that survivors of domestic violence are not discriminated against in the domain of housing.

Thus, States not only have to refrain from discriminatory actions against domestic violence survivors and act with due diligence to prevent discrimination by third party actors, they also have a positive obligation to provide domestic violence victims with access to safe housing.

D. EXAMPLES FROM PRACTICE

1. Advocacy before the Special Rapporteur on Adequate Housing of the United Nations High Commission on Human Rights

The following is excerpted from *Housing Rights for All: Promoting and Defending Housing Rights in the United States*¹⁸²:

US Groups Participate in UN Report on Women and Right to Adequate Housing

The Special Rapporteur on Adequate Housing of the United Nations High Commission on Human Rights, Miloon Kothari, held a special consultation on the effects of violence, displacement, discrimination and other factors on women's housing in Washington, DC on October 15-17, 2005. This event, coordinated by NLCHP and a number of other US and

¹⁸¹ Committee on Economic, Social, and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, para. 27, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (emphasis added).

¹⁸² National Law Center on Homelessness and Poverty and Centre on Housing Rights and Evictions, *Housing Rights for All: Promoting and Defending Housing Rights in the United States* (3d ed. 2007), <http://www.nlchp.org/content/pubs/2007%20Forum%20Human%20Rights%20Manual%20FINAL1.pdf>.

Canadian NGOs included a training and personal testimonies from women victims of housing rights violations.

The consultation highlighted the removal of children from their parents because of inadequate housing, the dangers faced by homeless women living on the street, and the relationship between domestic violence and women's homelessness, among other topics.

Over 65 women from the US and Canada drew on their personal experiences in a day of training designed to connect their experiences to the larger struggle for human rights. 20 women from the U.S. and Canada provided oral testimony to the Special Rapporteur over two days about violations of their housing rights, and dozens more participated in submitting written testimony.

The Special Rapporteur included information from these hearings in his final report on the gender dimensions of the right to adequate housing, presented to the UN Commission on Human Rights in February 2006. This report, which contains a wealth of beneficial information and recommendations, can be accessed at

<http://daccessdds.un.org/doc/UNDOC/GEN/G06/111/66/PDF/G0611166.pdf?OpenElement>.

2. Shadow reporting to the United Nations Committee on the Elimination of Racial Discrimination

In 2007, a group of housing and homelessness rights advocates submitted a “shadow report” to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) arguing that the U.S. should extend the model protections created for public housing in the Violence Against Women Act (VAWA) to protect *all* persons experiencing domestic violence in public or private housing. The shadow report argued that the government should increase resources for domestic violence shelters and transitional housing adequate to meet the need, and provide priority to domestic violence victims in obtaining permanent housing. They also urged state legislatures to redraft domestic violence statutes to define “family” more comprehensively, to afford the necessary protections to victims of same-sex domestic violence.¹⁸³

In the CERD Committee's Concluding Observations, the Committee noted:

While welcoming the various measures adopted by the State party to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities, the Committee remains deeply concerned about the incidence of rape and sexual violence experienced by women belonging to such groups. . . The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate

¹⁸³ Beyond Shelter, et. al., *A Report to the Committee on the Elimination of Racial Discrimination on Racial Discrimination in Homelessness and Affordable Housing in the United States*, Dec. 10, 2007, http://www.nlchp.org/content/pubs/CERD_Housing_Report_20071.pdf.

reparation or satisfaction for damages suffered.¹⁸⁴
The CERD Committee then recommended 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 “setting up and adequately funding prevention and early assistance centres, counselling services and temporary shelters.”¹⁸⁵

¹⁸⁴ Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/6 ¶ 26 (March 7, 2008).

¹⁸⁵ *Id.*

V. Female Genital Mutilation

A. DEFINITION OF FEMALE GENITAL MUTILATION UNDER INTERNATIONAL LAW¹⁸⁶

Female genital mutilation (“FGM,” also known as female genital cutting (“FGC”) or female circumcision) refers to a range of procedures of varying intrusiveness that remove parts of the female genitalia.¹⁸⁷ Various international human rights, humanitarian, and public health organizations, have defined FGM as “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.”¹⁸⁸ The practice is prevalent in 28 countries in Africa, and has been documented in several countries in Asia, the Middle East, and Latin America.¹⁸⁹ Some communities perform FGM on girls at birth, while others do so as a rite of passage ceremony during adolescence; the practice is also occasionally performed on adult and married women.¹⁹⁰ This Chapter takes the position that FGM violates the human rights of women and girls, as codified in numerous international human rights instruments.

It is important to note, however, that the conception of FGM as a human rights violation is not universally accepted amongst advocates or scholars. Not only is FGM a “widely accepted

¹⁸⁶ Please see Chapter I of the Manual for a general discussion on the sources of human rights law and their relevance to U.S. law.

¹⁸⁷ There are four main types of female circumcision. In a clitoridectomy (Type I), the prepuce and perhaps part or the entire clitoris is excised. In a Type II excision, the circumciser removes the prepuce, the clitoris, and part or all of the labia minora. Infibulation (Type III), involves the removal of the clitoris; in addition, after removing the entire labia minora, the surface of the remaining genitalia is stitched together, with a small opening remaining for urination and menstruation. Type IV refers to “numerous other procedures that have been documented, such as pricking, piercing, stretching or burning of the clitoris and or/surrounding tissues.” See World Health Organization, Female Genital Mutilation, http://www.who.int/topics/female_genital_mutilation/en/; Anika Rahman and Nahid Toubia, Female Genital Mutilation: A Guide to Laws and Policies Worldwide 7 (2000); Esther M. Kisaakye, Women, Culture, and Human Rights: Female Genital Mutilation, Polygamy, and Bride Price, in *The Human Rights of Women: International Instruments and African Experiences* 268, 270 (Wolfgang Benedek, Esther M. Kisaakye & Gerd Oberleitner eds. 2002). The U.S. Department of State has largely adopted this classification. Report on Female Genital Mutilation as required by Conference Report (H. Rept. 106-997) to Public Law 106-429 (Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001), *Prevalence of the Practice of Female Genital Mutilation (FGM); Laws Prohibiting FGM and Their Enforcement; Recommendations on How to Best Work to Eliminate FGM* (June 27, 2001) [hereinafter “State Dep’t Report on FGM (2001)”], at 5.

¹⁸⁸ World Health Organization, “Eliminating Female Genital Mutilation: An interagency statement: OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO,” 1 (2008).

¹⁸⁹ FGM has been documented as a traditional practice in Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Cote d’Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, and Yemen. In other countries, studies have documented FGM, but not national estimates have been made; these countries include India, Indonesia, Iraq, Israel, Malaysia, and the United Arab Emirates. There are also anecdotal reports of FGM in Colombia, the Democratic Republic of Congo, Oman, Peru and Sri Lanka. See World Health Organization, “Eliminating Female Genital Mutilation,” *supra* note 3, at 29-30. See also Kisaakye, *supra* note 2, at 270. In Colombia, the practice was first documented in 2007 amongst the Embera-Chami aboriginal group, and the UN Population Fund has been working in conjunction with local NGOs with the goal of transforming the practice. See Economic and Social Council, Permanent Forum on Indigenous Issues, 7th Session (April – May 2008): *Colombia*, UN Doc. No. E/C.19/2008/5/Add.5, para. 23.

¹⁹⁰ Kisaakye, *supra* note 2, at 271-72.

cultural practice” in many communities,¹⁹¹ but some suggest that asserting human rights approaches disrespects cultural integrity of communities where the practice is prevalent.¹⁹² While international law recognizes the rights to cultural autonomy and to freedom of religion, these rights are subject to limitations necessary to protect individual rights and freedoms. Social and cultural claims cannot justify or legitimize the practice of FGM in any form.¹⁹³

The practice of FGM implicates a range of human rights, including the rights to non-discrimination; to life and security of person; to freedom from torture, cruel, inhuman, or degrading treatment; and the right to health. Addressing these rights and the relevance of human rights law to FGM generally, this Chapter sets out:

- The individual rights implicated by FGM (Section B);
- State obligations under international law with regard to the practice (Section C); and
- Relevant legislation and case law (both United States statutes and cases, as well as foreign and international law) (Section D).

Throughout, it provides suggestions as to how international human rights law might be relevant in a domestic forum.

As explained in more detail in Section D, FGM is prohibited under federal law in the United States; it is also criminalized under state legislation in sixteen states across the country. In addition to the use of penal laws against perpetrators of FGM, U.S. asylum law provides that FGM can serve as the basis of a well-founded fear of persecution entitling an applicant to protection. Domestic laws and international norms prohibiting FGM could also provide additional support for an individual seeking an order of protection, petitioning for child custody, seeking to restrict a perpetrator’s visitation, or petitioning for divorce.

B. INDIVIDUAL RIGHTS

International human rights law affirms the rights of women and girls to freedom from discrimination; to life and security of person; to freedom from torture, cruel, inhuman, or degrading treatment; and the right to health. The practice of FGM violates these rights and is incompatible with international human rights law.

¹⁹¹ Rushmi Ramakrishna, *Universal Rights, Non-Universal Process: Confronting Culturally Grounded Human Rights Abuses*, 30 U. Pa. J. Int'l L. 1383, 1420 (2009).

¹⁹² See, e.g., Ramakrishna, *supra* note 6, at 1420-27; Leigh A. Trueblood, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory*, 28 Denv. J. Int'l L. & Pol'y 437 (2000); Renu Mandhane, *The Use of Human Rights Discourse to Secure Women's Interests: A Critical Analysis of the Implications*, 10 Mich. J. Gender & L. 275, 314 (2004).

¹⁹³ International law recognizes and protects the right to participate in cultural life and freedom of religion. Nonetheless, freedom to manifest one’s religion or beliefs are subject to limitations necessary to protect the fundamental rights and freedoms of others. Social and cultural claims cannot be invoked to justify FGM in any form. See International Covenant on Civil and Political Rights (“ICCPR”), G.A. Res. 2200A (XXI), 52, 21 U.N. GAOR Supp. No. 16, U.N. Doc A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966), article 18(3) [hereinafter ICCPR]. In addition, with respect to Lesotho, Senegal, and Tanzania, the Human Rights Committee, which monitors ICCPR implementation, has condemned female genital circumcision as a practice that breaches the rights to life (article 6) and freedom from cruel, inhuman, and degrading treatment (article 7), despite the cultural significance of this practice in certain societies. Sarah Joseph et al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 26 (2000).

Reference to international standards and rights violated by FGM can be persuasive before U.S. courts, and provide additional support when advocating on behalf of women who have been threatened with or subjected to the practice. As the Second Circuit Court of Appeals recently noted, “[i]n light of the long-lasting and severe consequences of genital mutilation, paired with the reasons for its infliction, the practice has been largely condemned by the international community.”¹⁹⁴ In describing the horrific nature of the practice, the court cited the World Health Organization,¹⁹⁵ the Committee on the Elimination of All Forms of Discrimination Against Women,¹⁹⁶ and the Declaration on the Elimination of Violence against Women,¹⁹⁷ before noting that the practice has also been criminalized under U.S. domestic law. This case, *Bah v. Mukasey*, (discussed in further detail in Section D) indicates the salience of international human rights law for advocating on behalf women who have experienced FGM.

1. Right to be free from discrimination

International human rights law enshrines the principle of non-discrimination and unequivocally guarantees the right of women and girls to be free from discrimination on the basis of sex.¹⁹⁸ Non-discrimination is recognized as an independent human right and also as a constituent element of other rights.¹⁹⁹ International law thus generally prohibits discrimination and also guarantees the human rights and freedoms of all persons without distinction of any kind. Accordingly, women and girls are protected from discrimination generally, through domestic

¹⁹⁴ *Bah v. Mukasey*, 529 F.3d 99, 103 (2d Cir. 2008).

¹⁹⁵ World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement* OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO (2008) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

¹⁹⁶ Committee on the Elimination of All Forms of Discrimination Against Women, *Female Circumcision General Recommendation No. 14*, U.N. GAOR, 45th Sess., Supp. No. 38 & Corr. 1, at 80, ¶ 438, U.N. Doc. A/45/38 (1990) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

¹⁹⁷ *Declaration on the Elimination of Violence against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/ 48/629 (1993) (including female genital mutilation as an example of violence sought to be eliminated) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

¹⁹⁸ *See, e.g.*, Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A(III), UN Doc. A/810 at 71 (1948), article 2 [hereinafter UDHR] (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as ... sex”); ICCPR, articles 2 (freedom from discrimination on, *inter alia*, the basis of sex) and 3 (“the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”); Convention on the Rights of the Child, adopted November 20, 1989, G.A. Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force September 2, 1990, signed by the United States February 16, 1995, article 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s ... sex”) [hereinafter CRC].

¹⁹⁹ For example, article 26 of the ICCPR contains a free-standing prohibition of discrimination, and also contains a provision guaranteeing the rights enumerated in the ICCPR to all individuals without discrimination (article 2). Similarly, article 7 of the Universal Declaration of Human Rights (UDHR) guarantees the independent right of non-discrimination: “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;” whereas Article 2 of the UDHR states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

legislation and/or practice, (i.e. disparate treatment or effect on the basis of their sex), and are also guaranteed the rights contained in international law without distinction based on sex.²⁰⁰

The Convention for the Elimination of all forms of Discrimination Against Women (“CEDAW”) defines discrimination as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁰¹

In addition, with regard to discriminatory traditional practices, CEDAW requires that States Parties “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.”²⁰²

FGM violates the right of women and girls to be free from discrimination based on sex. First, it is exclusively practiced upon women and girls and is “indicative of an inferior status attributed to them.”²⁰³ Second, the practice “often function[s] to keep women in a state of subordination” whereby “women are treated in distinctive and sometimes restrictive ways which impair or nullify the enjoyment of various of their human rights.”²⁰⁴ Moreover, is generally understood as rooted in power imbalances between men and women, and deprives women and girls from making an independent decision about an intervention that has a lasting effect on their bodies.²⁰⁵ In its General Comment No. 28 on the equality of rights between men and women set forth in the ICCPR,²⁰⁶ the Human Rights Committee specifically cites FGM as a violation of the right to enjoy freedom from torture, cruel, inhuman, and degrading treatment without discrimination.²⁰⁷ The practice of FGM is incompatible with the freedom from discrimination on the basis of sex that is a fundamental guarantee of international human rights law.

²⁰⁰ See UN Human Rights Committee, General Comment No. 18 (Non-discrimination), para. 12 (“[A]rticle 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination ... [This] provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities ... 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.”)

²⁰¹ Convention on the Elimination of All Forms of Discrimination Against Women G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Jan. 22, 1980), article 1 [hereinafter CEDAW].

²⁰² CEDAW, article 5(a).

²⁰³ Corinne A.A. Packer, Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa 62 (2002).

²⁰⁴ *Id.*

²⁰⁵ World Health Organization, “Eliminating Female Genital Mutilation,” *supra* note 3, at 9-10.

²⁰⁶ ICCPR, article 3.

²⁰⁷ U.N. Human Rights Committee General Comment No. 28: Equality of rights between men and women, U.N. Doc. No. CCPR/C/21/Rev.1/Add.10, ¶11 (Mar. 2000). ICCPR Article 7 guarantees the right to be free from torture, cruel, inhuman and degrading treatment and punishment.

The prohibition of discrimination on the basis of sex has been cited as a basis for arguing that human rights law also prohibits male circumcision. As a practice, male circumcision has received significantly less attention than FGM in academic literature and in commentaries of international bodies such as the Committee on the Rights of the Child (the treaty body which interprets the Convention on the Rights of the Child and oversees State compliance).²⁰⁸ While the CRC Committee has focused on FGM as a traditional practice harmful to the rights of the child, it has failed to make any substantive comments with respect to male circumcision, although the practice continues in many states around the world. As a result, some commentators have suggested that the practice of male circumcision is just as objectionable as FGM and that the lack of attention to this practice is problematic.²⁰⁹ While a full examination of the human rights issues implicated by male circumcision is beyond the scope of this chapter, it is noted that this debate continues.

2. Rights to life and security of person

International human rights law guarantees the rights to life, to physical security and the integrity of the person.²¹⁰ The Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man declare that every human being “has the right to life, liberty and the security of his person.”²¹¹ The importance of the right to life, as well as the right to security of person, is reflected by its incorporation in every major international human rights instrument.²¹² Several international human rights bodies have defined the right to life to include quality of life.²¹³ In addition to broad protections of the right to life and physical security, the Convention on the Rights of the Child provides enhanced protection for children against all forms of mental and physical violence and maltreatment.²¹⁴

FGM violates women and girls’ right to life and security of person. The practice constitutes violence against women and girls that can lead to severe physical and psychological

²⁰⁸ John Tobin, *The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States*, 9 Hum. Rts. L. Rev. 373, 382–84 (2009).

²⁰⁹ See, e.g., Aleeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 Medicine & Law 575 (1994); William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. Fam. L. 337 (1985).

²¹⁰ See, e.g., Convention on the Elimination of All Forms of Racial Discrimination, article 5(b) (providing for non-discrimination in the enjoyment of “the right to security of person and protection by the State against violence or bodily harm.”).

²¹¹ UDHR, article 3 (“Everyone has the right to life, liberty and security of person.”); ICCPR, article 9 (“Everyone has the right to liberty and security of person”); American Declaration on the Rights and Duties of Man, article II (“[e]very human being has the right to life, liberty and the security of his person”).

²¹² Universal Declaration of Human Rights, art. 3; ICCPR, at art. 6; African [Banjul] Charter on Human and Peoples’ Rights, art. 4; American Convention on Human Rights, at art. 4; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, at art. 2.

²¹³ For example, the Inter-American Court has concluded that the right to life “includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.” Street Children case (Villagrán Morales et al.), 1999 Inter-Am. C.H.R. (ser. C) No. 63, at ¶ 144 (Nov. 19, 1999). See also Status of Human Rights in Several Countries: Guatemala, in Annual Report of the Inter-American Commission of Human Rights 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7, at 213 (1992) (finding that “respect for rights linked to life and integrity should go hand in hand with improvements in the population’s living standards”); Human Rights Committee, General Cmt. No. 6, U.N. Doc. A/37/40, ¶ 5 (1982).

²¹⁴ CRC, article 19(1).

consequences. Immediate risks of health complications include severe pain, shock (caused by pain and/or hemorrhage), excessive bleeding, difficulty in passing urine, infections, HIV (due to the use of surgical equipment exposed to the HIV virus, without sterilization), and in extreme cases, death. Long-term risks include chronic pain, chronic infections (dermoid cysts, genital ulcers, pelvic infections, urinary tract infections, among others), excessive scar tissue, reproductive tract and sexually transmitted infections, decreased sexual pleasure or pain during sex, birth complications (including danger to newborns), and psychological consequences (including fear of sex, post-traumatic stress disorder, anxiety, depression, and memory loss).²¹⁵ FGM thus infringes upon women and girls' rights to life and security of person because the practice causes severe physical and mental health complications, and can even result in death.

3. Right to be free from torture and cruel, inhuman, or degrading treatment

The right to be free from torture and cruel, inhuman, or degrading treatment is a fundamental principle of international human rights law.²¹⁶ The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) explicitly prohibit cruel, inhuman, or degrading treatment, as does the Convention on the Rights of the Child.²¹⁷ Article 7 of the ICCPR states that “[n]o one shall be subjected to ... cruel, inhuman, or degrading treatment or punishment.”²¹⁸

Article 1 of the CAT defines torture as:

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.²¹⁹

Torture thus involves four elements: “(1) severe physical and/or mental pain and suffering; (2) intentional infliction; (3) specified purposes; and (4) some degree of official or quasi-official

²¹⁵ See World Health Organization, “A Systematic review of the health complications of female genital mutilation including sequelae in childbirth,” No. WHO/FCH/WMH/00.2 (2000); Packer, *supra* note 184; World Health Organization, Health Risks and Consequences of Female Genital Mutilation, *available at* <http://www.who.int/reproductive-health/fgm/impact.htm>; World Health Organization, “Eliminating Female Genital Mutilation,” *supra* note 3, Annex 5: Health complications of female genital mutilation.”

²¹⁶ See, e.g., UDHR, article 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); ICCPR, article 7. See generally, CAT.

²¹⁷ ICCPR, art. 7; CAT, art. 16; CRC, article 37(a).

²¹⁸ ICCPR, art. 7.

²¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States October 21, 1994, article 1 [hereinafter CAT].

involvement, whether active or passive.”²²⁰

The practice of FGM amounts to torture under international law where these elements are present. First, the severe physical and mental pain caused by FGM has been well-documented.²²¹ With regard to the second and third elements, the practice is intentionally performed on women and girls for various purposes related to preparing a girl for adulthood, ensuring a girl’s marriageability, and her preserving virginity; it is often upheld by local structure of authority such as traditional and religious leaders and elders.²²² It thus satisfies the requirement of “purpose” under the definition of torture because it is a gender-based act that constitutes “discrimination of [some] kind.”²²³ Finally, acts of torture committed by private individuals can amount to torture when a state fails to act with due diligence to prevent it;²²⁴ this satisfies the fourth requirement of official involvement, either active or passive.

Accordingly, the Human Rights Committee (HRC), which offers the authoritative interpretation of the ICCPR in addition to its role as the body charged with overseeing governmental implementation of the treaty, has explained that the prohibition of torture set forth in article 7 of the ICCPR encompasses the practice of FGM.²²⁵ Moreover, the UN Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment has declared that FGM “can amount to torture if States fail to act with due diligence.”²²⁶ Despite the clear prohibition of torture and of cruel, inhuman, or degrading treatment in international law, and widespread recognition that this prohibition extends to FGM, the practice continues in many nations.²²⁷ The practice of FGM violates the fundamental right of women and girls to be free from such treatment.

4. Right to health

Numerous international human rights mechanisms recognize the right to the highest attainable standard of physical and mental health. The Universal Declaration of Human Rights

²²⁰ Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 308 (1994).

²²¹ See, e.g., World Health Organization, “A Systematic review of the health complications of female genital mutilation including sequelae in childbirth,” No. WHO/FCH/WMH/00.2 (2000).

²²² World Health Organization, “Eliminating Female Genital Mutilation,” *supra* note 3, at 6-7; see also Packer, *supra* note 148, at 21-22.

²²³ CAT, article 1 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...for any reason based on discrimination of any kind...”). See also Copelon, *supra* note 3529, at 330.

²²⁴ UN Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008.CAT/C/GC/2 (requiring States Parties to prevent and protect victims from gender-based violence by exercising due diligence in investigating, prosecuting, and punishing perpetrators, including private actors). Cf. *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006) (“[P]ersecution can certainly be found when the government, although not itself conducting the persecution, is unable or unwilling to control it.”).

²²⁵ See, e.g., Concluding Observations of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, The Gambia, U.N. Doc. No. CCPR/CO/75/GMB (Aug. 12, 2004), para. 10 (“The Committee reaffirms that the practice of FGM is contrary to article 7 of the Covenant.”).

²²⁶ United Nations Special Rapporteur on Torture, *Report of the Special Rapporteur on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/3 (Jan. 15 2008).

²²⁷ See *supra* note 4, listing the countries around the world where the practice of FGM has been documented.

proclaims that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself.”²²⁸ Both the ICCPR and the ICESCR uphold the right to the highest attainable standard of health.²²⁹ In addition, article 24 of the Convention on the Rights of the Child specifically recognizes the right of the child to the enjoyment of the highest attainable standard of health, and mandates that States “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”²³⁰

FGM greatly threatens the health of women and girls. It is painful and traumatic; it interferes with normal functioning of the body and causes immediate and long-term health consequences. In particular, the Human Rights Committee has noted that it is “especially disturbed” by the high rate of maternal mortality resulting from the practice of FGM, noting this violation of the right to health can, at its most extreme, amount to a violation of the right to life.²³¹ FGM is a violation of a person’s right to the highest attainable standard of health because it interferes with healthy tissue without medical necessity and can lead to severe consequences for a woman’s physical and mental health.²³²

C. STATE OBLIGATIONS

In addition to the individual human rights implicated by FGM, international law places various obligations upon states with regard to the practice. In particular, international law obliges states to take all appropriate and effective measures to eradicate FGM, and to further adopt special measures for the protection of children. The international prohibition on FGM is derived from many major international human rights treaties, including CEDAW, the Convention on the Rights of the Child (“CRC”), the Convention Against Torture (“CAT”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Numerous international and regional human rights bodies, including the Committee on the Elimination of Discrimination Against Women, the Committee on the Rights of the Child, and the United Nations Human Rights Committee, have found that FGM violates fundamental human rights and have called upon states to eradicate it. This Section discusses state obligations under international law regarding the practice of FGM.

1. Take all appropriate and effective measures to eradicate FGM

Various international legal instruments require that states take all appropriate and effective measures to eradicate the practice of FGM. The Convention Against Torture requires that all States Parties “take effective legislative, administrative, judicial or other measures to prevent acts

²²⁸ UDHR, article 25.

²²⁹ ICCPR, article 12; ICESCR, article 12.

²³⁰ CRC articles 24, 24(c).

²³¹ See Human Rights Committee, U.N. Doc. No. CCPR/C/79/Add.82; 61st Sess. (Oct. 1997).

²³² See World Health Organization, “A Systematic review of the health complications of female genital mutilation including sequelae in childbirth,” No. WHO/FCH/WMH/00.2 (2000); Corinne A.A. Packer, *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa* (Intersentia 2002); World Health Organization, *Health Risks and Consequences of Female Genital Mutilation*, available at <http://www.who.int/reproductive-health/fgm/impact.htm>.

of torture in any territory under its jurisdiction.”²³³ As explained above, the practice of FGM amounts to torture where states fail to act with due diligence to prevent it.²³⁴ The language of this provision of CAT—requiring *legislative, administrative, judicial or other measures*—denotes a positive obligation on states to actively prevent and protect individuals from acts of torture, including FGM. CAT article 4 requires each State Party to “ensure that all acts of torture are offences under its criminal law.”²³⁵ In addition, States Parties are prohibited from “expel[ling], return[ing] (“refouler”) or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²³⁶ Accordingly, CAT places a positive obligation on all States Parties to prevent FGM and all acts of torture, to criminalize them within their jurisdiction, and to ensure that they do not return any person to another State where they might be subjected to such practices. The United States has signed and ratified CAT, and is legally bound by its provisions.²³⁷

CEDAW also obliges States Parties to take measures to eradicate FGM. Parties to CEDAW must “take all appropriate measures to modify or abolish customs and practices which constitute discrimination against women.”²³⁸ The Committee on the Elimination of Discrimination Against Women—the treaty body empowered to issue authoritative interpretations of CEDAW—explicitly denounced the practice of FGM in its General Recommendation No. 14 on Female Circumcision (1990).²³⁹ Specifically, the Committee exhorted States Parties to, *inter alia*, take all appropriate and effective measures to eradicate FGM; to support women’s organizations that work for the elimination of harmful practices; to introduce appropriate educational and training programs; and to include strategies aimed at eradicating FGM into national health policies. This General Comment has been specifically cited by the Second Circuit as authoritative regarding the severe consequences of FGM and indicative of the near-universal international condemnation of the practice.²⁴⁰ The obligations articulated therein were reaffirmed by the Committee in its General Recommendation No. 24 (1999) on Women and Health; the Committee emphasized that cultural practices such as FGM carry a high risk of death and disability and recommended that States Parties enact and effectively enforce laws that prohibit FGM.²⁴¹ This requirement also affirmed by the Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa, which requires states to eliminate harmful cultural practices, including FGM.²⁴² Moreover, the United Nations General Assembly, in its January 2002 Resolution on Traditional or Customary Practices

²³³ CAT, article 2(1).

²³⁴ See *supra* notes 30-34, and accompanying text.

²³⁵ CAT, article 4(1).

²³⁶ CAT, article 3(1).

²³⁷ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Status of Signatories and Ratifications, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited January 9, 2010).

²³⁸ CEDAW, article 2(f).

²³⁹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14: Female Circumcision (1990), U.N. Doc. A/45/38 and Corr.

²⁴⁰ *Bah v. Mukasey*, 529 F.3d 99, 103 (2d Cir. 2008).

²⁴¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999), U.N. Doc. A/54/38/Rev.1, chap. I.

²⁴² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, available at http://www.achpr.org/english/_info/women_en.html.

affecting the health of women and girls, called upon all States to ratify or accede to CEDAW, and to adopt national measures to prohibit traditional practices such as FGM.²⁴³

Despite the international obligation to take all appropriate and effective measures to eradicate FGM, the practice remains prevalent in at least 28 countries in Africa, as well as several countries in the Middle East, Asia, and Latin America.²⁴⁴ Amongst the African countries, there are seven countries where the national prevalence of FGM is nearly universal (above 85%); four countries with high prevalence (60-85%); there is medium prevalence in seven countries (30-40%); and nine countries have low prevalence (ranging from 0.6% to 28.2%).²⁴⁵ While some of these countries have enacted specific laws to prohibit FGM, the effectiveness of any such law depends on the extent to which it is linked to broader processes of social change.²⁴⁶ In particular, amendment, adoption and enforcement of laws should be done in consultation with community leaders and civil society representatives, and mechanisms should be established to review and assess the effectiveness of the laws.²⁴⁷ States must engage in systematic and comprehensive efforts to address the continuing practice of FGM in order to discharge their international obligation to take all appropriate and effective measures to eradicate the practice.

2. Adopt special measures to protect girls from FGM

With few exceptions, children are entitled to the same rights human rights protections as adults. In addition, in light of their unique needs and vulnerabilities, children are entitled to special protections under international human rights law.²⁴⁸ Article 24 of the ICCPR and article VII of the American Declaration on the Rights and Duties of Man both contain special protections provisions for children. Of particular relevance to the practice of FGM, the CRC requires States Parties to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's sex. It also mandates that states take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.²⁴⁹ The Committee on the Rights of the Child has explained that this obliges Parties to "protect adolescents from all harmful traditional practices, such as early marriages, honor killings and female genital mutilation."²⁵⁰ International law further mandates that "[i]n all actions concerning children ... the best interests of the child

²⁴³ U.N. General Assembly, Traditional or customary practices affecting the health of women and girls, U.N. Doc. A/RES/56/128 (Jan. 2002).

²⁴⁴ See *supra* note 4.

²⁴⁵ World Health Organization, "Eliminating Female Genital Mutilation," *supra* note 3, at 4-5, 29-30.

²⁴⁶ *Id.*, at 17.

²⁴⁷ UNFPA, "Guide to working from within: 24 tips for culturally sensitive programming" (2006); UNFPA, "A holistic approach to the abandonment of female genital mutilation/cutting" (2007). See also, Ramakrishna, *supra* note 6, at 1420-27.

²⁴⁸ The Committee on the Rights of the Child explains that it is children's vulnerability that necessitates this special protection: "The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence." UN Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, UN Doc. CRC/C/GC/8 (2006), para. 21.

²⁴⁹ CRC, article 24(3).

²⁵⁰ Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (2003), para. 39(g).

shall be the primary consideration.”²⁵¹

FGM is largely performed on girls at birth or as a coming of age ritual during adolescence.²⁵² As explained above, the practice exclusively targets females in violation of the principle of non-discrimination enshrined in international law generally, and further guaranteed to children.²⁵³ Moreover, FGM constitutes mental and physical violence that impinges on girls’ right to security of person and can violate their right to life; it also violates their right to freedom from torture and cruel, inhuman, or degrading treatment, and their right to health.²⁵⁴ In light of states’ international legal obligation to provide special protection for children due to their particular vulnerability, the continued practice of FGM on young girls can be considered particularly egregious. In particular, there is tension between states’ failure to protect girls from the practice, and the requirement that the “best interests of the child” be a primary consideration in state action. States have an obligation under international law to take extra measures to protect children and ensure that girls are not subjected to FGM.

D. RELEVANT LEGISLATION AND CASE LAW

1. United States law

In the United States, Congress has passed legislation that criminalizes performing FGM on a person under the age of eighteen.²⁵⁵ Specifically, 18 U.S.C. §116 provides:

[W]hoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained that age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.²⁵⁶

Sixteen states have also passed laws outlawing the practice on minors: California, Colorado, Delaware, Illinois, Maryland, Minnesota, Missouri, Nevada, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, West Virginia and Wisconsin.²⁵⁷ United States federal and state law on FGM thus largely incorporates and mirrors international standards; as explained in Chapter II on *Physical, Sexual and Psychological Abuse*,²⁵⁸ however, conformity with international rights and standards is much less often the case with regard to other issues relating to domestic violence.

In New York, N.Y. Penal Law §130.85 prohibits FGM on minors as a class E felony. The statute provides:

²⁵¹ CRC, article 3(1).

²⁵² See *supra* note 5.

²⁵³ See *supra* notes 9-18 and accompanying text.

²⁵⁴ See *supra* notes 19-37 and accompanying text.

²⁵⁵ H.R. 11829, 104th Cong. §645 (1996).

²⁵⁶ 18 U.S.C. §116 (1996).

²⁵⁷ State Dep’t Report on FGM (2001) at 27.

²⁵⁸ See Chapter II of this Manual—“Physical, Sexual and Psychological Abuse”—*supra*, outlining where, for example, affirmative obligations and due diligence principles are not adequately incorporated into United States law.

A person is guilty of female genital mutilation when:

(a) a person knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not reached eighteen years of age; or

(b) being a parent, guardian or other person legally responsible and charged with the care or custody of a child less than eighteen years old, he or she knowingly consents to the circumcision, excision or infibulation of the whole or part of such child's labia majora, labia minora or clitoris.²⁵⁹

The legislative memorandum in support of the New York Bill prohibiting FGM explained that the justification for the law was to protect young girls from the painful and mutilating procedure, described as “a form of dangerous child abuse” and the accompanying “extreme health risks including: pain, trauma, bleeding, infections, injury to adjacent organs, shock, chronic infection, painful menstruation, scarring, infertility, pain during intercourse, numerous childbirth complications, and even death.”²⁶⁰ The law appears to have been passed in anticipation of the appearance of the practice in New York with the growth of immigrant populations from countries where FGM is common.²⁶¹ To date, there have been no reported prosecutions for female genital mutilation in New York under N.Y. Penal Law § 130.85 or under statutes prohibiting assault, sexual abuse or child abuse generally. Nonetheless, there is some evidence that FGM is secretly practiced amongst immigrant communities in the United States.²⁶²

In domestic courts, the issue of FGM most frequently arises in the context of asylum proceedings. To be eligible for asylum, an applicant must demonstrate that she has a well-founded fear of persecution in her home country on account of one of five protected grounds: race, religion, nationality, membership in a social group, or political opinion.²⁶³ In other words, the applicant must not only show that she has suffered persecution or has a well-founded fear of persecution, but she must also demonstrate that the well-founded fear of persecution is on account of a protected ground. Gender alone does not constitute a social group and is not sufficient to establish asylum status.²⁶⁴ Instead, one successful formulation of a social group in an FGM asylum claim could be “women opposed to FGM who belong to an ethnic group that

²⁵⁹ N.Y. Penal Law §130.85.

²⁶⁰ McKinney's 1997 Session Laws of New York, at 1957, 2589.

²⁶¹ *Id.*

²⁶² According to a 2001 State Department Report, it has been “estimated that there were approximately 168,000 girls and women (mostly from Africa) in this country who had been or were at risk of being subjected to FGM. Of these, 48,000 were under the age of 18.” State Dep’t Report on FGM (2001), at 14. *See also* Michael Blanding, “Bostonians Changing the World,” *Boston Globe* (Apr. 30, 2006) (discussing women seeking FGM for their daughters at African Women's Health Center at Brigham, MA); Edward Hegstrom, “Gynecologists Report Female Circumcisions; Some Immigrants Had Operation, Study Finds,” *Hous. Chron.* (Dec. 27, 2000) at A19.

²⁶³ Asylum and withholding of removal are forms of relief available to an individual who is outside his or her country of origin and “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...” 8 U.S.C. § 1158(b)(1)(A); 8 U.S.C. § 1101(a)(42).

²⁶⁴ *See Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

practices FGM.”²⁶⁵ Thus, in order to successfully claim asylum based on FGM, a female applicant must at a minimum demonstrate that she belongs to a particular ethnic group and that ethnic group widely practices FGM.

In some circuits, having suffered FGM constitutes past persecution that is sufficient to create a presumption of a well-founded fear of future persecution. In the Ninth Circuit case of *Mohammed v. Gonzales*,²⁶⁶ the asylum applicant was a young Somali woman who had previously been subjected to FGM. She claimed that she was entitled to a presumption that she had a well-founded fear of future persecution as a result of being subjected to FGM in the past.²⁶⁷ The government contended that the past infliction of FGM should have rebutted the presumption because, having already suffered FGM, it was unlikely that she would be inflicted with the procedure in the future. The Ninth Circuit rejected this argument, analogizing FGM to forced sterilization, which had been classified as a “continuing harm that renders a petitioner eligible for asylum, without more.”²⁶⁸ Similarly, in the Eighth Circuit case of *Hassan v. Gonzales*, the court held that a showing that an applicant had been subjected to FGM in the past would create a presumption of a well-founded fear since the applicant could still suffer from forms of future persecution other than FGM. The court noted that the presumption of a well-founded fear as a result of past FGM is difficult to rebut because of the risk of violence and gender persecution, as evidenced by the applicant’s FGM.²⁶⁹

In the Second Circuit, the leading case on FGM is *Bah v. Mukasey*.²⁷⁰ Three Guinean women applied for withholding of removal on the ground that they had been subjected to FGM in the past and had well-founded fear of persecution on that basis if repatriated. The Board of Immigration Appeals (BIA) denied their petition assuming categorically that female genital mutilation was a “one-time” act that rebutted the presumption that the women’s lives or freedom would be threatened in future.²⁷¹ The Second Circuit held that the BIA erred in presuming FGM was a one-time act, and further erred because it assumed that FGM was the only type of persecution that was relevant to the analysis of whether the applicants were eligible for relief. The court noted that the State Department report for Guinea indicated that domestic violence against women was common and that women were commonly subjected to crimes such as rape and sex trafficking, all of which might constitute a basis for a well-founded fear of future persecution.²⁷² Following the Second Circuit’s ruling in *Bah*, the U.S. Attorney General ruled that asylum applicants who have been subjected to FGM in the past are entitled to a presumption

²⁶⁵ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that persecution was on account of applicant’s membership of a social group comprising of the young women of the Tchamba-Kunsuntu Tribe); *see also*, *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10 Cir. 2005) (holding that for purposes of FGM, a social group can be defined by both gender and tribal membership).

²⁶⁶ 400 F.3d 785 (9th Cir. 2005).

²⁶⁷ *Id.* at 791.

²⁶⁸ *Id.* at 799. *See also* *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (characterizing forced sterilization as a form of permanent and continuous persecution which creates an irrebuttable presumption of a well-founded fear of persecution).

²⁶⁹ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8 Cir. 2007).

²⁷⁰ 529 F.3d 99 (2d Cir. 2008).

²⁷¹ *In re A.T.*, 24 I. & N. Dec. 296, 299 (BIA 2007).

²⁷² *Bah v. Mukasey*, 529 F.3d at 115.

that they will face future persecution, and the government bears the burden in those cases of showing changed conditions that obviate the risk of persecution.²⁷³

In addition to its analysis of U.S. asylum law, the Second Circuit noted, “[i]n light of the long-lasting and severe consequences of genital mutilation, paired with the reasons for its infliction, the practice has been largely condemned by the international community.”²⁷⁴ In describing the horrific nature of the practice, the court cited the World Health Organization,²⁷⁵ the Committee on the Elimination of All Forms of Discrimination Against Women,²⁷⁶ and the Declaration on the Elimination of Violence against Women,²⁷⁷ before noting that the practice has also been criminalized under U.S. domestic law. This case indicates the salience of international human rights law for advocating on behalf women who have experienced FGM.

Importantly, protection under U.S. asylum law is not necessarily limited to the individual who has been personally subjected to FGM or who may be subjected to FGM if repatriated. In fact, courts have held that persecution against family and friends can support an applicant’s claim of a well-founded fear of future persecution, even where if the applicant has not suffered similar persecution. For example, in *Abay v. Ashcroft*, the Sixth Circuit found that a mother could establish a claim for asylum based on evidence that her young daughter would be subjected to FGM if returned to their native country.²⁷⁸ Such so-called “derivative” asylum claims are not as widely accepted as claims based upon the applicant’s personal well-founded fear, however.

While FGM arises in U.S. courts nearly exclusively in the asylum context, claims could be brought under either the federal or state statutes criminalizing the practice, and in at least one case a husband was successfully sued for civil battery for conspiring to subject his wife to FGM. In *Turner v. Ostrowe*, a woman sued her former husband and sought damages for physical and psychological injuries she sustained after he conspired to have another physician perform a surgical procedure on wife her without her knowledge or consent.²⁷⁹ On appeal, the court affirmed judgment against the husband but found that the trial court’s award of only \$35,000 in damages was abusively low; the court entered judgment for damages of \$125,000 noting that as result of the FGM surgery and the husband’s deception, the plaintiff suffered irreversible physical and mental injuries.²⁸⁰

²⁷³ *Matter of A. T.*, 24 I. & N. Dec. 617 (Att’y Gen. 2008).

²⁷⁴ *Bah v. Mukasey*, 529 F.3d at 103.

²⁷⁵ World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement* OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO (2008) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

²⁷⁶ Committee on the Elimination of All Forms of Discrimination Against Women, *Female Circumcision General Recommendation No. 14*, U.N. GAOR, 45th Sess., Supp. No. 38 & Corr. 1, at 80, ¶ 438, U.N. Doc. A/45/38 (1990) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

²⁷⁷ Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/ 48/629 (1993) (including female genital mutilation as an example of violence sought to be eliminated) (cited in *Bah v. Mukasey*, 529 F.3d at 103).

²⁷⁸ *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir.2004)

²⁷⁹ *Turner v. Ostrowe*, 828 So.2d 1212 (La. App. 1 Cir., 2002).

²⁸⁰ *Id.* at 1224-25.

2. Foreign and international law

In recent years, much like the United States, numerous foreign jurisdictions have recognized FGM as a form of persecution in their asylum decisions. For example, in France, the Commission des Recours des Réfugiés (CRR) accepted in *Aminata Diop* (1991), that FGM could constitute persecution, and that refugee status could be granted to a woman subjected to FGM against her will, where FGM was officially prescribed, encouraged or tolerated.²⁸¹ In the Canadian case of *Farah v. Canada*, FGM was described as a “torturous custom” and was recognized as a form of persecution. The Immigration and Refugee Board also found FGM to constitute a gross infringement of the applicant’s personal security, referring to article 3 of the Universal Declaration of Human Rights and a number of child-specific rights.²⁸² Similarly, in the United Kingdom, the House of Lords (the country’s highest court) has stated that “FGM constitutes treatment which would amount to persecution within the meaning of the [Refugee] Convention,” and has found that FGM “is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman, or degrading treatment.”²⁸³

The U.N. Human Rights Committee similarly affirms on a regular basis that the practice of FGM violates the human rights of women and girls. In its Concluding Observations on African countries where FGM is practiced, the Human Rights Committee has repeatedly called on governments to take measures against FGM, including legal measures.²⁸⁴

The European Court of Human Rights maintains that subjecting a woman to FGM amounts to ill-treatment in violation of Article 3 of the European Convention on Human Rights, which prohibits torture and cruel, inhuman, and degrading treatment. In *Collins and Akaziebie v. Sweden*, a mother and daughter from Nigeria applied for asylum in Sweden on the basis that the daughter feared being subjected to FGM if she were repatriated, and the mother feared being subject to a more severe form of the practice (she had already suffered FGM in the past).²⁸⁵ They noted that FGM is a deeply rooted tradition in Nigeria that is inflicted upon nearly all women. The court held that FGM constitutes ill-treatment in contravention of article 3 of the European Convention, and noted that the critical question in such cases is whether the particular applicants

²⁸¹ *CRR, 17 juillet 1991, 164078, Mlle Diop Aminata*, 164078, France: Commission des Recours des Réfugiés (CRR), 17 July 1991.

²⁸² *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh*, Immigration and Refugee Board of Canada, 10 May 1994.

²⁸³ *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, United Kingdom: House of Lords, 18 October 2006.

²⁸⁴ In 1997, the Human Rights Committee called on the government of Sudan to criminalize the practice of FGM and to pursue social and educational campaigns for its elimination, noting that FGM violated Article 7 of the ICCPR as well as Article 24 on the rights of children. See CCPR/C/79/Add.85; 61st Sess. (Oct. 1997). The Committee noted that it was “especially disturbed” by the high rate of maternal mortality resulting from the practice of FGM, and cited FGM as a violation of the right to life set forth in Article 6 as well as the prohibition on torture in Article 7. See CCPR/C/79/Add.82; 61st Sess. (Oct. 1997). Subsequently, in 1999, the Committee expressed concern that Cameroon did not have a law prohibiting FGM, again noting that the practice explicitly violated Article 7 of the ICCPR. See CCPR/C/79/Add.116; 67th Sess. (Oct. 1999).

²⁸⁵ *Collins and Akaziebie v. Sweden*, Eur. Ct. H.R., Application no. 23944/05 (March 8, 2007).

at issue are able to demonstrate that they face a real and concrete risk of being subjected to FGM upon their return.²⁸⁶

The practice of FGM implicates a range of human rights, including the rights to non-discrimination; to life and security of person; to freedom from torture, cruel, inhuman, or degrading treatment; and the right to health. Under international law, states are obliged to take all appropriate and effective measures to eradicate FGM, and to further adopt special measures to protect girls from the practice. In addition, FGM is prohibited under federal law in the United States, and it is criminalized at the state level by sixteen states across the country. Beyond the criminal context, U.S. asylum law provides that FGM can serve as the basis for a well-founded fear of persecution entitling an applicant to protection. Recognizing FGM as a basis for asylum protection thus implicitly recognizes State responsibility to protect its citizens from this kind of violence. In this sense, then, international norms that support providing asylum protection to women who have been subjected to or threatened with FGM could also provide additional support when advocating on behalf these woman, for example, when seeking an order of protection, petitioning for child custody, or seeking to restrict a perpetrator's visitation. These forms of protective orders, like asylum protection, recognize the need for State intervention when an individual is threatened by private violence. International human rights law recognizes FGM as a discriminatory practice that violates a woman's right to life and security of person, to freedom from torture, and her right to health. The severity with which the practice is treated by human rights law lends strong support for orders seeking to protect a woman from an individual who threatens to subject her to FGM or who supports such a violent and abusive practice.

²⁸⁶ *Id.* at pp. 11–12.

VI. Domestic Violence in the LGBT Community

Domestic violence is often thought of as a form of violence imposed by males upon their female partners. However, many gay and lesbian individuals in same-sex relationships, as well as people who identify as transgender, also experience domestic violence, struggling with similar problems as heterosexual domestic violence victims. Many studies report that domestic violence between same-sex partners happens just as frequently as domestic violence between opposite-sex partners,²⁸⁷ and “manifests as the same exercise of control through the use of coercion, violence, threats, and verbal and psychological abuse.”²⁸⁸ Despite the similarities in experience, lesbian, gay, bisexual, and transgender (LGBT) victims of domestic violence often face obstacles that heterosexual victims do not when they reach out for help. These obstacles can be a result of personal bias (homophobia, biphobia or transphobia) against LGBT individuals or a lack of legal protections for these communities.

One area in which LGBT victims encounter difficulties is in the context of interacting with law enforcement. For example, a police officer might refuse to enforce an order of protection for an LGBT victim because the officer believes that the homosexual victim does not deserve protection. An officer who has been called for assistance may refuse to determine who the “primary aggressor” in the relationship is, and either arrest both parties or not arrest either party. Either of these scenarios leaves the victim even more vulnerable. A transgender victim of domestic violence may be afraid to call the police if he or she has encountered a transphobic response from them in the past. Additionally, a service provider that has a wealth of experience helping victims of domestic violence may not have any training on the way in which domestic violence uniquely affects LGBT victims, and may even refuse to serve LGBT community members.

LGBT victims also face distinct legal obstacles. The system, while extending certain protections to heterosexual domestic violence victims, has holes that leave them unprotected, whether specifically intended or not. Prior to 2008, New York law permitting family court jurisdiction to issue restraining orders in domestic violence cases defined domestic violence as various forms of violence between “(a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common regardless whether such persons have been married or have lived together at any time.”²⁸⁹ Since LGBT couples are not permitted to marry under New York law²⁹⁰

²⁸⁷ See, e.g., Amnesty International USA, Domestic Violence in Lesbian, Bisexual, Gay and Transgender Communities: A Fact Sheet, <http://www.amnestyusa.org/violence-against-women/stop-violence-against-women-svaw/domestic-violence-in-lgbt-communities/page.do?id=1108438> (last visited Jan. 6, 2009).

²⁸⁸ Nancy J. Knauer, *Same Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 Temp. Pol. & Civ. Rts. L. Rev. 325, 330 (1999).

²⁸⁹ N.Y. Fam Ct. Act § 812(1) (McKinney 2007) (amended 2008).

²⁹⁰ On December 2, 2009, the New York State Senate rejected Bill S66003—“An act to amend the domestic relations law, in relation to the ability to marry”—that would have legalized gay marriage in the state. See N.Y. Senate Open Legislation, Bill S66003: Relates to individuals ability to marry, *available at* <http://open.nysenate.gov/openleg/bill/S66003> (last visited Feb. 10, 2010).

and often do not have a child in common, this narrow definition of domestic violence excluded LGBT domestic violence victims seeking restraining orders in family court.²⁹¹

In 2008, however, New York amended the law to expand the definition of domestic violence to include violence between “persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.”²⁹² New York family court now has jurisdiction to issue restraining orders in cases of domestic violence between LGBT couples, as long as the person seeking the restraining order can prove the existence of an “intimate relationship.” The fact that LGBT victims can obtain restraining orders in family court is significant because the alternative—handling the case through prosecution in criminal court—can be problematic for a number of reasons. For example, “criminal cases require a higher level of proof of the alleged incident(s) than civil court cases and can often take much longer to be decided,”²⁹³ and furthermore, the victim may not want to make his or her partner a criminal even if he or she wants to obtain a restraining order.

There are many legal authorities to support changes that address inequities against LGBT domestic violence victims—such as the legal change made in New York—and international human rights law can be one of them. While international law may not always be binding on domestic courts, an increasing number of domestic courts and judges deem it to be persuasive authority.²⁹⁴ Familiarity with international human rights law principles can help advocates in a non-litigation context, serving as a useful tool for organization and public education, and a source of empowerment for clients.

Two concepts in international human rights law mandate that LGBT domestic violence victims be afforded the same legal protection as heterosexual domestic ones: the right to equality before the law, and the principle of non-discrimination. International human rights require that everyone, including sexual minorities, be treated equally before the law. This means that if the law provides protection or remedies for heterosexual domestic violence victims, it must provide them for LGBT domestic violence victims as well. The right to equality before the law is widely regarded as one of the most fundamental human rights.

²⁹¹ Delaware, Louisiana, North Carolina, Montana, and South Carolina still state their domestic violence laws in terms of opposite-sex parties. See Shannon Little, *Challenging Changing Legal Definitions of Family in Same Sex Domestic Violence*, 19 *Hastings Women's L.J.* 259, 264 (2008).

²⁹² N.Y. Fam. Ct. Act § 812(1)(e) (Consol. 2010). “Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an ‘intimate relationship.’” *Id.* For more information, see Jennifer Cranstoun et al., *What’s an Intimate Relationship, Anyway? Expanding Access to the New York State Family Courts for Civil Orders of Protection*, 29 *Pace L. Rev.* 455 (2009).

²⁹³ Jennifer Rios, Note, *What’s the Hold-Up? Making the Case for Lifetime Orders of Protection in New York State*, 12 *Cardozo J.L. & Gender* 709, 718 (2006).

²⁹⁴ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, and 539 U.S. 558 (2003). See also The Opportunity Agenda, *Human Rights in State Courts*, <http://opportunityagenda.org/pdfs/Human%20Rights%20in%20State%20Court.pdf> (discussing openness of state courts to consider international law as persuasive authority).

The principle of non-discrimination is closely related to the right to legal equality. International human rights law vests various rights, such as the right to family²⁹⁵ and the right to life,²⁹⁶ in individuals. The principle of non-discrimination requires that these rights be vested equally among all individuals without discrimination based on arbitrary distinctions.²⁹⁷ International human rights law has recognized that discrimination based on sexual orientation or gender identity violates the principle of non-discrimination. Thus, the principle of non-discrimination ensures that LGBT domestic violence victims are entitled to, for example, the right to be free from ill-treatment, the right to family life, and the right to housing under international human rights law, just as heterosexual domestic violence victims are so entitled. It must be understood, however, that the principle of non-discrimination alone does not create any “right”; instead, it ensures that rights that States have already granted be provided equally among individuals.

These two concepts, while conceptually severable, are often used interchangeably because both address problems associated with discrimination based on arbitrary grounds by a state actor.

This Chapter will first explain the foundations for the right to equality before the law and the principle of non-discrimination in international human rights law. Secondly, it will explain States’ obligations to enforce these rights. Lastly, it will present examples of distinct problems LGBT domestic violence victims may face and discusses how advocates can use international human rights law to address these problems.

A. PRINCIPLE OF NON-DISCRIMINATION AND THE RIGHT TO EQUALITY BEFORE THE LAW

The right to equality before the law and the principle of non-discrimination are perhaps the most fundamental tenets of international human rights law. Major international human rights instruments, including the United Nations Charter,²⁹⁸ the Universal Declaration of Human Rights (“UDHR”),²⁹⁹ the International Covenant on Civil and Political Rights (“ICCPR”),³⁰⁰ the

²⁹⁵ UDHR, article 16; ICESCR, article 10; ICCPR, article 23.

²⁹⁶ UDHR, article 3; ICCPR, article 6(1); ECHR, article 2.

²⁹⁷ The principle of non-discrimination does not prohibit discrimination based on legitimate distinctions. For example, a government does not violate the principle of non-discrimination when it favors veterans over non-veterans for welfare purposes, because the distinction is legitimate.

²⁹⁸ U.N. Charter art. 1(3) (declaring that the purpose of the United Nations is “[t]o achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”); *id.* art. 55 (declaring that the United Nations “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”).

²⁹⁹ *Universal Declaration of Human Rights* art. 2, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter 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.”); *id.* art. 7 (“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.”).

³⁰⁰ International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter 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,

International Covenant on Economic, Social and Cultural Rights,³⁰¹ and the American Convention on Human Rights (“American Convention”)³⁰² enshrine the principle of non-discrimination and the right to be equal before the law.³⁰³

The bodies created under and charged with interpreting these treaties have reinforced the primacy of the principle of non-discrimination. The UN Human Rights Committee (“HRC”) has declared: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”³⁰⁴ The Inter-American Court of Human Rights has gone even further, describing the principle of non-discrimination and equal protection before the law as a *jus cogens* norm³⁰⁵ and “a fundamental principle that permeates all laws” upon which “the whole legal structure of national and international public order rests.”³⁰⁶

language, religion, political or other opinion, national or social origin, property, birth or other status.”); *id.* art. 26 (“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.”).

³⁰¹ International Covenant on Economic, Social and Cultural Rights art. 2(2), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (“The States 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.”).

³⁰² American Convention on Human Rights art. 1, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter American Convention] (“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.”); *id.* art. 24 (“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”).

³⁰³ See also *American Declaration of the Rights and Duties of Man* art. II, O.A.S. Res. XXX, 9th Int’l Conference of American States, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc. 21 rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992) [hereinafter *American 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.”); Protocol No. 12 to the 1950 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1(1) *opened for signature* Apr. 11, 2000, Europ. T.S. No. 177 (entered into force Apr. 1, 2005) (“The enjoyment of any right set forth by law 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.”); *id.* art. 20 (“Everyone is equal before the law.”); Charter of Fundamental Rights of the European Union art. 21, 2000 O.J. (C 364/8) (“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”).

³⁰⁴ UN Human Rights Comm., *General Comment No. 18*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (Oct. 11, 1989) [hereinafter, UN HRC, *General Comment No. 18*].

³⁰⁵ *Jus cogens* norms are rules of international law recognized as peremptory, permitting no derogation. Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331, 334, 347; Restatement of the Foreign Relations Law of the United States § 102 cmt. k (1987).

³⁰⁶ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 85 (Sep. 27, 2003). *Jus cogens* norms are rules of international law recognized as peremptory, permitting no derogation. Vienna Convention on the Law of Treaties arts. 53, 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 334, 347 (entered into force Jan. 27, 1980); Restatement of the Foreign Relations Law of the United States § 102 cmt. k (1987).

B. DEFINITION OF THE PRINCIPLE OF NON-DISCRIMINATION AND THE RIGHT TO EQUALITY BEFORE THE LAW UNDER INTERNATIONAL LAW

The right to equality before the law and the principle of non-discrimination just discussed are defined broadly under international law. The HRC interprets the ICCPR to require States Parties to protect all the rights enumerated and apply its laws without

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³⁰⁷

The Committee on Economic, Social and Cultural Rights has formulated a nearly identical definition of the principle of non-discrimination.³⁰⁸ However, “the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory”³⁰⁹ and “[t]he enjoyment of rights and freedoms on an equal footing . . . does not mean identical treatment in every instance.”³¹⁰ Still, for differential treatment to be justifiable, it has to be founded on reasonable and objective criteria³¹¹ and have a legitimate purpose.³¹²

C. STATES’ OBLIGATIONS CONCERNING NON-DISCRIMINATION UNDER INTERNATIONAL LAW AND THE RIGHT TO EQUALITY BEFORE THE LAW

Under international human rights law, the principle of non-discrimination and the right to equality before the law “require[] that State[s] not only protect people from discrimination from State agents but also from private entities and persons.”³¹³ The HRC has declared, in the course of interpreting ICCPR’s principle of non-discrimination and right to equality before the law, that

³⁰⁷ UN HRC, *General Comment No.18*, supra note 277, ¶7. This comment is also notable for illustrating that international law, unlike U.S. constitutional law, does not require proof of discriminatory intent or animus. *See, e.g.*, Anne F. Bayefsky, *The Principle of Equality or Non-discrimination in International Law*, 11 Hum. Rts. L.J. 1, 8 (1990) (“[I]nternational legal materials suggest a discriminatory intention is not a necessary element of discrimination or a denial of equality.”).

³⁰⁸ U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 20*, ¶ 7, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (“It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.”).

³⁰⁹ UN Human Rights Comm., Communication No. 172/1984 (*Brooks v. the Netherlands*), ¶ 13, U.N. Doc. CCPR/C/29/D/172/1984 (April 9, 1987).

³¹⁰ UN HRC, *General Comment No.18*, supra note 277, ¶ 8.

³¹¹ *Id.* ¶ 13.

³¹² *Id.*

³¹³ International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioners Guide No. 4 26 (2009) [hereinafter *Practitioners Guide*]; *accord Declaration on the Elimination of Violence Against Women* art. 4(c), G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (“States should 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 private persons.”).

the concepts prohibit any “discrimination in law or in fact in any field regulated and protected by public authorities.”³¹⁴

Further, the principle of non-discrimination and the right to equality before the law impose a positive obligation on States Parties to “ensure” that everyone enjoys his or her rights equally and without discrimination.³¹⁵ In explaining the nature of the general legal obligations imposed on States parties to the ICCPR, the HRC noted:

The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.³¹⁶

D. SEXUAL ORIENTATION AND GENDER IDENTITY AS A PROHIBITED GROUND FOR DISCRIMINATION

International human rights law has increasingly recognized sexual orientation and gender identity as prohibited grounds for differential treatment.³¹⁷ Although major international human rights instruments do not specifically include sexual orientation or gender identity as one of the enumerated prohibited grounds of discrimination, it is widely accepted that “international instruments were not meant to be exhaustive in their enumeration of [prohibited grounds for differential treatment]”³¹⁸ In addition, International bodies responsible for interpreting these instruments have referred to the prohibition of discrimination based on “sex” or “other status” to hold that discrimination based on sexual orientation or gender identity is prohibited. In its recent General Comment defining the meaning of non-discrimination in the International Covenant for Economic, Social, and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights explicitly stated that States “should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights.”³¹⁹ The Committee also acknowledged that “persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.”³²⁰

³¹⁴ UN HRC, *General Comment No.18*, supra note 277, ¶ 12.

³¹⁵ See ICCPR, supra note 273, art, 2(1).

³¹⁶ UN Human Rights Committee, *General Comment No. 31*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

³¹⁷ It should be noted that the issue of gender identity has received far less attention from the international human rights community than the issue of sexual orientation. As a result, most of the instruments, opinions, and cases cited in this document discuss only discrimination based on sexual orientation. However, it is certainly plausible to extend the rationale behind the prohibition on discrimination based on sexual orientation to discrimination based on gender identity, considering inherent similarities between both forms of discrimination.

³¹⁸ Practitioners Guide, supra note 18, at 29.

³¹⁹ UN Comm. on Economic, Social and Cultural Rights, General Comment No. 20, ¶ 32, U.N. Doc. E/C.12/GC/20 (June 10, 2009).

³²⁰ *Id.*

International case law and interpretive decisions strongly support sexual orientation as a protected classification under international law. In *Toonen v. Australia*, a 1994 case involving a challenge to Australian laws criminalizing gay sex, the Human Rights Committee declared that the laws “constituted an unlawful interference with the right of privacy, protected and guaranteed by Article 17 of the ICCPR”³²¹ In doing so, the HRC made clear that gay men are equally entitled to the right to privacy, as the reference to “sex” in Article 2.1 (principle of non-discrimination) and 26 (right to equality before the law) is to be interpreted to prohibit discrimination on the basis of sexual orientation.³²²

Six years later, in *Young v. Australia*, a complaint involving a challenge to the Australian government’s refusal to extend its veterans’ welfare benefits to a gay man’s partner, the HRC again confirmed that discrimination based on sexual orientation violates Article 26 of the ICCPR.³²³ This time, the Committee did not rely on the “sex” language in Article 26, but rather established “sexual orientation” as an independent protected classification under Article 26.³²⁴ Most recently in *X v. Colombia*, the HRC affirmed that “prohibition against discrimination under Article 26 [of the ICCPR] comprises also discrimination based on sexual orientation.”³²⁵

On a regional level, the Inter-American System of Human Rights has taken steps to recognize sexual orientation as a prohibited grounds for discrimination, despite its charter’s lack of explicit reference to “sexual orientation” or “gender identity.” The Inter-American Court of Human Rights’ *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants* states that “it is perfectly possible, besides being desirable, to turn attentions to all the areas of discriminatory human behavior, including those which have so far been ignored or neglected at international level (e.g., inter alia, social status, income, medical state, age, *sexual orientation*, among others).”³²⁶ In *Karen Atala and daughters v. Chile*, a mother of three daughters challenged the Chilean court’s ruling to remove her custody rights on account of her homosexuality. The Inter-American Commission ruled that the case stated a claim under the American Convention’s provision guaranteeing equal protection before the law and thus was admissible.³²⁷ The case is still pending, and a decision on the merits is expected soon.

The European Court of Human Rights and the Court of Justice of the European Communities have likewise affirmed discrimination based on sexual orientation and gender identity to violate the principle of non-discrimination and the right to be equal before the law.³²⁸

³²¹ Practitioners Guide, *supra* note 286, at 33.

³²² UN Human Rights Comm., *Communication No. 488/1992 (Toonen v. Australia)*, ¶ 8.7, U.N. Doc CCPR/C/50/D/488/1992 (Dec. 25, 1991).

³²³ UN Human Rights Comm., *Communication No. 941/2000 (Young v. Australia)*, UN Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003).

³²⁴ *Id.*

³²⁵ UN Human Rights Comm., *Communication No. 1361/2005 (X v. Colombia)*, U.N. Doc. CCPR/C/89/D/1361/2005 (May 14, 2007).

³²⁶ *Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 63 (Sep. 27, 2003) (emphasis added).*

³²⁷ Case 1271-04, Inter-Am. C.H.R., Report No. 42/08, OEA/Ser.L/V/II.130 Doc. 22, rev. ¶ 1 (2008).

³²⁸ *See, e.g., Smith & Grady v. United Kingdom*, App. Nos. 33985/96 & 33986/96, 29 Eur. H.R. Rep. 493 (1999) (striking down laws that excluded gays and lesbians from the military based on Article 8 of the European Convention on Human Rights); *Lustig-Prean and Beckett v. United Kingdom*, 29 Eur. Ct. H.R. 548 (1999) (same);

E. DISTINCTIVE PROBLEMS LGBT DOMESTIC VIOLENCE VICTIMS FACE AND HOW INTERNATIONAL HUMAN RIGHTS LAW PRINCIPLES ADDRESS THEM

LGBT victims of domestic violence often face distinct obstacles in securing protection and remedies that heterosexual victims generally do not confront. As this Chapter has discussed, however, the principle of non-discrimination and the right to equality before the law ensure that they be equally entitled to all other fundamental human rights and protections of the law. Below are some examples of the distinct obstacles they face and how advocates can use international human rights principles to address these obstacles.

1. Inappropriate police response to incidents of same-sex domestic violence

As previously discussed, LGBT domestic violence victims often have a difficult time securing the police protection to which they are entitled. Studies show that LGBT victims are less willing to seek help from police due to fear that they will face homophobic or transphobic reactions from officers.³²⁹ Indeed, some police officers might flatly refuse to offer their service to and maintain a hostile attitude towards LGBT domestic violence victims. In the worst case, police officers themselves might engage in abusive conduct against LGBT victims. Even when police officers do not have intentionally discriminate, their ignorance or lack of understanding of LGBT domestic violence issues can have troubling consequences.

For example, police may respond to reports of male same-sex domestic violence by arresting both the abuser and the victim ('dual arrest'). The common, but incorrect perception, is that in such situation there is no clear abuser or victim, and both should be responsible for the incident of violence as it is two males 'going at each other.' In contrast, police might respond to reports of female same-sex domestic violence by arresting neither, because officers think that it is a 'cat fight' between two females, despite mandatory arrest laws. Additionally, an officer may respond to a call for help from a transgender person and re-victimize them by assuming they are a sex worker or calling them disparaging names and refusing to help. In each case because the law is not being enforced in an equal manner to protect LGBT domestic violence victims, a plain violation of their right to equality before the law has occurred.

International human rights law imposes an obligation upon States to adequately protect domestic violence victims from their abusers—an obligation which, through the principle of non-discrimination, extends to cover LGBT as well as heterosexual victims. There is a strong trend to define domestic violence as a form of torture or inhuman treatment³³⁰ strictly prohibited by

Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309 (1999)(striking down a Portuguese court's decision to take away a father's custody rights due to his homosexuality); *P v. S and Cornwall County Council*, 1996 E.C.R. I-2143 (enjoining a dismissal from employment of a transsexual individual for a reason related to a gender reassignment); *Richards v. Sec'y of State for Work and Pensions*, 2006 E.C.R. I-3585 (striking down a UK welfare law that did not recognize a transgender individual with the sex of his/her choice).

³²⁹ See Amnesty Int'l USA, *Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the U.S.* 82 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

³³⁰ See Report of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences, U.N. Doc. E/CN.4/1996/53 (Feb. 6, 1996); see also U.N. Committee Against Torture, *General Recommendation No. 2*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

law, obligating States to exercise “due diligence” to protect domestic violence victims from their abusers and punish the abusers.³³¹

International human rights laws guarantee that individuals the right to be free from arbitrary arrest and detention,³³² which is clearly violated when police make a “mutual arrest” of both an abuser and a victim instead of determining who the primary aggressor is in the relationship. States have an obligation under international law to respect and ensure these rights.

The principle of non-discrimination requires that LGBT domestic violence victims be afforded the same protections under these state obligations as heterosexual domestic violence victims.

2. Failure to recognize LGBT-specific forms of abuse

Abusers in a same-sex relationship often implement non-physical abusive tactics that take advantage of their partners’ status as gay, lesbian, bisexual or transgender to gain control in the relationship. Common tactics include threatening to “out” their partner’s sexual orientation, gender identity, or HIV status to family members, friends, employers and others, or telling their partner that they are not a “real man” or “real woman.” An abuser might attempt to create and reinforce fears and a sense of insecurity in a victim’s mind that because of their sexual orientation, gender identity, or HIV status, no one would be willing to help them, or that for this reason, the victim “deserves” the abuse.

Domestic courts that are responsible for fashioning and granting appropriate relief for domestic violence victims may not recognize these behaviors as “abusive” as to warrant relief due to their unfamiliarity with LGBT issues and dynamics of same-sex relationships. However, for the victims, these tactics can be just as or even more painful and difficult to cope with than “typical” forms of physical abuse often associated with domestic violence.

Again, advocates can utilize the principles of international human rights law to encourage courts to take notice of the distinct forms of abuse from which LGBT domestic violence victims suffer. For example, the UN General Assembly resolution on the Elimination of Domestic Violence Against Women recognized that domestic violence can take many different forms, including physical, psychological and sexual violence as well as economic deprivation and isolation.³³³ Further, international human rights law firmly establishes that an individual has the right to be free from “arbitrary or unlawful interference with his privacy, family, or correspondence, [or from] unlawful attacks on his honour and reputation,” and that “everyone has the right to the protection of the law against such interference or attacks.”³³⁴ Advocates can encourage domestic courts to recognize these internationally accepted rights and fashion

³³¹ See UN Committee on Elimination of Discrimination against Women, *General Recommendation No. 19*, U.N. Doc. A/47/38 (11th Session, 1992); see also Report of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences, U.N. Doc. E/CN.4/1996/53 (Feb. 6, 1996).

³³² See, e.g., ICCPR, *supra* note 6, art. 9 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”).

³³³ UN General Assembly, *Declaration on the Elimination of Violence against Women*, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

³³⁴ ICCPR, *supra* note 6, art. 17.

appropriate remedies for LGBT domestic violence victims suffering from distinct forms of abuse. According to the principle of non-discrimination, these rights should be protected and enforced by States in a non-discriminatory manner regardless of one's sexual orientation or gender identity.

3. Custody and visitation rights

Custody and visitation are important issues for many domestic violence victims. Whether the victim can obtain custody and/or visitation rights of their child in common with their abuser can be a determinative factor in starting a new life independent from their abusers.

Today, many LGBT couples plan and raise children together through various means. However, when the relationship ends due to domestic violence, they may face obstacles in their fight to secure custody and visitation rights. For example, in New York State, only a legal parent has standing to bring a petition for visitation or custody, and legal parent is defined as a biological parent or an adoptive parent.³³⁵ As a result, when a same-sex couple has not completed a second-parent adoption of their child, only one of the parents has a legally recognized relationship to that child. This means that the other parent cannot petition for visitation or custody (unless there are extraordinary circumstances such as child abuse or neglect).

One can imagine, then, a situation as follows: a lesbian couple planned and raised a child together, conceived through artificial insemination where the non-biological parent did not complete a second parent adoption of her child for one of what could be many reasons.³³⁶ After raising the child for years together, the non-biological parent seeks to end the relationship with her partner because of abuse. However, since she has neither a biological nor an adoptive relationship with the child, she has no right to petition for custody or visitation under New York State law, and has to leave the child with her abusive partner if she decides to leave. Because she wants to maintain contact with the child and does not want to leave the child alone with the abusive partner, she may feel forced to stay despite the domestic violence. The law, then, operates in a way that discourages LGBT domestic violence victims from seeking proper legal relief.

International human rights law can provide a basis to challenge this kind of discriminatory law. First and foremost, it mandates that the government consider the best

³³⁵ *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that a woman who had been involved in planning for and raising the child had no standing to bring a petition for visitation, as she was not a "parent" within the meaning of New York State's visitation statute). In September 2009, the New York Court of Appeals decided to hear *Debra H. v. Janice R.* In that case, petitioner Debra H. is asking the Court to revisit this issue, and to allow a "functional parent" (an adult who is neither a biological parent nor an adoptive parent of the child but has formed a parent-child-like relationship with that child) to be granted standing to bring a petition for visitation or custody. See *Debra H. v. Janice R.*, 914 N.E.2d 1011 (N.Y. 2009) (granting motion for leave to appeal). As of February 2010, the case was still pending.

³³⁶ There are many potential reasons for not completing second-parent adoption. Cost can be one reason; the intrusive and cumbersome nature of the procedure—it requires a home visit, getting finger prints taken at police station, filing court papers, etc.—can be another. Sometimes, the biological parent assures her or his partner that she or he would never do anything to limit the non-biological parent's access to the child, only to betray the promise later.

interests of the child when making a determination involving custody and visitation.³³⁷ In many instances the child’s best interests can be served by granting custody and visitation rights to the non-abusive adult who has developed a “functional” parent-child relationship with the child rather than leaving the child in the hands of the abuser.¹ Additionally, the law requires that a child be free from parental abuse, not be separated from and maintain contacts with his/her parents barring exceptional circumstances, and be given an opportunity to be heard in a judicial or administrative proceeding affecting the child.³³⁸ These rights of the child must be enforced and protected regardless of the child’s parents’ sexual orientation or gender identity.

International human rights law guarantees individuals’ right to form a family and enjoy a family life as they see fit, and the principle of non-discrimination dictates that these rights be applied to LGBT domestic violence victims regardless of their sexual orientation.³³⁹

4. Right to housing

Housing is one of the main issues with which domestic violence victims in general struggle—both in the context of permanent housing and seeking temporary shelter to escape the violence of their partners. Many victims experience discrimination or forced eviction from landlords who do not want to deal with any “trouble” the domestic violence may cause, such as disturbance to neighbors, calls to the police or jeopardizing general safety. When the abuser has control over the economic resources, including the place of residence, domestic violence victims may have difficult time securing adequate housing.

This situation can be worse for LGBT domestic violence victims. Landlords, in addition to their bias and hostility toward domestic violence victims in general, may have another layer of bias and hostility toward LGBT individuals generally. LGBT domestic violence victims tend to have a harder time finding shelters that are willing to host them, compared to “straight” victims. In New York City a domestic violence shelter can legally refuse to shelter men if it is a single-sex unit for women. Therefore, male domestic violence victims, whether gay or straight, may enter a homeless shelter system that does not provide the added benefits of domestic violence shelters, such as a confidential address policy and counseling focused on domestic violence survivors.³⁴⁰ Another gender issue, “there are also specific problems for transgender survivors who may be identified by shelter providers by their gender assigned at birth, and therefore assigned to the single-sex shelters that do not correspond with the survivors’ gender identity.”³⁴¹

³³⁷ See Convention on the Rights of the Child art. 3, *opened for signature* Nov. 20, 1989, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990) [hereinafter CRC] (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

³³⁸ *Id.* at art. 9, 12 & 19.

³³⁹ See ICESCR, *supra* note 7, at art. 10 (“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. . . . 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.”).

³⁴⁰ See Stapel, *supra* note 28, at 264.

³⁴¹ *Id.*

Advocates can use international human rights law to address this inequity. Human rights law imposes upon States a duty to take appropriate steps to ensure the realization of individuals' right to adequate standard of living for themselves and their family members, including housing.³⁴² According to the principle of non-discrimination, this right must be secured for everyone regardless of their sexual orientation. This means that States must take efforts to improve housing situations for LGBT domestic violence victims at least to the level comparable to those for heterosexual domestic violence victims. The law also strictly forbids forced evictions on any grounds, which would include discriminatory ones.³⁴³

A large body of international human rights law supports the principle that lesbian, gay, bisexual and transgender victims of domestic violence be entitled to all the fundamental human rights and equal protection under the law that are theoretically available to heterosexual domestic violence victims. The trend in international human rights law supports the proposition that governments are prohibited from discriminating based on sexual orientation and gender identity. It follows, therefore, that States are obligated to equally protect LGBT victims. States must treat LGBT victims equally when considering custody or visitation issues, and must provide adequate housing for victims seeking shelter. The cases and provisions above offer a guide to the specific resources practitioners can use to include persuasive human rights arguments in their advocacy.

³⁴² See, e.g., ICESCR, *supra* note 7, at art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including . . . housing . . .”).

³⁴³ UDHR, article 12, article 17; ICCPR, article 12.

VII. Trafficking

This Chapter explores the international human rights law relevant to advocacy on behalf of trafficked victims of domestic violence. A human rights based approach is necessary because of the particular vulnerabilities and challenges that a trafficked person, and his or her advocate, face in trying to seek protection and remedies for domestic violence in the American court system. These particular vulnerabilities necessarily affect the strategies that domestic violence advocates use to meet the needs of trafficked individuals. However, they may also present the opportunity to use legal arguments that are not typically employed in the domestic violence context.

Attorneys who recognize that their clients have been trafficked and know how to assist trafficking victims are critical to the victim's case. Attorneys many find that the clients' experiences as trafficking victims are closely tied to the reasons that the clients are now in need of advocacy in the realm of domestic violence. Many victims are recruited into commercial sexual exploitation by a husband or boyfriend. This form of trafficking is a subset of domestic violence, as the same tactics used to maintain control over intimate partners are frequently taken to extremes to compel victims into trafficking. Other victims attempt to escape trafficking by marrying one of their traffickers. However, they often are abused by these new intimate partners. These batterers are able to control their victims by exploiting the shame and stigma of the victim's past in prostitution or other forms of trafficking. Domestic violence also may be present in labor trafficking cases when victims, both children and adults, who are trafficking for forced labor are sexually abused by their traffickers.

Trafficked persons, as victims of human rights violations, have rights at international law in addition to domestic legal protections, which advocates may draw upon to obtain adequate and appropriate remedies. Outlined below are some of the international human rights laws and norms that an advocate may consider using when representing a domestic violence victim who is also a trafficking survivor.

The sections of this Chapter set out:

- a general discussion on the issues particular to trafficking victims;
- the definition of trafficking in international law;
- the general and specific State obligations relating to trafficked persons;
- the relevant individual rights that may be relied upon by trafficked persons; and
- additional international commentary that may be useful for an advocate who is representing a trafficked person in the domestic violence context.

A. DOMESTIC VIOLENCE ISSUES RELEVANT TO TRAFFICKING VICTIMS

Due to the nature of the legal and social circumstances under which people are trafficked into the United States, trafficked women who experience domestic violence have particular vulnerabilities that affect their treatment under domestic violence law. For example, it is likely that a trafficking victim will have little or no financial support or insurance, and may need immediate access to health care services, including treatment for depression, sexual health problems or drug dependency. She is also unlikely to have family or community support networks, or any options for short or long term accommodation. It is probable that a trafficked

woman will have urgent immigration needs that interact with and compound her violent experience. She may be in the country illegally, or her legal status may depend upon a relationship with her trafficker and/or violent domestic partner. Her status as an undocumented immigrant may also disqualify her from accessing some of the government support that is offered to domestic violence victims who are American citizens.

Many traffickers keep trafficked persons physically and culturally isolated during their time in the United States as a way to control their movement or to discourage them from reporting their treatment. Thus, trafficking victims frequently have difficulty accessing or understanding the remedies available to put an end to the violence experienced from an intimate partner. Language barriers may mean that their ability to navigate the legal system, which is already an intimidating experience, is effectively impossible without clear and accurate translation. Often times, translation is simply not available. Even when it is, since traffickers are often embedded in local migrant communities, a trafficked woman may have a well-founded reluctance to use a translator for fear that information will be relayed to the perpetrator.

Through no fault of their own, trafficked women in the domestic violence legal system may also face additional discrimination from those in authority, for whom a concern over “illegal immigration” has fostered a view of irregular migrants as law-breakers rather than victims. This view may affect the sympathies of law enforcement agents or even courts, who may be unwilling to consider trafficking victims as “victims” of violence.

Since courts may be unfamiliar with the particular issues around trafficking, international human rights law can be a useful tool for the advocate. It can help both to educate the court about the vulnerabilities of a trafficked person, and also to direct them towards the internationally recognized rights and obligations that should be afforded to them by the State. The arguments detailed below can be used to advocate for greater protections for trafficked individuals in U.S. courts.

B. DEFINITION OF TRAFFICKING UNDER INTERNATIONAL LAW

International human rights law enshrines several definitions of a “trafficked person” that include the survivors of domestic violence discussed above. Although several of the definitions refer specifically to sex trafficking of women, it is important to note that these definitions also encompass labor trafficking, and trafficking of men and boys.

The most comprehensive definition of “trafficked person” is found in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (“the Palermo Protocol”), supplementing the UN Convention Against Transnational Organized Crime 2000,³⁴⁴ both of which the United States signed and ratified On November 3, 2005. Article 3 of the Palermo Protocol states that:

³⁴⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, *opened for signature* Dec. 12-15, 2003, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (2001) (entered into force Dec. 25, 2003), *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [hereinafter Palermo Protocol].

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.³⁴⁵

Pursuant to Article 3(b), where the victim’s trafficker has employed deception or coercion, the Protocol makes clear that “consent of the victim to the intended exploitation . . . shall be irrelevant.”³⁴⁶

Several additional international instruments also define trafficking as a form of violence against women. For example, the Committee that administers the Convention on the Elimination of Discrimination Against Women (the “CEDAW”) has noted in its General Recommendation 19 that trafficking puts “women at special risk of violence and abuse.”³⁴⁷ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the “Convention of Belém do Pará”) also includes trafficking in its Article 2 definition of violence against women.³⁴⁸

C. STATE OBLIGATIONS UNDER INTERNATIONAL LAW

Pursuant to international human rights law, States have several interrelated obligations in relation to trafficked victims of domestic violence, which could be invoked in court to make arguments on behalf of a trafficked domestic violence victim.

1. General obligation to protect victims of trafficking

The most relevant State obligations in this context are the obligations of protection and assistance that are owed to the victim, particularly if she is a woman. States’ general obligation to protect finds its source in various human rights instruments. For instance, the obligation to protect is explicitly stipulated in the Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949³⁴⁹ and the Optional Protocol on Sales of

³⁴⁵ *Id.* art. 3.

³⁴⁶ *Id.* art. 3(b).

³⁴⁷ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, ¶ 14, U.N.Doc. U.N. Doc. A/47/38 at 1 (1993), available at

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

³⁴⁸ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 2, March 7, 1996, Doc. OEA/Ser.P AG/doc.3115/94 rev.2, 33 I.L.M. 1534, available at

<http://www.oas.org/cim/english/convention%20violence%20against%20women.htm> [hereinafter Convention of Belém do Pará].

³⁴⁹ Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, opened for signature Mar. 21, 1950, 96 U.N.T.S. 271, available at <http://www2.ohchr.org/english/law/trafficpersons.htm>.

Children, Child Prostitution and Child Pornography 2000³⁵⁰ of the Convention on the Rights of the Child³⁵¹ (the “CRC”). The Preamble to the Palermo Protocol supplementing the UN Convention Against Transnational Organised Crime mentioned in Section II(a) above similarly declares that eradication of trafficking will require a State to “protect the victims of such trafficking, including by protecting their internationally recognized human rights.” In addition, “soft international law,”³⁵² such as that contained in the United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking³⁵³ (“the UN Guidelines and Principles on Trafficking”), makes clear that such protections should be extended to all trafficked persons without discrimination.

A female trafficked victim of domestic violence can also invoke General Comment 19 of the CEDAW Committee, which states that “States parties are required by Article 6 of the CEDAW to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women” (paragraph 13), and that “trafficking . . . and sexual assault of women . . . require[s] specific protective and punitive measures.”³⁵⁴ In addition, the Beijing Platform for Action³⁵⁵ contains a specific objective concerning violence against women, which provides that States have a responsibility to “eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.”

Human rights law also provides specific State obligations of protection relating to trafficked victims of domestic violence, several of which are discussed in detail below.

³⁵⁰ Optional Protocol on Sales of Children, Child Prostitution and Child Pornography 2000, *opened for signature* May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (entered into force Jan. 18, 2002), *available at* www2.ohchr.org/english/bodies/.../CRC.C.OPSC.USA.Q1.Add1.doc.

³⁵¹ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 44 (entered into force Sept. 2, 1990).

³⁵² “Soft international law” is a term referring to pronouncements that are not strictly legally binding as an international matter, but that nevertheless have legal significance. Soft law can nevertheless be instructive, as it serves as a useful indication of the highest standards of international action that are expected by experts in the field, provide guidance on the interpretation of ‘hard laws’ that are ambiguous or unclear, and, if they are followed by enough States, may be evidence of a “customary practice.” Soft international law includes UN declarations and resolutions, guidelines and the recommendations and general comments of international human rights treaty bodies and other supervisory organs. *See* Dinah Shelton, *Commentary and Conclusions, in* Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System 449, 449–53 (Dinah Shelton ed., 2000).

³⁵³ The UN High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights*, guideline 6, *delivered to the Economic and Social Council*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002), *available at* <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/caf3deb2b05d4f35c1256bf30051a003?Opendocument> [hereinafter UN Guidelines and Principles on Trafficking].

³⁵⁴ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, ¶ 16, U.N.Doc. U.N. Doc. A/47/38 at 1 (1993), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

³⁵⁵ The Beijing Platform for Action was a document produced by the Fourth World Conference on Women, which sets out measures for national and international action for the advancement of women. Although it is a non-binding instrument of “soft law” it is nonetheless an example of the type of action necessary to achieve gender equality. Fourth World Conference on Women, Sept. 4th-15th, 1995, *Beijing Declaration and Platform for Action*, A/CONF.177/20 (Oct. 17, 1995) & A/ CONF.177/20/Add.1 (Oct. 27, 1995), *available at* <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>.

2. Obligation to ensure physical safety

A State must take action to ensure the safety of trafficked persons within its borders, particularly in those persons' interactions with law enforcement. Article 6(5) of the Palermo Protocol specifically states that each State Party "shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory," and the Convention Against Transnational Organised Crime states that protection and assistance must be particularly provided to victims "in cases of threat of retaliation or intimidation."³⁵⁶ The UN Guidelines and Principles on Trafficking go further to state that: "there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard."³⁵⁷

Furthermore, the right to an effective remedy involves the ability of the trafficked person to take action against one's victimizer without fear of reprisals from the traffickers or associates. This means that courts have an obligation to provide a legal remedy for a trafficked woman that ensures an effective amount of anonymity and protection.

3. Obligation to protect the health of a trafficked domestic violence victim

Secondly, states have an obligation to protect the health of those trafficked, regardless of their legal status, by securing equal access to health services. The Committee on the Economic, Social and Cultural Rights has stated that States' obligation to respect the right to health extends to undocumented immigrants.³⁵⁸ In particular, Article 6(3) of the Palermo Protocol obliges States to:

consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including . . . the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.³⁵⁹

The Protocol requires that such types of measures shall be provided for in a way that is relevant to the "age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care."³⁶⁰

In addition, States are obliged under the CEDAW to ensure that all women, including women who have been trafficked, have the right to sexual health information.³⁶¹

³⁵⁶ Convention Against Transnational Organised Crime, *supra*, art. 25(1); Palermo Protocol, *supra*, art. 6(5).

³⁵⁷ UN Guidelines and Principles on Trafficking, *supra*, at guideline 6.6.

³⁵⁸ U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 14*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En).

³⁵⁹ Palermo Protocol, *supra*, art. 6(6).

³⁶⁰ *Id.* art. 6(4).

³⁶¹ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24*, ¶ 18, U.N. Doc.

4. Obligation to provide an “effective remedy”

Trafficked persons have an explicit right under international law to an effective remedy to redress the unlawful injury and loss they incur as a result of having been trafficked, the remedy for which may include compensation. Article 6(6) of the Palermo Protocol as well as Article 25(2) of the Convention Against Transnational Organised Crime both contain language that obligates a State Party to “ensure that its domestic legal system contains measures that offer victims of trafficking . . . the possibility of obtaining compensation for damage suffered.”³⁶²

The Palermo Protocol also obligates the State to provide legal or administrative remedies in a way that is sensitive to the cultural context of the trafficking victim, including by ensuring that the victim is provided with “[i]nformation on relevant court and administrative proceedings” and “[a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.”³⁶³

Although other human rights instruments do not contain provisions specifically related to the protection of victims of trafficking, the obligation can be inferred from a general duty to secure, ensure, or restore rights, and to provide remedies to compensate for the injury or loss caused by the actions of traffickers. Article 2(3)(a) of the International Covenant on Civil and Political Rights (the “ICCPR”), for instance, provides that: “States are under an obligation to ensure that “any person whose rights and freedoms as herein recognised are violated shall have an effective remedy.”³⁶⁴ Even though the wording may be different, a similar obligation is established by such instruments as the CRC and the International Covenant on Economic Social and Cultural Rights³⁶⁵ (the “ICESCR”).

5. Obligation to modify the social and cultural patterns of conduct of men and women

Under Article 5 of the CEDAW, a State also has the obligation 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 women³⁶⁶

³⁶² Convention Against Transnational Organised Crime art. 25(2), *opened for signature* Dec. 12-15, 2000, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (2001) (entered into force Sept. 29, 2003) [hereinafter Convention Against Transnational Organised Crime]; Palermo Protocol, *supra* note 316, art. 6(6).

³⁶³ Palermo Protocol, *supra* note 316, arts. 6(2)(a), 6(2)(a)(16).

³⁶⁴ International Covenant on Civil and Political Rights art. 2(3)(a), *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

³⁶⁵ See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 3*, ¶ 5, U.N. Doc. E/1991/23 annex III (1990) (detailing the nature of States Parties’ obligations under the ICESCR and offering guidance on the meaning of the duty to ensure effective judicial remedies).

³⁶⁶ Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

Trafficking of women, particularly for sexual exploitation, but also sometimes for labor, may be seen as a traditional or cultural practice that emerges from and perpetuates gender stereotypes that are rooted in the subordination of women. Therefore, States are obliged to modify and prevent trafficking as a systemic problem.

6. Immigration obligations

A trafficked person is likely to be in the United States without documentation, and her ability to stay in the United States may be one of the most pressing matters she faces. In order to assist an application to remain in the United States, it may be useful to refer to the two international obligations owed to a person deemed to be a refugee: the prohibition on returning a person to a country where there are reasonable grounds to conclude that such return would threaten the victim's life or freedom (the principle of "non-refoulement") and the state obligation to consider granting victims of trafficking temporary or permanent residence.

a. The obligation of non-refoulement of trafficking victims who are refugees

Under international law, a person who is trafficked to the United States from another country may be considered a refugee. In accordance with Article 33 of the Geneva Convention Relating to the Status of Refugees 1951, all States are obligated not to return all refugees, trafficked or otherwise, to a country where their life or freedom would be threatened.³⁶⁷ This principle of "non-refoulement" applies to trafficked victims regardless of the lawfulness of their immigration status. Similar provisions regarding non-refoulement are contained within Article 3 of the Convention Against Torture,³⁶⁸ a principle that the Committee Against Torture has specifically applied to "States Parties' failure to prevent and protect victims from gender-based violence, such as . . . domestic violence . . . and trafficking."³⁶⁹ The UN Principles and Guidelines on Trafficking in this regard urges States to ensure that "anti-trafficking laws, policies, programmes and interventions do not affect the right of . . . trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law," as well as to ensure "that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family."³⁷⁰

³⁶⁷ Convention Relating to the Status of Refugees art. 33, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

³⁶⁸ The Convention Against Torture contains an identical provision applicable "where there are substantial grounds for believing that [the individual at issue] would be in danger of being subjected to torture". Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

³⁶⁹ Comm. Against Torture, *General Comment No. 2*, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) ("The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence . . . the State bears responsibility. . . . The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.")

³⁷⁰ UN Guidelines and Principles on Trafficking, *supra*, at guidelines 1.6, 2.7, 4.6.

b. Obligation to consider the granting of temporary or permanent residence permits to victims of trafficking

Included in measures designed to secure the principle of non-refoulement are the granting of reflection periods and/or temporary or permanent residence permits to victims of trafficking so that they can legally reside in a given State. For example, Article 7 of the Palermo Protocol stipulates that State Parties must consider “adopting legislative or other appropriate measures that permit victims of trafficking . . . to remain in its territory, temporarily or permanently,” and in doing so will give “appropriate consideration to humanitarian and compassionate factors.”³⁷¹ Guidelines 4.7 and 6.6 of the UN Principles and Guidelines on Trafficking also urge States to permit trafficking victims to remain in the country legally. Such guidance may be cited in support of a trafficking victim’s visa or asylum application to remain in the United States.

D. INDIVIDUAL RIGHTS UNDER INTERNATIONAL LAW

Trafficking victims of domestic violence have a large number of general rights under international human rights law, some common to all individuals, some specific to women, upon which they might draw in order to advance their legal rights in domestic courts. These rights are not specific to trafficked persons, but may be used by an advocate who is trying to ensure that a trafficking victim is not disadvantaged by her particular vulnerabilities when negotiating the domestic violence legal system. Several of the most relevant rights are considered below by reference to situations which may be commonly experienced by trafficked domestic violence victims.

For example, an advocate may make a general argument that a trafficked person must not be discriminated against on the basis of her trafficked status. A trafficked victim has the same rights that all peoples have to equal protection and to be free from arbitrary discrimination, particularly on the basis of gender. These rights are almost universal across the human rights documents; some of the most relevant guaranties for trafficking victims in this context include the ICCPR’s and CEDAW’s mandates that States guarantee men and women equal protection under the law.³⁷²

In addition, an argument may be made that a court is obligated under international law not to take action that would expose the trafficked victim to reprisals by her trafficker, endanger her life, or expose her to the risk of being re-trafficked. In doing so, an advocate could rely upon several instruments, including the ICCPR and the Inter-American Convention of Belém do Pará, which enshrine the rights to life, to personal liberty and security, and to be free from violence and torture.³⁷³ International human rights law also guarantees individuals the right to be free from slavery, servitude, forced or compulsory labor, and arbitrary or unlawful state interference, in addition to the right to liberty of movement.³⁷⁴

³⁷¹ Palermo Protocol, *supra* note 316, art. 7.

³⁷² ICCPR, *supra*, art. 26; Convention on the Elimination of All Forms of Discrimination Against Women art. 15, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women’s Convention].

³⁷³ ICCPR, *supra*, arts. 6(1), 7, 9; Convention of Belem do Para, *supra*, art. 3.

³⁷⁴ ICCPR, *supra*, art. 8 (slavery and forced labor), art. 16 (arbitrary state interference), art. 8 (liberty of movement).

In a situation where an advocate is acting for a trafficked victim who has been married to her trafficker or someone else for the purposes of facilitating the trafficking, the advocate could support an application against the spouse by referring to the fact that the trafficker violated her right to enter into marriage freely with the full consent of both parties.³⁷⁵ Further, an advocate who is attempting to obtain housing, healthcare or household supplies for a trafficked client may also refer to the general right to adequate food, clothing and housing, and to the highest attainable standard of physical and mental health that is enshrined in ICESCR.³⁷⁶

E. ADDITIONAL RESEARCH AVENUES

In addition to the international human rights law discussed above, an advocate acting for a trafficked victim of domestic violence can also draw the court's attention to documents that detail the particular vulnerabilities and needs of persons who have been trafficked. Advocates can also point to the particular harms that are suffered by trafficking victims, so that the court can understand that some of the problems suffered by a victim (such as psychological problems, substance abuse or criminal history) may in fact be a result of her victimization by traffickers.³⁷⁷

Useful information about the specific conditions and causes of trafficking in certain countries may be obtained from the country reports addressing trafficking produced by the UN Special Rapporteur on Violence Against Women, its Causes and Consequences,³⁷⁸ the UN Special Rapporteur on Trafficking in Persons³⁷⁹ or from international NGO reports on trafficking, such as those produced by Human Rights Watch.³⁸⁰ Information and statistics regarding persons trafficked into the United States may be found in the United States State Department Trafficking in Persons reports that are produced annually.³⁸¹

³⁷⁵ ICESCR, *supra*, art. 10(1); Women's Convention, *supra*, art. 16.

³⁷⁶ ICESCR, *supra*, art. 11 (food, clothing, and housing), art. 12 (health).

³⁷⁷ For example, one may refer to the surveys done by Dr. Melissa Farley at Prostitution Research and Education in San Francisco, regarding the Post Traumatic Stress Syndrome that can affect women trafficked for sexual exploitation, available at http://www.prostitutionresearch.com/prostitution_research/000116.html

³⁷⁸ For example, see the following special rapporteur reports: *Mission to Bangladesh, Nepal and India on Trafficking of Women and Girls*, U.N. Doc. E/CN.4/2001/73/Add.2; *Trafficking in Women, Women's migration and violence against women*, U.N. Doc. E/CN.4/2000/68; *Mission to Poland on trafficking and forced prostitution of women*, U.N. Doc. E/CN.4/1997/47/Add.1. For more information, see the special rapporteur's website at <http://www2.ohchr.org/english/issues/women/rapporteur/issues.htm>. Human Rights Watch and Amnesty International are among the international NGOs that work to end trafficking; for their work in this area, see <http://www.hrw.org/en/category/topic/women%E2%80%99s-rights/trafficking-women-and-girls> and <http://www.amnestyusa.org/violence-against-women/end-human-trafficking/page.do?id=1108428>.

³⁷⁹ For example, see the following special rapporteur reports: Report Submitted By The Special Rapporteur On Trafficking In Persons, Especially Women And Children, Joy Ngozi Ezeilo U.N. Doc. A/HRC/10/16/2/2009; Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda A/HRC/4/2003/23. For more information, see the special rapporteur's website at <http://www2.ohchr.org/english/issues/trafficking/annual.htm>

³⁸⁰ Human Rights Watch and Amnesty International are among the international NGOs that work to end trafficking; for their work in this area, see <http://www.hrw.org/en/category/topic/women%E2%80%99s-rights/trafficking-women-and-girls> and <http://www.amnestyusa.org/violence-against-women/end-human-trafficking/page.do?id=1108428>; and <http://www.hrw.org/en/publications/reports/729/related>. See also the Shadow Reports to the CEDAW Committee and the U.N. Human Rights Committee (which is the treaty monitoring body for the ICCPR), available at the IRAW Asia-Pacific website <http://www.iwraw-ap.org/>.

³⁸¹ For more information, and 2001-2009 reports, see <http://www.state.gov/g/tip/rls/tiprpt/index.htm>.

Conclusion

International human rights law can provide powerful tools for domestic violence advocates in the United States. A human rights approach to combating domestic violence allows the violations at issue to be re-framed from acts of individual responsibility to acts of state responsibility. Not only does international human rights law outline State obligations, but this framework also sets out numerous individual rights which are particularly salient for advocates working to support, protect, and empower victims and survivors of domestic violence.

While international human rights law may not assist in every case, expanding our understanding of human rights law may sharpen our arguments, whether or not we deem it appropriate to make a human rights argument in any given case at hand. Furthermore, from the U.S. Supreme Court to state courts,³⁸² many judges are indicating an increasing openness to international jurisprudence to enrich their deliberations and decisions. This offers human rights and domestic violence advocates alike new opportunities to engage creatively with and make arguments under international human rights law.

In addition to providing new tools for advocates combating domestic violence, engagement with a human rights framework is creating new networking opportunities for domestic violence advocates and other social justice and human rights advocates. Advocates from across the United States and the Americas are beginning to work together, sharing strategies about how human rights law can be useful for women's rights and gender and sexuality rights. Human rights law is being used in creative and exciting ways to reinvigorate domestic violence advocacy throughout the United States, with new partnerships and a larger network working together to effect positive and meaningful change.

This Manual represents a first attempt to consolidate the human rights principles relating to critical domestic violence issues that advocates have identified. It is by no means a comprehensive document cataloguing all human rights approaches to domestic violence-related issues, but we see it as a first step of a larger project whereby human rights and domestic violence advocates can learn from and inspire each other, share strategies, and work together for justice.

³⁸² See, e.g., *Atkins v. Virginia*, 536 U. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, and 539 U.S. 558 (2003); The Opportunity Agenda, *Human Rights in State Courts*, <http://opportunityagenda.org/pdfs/Human%20Rights%20in%20State%20Court.pdf> respectively.