This note discusses the meaning of thinking globally and acting locally at the intersection of international obligation and local laws regarding homelessness. Few lawyers recognize the implication of international human rights law in the defense of the community homeless arrested or charged with violating local vagrancy ordinances. Yet, the potential of incorporating international norms for actions governed by local law is not limited to this one area.

The inability of lawyers to utilize international law at the local level is driven by the fact that the very language of international law pushes out from the state through international treaties, convention and declarations that determine the consensual norms of governance in regard to sovereignty, foreign trade, human rights and international peace and security. These dimensions of international law appear to have a minimal relationship with local problems. This is a misperception. While the outward push of international governance focuses our attention on other states, the problems associated with those relationships originate at the local level. The misperception distracts our attention from the potential that can be transmuted to local law making mechanisms. In that respect this note is about a change in attitude.

This note is meant to provoke discussion of utilizing international law to defend the homeless from arrest and prosecution for violating ordinances that arguably violate norms of international political and civil rights, as well as economic, cultural and social rights. The significance should not be overlooked as an adversarial tool in the fight against arrest and criminal prosecution for a status protected under human rights documents. It requires little effort for the practitioner to raise international law as a defense.

When a person is summarily executed or tortured, we intuitively recognize the violation of a human right. Yet when we are confronted by homeless persons, we are not necessarily filled with the same sense of concern. It rarely occurs to us that the same threat to life present when a person is summarily executed or tortured is, in effect, the same threat that exists simply because a person is homeless. To be homeless in many cities is threatening to life because it means being exposed to the cold, the rain and snow and long nights, many times without food or shelter. It also means facing other risks, as becoming a victim of crime or disease. It is well documented there is a higher risk of HIV and tuberculosis for those that are homeless. If a person is lucky enough to find a shelter, there will be exposure to crowded conditions and little privacy. There are more homeless people and demands for shelter than available space. For those not fortunate enough to find shelter or choose to live on the streets, or in a park, or near a public building because it is the only place they feel secure, local ordinances expose the homeless to increased risks by threat of arrest of prosecution, because they are being coerced to leave what they consider shelter.

In addition, the homeless generally cannot register to vote, and as a result have little say in political governance or local lawmaking. They are the target of the law, without a voice in its implementation. Without a home as a magnet for social activity there is little opportunity to organize for meaningful political function to change conditions or legal treatment. In short, to be homeless implicates a deprivation of civil and political right to life; a right to politically organize; a right to freedom of movement, as well as social and cultural rights guaranteed under international human rights instruments.
Most students of public international law will recall the substance of an international treaty is one source of this nation’s law via the Supremacy clause of the U.S. Constitution. Moreover, customary international law is incorporated into municipal law at the federal common law level which means that it can only be displaced by a federal statute or subsequent international agreement or norm. Absent a federal statutory scheme that displaces a treaty or other international legal obligation, the custom of civilized nations as proven by practice and usage, is a source of the law of this land.

Precisely what constitutes substantive international law is a crucial issue, and one that is subject to multiple interpretations by scholars and judiciaries. Treaties and covenants such as the U.N. Charter, Political and Civil Covenant; Economic, Social and Cultural Covenant are recognized as international law, and are applicable to United States domestic law if it is a party to a ratified and self-executing instrument. The doctrine of self-execution under United States law is the door that leads international obligation down the path to enforceability.

Customary international norms are distinct from treaties or conventions and are generally defined as a pattern of practice among states supported by a subjective intent to be bound to an obligation. Customary international law is subject to evolutionary development, and crystallization of a norm can occur by actual practice associated with statements of principles such as the 1948 Universal Declaration of Human Rights or express foreign policy. In other words, recognition of certain rights by a representative group of nations, when adhered to by a pattern of practice, will create a binding norm on other states, unless that state is a persistent objector to the norm as it emerged. As norms evolve they tend to rachet upward the standard of the expected obligation or behavior.

So, what are the controlling norms of law for the homeless defense application?

The U.N. Charter, of which the United States is a contracting party, mandates that each member take action to create conditions of a higher standard of living, social progress and development in human rights. These standards have been developed through other international political instruments such as the International Covenant on Economic, Social and Cultural Rights (“ECOSOC”) and International Covenant on Civil and Political Rights (“Civil and Political Rights”).

Under Article 11 of ECOSOC, each state party is obligated to recognize adequate standards of housing for its citizens and Article 2 obligates the state to take steps to implement Article 11 through “appropriate means” of utilizing “available resources”. Article 11 is identical in substance to the 1948 Universal Declaration of Human Rights article 25, yet Article 11 has been interpreted by the ECOSOC expert body to obligate members to provide access to housing sufficient for protection against the elements. But it does not require the government to build housing or provide it free of charge.

The United States is not a signatory member to ECOSOC and therefore is not bound to the covenant. While there has been some movement in the direction to make the United States a signatory, even if it was, other issues come into play. First, the objectives of adequate housing have not been defined under international law as to be binding on any state. Second, Article 2(1) of ECOSOC requires an affirmative duty to “take steps”, yet does not require an immediate obligation. Finally, “appropriate means” in conjunction with a requirement of utilization of “available resource” is obviously one of subjective definition and not very prone to enforcement.

On the other hand, the United States is a party to the Civil and Political Rights Covenant which does not implicate any right to housing, but does provide that every person has an inherent right to life and freedom from fear which shall be protected by law. Article 12 of the Civil and Political Rights covenant provides that every citizen shall have the right to liberty of movement and to choice of residence. Article 17 prevents any interference by the state with a person’s privacy.

Such guarantees implicate several considerations. First, the right to life includes an affirmative duty on the state to not take action depriving one of that right, especially as it also relates to shelter and freedom of movement. Because homeless people are exposed to various hazards and risks as victims of crimes, when an ordinance prohibits a homeless person from occupying a park at night or sleeping on a bench or near a public building, then the law is acting as a mechanism that interferes with the freedom of movement, choice of residence and privacy. That action may very well amount to a deprivation of life when it forces a person out into a more threatening environment whether it be by the natural elements or physical danger by risk of attack by others.
It would seem straightforward under a Political and Civil Rights theory that a homeless person has a defense to state action that creates risk to life, liberty and residence by arrest and prosecution. Unfortunately, it isn’t that linear. The United States Congress has entered reservations to Articles 1 through 27 indicating they are not self-executing.\textsuperscript{20} By taking itself out from under the obligations of the treaty, there is a serious separation of powers issue that is implicated, as it is the Court’s, not Congress’s, responsibility to determine if a treaty is self-executing.\textsuperscript{29} While this is not within the purview of this analysis, it has tremendous implications to the enforceability of the covenants as a direct source of law.\textsuperscript{30}

Similarly, Article 55 and 56 of the U.N. Charter have also been determined in state courts to not be self-executing, leaving a serious question as to the realistic import of the Charter into municipal law.\textsuperscript{31}

Likewise, customary international law is an unlikely possibility as a basis for defense because there is no established pattern of practice supported by a subjective intent in the international community to prevent the government from taking steps to enact laws regarding homelessness in its own self-interest. Though many states, including the United States, are a party to the 1948 Universal Declaration of Human Rights, which call for adequate housing under Art. 25, this document is aspirational in nature because it is not a binding legal contract, unlike the previously mentioned documents. Moreover, the fact that the United States has made reservations to most of the articles under the Civil and Political Covenant raises the argument that the United States is persistently objecting to an emerging norm regarding homeless ordinances and civil and political violations of international law. Therefore, the United States would not be bound to any practice even if it was accepted in the international community.

Does this then mean international law does not play a role at the local level for fighting prosecutions based on homelessness? In part, the answer is yes, but only to the extent that international law is relied on as a “source” of law to displace local ordinances directed at homelessness. That a state is a party to various documents indicates it has knowledge of its human rights responsibilities. Though awareness is not a source of law, it indicates that international law can be used as an “interpretative” aid to enhance or diminish the impact of public policy or constitutional law. Nationwide, case law supports this proposition.

In \textit{Pottinger v. City of Miami},\textsuperscript{32} a federal district court held a local ordinance that subjected homeless people to arrest for performing essential activities in public was unconstitutional as it violated their equal right as to fundamental right to travel and to be free from unreasonable searches and seizures. The Court ordered Miami to designate arrest free zones where homeless people could remain without being arrested for non-harmful conduct.\textsuperscript{33} In \textit{Thompson v. Oklahoma},\textsuperscript{34} the United States Supreme Court held the execution of a sixteen year old murderer was unconstitutional as violating the Eighth amendment. In doing so, the high court made interpretive reference to the Civil and Political covenant even though the United States was not member to the treaty at the time.\textsuperscript{35} In \textit{Boehm v. Superior Court},\textsuperscript{36} the fifth district California appellate division cited Article 25 of the 1948 Universal Declaration of Human Rights when it prohibited the county from not considering medical care and clothing costs when it sought to reduce the amount of the minimum subsistence for housing and food costs under general assistance.\textsuperscript{37} And in \textit{Lipscomb v. Simmons},\textsuperscript{39} a three judge federal panel invalidated an Oregon statute that denied state funds to foster children living with relatives. The court supported its decision with various references to the 1948 Universal Declaration of Human Rights, the Civil and Political Covenant and the International Covenant on Economic, Social and Cultural Rights, even though the United States is not even a signatory to the last convention.\textsuperscript{38} The Ninth Circuit reversed the district court, by declining to treat the children as a suspect class, and finding the Oregon statute was rationally related to a legitimate state interest.\textsuperscript{40}

As these examples illustrate, international human rights law, as an \textit{interpretation} mechanism can be used as a defense when the state prosecutes those living where they are forced or chose to live in violation of an ordinance to not sleep in particular areas.\textsuperscript{41} Because of the obstacle created by self-execution requirements, the interpretive application is one way the defense can mount an argument to increase the stakes for an arrest and prosecution by the local authorities and change the overall bargaining leverage in the criminal processes.

Ultimately, what rights really exist is a moral question as well as structural legal issue. What a society values, and the method of enforcing those rights is subject to political viewpoints and the will of its people. For example, what are the implications
under the right to be treated with dignity in a state that does not make assisted suicide illegal? If that state is a signatory to the Civil and Political Rights Covenant, and interprets the international obligation of right to privacy to be consistent with domestic non-criminal status, will that domestic application be allowed as an interpretive aid in United States courts as an defense to criminal prosecution for violation of assisted suicide laws? What if the defendant was from another state where ignorance of the law is a recognized defense and assisted suicide is a matter of human dignity and criminal wrongdoing? What if a defendant from a foreign state visiting the United States assists in a suicide and faces prosecution under statute or common law? Would an international interpretive application of these factors provide a defense? These are some of the issues that will arise as international law becomes a more influential norm in domestic law. Or stated in the form of a question: Will international norms become influential in the application of legal adversarialism?

Whether an international instrument is or is not a source of law under United States law may not be the ultimate issue. As the above cases illustrate, the Courts in their wisdom, for better or worse, are recognizing the power of international law as an interpretive aid to determine the validity of laws. Where the law is going in this regard is not certain, but it is not unclear. As the world becomes a more proximate in time, space and communication, the international dimension of international norms will have a more local influence. That influence is not limited to political rights or the rights of the homeless. It reaches into business practices and affairs; environmental and territorial jurisdiction. It wraps itself in comparative practice as well as conflicts of law application. There are thousands of international treaties and declarations of which the United States is a party. How those treaties and customary international law play at the local level is a matter of creative application by practitioners. The cost of invoking international norms may be minimal, and the potential rewards may well outweigh any risk. This note, as a pedagogical tool, suggests one such example of international law to local application.

Footnotes

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[b] See, eg., Pottinger v. City of Miami, 810F.Supp. 1551, 1559-60 (S.D. Fla. 1992) where homeless sleeping in parks in violation of City of Miami Code §§ 38-3, 37-34 and Fla. Statutes §810.08 trespassing, were arrested and permanently deprived of possessions under threat of prosecution.

[c] See, e.g., M. Janus, An Introduction to International Law 2 (Little, Brown & Co. 1993). For purposes of this note, references to “state” means “nation”, and reference to “municipal” refers to law that is domestic to the United States, whether it be federal or state law.

[d] See Pottinger, 810 F. Supp. 1551. See also, The Case of S.S. Lotus (Fr. v. Turk.), 1927P.C.I.J. (ser. A) No. 9, where Turkey’s enactment of state law criminalizing affects to its citizens originating outside jurisdiction led to a dispute with France over power to enact laws that resulted in prosecution within the territory for extraterritorial acts.

[e] In part, the distraction is due to the exclusive powers of Congress and the President to have the say in foreign relations with other nations. U.S. Const. arts. I § 8, II § 2, VI; Missouri v. Holland, 252 U.S. 416 (1920).


[g] See Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2nd Cir. 1980).


See Civil and Political Rights, arts. 6, 7, 9, 12; ECOSOC, arts. 1, 11; see also Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/810, at 71 (1948), arts. 1, 3, 12, 13, 25.

U.S. Const. art. VI, § 2. The Supremacy clause provides: “This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of Any State to the Contrary notwithstanding.”

175 U.S. at 700, where such works are “resorted to by judicial tribunals, not for what...the law ought to be, but for trustworthy evidence of what the law really *is.*”

The Court decides if a treaty is to be self-executing, and if the plain ordinary language the treaty is precise, clear and definite that no other implementing act is required to make it enforceable, it will be self-executing and is to be interpreted in a liberal spirit as to give construction to a treaty even where a local law is inconsistent. *Baker v. Carr*, 369 U.S. 186, 204 (1962); see *Foster v. Nielson*, 27 U.S. (2 Pet. 253, 314 (1829); see also *Asakura v. Seattle*, 265 U.S. 332 (1924); but cf. *Sei Fujii v. State of California*, 38 Cal. 2d 718 (1952). Once a convention or treaty has been signed and ratified, there is a presumption that Congress or the state will not act in derogation of its international obligation under the treaty, unless there is subsequent congressional action that is clear to displace the prior treaty. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *Cook v. United States*, 288 U.S. 102, 120 (1932). The court can only enforce the treaty to the extent it is self executing or there is implementing legislation adopted as to be enforceable against the United States.

15 See 175 U.S. at 700.

17 See, e.g., *Filartiga* at 884-85. “While the ultimate scope of those rights will be subject for continuing refinement and elaboration, we hold now that the right to be free from torture is now among them.”; see also Restatement (Third) of the Foreign Relations Law of the United States, pt. VI (1987), 102(2).

630 F.2d at 884. At one time torture was considered a routine concomitant of criminal interrogation in many nations, yet in more
modern times it has been universally renounced.

20 U.N. Charter arts. 55, 56.

21 There is a practical distinction between the rights emerging from these two covenants which was primarily due to political accommodations based on distinct regional and hemispheric “values”. In the theoretical context of indivisibility, both covenants have been described by scholars as different sides of the same coin, meaning that without one set of rights, the other is meaningless. See e.g. Marks, Emerging Human Rights: A New Generation for the 1980’s, 33 Rutgers L. Rev. 435, 451-2 (1981). However, each is recognized to the extent it has been incorporated into the law of the particular state. See, eg., 175 U.S. at 700.

22 ECOSOC, arts. 2, 11.

23 Art. 25 of the 1948 Universal Declaration of Human Rights provides: “Everyone has the right to a standard of living adequate for the health and well-being of himself and family ... including housing . . . [for] lack of circumstances beyond his control.”

24 M. Bowman & D. Harris, Multilateral Treaties 304 (Butterworths 11th ed., 1992 (Supp. 1995)).

25 Art. 6; see also Bowman & Harris at 223 (Supp.).

26 Art. 12 specifically provides that everyone lawfully within the territory of a state shall have the right to liberty and freedom to choose his residence.

27 Id.

28 Bowman and Harris, supra note 24, at 233 (Supp.). Moreover, no implementing legislation has been adopted to make articles, as 11 and 17, effective in domestic law.

29 See note 16, supra page 5.

30 See note 14, supra page 5. A state is bound to obligations of the treaty to the extent the treaty is ratified and self-executing.


33 Id. at 1584. For example, sleeping on a park bench.


35 Id. at 830-1, n. 34.

36 Boehm v. Superior Ct., 223 Cal. Rptr. 716 (Cl.App. 1986).
37. Id. at 721.


39. Id. at 1244, n. 1.


41. See *Pottinger*, 810 F.Supp. at 1584.

42. See Civil and Political covenant. Art. 7 provides that no one shall be subjected to degrading treatment or medical experimentation without permission. Art. 17 provides no one is to be subject to interference with their privacy by the state.