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THE HOPE ACT AND SUPREME COURT'S EPIC VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

There have been 2,453,457 evictions in just 10 U.S. states since March 2020.¹ Low-income and minority populations who receive federal housing assistance are the most frequent targets of these evictions.² Due to a lack of availability and an intensive screening process for federal housing applicants, many individuals and families never have the opportunity to obtain assistance.³ Therefore, there is a dual problem: the lack of availability to obtain housing assistance and retaining those benefits once obtained.⁴ One of the obstacles to retaining housing assistance includes the Housing Opportunity Program Extension Act of 1996 (HOPE Act), which encourages Public Housing Agencies (PHAs) to use their discretion to exclude applicants who have a criminal record.⁵ The Supreme Court of the United States upheld this policy in *Department of Housing v. Rucker*.⁶ Further, PHAs are obligated to exclude applicants and evict tenants who live in the same household as someone who has a criminal record, even if the tenant had no knowledge of the criminal activity that led to the arrest, charge, or conviction.⁷ These “tough-on-crime” policies adopted by the U.S. Congress and government agencies target innocent renters and strip them of their international right to adequate housing under the Universal Declaration

¹ EVICTION LAB, <https://evictionlab.org/eviction-tracking/> (last visited Aug. 7, 2023).

² See Alicia Mazzara & Brian Knudsen, *Where Families With Children Use Housing Vouchers*

A Comparative Look at the 50 Largest Metropolitan Areas, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 3, 2019), <https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers>.

³ See *Housing Choice Vouchers Fact Sheet*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/topics/housing_choice_voucher_program_section_8#hcv01.

⁴ See *id.*; Wendy J. Kaplan & David Rossman, *Called “Out” At Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE FORUM FOR L. & SOC. CHANGE 109, 112 (2011); see also Housing Opportunity Program Extension Act of 1996, 1996 Enacted S. 1494, 104 Enacted S. 1494, 110 Stat. 834.

⁵ Kaplan & Rossman, *supra* note 4, at 112; see also Housing Opportunity Program Extension Act of 1996, 1996 Enacted S. 1494, 104 Enacted S. 1494, 110 Stat. 834.

⁶ *Dep’t of Hous. v. Rucker*, 535 U.S. 125, 136 (2002).

⁷ Erica V. Rodarte Costa, *Reframing the “Deserving” Tenant: The Abolition of a Policed Public Housing*, 170 U. PA. L. REV. 811, 826.

of Human Rights (UDHR).⁸ Furthermore, the disparate impact these evictions have on tenants violates the International Covenant on the Elimination of all Forms of Racial Discrimination (CERD).⁹

The UDHR is a resolution adopted in “customary” international law.¹⁰ Many international law scholars interpret customary international law to mean that states are bound by customary rules, unless they explicitly object to their formation.¹¹ International law scholars posit that “if the amount of positive state practice reaches a specific threshold, the emerging customary norm does not only bind all affirming and abstaining states, but even those that are opposed to the formation of the norm.”¹² Critics of this thought process may argue that states cannot be bound to international law against their will, and they would still be correct.¹³ Under this framework of customary international law, if states explicitly reject the principles of customary law, they are not bound by it, but they must take affirmative action to reject it.¹⁴ However, there is unsettled international debate about how much action must be taken to disaffirm customary international law.¹⁵

Regardless of this threshold debate, the U.S. has historically affirmed the principles in the UDHR.¹⁶ For example, the U.S. was instrumental in the creation of the UDHR, leading the charge on the bulk of the UDHR’s drafting, and the U.S. has since taken no affirmative steps to reject the principles laid out in the UDHR.¹⁷ Therefore, the U.S. is customarily bound to adhere to the UDHR. In contrast, CERD is a treaty the U.S. has signed and ratified and is therefore bound to follow.¹⁸

⁸ See G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948).

⁹ See S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212.

¹⁰ GUDMUNDUR ALFREDSSON & ASBJORN EIDE, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS A COMMON STANDARD OF ACHIEVEMENT*, (1999) (ebook).

¹¹ See generally Niels Petersen, *The Role of Consent and Uncertainty in the Formation of Customary International Law*, MAX PLANCK INST. FOR RSCH. ON COLLECTIVE GOODS, 1 (2011).

¹² *Id.* at 1.

¹³ *Id.* at 2.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 1; *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>.

¹⁷ *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>.

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

The HOPE Act violates Article 25 of the UDHR, which guarantees adequate housing,¹⁹ and also violates the CERD, which binds the U.S. to eliminate all forms of racial discrimination.²⁰ Therefore, the HOPE Act violates international human rights laws (Article 25 of the UDHR and CERD) by evicting family members from their homes, solely based on the criminal record of a person also living in that home. To combat these human rights violations, the “innocent owner defense” should apply to family members living in the same home as someone with a criminal conviction, decreasing the disparate impact the HOPE Act has on low-income and minority populations. The innocent owner defense is rooted in civil asset forfeiture proceedings.²¹ This defense allows a defendant in a civil asset forfeiture proceeding the opportunity to prove by a preponderance of the evidence that he or she did not know of the criminal conduct that occurred on his or her property, or upon learning of the conduct, he or she did all that reasonably could be expected under the circumstances.²² If the defendant can satisfy this burden, then his or her property will not be seized by law enforcement.²³ This defense should apply to prevent family members or roommates from being evicted when they had no knowledge that someone they live with engaged in criminal activity, whether the criminal activity occurred on the property or not.

Section II of this comment details the background of forced evictions and their disparate impact on minorities. It will further explain how PHA leases and the Section 8 Housing Choice Voucher Program work, followed by a description of the legislative history and case law on public housing programs in the U.S. Section II further explains the standard of strict liability and the history of the innocent owner defense, and lastly, details the United Nations agreements that are being violated. Section III argues that the HOPE Act violates international human rights law, specifically the right to adequate housing guaranteed by Article 25 of the UDHR and the elimination of racial discrimination guaranteed in CERD. Finally, Section IV proposes that the U.S. should revise the HOPE Act, or judicially decide to allow an innocent owner defense instead of applying a strict liability standard in determining family evictions based on one person’s criminal record.

¹⁹ Universal Declaration of Human Rights, *supra* note 8.

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

²¹ Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 TEX. A&M J. PROP. L. 1001, 1003 (2019).

²² *Id.*

²³ *Id.*

II. BACKGROUND

A. *Evictions and the Legal Ramifications*

According to the United Nations Human Rights Office of the High Commissioner, forced evictions are defined 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.”²⁴ Millions of people are forcibly evicted from their homes every year in the U.S.²⁵ Evictions not only affect one’s housing stability, but also have a substantial impact on many facets of an individual’s well-being and socioeconomic opportunities.²⁶ For example, evictions often result in homelessness, acceptance of unfair rental agreements, difficulty securing a new rental or housing assistance benefits, job loss, disruption in education, and additional long-term psychological effects.²⁷ In cities across the U.S., it is estimated that eighty percent of individuals who are evicted are people of color.²⁸ Further, forced evictions have a disparate impact both nationally and globally on women, children, the elderly, and minorities.²⁹

Forced evictions are not limited to certain countries or regions of the world, and the practice often creates violations of other human, civil, and political rights.³⁰ Forced evictions are also not limited to densely populated urban areas, but also occur because of political upheaval, armed conflicts, communal or ethnic violence, or urban development.³¹

Low-income and minority populations that receive federal housing assistance are the most frequent targets of these evictions in the

²⁴ *Forced Evictions Special Rapporteur on the Right to Adequate Housing*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/special-procedures/sr-housing/forced-evictions>.

²⁵ Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV 115, 116-117.

²⁶ *See id.* at 117.

²⁷ *Id.* at 117-118.

²⁸ *Id.* at 120.

²⁹ ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 20 May 1997.

³⁰ *Id.*

³¹ *Id.*

U.S.³² In 1986, Congress passed the Anti-Drug Abuse Act, which required that public housing tenants or guests engaged in criminal activity on or near public housing property be evicted.³³ In 1996, President Clinton signed the HOPE Act, “which required PHA leases to include a provision that subjected a tenant to eviction for certain criminal activities.”³⁴ The statute authorized eviction for, “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control. . . .”³⁵

The U.S. Department of Housing and Urban Development (HUD) furthered this initiative through the “One Strike” policy by encouraging increased discretion of PHAs to look into criminal history of potential housing voucher recipients before they have obtained housing as a prerequisite to being eligible for a voucher.³⁶ The HUD developed this policy in an attempt to reduce crime in public housing.³⁷ This policy mandated that the PHAs should use a case-by-case review with more stringent background checks for applicants and all household members.³⁸ The policy additionally suggested changing tenant’s leases so that “any violation of a lease’s criminal activity terms, including activity by guests ‘under [a tenant’s] control’ was a serious lease violation and thus, grounds for eviction.”³⁹ The phrase “under a tenant’s control” referred to a mere showing that the tenant was a renter on the lease.⁴⁰ The One Strike policy gave PHAs wide discretion to police tenants and allowed PHAs to begin eviction proceedings based on the mere suspicion of criminal activity.⁴¹ Furthermore, HUD incentivized

³² See Alicia Mazzara & Brian Knudsen, *Where Families With Children Use Housing Vouchers*

A Comparative Look at the 50 Largest Metropolitan Areas, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 3, 2019), <https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers>.

³³ Lena M. Lundgren, Marah A. Curtis & Catherine Oettinger, *Postincarceration Policies for those with Criminal Drug Convictions: A National Policy Review*, 91 FAMS. IN SOC’Y: THE J. OF CONTEMP. SOC. SERS. 31, 35 (January 2010).

³⁴ Kaplan & Rossman, *supra* note 4, at 112; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).

³⁵ *Id.*

³⁶ Lundgren, Curtis & Oettinger, *supra* note 33, at 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Costa, *supra* note 7, at 826.

⁴⁰ *Id.*

⁴¹ *Id.* at 827.

PHAs to implement the One Strike policy by giving PHAs that did not implement the One Strike policy a lower Public Housing Management Assessment Program (PHMAP) score.⁴² A PHA's PHMAP score guarantees a PHA's funding and continuity in its management.⁴³

The One Strike policy further increased the disparate impact of evictions, considering fifty-eight percent of federal housing assistance tenants are Black, Latinx, Native American, or Asian.⁴⁴ In 2015, the Obama administration attempted to limit the One Strike policy by urging "PHAs to be more lenient in their administration and eviction determinations."⁴⁵ Further, HUD clarified that tenants have due process rights, including the right to "dispute the accuracy and relevance of a criminal record before admission or assistance is denied on the basis of such record," as well as a "right to request an informal hearing or review after an application for housing assistance is denied."⁴⁶ The most notable change to the One Strike policy was the rule preventing PHAs from evicting tenants based on mere suspicion of criminal activity, absent charges or convictions.⁴⁷ However, PHAs could still use police reports, records, and other evidence associated with an arrest to determine an applicant's housing eligibility.⁴⁸

Despite these attempts to weaken the One Strike policy, the policy has effectively remained untouched.⁴⁹ The HUD has led the charge to continue to encourage the policy by urging PHAs to implement it by providing budget incentives to comply with the policy.⁵⁰ For example, PHAs only retain funding through satisfactory performance scores.⁵¹ The factors that contribute to the performance score include the number of vacancies within a PHA's housing stock, the amount of rent uncollected, the condition of the unit, and the implementation of the One Strike policy.⁵² If a PHA receives a "failing" score, it can lose its funding and result in HUD taking over the local PHA.⁵³

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 828.

⁴⁵ Costa, *supra* note 7, at 828.

⁴⁶ *Id.* at 828-29.

⁴⁷ *Id.* at 829.

⁴⁸ *Id.* at 829.

⁴⁹ *Id.* at 828.

⁵⁰ *Id.* at 827.

⁵¹ Costa, *supra* note 7, at 827.

⁵² *Id.*

⁵³ *Id.*

In 1998, two years after the One Strike policy went into effect, Congress continued its tough-on-crime agenda and enforcement of controlled substances in housing by passing Title V of the Quality Housing and Work Responsibility Act of 1998 (QHWRA).⁵⁴ The QHWRA recommended that PHAs use data from the National Crime Information Center to screen applicants and gave PHAs guidance to evict or deny a lease to anyone who has used or is using controlled substances.⁵⁵ Despite the legalization of marijuana in some states, in 2014, HUD released a memorandum clarifying that “owners must deny admission to assisted housing for any household with a member determined to be illegally using a controlled substance, e.g., marijuana.”⁵⁶

Four years later, the Supreme Court addressed the question of whether tenants living in the same household as someone using a controlled substance could be evicted along with the alleged user.⁵⁷ The Court upheld strict liability for non-offending tenants in *Department of Housing v. Rucker*, even when the eviction was based solely on someone else in the household engaging in drug-related criminal activity.⁵⁸ In that case, Rucker was evicted by the Oakland Housing Authority because her granddaughter was found in possession of cocaine three blocks from their shared apartment.⁵⁹ Rucker’s attorney argued the innocent owner defense, claiming that she had no knowledge of the drug activity, and therefore should not be evicted from her home.⁶⁰

The Court determined that the One Strike policy required Rucker’s eviction.⁶¹ The Court reasoned that the statutory language, “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.”⁶² The Court further stated that “Congress’ decision not to impose any qualification in the

⁵⁴ Lundgren, Curtis & Oettinger, *supra* note 33, at 35.

⁵⁵ *Id.*

⁵⁶ Memorandum from Benjamin T. Metcalf, Assistant Sec’y for Multifamily Hous. Programs, U.S. Dep’t of Hous. and Urb. Dev., to All Multifamily Regional Center Directors et al. (Dec. 29, 2014).

⁵⁷ Dep’t of Hous., 535 U.S. at 136.

⁵⁸ *Id.* at 134.

⁵⁹ Sarah N. Kelly, *Separating the Criminals from the Community: Procedural Remedies for “Innocent Owners” in Public Housing Authorities*, 51 N.Y.L. SCH. L. REV. 379, 388-89 (2006).

⁶⁰ *Id.* at 389.

⁶¹ *Id.* at 382.

⁶² Dep’t of Hous., 535 U.S. at 130.

statute, combined with its use of the term ‘-any’ to modify ‘drug-related criminal activity,’ precludes any knowledge requirement.”⁶³ The Court also acknowledged that Congress had previously included an innocent owner defense in civil asset forfeiture statutes, and therefore knew how to implement the defense, but instead specifically chose not to implement it here.⁶⁴ The Court also rejected the Court of Appeals’ concern about Due Process, reasoning that the “government is not attempting to criminally punish or civilly regulate respondents as members of the general populace,” but instead is enforcing lease provisions as a landlord.⁶⁵

The Supreme Court expanded this holding in 2015 with *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, stating that federal housing assistance policies can have a disparate-impact of discrimination if “they can prove it is necessary to achieve a valid interest.”⁶⁶ The Supreme Court considered whether the Fair Housing Act (FHA) could be interpreted to allow disparate impacts in housing.⁶⁷ The HUD and the Supreme Court determined that the burden is on the plaintiff “prevail[ing] upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁶⁸ It is much easier for a defendant to show that the practice serves a valid interest compared to the plaintiff’s burden to identify a creative and nonburdensome solution that would produce a less discriminatory result.⁶⁹

Such legislative and judicial history shows that qualifying for PHA leases continues to become more stringent as the Supreme Court and Congress push for crime-free housing environments.⁷⁰ These policies not only affect the applicant or tenant engaged in criminal activity but apply to anyone who may be applying to live or already lives in the same home as the person engaged in the illegal conduct, regardless

⁶³ *Id.* at 130-31.

⁶⁴ *Id.* at 132.

⁶⁵ *Id.* at 135.

⁶⁶ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015).

⁶⁷ *Id.* at 525.

⁶⁸ *Id.* at 527.

⁶⁹ CONG. RSCH. SERV., R44203, DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT 12 (2015).

⁷⁰ *Dep’t of Hous. v. Rucker*, 535 U.S. 125, 136 (2002); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015); Lundgren, Curtis & Oettinger, *supra note* 33, at 35.

of their knowledge of the conduct.⁷¹ This practice is referred to as a type of “strict liability.”⁷²

B. *Housing Choice Vouchers*

There are three main types of federal rental assistance programs: public housing, Housing Choice Vouchers (Section 8 Vouchers), and Project-Based Rental Assistance.⁷³ The Housing Choice Voucher program is the federal government’s largest rental assistance program for low-income families, the disabled, and the elderly.⁷⁴ Local PHAs administer Housing Choice Vouchers from federal funds received through the HUD.⁷⁵ Through this voucher program, families are able to search for and secure housing of the family’s choice.⁷⁶ Under this program, families are free to choose any housing option if it is within the parameters of the program, including that the owner must be willing to rent under the program, and the rental unit must meet minimum health and safety standards as set by local PHAs.⁷⁷ Families are not required to choose units that are part of subsidized housing projects.⁷⁸

PHAs operate locally by administering housing vouchers, but they also receive federal funds from the HUD.⁷⁹ PHAs are state-created entities governed by state law.⁸⁰ Although PHAs are not federal agencies, HUD has regulatory oversight over many PHA programs.⁸¹ The PHA pays the housing subsidy directly to the landlord, and the family pays the difference between the rent and the amount subsidized by the voucher.⁸²

⁷¹ Kaplan & Rossman, *supra* note 4, at 112; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-20, § 1494, 110 Stat. 834 (1996).

⁷² *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Falt and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 745 (2016); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM CH. 4 SCOPE NOTE (AM. L. INST. 2010).

⁷³ *Policy Basics: Public Housing*, CENTER ON BUDGET AND POL’Y PRIORITIES (June 16, 2021), <https://www.cbpp.org/research/public-housing>.

⁷⁴ U.S. DEP’T OF HOUS. AND URB. DEV., *supra* note 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *The PHAs Role in the Housing Choice Voucher Program*, U.S. DEP’T OF HOUS. AND URB. DEV. (Dec. 3, 2022), <https://files.hudexchange.info/resources/documents/PIH-HCV-Landlord-The-PHA-Role-in-the-Housing-Choice-Voucher-Program.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² U.S. DEP’T OF HOUS. AND URB. DEV., *supra* note 3.

Determinations regarding who may receive a voucher is split between federal regulations and local PHA discretion.⁸³ For example, “eligibility for a housing voucher is determined by the PHA based on the total annual gross income and family size and is limited to U.S. citizens and specified categories of non-citizens who have eligible immigration status.”⁸⁴ In general, the family’s income may not exceed fifty percent of the median income for the county or metropolitan area where the family chooses to live.⁸⁵ Federal law requires that PHAs provide seventy-five percent of its available vouchers to applicants whose income is not above thirty percent of the area income.⁸⁶

Despite a degree of federal regulation regarding one’s eligibility to receive a voucher, local PHAs have wide discretion to determine what type of assistance families will receive.⁸⁷ For example, PHAs have the discretion to set payment standards that determine the maximum amount of rental assistance a PHA may pay to the landlord for the assisted tenant.⁸⁸ Additionally, PHAs may establish local preferences that are consistent with local housing needs in its community.⁸⁹ Some of these preferences include “a preference to a family who is (1) homeless or living in substandard housing[;] (2) paying more than 50% of its income for rent[;] or (3) involuntarily displaced.”⁹⁰ The PHA has the discretion to move families up on the waitlist that qualify for any local preferences.⁹¹ Additionally, local PHAs may offer “distinct or special purpose” vouchers that give preference for groups they determine are “high need.”⁹² Finally, PHAs set different inspection standards and vary the frequency of those inspections.⁹³

Applicants for the voucher program apply through their local PHA.⁹⁴ The application process through the local PHA includes collecting information regarding family composition, income, and

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ U.S. DEP’T OF HOUS. AND URB. DEV., *supra* note 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *The PHA’s Role in the Hous. Choice Voucher Program*, U.S. DEP’T OF HOUS. AND URB. DEV., <https://files.hudexchange.info/resources/documents/PIH-HCV-Landlord-The-PHA-Role-in-the-Housing-Choice-Voucher-Program.pdf>.

⁹² U.S. DEP’T OF HOUS. AND URB. DEV., *supra* note 3.

⁹³ *Id.*

⁹⁴ *Id.*

assets.⁹⁵ The PHA then verifies the information with the applicant’s employer(s), bank(s), and local agencies to confirm if the applicant is eligible for the program.⁹⁶ If the PHA decides that a family is eligible, the PHA will put the family on a waitlist with priority given to those identified with the criteria set out above.⁹⁷

C. *Strict Liability and the Innocent Owner Defense*

Strict liability means “liability without wrongdoing,”⁹⁸ or “liability imposed without regard to the defendant’s negligence or intent to cause harm.”⁹⁹ When courts apply strict liability, the “plaintiff need not prove the defendant’s negligence or intent, and the defendant cannot escape liability by proving a lack of negligence or intent.”¹⁰⁰ In the housing context, this means that someone in the home could have no knowledge or intent, and has not committed a negligent act in regard to another tenant’s criminal activity to be found liable.¹⁰¹ HUD argues that strict liability in these cases motivates tenants to “to avoid behavior which can lead to eviction,” and alternative standards “would allow a variety of excuses” and would “undercut the tenant’s motivation to prevent criminal activity by household members.”¹⁰² All occupants of the home can therefore be evicted, despite lacking the requisite knowledge, intent, or negligence of the conduct that resulted in eviction.¹⁰³

The idea that a person should lose possession of property because of a criminal conviction is rooted in English common law.¹⁰⁴ At English common law, once a person was convicted of a crime, all of their land and property was turned over to the Crown.¹⁰⁵ It was understood that a person’s criminal conviction “resulted in the corruption of blood,

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Goldberg & Zipursky, *supra* note 72, at 745 (2016); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, *supra* note 71.

⁹⁹ RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, *supra* note 72.

¹⁰⁰ *Id.*

¹⁰¹ See *Dep’t of Hous. and Urb. Dev. v. Rucker*, 535 U.S. at 134.

¹⁰² Barclay Thomas Johnson, *The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 234, 246 (2001).

¹⁰³ See *id.*

¹⁰⁴ M Fourie & GJ Pienaar, *Tracing the Roots of Forfeiture and the Loss of Property in English and American Law*, 23 FUNDAMINA 20, 24 (2017).

¹⁰⁵ *Id.*

with the consequences that the bloodline of any person convicted and attained became stained or blackened and his descendants or family were prohibited from inheriting.”¹⁰⁶ Other countries have employed a similar theory to justify evictions and property loss based on criminal conduct.¹⁰⁷ In South Africa, property has been seized to disgorge the “fruits of illegal conduct,” and was primarily used as a deterrent.¹⁰⁸ In the U.S., there are two main justifications for civil forfeiture, namely that the property is guilty of the offense and the “owner may be held accountable for the wrongs of others to whom he entrusts his property.”¹⁰⁹

Ireland employed a similar tactic.¹¹⁰ However, it specified that residents who shared property with someone guilty of a criminal conviction must prove that they were unaware of the criminal activity to retain possession of the shared property.¹¹¹ Thus, Ireland essentially added a knowledge requirement to evict someone for the criminal activity of another.¹¹² This is known as the innocent owner defense.¹¹³ Ireland’s justification for this defense is that the criminal defendant should be punished, but the punishment should not extend to the innocent resident in addition to the guilty defendant.¹¹⁴

The innocent owner defense is also used in the U.S. in civil forfeiture cases.¹¹⁵ A property interest that would otherwise be forfeited due to criminal activity is not forfeited if the owner “(1) did not know of the conduct giving rise to forfeiture; or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”¹¹⁶ Until *Rucker*, tenants’ lawyers attempted to assert the innocent owner defense in One Strike policy cases.¹¹⁷ However, in *Rucker*, the Court determined that Congress intended to include the innocent owner defense in the civil forfeiture statute but not in the One Strike policy.¹¹⁸ The Court concluded

¹⁰⁶ *Id.* at 21.

¹⁰⁷ *See id.* at 23; Liz Campbell, *Theorising Asset Forfeiture in Ireland*, 71 J. CRIM. L., 441 (2007).

¹⁰⁸ Fourie & Pienaar, *supra* note 104, at 33.

¹⁰⁹ *Id.* at 31.

¹¹⁰ *See* Liz Campbell, *Theorising Asset Forfeiture in Ireland*, 71 J. CRIM. L., 441 (2007).

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 37 C.J.S. Forfeitures § 30.

¹¹⁶ 18 U.S.C.A. § 983 (2022).

¹¹⁷ Kelly, *supra* note 44, at 390; *see also* Dep’t of Hous. 535 at 136.

¹¹⁸ Kelly, *supra* note 44, at 390; *see also* Dep’t of Hous. 535 at 136.

that Congress knew how to create the defense because they had done so previously, so they, therefore, had intentionally excluded it in the One Strike policy.¹¹⁹ The Court further found that Congress later “amended the civil forfeiture portion of the statute to explicitly include leaseholds.”¹²⁰ In drafting the amendment, Congress again explicitly chose not to include an innocent owner defense for Section 8 tenants.¹²¹

Moreover, the Asset Forfeiture Act’s innocent owner defense does not require that an objectively reasonable person in their position should have known about the criminal activity, but rather that the owner did not actually know.¹²² However, willful blindness will not suffice for the innocent owner defense.¹²³ Willful blindness is a legal doctrine in criminal law that does not relieve someone of liability who purposefully avoids knowledge of that criminal activity.¹²⁴ The innocent owner defense is a potential solution to violations of UN law on adequate housing that will be discussed further in the next section.

D. *United Nations Law on Adequate Housing*

The UDHR sets out fundamental human rights to be universally protected.¹²⁵ World War II inspired the international community to adopt new guidelines and standards of human rights.¹²⁶ The UDHR was adopted as a resolution of the UN General Assembly and is therefore not subject to ratification or accession like other UN treaties.¹²⁷ However, the UDHR carries more legal weight than an ordinary resolution.¹²⁸ The UN General Assembly uses the UDHR to interpret provisions of the UN Charter, interpret other instruments and resolutions, interpret statements made by the Secretary-General and other international and national governmental settings, and set international standards.¹²⁹ Additionally, states have used the UDHR to create legislation and as a model for their constitutions.¹³⁰ Finally, the International Court of Justice uses the

¹¹⁹ Dep’t of Hous., 535 U.S. at 132.

¹²⁰ Kelly, *supra* note 44, at 390; *see also* Dep’t of Hous. 535 at 136.

¹²¹ *See* Dep’t of Hous. 535 at 136.

¹²² 18 U.S.C.A. § 983 (2022).

¹²³ *Id.*

¹²⁴ Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. OF L.A. LAW REV. 405, 407 (2021).

¹²⁵ Universal Declaration of Human Rights, *supra* note 8.

¹²⁶ THE UNIVERSAL DECLARATION OF HUMAN RIGHTS A COMMON STANDARD OF ACHIEVEMENT, *supra* note 10, at 27.

¹²⁷ *Id.* at 30.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 31.

UDHR as an interpretive tool, but also as a measure of international custom.¹³¹ The UDHR was designed to outline the minimum standard of international human rights to be recognized by the member states.¹³² One of these rights was the right to adequate housing.¹³³ Article 25 of the UDHR addresses the right to adequate housing by stating that:

everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, [and] housing . . . in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹³⁴

There are some instances that justify legal evictions that do not violate human rights, including when there is compulsory land acquisition for initiating large-scale development projects, urban renewal, or housing renovation programs.¹³⁵ Additionally, some may argue that eviction does not deprive someone of the right to housing, in the same way that denying someone's lease application or mortgage loan does not deprive someone of their right to housing. However, there are limitations to these justified evictions.¹³⁶ For example, evictions, just like lease application decisions and mortgage loans, must not be discriminatory; they must comply with reasonable standards, and they must have judicially enforced procedural safeguards before, during, and after eviction.¹³⁷

The UN further attempted to define "reasonable standards," but offered little guidance on how to implement its broad definitions.¹³⁸ In the UN's Guidelines for the Implementation of the Right to Adequate Housing stated, "States must recognize the right to adequate housing as

¹³¹ *The Universal Declaration of Human Rights and its relevance for the European Union*, at 1 (Nov. 2018), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA\(2018\)628295_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf).

¹³² ALFREDSSON & EIDE, *supra* note 10.

¹³³ Universal Declaration of Human Rights, *supra* note 8, at Art. 25 (Dec. 10, 1948).

¹³⁴ *Id.*

¹³⁵ S M Atia Naznin, *Researching the Right to Housing*, HAUSER GLOBAL LAW SCHOOL PROGRAM (Nov./Dec. 2018), https://nyulawglobal.org/globalex/Housing_Rights.html#_3._Forced_Eviction.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Guidelines for the Implementation of the Right to Adequate Housing, *To the Human Rights Council at its 43rd session*, U.N. Doc. A/HRC/43/43 (24 Feb. – 20 Mar. 2020).

a legal obligation under domestic law.”¹³⁹ Reasonable standards were further defined as deliberate, concrete, and targeted measures “taken towards the fulfilment of the right to housing within a reasonable time frame.”¹⁴⁰ Further, the UN stated that states must allocate sufficient resources and prioritize the needs of disadvantaged and marginalized individuals or groups living in poor housing conditions.¹⁴¹

In 2000, the Constitutional Court of South Africa heard a case to define the scope of the reasonableness standard of adequate housing.¹⁴² In *Government of the Republic of South Africa v. Grootboom*, Mrs. Grootboom was evicted and left homeless while waiting for low-income housing.¹⁴³ Mrs. Grootboom lived temporarily in a squatter’s settlement with no water, sewage, or refuse removal services, and only five percent of the shacks had electricity.¹⁴⁴ She waited for low-income housing for at least seven years.¹⁴⁵ South Africa adopted a provision in Section 26 of its Constitution that mirrors that of Article 25 of the UDHR.¹⁴⁶ The Court considered whether the state violated Section 26 (South Africa’s constitutional right to adequate housing) by failing to provide reasonable housing accommodations upon Mrs. Grootboom’s eviction.¹⁴⁷

The Constitutional Court considered several factors in its reasonableness inquiry, including whether the state took reasonable legislative measures within its available resources, reasonably implemented those measures with adequate budgetary support by the national government, and satisfied the “minimum core of the right.”¹⁴⁸ The court also considered the availability of land, level of poverty in the state, the difference between city and rural communities, the economic and social history of a country, whether the housing program accommodates immediate circumstances of those in crises, and the scale of the overall housing crisis within a state.¹⁴⁹ The court ultimately

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 1 (S. Afr.).

¹⁴³ *Id.* at 2.

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.* at 33.

¹⁴⁸ See *Government of the Republic of South Africa* 2000 (1) SA at 26, 33 (S. Afr.). (the minimum core right is typically determined by the needs of the most vulnerable groups that are entitled to the protection of the right in question).

¹⁴⁹ *Id.* at 27.

determined that South Africa was in breach of its constitutional obligation to provide adequate housing because it did not meet this reasonableness standard.¹⁵⁰ Most importantly, South Africa's national low-income housing program failed to provide any form of relief to those desperately in need of access to housing.¹⁵¹ To fulfill this obligation, the court determined that the state must "devise, fund, implement, and supervise measures to provide relief to those in desperate need."¹⁵² Although the court ultimately did not define "desperate need," the case provides one perspective that considers multiple factors about how member states should implement a "reasonableness standard" to enforce its international obligation of the right to adequate housing.¹⁵³

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also informs states on how to comply with Article 25 of the UDHR.¹⁵⁴ In 1977, President Jimmy Carter signed the ICESCR.¹⁵⁵ In October 1977, President Carter sent the Covenant to the Senate, which subsequently sent it to the Senate Committee on Foreign Relations.¹⁵⁶ In November 1979, the Senate held hearings on the ICESCR, but no resolution or ratification was passed.¹⁵⁷ However, the ICESCR was also not returned to the president to signal a rejection of the treaty.¹⁵⁸ Therefore, the Senate still has the power to ratify the ICESCR, and no president has taken steps to revoke signatory status.¹⁵⁹ Since the U.S. has signed but not ratified the ICESCR, it is not binding on the U.S.¹⁶⁰ However, the U.S. is customarily encouraged to follow it, because similar to the UDHR, the U.S. has taken steps (signing the treaty) to affirm the principles laid out in the ICESCR, and has taken no steps to reject its principles.¹⁶¹

According to General Comment No. 7 of ICESCR, even in justified cases, evictions are capable of violating a person's human

¹⁵⁰ *Id.* at 66.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Government of the Republic of South Africa* 2000 SA 1 CC at 1 para. 53 (S. Afr.).

¹⁵⁴ Jeffrey L. Roberg, *The Importance of International Treaties: Is Ratification Necessary*, 169 *WORLD AFFS.* 182 (2007).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See generally *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁶¹ Petersen, *supra* note 11, at 1.

rights.¹⁶² The ICESCR further states that even in such justified cases, an eviction should not cause a person to become homeless, and the state is responsible for providing an adequate alternative for shelter.¹⁶³ Adequate housing, as defined by the ICESCR, requires a living standard that includes dignity, peace, security, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.¹⁶⁴ The requirement for accessibility goes beyond being physically accessible to occupants.¹⁶⁵ The ICESCR requires that “suitable accommodation should be available to other disadvantaged groups.”¹⁶⁶

Additionally, international law explicitly rejects discrimination in housing.¹⁶⁷ The U.S. has signed and ratified the CERD.¹⁶⁸ The CERD defines the requirements to combat discriminatory practices as promoting and encouraging universal respect for and observance of human rights and fundamental freedoms for all, without distinction, [exclusion, restriction or preference] based on race, colour, language or religion, [descent, or national/ethnic or ethnic origin].¹⁶⁹ More specifically, Article 5(d)(i) of the CERD requires “the right to freedom of movement and residence within the border of the State.”¹⁷⁰ In signing CERD in 1966 and ratifying it in 1994, the U.S. must ensure that all people, regardless of race, have the right to housing and to own property.¹⁷¹ Further, CERD protects not only overt acts of discrimination but also discriminatory effects.¹⁷² CERD states in Article 1:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of

¹⁶² ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997.

¹⁶³ *Id.*

¹⁶⁴ 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 342-43 (2008).

¹⁷² *Id.* at 339.

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁷³

The violation is not dependent on whether the action was taken with a discriminatory purpose or unintentionally created a discriminatory impact evidenced by the language, “purpose or effect.”¹⁷⁴ This obligation requires the federal government to “rectify or invalidate federal, state, and local policies and laws that have racially disparate impacts, not just those that were developed or passed with discriminatory intent.”¹⁷⁵ The counterargument here is that usually disparate impact challenges are cured when there is a justifiable reason for the disproportionate impact.¹⁷⁶ Here, that justifiable reason could be to create crime-free housing environments and safer communities.¹⁷⁷

However, the U.S. Department of Justice Civil Rights Division (DOJ CRT) recently secured a consent order against Hesperia, California after alleging that the crime-free ordinances were a pretext for racial discrimination.¹⁷⁸ DOJ CRT is investigating crime-free housing programs across the country, suing city governments and police departments, claiming their crime-free ordinances violate the Fair Housing Act.¹⁷⁹ Assistant U.S. Attorney General Kristen Clarke stated, “[s]o-called ‘crime-free’ ordinances are often fueled by racially discriminatory objectives, destabilize communities and promote modern-day racial segregation.”¹⁸⁰ Therefore, it may be difficult for PHAs to continue to sidestep the disparate impact of implementing the

¹⁷³ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

¹⁷⁴ Gay McDougall, *International Convention on the Elimination of All Forms of Racial Discrimination*, AUDIOVISUAL LIBR. OF INT'L L., (Dec. 21, 1965), <https://legal.un.org/avl/ha/cerd/cerd.html>.

¹⁷⁵ Leeuw et al., *supra* note 171, at 344.

¹⁷⁶ McDougall, (quoting Comm. on the Elimination of Racial Discrimination, General Recommendation No. 14, U.N. Doc. A/48/18 (Sept. 15, 1993), *supra* note 174.

¹⁷⁷ *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 541 (2015); Dep't of Hous. v. Rucker, 535 U.S. 125, 136 (2002); Lundgren, Curtis, & Oettinger, *supra* note 33, at 35.

¹⁷⁸ *Justice Department Secures Landmark Agreement with City and Police Department Ending “Crime-Free” Rental Housing Program in Hesperia, California*, OFF. OF PUB. AFF. U.S. DEP'T OF JUST., (Dec. 14, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-and-police-department-ending-crime-free>.

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

One Strike policy and their violations of CERD as arguments continue to be made that these policies are pretext for unjustifiable discrimination.

III. APPLYING THE INNOCENT OWNER DEFENSE TO U.S. HOUSING PROGRAMS WILL ASSIST IN FURTHER COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

The HOPE Act and subsequent Supreme Court decisions are in violation of the Article 25 of the UDHR and the CERD.¹⁸¹ Therefore, family members should not be evicted solely based on the criminal record of a person living in their home. *Rucker* must be overturned through a judicial act or legislation, and an innocent owner defense, akin to the defense for civil forfeiture, should be implemented as an alternative to evicting innocent tenants with no knowledge of criminal activity. This change would allow the U.S. to achieve compliance with UN human rights obligations.

A. U.S. Violations of UDHR Article 25

Article 25 of the UDHR has become customary international law with a presumption against forced evictions, and thus binding on nations.¹⁸² States have independently and collectively adopted the UDHR into domestic constitutions, laws, regulations, and policies.¹⁸³ In the international realm, the UDHR has been recognized as customary law “by states in intergovernmental and diplomatic settings, in arguments submitted to judicial tribunals, by the actions of intergovernmental organizations, and in the writings of legal scholars.”¹⁸⁴ “[C]ustom is created by the practice of States and continues to exist and operate as a norm based on the practice.”¹⁸⁵ However, customary international law must go beyond being “a norm” for it to be

¹⁸¹ See Universal Declaration of Human Rights, *supra* note 8; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

¹⁸² See ICESCR, General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions), 16th Sess., adopted 1997; Ionel Zamfir, *The Universal Declaration of Human Rights and its Relevance for the European Union*, EUROPEAN PARLIAMENTARY RES. SERV. (Nov. 2018), [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2018\)628295](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2018)628295).

¹⁸³ See Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH AND HUM. RTS., 145, 145-152 (1998).

¹⁸⁴ *Id.* at 145.

¹⁸⁵ Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN YB INT’L L 9, 10 (1988).

legally enforceable.¹⁸⁶ Nations must accept common rules of conduct as law to become legally binding norms.¹⁸⁷ To do so, courts look to the collective actions of different state practices to determine whether continuous, uniform, and precedential actions were taken.¹⁸⁸ Customary international law requires that an “agreement is reached through the repetition of similar acts that under certain conditions assume precedent value.”¹⁸⁹ States act with the belief that its actions can affect the formation and content of general customary law, as well as its mutual legal relations with other actors.¹⁹⁰ Because of this, states that “participate in international practice usually express through their actions or official statements a certain legal position.”¹⁹¹

Almost every state accepts the principles laid out in the UDHR, and the instrument is widely accepted as the International Bill of Human Rights.¹⁹² At least 90 national constitutions created since 1948 contain statements of fundamental rights inspired by the UDHR.¹⁹³ Many countries in Africa have included explicit references to the UDHR, and Indian courts have stated that the Indian Constitution has embodied most of the articles.¹⁹⁴ Further international human rights treaties have expanded the provisions of the UDHR including Article 12 of the ICESCR, which specifically expands Articles 23 through 25 of the UDHR.¹⁹⁵ This collective realization across states’ domestic constitutions, legislation, and regulations, as well as international recognition through language of additional human rights treaties and judicial and diplomatic affairs, shows that the UDHR should be recognized as customary international law.

Despite differing opinions from scholars on the enforceability of customary international law, a prevailing viewpoint is that customary international law binds UN member states unless they explicitly object to its formation, at the time of its formation.¹⁹⁶ This approach does not eliminate the free will of nations by binding member states that explicitly

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 11.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 13.

¹⁹⁰ *Id.*

¹⁹¹ Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN Y.B. INT'L L 9, 13 (1988).

¹⁹² Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH AND HUMAN RIGHTS 145-146-47 (1998).

¹⁹³ *Id.* at 150.

¹⁹⁴ *Id.* at 150-51.

¹⁹⁵ *Id.* at 152-53.

¹⁹⁶ Petersen, *supra* note 11, at 1-2.

reject the principles laid out in customary international law.¹⁹⁷ However, under this model of customary international law, nations that affirm, abstain, or oppose the formation of a norm are bound to the customary law unless it takes affirmative steps to reject the norm.¹⁹⁸ Other interpretations of customary international law point out that there is no quantifiable threshold of participating nations to create the norm or a quantifiable amount of disaffirming action to unbind a disavowing nation.¹⁹⁹ Regardless, although the U.S. has done a poor job of affirmatively adhering to the provisions of the UDHR, the U.S. has taken no affirmative steps to reject the principles laid out in the UDHR.²⁰⁰ Therefore, the U.S. is customarily bound to adhere to the UDHR.

Article 25 of the UDHR has become customary international law with a presumption against forced evictions, and thus binding on nation behaviors.²⁰¹ Evictions in the U.S. because of someone’s criminal record do not comply with these current international laws and limitations.²⁰² More specifically, the U.S. falls outside UDHR Article 25 when it evicts innocent tenants by failing to provide adequate housing under the “reasonableness standard.”²⁰³ The ICESCR informs our inquiry about what constitutes adequate housing.²⁰⁴ As previously mentioned, as a part of the reasonableness inquiry, evictions must not be discriminatory, tenants must have judicial procedural safeguards before, during, and after eviction, and there must be an adequate alternative provided by the state.²⁰⁵ Judicial safeguards include allowing tenants to have an adequate defense to unlawful evictions and discriminatory practices when an action is brought against them in an eviction proceeding.²⁰⁶ The impact of discriminatory housing practices will be expanded on in the following section.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2-3.

²⁰⁰ See generally *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>.

²⁰¹ ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997; ALFREDSSON & EIDE, *supra* note 10, at 305.

²⁰² Universal Declaration of Human Rights, *supra* note 8, at Art. 3; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

²⁰³ Universal Declaration of Human Rights, *supra* note 8, at Art. 25.

²⁰⁴ See ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997.

²⁰⁵ Naznin, *supra* note 135.

²⁰⁶ *Id.*

As to judicial safeguards, the U.S. judicial system is not designed to provide safeguards to Housing Voucher tenants. Section 8 tenants face frequent barriers in obtaining legal counsel.²⁰⁷ Representation of these clients is frequently carried out through free legal services for qualifying clients, and many tenants go unrepresented.²⁰⁸ Furthermore, these low-income tenants frequently “face the landlord’s lawyer in a court proceeding that involves a complex web of federal, state, and local laws that she is ill-equipped to utilize.”²⁰⁹ Therefore, PHAs will continue to use overly discretionary tactics in looking into criminal records and history, and Section 8 tenants will continue to be over-policed. The result is, and will continue to be, that Section 8 tenants will be dissuaded and discouraged from fighting discriminatory practices, even those that are overt.²¹⁰ Consequently, U.S. judicial safeguards for evicted tenants do not meet the reasonableness standard laid out in the UN’s 2019 Special Rapporteur on Adequate Housing because the U.S. has not allocated sufficient judicial and legal resources to provide appropriate judicial recourse for Section 8 tenants.²¹¹ The innocent owner defense would be a step in the right direction to provide tenants with adequate judicial safeguards.

Furthermore, allowing a strict scrutiny standard for evictions gives innocent tenants essentially no judicial recourse, unless they can overcome the immense hurdle of proving a civil rights violation.²¹² However, any judicial remedy is stacked against the non-offending tenant, as landlords can simply argue they have a justified and legitimate interest in promoting drug and crime-free housing.²¹³ There is also no recourse for innocent tenants who may be denied future federal housing assistance benefits or private rentals because they have an eviction record. The HOPE Act, the subsequent decision in *Rucker*, and HUD guidance allows for PHAs to be the judge and jury in granting future Section 8 Vouchers to previously evicted tenants, taking away any judicial safeguards before, during, or after an eviction of an innocent tenant.²¹⁴

²⁰⁷ Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1506 (1997-1998).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See generally U.N. Hum. Rts. Off. of the High Comm’r, *supra* note 138.

²¹² Johnson, *supra* note 102, at 246.

²¹³ See Dep’t of Hous., 535 U.S. at 125.

²¹⁴ See Housing Opportunity Program Extension Act of 1996, 104 Enacted S. 1494, 110 Stat. 834; see Dep’t of Hous., 535 U.S. at 125.

Since tenants have the right to pursue their limited remedies in court, it seems that the reasonableness standard for judicial safeguards is met. However, as addressed by South Africa’s Constitutional Court, it is not enough to have legislation or a remedy alone to satisfy granting the right.²¹⁵ The effective and reasonable implementation of that right is also required.²¹⁶ Although an innocent tenant may be heard in court, the strict scrutiny standard violates the reasonableness standard by barring the implementation of judicial recourse for an innocent tenant.²¹⁷ Therefore, allowing an innocent owner defense would bring the U.S. closer to achieving compliance with Article 25 of the UDHR.

The third responsibility under Article 25 to fulfill the obligation to providing adequate housing includes providing an adequate alternative for shelter if a person loses the right to their home or their current home is inadequate.²¹⁸ The U.S. starkly ignores this obligation by evicting innocent tenants from federally subsidized housing. The essence of the federal housing programs is to provide low-income tenants with an adequate alternative to the unaffordable private housing rental market.²¹⁹ By evicting these residents, especially those that are innocent, the U.S. takes the adequate alternative to affordable housing and makes it nearly impossible to obtain again. Federal housing assistance programs were set up to combat a shortage of affordable, safe, and attainable housing alternatives to ensure that individuals could have the right to adequate housing.²²⁰ By evicting the innocent, the U.S. is stripping people of that right. Therefore, the U.S. also fails under the 2019 UN Special Rapporteur on Adequate Housing reasonableness standard by failing to use all its available resources to provide an adequate alternative to those in desperate need.²²¹

Aside from the U.S. uprooting the established adequate alternative by evicting innocent tenants, when Housing Voucher tenants are evicted, the U.S. makes few attempts to secure a different adequate

²¹⁵ Government of the Republic of South Africa, 2000 (1) SA 1 (CC) at 27 para. 33 (S. Afr.).

²¹⁶ *Id.* at 26-27 para. 31-32.

²¹⁷ *Id.* at 27 para. 33.

²¹⁸ ICESCR, General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions), 16th Sess., adopted 1997.

²¹⁹ *Housing Choice Vouchers Fact Sheet*, *supra* note 3.

²²⁰ *Id.*

²²¹ *See* U.N. Hum. Rts. Off. of the High Comm’r, *supra* note 138.

alternative. Instead, the result is most often homelessness.²²² Some EU member states work to combat this problem by implementing the “staircase approach,” which creates a transitional housing program from hostels and shelters to permanent housing.²²³ However, with current U.S. policies and the tough-on-crime agenda that the U.S. has adopted, it seems difficult to imagine a U.S. policy that gives support to formerly evicted families due to criminal activity, regardless of their culpability. Instead, to reduce discrimination, enforce judicial safeguards before, during, and after eviction, and provide an adequate alternative to housing, the U.S. should adopt an innocent owner defense in Section 8 cases for innocent tenants.

B. *Violations of CERD*

Perhaps the most troubling and pervasive human rights violation the U.S. has perpetuated with the passage and implementation of the HOPE Act, and the decisions in *Rucker* and *Texas Department of Housing*, is the U.S.’s flagrant abandonment of its commitment to CERD. Under CERD, the U.S. is required to ensure freedom of movement and residence, the right to housing without distinction as to race, cease discriminatory actions, and invalidate policies and laws with discriminatory effects regardless of intent.²²⁴ The HOPE Act, and the *Rucker* and *Texas Department of Housing* decisions squarely violate these provisions.

Forced evictions generally perpetuate “inequality, social conflict, segregation, and ghettoization” and have a disparate impact on the poor.²²⁵ For example, the HOPE Act authorized evictions of Section 8 tenants engaged in criminal activity or any member of the tenant’s household.²²⁶ This eviction practice perpetuates disparate impacts by evicting tenants who are inevitably poor and marginalized because they

²²² Linda Wood-Boyle, *Facing Eviction: Homelessness Prevention for Low-Income Tenant Households*, FEDERAL RESERVE BANK OF BOSTON, <https://www.bostonfed.org/publications/communities-and-banking/2015/winter/facing-eviction-homelessness-prevention-for-low-income-tenant-households.aspx>.

²²³ Volker Busch-Geertsema, *Housing First Europe Final Report*, EUROPEAN UNION PROGRAMME FOR EMPLOYMENT AND SOCIAL SECURITY at 15 (2013).

²²⁴ Leeuw et al., *supra* note 171, at 345.

²²⁵ Naznin, *supra* note 135.

²²⁶ Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 837-38 (1996).

are in a federal housing assistance program.²²⁷ Then, the practice worsens evicted tenants’ inequality, socioeconomic status, and poverty when they are forcibly removed from their homes by making it more difficult to have economic and social stability, creating a cycle of poverty for marginalized groups.²²⁸

Furthermore, the incentive program that followed from the HOPE Act as outlined in HUD’s One Strike policy encourages discriminatory PHA practices. By giving PHAs lower PHMAP scores if they do not implement the One Strike policy,²²⁹ it encourages PHAs to over-police minority communities. Since fifty-eight percent of public housing tenants are minorities,²³⁰ PHAs constructively target minorities by over-screening and over-punishing. This causes an increase in eviction rates for minorities and produces discriminatory effects.²³¹ Furthermore, since *Rucker* only requires strict liability for innocent tenants,²³² innocent tenants are essentially being punished for being impoverished. These innocent tenants are more likely to live in higher drug and crime areas by the implications of their socioeconomic status.²³³ Under *Texas Department of Housing*, the Supreme Court has deemed these disparate impacts constitutional since these policies are “necessary to achieve a valid interest.”²³⁴

However, as previously mentioned, CERD explicitly requires the U.S. to review policies, and amend, rescind, or nullify laws that have the effects of perpetuating racial discrimination, even those that have disparate impacts.²³⁵ The U.S. has failed to do so. The U.S. has specifically come under international scrutiny for its violations of CERD by requiring that a plaintiff prove a perpetrator’s intent, known as the Intent Doctrine, to discriminate to win an equal protection claim.²³⁶

²²⁷ See *Evictions: A Vicious Cycle for People in Poverty*, COMMUNITY AND ECONOMIC DEVELOPMENT IN NORTH CAROLINA AND BEYOND (Aug. 17, 2023), <https://ced.sog.unc.edu/2016/08/evictions-a-vicious-cycle-for-people-in-poverty/>.

²²⁸ *Id.*

²²⁹ *Costa*, *supra* note 7, at 827.

²³⁰ *Id.* at 828.

²³¹ *Id.* at 827-28.

²³² Dep’t of Hous. & Urb. Dev., 535 U.S. at 134.

²³³ U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, NAT’L INST. OF JUST., RSCH REP., 145329, DRUGS AND CRIME IN PUBLIC HOUSING: A THREE CITY ANALYSIS (1994).

²³⁴ *Tex. Dep’t of Hous. & Cmty. Aff.*, 576 U.S. at 541.

²³⁵ International Covenant on the Elimination of all Forms of Racial Discrimination, *supra* note 9 at 5.

²³⁶ Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. SOC. JUST. 263, 263 (2011).

CERD distinctly focuses on a disparate impact analysis that contemplates whether an action resulted in discrimination, rather than if racial discrimination was intended.²³⁷ The UN adopted this “effects” framework to combat modern discrimination that is often not overt or explicit, but is rather subconscious and institutional.²³⁸ However, the U.S. has refused to comply with the CERD framework and instead requires that a plaintiff prove that a defendant had a specific intent to discriminate against them to have a claim.²³⁹

Further, the Obama administration attempted to review these policies, but the outcomes were minimal because local PHAs retained broad discretion to implement the One Strike policy, and the law has remained unchanged since 2002.²⁴⁰ Instead, HUD and the Supreme Court have continued to give PHAs more discretion and continue to encourage evictions of innocent tenants regardless of the discriminatory impact.²⁴¹ Therefore, the U.S. remains in violation of CERD. Adopting an innocent owner defense will not completely solve the systemic problem of forced evictions in public housing, but it will get the U.S. started in the right direction of reducing discriminatory housing practices in violation of CERD.

C. *Implementing an Innocent Owner Defense for Innocent Section 8 Tenants*

To illustrate how the innocent owner defense would work, take this hypothetical example: a mother is renting an apartment on a Section 8/PHA voucher. The landlord of her apartment catches the mother’s son with marijuana. Before the eviction of the mother can take place, she would be entitled to a court hearing. This hearing would allow the mother to elect to be represented by counsel and prepare a defense. The burden would be on the landlord to prove that: (1) a breach of the lease agreement occurred due to drug possession and (2) that the party the landlord is trying to evict had knowledge of the criminal activity. The mother and her counsel could then assert the innocent owner defense. The defense would be asserted in an analogous way to civil forfeiture proceedings. More specifically, the mother would have to prove by a

²³⁷ *Id.* at 264.

²³⁸ *Id.*

²³⁹ *Id.* at 264-66.

²⁴⁰ *See Costa, supra* note 7, at 828.

²⁴¹ Lundgren, Curtis, & Oettinger, *supra* note 33, at 35; Dep’t of Hous. & Urb. Dev., 535 U.S. at 136; Kaplan & Rossman, *supra* note 4, at 112-13; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 837-38 (1996).

preponderance of the evidence that she did not know of the criminal conduct, or upon learning of the conduct she did all that reasonably could be expected under the circumstances.²⁴² If the mother can satisfy this burden, she will not be evicted.

An innocent owner defense will allow for innocent tenants to have judicial recourse in compliance with Article 25. Although the innocent owner defense was previously rejected for Section 8 Voucher recipients in *Rucker* because the Court argued that recipients were not entitled to the same protection as private lessees, the Court did not consider or address the international implications of denying such a defense.²⁴³ The innocent owner defense will reduce discriminatory practices by reducing the number of low-income, minority tenants that are being evicted, moving the U.S. in the direction of compliance with CERD. If the U.S. continues to disregard its international obligations, the U.S. will continue to lose international credibility. The U.S. should tread carefully when disregarding violations of international human rights that it has chosen to obligate itself to.

IV. CONCLUSION

The U.S. is in violation of international human rights law when it forcibly evicts families from federal housing assistance programs based on the criminal record in someone’s home. Forced evictions disproportionately affect minority communities. The HOPE Act and the *Rucker* decision have perpetuated this problem specifically by allowing for innocent tenants to be evicted despite no knowledge or contribution to the criminal activity. These policies and decisions violate UDHR Article 25, the right to adequate housing, and CERD. To become compliant with Article 25 and CERD, the U.S. should adopt an innocent owner defense in Section 8 cases for innocent tenants. Adopting an innocent owner defense will not remove all discrimination in federal housing assistance programs. However, adopting this defense will be a big step in bringing the U.S. closer in compliance with UDHR customary international law, and CERD, which the U.S. is domestically and internationally bound to follow.

²⁴² Suarez, *supra* note 21, at 1003.

²⁴³ See generally *Dep’t of Hous. v. Rucker*, 535 U.S. at 125, 127, 135.

