Using International Human Rights Standards to Effect Criminal Justice Reform in the United States
By Connie de la Vega

While Americans might wonder why we are concerned about what treaties and international law provide, there are a number of areas where individuals’ rights are better protected under international standards than our own Constitution and statutes. Criminal justice is one of those areas where international standards and treaties that the United States is party to provide more protection than our laws and have been and can continue to provide a foundation for criminal justice reform in the United States. Indeed, in the past 10 years, international law has provided the support for prohibiting excessive sentences for juvenile offenders, such as the death penalty and mandatory juvenile life without parole (JLWOP). This article will discuss how international standards and have been used by the courts to support greater protection of human rights and how they can continue to be used to promote better protection of rights in the area of criminal justice.

International human rights are applicable in three ways in state and federal courts. First, under Article VI of the United States Constitution, treaties ratified by the United States are the “supreme law of the land” and have the same effect as federal law. Second, human rights provisions that are part of customary international law may apply in a manner similar to United States common law. Third, courts may refer to international law in determining the content of both federal and state laws, and in particular their constitutions.

The United States is a party to three human rights treaties that include protection of rights in the criminal justice arena: the International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States on June 8, 1992); the Convention against Torture (CAT) (ratified by the United States on October 21, 1994); and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ratified by the United States on October 21, 1994). A number of provisions of the ICCPR implicate sentencing practices, including: Article 7, which prohibits cruel, inhuman, and degrading treatment or punishment; Article 10, which provides that people deprived of their liberty shall be treated with humanity, that accused persons should be segregated from convicted persons, that accused juvenile persons shall be separated from adults and brought to adjudication as speedily as possible, and that the aim of the penal system is the reformation and social rehabilitation of those convicted; Article 14, which provides many protections covered by the Eighth Amendment but includes the requirement that procedures for juvenile persons shall be such as will take account of their age and promote their rehabilitation; Article 15, which prohibits ex post facto penalties and mandates the retroactive application of lighter penalties provided by law subsequent to the commission of the crime; and Article 24, which specifically provides that children shall not be discriminated against based on race and other categories and shall be given protection as required by their status as minors.

The latter provision was interpreted by the Human Rights Committee, the body that oversees the implementation of the treaty, such that the death penalty could not be imposed for crimes committed by persons younger than 18. In a recent review of the United States’ report, the Committee requested that the United States not sentence offenders under 18 to life imprisonment without parole. It also has recently held in a case against Australia that sentences for juvenile offenders that do not give a possibility of review and prospective release notwithstanding the gravity of the crime violate Articles 7, 10(3), and 24. Blessington v Australia, U.N. Doc. CCPR/C/112/D/1968/2010 (Hum. Rts. Comm. Nov. 3, 2014). The Committee against Torture, the official

Unfortunately, the United States made a number of reservations when it ratified these three treaties, including a declaration that the treaties were not self-executing (NSE). While advocates have been reluctant to enforce the treaty obligations directly in U.S. courts because of the NSE declaration, there are grounds for doing so in criminal defense cases. First, there are questions whether the declaration is valid. See Connie de la Vega, Civil Rights During the 1990s: New Treaty Law Could Help Immensely, 65 CINN. L. REV. 423, 456 (1997). Second, courts have applied treaties in defensive postures without considering whether they are self-executing. See United States v. Alvarez-Machain, 504 U.S. 655, 699–70 (1992), rev’d on other grounds, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); United States v. Rauscher, 119 U.S. 407, 430 (1886).

Third, the legislative history of the declarations indicates that the declarations were intended to prohibit private causes of action, not defenses in cases. See de la Vega, supra, at 456–57 n.206.

In addition to raising the treaty provisions as defenses in criminal law cases, advocates can raise the sentences such as JLOP as violations of customary international law and even jus cogens or peremptory norms of international law, since the United States is the only country in the world to allow them (with the possible exception of Australia as discussed above). See Connie de la Vega et al., Univ. of S.F. Sch. of Law Ctr. for Law & Global Justice, Cruel and Unusual: U.S. Sentencing Practices in a Global Context 59–60 (2012). As a customary international norm, the prohibition is applicable in the United States as “part of our law, and it must be ascertained and administered by the courts of justice of appropriate jurisdiction.” The Paquita Habana, 175 U.S. 677, 700 (1900). Besides JLOP, other long sentencing schemes for juveniles also may be violations of customary international law. Similarly, customary international law has been raised before the Connecticut Supreme Court in cases addressing the issue of whether abolishing the death penalty by the legislature should be applicable retroactively to people with pending death sentences. The argument is based on Article 15 of the ICCPR as well as the practice of nations—no country that has abolished the death penalty has ever executed anyone with a prior sentence.

The greatest success thus far has been raising international human rights law as a guide to the courts in interpreting the U.S. Constitution. In Trop v. Dulles, 356 U.S. 86, 100 (1958), the U.S. Supreme Court expounded on the need for dignity and civility in interpreting the Eighth Amendment. Because the Eighth Amendment’s words are not precise and the scope is not static, the Court established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. Id. at 100–01. For example, it noted that the “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.” Id. at 102–03.

In Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977), the Court considered “the climate of international opinion concerning the acceptability of a particular punishment.” In support of its conclusion that a death sentence for rape was cruel and unusual, the Court stated it is “not irrelevant that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” Id.

In Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982), the Court acknowledged Coker, noting that the “climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant” under the Eighth Amendment. In finding the death penalty is cruel and unusual punishment for felony murder, the Court noted that felony murder “has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe. It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant’s lack of premeditation and limited participation in the homicidal act.” Id. (citation omitted).

In Thompson v. Oklahoma, 487 U.S. 815, 830 (1988), the Court recognized the relevance of the views of “respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community” in its conclusion that the Eighth and Fourteenth Amendments prohibited execution of a defendant convicted of first-degree murder that he committed when he was 15 years old. The Court made an additional reference to international practice and opinion in a footnote: “We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.” Id. at 830 n.31.

In Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002), the Court looked to the overwhelming disapproval of the “world community” to sentencing mentally retarded offenders to death. “Although
these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." Id.

In Roper v. Simmons, 543 U.S. 551, 575-76 (2005), the Supreme Court abolished the juvenile death penalty. The Court relied on the "evolving standards of decency" reasoning applied in Trop and Thompson, and looked to international law, practice, and opinion to categorically prohibit juveniles from receiving the death penalty. In the inquiry whether the death penalty for juvenile offenders is cruel and unusual, the Court gave due deference to international treatment of juvenile offenders. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." Id. at 578.

In Graham v. Florida, 560 U.S. 48, 81 (2010), the Court, citing Roper, reaffirmed the relevance of international practice and opinion in holding unconstitutional life without parole sentences for juveniles for non-homicide crimes. Justice Stevens's concurrence in Graham acknowledges that "evolving standards of decency" have played a central role in Eighth Amendment jurisprudence for decades and will continue to do so. Id. at 85 (Stevens, J., concurring).

The international law standards have been raised in the juvenile sentencing cases primarily by amici curiae, and the Court has not referred to international standards in more recent juvenile sentencing cases. In Miller v. Alabama, 132 S. Ct. 2455 (2012), the Court held that mandatory sentences for juvenile offenders violate the Eighth Amendment but did not cite to international standards as it had in Roper and Graham. The international standards were raised by amici curiae and not the parties.

State courts have also found international standards helpful in deciding criminal cases as well as those involving other fundamental rights. In Connecticut v. Santiago, 49 A.3d 566 (Conn. 2015), the Connecticut Supreme Court held that the abolition of the death penalty by the legislature applied retroactively to the 11 persons already on death row. Justice Eveleigh, concurring, referred to other nations' practices regarding retroactive application of ameliorative laws. The California Supreme Court used worldwide "standards of decency" to reject a penalty as impermissibly "unusual" under the California Constitution. People v. Anderson, 493 P.2d 880, 897-99 (Cal. 1972). It compared another penalty "with the punishments prescribed for the same offenses in other jurisdictions having an identical or similar constitutional provision" in concluding the penalty at issue "shocks the conscience and offends fundamental notions of human dignity." In re Lynch, 503 P.2d 921, 930, 932 (Cal. 1972).

The California Supreme Court also referred to international standards when interpreting other California state constitutional provisions. See, e.g., In re Marriage Cases, 183 P.3d 384, 426 n.41 (Cal. 2008) recognizing that "the California and federal Constitutions are not alone in recognizing that the right to marry is not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit, but rather that the right constitutes a basic civil or human right of all people", citing Universal Declaration of Human Rights, art. 16; ICCPR, art. 23), superseded by constitutional amendment as stated in Perry v. Brown, 671 F.3d 1052, 1065 (9th Cir. 2012), cert. granted, 133 S. Ct. 786 (2012), vacated and remanded sub nom., Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); City of Santa Barbara v. Adamson, 610 P.2d 436, 439 n.2 (Cal. 1980) (citing international law in interpreting right to privacy under the state constitution).

Other state supreme courts have also considered international standards when interpreting their state constitutions. In Servin v. State, 32 P.3d 1277, 1291-92 (Nev. 2001) (Rose, J., concurring), the Supreme Court of Nevada's Justice Rose found in a concurring opinion that customary international law supersedes contrary state law. In Moore v. Ganain, 560 A.2d 742, 780-81 (Conn. 1995) (Peters, C.J., concurring), the Supreme Court of Connecticut's Chief Justice Peters discussed the "wide international agreement on at least the hortatory goals identified in" the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as support for finding a Connecticut state constitutional right to minimal subsistence notwithstanding that the United States was not a party to the ICESCR and that federal law had not identified that constitutional right. In Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981) (en banc), the Supreme Court of Oregon referred to international instruments in construing the guarantee against "unnecessary rigor" in the state constitution. In Paisley v. Kelley, 255 S.E.2d 859, 863-64 n.5 (W. Va. 1979), the Supreme Court of Appeals of West Virginia cited the Universal Declaration of Human Rights in holding education to be a fundamental right under the state constitution. See generally Anna Maria Gabrieli, Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts, 12 BUFF. HUM. RTS. L. REV. 139, 169 (2006); Hon. Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from their Children": Interpreting State Constitutions in an Age of Global Jurisprudence, 79 N.Y.U. L. REV. 1633 (2004).

Perhaps one of the more helpful sources for addressing the disproportionate use of extreme sentences on minorities in the United States is CERD. In addition to prohibiting discrimination "based on race, colour, descent, or national or ethnic origin," Article I also requires that state parties take special measures to ensure equal enjoyment or exercise of human rights and fundamental freedoms for certain racial or ethnic groups or individuals.
Such special measures are not deemed racial discrimination. Article 5(a) specifically provides for the “right to equal treatment before the tribunals and all other organs administering justice.” Because the goal of the treaty is to attain equality, it is not necessary to find intent behind discriminatory practices used in the criminal justice system. Article 6 provides for effective remedies for violation of the treaty, and Article 7 provides for immediate and effective measures for teaching and information to combat prejudices that lead to racial discrimination.

In addition to using the international standards in courts, advocates can use them to promote legislation that will help to ameliorate problems and violations in the criminal justice system, such as excessively long sentences that result from life without parole sentences, recidivist statutes, consecutive sentences, and mandatory minimum sentences. See de la Vega et al., Cruel and Unusual, supra. In addition to violating basic principles of international law, the use of these sentences is way out of proportion with their use in the rest of the world. Publicizing these discrepancies could be useful to mobilize change at the legislative level, where there is already pressure to reduce the extremely high incarceration rates in a number of states. The international standards and practices help to focus attention on the need to have a fair and humane criminal justice system that has the goal of rehabilitation so that criminal offenders can become productive members of society. They are also helpful for ending the racial discrepancy that continues in the use of extreme sentences in the United States.

Connie de la Vega is a professor of law at the University of San Francisco. She has written extensively on international human rights law and has filed numerous amicus curiae briefs in U.S. courts. She also participates in meetings at the human rights bodies at the UN and has handled cases before the Inter-American Commission on Human Rights.

Introduction from inside cover
To the contrary, Massimo says, treaties have helped change the world’s mindset about holding nations accountable for abuse of individuals, wherever they reside, and are an increasingly critical tool in U.S. diplomacy. Witness the growth in reach and stature of the international tribunals, he points out, and our government’s responses to heightened international criticism of U.S. treatment of prisoners from Abu Ghrabi to Guantanamo to domestic solitary confinement.

Doug Cassel of Notre Dame Law School describes key provisions of the treaties that the United States has ratified and therefore has an international obligation to implement. He also points out major and wide-ranging concerns that UN human rights review committees and UN member nations are raising about the U.S. human rights record domestically, from access to voting, housing, and water to continuing questions about the government’s antiterrorism practices, including torture, in our post-9/11 environment.

Martha Davis, director of the Program on Human Rights and the Global Economy at Northeastern University School of Law and co-author of the recent publication, Human Rights Advocacy in the United States, examines ways in which human rights treaties and norms are influencing policy, litigation, and legislation in the courts and at every level of U.S. government.

Tarah Demant, a senior director at Amnesty International USA, provides numerous examples of lawyers’ and other advocates’ use of international human rights principles in domestic advocacy. She discusses particularly the nationwide initiative “Cities for CEDAW” (Convention on the Elimination of All Forms of Discrimination against Women), formed last year to press for incorporation of CEDAW’s goals into state and local laws, policies, and programs.

Risa Kaufman, a clinical law professor at Columbia Law School, describes how, 15 years after its founding, the Brinieing Human Rights Home Lawyers’ Network and the hundreds of lawyers who are part of the network are propelling the movement.

Connie de la Vega, of the University of San Francisco, discusses potential and proven uses of international human rights standards to promote U.S. criminal justice reform.

Isabella Bunn, an international lawyer who teaches ethics and human rights courses here and in England, describes U.S. corporations’ efforts to integrate human rights goals and business practices, as well as a federal initiative to help guide and ensure compliance with these goals.

This issue’s Human Rights Hero is Gay McDougall, a preeminent international human rights lawyer and leader whose life work epitomizes the concept of bringing human rights home. As Duke Law School’s Jim Coleman writes, McDougall’s path from the segregation and civil rights battles of this country to the fight against apartheid in South Africa led to sharing a stage in victory with Nelson Mandela. But it also deepened her resolve to fight inequity here, as well as around the globe. She became one of the first to say, “We must bring human rights home.”

“Bringing human rights home” does not obviate the need for U.S. ratification of the UN human rights treaties. In fact, strong commitment to their purpose and values is more essential than ever for the United States to maintain its leadership role in international human rights matters. And the U.S. record, if perhaps better than most others, is far from perfect. As the authors in this issue of Human Rights demonstrate, increased reliance on treaty principles can and does spur progress at home. After all, they say, human rights are our rights, too.

Penny Wakefield is a legislative/public policy lawyer focusing on women’s rights and international human rights matters. She is co-chair of the ABA CRSJ Section’s International Human Rights Committee and on the ABA Human Rights Center Advisory Council and Human Rights magazine Editorial Board.