



The **Opportunity** Agenda

*Building the National Will
to Expand Opportunity in America*

Legal and Policy Analysis:

*Human Rights in State
Courts 2011*

Acknowledgments

The statements made and views expressed in this report are solely the responsibility of The Opportunity Agenda.

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About The Opportunity Agenda

The Opportunity Agenda was founded in 2004 with the mission of building the national will to expand opportunity in America. Focused on moving hearts, minds, and policy over time, the organization works with social justice groups, leaders, and movements to advance solutions that expand opportunity for everyone. Through active partnerships, The Opportunity Agenda synthesizes and translates research on barriers to opportunity and corresponding solutions; uses communications and media to understand and influence public opinion; and identifies and advocates for policies that improve people's lives. To learn more about The Opportunity Agenda, go to our website at www.opportunityagenda.org.

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Table of Contents

Introduction	1
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Overview and Recommendations for Legal Advocacy	2
--	----------

International Human Rights in State Courts	7
---	----------

Alabama	7	Montana	34
Arkansas	8	Nebraska	34
Arizona	9	Nevada	35
California	10	New Hampshire	35
Connecticut	18	New Jersey	36
Delaware	20	New Mexico	37
Florida	20	New York	37
Hawaii	22	North Carolina	41
Illinois	22	North Dakota	43
Indiana	24	Ohio	43
Iowa	25	Oklahoma	45
Kansas	26	Oregon	46
Kentucky	27	Pennsylvania	47
Louisiana	28	South Dakota	48
Maine	28	Tennessee	48
Maryland	29	Texas	50
Massachusetts	30	Utah	54
Michigan	31	Washington	54
Minnesota	32	West Virginia	55
Mississippi	33	Wisconsin	55
Missouri	34		

Conclusion	57
-------------------	-----------

Introduction

Since the last version of this report was released, state court litigants in the United States have continued using international human rights law in their arguments. Many of these cases have been met with cursory dismissals from the court, especially in death penalty cases. At the same time, courts have seriously considered some arguments, and occasionally use international law affirmatively as persuasive authority for the interpretation of state constitutions, statutes, and common law.

This updated publication includes cases that have been decided since the last edition, as well as cases that were not included previously.¹ Some highlights include:

- ▶ Before the U.S. Supreme Court found that sentencing a juvenile to life without the possibility of parole for a non-homicide offense constituted cruel and unusual punishment under the Eighth Amendment,² a Florida court used international human rights law to analyze the issues.³ Though it referred to both international treaties and “international pressure to change our existing legal system” as the defendant’s strongest argument, the court declined to create a *per se* ban on the punishment for juveniles.⁴
- ▶ Cases have increasingly referred to Article 36 of the Vienna Convention, which provides the right to communicate with a consular official and to have an official notified promptly of one’s arrest.⁵ In evaluating this argument, courts are divided as to whether the treaty grants individual rights. In a notable 2011 decision, *Commonwealth v. Gautreaux*, the Supreme Judicial Court of Massachusetts held that the VCCR does confer an individual right to consular notification. Further, the Massachusetts court acknowledged that the state falls within the ambit of international law, noting that decisions of the International Court of Justice are entitled to “respectful consideration” by the state court. However, courts have continued to find that such violations have not resulted in sufficient prejudice for defendants to successfully obtain postconviction relief. Despite this result, this trend has expanded the use of international human rights law, as state courts that previously have not analyzed human rights law have begun to look at international human rights treaties based on these appeals. Indeed, the Massachusetts’ court’s treatment of the ICJ decision could be viewed as a sort of Charming Betsy doctrine for the state, establishing the principle that state courts should try to avoid violating the terms of international judgments.
- ▶ Courts have also used human rights law, in particular the Hague Convention on Civil Aspects of International Child Abduction, to analyze both procedural and substantive rights in the family law context.⁶

1 The research cited in this report is based on a review of caselaw completed in December 2010. This report additionally includes one case from January 2011, *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011), because it is a notable development.

2 See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

3 See *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008).

4 *Id.* at 50.

5 See, e.g., *People v. Rocha*, No. F051887, 2008 WL 3413131, at *9 (Cal. Ct. App. Aug. 13, 2008), *rev denied*; *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011).

6 See, e.g., *In re Karla C.*, 186 Cal. App. 4th 1236 (Cal. Ct. App. 2010) (analyzing the Hague Convention’s impact on a decision to award custody in a dependency hearing to a noncustodial parent living in Peru, particularly the court’s ability to enforce its jurisdiction, and remanding for the lower court to clarify that the noncustodial parent in Peru has only temporary custody and collect additional evidence on the ability of the court to enforce its jurisdiction); *Escobar v. Flores*, 183 Cal. App. 4th 737, 746 (Cal. Ct. App. 2010) (using the Hague Convention and cases analyzing the Convention to uphold a lower court’s decision that a nine-year-old was not too young to qualify under the Convention’s clause that an order of return may be refused if “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”).

Overview and Recommendations for Legal Advocacy

Human rights are a crucial part of the United States' legal and cultural foundation. The founders of our country declared that we are all created equal and endowed with certain inalienable rights. The United States helped craft the Universal Declaration of Human Rights (UDHR) and the international human rights system after World War II and the horrors of the Holocaust. The notion of human rights has been central to our nation's struggles to achieve equality and justice for all.

Yet, despite that legacy, international human rights laws have not played a major role in legal efforts to pursue fundamental rights, justice, and equality in the United States. That trend has begun to change over the last decade, as more and more legal advocates have begun to incorporate human rights arguments into their work, and as the U.S. Supreme Court, in particular, has increasingly cited human rights law as persuasive authority for important constitutional decisions.⁷

The federal courts, however, are in flux when it comes to the consideration of individual rights in general and human rights in particular. Federal constitutional and legislative protections tend not to include economic, social, and cultural rights that are an important part of the international human rights system. State courts, by contrast, often consider such protections and, in interpreting state law, have the independence to recognize a broader panoply of rights. In addition, state courts have authority to interpret international treaties, including human rights treaties.

Recognizing this important and underutilized opportunity, this report details the ways in which state courts have considered and interpreted international human rights law. It is intended for public interest lawyers and state court litigators, and also for state and municipal policymakers interested in integrating compliance with international human rights law into their domestic policies.⁸

⁷ See, e.g., Graham, 130 S. Ct. at 2034 (referring to widespread rejection of sentencing juveniles to life without the possibility of parole across the world); *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (considering whether practices have “been accepted as an integral part of human freedom in many other countries” or “rejected elsewhere” in construing the constitutional concepts of privacy and due process); *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (Ginsburg, J., concurring) (citing United Nations conventions and the “international understanding” as to affirmative action plans).

⁸ A number of advocates have argued that state courts should look to international and comparative law as they explore the meaning of positive rights under state constitutions, statutes, and common law. See, e.g., Paul R. Dubinsky, *International Law In The Legal System Of The United States*, 58 AM. J. COMP. L. 455 (2010); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1628, n.300 (May 2006) (citing Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part 1: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006)); Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy Int'l Standards of Human Decency*, 39 GONZ. L. REV. 421 (2003); Bert B. Lockwood et al., *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL RTS. J. 1 (1993); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001). See also Catherine Albisa & Sharda Sekaran, *Realizing Domestic Social Justice Through International Human Rights: Foreword*, 30 N.Y.U. REV. L. & SOC. CHANGE 351 (2006); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 824–36 (1990).

State courts can draw upon a number of arguments to support their use of international human rights principles in decision-making. Under Article VI, Section 2 of the U.S. Constitution, treaties are the “supreme Law of the Land,” binding on the “Judges in every State.”⁹ The United States has signed and ratified the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and is therefore bound by these treaties.

Implementation of these treaties and their principles is the responsibility of federal, state, and local government.¹⁰ Under the federal system, states are responsible for regulating areas of substantive law, including criminal, family, and social welfare law. The reservations the U.S. Senate issued when it ratified the treaties make clear that states are responsible for implementing international human rights law in these areas.¹¹ Thus, state court incorporation of human rights principles is crucial to ensuring implementation at the state level.

Although the treaties are “non-self-executing”—meaning that they cannot be directly enforced in U.S. courts¹²—they impose concrete obligations on states. Ratified treaties “have a legal status equivalent to enacted federal statutes;”¹³ they prevail over previously enacted federal statutory law (when there is a conflict) and over any inconsistent state or local law.¹⁴

In ratifying the ICCPR, the Senate mandated that its protections go no further than corresponding protections in domestic law.¹⁵ Advocates and scholars have argued that such a reservation frustrates the purpose of the treaty and may be invalid under international law and therefore unenforceable—although the rest of the treaty may be severable and continue to have legal effect.¹⁶ But state courts

9 U.S. CONST. art. VI, cl. 2. The U.S. Supreme Court has noted that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

10 Because of the United States’ federal system, “when the United States assents to a treaty or other international agreement, . . . implementation [must] occur [at] the state as well as the federal level. If states fail to implement international treaty provisions that address areas traditionally reserved to them, the United States cannot, as a practical matter, achieve compliance with the treaty provisions to which it is party.” Davis, *supra* note 8, at 361–64.

11 Senate ratification of major treaties has been accompanied by the following understanding: “That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.” *Id.* at 363 (citing 138 Cong. Rec. 8068, 8071 (1992) (understanding for International Covenant on Civil and Political Rights); 140 Cong. Rec. 14326, 14326 (1994) (same understanding for International Convention on the Elimination of All Forms of Racial Discrimination); 136 Cong. Rec. S17486, S17486 (1990) (same understanding for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)).

12 U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, at S4784 (1992); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (1994); U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (1990). When treaties are non-self-executing, individuals cannot sue for violation of rights recognized under the treaties. See Andrew Solomon and Katherine Brantingham, *When Can an Individual Enforce a Right Set Forth in an International Treaty* American Society of International Law and the International Judicial Academy (2006), http://www.judicialmonitor.org/archive_0706/asilsidebar.html.

13 Davis, *supra* note 8, at 363 (quoting United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, UN Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/\\$FILE/G0044926.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/$FILE/G0044926.pdf)).

14 United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, UN Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000).

15 138 Cong. Rec. S4781-01, S4783 (1992) (attaching a reservation to the ICCPR and stating “that the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”).

16 See, e.g., Penny White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 950–51, 967–69 (2003) (arguing that state judges have an independent authority to interpret the underlying treaties and reservations).

routinely invoke Senate reservations to deny individuals' claims under treaties like the ICCPR.¹⁷

Despite such reservations, international and U.S. law requires courts to interpret both state and federal law so that it does not conflict with ratified treaties.¹⁸ And as a signatory to covenants and conventions like the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Covenant on Rights of the Child (CRC), the United States must “refrain from acts which would defeat the object and purpose of a treaty.”¹⁹ Furthermore, when human rights principles rise to the level of customary international law, meaning they are “practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”²⁰ (in other words, forming “general and consistent practice followed by states from a sense of legal obligation”²¹), they do not require implementing legislation to be binding in the United States.²² Customary international law is part of federal common law and, as such, it displaces conflicting state laws.²³

Most importantly, courts can look to international human rights treaties for interpretive guidance, whether or not the treaties are signed, ratified, or considered customary international law. Specifically, courts can turn to international human rights law to help clarify the meaning of vague or unsettled domestic law. Even if human rights principles are not directly binding, they can influence courts as they define and explain statutory provisions, and as they give meaning to domestic constitutional rights. Courts have looked to unratified as well as ratified treaties for this purpose.²⁴

Some highlights of state court decisions that draw upon international human rights law include:

- ▶ California courts citing the UDHR to support their interpretation of the right to practice one's trade, the right to privacy, the meaning of “physical handicap,” the right to freedom of movement, and the scope of welfare provisions;²⁵

17 See, e.g., *People v. Caballero*, 206 Ill. 2d 65, 103 (Ill. 2002) (reservations to ICCPR); *State v. Phillips*, 74 Ohio St. 3d 72, 103–04 (Ohio 1995) (noting that the U.S. approved the Charter of the Organization of American States with a reservation “that none of its provisions shall be considered as limiting the powers of the several states with respect to any matters recognized under the Constitution as being within the reserved powers of the several states”) (internal citations and quotations omitted); *People v. Cook*, 39 Cal. 4th 566, 620 (Cal. 2006) (reservations to ICCPR); *People v. Brown*, 33 Cal. 4th 382, 403–04 (Cal. 2004) (same). *But see* *Servin v. State*, 117 Nev. 775, 794–95 (Nev. 2001) (Rose, J., concurring) (raising concerns about the validity of a reservation to the ICCPR regarding the execution of juveniles); *Domingues v. State*, 114 Nev. 783, 786–87 (Nev. 1998) (Rose, J., dissenting) (insisting in a juvenile death penalty decision that the defendant's case be remanded to the lower court for a determination of the validity of a Senate reservation to the ICCPR).

18 *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”). See also Maria Foscarinis, *Realizing Domestic Social Justice Through International Human Rights: Part II: Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 478 n.204 (2006).

19 Janet M. Hostetler, *Realizing Domestic Social Justice Through International Human Rights: Part II: Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City*, 30 N.Y.U. REV. L. & SOC. CHANGE 483, 492–93, 493 n.53 (2006) (citing Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331).

20 BLACK'S LAW DICTIONARY 162 (17th ed. 1996).

21 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757, 758 (2001).

22 Foscarinis, *supra* note 18, at 478 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); Restatement (Third) of Foreign Relations Law of the United States 111 (1987)). See also Restatement (Third) of Foreign Relations Law 102(2) (1986).

23 Restatement (Third) of Foreign Relations Law of the United States 111; see also *The Paquete Habana*, 175 U.S. at 700. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

24 See, e.g., *White*, *supra* note 16, at 973 (“State appellate courts, in applying state law, are free to utilize international treaty provisions and international law in making” decisions as to the content of constitutional guarantees).

25 *Bixby v. Pierno*, 481 P.2d 242, 251 n.9, 253 n.12 (Cal. 1971); *Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.2 (Cal. 1980); *Am. Nat'l Life Ins. Co. v. Fair Employment & Housing Comm.*, 610 P.2d 436, 442 n.4 (Cal. 1982); *In re White*, 158 Cal. Rptr. 562, 567 n.5 (Cal. Ct. App. 1979); *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986).

- ▶ A Maryland Supreme Court relying heavily on the Nuremberg Code to find a greater duty toward subjects for researchers conducting non-therapeutic programs;²⁶
- ▶ A Missouri Supreme Court decision citing the International Convention on the Rights of the Child (CRC), among other grounds, in striking down the juvenile death penalty;²⁷
- ▶ The New Hampshire Supreme Court relying on the ICCPR and the ICESCR in its interpretation of parental rights under the state constitution;²⁸
- ▶ New York courts invoking the UDHR in cases involving the rights to work and to strike, a transnational discovery dispute, and the act of state doctrine;²⁹
- ▶ The Oregon Supreme Court looking to the UDHR, ICCPR, and European Convention to interpret the meaning of the state constitution's provision on the treatment of prisoners;³⁰
- ▶ A Pennsylvania trial court reviewing the state's failure to provide a 15-year-old defendant with schooling while in custody in light of the UDHR;³¹
- ▶ The Utah Supreme Court using the ICCPR to help define constitutional standards for the treatment of prisoners;³²
- ▶ Minnesota courts noting that a violation of the Vienna Convention on Consular Relations can be used to determine whether inculpatory statements were given knowingly and voluntarily;³³
- ▶ The West Virginia Supreme Court invoking the UDHR to review the financing scheme for public schools and to define the right to education;³⁴
- ▶ A concurring opinion in a Montana Supreme Court case recognizing that the state's constitution was steeped in a history of human rights declaration in support of a ruling that a state university's denial of health coverage to same-sex partners was not rationally related to a legitimate government interest;³⁵
- ▶ Dissenting Michigan Supreme Court opinions invoking the ICCPR to interpret the meaning of the Michigan constitution's double jeopardy clause and citing the UDHR to interpret the meaning of the establishment clause;³⁶
- ▶ Dissenting and concurring Nevada Supreme Court opinions arguing that customary international law prohibits the execution of minors and invoking the ICCPR to challenge the juvenile death penalty;³⁷ and
- ▶ More than 30 different California Supreme Court cases have addressed international human rights law in the context of death penalty cases since the last report. Defendants in these cases generally have argued that international law prohibits the death penalty because the United

26 Grimes v. Kennedy Krieger Inst., 782 A.2d 807, 835 (Md. 2001).

27 Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).

28 State v. Robert H., 393 A.2d 1387, 1389 (N.H. 1978), *overruled in part by* In re Craig T., 800 A.2d 819, 820 (N.H. 2002).

29 Wilson v. Hacker, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950); Jamur Prod. Corp. v. Quill, 273 N.Y.S.2d 348, 356 (N.Y. Sup. Ct. 1966); In re Estate of Vilensky, 424 N.Y.S.2d 821 (N.Y. Surrog. Ct. 1979); Beck v. Mfrs. Hanover Trust Co., 481 N.Y.S.2d 211, 215 (N.Y. Sup. Ct. 1984).

30 Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981); *see also id.* at 131 n.21.

31 Commonwealth v. Sadler, No. Nos. 1214-16, 1979 WL 139269, 3 Phila. Co. Rptr. 316 (Pa. Com. Pl. Dec. 10, 1979), *reversed by* Commonwealth v. Sadler, 301 Pa. Super. 228 (Pa. Super. 1982).

32 Bott v. DeLand, 922 P.2d 732 (Utah 1996), *overruled in part by* Spackman v. Bd. of Educ., 16 P.3d 533 (Utah 2000).

33 State v. Morales-Mulato, 744 N.W.2d 679, 685 (Minn. Ct. App. 2008).

34 Pauley v. Kelly, 255 S.E.2d 859, 864 (W. Va. 1979).

35 Snetsinger v. Montana Univ., 104 P.3d 445 (Mont. 2004) (Nelson, J., concurring).

36 State v. Davis, 695 N.W.2d 45, 54-55 (Mich. 2005) (Kelly, J., dissenting); Sheridan Road Baptist Church v. Michigan, 426 Mich. 462, 516 (Mich. 1986) (Riley, J., dissenting).

37 Servin v. State, 32 P.3d 1277, 1290 (Nev. 2001) (Rose, J., concurring); Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (Rose, J., & Springer, C.J., dissenting).

States is a signatory to a particular treaty or that the death penalty statute itself is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments.³⁸ The court continues to reject both of these claims.³⁹

These decisions—described in further detail in the body of this report—use human rights law as persuasive authority in interpreting state constitutions, statutes, and common law.

This report uses the following abbreviations:

- ▶ American Convention: American Convention on Human Rights
- ▶ American Declaration: American Declaration on the Rights and Duties of Man
- ▶ CAT: Convention Against Torture
- ▶ CEDAW: Convention on the Elimination of Discrimination Against Women
- ▶ CERD: International Convention on the Elimination of All Forms of Racial Discrimination
- ▶ CRC: International Convention on the Rights of the Child
- ▶ European Convention: European Convention for the Protection of Human Rights and Fundamental Freedoms
- ▶ Hague Convention: Hague Convention on the Civil Aspects of International Child Abduction
- ▶ ICCPR: International Covenant on Civil and Political Rights
- ▶ ICESCR: International Covenant on Economic, Social, and Cultural Rights
- ▶ UDHR: Universal Declaration of Human Rights
- ▶ UNHRC: United Nations Human Rights Committee
- ▶ VCCR: Vienna Convention on Consular Relations

38 See, e.g., *People v. Hamilton*, 200 P.3d 898, 971 (Cal. 2009); *People v. Bennett*, 199 P.3d 535, 573 (Cal. 2009); *People v. Dykes*, No. S050851, 2009 WL 1651345 at *61 (Cal. June 15, 2009); *People v. Lindberg*, 190 P.3d 664, 704 (Cal. 2008).

39 See *People v. Bennett*, 199 P.3d at 573.

International Human Rights in State Courts

The following discussion examines the role international human rights law has played in state court decisions, breaking down cases by state. Although the discussion does not identify every single decision in which a state court has discussed international human rights law, it is fairly comprehensive. (In those states not listed here, no significant body of decisions citing international human rights law yet exists.) There are virtually no cases in which state courts have relied solely on international human rights law to reach a decision. Rather, state courts most often turn to international human rights law when it is offered as an interpretive guide for the development of rights enumerated in state constitutions or statutes.

Alabama

State courts in Alabama have addressed international human rights law primarily in the criminal context. In a 2000 decision, the Alabama Supreme Court upheld the juvenile death penalty, rejecting the defendant's international law argument.⁴⁰ The court held that the ICCPR was not self-executing and did not create a private right of action in U.S. courts.⁴¹ It dismissed the defendant's argument that the U.S. Senate reservation upon which the court based its decision was invalid.⁴² And it rejected the defendant's arguments under CERD and CAT, noting that when the United States ratified those treaties it specifically stated that international law did not prohibit the juvenile death penalty.⁴³

Following the 2005 decision in *Roper v. Simmons*,⁴⁴ in which the U.S. Supreme Court invoked international human rights law and invalidated the juvenile death penalty, Alabama courts have overturned at least two juvenile death penalty cases, finding the convictions in violation of international treaties and U.S. law.⁴⁵

Outside the juvenile context, at least one defendant has tried (and failed) to invoke international human rights law in a *habeas* petition in Alabama state court.⁴⁶ In *Wood v. State*, the Alabama Court of Criminal Appeals rejected on jurisdictional grounds a defendant's argument that his "human rights were violated in contravention of" the ICCPR and CERD.⁴⁷ In 2008, a defendant unsuccessfully argued that the lengthy incarceration time spent by death row inmates constitutes cruel and unusual punishment and is a violation of the ICCPR.⁴⁸ Citing the 2000 Alabama Supreme Court decision in *Ex*

40 Ex parte Pressley, 770 So. 2d 143 (Ala. 2000); see also Wynn v. State, 804 So. 2d 1122 (Ala. Crim. App. 2000) (addressing the ICCPR and the death penalty by adopting the *Pressley* reasoning as its own); Ex parte Carroll, 852 So. 2d 821 (Ala. 2001) (same).

41 Pressley, 770 So. 2d at 148, n.3.

42 *Id.* at 148–49.

43 *Id.*

44 543 U.S. 551, 575–78 (2005).

45 Adams v. State, 955 So. 2d 1037 (Ala. Crim. App. 2003) (addressing the ICCPR and upholding the juvenile death penalty), *overturned on appeal*, Ex Parte Adams, 955 So. 2d 1106 (Ala. 2005) (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). See also Duncan v. State, 925 So. 2d 245, 276–77 (Ala. Crim. App. 2005) (“The appellant’s third argument is that the sentence of death, which was imposed for a crime he committed when he was 17 years old, constitutes cruel and unusual punishment and violates several international treaties and covenants. Based on *Roper* . . . we are compelled to agree . . .”).

46 Wood v. State, 891 So. 2d 398, 420 (Ala. Crim. App. 2004).

47 *Id.*

48 Sharifi v. State, 993 So. 2d 907, 920–21 (Ala. Crim. App. 2008).

parte Pressley, the Alabama Court of Criminal Appeals ruled that, because the ICCPR is a non-self-executing treaty, it did not provide the defendant an individual right of action to bring this claim.⁴⁹ In 2009, the same court summarily rejected another defendant’s argument that the death penalty violated international human rights norms.⁵⁰ In *Newton v. State*, the court noted that the defendant referred to *Lawrence v. Texas*,⁵¹ *Roper*,⁵² “and international human rights developments, and appear[ed] to contend that the death penalty violates the Eighth Amendment’s ban on cruel and unusual punishment,” but without further explanation, stated “[w]e disagree.”⁵³

Alabama courts have also used international law to reinforce decisions in the family court context. In *Lee v. Lee*, the Court of Civil Appeals of Alabama affirmed a lower court’s decision requiring a mother to submit to supervised visitation based in part on an understanding of the Hague Convention, which can be relevant for providing a uniform basis for adjudicating child custody issues where parents are from or likely to reside in different countries.⁵⁴ The court also noted evidence of the mother’s statements that she would take the couple’s child to Morocco if the court did not decide in her favor as well as the fact that Morocco is not a signatory to the Hague Convention.⁵⁵ These factors, including the status of the Hague Convention in Morocco, were apparently important to the court in determining to uphold the lower court’s ruling.⁵⁶

Arkansas

The Arkansas Supreme Court addressed in 1999 the applicability of the ICCPR to the juvenile death penalty in dicta in *McFarland v. State*.⁵⁷ The court pronounced the defendant’s reliance on the treaty “novel” but declared it “meritless,” observing “the treaty signed by the president provides that persons under age eighteen *may* be sentenced to death.”⁵⁸ In any event, the court noted that the argument was moot, as McFarland had not been sentenced to death.⁵⁹

In 2008, the Arkansas Court of Appeals was faced with the question of whether a defendant’s statements made while in custody should be suppressed due to a failure to inform him of his right to contact the Kenyan consulate in keeping with the VCCR.⁶⁰ The court declined to decide the issue, however, stating that pursuant to the U.S. Supreme Court’s decision in *Medellin v. Texas*,⁶¹ they did not need to decide the issue because the “[Vienna Convention] is not domestically enforceable.”⁶²

Courts in Arkansas have also used the Hague Convention to determine the proper court to decide child custody disputes. In the 2010 case *Courdin v. Courdin*, for example, the court considered whether it was proper for courts in Brazil, where one parent was a citizen, or the United States, where the other parent was a citizen, to determine who should be given custody of their young daughter. The family had moved from Brazil and had been living in Arkansas for almost a year.⁶³ In this case, the court

49 *Id.* at 921.

50 *Newton v. State*, No. CR-05-1517, 2009 WL 3170787 (Ala. Crim. App. Oct. 2, 2009).

51 539 U.S. 558 (2003).

52 543 U.S. 551 (2005).

53 *Newton*, 2009 WL 3170787 at *14.

54 No. 2080905, 2010 WL 1539733 (Ala. Civ. App. Apr. 16, 2010).

55 *Id.* at *3.

56 *Id.*

57 989 S.W.2d 899, 906 (Ark. 1999).

58 *Id.* (emphasis in original).

59 *Id.*

60 *Gikonyo v. State*, 102 Ark. App. 223, 283 S.W.3d 631 (Ark. Ct. App. 2008).

61 128 S. Ct. 1346 (2008) (holding that the International Court of Justice’s opinion in *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 ICJ 12, did not create law that independently binds domestic courts to enforce individual rights pursuant to the Vienna Convention).

62 *Gikonyo*, 102 Ark. App. at 231.

63 2010 Ark. App. 314 (Ark. Ct. App. 2010).

clearly stated that the mandates of the Hague Convention were controlling based on the appellant's filed petition for the child's return under the International Child Abduction Remedies Act (ICARA). Using the Hague Convention's language on habitual residence, the court decided that the trial court's determination that there was a shared intent to set up a habitual residence in the United States was not clearly erroneous.⁶⁴ Thus, the circuit court in which ICARA was filed had jurisdiction to decide the case. The court took care to note that jurisdiction was not established by the appellant's filing of the petition under ICARA in the circuit court. Instead, the petition, the court stated, "merely tested the issue of whether, under the Hague Convention, the United States or Brazilian courts could proceed to the merits of the pending ... custody case."⁶⁵

Arizona

Arizona has addressed international human rights law in at least three death penalty cases. The Supreme Court of Arizona said in a 1983 decision, *State v. Richmond*, that they did not "find it necessary to address [the] contention that the death penalty is a violation of international law," in response to a defendant's argument.⁶⁶ However, in the 2007 case *State v. Tucker*, a death penalty defendant was able to reserve his claim that the death penalty was a violation of international law for federal review.⁶⁷ Two weeks later, the Arizona Supreme Court noted in its decision that death penalty counsel have a duty to "take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client,"⁶⁸ which demands that counsels are "intimately familiar with . . . the substantive state, federal, and *international law* governing death penalty cases."⁶⁹ In *State v. Martinez*, however, the court again rejected the claim that the death penalty "is an irreversible denial of human rights and international law."⁷⁰

The Arizona Court of Appeals also considered international human rights briefly in a 2008 civil case.⁷¹ The court rejected the argument that a recently constructed fence near a condominium complex violated the plaintiff's human rights under the ICCPR.⁷² Although ultimately decided on procedural grounds, the court noted that "the ICCPR [does not] create a private right of action, thus precluding [the plaintiff] from basing his claims on such laws."⁷³

Arizona courts have also looked at the VCCR's implications for criminal defendants. For instance, the 2009 case *State v. Aguilar* considered the situation of a defendant who claimed that his statements to the police were involuntary due to his status as a juvenile and the Vienna Convention.⁷⁴ However, the court concluded that evidence concerning the officers' "knowledge of and/or compliance with" the Vienna Convention was not relevant to whether the defendant's statements were voluntary or not.⁷⁵

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Id.

65

Id.

66 *State v. Richmond*, 666 P.2d 57, 67 (Ariz. 1983).

67 160 P.3d 177, 203 (Ariz. 2007) (en banc).

68 *State v. Garza*, 163 P.3d 1006, 1022 n.16 (Ariz. 2007) (en banc) (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline § 10.11(L) (2003)).

69 *Id.* at 1022 n.16 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline § 1.1 cmt (2003)) (emphasis added).

70 189 P.3d 348, 366 (Ariz. 2008) (citing *Richmond*, 66 P.2d at 67).

71 *Kaenel v. Maricopa County Bd. of Supervisors*, No. 1 CA-CV 08-0043, 2008 WL 4814283, at *2 (Ariz. Ct. App. Oct. 23, 2008).

72 *Id.* at *2.

73

Id.

74 No. 1 CA-CR 06-0035, 2009 WL 690598 (Ariz. Ct. App. Mar. 17, 2009).

75

Id. at *13.

Arizona has also applied international and human rights law in using the Hague Convention on the Civil Aspects of International Child Abduction to determine custody matters.⁷⁶ For example, a father appealed a lower court decision in *West v. Belmont*, which allowed his ex-wife to travel with their daughter, and attempted to use evidence that Brazil, the native country of the ex-wife, did not comply with the Hague Convention even though it was a signatory.⁷⁷ The court rejected this argument and affirmed the lower court's decision, noting that the lower court analyzed Brazil's status as a signatory to the treaty and imposed travel restrictions on the mother and child as the father had requested.⁷⁸

Referring to international law generally, the court in *State v. Flores* determined whether international law prevented the state from exercising jurisdiction over a Mexican defendant charged with smuggling Mexican individuals into Arizona.⁷⁹ Finding that the state was not preempted by international or federal law and thus could prosecute individuals charged with violations of the state's human smuggling law, the court went on to determine whether subject matter jurisdiction existed on the matter. Again, the court concluded that subject matter jurisdiction was also proper because the defendant's criminal activity "was intended to and did direct harm to Arizona."⁸⁰

California

Over the past 20 years, California courts have repeatedly addressed international human rights law in criminal cases. A California Court of Appeals assumed, without deciding, that the VCCR created an individually enforceable right in the review of a criminal case.⁸¹ However, the court still refused to find that the violation of the treaty was reason to exclude the defendant's statements.⁸² In *People v. Rocha*, a defendant argued that his confession was the product of coercion, in part, because he was entitled under Article 36 of the VCCR to be notified of his right to communicate with a consulate official and to have an official notified promptly of his arrest.⁸³ The court found that the statement was not a product of coercion as a result of the error.⁸⁴ Quoting a U.S. Supreme Court decision, the California appeals court noted that "[t]he provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention."⁸⁵ In a 2009 decision, the court rejected a defendant's assertion that the failure to notify him of his right to contact the Mexican Consulate under the VCCR entitled him to a writ of error *coram nobis*, saying that he was alleging errors of law rather than errors of fact.⁸⁶

At least one concurring opinion and one dissent in California criminal cases cited the UDHR in their decisions. In *Cramer v. Tyars*, California Supreme Court Justice Frank Newman dissented, finding that the trial court violated the state constitution by requiring a defendant who suffered from "severe and irreversible mental retardation" to respond to questioning that might incriminate him. Justice Newman

76 See, e.g., *Kelly v. Faizi*, No. 1 CA-CV 08-0583, 2009 WL 3116160 (Ariz. Ct. App. Sept. 29, 2009).

77 No. 1 CA-CV 09-0534, 2010 WL 2025111 (Ariz. Ct. App. May 20, 2010) (reversing and remanding for less burdensome restrictions than confiscating the father's U.S. and Pakistani passport because there were no other reasons to justify the mother's fear that the father would kidnap the children during visitation other than the fact that Pakistan is a non-signatory to the Hague Convention).

78 *Id.* at *1.

79 218 Ariz. 407 (Ariz. Ct. App. 2008) (though the court did not cite any specific treaties, it did refer to 'principles' of international law and application of international law as laid out in the Third Restatement of Foreign Relations Law, §402 (1)(c), (3) (1987)).

80 *Id.* at 415.

81 *People v. Rocha*, No. F051887, 2008 WL 3413131, at *9 (Cal. Ct. App. Aug. 13, 2008), *rev denied*.

82 *Id.* at *9–10.

83 *Id.*

84 *Id.* at *10.

85 *Id.* at *10 (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006)).

86 *People v. Villa*, 202 P.3d 427, 435 (Cal. 2009).

cited the UDHR and found the treatment of the defendant “cruel and degrading.”⁸⁷ In a concurrence in *People v. Levins*, Justice Newman noted his agreement that the defendant had a right to a post-indictment preliminary examination, pointing to amicus briefs by the ACLU suggesting that the court consider the UDHR and the ICCPR, as well as to articles citing CERD.⁸⁸

In various unpublished opinions, the California Supreme Court weighed in on the applicability of international human rights law in the juvenile offender context.

In *People v. Bell*, the court decided that a life sentence without the possibility of parole for a juvenile offender does not violate international law.⁸⁹ Citing *Roper*,⁹⁰ the court stated that, while international consensus against such a sentence is instructive, it is not controlling; thus there was nothing in *Roper* requiring departure from California’s own precedent.⁹¹

In *People v. Her*, the defendant cited the CRC and *Roper* in his argument that a life sentence without the possibility of parole was cruel and unusual.⁹² However, the California Supreme Court found the argument, though successful in the juvenile death penalty context, insufficient in the context of a life sentence with the possibility of parole for a juvenile offender. It stated that “[t]hese authorities are so far removed from the present circumstances” that they do not apply to the defendant because his sentence is much more proportional, given that he had been granted the possibility of parole.⁹³

Similarly, the defendant in *People v. Dyleski* argued that the fact that he was tried as an adult, despite being 16 when he committed the crime, and was sentenced to life without parole violated customary international law.⁹⁴ In that case, the defendant relied on the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man, but the court said that “neither the courts of California nor those of the United States are bound by these agreements.”⁹⁵ They also noted that the CRC has not been ratified by the United States and thus was not binding either.⁹⁶ In *People v. See*, defendants under the age of 18 who were found guilty of murder with gang enhancements argued that their sentence of life without parole violated the ICCPR.⁹⁷ Pointing to the juvenile provisions of the ICCPR, two of the defendants also relied on *Roper* to challenge the constitutionality of their punishment. Distinguishing between the death penalty and life without parole, the court looked to the “callous” nature of the crime and gang affiliation in spite of the defendants’ age for a determination as to whether or not the punishment was still appropriate for the defendants.⁹⁸ The court also addressed the U.S. reservation to that part of the ICCPR which limited the effect of the juvenile provision as support for denying the defendants’ claims.⁹⁹

87 588 P.2d 793, 805 n.1 (Cal. 1979) (Newman, J., dissenting).

88 586 P.2d 939, 942 (Cal. 1978) (Newman, J., concurring).

89 No. E038574, 2007 WL 1653102, at *45 (Cal. Ct. App. June 8, 2007) (citing *Roper v. Simmons*, 543 U.S. at 554, 575), *rev denied* (Sept. 25, 2007).

90 543 U.S. 551 (2005) (holding that sentencing a juvenile to the death penalty is unconstitutional).

91 *Id.*

92 No. C051473, 2007 WL 4217445, at *14 n.8 (Cal. App. 3 Dist. Nov. 30, 2007), *rev denied* (Mar. 12, 2008).

93 *Id.*

94 No. A115725, 2009 WL 1114077, at *36 (Cal. Ct. App. Apr. 27, 2009), *rev denied* (Aug. 12, 2009).

95 *Id.*

96 *Id.*

97 No. F055800, 2009 WL 4882677, 2009 Cal. App. Unpub. LEXIS 10015 (Cal. Ct. App. 5th Dec. 18, 2009).

98 *Id.* at *44.

99 The provision states “[t]hat the policy and practice of the United States are generally in compliance with and supportive of the [ICCPR’s] provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14.” *See* 138 Cong. Rec. S4781-01.

Finally, *People v. Pratcher* considered whether a life sentence for a defendant charged with first-degree murder at the age of 15 violated international human rights norms.¹⁰⁰ The defendant highlighted treaties such as the CRC to support the proposition that “juveniles must be afforded special treatment in the criminal justice system.”¹⁰¹ The court itself cited multiple sections of the CRC and international cases decided in the European Court of Human Rights on the issue, as well as *Roper*.¹⁰² Despite admitting that the trend in international law is toward “protection and rehabilitation of juvenile offenders rather than punishment and deterrence,” the court still found no consensus on the issue, particularly in this country.¹⁰³ As such, it denied the defendant’s claim of cruel and unusual punishment.¹⁰⁴ Notably, this case’s authority is likely limited by the 2010 Supreme Court decision of *Graham v. Florida*, which created a *per se* ban on life without the possibility of parole for juvenile offenders (convicted of non-homicide crimes).¹⁰⁵

However, the majority of California cases addressing international human rights law have been death penalty cases. In a 1987 case, *People v. Ghent*, the defendant relied on various U.N. resolutions in challenging the death penalty law as inconsistent with “principles of international human rights law.”¹⁰⁶ The California Supreme Court rejected these arguments, finding that international resolutions and treaties have no domestic effect without implementing legislation from Congress.¹⁰⁷ Almost 15 years later, in *People v. Hillhouse*, the California Supreme Court denied that the ICCPR, the American Declaration, and CERD prohibited the death penalty, ruling, “international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.”¹⁰⁸ Indeed, the California courts have generally rejected arguments using international human rights law in death penalty cases, both in cases challenging the death penalty sentence and cases challenging the judicial processes in death penalty cases. Defendants generally used three main arguments to challenge the death penalty using international human rights law: (1) the death penalty violates an international treaty (most commonly the ICCPR); (2) the death penalty as a “regular form of punishment” violates international law; or (3) the death penalty violates international norms of human decency and therefore also violates the Eighth and/or Fourteenth Amendments.

Defendants in California frequently argued that the death penalty violates a specific treaty—including CERD, the UDHR, the American Declaration, and, most commonly, the ICCPR. California courts rejected these arguments using several justifications. First, when defendants have tried to argue that the ICCPR prohibits the death penalty, courts have noted that Congress attached a reservation to the treaty reserving the right to impose the death penalty. In a 2004 case, *People v. Brown*, the California Supreme Court again upheld the California death penalty statute against the defendant’s charge that it violated the ICCPR.¹⁰⁹ The court noted that the U.S. Senate had attached a reservation to the treaty expressly reserving states’ rights to impose the death penalty.¹¹⁰ In 2006, the California Supreme

100 No. A117122, 2009 WL 2332183 (Cal. Ct. App. July 30, 2009).

101 *Id.* at *50.

102 *Id.* The court specifically referred to *Hussain v. United Kingdom*, (1996) 22 E.H.H.R. 1, 19.

103 *Id.* at *50. *See also*, *People v. Contreras*, No. F056106, 2009 WL 2488908 (Cal. Ct. App. Aug. 17, 2009).

104 *See also*, *People v. Dyleski*, No. A115725, 2009 WL 1114077 (Cal. Ct. App. Apr. 27, 2009) (similarly overturned holding that a juvenile’s sentence to life without parole where the juvenile argued violations of international law).

105 *Graham*, 130 S.Ct. at 2030.

106 739 P.2d 1250, 1276 (Cal. 1987).

107 *Id.* (citing *Sei Fujii v. California*, 38 Cal. 2d 718 (Cal. 1952)).

108 40 P.3d 754, 782 (Cal. 2002).

109 93 P.3d 244, 258 (Cal. 2004); *see also* *People v. Perry*, 132 P.3d 235, 248 (Cal. 2006) (citing *Brown* and noting “when the United States ratified the treaty, it specially reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under laws permitting the imposition of capital punishment”); *People v. Turner*, 99 P.3d 505, 529 (2004) (citing *Brown* to reject an attempt to use the ICCPR).

110 *Id.* (“Given states’ sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.”).

Court reiterated its position that, given the U.S. government’s reservation to the ICCPR, “international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements.”¹¹¹

Second, California courts have justified their decisions by writing that international law does not prohibit a sentence given in accordance with state and federal constitutional and statutory requirements.¹¹² For example, in the 2009 case *People v. Hamilton*, the defendant argued that imposing the death penalty violated his right to life under several international treaties by which California was bound, including the ICCPR, the UDHR, the American Declaration, CAT, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Vienna Convention on the Law of Treaties.¹¹³ The Supreme Court of California rejected this argument, saying “international law does not prohibit a sentence of death where . . . it was rendered in accordance with state and federal constitutional and statutory requirements.”¹¹⁴

In *People v. Taylor*, the defendant also argued that his death sentence violated international law.¹¹⁵ In this case, the defendant based his contention that imposing the death penalty absent a showing of intent violated international law on the ICCPR and a resolution by the Economic and Social Council of the United Nations. However, the court rejected this argument, stating that the defendant had not established the premise that he “suffered violations of state or federal constitutional law.”¹¹⁶

The defendant in *People v. Gamache* claimed that the imposition of the death sentence in his case violated international law, though he did not cite specific international treaties.¹¹⁷ Instead, the defendant made two contentions based on international law: (1) that the violations of state and national law in his case were also violations of international law; and (2) that his “lengthy confinement under a sentence of death” was cruel and unusual punishment, violating state, federal, and international law.¹¹⁸ Concluding that there were no state or federal violations of law in Gamache’s case, however, the court summarily dismissed the defendant’s claims.

Citing generally to international law, the defendant in *People v. Verdugo* challenged his death sentence based on the violations of state and federal law in his case.¹¹⁹ The court decided, however, that it did not find any state or federal law violations that precluded the imposition of the death penalty. Moreover, the court reiterated that “[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.”¹²⁰

Defendants also have argued that the use of the death penalty as a “regular form of punishment” is a violation of international law. However, the California Supreme Court has explicitly rejected this

111 *People v. Cook*, 139 P.3d 492, 531 (Cal. 2006).

112 *See People v. Hawthorne*, 205 P.3d 245, 361 (Cal. 2009); *People v. Mungia*, 189 P.3d 880, 910 (Cal. 2008); *People v. Riggs*, 187 P.3d 363, 422 (Cal. 2008); *People v. Whisenhunt*, 186 P.3d 496, 534 (Cal. 2008); *People v. Lewis*, 181 P.3d 947, 1034 (Cal. 2008) (citing *People v. Cook*, 139 P.3d 492, 531 (Cal. 2006)); *People v. Valencia*, 180 P.3d 351, 387 (Cal. 2008) (citing *People v. Tafoya*, 164 P.3d 590, 629 (Cal. 2007)); *People v. Kelly*, 171 P.3d 548, 573 (Cal. 2007) (citing *Tafoya*, 164 P.3d at 629); *People v. Carey*, 158 P.3d 743, 761 (Cal. 2007) (citing *People v. Hillhouse*, 40 P.3d 754, 782 (Cal. 2002)); *People v. Leonard*, 157 P.3d 973, 1017 (Cal. 2007); *People v. Prince*, 156 P.3d 1015, 1099 (Cal. 2007) (citing *People v. Jenkins*, 997 P.2d 1044, 1055 (Cal. 2000)); *People v. Boyer*, 133 P.3d 581, 636 (Cal. 2006); *People v. Ramirez*, 139 P.3d 64, 118–19 (Cal. 2006); *People v. Harris*, 118 P.3d 545, 584 (Cal. 2005) (citing *Hillhouse*, 40 P.3d at 782); *People v. Cornwell*, 117 P.3d 622, 659 (Cal. 2005), *overruled on other grounds by People v. Doolin*, 198 P.3d 11, 36 n.22 (Cal. 2009); *People v. Brown*, 93 P.3d 244, 258–59 (Cal. 2004); *People v. Hoyos*, 41 Cal. 4th 872, 925 (Cal. 2007).

113 200 P.3d 898, 971 (Cal. 2009).

114 *Id.*

115 48 Cal. 4th 574 (Cal. 2010).

116 *Id.* at 661.

117 48 Cal. 4th 347, 407 (Cal. 2010).

118 *Id.* at 407–08.

119 50 Cal. 4th 263 (Cal. 2010).

120 *Id.* at 312 (citing *People v. Hillhouse*, 27 Cal. 4th 469 (2002)).

argument, asserting that California's death penalty is not a regular form of punishment because it is used only for the crime of first-degree murder where special circumstances are found to exist.¹²¹ In *People v. Dykes*, the defendant argued in a narrower fashion that, even if the death penalty itself is consistent with international law, its use as a "regular punishment for substantial numbers of crimes" is not consistent with the international law.¹²² The court rejected this argument as well, noting "the death penalty statutes adequately narrow the class of persons subject to the penalty of death under state and federal law."¹²³

Lastly, the Supreme Court of California rejected claims that that application of the death penalty is contrary to international norms of humanity and decency and therefore violates the Eight or Fourteenth Amendments.¹²⁴ For example, the court in *People v. Lindberg* denied the defendant's argument that the death penalty was a "regular form of punishment [in California, used] for a substantial number of crimes, rather than...an extraordinary punishment for extraordinary crimes," and, as such, "offend[ed] the Eighth and Fourteenth Amendments by violating international norms of human decency."¹²⁵

The defendant in *People v. Morgan*, a 2007 case, asserted that California's death sentencing scheme violates the ICCPR, and that the application of the death penalty in this specific case would be a violation of "international norms of humanity and decency reflected in the laws and practices of most civilized nations."¹²⁶ The defendant then argued that California, as one among the minority of jurisdictions in the world that apply the death penalty, thus violates the Eighth Amendment.¹²⁷ In dismissing these claims, the court reiterated that the death penalty is valid under international law so long as the sentencing is compliant with state and federal constitutions and statutory requirements.¹²⁸

For instance, in *People v. Solomon*, as with previous cases, the court summarily addressed the defendant's argument that the death penalty violates international norms and thus was unconstitutional under the Eighth and Fourteenth Amendments.¹²⁹ Citing numerous sources of international human rights law, such as the UDHR, the ICCPR, and the American Declaration of the Rights and Duties of Man, the court noted that an execution in line with state and federal constitutional and statutory law did not violate international law.

The California Supreme Court has given no justification for their denial of a defendant's international

121 See *People v. Watson*, 182 P.3d 543, 578–79 (Cal. 2008) (citing *People v. Blair*, 115 P.3d 1145, 1190 (Cal. 2005), *cert. denied*, *People v. Blair*, 126 S. Ct. 1881 (2006)); *People v. Mendoza*, 171 P.3d 2, 18 (Cal. 2007) (citing *Blair*, 115 P.3d at 1189); see also *People v. Brasure*, 175 P.3d 632, 656 (Cal. 2008); *People v. Wilson*, 178 P.3d 1113, 1139 (Cal. 2008) (citing *People v. Hillhouse*, 40 P.3d 754, 782 (Cal. 2002)).

122 209 P.3d 1, 73 (Cal. 2009); see also *People v. Gutierrez*, 200 P.3d 847, 879 (Cal. 2009) (finding no violation of state or constitutional law where defendant argued that California's use of the death penalty "as regular punishment for substantial numbers of crimes" is contrary to international norms of human decency).

123 *Dykes*, 209 P.3d 1 at 73.

124 See *People v. Avila*, 208 P.3d 634, 672 (Cal. 2009); *People v. Bunyard*, 200 P.3d 879, 898 (Cal. 2009); *People v. Lindberg*, 190 P.3d 664, 704 (Cal. 2008); *People v. Wallace*, 189 P.3d 911, 958 (Cal. 2008); *People v. Loker*, 188 P.3d 580, 628 (Cal. 2008); *People v. Cruz*, 187 P.3d 970, 1005 (Cal. 2008); *People v. Harris*, 185 P.3d 727, 766 (Cal. 2008).

125 190 P.3d at 704 (Cal. 2008).

126 170 P.3d 129, 152 (Cal. 2007).

127 *Id.* (citing *People v. Moon*, 117 P.3d 591, 621 (2005)). In *People v. Moon*, the California Supreme Court acknowledged that what constitutes cruel and unusual punishment is not a "static concept." However, the Court was not convinced that the abolition of the death penalty in Western Europe and the abolishment of the death penalty for crimes committed as a juvenile results in a per se rule that the death penalty is unconstitutional, because no "national consensus has emerged against the death penalty." 117 P.3d at 621.

128 *People v. Morgan*, 170 P.3d at 152.

129 49 Cal. 4th 792 (Cal. 2010). See also *People v. Burney*, 47 Cal. 4th 203 (Cal. 2009) (holding that defendant's death sentence did not violate international law because federal and state constitutional rights were not denied and that claim of mental impairment as to invalidate sentence was not supported by the record).

arguments in death penalty cases, merely saying that their contentions are rejected.¹³⁰ At times, the California Supreme Court has expressed impatience with arguments using international law and international norms in death penalty cases. For example, in *People v. Bennett*, the court wrote, “Defendant argues that executing the defendant after his ‘lengthy confinement under sentence of death’ would constitute cruel and unusual punishment in violation of the federal Constitution, the California Constitution, and international law. We have repeatedly rejected this claim and do so again here.”¹³¹

Death penalty defendants have also used international human rights law to challenge other judicial processes in their cases.¹³² In the 2006 case *People v. Lewis*, one of the defendants, Oliver, claimed that the physical restraints he had to wear before and during his trial violated the UDHR.¹³³ The California Supreme Court found that Oliver’s claim lacked merit, because the trial court’s shackling orders did not violate applicable state or federal law, and because Oliver had failed to show how international law differed from domestic law on the issue.¹³⁴

In 2007, the defendant in *People v. Leonard* failed to show merit under the California constitution in various claims of error, including procedural errors, a juror dismissal error, and a competence of defendant determination error, at the guilt and penalty phases of his trial.¹³⁵ The defendant sought to claim that the same errors were also in violation of the ICCPR, the American Declaration, the American Convention, the European Convention, and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment adopted by the U.N.¹³⁶ The California Supreme Court, however, ruled that these international claims lacked merit because the defendant did not show that his rights under these agreements exceeded those provided for by California law.¹³⁷

Three months later, in *People v. Alfaro*, the defendant claimed that she had been denied the right to a fair trial, protection against arbitrary deprivation of life, and discriminatory application of state criminal law in violation of customary international law, the UNDH, the ICCPR, and the American Declaration.¹³⁸ The California Supreme Court assumed, without a decision, that the defendant had standing to evoke these international instruments; however, it ultimately denied her claims, since she had been afforded a fair trial and had not been subjected to racial discrimination.¹³⁹ The California Supreme Court also reiterated “international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.”¹⁴⁰

130 See *People v. Jackson*, 199 P.3d 1098, 1124 (Cal. 2009); *People v. Bennett*, 199 P.3d 535, 572 (Cal. 2009); *People v. Doolin*, 198 P.3d 11, 60 (Cal. 2009); *People v. Hovarter*, 189 P.3d 300, 333 (Cal. 2008); *People v. Parson*, 187 P.3d 1, 29, 44 Cal. 4th 332, 372 (Cal. 2008).

131 199 P.3d at 571–72; see also *People v. Curl*, 207 P.3d 2, 20 (Cal. 2009) (“Finally, [w]e again reject the argument that the death penalty is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments.”); *People v. Hamilton*, 200 P.3d 898, 971 (Cal. 2009) (“To the extent defendant challenges the death penalty itself as violative of international norms, we again reject this claim as we have done repeatedly and consistently in other cases.”); *People v. Romero*, 187 P.3d 56, 86, 44 Cal. 4th 386, 429 (Cal. 2008) (“We have repeatedly rejected the claim that the death penalty is unconstitutional on the ground it violates international norms.”); *People v. Page*, 186 P.3d 395, 436 (Cal. 2008) (“Finally, we have declined to accept the view that international law compels the elimination of the death penalty in California. . . . We are not persuaded that we should reconsider these determinations.”).

132 See, e.g., *People v. Tafoya*, 164 P.3d 590, 629 (Cal. 2007) (defendant raised claims that he did not receive a fair and impartial trial and that he suffered racial discrimination in violation of international law in death penalty case, but the court opinion did not specifically cite any sources of international law, using only the general term ‘international law’).

133 140 P.3d 775, 824 n.21 (Cal. 2006) (citing *People v. Blair*, 115 P.3d 1145, 1189 (Cal. 2005) (finding that defendant had failed to establish a violation of international law where no federal or state laws were violated)).

134 *Id.*

135 157 P.3d 973 (Cal. 2007).

136 *Id.* at 1017 (Cal. 2007).

137 *Id.*

138 163 P.3d 118, 157 (Cal. 2007).

139 *Id.*

140 *Id.*

The petitioner in *In re Martinez*¹⁴¹ sought a successive writ of *habeas corpus* based on the ICJ case *Case Concerning Avena and Other Mexican Nationals*¹⁴² and the subsequent Presidential Memorandum instructing courts to give effect to the case's ruling that the United States had violated the Vienna Convention's notification requirement.¹⁴³ However, while the petition was still pending, the Supreme Court decided *Medellin v. Texas*.¹⁴⁴ Despite the petitioner's argument that *Medellin* allowed state courts discretion to give effect to *Avena*, the court ruled that the petitioner had already argued that the Mexican consulate was not informed of his confinement in a petition he had filed previous to *Avena*. Thus, the current petition was successive and, as a result, dismissed.¹⁴⁵

California state courts also have significant experience with international human rights law in the civil context. In a few cases, courts have demonstrated a willingness to use treaties and customary international law to develop state constitutional and statutory protections. In a 1952 case, *Sei Fujii v. California*, the California Supreme Court refused to apply the nondiscrimination guarantees of the United Nations Charter to invalidate the California Alien Land Law, which denied immigrants the right to own land in the state.¹⁴⁶ The court inquired into the "intent of the signatory parties" to determine whether the provisions of the charter were self-executing.¹⁴⁷ It held that they were not; although the charter's "humane and enlightened objectives" warranted "respectful consideration by the courts," its language "lack[ed] the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification."¹⁴⁸

In its 1971 decision in *Bixby v. Pierno*, however, the California Supreme Court looked more favorably at international human rights law, citing the UDHR, among other authorities, to support its statement that the California constitution protects the right to practice one's trade or profession.¹⁴⁹ In 1980, two relevant cases came before the Court: *Santa Barbara v. Adamson*, in which the California Supreme Court again invoked the UDHR, this time to interpret a state law protecting privacy;¹⁵⁰ and *Conservatorship of Hofferber*, in which the California Supreme Court cited two U.N. subcommittee hearings in support of its conclusion that the state has a compelling interest in preventing the inhumane treatment of mentally disturbed persons when involuntary confinement is prescribed for them.¹⁵¹ Two years later, in *American National Life Insurance Company v. Fair Employment and Housing Commission*, the court relied on international human rights documents to interpret whether the effects of a statute were discriminatory.¹⁵²

Courts of appeal in California have also drawn extensively on international human rights law. The Fifth District Court of Appeal cited the UDHR in its 1979 decision, *In re White*, to support its determination that the California constitution guaranteed freedom of movement within the state.¹⁵³

141 46 Cal. 4th 945 (Cal. 2009).

142 2004 I.C.J. 12 (Mar. 2004).

143 Memorandum for the Attorney General from the President of the United States of America on Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at <http://www.unhcr.org/refworld/docid/429c2fd94.html>.

144 552 U.S. 491 (2008) (holding that the ICJ decision was not binding on state courts and the Presidential Memo giving effect to the *Avena* decision could not make the Vienna Convention self-executing outside of legislative action on the part of Congress to give a treaty effect within the United States).

145 *Martinez*, 46 Cal. 4th at 967.

146 242 P.2d 617 (Cal. 1952).

147 *Id.* at 620.

148 *Id.* at 622.

149 481 P.2d 242, 251 n.9 (Cal. 1971); *Id.* at 253 n.12.

150 610 P.2d 436, 440 n.2 (Cal. 1980).

151 616 P.2d 836, 844 n.9 (Cal. 1980).

152 651 P.2d 1151, 1154 n.4 (Cal. 1982) (citing UDHR to construe the definition of "physical handicap" in an antidiscrimination statute); see also *Wong v. Tenneco*, 702 P.2d 570, 581 (Cal. 1985) (Mosk, J., dissenting) (citing UDHR); *Perez v. Sharp*, 198 P.2d 17, 29–30 (Cal. 1948) (Carter, J., concurring) (citing U.N. Charter).

153 158 Cal. Rptr. 562, 567 n.4 (Cal. Ct. App. 1979); see also *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 868 n.4 (Cal. Ct.

In its 1986 decision, *Boehm v. Superior Court*, the Fifth District Court of Appeal relied heavily on international law for guidance in interpreting the state’s welfare statute.¹⁵⁴ The plaintiffs had challenged the defendant county’s planned reduction of welfare assistance payments as a violation of the state’s welfare statute.¹⁵⁵ The Court of Appeal held that the statute required the county to provide for minimum subsistence and relied on the UDHR to determine what that entailed.¹⁵⁶ The court concluded that “it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation, and medical care.”¹⁵⁷ The court added, “to leave recipients without minimum medical assistance is inhumane and shocking to the conscience.”¹⁵⁸

In a 2004 case, *C & C Construction, Inc. v. Sacramento Municipal Utility District*, the Third District Court of Appeal contrasted the meaning of discrimination in CERD with the meaning of discrimination under the state constitution.¹⁵⁹ In *C & C Construction*, the plaintiff contractor sued the district, alleging that its race-based affirmative action program violated the state constitution. The California Supreme Court affirmed the trial court’s ruling in favor of the plaintiff, finding that the definition of discrimination in the state constitution, as amended by Proposition 209, prohibited the state from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public contracting, employment, or education. The court noted that California Government Code 8315, enacted during the pendency of the appeal, attempted to change the definition of discrimination in the California constitution to be consistent with the definition in CERD. Section 8315 quoted CERD, which recognizes that “special measures” such as affirmative action “may be necessary in order to ensure . . . equal enjoyment or exercise of human rights and fundamental freedoms.”¹⁶⁰ The court rejected the definition of discrimination in Section 8315 as contrary to the clear meaning of the “anti-discrimination” (i.e., anti-affirmative action) language of the amended state constitution.

More recently, in 2007, the Third District Court of Appeal considered a similar case, *Connerly v. Schwarzenegger*, and cited *C & C Construction* in its discussion. In *Connerly*, the plaintiff sought a declaration that section 8315 was in conflict with the state constitution and therefore invalid.¹⁶¹ The Court of Appeal dismissed the plaintiff’s claim on the grounds that there was no justiciable controversy surrounding the statute, because section 8315 had been successfully challenged in *C & C Construction* and a final decision by an appellate court had rendered the statute null and void.¹⁶²

In contrast, in the context of voluntary school-desegregation plans, a 2004 California superior court upheld the constitutionality of a “race-conscious” school assignment plan to voluntarily desegregate the school district.¹⁶³ The court stated that the proposed application of Proposition 209 by plaintiffs opposing the plan would be “inconsistent with [section] 8315 which provides that ‘[r]acial discrimination’ or ‘discrimination on the basis of race’ . . . shall have the same meaning . . . as defined and used in” CERD.¹⁶⁴ The court further highlighted that section 4 of CERD recognizes that the use

App. 2001).

154 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986), *superseded by statute*, Cal. Welf. & Inst. Code § 17001 (1969), *as recognized in* Gardner v. County of Los Angeles, 40 Cal. Rptr. 2d 271 (Cal. Ct. App. 1995), *rehearing denied* (May 17, 1995) *and review denied* (June 13, 1995).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 18 Cal. Rptr. 3d 715, 725 (Cal. Ct. App. 2004).

160 *Id.* at 725–26 (citing CERD) (internal quotations omitted).

161 53 Cal. Rptr. 3d 203, 207 (Cal. Ct. App. 2007).

162 *Id.* at 213–14.

163 Avila v. Berkeley Unified School Dist., No. RG03-110397, 2004 WL 793295, at *4 (Cal. Super. Ct. Alameda County Apr. 6, 2004).

164 *Id.*

of race-conscious plans may be necessary, so that racial and minority groups may have the “equal enjoyment or exercise of human rights and fundamental freedoms,” and that these measures “shall not be deemed racial discrimination.”¹⁶⁵

In 2008, the California Supreme Court cited the UDHR, the European Convention, the American Convention, and “the constitutions of many nations” in its landmark decision, *In re Marriage Cases*.¹⁶⁶ The court cited the ICCPR, the European Convention, the American Convention, and “the constitutions of many nations throughout the world” to support its decision that marriage is a constitutionally protected, fundamental human interest belonging to the individual and not the state.¹⁶⁷ (The California Constitution was amended in 2008, by Proposition 8, to provide that same-sex marriages would not be valid under California law; at the time of publication, the federal Constitutionality of Proposition 8 was pending appeal.)

California courts have also used human rights law and treaties, particularly the Hague Convention, to analyze both procedural and substantive rights in the family law context.¹⁶⁸ For example, in *Bardales v. Duarte*, the court analyzed whether it was proper of a lower court to dismiss a mother’s petition under the Hague Convention for lack of prosecution.¹⁶⁹ Holding that a court can dismiss Convention petitions if a parent delays prosecution of the matter as well as proceed to determine custody matters after the Convention petition has been dismissed, the Appellate Court affirmed the trial court’s decision to award custody to the father who had earlier filed a petition to return his children.

Connecticut

The state of Connecticut has been open to considering human rights in a variety of legal contexts, such as the inclusion of human rights norms in its Commission on Health Equity,¹⁷⁰ as well as court recognition of international law during considerations of the constitutionality of sentencing juveniles to life without parole. For instance, the court in *State v. Allen* acknowledged that “international practices are relevant” to the question of whether juvenile life without parole is constitutional.¹⁷¹ It also noted, “we agree that the large number of juveniles serving life sentences in the United States as compared to those few other countries that permit such a sentence raises deeply troubling questions.”¹⁷² Ultimately, however, it upheld the sentence, deciding that the “wisdom of this sentencing scheme” should be left to the legislatures, since the U.S. Supreme Court has indicated that juvenile life without parole is consistent with the [E]ighth [A]mendment.¹⁷³

Former Chief Justice Ellen Peters of the Connecticut Supreme Court has openly recognized the important role that state courts can play, and have played to date, in safeguarding human rights.¹⁷⁴

165 *Id.*

166 183 P.3d 384, 426 (Cal. 2008), *superseded by constitutional amendment as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) *as modified* (June 17, 2009), *rehearing denied* (June 17, 2009).

167 *Id.* at 426 n.41.

168 *See, e.g.*, *In re Karla C.*, 186 Cal. App. 4th 1236 (Cal. Ct. App. 2010) (analyzing the Hague Convention’s impact on a decision to award custody in a dependency hearing to a noncustodial parent living in Peru, particularly the court’s ability to enforce its jurisdiction, and remanding for the lower court to clarify that the noncustodial parent in Peru has only temporary custody and collect additional evidence on the ability of the court to enforce its jurisdiction); *Escobar v. Flores*, 183 Cal. App. 4th 737, 746 (Cal. Ct. App. 2010) (using the Hague Convention and cases analyzing the Convention to uphold a lower court’s decision that a nine year old was not too young to qualify under the Convention’s clause that an order of return may be refused if “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”).

169 181 Cal. App. 4th 1262 (Cal. Ct. App. 2010).

170 CT Public Act No. 08-171 (2008).

171 958 A.2d 1214, 1236 (Conn. 2008).

172 *Id.*

173 *Id.*

174 *See* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1072, 1084 (1998).

In a 1995 concurrence in *Moore v. Ganim*,¹⁷⁵ Justice Peters relied on the ICESCR and the UDHR to interpret the Connecticut constitution as requiring a minimal social welfare safety net for the poor.¹⁷⁶ She looked to the UDHR and the ICESCR, among other sources, to support her contention that “contemporary considerations of law and policy” mandate governmental responsibility to provide for the poor.¹⁷⁷ Although the United States is not a party to the ICESCR, she noted that it represented “wide international agreement on at least the hortatory goals” contained within.¹⁷⁸ The majority opinion did not address international human rights law.

Throughout the Connecticut courts’ jurisprudence the response to human rights law has been mixed. In a 1972 Connecticut Supreme Court case, a plaintiff argued that a number of international affirmations of antidiscrimination, including the precursor to CEDAW, prohibited the Connecticut state bar from refusing to admit her on the grounds that she was a foreign national.¹⁷⁹ The court eschewed a discussion of her international law arguments in its rejection of her claim.¹⁸⁰

In contrast, in *Batista v. Batista*, a superior court judge expressed “great concern and embarrassment” that the United States had not signed the CRC and nonetheless used the convention as a guide for her custody determination.¹⁸¹

However, in *Belic v. Amtrak*, another superior court judge refused to allow claims under the UDHR to proceed on the grounds that there was no private right of action for violation of the UDHR.¹⁸² Though the court highlighted that the United States was not a signatory to the UDHR, the court did not address the fact that the United States helped craft the document.¹⁸³ In another unreported decision, *Wendt v. Wendt*, the plaintiff in a divorce proceeding cited the UDHR, articles by legal scholars, and laws in sister states in support of her argument that marriage is a partnership. The superior court considered and dismissed her arguments.¹⁸⁴ Likewise, in *Abdullah v. Warden-Cheshire*, an unreported 2009 decision, the Superior Court of Connecticut dismissed a petitioner’s contention that his sentence of life in prison violates CERD saying that CERD does not provide a private right of action.¹⁸⁵

In *Lantz v. Coleman*,¹⁸⁶ the Superior Court rejected Coleman’s claim that force-feeding a hunger-striking prisoner violated international law. Coleman, who was serving an eight-year sentence in state prison, was engaged in a prolonged and dangerous hunger strike as a form of protest. The Connecticut court conceded that domestic courts “may look for instruction from international sources of law to interpret our state and federal constitutions.”¹⁸⁷ However, such authorities are only binding if the proponent of their use can prove they have “ripened” into customary international law.¹⁸⁸ Coleman asserted that the World Medical Association’s Tokyo and Malta Declarations, which both prohibited forced-feeding, and similar prohibitions by peer countries were instructive.¹⁸⁹ However, the court

175 660 A.2d 742 (Conn. 1995) (Peters, J., concurring).

176 *Id.* at 772.

177 *Id.* at 779.

178 *Id.* at 781.

179 *In re Griffiths*, 294 A.2d 281, 289 (Conn. 1972), *rev’d*, 413 U.S. 717 (1973).

180 *Id.* at 289.

181 6 Conn. L. Rptr. 512, No. FA 92 0059661, 1992 WL 156171, 1992 Conn. Super. LEXIS 1808, at *18–20 (Conn. Super. Ct. June 18, 1992).

182 31 Conn. L. Rptr. 548, No. CV010275697S, 2002 WL 500366, 2002 Conn. Super. LEXIS 795, at *5 (Conn. Super. Ct. Mar. 11, 2002).

183 *Id.*

184 No. D.N. FA96 0149562 S, 1998 WL 161165, 1998 Conn. Super. LEXIS 1023 (Conn. Super. Ct. Mar. 31, 1998).

185 No. CV010457822, 2009 WL 1140526, at *6 (Conn. Super. Ct. Mar. 26, 2009).

186 49 Conn. L. Rptr. 560, No. HHDCV084034912, 2010 WL 1494985, 2010 Conn. Super. LEXIS 621 (Conn. Super. Ct. Mar. 9, 2010).

187 *Id.* at *43.

188 *Id.*

189 *Id.* at *43–47.

found that authorities were split. The court noted that the European Court of Human rights and some peer countries *do* allow force-feeding.¹⁹⁰ The court concluded that there was insufficient consensus to suggest that force-feeding violated customary international law and denied Coleman’s claim.¹⁹¹

Delaware

The Delaware courts have addressed the applicability of the Vienna Convention on Consular Rights in an unpublished 2009 decision.¹⁹² In *State v. Garduno*, the defendant argued he was entitled to post-conviction relief, claiming his rights were violated because he was unable to speak to the Mexican Consulate, which caused him to enter into a guilty plea without informed consent.¹⁹³ The court dismissed this claim, saying, “Delaware does not recognize a defendant’s right to contact his consul under the Vienna Convention on Consular Rights as a Constitutional right.”¹⁹⁴

Florida

A number of Florida courts have considered the ICCPR in their decisions, but in only one case has a judge given the covenant any weight. In a 2000 decision, *Booker v. State*, the defendant argued that pursuant to the ICCPR and CAT, the state had forfeited its right to execute him due to the length of time that he had spent on death row.¹⁹⁵ The Florida Supreme Court rejected the arguments, pointing to a recent decision, *Knight v. State*, in which it had found an identical claim “interesting” but without merit.¹⁹⁶ The court dismissed the international law claim on the grounds that “no federal or state courts ha[d] accepted [defendant’s] argument that a prolonged stay on death row constitute[d] cruel and unusual punishment, especially where both parties bear responsibility for the long delay.”¹⁹⁷

In the 1999 decision in *Brennan v. State*, the Florida Supreme Court struck down the Florida juvenile death penalty.¹⁹⁸ A concurring justice invoked the ICCPR in support of an argument based on “evolving standards of decency.”¹⁹⁹ In 2008, a juvenile defendant urged the Florida District Court of Appeal to *per se* ban the use of the sentence of life without parole for juveniles, citing the ICCPR and the international community’s aversion to the life sentence for juveniles.²⁰⁰ The court found the “international pressure to change our existing legal system” the strongest argument for the defendant’s proposition.²⁰¹ The court discussed at some length the respectable weight of international opinion and how it may shape the court’s interpretation of the Eighth Amendment.²⁰² However, the court ultimately declined to create a *per se* ban on the sentence of life without parole for juveniles, noting that the weight of international opinion must also be balanced against the “due deference owed the state legislatures of this country in matters of sentencing.”²⁰³

190 *Id.* at *51.

191 *Id.* at *51.

192 *State v. Garduno*, No. 0311010209, 2009 WL 1638623, at *2 (Del. Super. May 14, 2009).

193 *Id.*

194 *Id.*

195 773 So. 2d 1079, 1096 (Fla. 2000).

196 *Knight v. State*, 746 So. 2d 423 (Fla. 1998).

197 *Id.* (quoting *Knight v. State*, 746 So. 2d at 437 (Fla. 1998)) (internal quotations and citations omitted).

198 754 So. 2d 1 (Fla. 1999).

199 *Id.* at 14 n.18 (Anstead, J., concurring). That same year the Florida Supreme Court reversed a death penalty conviction for failure to hold a timely competency hearing in violation of the due process clause and a Florida rule of civil procedure, relying in part on a dissenting opinion by Justice Stephen Breyer, invoking foreign decisions on delay in carrying out the death penalty, including a European Court of Human Rights decision. *Jones v. State*, 740 So. 2d 520, 524–25 (Fla. 1999) (citing *Elledge v. Florida*, 119 S. Ct. 366 (1998) (Breyer, J., dissenting from denial of certiorari)).

200 *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *overruled by* *Graham v. Florida*, 130 S. Ct. 2011 (2010).

201 *Id.* at 50.

202 *Id.* at 50–51.

203 *Id.* at 51.

The U.S. Supreme Court granted certiorari for this case in the 2009–2010 term in *Graham v. Florida*, addressing the issues of whether the Constitution mandates *per se* ban on sentencing juveniles to life without parole.²⁰⁴ Similar to the decision in *Roper v. Simmons*, the Court relied on the different development expectations as juveniles and referred to international consensus on the propriety of life without the possibility of parole as a punishment for juveniles. Holding that it was not a proper punishment for juveniles who had committed non-homicide crimes, the Court noted “that Article 37(a) of the United Nations Convention on the Rights of the Child . . . ratified by every nation except the United States and Somalia, prohibits the imposition of ‘life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.’”²⁰⁵

A Florida District Court of Appeal addressed international human rights law in the civil context in a 2002 case, *Toca v. State*.²⁰⁶ The *pro se* plaintiff refused to sign court papers on religious grounds, invoking the ICCPR in support of his argument. After observing that there is “scant case law nationally, and none . . . in Florida” that interprets the treaty’s article concerned with religious freedom, the court found the ICCPR inapplicable due to the U.S. Senate’s reservation declaring it non-self-executing.²⁰⁷ The court also noted that at least one court had interpreted Article 18 of the ICCPR, the religious freedom provision, as “furnishing no greater rights or protections than those provided in the First Amendment.”²⁰⁸ As a result the court concluded that even if the ICCPR were enforceable, the plaintiff’s assertions under the ICCPR would fail on their merits, just as his constitutional claims had failed.²⁰⁹

In a 2008 case, the Supreme Court of Florida also addressed the applicability of the VCCR.²¹⁰ The defendant in *Lugo v. State* alleged that because the Bahamian police failed to contact the American Embassy in the Bahamas or notify him of his right to contact them, that the evidence resulting from this violation of the VCCR should be suppressed.²¹¹ The court dismissed this contention saying that the defendant did not establish standing, based on the notion that “treaties are between countries, not citizens.”²¹² The court went on to note that even if the defendant had established standing, he could not show that the he was prejudiced by the violation.²¹³

Florida courts have also addressed international law as a general concept protecting human rights, particularly in the death penalty context. In 2010, the defendant in *Johnston v. State* challenged his death sentence conviction on the grounds that it was now unconstitutional under the Eighth Amendment and violated international law, due to the extreme length of time that he had been awaiting execution.²¹⁴ Using “binding international law” as support, the defendant argued that his sentence should be reduced to life after spending 25 years on death row.²¹⁵ Citing other cases where similar arguments had been rejected in spite of defendants having been on death row for up to 31 years, the court stated that his argument was “without merit.”²¹⁶ In relation to this claim, the court also

204 130 S. Ct. 2011 (2010).

205 *Id.* at 2034.

206 834 So. 2d 204 (Fla. Dist. Ct. App. 2002).

207 *Id.* at 211.

208 *Id.*

209 *Id.*

210 *Lugo v. State*, 2 So. 3d 1, 17 (Fla. 2008).

211 *Id.*

212 *Id.* (citing *Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000) (holding that defendant’s allegation of the State’s failure to uphold its international obligations when it did not alert the British consulate that a British citizen had been charged with a capital crime was procedurally barred because it was not raised on direct appeal as it could have and should have been)).

213 *Lugo v. State*, 2 So. 3d at 17.

214 27 So. 3d at 11 (Fla. 2010).

215 *Id.* at 28.

216 *Id.* at 27–28.

noted that the protracted delay was the result of the defendant’s actions challenging his conviction.²¹⁷

Though most defendants citing international human rights law in Florida referred to specific treaties, the defendant in *Kilgore v. State* referred generally to international law to challenge his death sentence in a post-conviction appeal.²¹⁸ Here, the defendant challenged the specific methods of execution that would be used to execute him, namely lethal injection or electrocution. In addition to finding that the defendant’s claim was procedurally barred because he had not raised it on direct appeal, the court summarily declared that the defendant’s argument was “without merit” and denied his claim for relief.²¹⁹

Hawaii

In 2007, the Hawaii Supreme Court cited the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, in addition to CEDAW, as support in upholding a state statute criminalizing prostitution. Although the Convention itself targets trafficking and does not express an opinion on prostitution, the court cited it, as well as CEDAW, to illustrate “a general consensus in the international community that prostitution has negative consequences.”²²⁰ The court rejected the defendant’s Constitutional privacy argument, upholding her conviction.²²¹

In 2010, the plaintiffs used international law to support a claim based on the rights of indigenous people to their traditional lands in *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*.²²² The plaintiffs sought both a declaratory judgment and an injunction to prevent the defendants from alienating ceded land from the public trust. Though the court recognized the support that international law provided the plaintiff’s claims, it declined to “engage in a discussion of these issues inasmuch as our holding is grounded in Hawai’i and federal law.”²²³ In the end the court decided for the plaintiffs, vacating a lower court ruling against them and remanding with instructions to grant the requested injunction. A later version of this case reversed and remanded this ruling.²²⁴

Illinois

The Illinois Supreme Court has addressed international human rights law in its death penalty decisions. In *People v. Caballero*, the court rejected the argument by the Mexican government, appearing as an amicus, that the death penalty imposed on an 18-year-old Mexican national violated CERD and the ICCPR.²²⁵ In response to the country of Mexico’s argument—that the execution of the defendant, one of four perpetrators and the only noncitizen, “would have an unmistakable discriminatory effect”—the court discussed the substance of CERD based on Mexico’s framing of the issues as based on the language and import of the Convention.²²⁶ On this basis the court held that the defendant had failed to establish a *prima facie* case of discrimination.²²⁷ In response to the ICCPR argument—that the defendant was unfairly sentenced to death while a co-perpetrator was given a much lighter sentence—the court invoked the U.S. Senate’s reservation to the ICCPR, asserting that the ICCPR must be read

217 *Id.*
 218 Nos. SC09-257, SC09-1552, 2010 WL 4643043 (Fla. Nov. 18, 2010).
 219 *Id.* at *20.
 220 *State v. Romano*, 155 P.3d 1102, 1114 n.14 (Haw. 2007).
 221 *Id.* at 1114.
 222 117 Hawai’i 174 (2008), *reversed and remanded by Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009).
 223 *Id.* at 211, n.25.
 224 *See Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*, No. 25570, 2009 WL 1449040 (Haw. May 15, 2009).
 225 794 N.E.2d 251, 272 (Ill. 2002).
 226 *Id.* at 272–74.
 227 *Id.* at 273.

consistently with the U.S. Constitution. Because the imposition of the death penalty was constitutional, the court found that the ICCPR offered no relief.²²⁸

The Illinois Supreme Court's decision in *People v. Madej* is notable for its discussion of the VCCR in the context of a death penalty case.²²⁹ The defendant, a Polish citizen, contended that his sentence was void under international law due to the state's failure to inform him of his right to contact the Polish consulate to assist him with his defense.²³⁰ The court held that the international legal principle of *restitutio in integrum*, an equitable remedy recognized in international law that provides for the restoration of an injured party to his condition *ex ante*, did not invalidate a death sentence.²³¹ Moreover, the court opined, the defendant's rights were a matter of public record, and therefore the state did not fraudulently conceal his right to contact a consular official.²³² The decision provoked strong dissents, including one from a justice who cited a decision from the Inter-American Court of Human Rights that held that the execution of an individual deprived of his rights under the Vienna Convention violated the "right not to be deprived of life 'arbitrarily'" under the American Declaration and the ICCPR.²³³

In *People v. Rajagopal*, the defendant argued that his trial counsel was ineffective for failing to tell him of collateral immigration consequences of his guilty plea and that he would have won at trial because the police did not alert the Indian consulate of his arrest under the Vienna Convention.²³⁴ However, the court did not address the defendant's argument under the Vienna Convention, instead focusing on the issue of whether collateral immigration consequences, namely deportation, constituted imprisonment for purposes of post-conviction petitions. The court held that it did not, and the defendant was not entitled to relief.²³⁵

Similarly, stating that the defendant's argument was foreclosed based on *People v. Madej* and *People v. Montano*, the court in *People v. Najera*²³⁶ interpreted precedent from the U.S. Supreme Court's ruling in *Sanchez-Llamas v. Oregon*²³⁷ to hold that "the treaty does not generally provide enforceable individual rights and that any remedy that might be applied in a given case is subject to state procedural default rule."²³⁸ The court then found that the defendant's conviction was not void and, even if the defendant was able to claim a justiciable remedy under the Vienna Convention, his guilty plea waived such a right.²³⁹

In *People v. Martinez*, the defendant argued that the court should have suppressed his statements to police in light of failures to alert the Mexican consulate in violation of the Vienna Convention based on the "remedy and justice" provision of the Illinois Constitution.²⁴⁰ Rejecting the defendant's attempt to use the state's constitution to enforce international rights under the Convention, the court held that the provision "is merely an expression of a philosophy and not a mandate that a certain remedy be

228 *Id.* at 275.

229 739 N.E.2d 423, 426 (Ill. 2000). *See also* *People v. Montano*, 365 Ill. App. 3d 195, 200 (Ill. Ct. App. 2006) (declining to address the issue of whether the Vienna Convention creates a right enforceable by individuals in court but finding that it does not create a fundamental right such that courts should grant a new trial for its violation as with a Miranda violation, for example).

230 *Id.*

231 *Id.* at 426–27.

232 *Id.* at 428.

233 *Id.* at 429 (McMorrow, J., dissenting).

234 381 Ill. App. 3d 326 (Ill. Ct. App. 2008).

235 *Id.* at 330–31.

236 371 Ill. App. 3d 1144, 864 N.E.2d 324 (Ill. Ct. App. 2007).

237 548 U.S. 331 (2006).

238 *Najera*, 371 Ill. App. at 1147.

239 *Id.*

240 372 Ill. App. 3d 750 (Ill. Ct. App. 2007).

provided in any specific form.”²⁴¹

The defendant in *People v. Salgado* also argued that, due to the police’s obtainment of his signature in violation of the Vienna Convention, the court should have suppressed his statement.²⁴² Even though the court held that the defendant had individual rights under the Vienna Convention, it found that reversal of the defendant’s conviction and remanding for a new trial with instructions to suppress the statement would not be the appropriate remedy.²⁴³

In *People v. Vasquez*,²⁴⁴ the defendant made an ineffective assistance of counsel argument based on his post-conviction counsel’s failure to allege that his trial counsel was ineffective for not alleging a violation of his rights under the Vienna Convention. Rejecting this claim, the court held that post-conviction counsel did not fail to provide reasonable representation despite a failure to amend the claim to allege a violation of the Vienna Convention. It added that relief on a post-conviction claim was inappropriate for a trial attorney’s failure to move to suppress statements based on a violation of the Vienna Convention.²⁴⁵

In 2000, Chief Justice Harrison of the Illinois Supreme Court cited international and human rights bodies, the courts of the British Commonwealth, and the European Convention in his dissenting opinion in *People v. Simms*.²⁴⁶ Referring to the British Commonwealth and the European Convention, Chief Justice Harrison stated that holding a defendant on death row for 15 years was “torture . . . inhumane or degrading treatment.”²⁴⁷ In part, because the court viewed the American judicial system as favoring the hearing of all meritorious death sentence appeals, the majority had rejected the inmate’s contention that his multiple death resentencing hearings were unconstitutional.²⁴⁸

Indiana

Indiana courts appear to have addressed international human rights in only a handful of cases.²⁴⁹ In *Baird v. State*, the petitioner sought a subsequent challenge to his death penalty conviction on the grounds that he should not have been sentenced to death because he was mentally ill when he had committed the murders.²⁵⁰ The petitioner argued that international treaties and customary international law prohibited death sentences for the mentally ill, and he was therefore entitled to post-conviction relief. The court concluded that the petitioner had not shown a reasonable possibility of success as required for a successive post-conviction claim. It further noted that three of the documents cited by the petitioner—the ICCPR, the UDHR, and CAT—did not specifically discuss the execution of mentally ill people. According to the court, incarcerated individuals like the petitioner lack standing to claim relief under these documents, citing the U.S. Supreme Court’s decision in *Sosa v. Alvarez-Machain*,²⁵¹ which held that the UDHR did not “of its own force” impose obligations as a matter of international law. The court went on to say that, given U.S. reservations in ratifying these documents, they did not themselves create obligations enforceable in American courts.²⁵²

241 *Id.* at 757.

242 366 Ill. App. 3d 596 (Ill. Ct. App. 2006).

243 *Id.* at 608–09.

244 356 Ill. App. 3d 420 (Ill. Ct. App. 2005).

245 *Id.* at 425.

246 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, J., dissenting).

247 *Id.*

248 *Id.* at 1140–41.

249 *Smith v. Ind. Dep’t of Corr.*, 881 N.E.2d 1100, 1004 (Ind. Ct. App. 2008), is a recent Indiana case where a defendant claimed his jail conditions violated the UNDH. The court, however, declined to address the issue and deemed the suit as frivolous and based on “misguided legal theories as to the application of the Universal Declaration of Human Rights.”

250 831 N.E.2d 109 (Ind. 2005).

251 124 S. Ct. 2739 (2004).

252 *Baird*, 831 N.E. 2d at 115.

In *Matthew v. State*, the court considered the appeal from an alleged battery case, where the defendant claimed that she was using reasonable corporal punishment on her child.²⁵³ While the case was not decided using international law, the dissenting opinion pointed to U.N. recommendations to ban corporal punishment and numerous other countries' bans on corporal punishment.²⁵⁴

Lastly, Indiana courts have also considered the rights of defendants under the VCCR.²⁵⁵ In *Olvera v. State*, an Indiana court addressed a foreign defendant's claim that he was entitled to post-conviction relief because he had never been advised of his right to talk with the Mexican consulate under the Vienna Convention.²⁵⁶ The court found that the defendant failed to show any actual prejudice as a result of the failure, and thus was not entitled to post-conviction relief on these grounds.²⁵⁷

Iowa

The Iowa Supreme Court has addressed international human rights when reviewing an appeal of a criminal conviction. To determine whether the defendant was properly convicted of first-degree kidnapping, the court in *State v. White* sought to determine whether torture could encompass mental as well as physical anguish.²⁵⁸ The court looked to various definitions of torture in dictionaries, treaties, and case law from other jurisdictions, including a federal court case in Georgia that cited the definition of torture in CAT.²⁵⁹ The court relied on the definition of torture in that case and others and affirmed the defendant's conviction on the grounds that mental anguish alone was sufficient to constitute torture for first-degree kidnapping.²⁶⁰ In another case, *State v. Gailey*, the Iowa Court of Appeals relied on *State v. White's* definition of torture to find sufficient evidence of torture to support a defendant's conviction for first-degree kidnapping.²⁶¹

Additionally, the Iowa Supreme Court has looked at the applicability of the VCCR. In *Ledezma v. State*, the Iowa Supreme Court declined to say whether foreign individuals have a private cause of action when they are not notified of their right to contact the consulate after arrest or imprisonment pursuant to the VCCR.²⁶² The court did note, however, that any attorney representing a foreign national has a duty to advise his or her client of their rights under the VCCR.²⁶³

In 2003, the court revisited the issue in *State v. Buenaventura*.²⁶⁴ There, a defendant argued on appeal that the trial court should have suppressed his statements to the police because they were obtained in violation of the VCCR and thus were not voluntary.²⁶⁵ The Iowa Supreme Court held that "the exclusionary rule simply does not apply to evidence obtained in violation of Article 36" of the VCCR.²⁶⁶ Without deciding whether the treaty creates an individually enforceable right, the Court reasoned that suppression of evidence is only an appropriate remedy for a violation of the VCCR if the treaty provides for that remedy.²⁶⁷ Because it concluded it did not, the court rejected the defendant's

253 892 N.E.2d 695, 698 (Ind. Ct. App. 2008).

254 *Id.* at 702 (Baker, J., dissenting).

255 *See, e.g.,* *Olvera v. State*, 899 N.E.2d 708 (Ind. Ct. App. 2009); *Sanchez v. State*, 891 N.E.2d 174, 177 n.2 (Ind. Ct. App. 2008) (the court queries whether the defendant had been advised of his consular rights under the Vienna Convention, citing *Alexander v. State*, 837 N.E.2d 552, 557-58 (Ind. Ct. App. 2005)).

256 899 N.E.2d 708, 711 (Ind. Ct. App. 2009).

257 *Id.*

258 668 N.W.2d 850 (Iowa 2003).

259 *Id.* at 856-88.

260 *Id.*

261 No. 08-0628, 2009 WL 778772, at *2 (Iowa Ct. App. Mar. 26, 2009).

262 626 N.W.2d 134, 151 (Iowa 2001). *See also* *State v. Lopez*, 633 N.W.2d 774, 782 (Iowa 2001).

263 *Id.* at 152.

264 660 N.W.2d 38, 44 (Iowa 2003).

265 *Id.* at 44.

266 *Id.* at 45.

267 *Id.* at 45-46.

contention that evidence obtained should be suppressed.²⁶⁸ The court did not address whether there was actual prejudice as a result of the error.²⁶⁹

The 2009 case, *Garcia v. State*, analyzed similar issues.²⁷⁰ There, the defendant argued that he had ineffective counsel because his attorney failed to inform him of his right to contact his consulate.²⁷¹ The court noted that, “even assuming that defense counsel did have a duty to inform Garcia of his right to consular access, we find that Garcia has failed to show prejudice” as a result of the attorney’s failure to notify.²⁷² In this case, it found that the defendant had not shown that contact with the consulate would have assisted him.²⁷³

Courts have also used the Hague Convention to decide child custody issues. For example, *In re Marriage of Rudinger* analyzed the status of a country as a Hague Convention signatory in its consideration of a party’s claim that the appellee would not abide by the dissolution decree.²⁷⁴ Affirming a dissolution proceeding decision awarding custody to a parent planning to return to Germany with a couple’s child, the court noted that the Hague Convention provided support for the appellant’s right to have the dissolution decree upheld if the appellee did not abide by it. The court also stated that “[o]ur hope for justice for our citizens in foreign courts can best be forwarded by our efforts to offer fair and equitable treatment to foreign nationals in our jurisdiction.”²⁷⁵

In *Thompson v. Iowa Dist. Court for Polk County*, the court used the Hague Convention to determine the child’s home state in a custody hearing.²⁷⁶ It found that, even though the child had visited her mother in Australia from June 3, 2006 to August 1, 2007, the child’s home state was still Iowa, where the father had filed an application under the Hague Convention for the child’s return.²⁷⁷

Kansas

Kansas courts have addressed international human rights law in the context of both criminal and family law. In *Kansas v. Kleypas*, the state’s supreme court rejected the defendant’s claim that customary international law and unspecified treaties invalidated the Kansas death penalty statute.²⁷⁸ The court rejected the argument in a conclusory fashion, reasoning, “The weight of federal and state authority dictates that no customary international law or international treaty prohibits the State of Kansas from invoking the death penalty as a punishment for certain crimes.”²⁷⁹ In *In re D.A.*, the Kansas Court of Appeals examined the U.N. Declaration on the Rights of the Child as part of its refusal to restore the custody of a child to a Mexican national who had been accused of abuse.²⁸⁰ The court quoted the declaration as evidence of customary international law, but then held that it was consistent with Kansas’s law and thus did not require any further examination.²⁸¹

268 See 660 N.W.2d at 46.

269 See 660 N.W.2d at 45.

270 No. 05-1013, 2009 WL 1066520 (Iowa Ct. App. Apr. 22, 2009).

271 *Id.* at *7.

272 *Id.* at *8. *Cf.* 626 N.W.2d 134, 152 (Iowa 2001) (noting that an attorney did have a duty to inform his noncitizen client of his right to contact the consular office of his home state under the Vienna Convention).

273 *Id.*

274 No. 09-0281, 2009 WL 3337609 (Iowa Ct. App. Oct. 7, 2009).

275 *Id.* at *3.

276 No. 09-0770, 2010 WL 624216 (Iowa Ct. App. Feb. 24, 2010).

277 *Id.* at *4

278 40 P.3d 139, 255 (Kan. 2001), *overruled on other grounds by* *Kansas v. Marsh*, 126 S. Ct. 2516 (2006).

279 *Id.*

280 794 P.2d 1177, No. 63,956, 1990 Kan. App. LEXIS 453, *6–10 (Kan. Ct. App. June 29, 1990).

281 *Id.* at *9.

Kansas courts have also examined the VCCR. In *State v. Amaya-Ticas*, the Kansas Court of Appeals addressed the defendant’s argument that his guilty plea was involuntary based on a denial of his rights under the Vienna Convention to consult with the Mexican consulate.²⁸² After describing the treaty, the court noted that the law is “unsettled as to whether the Vienna Convention gives rise to any individually enforceable rights.”²⁸³ However, the court went on to find that the purpose of the treaty is to “promote peaceful international relations,” not rights for individuals. As such, the court declined to uphold the defendant’s claim, noting that even if the Vienna Convention did grant individual rights, the defendant did not prove that he had been prejudiced.²⁸⁴

Kentucky

Kentucky courts have addressed international human rights law in both the criminal and family law contexts. In 2006, the Kentucky Supreme Court considered the ICCPR in reviewing a death sentence, rejecting the defendant’s argument that the ICCPR was a properly ratified treaty and therefore part of the supreme law of the land. The court pointed to a Sixth Circuit decision that noted that the ICCPR was not binding on U.S. courts and did not require the United States to abolish the death penalty. The court noted that the United States had to abide by the covenant only “to the extent that the 5th, 8th, and 14th amendment ban cruel and unusual punishment.”²⁸⁵ The court found that the defendant had received a fundamentally fair trial and was not deprived of any legal right. More recently, in 2007, the Kentucky Supreme Court reasserted that Congress ratified the ICCPR with the specific reservation that Articles 1 through 27 are not self-executing, thus leaving the death penalty defendant without a cause of action under the ICCPR.²⁸⁶

Kentucky also addressed international law in another death penalty case, one which involved an allegedly “mentally retarded” defendant.²⁸⁷ The defendant claimed that he was “at least borderline mentally retarded” and should not be subject to the death penalty because of several international treaties, including the ICCPR and the UDHR.²⁸⁸ Though the court denied the defendant’s claims on procedural grounds, it went on to address the international law claims. They noted that the ICCPR does not require the elimination of the death penalty, and that the United States has agreed to follow the ICCPR only to the extent that the Constitution bans cruel and unusual punishment.²⁸⁹ While the Eighth Amendment bars the execution of developmentally disabled individuals, the defendant was found to not be developmentally disabled at trial, and as a result, sentencing him to the death penalty did not violate the treaty or the Constitution.²⁹⁰ The court went on to cite the U.S. Supreme Court case *Medellin v. Texas*,²⁹¹ saying that “to be binding on the states, treaties must either be self-executing or carried out by way of legislation,” and that the ICCPR was neither self-executing nor did it have implementing legislation.²⁹² Lastly, they noted that the UDHR is not a treaty, but rather a statement of principles and so Kentucky courts were not bound by it.²⁹³

282 No. 97,537, 2008 WL 440827 (Kan. Ct. App. Feb. 15, 2008).

283 *Id.* at *2.

284 *Id.*

285 *Simmons v. Commonwealth*, 191 S.W.3d 557, 567 (Ky. 2006) (citing *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001)), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

286 *Halvorsen v. Commonwealth*, No. 2004-SC-000017-MR, 2007 WL 2403390, at *8 (Ky. Aug. 23, 2007).

287 *Parrish v. Commonwealth*, 272 S.W.3d 161, 179 (Ky. 2008).

288 *Id.*

289 *Id.* at 180.

290 *Id.* *But see Atkins v. Virginia*, 536 U.S. 304 (2002).

291 *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008).

292 *Parrish*, 272 S.W.3d at 180.

293 *Id.*

In 1999, a Kentucky Court of Appeals applied the ICCPR by way of the Hague Convention, in a case involving a Greek father's efforts to retrieve his daughter from her mother, who was residing in Kentucky.²⁹⁴ The mother defended her actions by arguing, *inter alia*, that Greek police had subjected her daughter to physical and verbal abuse in violation of the ICCPR.²⁹⁵ The court did not analyze the applicability of the covenant, holding that the mother had failed to allege anything other than vague, insufficient indictments of the Greek police system.²⁹⁶

Louisiana

In the Louisiana Supreme Court case *State v. Kennedy*, the court determined that a death sentence for the rape of a child is not unconstitutional, but in so doing discussed the appropriateness of judges in using international opinion as instructive in their own interpretation of the Eighth Amendment. The subsequent U.S. Supreme Court decision held that under the evolving standards of decency defining the Eight Amendment, capital punishment was not a proportionate sentence for the crime of child rape. The sentence therefore violated the Eight and Fourteenth Amendments.²⁹⁷

In *State v. Craig*, the state's Court of Appeal affirmed the trial court's decision to change the sentence of a juvenile defendant under the age of 18 from a death sentence to life without parole.²⁹⁸ The defendant challenged the trial court's decision, arguing that a sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence violated the ICCPR and the Supremacy Clause of the U.S. Constitution. The court rejected the defendant's argument, noting that although the U.S. Supreme Court discussed the ICCPR in *Roper*,²⁹⁹ it was in the context of rejecting the death penalty for juvenile offenders, not life imprisonment for juvenile offenders. The Louisiana court emphasized that the *Roper* Court had, in fact, affirmed the defendant's life without parole sentence. The court added that when the United States ratified the ICCPR, it reserved the right "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws . . . including such punishment for crimes committed by persons below eighteen years of age."³⁰⁰

Maine

The Supreme Court of Maine has not yet considered international human rights law on the merits. However, in 2000, the court did refer to international law in a case involving charges of criminal assault of a son by his father.³⁰¹ The court had to draw a line between actions deemed as criminal assault and the fundamental right of parents to control the upbringing of their children, including the use of reasonable force to control their behavior.³⁰² The court looked to European common law to support its finding of the parental right to use such force to control behavior.³⁰³ It noted that the European Court of Human Rights had ruled that the standards of English common law contravened the European Convention, which applies to the United Kingdom and is viewed as "effectively prohibiting approval of parental corporal punishment."³⁰⁴

294 Janakakis-Kostun v. In re Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999).

295 *Id.* at 851.

296 *Id.*

297 *State v. Kennedy*, 957 So. 2d 757, 784 n.30 (La. 2007) (citing *Roper v. Simmons*, 543 U.S. at 575), *rev'd*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

298 944 So. 2d 660, 662-64 (La. Ct. App. 2006).

299 543 U.S. 551, 578 (2005).

300 *Craig*, 944 So. 2d at 662-64 (internal quotations and citations omitted).

301 *State v. Wilder*, 748 A.2d 444 (Me. 2000).

302 *Id.* at 450.

303 *Id.* at 449 n.6.

304 *Id.*

Maryland

The Maryland Supreme Court has considered international human rights law in several cases. In a 1984 decision, the court refused to invalidate the state's juvenile death penalty statute on constitutional grounds.³⁰⁵ Although the court noted that the ICCPR and the American Convention "have called for the abolition of capital punishment of juveniles," it contrasted their provisions with the practices of states and decided that it was "unable to conclude that society's contemporary standards of decency have rejected capital punishment of juveniles."³⁰⁶ The defendant's sentence was vacated on appeal because he was improperly advised of his right to a jury sentencing, however, and he was sentenced to life in prison after Maryland passed a law prohibiting the death penalty for juveniles subsequent to the first case.³⁰⁷

In *Grimes v. Kennedy Krieger Institute*, the court relied extensively on the Nuremberg Code to reach its decision that, in certain circumstances of non-therapeutic research programs, informed consent can create a special relationship giving rise to greater duties, the breach of which are actionable in court.³⁰⁸ In *Grimes*, a lead poisoning research program was conducted by an affiliate of the Johns Hopkins University. The project sought to follow the effects of lead poisoning in children by limiting the amount of lead paint that was removed from residential premises. The Johns Hopkins Institutional Review Board approved the project; it allowed for the accumulation of lead in the blood of children, which was previously recognized by the same researchers as highly hazardous,³⁰⁹ and considered the informed consent of parents as sufficient. The court noted that the subjects were primarily low-income, and that landlords were encouraged, and at least in one case required, to have families with young children as their tenants. In the court's view, "[P]arents, whether improperly enticed by trinkets, food stamps, money or other items, have no more right to intentionally and unnecessarily place children in potentially hazardous non-therapeutic research surroundings, than do researchers. In such cases, parental consent, no matter how informed, is insufficient."³¹⁰ The court relied heavily on the Nuremberg Code.³¹¹ It noted that "The Nuremberg Code specifically requires researchers to make known to human subjects of research 'all inconveniences and hazards reasonably to be expected, and the effects upon his health or person which may possibly come from his participation in the experiment.'" The court concluded that the interest of the particular child subjected to the research overrides the interests of the parents, researchers, and public at large.³¹²

In a gender identity case, where the petitioner was transitioning from male to female and wanted the gender changed on all of her documents to reflect her identity accordingly,³¹³ the Maryland Supreme Court looked favorably toward international human rights law. The court ruled that lower courts have jurisdiction to consider the recognition of gender changes based on the evidence available to them, and that an outright ban on gender modification, as a matter of law, was improper.³¹⁴ In so doing, the court cited the European Convention and a decision from the European Court of Human Rights concluding that the "deep personal, social, and economic interest in having the official designation of his or her

305 Trimble v. Maryland, 478 A.2d 1143 (Md. 1984).

306 *Id.* at 1161.

307 Trimble v. State, 582 A.2d 794, 802 (Md. 1990). *See also* Md. Code, Art 27 § 412 (f)(1989), *repealed by* Acts 2002, c. 26, § 1, eff. Oct. 1, 2002.

308 782 A.2d 807, 858 (Md. 2001).

309 *Id.* at 812.

310 *Id.* at 814.

311 *Id.* at 835 ("The Nuremberg Code is the 'most complete and authoritative statement of the law of informed consent to human experimentation.' It is also 'part of international common law and may be applied, in both civil and criminal cases, by state, federal and municipal courts in the United States.'").

312 *Id.* at 849.

313 *In re Heilig*, 816 A.2d 68 (Md. 2003).

314 *Id.* at 87.

gender match what, in fact, it always was or possibly has become”³¹⁵ is indeed a right.³¹⁶

In *Diallo v. State*, the Maryland Court of Appeals affirmed the trial court’s dismissal of Diallo’s claim that he had diplomatic immunity through his father.³¹⁷ According to the Vienna Convention on Consular Relations, visiting diplomats have immunity while in the country.³¹⁸ That immunity usually extends to members of the diplomat’s family and household.³¹⁹ However, Diallo’s father was a diplomat in the U.N. The principle source of U.N. Diplomatic immunity is the U.N. Convention, not the Vienna Convention as Diallo had claimed.³²⁰ Thus, the U.N. Convention acts as a threshold and Diallo had to have been in compliance with it in order to prevail on his Vienna Convention claim. According to U.N. Convention Article IV, Section 11, a diplomat’s immunity is limited to “functional immunity,”³²¹ which means only actions taken in furtherance of his official duties are immune. A diplomat is only functionally immune when he is present in the United States.³²² Thus, in order for Diallo to claim immunity he would have needed to prove that his father was present in the country at the time of his offense and that his offense was in furtherance of his father’s official duties.³²³ The Court of Appeals found that Diallo had not proven that his father was present in the country at the time of his offense, and affirmed his conviction.³²⁴

Massachusetts

The Massachusetts Supreme Judicial Court, in *Adoption of Peggy*, held that the CRC did not prohibit the termination of a father’s parental rights and the adoption of his child without his consent.³²⁵ Although the court held that the convention did not apply to Massachusetts’s courts because the United States had not ratified it, the court nonetheless applied the CRC and held that the proceedings complied with the CRC’s provisions.³²⁶

In *Commonwealth v. Diemer*,³²⁷ a criminal defendant argued on appeal that his statements to state police should have been suppressed for failure to comply with the Vienna Convention on Consular Relations, as he had made statements to the police while under investigation without being informed of his rights to notify his consulate. However, the court upheld the trial court’s finding that this violation of the convention had not prejudiced defendant. Additionally, the court stated that the VCCR does not provide suppression of evidence as a remedy.

In January 2011, the Supreme Court of Massachusetts issued a decision regarding consular notification rights under the Vienna Convention in *Commonwealth v. Gautreaux*.³²⁸ The defendant in *Gautreaux* was an immigrant from the Dominican Republic who was arrested (on charges that were later dismissed) and received an order of deportation based on a guilty plea from previous charges, dating from five years earlier. The defendant moved to vacate his guilty plea and for a new trial, based on the fact that he had never been notified of his right as a foreign national to have his consulate informed of his arrest pursuant to article 36 of the VCCR. The defendant also argued that he was never provided

315 *Id.* at 86.
 316 *Id.* at 86 n.7.
 317 994 A.2d 820 (Md. 2009).
 318 *Id.* at 829.
 319 *Id.* at 829.
 320 *Id.* at 831.
 321 *Id.*
 322 *Id.*
 323 *Id.* at 832.
 324 *Id.* at 834.
 325 767 N.E.2d 29 (Mass. 2002).
 326 *Id.* at 37.
 327 57 Mass. App. Ct. 677 (2003).
 328 458 Mass. 741 (2011).

an interpreter, and that he was not made aware of the possibility of his deportation as a result of a guilty plea.

The decision in *Gautreaux* addressed whether art. 36 of the VCCR confers an individually enforceable right to consular notification, and what remedy is appropriate for a violation of that right. While it concluded that an individual defendant did have an enforceable right to consular assistance following arrest, it also held that the defendant was not entitled to a new trial. The court reviewed the federal circuit court split on the issue of individually enforceable rights, as well as a decision by the International Court of Justice. The Massachusetts court's treatment of the ICJ decision is particularly notable, since it states that ICJ decisions are entitled to "respectful consideration."³²⁹ This aspect of the decision essentially articulates a Charming Betsy doctrine for the state, suggesting that state courts should avoid violating established principles of international law. By assigning such a status to the ICJ decision, the Massachusetts court tacitly acknowledged its own role within the international system as well.

Based on the ICJ determination that art. 36 grants rights enforceable by individual detainees as well as by signatory states, the court concluded that a clear violation of the VCCR creates an obligation to "provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation."³³⁰

However, the court denied the defendant's motion for a new trial. The court stated that in a postconviction review, it is "incumbent on the foreign national to demonstrate that the failure to comply with art. 36 of the Vienna Convention gave rise to a substantial risk of a miscarriage of justice," in other words, when the court has a "serious doubt whether the result of the [proceeding] might have been different had the error not been made."³³¹ In the consular notification context, this required that at a minimum, the defendant establish that his consulate would have provided assistance that would have favorably affected the outcome of his case.³³² The defendant did not produce sufficient evidence to support this argument, failing to show what assistance his consulate would have provided. The court also found that, even if the consulate would have assisted the defendant, that assistance would have resulted in procedural protections similar to those already afforded the defendant, such as the right to counsel.

Michigan

Two dissenting justices of the Michigan Supreme Court have relied on international human rights law to support their positions. In a 1986 case, a dissenting justice disagreed with the majority's decision upholding a Michigan statute that required two religious schools to close for failure to comply with a teacher certification requirement.³³³ To support her interpretation of the First Amendment's Establishment Clause, the justice cited the UDHR for the proposition that "parents should have the prior right, and primary role, in directing the education of their children."³³⁴

In *State v. Davis*, a 2005 decision, a dissenting justice disagreed with the majority's decision that a prior conviction in Kentucky for a single offense did not bar a second prosecution in Michigan.³³⁵ The justice took issue with the majority's reliance on what she deemed outdated U.S. Supreme Court case law on the double jeopardy clause and invoked the ICCPR in support of her argument.³³⁶

329 *Id.* at 625, *citing* Breard v. Greene, 523 U.S. 371, 376 (1998).

330 *Id.* at 751.

331 *Id.* at 751, *citing* Commonwealth v. LeFavre, 430 Mass. 169, 174 (1999).

332 *Id.* at 626.

333 *Sheridan Road Baptist Church v. Michigan*, 396 N.W.2d 373, 398 (Mich. 1986) (Riley, J., dissenting).

334 *Id.* at 408 n.30.

335 695 N.W.2d 45, 54–55 (Mich. 2005) (Kelly, J., dissenting).

336 *Id.* (observing that "international law recognizes that multiple prosecutions by separate nations violate fundamental human

Minnesota

The Supreme Court of Minnesota first addressed the applicability of the VCCR to a criminal defendant's rights in the 2008 case, *Arredondo v. State*.³³⁷ After being convicted of first-degree felony murder and losing on appeal, the defendant applied for post-conviction relief alleging ineffective assistance of counsel, in part, because the defendant was not notified of his right to consular assistance under the VCCR and his trial and appellate attorneys had failed to pursue the error.³³⁸ The court found that, though his ineffective assistance claim was barred on other grounds against his trial attorney, the appellate attorney reasonably could have determined that the defendant could not have shown the required prejudice from the error, and thus would not have succeeded on the claim.³³⁹

The court also decided *State v. Morales-Mulato* in 2008, which considered whether a defendant's statements should have been suppressed based on a violation of the Vienna Convention by noting that, "[b]ecause it is a treaty, the Vienna Convention is the supreme law of the land and is binding on the states."³⁴⁰ In spite of this, the court held that suppression was not an appropriate remedy for violating a foreign national's rights under the Vienna Convention.³⁴¹ In doing so, it referred to the U.S. Supreme Court's decision in *Sanchez-Llama v. Oregon*³⁴² and Minnesota's precedent established in *State v. Miranda*³⁴³ for support. The court did note, however, that a violation of the Vienna Convention could be used in assessments of whether statements were "voluntary, knowing, and intelligent."³⁴⁴ *Joseph v. State* considered whether a defendant who was a foreign national was prejudiced when he was not notified that he had the right to contact his consulate.³⁴⁵ Citing *State v. Miranda*,³⁴⁶ the court noted that the defendant has the burden of proving a violation of the Vienna Convention resulted in prejudice to him or her.³⁴⁷ Pointing out that the defendant's native language was English and that he did not claim to have incompetent counsel or trouble understanding and communicating with his counsel, the court found that the defendant was not prejudiced by the violation.³⁴⁸

Minnesota courts have also looked at other forms of international law. For instance, in *Scala v. Pearson*, the court addressed whether the lower court abused its discretion by granting attorney fees and costs to the appellant after it granted the petition for the return of a child under Hague Convention.³⁴⁹ After the court discussed the Convention itself, it held that "[t]he district court has broad discretion in applying the attorney fee provision of the Convention consistent with local laws and standards."³⁵⁰ Using a standard of clear error, the Court of Appeals affirmed the district court's decision to award fees, reiterating the district court's decision that the respondent had not shown that awarding attorney fees to the appellant would be "clearly inappropriate."

In addition, *State v. Martin* considered whether imposition of life without parole for a juvenile was cruel and unusual punishment in violation of the Constitution.³⁵¹ Though the court did not explicitly

rights" and citing the ICCPR).

337 754 N.W.2d 566, 575 (Minn. 2008).

338 *Id.*

339 *Id.* at 576.

340 744 N.W.2d 679, 685 (Minn. Ct. App. 2008).

341 *Id.*

342 126 S. Ct. 2669 (2006).

343 622 N.W.2d 353, 356 (Minn. Ct. App. 2001).

344 744 N.W.2d at 686.

345 No. A08-0385, 2009 WL 817849 (Minn. Ct. App. Mar. 31, 2009).

346 622 N.W.2d 353, 356 (Minn. Ct. App. 2001).

347 2009 WL 817849 at *9.

348 *Id.*

349 Nos. A09-709, A09-761, 2010 WL 606967 (Minn. Ct. App. Feb. 23, 2010).

350 *Id.* at *5 (citing *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004)).

351 773 N.W.2d 89 (Minn. 2009).

refer to human rights documents, it noted the defendant’s argument that the imposition of life without the possibility of release for an individual who committed the crime as a juvenile violated international law in a footnote.³⁵² Comparing the U.S. Supreme Court’s analysis of international law in *Roper*,³⁵³ the court said that the Supreme Court only looked to international law for “confirmation” since “interpreting the Eighth Amendment remains our responsibility.”³⁵⁴

Mississippi

Only since the U.S. Supreme Court’s decision in *Roper* have Mississippi courts given weight to international human rights law.³⁵⁵ In ruling on a 2003 habeas petition in *McGilberry v. State*, the Mississippi Supreme Court rejected the petitioner’s arguments under the ICCPR, invoking U.S. Senate reservations and noting that the treaty did not bar the state from executing a juvenile offender.³⁵⁶ After the U.S. Supreme Court’s decision in *Roper*, however, the Mississippi Supreme Court remanded the case to the circuit court with instructions that it should resentence the defendant to life imprisonment without parole.³⁵⁷

In a 2004 opinion in *Dycus v. State*,³⁵⁸ the Mississippi Supreme Court also rejected the defendant’s argument that the ICCPR barred the juvenile death penalty. The court indicated no willingness to consider international law and stated:

[T]his is an appeal concerning a crime committed in the State of Mississippi and heard by a Mississippi state court. . . . [The defendant] has cited no applicable laws in the United States nor in Mississippi where international law has been applied to a death penalty case in a state court. The issue is without merit.³⁵⁹

The U.S. Supreme Court overturned and remanded *Dycus* on appeal³⁶⁰ in light of its decision in *Roper*. The Mississippi Supreme Court called for supplemental briefs from the parties, and both sides agreed that *Dycus* should be resentenced to life in prison without parole.³⁶¹ Justice Michael Randolph made clear that he concurred only because his “oath and loyalty to th[e] office and the law require[d] [him] to comply with the mandate of the U.S. Supreme Court in *Roper*,”³⁶² and drew upon Supreme Court Justice Scalia’s criticism of the majority opinion in *Roper* as “legally flawed, lack[ing] valid reasoning and def[ying] historic precedent.”³⁶³

In a 2005 case, *Jordan v. State*, the petitioner sought post-conviction relief, alleging that his attorneys were ineffective because they had failed to raise various international treaties as defenses to imposition of the death penalty.³⁶⁴ The petitioner cited the ICCPR, CAT, CERD, the American Convention, and the ICESCR, claiming that those treaties should be enforced under the Supremacy Clause of the U.S. Constitution.³⁶⁵ The court “unhesitatingly acknowledged” the U.S. Supreme Court’s decision in *Roper*,

352 *Id.* at 98 n.3.
 353 125 S. Ct. 1183 (2005).
 354 773 N.W.2d at 98 n.3.
 355 543 U.S. 551 (2005).
 356 *McGilberry v. Mississippi*, 843 So. 2d 21, 32 (Miss. 2003).
 357 *McGilberry v. State*, 2000-DR-00343-SCT, 2005 Miss. LEXIS 598 (Miss. Sept. 22, 2005).
 358 875 So. 2d 140, 168–69 (Miss. 2004).
 359 *Id.* at 168–69.
 360 *Dycus v. Mississippi*, 544 U.S. 901 (2005).
 361 *Dycus v. State*, 910 So. 2d 1100 (Miss. 2005).
 362 *Id.* at 1102 (Randolph, J., specially concurring).
 363 *Id.* (internal citations and quotations omitted).
 364 918 So. 2d 636, 656 (Miss. 2005).
 365 *Id.*

but noted that the petitioner was 18 years of age—“and only 81 days from his 19th birthday”—and it therefore chose to “decline to rely on international law, covenants and treaties in determining whether the death penalty is appropriate.”³⁶⁶

Missouri

The Missouri Supreme Court in *Simmons v. Roper* found that juvenile executions were prohibited by the Eighth and Fourteenth Amendments.³⁶⁷ The court found it “of note . . . although by no means dispositive . . . that the views of the international community have consistently grown in opposition to the death penalty for juveniles.”³⁶⁸ The court referred to the CRC and to “other international treaties and agreements” that “expressly prohibit the practice.”³⁶⁹

In *Rosito v. Rosito*, the court considered a mother’s argument in a post-divorce motion that the trial court erred in allowing a father to take their child to Guatemala because the Hague Convention on the Civil Aspects of International Child Abduction did not sufficiently protect her rights, since Guatemala was not a signatory to the treaty.³⁷⁰ However, the court declared the matter moot because the United States recognized Guatemala’s accession to the Convention eight months before the case was decided.³⁷¹

Montana

In 2004, the Montana Supreme Court ruled that Montana University’s denial of health coverage to same-sex partners of employees was a policy not rationally related to a legitimate government interest, including marriage, and violated equal protection.³⁷² In a special concurrence, Judge Nelson drew upon the Montana constitution’s human dignity clause, which, he noted, “reflects the international community’s focus on human dignity as a fundamental value.”³⁷³ The clause found its origins in the Puerto Rican constitution, which “followed from a history of international and foreign constitution-making and human rights declarations at the end of World War II” and ultimately came from international concepts of human dignity.³⁷⁴

Nebraska

Recently, Nebraska courts analyzed the implications of the VCCR protections for parents facing termination of parental rights.³⁷⁵ For instance, *In re Interest of Antonio O.* addressed whether a father had been prejudiced due to a state’s failure to comply with the Vienna Convention to notify his consulate of proceedings to terminate his parental rights.³⁷⁶ Though the court stated that this argument lacked merit and the father was not denied due process as a result of the state’s failure to notify the Mexican consulate, it noted that the department should implement procedures to follow Neb. Rev. St. §43-3804, which requires the notification of consulates in cases where minors they have made wards are foreign nationals or have multiple nationalities.³⁷⁷

366 *Id.*
 367 *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *aff’d*, 543 U.S. 551 (2005).
 368 *Id.* at 411.
 369 *Id.*
 370 268 S.W.3d 410 (Mo. App. W.D. 2008).
 371 *Id.* at 419.
 372 *Snetsinger v. Montana Univ.*, 104 P.3d 445 (Mont. 2004).
 373 *Id.* at 458.
 374 *Id.*
 375 *In re Interest of Antonio O.*, 18 Neb. App. 449 (Neb. Ct. App. 2010). *See also* *In re Interest of Angelica L.*, 277 Neb. 984 (Neb. 2009) (holding that the juvenile court’s finding that the State complied with the Vienna Convention was not erroneous in considering whether compliance with the Vienna Convention is a jurisdictional prerequisite in actions to terminate parental rights).
 376 18 Neb. App. 449 (Neb. App. Ct. 2010).
 377 *Id.* at 467.

Nevada

As with most states' courts, the Nevada Supreme Court has addressed international human rights law in the context of its death penalty jurisprudence. Although the court as a whole has at times displayed little patience with international law,³⁷⁸ at least one justice, Robert Rose, has proven willing to consider human rights claims.

In *Servin v. State*³⁷⁹ the Nevada Supreme Court relied on the U.S. Senate's reservation to the ICCPR to hold that the treaty does not prohibit American jurisdictions from executing juveniles, although it found other reasons to invalidate the sentence as applied to the defendant.³⁸⁰ In his concurring opinion, Justice Rose argued that customary international law prohibits the execution of minors and thus provided a second basis for the majority's decision.³⁸¹ He considered and rejected the argument that the Senate's reservation to the ICCPR is invalid,³⁸² but then examined the work of international law scholars to support his conclusion that customary international law required that the defendant's sentence be commuted.³⁸³

Similarly, in *Domingues v. State*, a majority of the Nevada Supreme Court relied on the reservation to the ICCPR to reject the defendant's argument that the treaty bars the execution of minors.³⁸⁴ Justice Rose dissented, arguing that the case should be remanded to allow the district court to determine whether the Senate's reservation is valid and, if not, whether the treaty would continue to bind the United States.³⁸⁵ Chief Justice Charles Springer also dissented, arguing that the ICCPR is a binding treaty and that the United States should not "[join] hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children."³⁸⁶

New Hampshire

The New Hampshire Supreme Court relied on international human rights law to support its interpretation of parental rights under the state constitution.³⁸⁷ In *State v. Robert H.*, a father challenged the termination of his parental rights on grounds of neglect.³⁸⁸ After a discussion of the constitutional right of parents to assume the primary role in their children's upbringing, the court quoted from the ICCPR and the ICESCR in support of its conclusion:

On an international level, the United Nations Covenant on Civil and Political Rights holds that "the family is the natural and fundamental unit of society and the State." Art. 23, s. 1 (1966). Likewise the United Nations Covenant on Economic, Social and Cultural Rights recognizes that the "widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society. . . ." Art. 10, s. 1 (1966). The family and the rights of parents over it are held to be natural, essential, and inherent rights within the meaning of [the] New Hampshire Constitution.³⁸⁹

378 *E.g.*, *Colwell v. Nevada*, 59 P.3d 463, 469 (Nev. 2002) (declining to address the argument that death by lethal injection violates the ICCPR based on defendant's failure to raise such issues at trial or on appeal or that it had already been decided).

379 32 P.3d 1277 (Nev. 2001).

380 *Id.* at 1285.

381 *Id.* at 1289 (Rose, J., concurring).

382 *Id.*

383 *Id.* at 1291–92.

384 961 P.2d 1279, 1279–80 (Nev. 1998).

385 *Id.* at 1281 (Rose, J., dissenting).

386 *Id.* at 1280 (Springer, C.J., dissenting).

387 393 A.2d 1387 (N.H. 1978), *overruled in part by* *In re Craig T.*, 147 N.H. 739 (N.H. 2002).

388 *Id.* at 1387.

389 *Id.* at 1389.

New Jersey

New Jersey courts have examined international human rights law on several occasions. In *Sojourner A. v. New Jersey Department of Human Services*, the Supreme Court of New Jersey summarily rejected arguments by *amici curiae* that a New Jersey statute establishing a “family cap” in New Jersey’s welfare program violated international norms related to birth-status discrimination.³⁹⁰ In *ACLU v. County of Hudson*, a suit to compel counties that held detainees for the Immigration and Naturalization Service in their jails to disclose information on detainees, the New Jersey Appellate Division found that “questions of whether and the extent to which international law guarantees have been denied to the INS detainees are not before us,” but acknowledged that it must “construe State statutes and such federal laws as may come before [it] agreeably to any treaties to which the United States may be a party, for treaties are the supreme law of the land.”³⁹¹ However, the international law issues had not been developed sufficiently in the trial court to be preserved for appeal.

In a 1998 decision, *State v. Nelson*, the Supreme Court of New Jersey noted that international law did not require invalidation of New Jersey’s death penalty, given that the United States had not subscribed to any human rights accord that invalidated the death penalty.³⁹² The Supreme Court of New Jersey echoed that reasoning in *State v. Timmendequas*, finding again that customary international law did not require invalidation of the New Jersey death penalty.³⁹³

In *State v. Caraballo*,³⁹⁴ the court relied on the U.S. Supreme Court’s decision in *Sanchez-Llamas*³⁹⁵ to reject the defendant’s motion to suppress his statements at trial. The Court in *Sanchez-Llamas* held that suppression of evidence was not a remedy for violation of the VCCR. The VCCR does not provide suppression as a remedy, but rather states that the Convention is to be applied according to the procedures of the forum state.³⁹⁶ The Court held that suppression, which under U.S. law is generally reserved for Constitutional violations, would be a disproportionate remedy for a violation of the VCCR – especially as the VCCR does not provide rights beyond consular notification.³⁹⁷ The court in *Caraballo* considered itself bound by the Court’s interpretation in *Sanchez-Llamas*.

In *Wing v. Noguera*,³⁹⁸ despite The Republic of Trinidad and Tobago not being a signatory to a reciprocity pact with the United States regarding family support obligations, the New Jersey Superior Court utilized the principle of inter-jurisdictional comity to uphold child support payments. The court defined comity as “the recognition that one nation gives to the ‘legislative, executive or judicial acts of another nation.’”³⁹⁹ It then described comity as more than a “mere courtesy” but less than an “absolute obligation.”⁴⁰⁰ It further found that “it has become necessary and commonplace . . . for courts to interpret and enforce the laws of other jurisdictions.”⁴⁰¹ The court stated:

Comity represents “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to

390 177 N.J. 318, 336 n.9 (N.J. 2003).

391 799 A.2d 629, 640 (N.J. Super. Ct. App. Div. 2002).

392 715 A.2d 281, 294 (N.J. 1998).

393 737 A.2d 55 (N.J. 1999).

394 2009 WL 21509 (N.J. Super. Ct. App. Div. Jan. 6, 2009).

395 548 U.S. 331 (2006).

396 *Id.* at *6.

397 *Id.*

398 2008 WL 5194382 (N.J. Super. A.D. Dec. 12, 2008).

399 *Id.* at *4 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1985)).

400 *Id.* at *4 (citing *Fantony v. Fantony* 21 N.J. 525, 533 (1956)).

401 *Id.* at *4 (citing *Cogen Techs. v. Boyce Eng’g Int’l, Inc.*, 241 N.J. Super. 268, 273 (1990)).

the rights of its own citizens or of other persons who are under the protection of its law.”⁴⁰²

The court further listed a two-pronged approach to determine whether there is comity. First, the foreign court must have subject matter jurisdiction. Second, the “foreign judgment must not offend the public policy of our own State.”⁴⁰³

New Mexico

As with many other states, New Mexico has also begun to consider human rights law in certain cases. For instance, criminal defendants have invoked the VCCR for protection of their rights in New Mexico courts. *State v. De Rio Aguilar* is one such case.⁴⁰⁴ There, the defendant argued that his statements to police should have been suppressed because, in violation of the VCCR, he was denied the opportunity to contact the Mexican consulate and did not have access to an interpreter.⁴⁰⁵ In addition to noting that the defendant did not seem to have trouble understanding English, the court found that the “New Mexico Supreme Court has determined that the provisions of the VCCR do not create legally enforceable individual rights.”⁴⁰⁶ As a result, the court affirmed the lower court’s decision to deny the defendant’s motion to suppress his statements to police.⁴⁰⁷

Courts in New Mexico have also noted the general need for judges to draw upon international law in their decisions. In *City of Aztec v. Gurule*, the Supreme Court of New Mexico stated, “indeed, we could not succeed in our work if we were not free to consult the great body of local, state, national, and international law that exists.”⁴⁰⁸

New York

New York courts have been addressing international human rights law for decades. In a 1950 case, a New York trial court considered the UDHR in its decision prohibiting a labor union that had exclusive negotiating rights with a tavern from forcing the establishment to fire its female barmaids, who were ineligible to join the union.⁴⁰⁹ The court condemned discrimination on the grounds of gender “as a violation of the fundamental principles of American democracy” and noted that provisions of the UDHR were “[i]ndicative of the spirit of our times,” quoting Articles 2 and 23, which protect equal rights and the right to work, free choice in employment, favorable work conditions, and protection against unemployment.⁴¹⁰

In *Jamur Productions Corp. v. Quill*, a 1966 case concerned with the right of workers to strike, a lower court pronounced the provisions of the UDHR “precepts of ethical behavior” and analogized them to “doctrinal codes and commands of religious bodies and orders.”⁴¹¹ The court noted, however, that these “precepts” did not “yet entail judicial authority” and were “not in the texture of known categories of actions available here, despite the growth of regard and concern for redress of tortious wrongs.”⁴¹²

402 2008 WL 5194382 at *4 (citing Fantony, 21 N.J. at 533).

403 *Id.* at *5 (citing Zanzonico v. Neeld, 17 N.J. 490, 495 (1995)).

404 2010 WL 4550738 (N.M. Ct. App. June 24, 2010).

405 *Id.*

406 *Id.* at *4.

407 *See also* State v. Peralta, No. 28,115, 2010 WL 4162104 (N.M. Ct. App. May 25, 2010) (holding the same).

408 228 P.3d 477, 479 (N.M. 2010).

409 Wilson v. Hacker, 101 N.Y.S.2d 461, 472–73 (N.Y. Sup. Ct. 1950).

410 *Id.*

411 51 Misc. 2d 501, 509 (N.Y. Sup. Ct. 1966).

412 *Id.*

A 1972 decision by the New York Court of Appeals considered whether “children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life.”⁴¹³ The court found that the state constitution “does not confer or require legal personality for the unborn” and affirmed the Appellate Division’s order, remanding the case to the trial court to enter a declaratory judgment “sustaining the validity of the statute” that outlined “[j]ustifiable abortifacient act[s].”⁴¹⁴ In his dissenting opinion, Judge Adrian Burke argued that “our laws should protect the unborn,” pointing to the U.N. Convention against Genocide, “which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation.”⁴¹⁵ He concluded that “the butchering of a foetus [sic] under the present law is inherently wrong, as it is an illegal interference with the life of a human being of nature.”⁴¹⁶

In a 1979 decision, a lower court addressed international human rights law in a discovery dispute. The court considered whether to allow the issuance of letters rogatory to a court in the Soviet Union to take the testimony of a party.⁴¹⁷ The court noted that letters rogatory are the least favored method of disclosure and added that denying alleged heirs in the Soviet Union the right to pursue their inheritance by appearing in New York court violated the Helsinki Accords, an international human rights treaty signed by both countries. The court denied the petitioner’s motion to take testimony by means of letters rogatory, quoting extensively from the Helsinki Accords, including the portion that guarantees U.S. and Soviet compliance with international human rights principles:

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the U.N. Charter and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.⁴¹⁸

In 1984, another lower court demonstrated its willingness to accept the UDHR as a source of legal obligation.⁴¹⁹ The court in *Beck v. Manufacturers Hanover Trust Co.* recited the act of state doctrine, which bars American courts from inquiring into the validity of the public acts of a foreign sovereign on its own soil, but opined in a footnote that the act of state doctrine would not apply “for acts in gross violation of accepted standards of international law.”⁴²⁰ The court pointed to the Second Circuit’s decision in *Filartiga v. Peña-Irala*, which drew upon “universally accepted norms of the international law of human rights.” The *Beck* court suggested in dicta that violations of the U.N. Charter and the UDHR may be actionable in American courts.⁴²¹

A few years later, in *State v. Scutari*, a lower court again considered the applicability of international human rights law. The defendants, accused of criminal trespass, argued that they were justified in remaining in a U.S. Congressman’s office after closure to protest U.S. aid to El Salvador, given its human rights violations.⁴²² In their defense, the defendants testified, and called witnesses to testify, that the law of the United States incorporates international law, as well as constitutional law and

413 *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 199, 201 (N.Y. 1972).

414 *Id.* at 199, 203.

415 *Id.* at 206–08.

416 *Id.* at 208.

417 *In re Estate of Vilensky*, 424 N.Y.S.2d 821 (N.Y. Surrog. Ct. 1979).

418 424 N.Y.S.2d at 824–25 (internal quotations and citations omitted).

419 *Beck v. Mfrs. Hanover Trust Co.*, 125 Misc. 2d 771 (N.Y. Sup. Ct. 1984).

420 *Id.* at 774 n.5.

421 *Id.* (citing 630 F.2d 876, 885 (2d Cir. 1980)).

422 560 N.Y.S.2d 943 (N.Y. Dist. Ct. 1990).

treaties. According to the defendants' expert in international law and human rights, continued U.S. aid to the government of El Salvador violated the Geneva Accords. The court "acknowledge[d] that international law is part of United States Law."⁴²³ But the court concluded that the "defendants offered no proof that the Congressman's vote would have any immediate impact on the continued funding" of the government of El Salvador; therefore, the defendants' actions did not constitute "an emergency measure that could reasonably have been thought to accomplish the goal of changing United States policy."⁴²⁴

More recently, in *People v. Wolfer*,⁴²⁵ the defendant resorted to the consular provision of the VCCR. The court found the argument to be misplaced. It reasoned that the Vienna Convention does not create any enforceable fundamental rights. Even if a violation were to be found, it does not warrant vacatur of a guilty plea and resulting conviction.⁴²⁶

Several cases have allowed New York courts to consider the application of international law to family law. In *the Matter of Pedro M.*,⁴²⁷ the court reasoned that an amendment to the Family Court Act allowed for increased direct participation of a minor in Family Court matters that affect their lives. In a footnote, it cited the U.N. Convention on the Rights of the Child and stated that children should be given the opportunity in matters affecting them to freely express their views during proceedings.⁴²⁸

The court considered the applicability of international law to the guardianship of the developmentally disabled in *In re Mark C.H.*⁴²⁹ Mark C.H. ("Mark"), suffered from "mental retardation," autism, and other behavioral and health problems.⁴³⁰ His extremely wealthy adoptive mother passed away, leaving Mark and his brother the beneficiaries of a \$12 million trust.⁴³¹ The trustee never spent any of the trust fund money on Mark, nor did he ever visit the child.⁴³² The court found that Mark was on Medicaid and unable to afford one of the medicines needed to help his symptoms.⁴³³ Furthermore, Mark was unable to acquire any of the items or services that his caregivers at school thought would improve his quality of life.⁴³⁴ The court stated that, "[t]he facts in this case dramatically demonstrate why a statute that gives a guardian control over the life of a person with mental retardation and/or developmental disabilities must include a provision for periodic court review."⁴³⁵

The *In re Mark C.H.* court used international human rights law as one justification for its conclusion. It found that the Convention and Optional Protocol on the Rights of Persons with Disabilities (the Disabilities Convention), which President Obama signed and recommended for ratification, supports monitoring of guardians.⁴³⁶ (Though the Treaty has not been ratified, the United States still has an obligation under the Vienna Convention to "refrain from acts which would defeat [the Disability Convention's] object and purpose.")⁴³⁷ The Disability Convention recognizes that disabled people are equal before the law and "[s]tates may act in order to support disabled individuals who are exercising

423 *Id.* at 946.

424 *Id.*

425 889 N.Y.S.2d 883 (Table), No. 03-09854, 2009 WL 1664774 (N.Y.Sup.), 2009 N.Y. Slip Op. 51211 (N.Y. Sup. Ct. June 12, 2009).

426 *Id.*

427 864 N.Y.S.2d 869 (N.Y. Fam. Ct. 2008).

428 *Id.* at 872.

429 906 N.Y.S.2d. 419 (N.Y. Sur. Ct. 2010).

430 *Id.* at 420.

431 *Id.* at 419.

432 *Id.* at 420.

433 *Id.* at 421.

434 *Id.*

435 *Id.*

436 *Id.* at 431–32.

437 *Id.* at 432 (citation omitted).

their legal capacities.”⁴³⁸ The state’s actions “shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.”⁴³⁹ Thus, the state should monitor guardianships to ensure that disabled persons are not abused. The court also found a basis for periodic review of guardianships in the International Covenant on Civil and Political Rights (ICCPR).⁴⁴⁰ The ICCPR “provides for the ‘right of self determination,’”⁴⁴¹ and obliges signatories to, “adopt . . . measures as may be necessary to give effects to the rights recognized” in the covenant.⁴⁴² Thus, the court reasoned that periodic monitoring of guardianships of the developmentally disabled would bring the state into compliance with its obligations under the ICCPR.

In three relatively recent cases, New York courts have considered the effect of international law on service and the enforcement of foreign judgments. In *Am. Int’l Group v. Greenberg*,⁴⁴³ the court addressed service requirements under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. It held that the Convention’s language on service limited it to “official channels,”⁴⁴⁴ and made no reference to the permissibility of alternate means of service.⁴⁴⁵

In *Galliano v. Stallion*,⁴⁴⁶ Galliano requested the recognition of a foreign judgment in his favor (and against Stallion) by the New York courts. Stallion argued that the New York courts should not have recognized the judgments of a French court because the French court lacked personal jurisdiction. Under New York law, a money judgment will generally be enforced unless the defendant can show that the court lacked personal jurisdiction or that he did not receive notice of the judgment.⁴⁴⁷ The court found that Stallion did submit to the jurisdiction of the French court, as he had received proper notice under the Hague Convention on Service.⁴⁴⁸ As a result, the court found that it could administer the judgment against Stallion.

In *Morgenthau v. Avion Res. Ltd.*,⁴⁴⁹ plaintiffs claimed that service on depositors in Brazil was improper because it was not done through letters rogatory as required by some international treaties. The plaintiffs asserted that service “offend[ed] international notions of comity and requirements of international treaties.”⁴⁵⁰ The court was cautious in applying the doctrine of comity, noting, “whether to apply the doctrine lies in the sound discretion of the court.”⁴⁵¹ The court stated that it had “never applied the doctrine to import the laws of a foreign country”⁴⁵² and declined to do so. Moreover, the court noted that Brazil was not a signatory to the Hague Convention on Service, which made that treaty irrelevant.⁴⁵³ As such, the treaty’s procedures for service were not required to have been followed in this case. As for the Inter-American Convention on Letters Rogatory, which both Brazil and the United States did sign, the court noted that the treaty did not mandate that letters be the exclusive means of service.⁴⁵⁴ Therefore, the court dismissed the defendant’s arguments.

438 *Id.* at 432.

439 *Id.* (citation omitted).

440 *Id.* at 434.

441 *Id.*

442 *Id.*

443 877 N.Y.S.2d. 614 (N.Y. Sup. Ct. 2008).

444 *Id.*

445 *Id.*

446 930 N.E.2d 756 (N.Y. 2010).

447 *Id.* at 758.

448 *Id.*

449 898 N.E.2d 929 (N.Y. 2008).

450 *Id.* at 932.

451 *Id.* at 934.

452 *Id.*

453 *Id.*

454 *Id.* at 935.

North Carolina

The North Carolina courts have been reluctant to apply international law in the criminal context, including death penalty cases. In *State v. Smith*, a 2002 death penalty case, the North Carolina Supreme Court admitted that “state law must yield when it is inconsistent with or impairs the policy” of treaties, but held that the ICCPR did not prohibit the defendant’s execution.⁴⁵⁵ The court summarily rejected the defendant’s arguments that the long delay between sentencing and execution and the conditions of death row inmates constituted “cruel or degrading treatment or punishment” and “arbitrary deprivation of life” in violation of the ICCPR.⁴⁵⁶ Subsequent North Carolina Supreme Court decisions reference *Smith* to dismiss, in a conclusory fashion, international law arguments in death penalty cases.⁴⁵⁷

In *State v. Thompson*, a 2004 death penalty case, the North Carolina Supreme Court went a step further in explaining its reasons for dismissing international human rights law arguments. The court refused to address the defendant’s ICCPR argument on the grounds that it did not have the duty to apply international law even if state laws were in conflict.⁴⁵⁸ That same year, the Court of Appeals rejected an ICCPR-based argument on the grounds that the treaty is non-self-executing.⁴⁵⁹ And a year later, in *State v. Duke*, the North Carolina Supreme Court again rejected a defendant’s argument that the North Carolina capital sentencing statute violated international law. The court noted, without further explanation, that it had rejected this issue, among others, in the past and “decline[d] to depart from . . . prior precedent.”⁴⁶⁰

The defendant in *State v. Campbell*, a 2005 case, attempted to utilize international law as a shield against a death penalty sentence imposed for first-degree murder and robbery with a dangerous weapon.⁴⁶¹ The defendant alleged that the imposition of a death sentence was in violation of the ICCPR, a covenant to which the United States was a party.⁴⁶² However, the court summarily disregarded this argument without further discussion, stating that it had “considered [the] defendant’s arguments on these issues and conclude[d] that the] defendant ha[d] shown no compelling reason to depart from [its] previous holdings.”⁴⁶³

In 2006, the defendant in *State v. Hurst* argued “that the death penalty constitute[d] cruel and unusual punishment in violation of the . . . International Covenant on Civil and Political Rights.”⁴⁶⁴ However, this argument was also rejected on the grounds of *Smith*.⁴⁶⁵ In *State v. Allen*, another 2006 decision, the North Carolina Supreme Court again cited *Smith* to reject the defendant’s argument that the ICCPR prohibits the arbitrary deprivation of life. The court determined that, given the U.S. reservation, the ICCPR did not prohibit the defendant’s execution.⁴⁶⁶ The court also rejected the defendant’s argument that the length of time and the conditions under which he expected to be detained while appealing his conviction and sentence violated Article VII of the ICCPR. The court reasoned that while Article VII

455 352 N.C. 531, 566 (N.C. 2002).

456 *Id.*

457 *State v. Williams*, 355 N.C. 501, 585–86 (N.C. 2002); *State v. Bell*, 359 N.C. 1, 43 (N.C. 2004).

458 359 N.C. 77, 126 (N.C. 2004) (“[W]e acknowledge that notions of international justice are not always consistent with our state and nation. We recognize that our foremost task is to uphold the Constitutions of the United States and the State of North Carolina. . . . To that end, we exercise judicial restraint and decline to consider the general principles of international law raised by defendant.”).

459 *State v. Bruton*, 600 S.E.2d 49, 55–56 (N.C. Ct. App. 2004).

460 360 N.C. 110, 143 (N.C. 2005).

461 *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (N.C. 2005).

462 *Id.* at 705.

463 *Id.* at 706.

464 *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (N.C. 2006).

465 *Id.* at 206.

466 360 N.C. 297, 318 (2006).

condemns torture, allowing the defendant to appeal his conviction and sentence was not “torturous.”⁴⁶⁷ The court held, “We simply cannot find a violation of defendant’s rights merely because he chooses to subject himself to the rigors of judicial review.”⁴⁶⁸

The reluctance of North Carolina courts to confront international law has also manifested itself outside the criminal context. In *Gaspersohn v. Harnett County Board of Education*, the amicus curiae on behalf of the plaintiff urged the Court of Appeals to declare that the U.N. Charter prohibits corporal punishment. The court was unwilling to consider international law: “The United States Supreme Court in [its ruling that corporal punishment does not violate the Eight Amendment in] *Ingraham* did not mention the UN Charter or the application of international law. We do not believe we should hold that international law made applicable to North Carolina by the UN Charter proscribes corporal punishment.”⁴⁶⁹

In *State v. Herrera*,⁴⁷⁰ the defendant argued that the manner in which his written statements were obtained violated the VCCR. In particular, the violation occurred because defendant was not advised of his right to contact the Honduran consulate in accordance with Article 36 of the VCCR. The court referenced the discussion in *State v. Nguyen* of the Vienna Convention.⁴⁷¹ The court in *Nguyen* cited *Murphy v. Netherland*⁴⁷² stating, “the Supremacy Clause [of the U.S. Constitution] does not convert violations of treaty provisions . . . into violations of constitutional rights.”⁴⁷³ The court also noted that treaties create rights of the sovereign and not rights of the individual that are enforceable in courts, because treaties are compacts between nations.⁴⁷⁴ The court then noted, as in *Jimenez-Nava*, that the Vienna Convention’s purpose is to ensure consular efficiency and not to benefit individuals.⁴⁷⁵ Finally, it noted that while the Supreme Court has never explicitly dealt with the question of whether Article 36 implicates individual rights, it has held that “suppression of evidence is not an appropriate remedy.”⁴⁷⁶

In *Obo v. Steven*,⁴⁷⁷ the Court of Appeals examined the application of the Hague Convention on Civil Aspects of International Child Abduction. In *Obo*, the child’s parents lost custody in their hometown of Mannheim, Germany due to neglect.⁴⁷⁸ The parents took their son from his foster family and fled to North Carolina without the consent of Mannheim Department of Children’s Services (“Mannheim DCS”). The United States is party to the Hague Convention, an international agreement created to ensure that child custody is respected across international borders.⁴⁷⁹ Mannheim DCS filed a claim for the son’s return under the Hague Convention in North Carolina court and prevailed in the lower court.⁴⁸⁰ On appeal, the parents argued that the trial court lacked jurisdiction to remove the son from his parents because Hague Convention claims must comply with U.S. domestic procedural law. Under North Carolina procedure, child custody review orders must be verified in order for courts to have subject matter jurisdiction.⁴⁸¹ The Court of Appeals found that Mannheim DCS did not verify its

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Id.

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Id. at 280.

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75 N.C. App. 23, 35 (N.C. Ct. App. 1985), *citing* *Ingraham v. Wright*, 430 U.S. 651 (1977).

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195 N.C. App. 181 (N.C. 2009).

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Herrera, 195 N.C. App. 181 at 193.

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Id. (citing *Nguyen*, 178 N.C. App. 447, 459 (quoting *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997))).

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Id.

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Id. (citing *State v. Aquino*, 560 S.E.2d 552, 556 (N.C. Ct. App. 2002) and *United States v. Jimenez-Nava*, 243 F.3d 192,

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Id. at 556.

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Id. at 672.

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687 S.E.2d 496 (N.C. Ct. App. 2009).

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Id. at 498.

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Id. at 496.

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Id. at 498.

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Id. at 500 (citing *In re T.R.P.*, 360 N.C. at 594–95, 636 S.E. 2d at 792).

petition as required by state law and held that the trial court did not have proper jurisdiction.⁴⁸² The Hague Convention claims were vacated and the remainder of the case was remanded.⁴⁸³

North Dakota

In *Riemers v. Anderson*,⁴⁸⁴ the North Dakota Supreme Court refused to permit a plaintiff to prosecute a civil claim against law enforcement officials for violations of the ICCPR. The court adopted the Second Circuit's reasoning in *Flores v. Southern Peru Copper Corporation*,⁴⁸⁵ explaining that the U.S. Senate's declaration that the ICCPR is not self-executing means that "this treaty does not create a private cause of action in United States courts."⁴⁸⁶ The North Dakota Supreme Court also stressed the plaintiff's failure to draw its "attention to any decisions construing or applying the covenant" as a basis for the dismissal.⁴⁸⁷

Ohio

In several cases before Ohio courts, defendants have unsuccessfully attempted to invalidate the Ohio death penalty statute as inconsistent with various treaties and customary international law.⁴⁸⁸ The Ohio Supreme Court's decision in *State v. Phillips* is representative of the reasoning in these cases. In *Phillips*, the court observed that the American Declaration does not mention the death penalty, and the U.S. Senate ratified the Charter of the Organization of American States with the reservation that none of its obligations would violate principles of federalism codified in the U.S. Constitution.⁴⁸⁹ The Ohio Court of Appeals in *State v. Skatzes* ruled that Ohio's death penalty statutes do not violate due process, are not imposed in a racially discriminatory manner, and are consistent with customary international law.⁴⁹⁰

In *State v. Davis*,⁴⁹¹ relying on *State v. Bey*,⁴⁹² the court rejected Davis's claim that Ohio's death penalty violated international law and treaties.

One defendant tried a slightly different argument; he questioned the ability of the Senate to place reservations and conditions at the front end of the process for the adoption of treaties by the United States, thereby arguing that the United States was required to abide by *all* the provisions of international treaties. In *State v. Tenace*, an unreported decision, the defendant attempted to convince the court that obligations under international covenants and treaties are not limited by the reservations and conditions that the United States placed on them.⁴⁹³ The defendant then argued that the Senate did

482 *Id.* at 501.

483 *Id.*

484 680 N.W.2d 280, 286 (N.D. 2004).

485 343 F.3d 140 (2d Cir. 2003), *superseded by* *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

486 680 N.W.2d at 286 (quoting *Flores*, 343 F. 3d at 164 n.35).

487 *Id.* at 287; *see also* *Riemers v. O'Halloran*, 678 N.W.2d 547, 550 (N.D. 2004) (holding that the plaintiff had failed to provide "any supportive reasoning or citations to relevant authorities showing that the [ICCPR] was either violated or applicable" to his argument that prosecution witnesses were not immune from suit).

488 *State v. Keene*, No. 14375, 1996 WL 531606, 1996 Ohio App. LEXIS 4048, at *178–80 (Ohio Ct. App. Sept. 20, 1996) (discussing the ICCPR, Charter of the Organization of American States, and UN Charter); *State v. Steffen*, No. C-930351, 1994 WL 176906, 1994 Ohio App. LEXIS 1973 (Ohio Ct. App. May 11, 1994) (discussing the American Declaration and customary international law); *State v. Greer*, No. 15217, 1992 WL 316350, 1992 Ohio App. LEXIS 5477, at *23–24 (Ohio Ct. App. Oct. 28, 1992) (discussing the American Declaration).

489 *State v. Phillips*, 74 Ohio St. 3d 72, 103–04 (Ohio 1995) (discussing the American Declaration and the Charter of the Organization of American States).

490 *State v. Skatzes*, 2003 Ohio 516, No. 15848, 2003 WL 24196406, 2003 Ohio App. LEXIS 865, at *182–84 (Ohio Ct. App. Jan. 31, 2003) (discussing the ICCPR, CERD, and CAT).

491 880 N.E.2d 31 (Ohio 2008).

492 709 N.E.2d 484 (Ohio 1999).

493 *State v. Tenace*, No. L-00-1002, 2003 WL 21500249, at *26 (Ohio App. June 30, 2003).

not have the power to adopt a treaty with reservations and that its declaration that the ICCPR is not self-executing was unconstitutional.⁴⁹⁴ The *Tenace* court, however, again utilized the reasoning that “none of the treaties cited by appellant ban[ned] the death penalty. . . . Therefore, the issue of whether the [sic] could be adopted with reservations or [were] self-executing [was] irrelevant.”⁴⁹⁵ Additionally, the issue of international customary law was raised in *Tenace* when the appellant argued that the state’s death penalty statute violated the guarantees of equal protection, due process, right to life, and protection against torture or cruel, inhuman, or degrading punishment. These arguments also failed, with the court citing both the Sixth Circuit’s decision in *Buell* (which stated, “there is no customary international law prohibiting the death penalty for adult offenders”)⁴⁹⁶ and the Ohio Supreme Court’s decision in *State v. Issa*, where the court held that “the Ohio death penalty statute [did] not violate the American Declaration of the Rights and Duties of Man.”⁴⁹⁷

In *State v. Conway*, Conway brought a petition for post-conviction relief, challenging his death sentence.⁴⁹⁸ Conway argued that the trial court erred in failing to appoint and fund an expert witness on international law to demonstrate that his convictions and sentence violated customary international law guaranteed by the UDHR, the ICCPR, and American Declaration. The Court of Appeals rejected Conway’s arguments, noting that the state statute granting post-conviction relief only provided for appointment of counsel, not a right to expert witnesses.⁴⁹⁹ Other attempts have been made on appeal to try to bring international law arguments into discussions seeking post-conviction relief. However, courts have refused to consider new international law arguments, because the courts determined that these arguments could and should have been brought up during the trial or on direct appeal. As a result, the courts decided (in a series of unreported cases) that these arguments were barred by the doctrine of *res judicata* and did not consider them in their deliberations.⁵⁰⁰

International human rights arguments had more success in one civil case. An Ohio Court of Common Pleas relied on the CRC in *In re Julie Anne* to prohibit a child’s mother from smoking tobacco in her presence.⁵⁰¹ The court noted that the convention was “the most universally accepted human rights document in the history of the world,” and “create[d] obligations for signatory governments to ensure children’s right to the highest attainable standard of health.”⁵⁰² The court also emphasized “that under the CRC, which has been ratified by the United States, courts of law, and state legislatures, administrative agencies have a duty as a matter of human rights to reduce children’s compelled exposure to tobacco smoke.”⁵⁰³ The court’s reasoning may be flawed, however, as the United States has not in fact ratified the CRC but merely its optional protocols.

In *State v. Liu*,⁵⁰⁴ the defendant argued that he was not notified of his right to contact his consulate in violation of the Vienna Convention. In dismissing this argument, the court stated that any rights in

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Id.

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Id.

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Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001).

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Id. (citing *State v. Issa*, 93 Ohio St.3d 49, 69 (Ohio 2001)).

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2006 Ohio 6219, 2006 Ohio App. LEXIS 6192, at *14 (Ohio Ct. App. Nov. 28, 2006).

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Id. at *15.

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State v. Myers, No. 2000-CA-35, 2001 WL 929934 (Ohio App. 2 Dist. Aug. 17, 2001); *State v. Lundgren*, No. 97-L-110, 1998 WL 964592 (Ohio App. 11 Dist. Dec. 18, 1998); *State v. Mills*, C-930817, 1995 WL 109127 (Ohio App. 1 Dist. Mar. 15, 1995); *State v. Wickline*, No. 93APA10-1411, 1994 WL 314055 (Ohio App. 10 Dist. June 28, 1994).

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121 Ohio Misc. 2d 20 (2002). *But see* *Rodgers v. Ohio Dept. of Rehabilitation & Correction*, 91 Ohio App. 3d 565 (1993) (rejecting without discussion a *pro se* prisoner litigant’s claims against the Ohio corrections department for alleged violations of the ICCPR, UDHR, and Helsinki Final Act).

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121 Ohio Misc. 2d at 41.

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121 Ohio Misc. 2d at 47.

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No. 24112, 2008 Ohio App. LEXIS 5693 (Ohio Ct. App. Dec. 23, 2008).

Article 36 belong to the party states and not to individuals. Further, the court stated that the only remedies of this kind of violation “are diplomatic, political, or exist between states under international law.”⁵⁰⁵

In *State v. Hernandez*, the court held that whatever rights the Vienna Convention confers are waivable.⁵⁰⁶ This court also found that the failure of a trial court to inform a defendant of his rights under the VCCR does not constitute not plain error.

In *Ohio v. Alhajjeh*,⁵⁰⁷ the court continued its Vienna Convention analysis. Alhajjeh, who was a dual citizen of Sweden and Jordan, voluntarily waived his Vienna Convention right to contact the consulate of either country, twice — upon his arrest and again during arraignment.⁵⁰⁸ Alhajjeh was convicted of murder, felonious assault, and tampering with evidence. On appeal, Alhajjeh claimed that his Vienna Convention rights to contact a consulate were not respected. The court found that Vienna Convention rights are not equal to constitutional rights and were properly waived.⁵⁰⁹ Alhajjeh’s claims were dismissed.⁵¹⁰

Oklahoma

It seems that Oklahoma courts have only addressed international human rights law in reference to the VCCR. For instance, in *Valdez v. State*,⁵¹¹ Valdez, a Mexican national, submitted a subsequent application for post-conviction relief on the grounds that he was not notified of his rights under Article 36 of the VCCR, which provides foreign nationals detained in the United States a right to consular notification and assistance. Valdez cited the International Court of Justice’s (ICJ) decision in *F.R.G. v. United States*, which found that the United States, through the state of Arizona, had violated the Vienna Convention when it had failed to notify two German nationals convicted of a crime of their rights under Article 36.⁵¹²

Valdez argued that the Court of Criminal Appeals should grant him relief on the basis of *F.R.G. v. United States*, noting that the United States is bound by international treaties, had signed the U.N. Charter, and had ratified the optional protocol to the Vienna Convention, requiring compliance with the decisions of the ICJ. In its amicus brief, the government of Mexico echoed Valdez’s arguments, claiming that courts in the United States cannot provide a remedy to German nationals that is not equally applicable to non-Germans without violating U.S. obligations under CERD.⁵¹³ Oklahoma countered these arguments, noting that the U.S. Constitution’s Supremacy Clause “does not convert violations of treaty provisions into violations of constitutional rights.”⁵¹⁴ The Court of Criminal Appeals then rejected Valdez’s international law arguments on the grounds that these claims were available to him from the time of his arrest and could have been raised in his first post-conviction application.⁵¹⁵

505 *Id.* (citing *State v. Lopez*, 2003 Ohio 3974 (Ohio Ct. App. 2003)).

506 2009 Ohio 1121, No. WD-08-035, 2009 Ohio App. LEXIS 912 (Ohio Ct. App. Mar. 13, 2009).

507 2010 Ohio 3179 (Ohio Ct. App. 2010).

508 *Id.* at 14.

509 *Id.* (citing *State v. Lopez*, 2003 Ohio 3974 (Ohio Ct. App. 2003)).

510 *Id.*

511 46 P.3d 703 (Ct. Crim. App. Ok. 2002).

512 *Id.* at 707–08.

513 *Id.* at 708 n.21.

514 *Id.* at 708.

515 *Id.* at 709–10.

One issue that may influence the ability to use human rights law in Oklahoma is that the state's voters recently approved a new law saying that judges cannot refer to international law in their decisions. Known as the "Save our State" amendment, during the November 2, 2010 elections, voters approved an amendment to prevent the use of international or Sharia law in its state courts. In relevant part, the amendment states, "the courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression."⁵¹⁶ However, two days after the ballot measure passed, a federal lawsuit was filed challenging the constitutionality of the amendment, resulting in a preliminary injunction preventing its enactment.⁵¹⁷

Oregon

The Oregon Supreme Court has drawn upon international human rights law in deciding a number of cases. In a 1949 decision, *Namba v. McCourt*, the Supreme Court of Oregon referred to Article 55 of the U.N. Charter to support its declaration that the Oregon Alien Land Law violated the Equal Protection clause of the Fourteenth Amendment.⁵¹⁸

The Oregon Supreme Court's 1981 decision in *Sterling v. Cupp* is often cited in caselaw as an example of how a state court can use international human rights law to provide interpretive guidance for state constitutional protections.⁵¹⁹ In *Sterling*, the plaintiffs, male inmates of the Oregon State Penitentiary, sued to enjoin prison officials from assigning female guards to duties that involved frisking male prisoners and supervising them in showers.⁵²⁰ The prisoners invoked a number of state and federal constitutional provisions in support of their claims, including Article I, Section 13 of the Oregon constitution, which prohibits the treatment of prisoners with "unnecessary rigor."⁵²¹ To determine the meaning of "unnecessary rigor," the court examined a variety of sources, including international legal standards for the treatment of detainees in the UDHR, ICCPR, and European Convention.⁵²² The court carefully explained: "The various formulations in these different sources in themselves are not constitutional law" but rather "contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13."⁵²³

In *Humphers v. First Interstate Bank*, the Supreme Court of Oregon considered whether the plaintiff had stated a claim for damages in alleging that her former physician revealed her identity to a daughter she had given up for adoption.⁵²⁴ The plaintiff argued that her former doctor's disclosure of confidential information was an invasion of privacy and a breach of his contractual obligation to keep her identity secret. In considering the definition of privacy, the court looked to various law review articles, including an article that referred to the right to privacy in international human rights

516 Enrolled House Joint Resolution 1056, State Question Number 755, 52nd Legislature of the State of Oklahoma.

517 See *Awad v. Zirrax, et al.*, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010). See also *Muslim Sues Oklahoma State for Banning Sharia Law*, SIFYNEWS.COM (Nov. 5, 2010, 13:50:00), available at <http://sify.com/news/muslim-sues-oklahoma-state-for-banning-sharia-law-news-international-klfnOcbahjd.html> (noting Muneer Awad, executive director of the Council on American-Islamic Relations in Oklahoma, as stating that the law violates the First Amendment right to freedom of religion and is based in anti-Muslim sentiment. In contrast, Republican State Representative Rex Duncan, who proposed the measure, said it was a "pre-emptive strike [against judges] legislating from the bench or using international law or Sharia law," even though no Oklahoma court has cited Sharia law.)

518 204 P.2d 569, 579 (Or. 1949).

519 625 P.2d 123 (Or. 1981).

520 *Id.* at 125.

521 *Id.* at 126 n.1; see also Oregon Constitution art. 1, § 13.

522 *Sterling*, 625 P.2d at 131 n.21.

523 *Id.* at 131.

524 696 P.2d 527 (Or. 1984).

documents, and quoted the relevant provisions of the UDHR and the European Convention.⁵²⁵

Using general ideas of international law, the defendant in *State v. Aydiner* claimed that his sentence was invalid as the state had tricked the defendant into returning to the United States after he left the country.⁵²⁶ Using facts such as the defendant's lack of awareness of charges against him, the court denied the defendant's claim. Moreover, the court stated that "to imply from the terms of [the Extradition Treaty] that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a large ... inferential leap, with only the most general of international law principles to support it."⁵²⁷

Pennsylvania

Pennsylvania trial courts have several cases examining the human rights of criminal defendants. In *Commonwealth v. Sadler*, a trial court reviewed the conviction of a 15-year-old to determine whether the state had violated the Pennsylvania constitution by failing to provide the defendant schooling while in custody, because he was certified to be tried in adult court.⁵²⁸ The court noted that the right to education is established under the UDHR and is fundamental to American democracy. It found that a "boy in custody, regardless of his status under the criminal law, is still a child and entitled to the education rights of all children."⁵²⁹ The judge determined that the separate classification of youths certified to be tried in adult court was a violation of the equal protection clause and Pennsylvania statutes.⁵³⁰

In *Pennsylvania v. Sattazahn*, the petitioner sought post-conviction relief for his death sentence, arguing that the court's failure to instruct the jury that its life-sentencing option was statutorily defined as life without possibility of parole violated U.S. constitutional law, as well as "United States international human rights treaty obligations against arbitrary deprivation of life and cruel, inhuman, or degrading treatment or punishment."⁵³¹ The court dismissed the claim, finding that the petitioner failed to raise it on direct appeal and therefore waived it.⁵³²

The death penalty issue was explored further in *Commonwealth v. Judge*.⁵³³ Convicted of two counts of murder in the first degree and one count of possession of an instrument of a crime, the appellant was sentenced to death. The appellant escaped from custody to Canada, but was subsequently deported to New York and transferred to Pennsylvania. He then filed a complaint with the United Nations Human Rights Committee (UNHRC), claiming that deportation to face a death sentence violated his rights under the ICCPR. The United States responded, declining to recognize the weight of the ICCPR and declaring it to be non-self-executing. However, the UNHRC declared that the appellant's right to life had been "violated by his deportation without receipt of assurances that his death sentence would not be carried out."⁵³⁴ As a result, the appellant filed a petition to reduce his sentence to life imprisonment or removal to Canada,⁵³⁵ and argued that the United States, as a party to the ICCPR, was required to enforce the provisions of the treaty as binding federal law.⁵³⁶ He further argued that the Supremacy

525 *Id.* at 531 n.7.

526 228 Or. App. 282 (Or. Ct. App. 2009).

527 *Id.* at 288 (citing *United States v. Alvarez-Machain*, 504 U.S. 655, (1992)).

528 3 Phila. 316, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979).

529 *Id.* at 330–31.

530 *Id.*

531 2006 Pa. Dist. & Cnty. Dec. LEXIS 104, No. 2194-89, at *68 (Comm. Pleas Ct. June 16, 2006).

532 *Id.* at *115.

533 *Commonwealth v. Judge*, 591 Pa. 126, 916 A.2d 511 (2007).

534 *Id.* at 135.

535 *Id.* at 136–37.

536 *Id.* at 143.

Clause of the U.S. Constitution required international treaties to be treated as equivalent to federal law.⁵³⁷ Though the appellant’s arguments were extensive, the court found against the appellant, and held that “although [the] Appellant was entitled to raise his claim in a petition for writ of habeas corpus, neither the decisions of the Committee nor the ICCPR itself mandate that this Court provide a remedy for Canada’s violations.”⁵³⁸ The court went on to say that it could not “enforce as laws those treaties, no matter how admirable their purposes, which Congress has not chosen to incorporate into our domestic legal system.”⁵³⁹

In *Commonwealth v. Ligon*, the appellant challenged his death sentence on collateral review.⁵⁴⁰ One of his asserted grounds for appeal implicated international human rights law. He asserted that “his death sentence should be vacated because it is a product of racial discrimination in violation of the United States and Pennsylvania Constitutions, Pennsylvania’s Sentencing Statute, and International Law.”⁵⁴¹ The court did not address the merits of this claim because the appellant did not raise the racial discrimination issue on direct appeal.⁵⁴²

In *Commonwealth v. Baumhammers*,⁵⁴³ the defendant claimed that he was not informed of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, as part of his appeal. The court rejected the Vienna Convention claims for several reasons. First, as the Vienna Convention is for those apprehended by a *foreign* country, Bauhammers, as a dual citizen of the United States and Latvia, had no right to call a consulate and was not prejudiced by a lack of Latvian representation; furthermore, he had never requested assistance from the Latvian consulate.⁵⁴⁴ Additionally, Bauhammer’s assertion that ICJ’s decision in *Avena* prevented his execution was rejected: the Supreme Court held that ICJ judgments are not self-executing (that is, not binding on domestic law without implementing legislation), and have not been otherwise incorporated into our domestic law.⁵⁴⁵ Hence, the court ruled that *Avena* does not bind U.S. courts.

South Dakota

As in other states, the Hague Convention has arisen in the context of family law disputes in South Dakota. In *Sullivan v. Sullivan*,⁵⁴⁶ the Supreme Court of South Dakota considered a father’s appeal of a trial court’s decision to allow his ex-wife to take their children out of the country to the Philippines for three weeks. One of the father’s claims was that, because the Philippines were not a signatory to the Hague Convention, he would have no legal recourse if the mother took the children there and decided not to return. However, since the mother had already traveled and returned to the country by the time the case was decided, the court declared the issue moot.⁵⁴⁷

Tennessee

Tennessee courts have grappled with international human rights law in the context of criminal appeals, usually in death penalty cases. In *State v. Odom*,⁵⁴⁸ the defendant in a capital case invoked the ICCPR, CERD, and CAT to argue that “(1) customary international law and specific international treaties

537 *Id.*
 538 *Id.* at 152.
 539 *Id.*
 540 971 A.2d 1125 (Pa. 2009).
 541 *Id.* at 1159.
 542 *Id.*
 543 960 A.2d 59 (Pa. 2008).
 544 *Id.* at 96.
 545 *Id.* at 97.
 546 764 N.W.2d 895 (S.D. 2009).
 547 *Id.*
 548 137 S.W.3d 572 (Tenn. 2004).

prohibit capital punishment; and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty once it has been abolished.”⁵⁴⁹ The Supreme Court of Tennessee began its analysis with the observation that “the defendant has cited no decision of any court accepting his arguments.”⁵⁵⁰ It then signaled its willingness to follow federal pronouncements on international law by adopting the logic of the Sixth Circuit in *Buell v. Mitchell*,⁵⁵¹ where the Sixth Circuit rejected the argument that the American Declaration and the ICCPR invalidated death penalty statutes in the United States.⁵⁵² The *Odom* court stressed in particular that international human rights treaties were not self-executing, that Senate reservations to these treaties were valid, and that the treaties did not stand for a customary international legal prohibition on the death penalty.⁵⁵³

In *State v. Faulkner*, the Tennessee Court of Criminal Appeals ruled nearly identically, disavowing any competence even to pronounce on the content of customary international law and citing with approval the following passage from *Buell*:

We hold that determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it is their constitutional role to determine the extent of this country’s international obligations and how best to carry them out.⁵⁵⁴

In another case, the Tennessee Supreme Court refused to stay an execution to allow an allegedly mentally ill defendant to pursue relief in the Inter-American Commission on Human Rights.⁵⁵⁵ The court declared, “As a general rule, international agreements, even those benefiting private parties, do not create rights privately enforceable in domestic courts,” and that only agreements “where such rights are contemplated in the” text itself do so.⁵⁵⁶ It then denied that the American Declaration and the American Convention create judicially cognizable private rights.⁵⁵⁷ The court further observed that any decision by the Inter-American Commission on Human Rights, even if pursuant to a binding treaty, would constitute merely a “recommendation” and thus would not bind Tennessee courts.⁵⁵⁸

The Court of Criminal Appeals displayed more willingness to address the merits of an international human rights claim in its discussion of a defendant’s double jeopardy defense based on the ICCPR in *State v. Carpenter*.⁵⁵⁹ The court found that the plaintiff, who challenged a successive prosecution in Tennessee after a conviction in Ohio, “correctly point[ed] out that a properly ratified treaty is the supreme law of the land.”⁵⁶⁰ But the court held that the ICCPR does not prohibit prosecutions by different sovereigns, and “in ratifying the ICCPR . . . [t]he Senate wished to preserve the ability for the federal government and states to successively prosecute a person under the ‘dual sovereignties’ exception to the Fifth Amendment double jeopardy bar.”⁵⁶¹ The court noted that the Senate’s

549 *Id.* at 597.

550 *Id.*

551 274 F.3d 337 (6th Cir. 2001).

552 *Odom*, 137 S.W.3d at 598–99.

553 *Id.* at 599–600.

554 *State v. Faulkner*, No. W2001-02614-CCA-R3-DD, 2003 Tenn. Crim. App. LEXIS 836, at *96–97 (Tenn. Crim. App. Sept. 26, 2003) (quoting *Buell v. Mitchell*, 274 F.3d 337, 375–76 (6th Cir. 2001)) (internal quotations omitted).

555 *Thompson v. State*, 134 S.W.3d 168, 174–76 (Tenn. 2004).

556 *Id.* at 174.

557 *Id.* at 175.

558 *Id.*

559 69 S.W.3d 568, 578–79 (Tenn. Crim. App. 2001).

560 *Id.* at 578.

561 *Id.* at 579 n.4.

reservations to the ICCPR invalidate any argument that international law does not recognize states in a federal system as different sovereigns.⁵⁶²

In another case, the Tennessee Court of Criminal Appeals refused to find that the defendant had been denied effective assistance of counsel for his counsel's failure to raise purported violations of the UDHR, CAT, ICCPR, ICESCR, CERD, CEDAW, American Convention, and American Declaration.⁵⁶³

In *McKinny v. State*,⁵⁶⁴ the Court of Criminal Appeals denied McKinney's claim that his death sentence violated "treaties of the United States and, hence the *federal constitution's Supremacy Clause*."⁵⁶⁵ The court noted that U.S. courts consistently rejects such claims and found no reason to depart from that precedent in this case.⁵⁶⁶ Despite failing to prevail on his human rights claims, McKinney's ineffective assistance of counsel claim was successful and his case was remanded.⁵⁶⁷

Similarly, in *State v. Hester*,⁵⁶⁸ Hester claimed that CERD, the ICCPR, and CAT all outlaw capital punishment.⁵⁶⁹ Hester asserted that by virtue of the Supremacy Clause, the United States, as party to these international agreements, was prevented from putting him to death. The court rejected Hester's claim, holding that international treaties do not prohibit states from imposing the death penalty.⁵⁷⁰

Texas

Texas courts have addressed international human rights law in a variety of contexts. In *Hinojosa v. Texas*, the Court of Criminal Appeals refused to set aside a defendant's death sentence pursuant to the U.N. Charter.⁵⁷¹ The court held that, generally speaking, "individuals do not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute."⁵⁷² After an analysis of the charter's "meaning and purpose," the court stated that the document did not "establish individually enforceable rights."⁵⁷³ Moreover, the court held that the charter does not mandate the abolition of the death penalty.⁵⁷⁴ In a 2005 case, the Court of Criminal Appeals rejected a defendant's argument that his death sentence violated CAT, the ICCPR, and the Supremacy Clause of the U.S. Constitution. It reasoned that the U.S. Senate filed reservations to both treaties that state that they do not prohibit the United States from imposing capital punishment consistent with the Constitution.⁵⁷⁵

The Court of Criminal Appeals of Texas in *Ex parte Medellin* also dealt with the death penalty issue. In *Medellin*, a Mexican national was convicted of capital murder and sentenced to death.⁵⁷⁶ The defendant filed an application for a writ of *habeas corpus*, claiming that his rights had been violated because he had not been told that he could contact a Mexican consular official after he

562 *Id.* at 578–79. The court took care to explain that the federal government could not enter into an agreement that inhibited states' ability to punish intrastate violence without overstepping Tenth Amendment bounds. *Id.* at 579 n.4. *See also* *State v. Thomas*, 158 S.W.3d 361, 391–93 (Tenn. 2005) (reaffirming its decision in *Carpenter* and dismissing defendant's claim that his state court trial violated the ICCPR, because defendant's federal charges arose from the same criminal event).

563 *Cauthern v. Tennessee*, 145 S.W.3d 571, 596 (Tenn. Crim. App. 2004).

564 No. W2006-02132-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 219 (Tenn. Crim. App., Mar. 9, 2010).

565 *Id.* at *147.

566 *Id.*

567 *Id.* at *151.

568 No. E2006-01904-CCA-R3-DD, 2009 Tenn. Crim. App. LEXIS 363 (Tenn. Crim. App. Feb. 5, 2009).

569 *Id.* at *145.

570 *Id.* (citing *State v. Odom*, 137 S.W.3d 572, 599 (Tenn. 2003)).

571 4 S.W.3d 240 (Tex. Crim. App. 1999).

572 *Id.* at 252.

573 *Id.*

574 *Id.*

575 *Sorto v. State*, 173 S.W.3d 469, 490 (Tex. Crim. App. 2005).

576 *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

was arrested in accordance with the VCCR.⁵⁷⁷ The defendant also claimed that decisions of the ICJ were binding federal law that preempted the law of the state of Texas. The court disagreed. After extensive examination of the procedural history and various claims brought by the defendant, the court determined that “the ICJ *Avena* decision and the Presidential memorandum [did] not constitute binding federal law that preempt[ed] . . . the Supremacy Clause of the United States Constitution and that neither qualif[ied] as a previously unavailable factual or legal basis.”⁵⁷⁸ It subsequently dismissed the defendant’s application for a writ of *habeas corpus*.

In an unpublished opinion in *Townsend v. Texas*, the defendant appealed his misdemeanor conviction for repeatedly calling a woman after she had asked him to stop and after the police department had sent him a letter requesting that he stop.⁵⁷⁹ He argued that the statute under which he was convicted was unconstitutionally vague and overly broad, violated U.S. treaty obligations, and violated *jus cogens* (compelling) international law under the ICCPR. The defendant also contended that the federal, state, and county governments violated his rights under the ICCPR and CAT by, *inter alia*, stealing his inheritance, bringing false charges, placing him under surveillance and in solitary confinement, torturing him while in jail, attempting to assassinate him, and “acting in reference to the Appellant as totalitarian states generally act.”⁵⁸⁰ The Court of Appeals declined to address these arguments, reasoning that “appellant’s complaints [did] not attack the validity of the judgment” and were “inappropriate on appeal.” The court rejected the defendant’s claims relating to *jus cogens* international law pursuant to the ICCPR, because he presented no arguments on the issue.⁵⁸¹

In *Dubai Petroleum Company v. Kazi*, the family of an Indian citizen killed while working on an oilrig off the coast of the United Arab Emirates brought a wrongful death suit.⁵⁸² Under Texas law, suits for wrongful death are permissible if the decedent’s country of citizenship has “equal treaty rights” with the United States. To determine whether India has equal rights with the United States, the Texas Supreme Court looked to the provisions of the ICCPR, on which the plaintiffs relied. The court interpreted Article 14(1) of the ICCPR as “requir[ing] all signatory countries to confer the right of equality before the courts to citizens of all other signatories.”⁵⁸³ The court quoted from a comment by the UNHRC, explaining that the ICCPR “not only guarantees foreign citizens equal treatment in the signatories’ courts, but also guarantees them equal access to these courts.”⁵⁸⁴ The court cited the UNHRC’s comment in rejecting the defendant’s contention that Article 14(1) does not confer “equal treaty rights.”⁵⁸⁵

In *In re Sigmar*,⁵⁸⁶ the court held that evidence regarding a foreign country’s legal practices and procedures are legislative facts. Therefore, the facts related to a country’s compliance with the Hague Convention are also legislative facts, which can be reviewed by the court without prompting by either party.⁵⁸⁷

577 *Id.* at 321.

578 *Id.* at 352.

579 No. 14-96-01571-CR, 1999 Tex. App. LEXIS 9561 (Tex. Ct. App. Dec. 30, 1999).

580 *Id.* at *10–11.

581 *Id.* at *7–8, *12.

582 12 S.W.3d 71 (Tex. 2000); *see also* Ford Motor Co. v. Aguiniga, 9 S.W.3d 252, 261–62 (Tex. App. 1999) (discussing the ICCPR in the context of equal treaty rights in a negligence suit where subject matter jurisdiction was at issue).

583 *Id.* at 82.

584 *Id.*

585 *Id.*

586 270 S.W.3d 289 (Tex. Crim. App. 2008).

587 *Id.* at 302.

In Ex parte Nguyen,⁵⁸⁸ the defendant argued that his rights under the Vienna Convention were violated and his guilty plea was therefore involuntary. The trial court dismissed the claims because the defendant failed to present evidence that proved his individual due process rights were violated.⁵⁸⁹ The trial court found no violation because the VCCR does not provide individual due process rights but merely governs the relationship between individual nations and foreign consuls.⁵⁹⁰ The appellate court affirmed.

In *Velasco v. Ayala*,⁵⁹¹ the Court of Appeals held that where the Hague Service Convention applies, its rules for service supersede the Texas rules for service.⁵⁹² Ayala claimed he was unable to locate his estranged wife in order to personally notify her of his intention to initiate a divorce and ask for mandatory custody of their child.⁵⁹³ Therefore, Ayala served her by publication, which was acceptable under Texas procedural rules.⁵⁹⁴ The Hague Service Convention applied in this case because the wife was a Mexican citizen and “[s]ervice of process on a defendant in Mexico is governed by the Hague Service Convention, which is an international treaty. . . .”⁵⁹⁵ The court held:

Although nothing in the Hague Convention disavows service by publication, because service under the Convention is required to be in Spanish and transmitted through Mexico’s Central Authority, it does not appear that service by publication in English in a Texas newspaper, when the defendant is known to be in Mexico (as evidenced by [Ayala’s] assertions in his petition), comports with the terms of the Hague convention.⁵⁹⁶

Thus, the court found that Ayala did not comply with Hague Service requirements. The court stated that even if the Texas rules did govern this case, service would still have been improper, as he had served his wife through publication despite evidence that he knew her address.⁵⁹⁷

In re Kamstra,⁵⁹⁸ another Hague Convention on Child Abduction case, the court refused to apply the Hague Convention to child citizens of a member state (Holland), who were “habitually resident”⁵⁹⁹ in a non-member state (Burundi).⁶⁰⁰ The court held that the Hague Convention does not give a U.S. court subject matter jurisdiction where the children in a custody dispute are not “habitually resident”⁶⁰¹ in a member-state.⁶⁰²

In *Contreras v. State*,⁶⁰³ the petitioner, a Mexican national, was arrested for intoxication, assault, and failure to stop and render aid. At trial, the statements that Contreras made to law enforcement officers after arrest were admitted into evidence.⁶⁰⁴ The court denied Contreras’ motion to suppress these

588 No. 2-08-207-CR, 2008 WL 4355047 (Tex. Ct. App. Sept. 25, 2008).
 589 *Id.* at 2.
 590 *Id.*
 591 312 S.W.3d 783 (Tex. Ct. App. 2009).
 592 *Id.* at 792.
 593 *Id.* at 787–88.
 594 *Id.* at 788.
 595 *Id.* at 792.
 596 *Id.* at 794.
 597 *Id.* at 797.
 598 No. 12-09-00017-CV, 2010 Tex. App. LEXIS 1478 (Tex. Ct. App. Mar. 2, 2010).
 599 *Id.* at *13.
 600 *Id.*
 601 *Id.* at *13.
 602 *Id.* at *21.
 603 Nos. 11-09-00107-CR, 11-09-00109-CR, 2010 Tex. App. LEXIS 7454 (Tex. Ct. App. Sept. 9, 2010).
 604 *Id.* at *2.

statements.⁶⁰⁵ Upon appeal, Contreras asserted that these statements were improperly admitted.⁶⁰⁶ Under the Fifth Amendment, “a defendant must knowingly and intelligently waive his right prior to police questioning.”⁶⁰⁷ The VCCR gives a foreign national who is arrested outside of his home country the right to contact his consulate; arresting officials are to inform him of this right as soon as possible.⁶⁰⁸ Contreras claimed that as a Mexican national, he should have been informed of his Vienna Convention rights before questioning, so he could have intelligently waived his rights as required by the Fifth Amendment.⁶⁰⁹ Accordingly, Contreras claimed that the trial court improperly allowed his statements to be introduced in evidence because he was not informed of his right to contact his consulate before he made statements to law enforcement officials.⁶¹⁰

The Court of Appeals rejected Contreras’ claims for several reasons. First, the court found that the Vienna Convention does not create a private enforcement right.⁶¹¹ Thus, Contreras could not use it to assert that the due process clause mandates police to follow Vienna Convention procedure. Secondly, the court found that because the Vienna Convention does not create a substantive right for private individuals, it does not obligate police officers to follow certain procedures when arresting a foreign national.⁶¹² Next, the court rejected Contreras’ claim that the ICJ’s decision in *Avena*, holding that trial without notification of right to contact a consular official is a human rights violation, should allow relief.⁶¹³ The court found this claim unavailing because the U.S Supreme Court held that “ICJ decisions are entitled to respectful consideration but that they are not binding precedent ‘*even as to the ICJ itself*.’”⁶¹⁴ The court also rejected Contreras’ claim that courts must comply with *Avena* because President Bush ordered state courts to comply with the ICJ’s decision, as the Supreme Court held in *Medellin* that lacked that authority over the state courts.⁶¹⁵ Finally, the court found that even if it erred, Contreras still could not get relief because the “Supreme Court has held that suppression under the federal exclusionary rule is not an appropriate remedy for a violation of the Vienna Convention.”⁶¹⁶

In *Mays v. State*,⁶¹⁷ Mays sought post-conviction relief for his capital sentence. Mays, who was mentally ill, asserted that the U.S. Supreme Court’s holding in *Atkins v. Virginia* — that it violates the Eighth Amendment to execute the “mentally retarded”⁶¹⁸ — should be extended to the mentally ill. To support his claim, Mays relied “upon various pronouncements in the international community.”⁶¹⁹ However, the court found that Mays could not find any domestic cases to support extending *Atkins* to the mentally ill and affirmed the lower court’s imposition of the death penalty.⁶²⁰

605 *Id.*
 606 *Id.*
 607 *Id.*
 608 *Id.*
 609 *Id.*
 610 *Id.*
 611 *Id.*
 612 *Id.*
 613 *Id.* at 6.
 614 *Id.* (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006)).
 615 *Id.*
 616 *Id.* (quoting *Sanchez-Llamas*, 548 U.S. at 350).
 617 No. AP-75924, 2010 Tex. Crim. App. LEXIS 480, at *21 (Tex. Crim. Ct. App. Apr. 28, 2010).
 618 536 U.S. 304, 335 (2002).
 619 *Mays v. State*, No. AP-75924, 2010 Tex. Crim. App. LEXIS 480 (Tex. Crim. Ct. App. Apr. 28, 2010).
 620 *Id.*

Utah

The Utah Supreme Court used the ICCPR to help define constitutional standards for treatment of prisoners in *Bott v. DeLand*.⁶²¹ The plaintiff, a prisoner, suffered severe health problems after prison physicians failed to diagnose him correctly. He argued that physicians had subjected him to “unnecessary rigor” in violation of the Utah constitution.⁶²² The plaintiff appealed the trial court’s limitation on the damages he had recovered. In upholding the damages limitation, the court drew on the UDHR and the ICCPR to determine what constituted abusive conditions in prisons and to decide whether the treatment the plaintiff had endured qualified as such under the Utah constitution’s “unnecessary rigor” provision.⁶²³

Washington

Washington courts have interpreted and applied human rights treaties in several decisions involving its penal statutes. In an unpublished opinion, *Washington v. Berry*, the defendant argued that a life sentence without parole violated his right under the ICCPR to a prison term with rehabilitation, not punishment, as its goal.⁶²⁴ The Court of Appeals rejected the defendant’s argument, stressing that the ICCPR “speaks of the goal of penitentiary systems in general and not what can or cannot be done with individual prisoners.” It invoked the U.S. Senate’s reservation to that provision of the ICCPR, which insists that the provision “does not diminish the goals of punishment, deterrence and incapacitation as additional legitimate purposes.”⁶²⁵ The Court of Appeals also rebuffed a defendant’s efforts to use the ICCPR to receive a lighter sentence in *In re Haynes*.⁶²⁶ The petitioner argued that the state imposed a heavier penalty on him than the penalty available at the time of the crime’s commission, in violation of the covenant. The court disagreed, and noted *in dicta* the possibility that the ICCPR is not self-executing “and therefore does not apply to the states.”⁶²⁷

In a 1973 civil case, the Washington Supreme Court relied in part on the freedom of movement guarantee in the UDHR to support its holding that the Washington constitution prohibited Seattle’s one-year residency requirement for those applying for civil-service positions.⁶²⁸ The court mentioned the UDHR in a background discussion of the freedom of movement in Anglo-American law.⁶²⁹

In *Perez v. Garcia*, the appellant contended that the delay of a hearing on a motion to revise violated the Hague Service Convention, which requires use of “the most expeditious procedures available.”⁶³⁰ The court dismissed the claim without discussion, noting that the appellant had not clearly stated the remedy requested.⁶³¹

In addition, there were at least two cases where the court refused to apply the tenets of international treaties because the treaties themselves were not self-executing. The first opinion, *In re Hegney*, involved a situation where the defendant sought relief from a sentence of first-degree felony murder.⁶³²

621 922 P.2d 732 (Utah 1996), *overruled in part* by Spackman v. Bd. of Educ., 16 P.3d 533 (Utah 2000).

622 *Id.* at 735.

623 *Id.* at 740.

624 1998 Wash. App. LEXIS 1525, at *17 (Wash. Ct. App. Oct. 26, 1998) (finding that the Persistent Offender Accountability Act, which mandated a sentence of life without the possibility of parole for certain offenders, did not violate the ICCPR).

625 *Id.* at *18 (internal quotations omitted); *see also* State v. Russ, 969 P.2d 106 (Wash. Ct. App. 1998) (published in part).

626 100 Wa. App. 366 (Wash. Ct. App. 2000).

627 *Id.* at 379–80, 380 n.31; *see also* State v. Stone, No. 30616-6-II, 2005 Wash. App. LEXIS 1734 (Wash. Ct. App. July 19, 2005) (pointing to the Senate reservations to reject defendant’s argument under the ICCPR).

628 Eggert v. Seattle, 81 Wash. 2d 840, 841 (1973).

629 *Id.*

630 198 P.3d 539, 546 (Wash. Ct. App. 2009).

631 *Id.*

632 158 P.3d 1193, 1196 (Wash. Ct. App. 2007).

The court, however, refused to apply any related international treaties. Although the defendant argued that the ICCPR should be controlling in this case, the court disagreed. It stated that “treat[ies] such as the ICCPR [do] not automatically supersede local laws that are inconsistent with it unless the treaty provisions are self-executing,”⁶³³ and that Congress “ha[d] not enacted implementing legislation.”⁶³⁴

State v. Hankins, decided one month later, followed a similar line of reasoning.⁶³⁵ The court wrote in the decision, “International treaties are only binding on the states when they have been signed and ratified by the United States, and when they are either self-executing or have been executed through implementing legislation.”⁶³⁶ It went on to state that the CRC had not been ratified by the United States, the CRC was thus not binding on the court, and “the ICCPR [did] not create a private right of action.”⁶³⁷ Concluding its opinion, the *Hankins* court in also analyzed the question of customary law, stating, “customary international law does not apply to a direct challenge of a statute . . . because the lawmaking function has been entrusted to the legislative branches of the federal and state governments, and customary international norms cannot override the intent of our legislators.”⁶³⁸ The court opined, “the power to recognize international obligations [was] vested in both the executive and legislative branches of the federal government, not to the courts or the state governments.”⁶³⁹

In another recent case, *In re Ayers*, the court considered the motion for relief from judgment from a *pro se* defendant who challenged his civil commitment as a sexually violent predator.⁶⁴⁰ One of the defendant’s arguments was that his commitment violated several articles under the UDHR.⁶⁴¹ Stating that the Declaration did not impose legal obligations as a matter of international law, the court decided that the defendant’s arguments based on the Declaration failed.⁶⁴²

West Virginia

In *Pauley v. Kelly*, the West Virginia Supreme Court, addressing the constitutionality of a financing scheme for public schools, invoked the UDHR in support of its holding that “education is a fundamental right of every American.”⁶⁴³ The court cited the UDHR in its review of other state and federal courts’ analyses of the right to education, pointing to the UDHR as part of the “embarrassing abundance of authority” on the topic.⁶⁴⁴

Wisconsin

Several criminal cases have appeared in Wisconsin courts with defendants appealing to the Vienna Convention. For example, *State v. Navarro* decided the issue of whether Article 36 of the Vienna Convention confers a right for foreign nationals to consult the consular offices of their country in Wisconsin.⁶⁴⁵ Noting, “International treaties do not create personal rights that an individual may enforce in the courts of its signatory nations,”⁶⁴⁶ the court held that the Vienna Convention did not create such a right and, thus, the defendant did not have standing to bring his claim.

633 *Id.* at 1207.

634 *Id.*

635 No. 55563-4-I, 2007 WL 1739693 (Wash. Ct. App. June 18, 2007).

636 *Id.* at *11.

637 *Id.*

638 *Id.*

639 *Id.* (emphasis added).

640 Nos. 37822-1-II, 37747-1-II, 2010 WL 1223091 (Wash. App. Mar. 30, 2010).

641 *Id.* at *5.

642 *Id.*

643 162 W. Va. 672, 679, 708–09 (1979).

644 *Id.* at 679.

645 260 Wis. 2d 861 (Wis. Ct. App. 2003).

646 *Id.* at 869.

Citing *State v. Navarro*, the court denied the defendant's ineffective assistance of counsel claim in the 2005 case, *State v. Markovic*,⁶⁴⁷ and held that the failure of a foreign national's attorney to inform the national of his rights to consult with his country's consulate after his arrest was not ineffective assistance in violation of the Sixth Amendment because the issue had been "unsettled" at the time of his arrest.⁶⁴⁸ Considering a defendant's arguments that his sentence should have been modified based on "a due process violation of his rights under the Vienna Convention,"⁶⁴⁹ the court in *State v. Cervantes-Carillo* found that the "circuit court correctly stated that in [*State v. Navarro*], this court held 'that the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case.'"⁶⁵⁰

Finally, in *State v. Delacruz*, a *pro se* defendant argued that his appellate counsel was ineffective for failing to argue the ineffectiveness of trial counsel, who in turn had not argued a due process violation based on the state's delayed notice to the Mexican consulate of his arrest.⁶⁵¹ Giving two reasons for why the defendant's argument had failed, the court stated that the defendant had not shown that the delay was intentional or unreasonable and that he lacked standing to claim a remedy under the Vienna Convention. The court further noted, "[the Vienna Convention] represents only a notice accommodation to a foreign national and dictates no substantive procedures and confers no substantive rights in a state court proceeding. We cannot fault counsel for not urging a nonexistent remedy."⁶⁵²

647 No. 2004AP1560, 2005 WL 1283112 (Wis. Ct. App. June 1, 2005).

648 *Id.* at 3.

649 No. 2005AP1408-CR, 2007 WL 968797 (Wis. Ct. App. Apr. 3, 2007).

650 *Id.* (citing *Navarro*, 260 Wis. 2d 861, 868 (Wis. Ct. App. 2003)).

651 322 Wis. 2d 573 (Wis. Ct. App. 2009).

652 *Id.* at *3.

Conclusion

Recommendations for a State Court Human Rights Strategy

This survey of state court cases reveals that courts have most frequently addressed international human rights in death penalty cases, when defendants argue that the ICCPR or customary international law prohibits capital punishment. Other than in the juvenile context, these arguments have proven largely unsuccessful. Courts either have accepted U.S. Senate reservations to human rights treaties uncritically or, in some instances, have simply refused to adjudicate human rights defenses. A more promising area for the development of international human rights jurisprudence is in civil lawsuits. As the survey shows, some state courts have started to look to human rights principles to help define state constitutional or statutory guarantees, and there are openings for further development of the law in this manner.

As one scholar noted, while courts have proven “reluctant to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms.”⁶⁵³ Scholars have repeatedly argued, “This ‘indirect incorporation’ of international human rights law continues to be a promising approach warranting greater attention and increased use by human rights advocates.”⁶⁵⁴

State court litigators should therefore consider using international human rights standards as interpretive guides for state constitutional and statutory rights whenever strategically possible. Invoking international human rights law as an interpretive guide, while relying on state law for the rule of decision, has several advantages. It insulates decisions from review by the U.S. Supreme Court and makes them more resistant to removal to federal court.⁶⁵⁵ State courts can thus safely develop their own jurisprudence of international human rights without the possibility that federal courts will intervene and frustrate the project altogether. An “indirect incorporation” approach also allows state courts to circumnavigate the self-execution doctrine and reservations to treaties that otherwise may limit treaties’ impact. These limitations are less relevant when state courts are not asked to apply treaties as governing law.

Moreover, the development of a jurisprudence in which human rights law plays a subsidiary but important interpretive role may encourage state courts, which have limited familiarity with such law, to examine international sources of obligation more frequently. As state courts become more familiar with international human rights law, they may prove more willing to adjudicate a violation of international human rights law standing alone, without having to rely on analogous standards in state law for the rules of decision. And over time, as international human rights principles become more integrated into state law, courts will define rights more broadly and will hold government accountable for enforcing those rights, expanding opportunity for all Americans.

653 Strossen, *supra* note 8, at 824.

654 Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT’L L. & POL’Y 1, 19 (1993); see also Martha F. Davis, *Lecture: Int’l Hum. Rts. & U.S. Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 428–31 (2000); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006).

655 See, e.g., Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT’L LAWYER 61 (1984) (“Another advantage of using human rights law as an interpretive device rather than arguing that it is binding on the state court as treaty or customary law is that a California decision which adopts a human rights norm to interpret California law cannot be reviewed by the U.S. Supreme Court; it is insulated from Supreme Court review because there is an ‘independent state ground’ for the decision.”).



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