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INTERNATIONAL HUMAN RIGHTS LAW: A DEVELOPMENT OVERVIEW AND DOMESTIC APPLICATION WITHIN THE U.S. CRIMINAL JUSTICE SYSTEM

**BY
WILLIAM D. AUMAN***

We have before us an extraordinary moment in the history of the human rights movement—a window of opportunity to gain universal acceptance of guarantees for individual freedoms. Now that curiosity is aroused, one must wonder what possible miracle cure has been devised and why no one told you about it. Simple. We're talking international human rights. Of course the reaction of "real" lawyers to mention of such a concept is likely to be one of puzzlement or the tolerant but cynical smile that is supposed to distinguish the realist from the idealist. Since the term is usually employed as a generic phrase and bandied about rather loosely by politicians and the like, it is not surprising that some confusion exists. Accordingly, we must add the word "law" to qualify this window of opportunity.

International human rights law is today an extensive body of agreed-upon norms and international obligations codified in over 50 international treaties and declarations of both a general and fairly specialized nature. United States lawyers and judges are turning with increasing frequency to these laws as a basis for rules of decision and as interpretive guides in domestic cases involving refugees, detainees, undocumented aliens, and government activities. The time is ripe for enhanced development and application of a variety of human rights issues through ratification of several treaties currently pending before the U.S. Senate Foreign Relations Committee including The Convention Against Torture and other Cruel, Inhuman or Degrading Punishment; The International Covenant on Economic, Social, and Cultural Rights; The International Convention on the Elimination of All Forms of Racial Discrimination; and

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The Convention on the Elimination of All Forms of Discrimination Against Women. Altogether, there are over forty international human rights treaties now pending in the Senate.

This article will attempt to provide both the realist and idealist with a general understanding of international human rights law, together with the whys and wherefores of how such treaties may be able to significantly contribute to American jurisprudence. Particular focus will be on the impact that ratification of select treaties could have on the federal and North Carolina criminal justice systems. Anticipating ratification, we will explore the background and development of codified international human rights law—the evolutionary process that has set the stage for the upcoming senatorial deliberations with respect to these treaties. The mechanics of treaty and legislative ratification will also be examined to acquaint the reader with procedural aspects of a subject so often left out of the typical law school curriculum: public international law.

BACKGROUND

A. *Aliens and the Red Cross*

Although most observers regard the formation of the United Nations and the promulgation of the Universal Declaration of Human Rights as the beginning of international human rights law, the origins of human rights can be traced to early philosophical and legal theories of “natural law” or “God’s law,” a law higher than the substantive laws of states. Such theories gave individuals certain immutable rights as human beings that commanded moral obedience, even when the right in question conflicted with positive laws enacted by the state. During the nineteenth century, however, the concept that states were the only proper subjects of international law gained acceptance. Though the state-oriented view granted individuals no international legal status, several other developments presaged the modern protection of human rights. The Hague Convention No. IV on the rules of war adopted in 1907, the establishment of the International Labor Organization in 1919, the efforts to abolish slavery and the slave trade, and the diplomatic efforts to protect the rights of aliens all served to set the stage for contemporary human rights law.¹

The specific protection of aliens is particularly significant, because we are confronted with an “international standard of justice” for the first time. Alien concern grew out of the concept of state sovereignty, whereby a nation may demand respect for the rights of its nationals

1. See e.g. Hannum, *International Human Rights Law: Neither Myth nor Magic*, 31 *FED. NEW & J.* 19 (1984).

abroad.² Although initial enforcement of this right was in the form of self-help reprisal, diplomatic negotiation between the government of the aggrieved individual and the government of the territory where the wrong occurred evolved as a suitable replacement. This state intervention rested on an alien's right to be treated in accordance with international standards of justice and to get the same protection as nationals of the country in which the alien was residing.³

Concern for human rights likewise motivated the formation of the International Committee of the Red Cross (ICRC) at the 1863 Geneva International Conference. The ICRC was instrumental in preparing the initial draft of the first multilateral treaty protecting the victims of armed conflict known as: the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁴ This international treaty protected military hospitals from attack and provided equal medical treatment for combatants on both sides of a conflict.⁵

Following World War II, the four Geneva Conventions of 1949 supplemented the 1864 Convention. The first three conventions provide for the care of sick and wounded members of the armed forces and for the treatment of prisoners of war.⁶ The fourth extends protection to civilians in time of war.⁷ In 1974, the ICRC initiated a conference to draft two protocols intended to update and clarify the Geneva Conventions and to modernize the rules limiting methods and means of warfare. As a result, the two additional Protocols of 1977 were adopted and added to the 1949 Conventions. The Protocols attempted to combine the Geneva Conventions' focus on the protection of war victims with the Hague Conventions' concern with the rules for waging war.⁸ Emerging from the adoption were certain humanitarian rights conferred upon both individual combatants and civilians. Combatants are given prisoner-of-war status once they are placed outside of battle by becoming sick, wounded,

2. See L. JOHN, AND T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, at 6-7 (1973).

3. Tarnopolosky, *General Course on International Protection of Human Rights*, in *INTERNATIONAL INSTITUTE OF HUMAN RIGHTS, COLLECTION OF LECTURES* 1, 9 (1984).

4. A. ROBERTS & R. CUELF, *DOCUMENTS ON THE LAW OF WAR* (1982) (The ICRC also participated in drafting the Geneva Conventions of 1906, 1929 and 1949, and the Additional Protocols of 1977.)

5. See Weissbrodt & O'Toole, *The Development of International Human Rights Law*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL* 17 (1988).

6. *Id.*

7. *Id.*

8. *Id.* at 21. (Note that fifteen Hague Conventions of 1899 and 1907 emphasize limits on the means and methods of waging warfare. For example, the Hague Conventions outlaw the use of weapons calculated to cause unnecessary suffering, i.e. active combatants are given the right not to be targets of biological, bacteriological, or chemical weaponry.)

shipwrecked, or by voluntarily laying down their arms.⁹

The Geneva Conventions also established a minimum international standard for securing the life, liberty, and property of civilians in occupied territories. Civilians were given certain minimal human rights, including the right to be free from torture, mutilation, destruction of cultural objects and places of worship, and the taking of hostages.¹⁰ With the United States as a signatory and ratifying nation, the Geneva Conventions may serve to be the most effective source of international humanitarian law. Unfortunately, utility is extremely limited due to the parochial nature of circumstances necessary for application of the provisions, i.e. human rights violations do not limit their occurrence to periods of declared warfare.

B. *Minority Protection and The Abolition of Slavery*

Between 1680 and 1786, British slave traders transported more than two million Blacks to the western hemisphere.¹¹ Collective international measures were taken to demonstrate the growing international concern for minority human rights until the nineteenth century. After centuries of involuntary servitude, opposition to this traffic gradually developed, and the slave trade was finally condemned by treaty in the Additional Articles to the Paris Treaty of 1814 between France and Great Britain.¹² In 1885, the General Act of the Berlin Conference on Central Africa affirmed that the trading of slaves was to be forbidden in conformity with the principles of international law.¹³ These beginnings set the stage for the League of Nations Convention to Suppress the Slave Trade and Slavery of 1926. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery augmented the League of Nations Convention when adopted in 1956.¹⁴

International standards of justice also developed in early efforts to protect religious minorities. Beginning with the Reformation and the religious wars of the 16th and 17th centuries, peace treaties began to include provisions protecting religious minorities.¹⁵ Though diplomatic alternatives were less intrusive, many countries used humanitarian purposes as excuses for military intervention in an effort to punish states abusing their minorities. Such sovereign intrusions were thought to be justified

9. See Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 VA. J. INT'L L. 557, 573 (1979).

10. *Id.*

11. Weissbrodt & O'toole, *supra* note 5, at 19.

12. See Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 HUM. RTS. Q. 306 (1986).

13. P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS*, § 1.7, at 13 (1983).

14. *Id.* § 18.4.6, at 233-34.

15. Tarnopolsky, *supra* note 3, at 10-13.

when a government's treatment of its subjects shocked the conscience of humankind.¹⁶ For example, Great Britain, France, and Russia described their military excursion in 1827 against the Ottoman Empire as necessary to stop Turkish abuse of its Greek population.¹⁷

A common-sense approach, similar to modern day United Nations methods of addressing minority human rights problems, was advanced by nations who regarded diplomatic intervention as an appropriate means to express concern over another government's treatment of minorities. The United States and six European nations utilized this tactic by sending a collective diplomatic note to the government of Romania in 1872 protesting Romanian mistreatment of Jews.¹⁸ Such measures exhibit more genuine respect for another respected principle of international human rights, that of self-determination. This principle became one of the basic components of minority protection treaties administered by the League of Nations, which created a mandate system to guarantee freedom of conscience and religion in the former colonial territories of Germany and Turkey.¹⁹ Mandatory powers promoted the material and moral well-being as well as the social progress of the inhabitants of mandate territories.²⁰ The goal of the system was to prepare the former colonies for independence; they were considered prepared for independence when protections of religious, linguistic, and ethnic minorities were guaranteed. Also, protection for alien rights and freedom of conscience were notable prerequisites for autonomy.

C. *Human Rights in National Law*

Perhaps the most obvious evolutionary recognition of human rights was the development of charters and proclamations within individual nation states that, at least in theory, codified inherent civil rights applicable to all citizens. The best example of this is, perhaps, our own Declaration of Independence and Bill of Rights. When the American colonies rebelled against Great Britain, the rebels set forth their reasons in the Declaration as follows:

We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

16. L. JOHN & T. BVERGENTHAL, *supra* note 2, at 181.

17. Tarnopolsky, *supra* note 3, at 12.

18. Weissbrodt & O'Toole, *supra* note 5, at 19.

19. L. JOHN & T. BUERGENTHAL, *supra* note 2, at 337-69.

20. See Weissbrodt & Mahoney, *International Legal Action Against Apartheid*, 4 L. & INEQUALITY 485, 489 (1986).

Great rhetoric, but black citizens were still slaves and all women were disenfranchised and deprived of important liberties. Still, rhetoric has a way of shaping reality, and the twentieth century America is closer to the ideals of the Declaration than it was in 1776.

European governments followed suit, beginning with France in 1789 when the French Revolution brought forth the Declaration of the Rights of Man and of the Citizen. Similar written were promulgated in the Netherlands (1798), Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849) and Prussia (1850).²¹ The development of socialism in the nineteenth century expanded the concept to include not only the right to be free from state intervention but, also, the right to have the states redress economic inequality. These economic, social and cultural rights were first incorporated into the constitutions of Mexico (1917) and the Soviet Union (1918).²²

Following World War I and the resulting territorial changes, nine European nations and the principal allied powers entered into treaties that provided protection for racial, linguistic and religious minorities. These instruments required signatory states to guarantee within their own national law that the civil rights of minorities would be protected and that these protections could not be modified by ordinary legislation; these guarantees were theoretically sound but impractical. Despite increased protection within the international community, the concept of national sovereignty effectively limited the extent to which other nations could criticize a government's treatment of its nationals, resulting Nazi atrocities and World War II. Certainly, within the international legal framework present at the time, Hitler plausibly could have argued that the treatment of its own citizens was not a matter of international concern. Likewise, other governments could have refused intervention because they were not responsible for the conduct of the German government.

The United Nations and an "International Bill of Rights"

Forty-two years ago, governments set a new world standard for human rights—the Universal Declaration of Human Rights. Adopted by the United Nations General Assembly on December 10, 1948, the Declaration proclaims fundamental and equal rights for all human kind and provides a worldwide standard for the preservation of human equality and dignity. This action, prompted by the Holocaust, marked universal recognition by the United States and other United Nations' members of the necessity to protect human rights in the global arena.

Soon after its founding in San Francisco in 1945, the United Nations

21. P. SIEGHART, *supra* note 13 § 1.3, at 9 n. 11.

22. Weissbrodt & O'Toole, *supra* note 5, at 21.

began receiving letters about human rights violations. The question of these petitions led to the creation of the U.N. Commission on Human Rights, originally chaired by Eleanor Roosevelt. After the Commission began operation, the Secretary of the United Nations prepared an outline that listed most of the rights of which the Universal Declaration would eventually consist. This outline was followed by a draft that drew upon national constitutions and texts created by both governmental and non-governmental organizations. Suggestions were submitted by entities such as the Sub-Commission on Freedom and Information, Commission on the Status of Women, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. These groups were catalysts for agreement on the final format just two days before the end of the U.N. General Assembly Session. Adoption was "a much greater achievement than anyone could have imagined," wrote John P. Humphrey, first director of the United Nations Division of Human Rights.²³ Humphrey further noted that the impact of the Declaration on world public opinion has been great if not greater than that of any contemporary international instrument.²⁴

As promulgated, the Universal Declaration includes the following six Articles that arguably could have direct relevance within the American criminal justice system (see discussion, *infra*): Article I states that all human beings are born free and equal in dignity and rights, and are endowed with reason and conscience and should act towards one another in a spirit of brotherhood; Article III guarantees the right to life, liberty, and security of person; Article V mandates that no one be subjected to torture or to cruel, inhumane or degrading treatment of any kind; Article IX prevents arbitrary arrest, detention or exile; Article X entitles all to a fair and public hearing before an independent and impartial tribunal in determining rights and obligations regarding criminal charges brought against that individual; and Article XIX guarantees the right to freedom of opinion and expression, including the freedom to hold opinions without interference, and to seek, receive, and impart information through any media regardless of frontiers.²⁵ United Nations' members were not required to ratify the Universal Declaration, which in and of itself is not legally binding, though United Nations membership is considered to be an implicit acceptance of the principles contained therein. The United States played a major role in the conception and drafting of the Declaration but has not ratified most of the subsequent covenants and conventions designed to implement the document.

23. J. ISRAEL, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: AN INTRODUCTION* (Jan. 1988) (available through AIUSA, New York).

24. *Id.*

25. See generally, *U.N. Universal Declaration of Human Rights*, G.A. Res. 172 A (III) (1948).

A. *Terminology and U.S. Legal Machinery*

For those who are unfamiliar with public international law terminology, a declaration (such as the U.N. Universal Declaration noted above) is merely a general statement of intent or principle declared by a group or organization. It is not necessarily signed, ratified or adopted by individual nations. A covenant or convention, unlike a declaration, is legally binding on those governments that sign and ratify it. Signing a convention or covenant signifies the intent of a nation to ratify but does not bind the nation to the agreement. Each sovereign nation-state has its own governmental machinery of established procedures for ratification. In the United States, our President's signature results in submission to the Senate for final passage. The President may sign the treaty as is or may add several declarations, reservations, or understandings to the original form of the instrument. Reservations are statements which modify or limit the substantive effect of one or more of the treaty provisions, which simply clarify a matter that is generally incidental to the operation of the treaty.²⁶ Accordingly, after the U.N. General Assembly adopts a treaty and opens it for signature to member nations, our Chief Executive must initially determine whether to sign it. If he chooses to sign, the State Department will then prepare a report based on review from the Executive Department that includes any additional recommendations. In the Senate, the treaty is referred to the Senate Foreign Relations Committee for hearings and review. The Committee can accept, add to, or delete any added declarations, reservations, or understandings before reporting to the full Senate. The Senate must agree to ratify by a two-thirds majority vote.²⁷ If there has been any change from the initial form as submitted by the President, the President may then choose to withdraw the treaty from consideration. Assuming two-thirds consent and Presidential agreement, the treaty is then deposited with the Secretary General of the United Nations. At this point, the treaty has international force only if a required number of other United Nations members have also ratified. The next step for the United States may be a reservation in order to abide by the U.S. Constitution, in addition to implementing legislation which converts the treaty to domestic law. This legislation must go through both the House and Senate, with a Presidential signature necessary to become law.

B. *The United States and International Covenants*

Perhaps the most authoritative definition of human rights outside of

26. R. LILICH, U.S. RATIFICATION OF HUMAN RIGHTS TREATIES, WITH OR WITHOUT RESERVATION (1981); G. MOWER, THE UNITED STATES, THE UNITED NATIONS, AND HUMAN RIGHTS (1979).

27. U.S. CONST. art. II.

the Universal Declaration is found in the International Covenant on Civil and Political Rights (ICCPR).²⁸ This treaty was not adopted nor opened for adherence until 1966, and it was 1976 before the ICCPR came into international legal force.²⁹

The ICCPR makes more specific and binding the obligation of governments to protect the rights referred to previously in the Universal Declaration. Included are such notable protections as freedom from arbitrary deprivation of life, freedom from torture, cruel, inhuman or degrading treatment, freedom from arbitrary arrest and detention, right to a fair trial, and freedom of thought, conscience and religion.

The ICCPR's governing machinery is the Human Rights Committee of the United Nations. This Committee, which reports to the Economic and Social Council of the U.N., is an eighteen-member body elected by the nations that have ratified the Covenant. The Human Rights Committee considers required, periodic human rights status reports which must be submitted by all nations party to the Covenant and, also, hears complaints issued by one state party against another. A nation that is party to the Covenant may also adopt the optional protocol, which binds the subject nation-state to stricter enforcement. This protocol enables the Human Rights Committee to consider communications in closed session from individuals who allege that they have been victims of a human rights violation by one of the nations party to the protocol.³⁰

A 2nd Optional Protocol, adopted on December 15, 1989, requires states to take all necessary measures to abolish the death penalty (see death penalty discussion, *infra*).³¹ This is quite an expansion from the original ICCPR text, which prohibits the execution of juveniles (under age 18 at time of offense) and the mentally retarded. As of March, 1990, the following ten nations have ratified the 2nd Protocol: Federal Republic of Germany, Denmark, Finland, Italy, Norway, Portugal, Sweden, Uruguay, Luxembourg, and Costa Rica. Based on the previous history of the United States as regards the basic ICCPR, it is unlikely that we can expect ratification of the 2nd Protocol at any time within the near future.

President Carter signed the ICCPR in 1977, eleven years after the Covenant was adopted unanimously by the U.N. General Assembly. To date, eighty-seven countries have ratified the treaty and become party to the Covenant; the United States is reluctant to join the ranks of the ratifying nations. In 1978, the President urged passage of the ICCPR which

28. G.A. Res. 2200 A (XXI) (1966).

29. N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987).

30. LILLICH, *supra* note 26.

31. See International Covenant on Civil and Political Rights, 2nd Optional Protocol, art. 1 and 2.

resulted in Senatorial hearings,³² however, his proposal fell victim to problems between his Administration and Congress. According to Peter Weiss of the Center for Constitutional Rights, the United States problem can be described in two magic words—sovereign immunity.³³ Our Supreme Court has sanctioned the invocation of this doctrine, which essentially prohibits the judicial recognition of suits brought by victims of human rights abuses. Foreign governments and their nationals are thereby seemingly immune from judicial reparation, and such immunity is in keeping with U.S. diplomatic policy. Hearings on the ICCPR are still pending, seemingly indefinitely, within the Senate Foreign Relations Committee; however, another treaty may soon be cast among the political spotlight—the Convention Against Torture (CAT).³⁴

The background of the CAT can be traced to Resolution 3059, passed in November 1973 to reject any form of torture and other cruel, inhuman or degrading treatment or punishment. Resolution 3218 followed in 1974 to launch the initial stage of a program towards setting international standards to prevent torture. It included a clause requesting action by future U.N. Congresses, and this action occurred in August of 1975 with the drafting of minimum rules for the treatment of prisoners worldwide. On December 9, 1975, the United Nations issued its first official declaration against torture, and two years later authorized the Commission on Human Rights to draft a convention to incorporate these concerns. Adoption of the completed Convention, an important culmination of the development of international standards against torture, was finally accomplished in December of 1984.³⁵

Perhaps the most significant provision of the CAT is the creation of a committee authorized to investigate allegations of torture brought by member nations. A panel of ten experts from a variety of nation-states comprise the committee, which is empowered to examine periodic reports from states' parties and to make inquiries into apparent systematic practices of torture.³⁶ Reports are made annually to all member states and to the U.N. General Assembly. As of 1989, forty-one states had ratified the CAT and an additional thirty-eight had signed, thereby evidencing intent to ratify.

The United States is one of the thirty-eight, having signed the Convention on April 8, 1988. It has been submitted to the Senate Foreign Rela-

32. Human Rights Treaties, President's Message to the Senate, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 27, 1978).

33. P. Weiss, Remarks at the Amnesty International Legal Support Network National Conference at the Urban Morgan Institute for Human Rights, University of Cincinnati Law School (Feb. 24, 1990).

34. G.A. Res. 39/46 (1984).

35. RODLEY, *supra* note 29, at 46-47.

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, art. 17-20.

tions Committee with a total of four declarations, three reservations and eight understandings, which propose various qualifications on the substantive provisions. Many revisions detrimentally alter the purpose of the treaty, including a proviso that excludes United States' participation in almost all of the international monitoring aspects (such as the Committee Against Torture power noted *supra*) and a limitation which makes the treaty unenforceable domestically unless new legislation is passed. This limitation, which renders the treaty "non-self-executing," serves to restrict domestic litigation though global enforcement would still be effectual. Evidently the United States, a nation that publicly proclaims support for human rights, fears the universal jurisdiction that the treaty would provide for, or the possible criticisms that may issue.

Pursuant to the CAT, torture is to be punished as a crime of grave nature, and prisoners are not to be extradited to countries where they may face torture.³⁷ Could it be that the death penalty being in force in the United States would be considered torture, thereby creating an international hurdle for the extradition of multinational drug cartel members in addition to internal criminal justice concerns? We must seek the answers from our executive and legislative branches. For now, it is sufficient to say that, like the Declaration of Independence, this treaty creates momentum towards the realization of the hopes that it offers. After ratification, it would be universally legitimate for our nation to intercede regarding the behavior of another country towards its citizens, thereby eliminating the perceived need of gunboat diplomacy. The CAT further provides for the prosecution of torturers and the right of victims to be compensated. We should be quick to affirm these humanitarian measures.

The United States can be proud of the recent affirmation of the Genocide Convention on November 4, 1988.³⁸ Passed as the Genocide Convention Implementation Act, the new statute is to be known as the Proximire Act on behalf of the Senator who worked for decades promoting ratification.³⁹ The Genocide Convention aims at preventing the international destruction of national, ethnic, racial, or religious groups and provides for the punishment of those responsible for such acts. For the first time, it is a crime under U.S. law to commit genocide. Such action was not easy to come by, as evidenced by the fact that ninety-two nations were parties to the Convention before the U.S. decided to join their ranks.

Raphael Lemkin, in 1944, coined the word "genocide" to signify the

37. *Id.* art. 3-4.

38. 18 U.S.C. § 1091-1093 (1988).

39. Ginger, *The New U.S. Criminal Statute, The First Amendment, and the New International Information Order*, 46 NAT'L L. GUILD PRACT. 16, 17 (1989).

horror of the Nazi Holocaust. The Greek root "genos" and Latin root "gens" mean race of kind and occur in "genesis," "progeny," and "genealogy." Its suffix, "cide," derives from the Latin "caedere," meaning to kill. Genocide is therefore the murder of a people; it is homicide directed at the family of man. Particularly poignant for Americans, it is more than a memory from the stories of others, Lemkin, for example, was a Polish Jew who lost 49 family members to the Nazis. He immigrated to the U.S. in 1941 and was subsequently an advisor to Robert Jackson, the U.S. Prosecutor at the Nuremburg War Crimes Trials.⁴⁰

These background points serve to introduce the Genocide Convention, a treaty intended to place all nations on the record together against genocide. Drafted over a two-year period by a United Nations Committee chaired by U.S. Delegate John Maktos, the Convention was adopted unanimously by the General Assembly meeting in Paris on December 9, 1948.⁴¹ On June 16, 1949, President Truman transmitted the treaty to the Senate together with a message urging that it give its advice and consent to ratification.⁴² There was no response. In 1953, the Eisenhower administration withdrew support for the Convention, though the Kennedy and Johnson administrations subsequently came out in favor of ratification.⁴³ On the congressional ratification process, a special committee of the Senate Foreign Relations Committee recommended ratification in 1950 but did nothing to facilitate consideration by the full Senate. Ratification was also recommended in 1970, 1971 and 1976, but the process was stalemated largely due to a reluctance on the part of the American Bar Association to endorse passage.⁴⁴

Accordingly, the 1988 vote is to be considered a decisive step, albeit long in coming, towards peace and cooperation among all nations. It is not a giant step but yet a dramatic one in the right direction. The action by the United States reveals our commitment to the United Nations process and signals acceptance of U.S. responsibility to ratify and enforce international law.

Specifically, the Proxmire Act makes it a crime for any national of the United States to commit a variety of acts with the specific intent to destroy a national, ethnic, racial or religious group. These acts include the following: killing or causing serious injury to members of a group; causing permanent impairment of the mental faculties of the group using drugs, torture, or similar techniques; subjecting the group to conditions of life that are intended to cause the physical destruction of the group;

40. Convention on the Prevention and Punishment of The Crime of Genocide, Conflict Analysis Center, Washington, D.C. (1984).

41. *Id.* at 3-4.

42. *Id.*

43. *Id.*

44. *Id.* at 5.

imposing measures intended to prevent births within the group; and transferring by force children of the subject group to another group.⁴⁵ No exception for wartime activity is noted, and penalties range from twenty years to life imprisonment together with a fine of up to one million dollars.⁴⁶

The Act can be looked at as an addition to U.S. criminal law to be used against the KKK, American Nazis, and other individuals who directly and publicly incite attacks on members of protected groups. It must be stated explicitly that the Act does limit speech, thereby generating First Amendment issues and concerns. Therefore, existing laws of conspiracy, fraud, libel, and Miranda warnings may come into question. It is now criminal to say certain things under certain circumstances with certain intent, just as previous law makes it criminal or actionable under certain circumstances to lie, or to talk or write to further a criminal conspiracy.⁴⁷ Current law also forbids the use of certain speech in a criminal trial unless a confession is preceded by a warning, and unless this speech, i.e. testimony, is ruled admissible by a judge.

In keeping with these Bill of Rights concerns, people who believe in freedom within the United States must undertake the task of working out how to enforce the Act. Enforcement will require a rethinking of U.S. history, including facing the genocide committed by the U.S. government against the many nations that were here before the Europeans arrived, against the millions of African slaves brought here against their will, and against the members of other protected groups subjected to human rights exploitation throughout our past. With hard work, this process may also lead to the acceptance of other international treaties, such as the ICCPR and the CAT, that are now awaiting action.

The United States does have a credibility problem within the world community in the area of human rights covenants and conventions. Though we have played a leading role in the development of major human rights treaties, we have declined to ratify many and have seemed slow to recognize others. Further, serious credibility problems will arise if, in the process of future ratification, the United States undercuts the substance of treaties such as the CAT through the attachment of limiting reservations and understandings. We should not fear these treaties, for the impact of additional ratification would create many interesting opportunities for human rights protection within the U.S. judicial system.

45. 18 U.S.C. § 1091(a) (1988).

46. *Id.*

47. Giner, *supra* note 39, at 24.

INTERNATIONAL HUMAN RIGHTS IN U.S. COURTS

A. *Treaty Power and Customary International Law*

Article VI, section 2, of the U.S. Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." It is well established that a self-executing treaty, or a non-self-executing treaty implemented by Congress, supercedes any prior inconsistent federal statutes as well as any inconsistent state and local laws.⁴⁸ Although customary international law is not specifically mentioned in the Constitution, the Supreme Court has declared that it is also "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."⁴⁹ Customary international law, like treaties, supercedes any and all inconsistent state and local laws, though the issue of federal supervision is still open for debate.

So what is this phenomenon referred to as "customary international law?" The answer is simply unclear. What constitutes customary international law is determined in large measure by reference to state practice, which includes, *inter alia*, "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy. . . ."⁵⁰ Widely ratified human rights treaties, such as the ICCPR, may also contribute to the creation of specific human rights recognized under customary international law.⁵¹ So may resolutions of international organizations, such as the United Nations' Universal Declaration of Human Rights, national and international judicial and arbitral decisions, and the opinions of prominent scholars.⁵² Thus, customary international law may prohibit incommunicado detention, unlawful arrest, and other gross human rights abuses, depending upon the interpretation adhered to by the presiding judge. United States courts have held, during this decade alone, that customary international law prohibits torture,⁵³ prolonged arbitrary detention,⁵⁴ and "causing [the] disappearance" of individuals.⁵⁵

The case of 17-year-old Jeolito Filartiga will perhaps provide an ap-

48. *See Asakura v. Seattle*, 265 U.S. 332, 341 (1924).

49. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

50. *See generally*, A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

51. H. HANNUM, *MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CRIMINAL LAW AND PROCEDURE* 5 (1989).

52. *Id.*

53. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

54. *Fernandez-Roque v. Smith*, 622 F.Supp. 887, 902 (N.D. Ga. 1985).

55. *Forti v. Suarez-Mason*, 694 F.Supp. 707, 711 (N.D. Cal. 1988).

propriate example of the use of customary international law within the United States. Joelito disappeared from his home in Paraguay in March of 1976. His body was later found, together with evidence of brutal torture by the Asuncion police. The Inspector General of the police fled to the United States and was apprehended by the Immigration and Naturalization Service. While in detention pending deportation, Joelito's family filed suit against him pursuant to the 1789 Judiciary Act, which provides that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort. . . committed in violation of the law of nations or a treaty of the United States."⁵⁶ To make a long story short, Chief Judge Irving Kaufman of the Second Circuit Court of Appeals found that customary international law, as reflected in a host of solemn multilateral conventions (including the Universal Declaration of Human Rights), has come to enshrine a legal prohibition against state-sanctioned torture.⁵⁷

Another significant decision concerning customary international law, *Fernandez v. Wilkinson*,⁵⁸ considered whether the continued detention of a Cuban who had arrived in the United States in 1980 as part of the "freedom flotilla" violated domestic or international law. The federal district court concluded that arbitrary detention is clearly prohibited by customary international law and judicially remedial within the United States, even though such cannot be said to violate the U.S. Constitution or our statutory laws.⁵⁹ The Tenth Circuit affirmed the district court's order but based its holding on U.S. statutory provisions rather than international law. Nevertheless, the Court found it proper to "consider international law principles for notions of fairness" and noted that its interpretation of the relevant statute is "consistent with accepted international law principles."⁶⁰

Numerous other attempts have been made over the years to invoke the Universal Declaration of Human Rights and other international legal instruments in domestic court cases. The Vietnam War generated many such decisions,⁶¹ most of which were largely unsuccessful in establishing supportive judicial precedent. These imaginative efforts, however, may someday bear fruit if domestic courts can be convinced to rethink their traditional attitudes and adopt a more enlightened approach towards in-

56. 28 U.S.C. § 1350 (1988)).

57. Schneebaum, *The Enforceability of International Human Rights Norms in United States Courts*, 31 FED. B. NEWS & J. 5, 194 (1984).

58. 505 F. Sup. 787 (D. Kan. 1980).

59. *Id.* at 798.

60. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388-90 (10th Cir. 1981).

61. See Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974).

ternational human rights claims. Certainly *Filartiga* and *Fernandez* are innovative steps in the right direction.

A major fear that must be overcome in order for the aforementioned end to occur is the concern that international law may unconstitutionally enlarge the powers of the federal government or abridge constitutionally guaranteed rights. This fear is unfounded since no treaty can override or supersede the U.S. Constitution.⁶² As the Supreme Court categorically stated in *Reid v. Covert*,⁶³ "[t]here is nothing in [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."⁶⁴ Whatever international obligations the United States may have under customary or conventional international law, the Constitution shall prevail.

Regarding federal law, the Supreme Court has made it clear that courts will not undertake to construe a treaty in any manner inconsistent with a subsequent federal statute;⁶⁵ however, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." Powers of a state must give way when they run counter to federal treaties or policies evidenced by customary international law.⁶⁶ Such invalidation of state laws should be quite infrequent, though, due to the growing trend on the part of state courts to extend individual rights through the use of state laws and constitutions rather than by reliance on federal constitutional provisions.⁶⁷ Therefore, state courts provide perhaps even more fertile ground for the utilization of international human rights law as a means of informing or interpreting state constitutional or statutory provisions.

B. U.S. Criminal Justice and International Standards

Abuse of powers of arrest and detention is perhaps the most widespread human rights violation in the world. It is the most common form of repression against political opposition groups within a country, and its use is often cloaked in the mantle of "national security" or an equivalent phrase which seeks to excuse the purely political nature of the detention.⁶⁸ Though many would argue that the Sanctuary Workers, the Wilmington 10, and perhaps other U.S. "political" cases would fit the above mold, this article will not attempt to draw those type of distinctions within the U.S. criminal justice system. Instead, it will focus on the ap-

62. H. HANNUM, *supra* note 51, at 8.

63. 354 U.S. 1 (1957).

64. *Id.* at 16-17.

65. *See, Baker v. Carr*, 369 U.S. 186, 212 (1962).

66. *See, United States v. Pink*, 315 U.S. 203, 230-31 (1942).

67. *See, Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L. REV. 535 (1986).

68. H. HANNUM, *supra* note 51, at 17.

plicability of international standards that may one day provide binding legal authority for use in criminal cases within our court system.

The general international standard is noted in the Universal Declaration of Human Rights, which gives everyone the entitlement to "liberty and security of person." No one may be subjected to arbitrary arrest or detention. Though some commentators have suggested that "arbitrary" is the equivalent to "illegal,"⁶⁹ the preferred view is that the notion of "arbitrary" includes both procedural and substantive components. The U.N. Commission on Human Rights has designated an arrest to be arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.⁷⁰

For an example of the possible application of this standard as it might apply in North Carolina, consider the case of an officer who, without obtaining a search warrant, enters the home of a third-party to effect an arrest. Absent consent or exigent circumstances this officer has committed an illegal arrest, not only in violation of the Fourth Amendment but also in violation of the ICCPR international standard.⁷¹ Upon ratification of the ICCPR, a motion to dismiss a charge based on said arrest would have additional legal teeth. At least one U.S. court has already held that prohibition against arbitrary arrest and detention is directly binding on the United States as part of customary international law, citing the ICCPR and Universal Declaration among other treaties.⁷²

Though the ICCPR does not require the full panoply of "Miranda" warnings mandated under our Fifth Amendment,⁷³ it does require that anyone arrested be informed of the reasons for such arrest and of any charges.⁷⁴ Anyone arrested or detained on a criminal charge must further be brought promptly before a judge or other officer authorized by law to exercise judicial power.⁷⁵ This requirement of "promptness" has been construed by the Human Rights Committee to require presentment within a few days.⁷⁶ Any ratification of the ICCPR or companion treaties should not effect North Carolina as regards this issue or, at least, should not pose an inconsistency with North Carolina law. N.C. General Statutes Sections 15A-601 and 15A-605 impose ninety-six hour time

69. See, e.g., references contained in United Nations Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile, at 5-7 (1964).

70. H. HANNUM, *supra* note 51, at 17.

71. See, *Steagald v. United States*, 451 U.S. 204 (1981).

72. 505 F. Supp. 787 (D. Kan. 1980).

73. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

74. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 9 (2).

75. *Id.* art. 9 (3).

76. Human Rights Committee, General Comment 8 (16) (article 9), Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) at 95 (1982).

limitations on a defendant's first judicial appearance and require advisement concerning charges that have been filed against the defendant. Challenges may be made under differing provisions applicable in other states or jurisdictional areas, though generally prompt appearance is provided for when violations of state law are alleged.

Habeas corpus is another area where ratification should not enlarge the rights of criminal defendants in North Carolina, nor in the United States as a whole, unless some imaginative legal theorist could structure a procedure whereby initial legality of detention could be challenged through such a writ. In the United States, habeas corpus is generally restricted to the post-trial context, with other constitutional provisions such as the "speedy trial" guarantee of the Sixth and Fourteenth Amendments available to seek pre-trial relief. North Carolina has a comparable restriction pursuant to Article 21 of the state constitution. Unlike in the United States, international standards relating to habeas corpus are not generally available as a means of collaterally attacking unconstitutional or otherwise defective laws. The ICCPR and related documents restrict habeas review to a determination of the initial legality and reasonableness of detention and, in some circumstances, the continuing validity of detention.⁷⁷ In the latter situation, international law is concerned with a detention based on factors which may change over time, such as mental illness.

The international right to a fair trial may be a more appropriate venue for incorporation of international rights within the United States than either prompt presentment or habeas corpus. It is an international legal norm that every accused has the right to a "fair and public hearing by a competent, independent and impartial tribunal."⁷⁸ International instruments also generally guarantee certain specific additional rights of the accused, such as the presumption of innocence, right to counsel (appointed if necessary), and rights to expert assistance in the preparation of a defense.⁷⁹ These are a few of the international minimum fair trial guarantees, with nothing to suggest that individual nation states cannot go to greater lengths in their attempts to protect the rights of the accused. The remainder of this "fair trial" section will concentrate on some of these minimum rights that have potential applicability within U.S. criminal court.

An independent and impartial tribunal is a fundamental necessity upon which all other fair trial rights may depend. Obviously, a tribunal must be independent of the prosecution and defendant. The European

77. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 9 (4).

78. *Id.* at 14 (1). Similar wording is found in the American and European Conventions on Human Rights at articles 8 (1) and 6 (1), respectively.

79. *See*, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 14 (2), (3); American Convention, art. 8 (2), and European Convention, art. 6 (3).

Court and Commission of Human Rights have made frequent reference to the English maxim that "justice must not only be done—it must be seen to be done."⁸⁰ Thus, an "impartial" tribunal must be composed of members who not only exhibit no actual bias against an accused, but who also are free from reasonable suspicion of bias because of their manner of appointment, prior dealings with a case, etc. The United States's standards are similar, and the basic rule is a "fair trial in a fair tribunal."⁸¹ Bias must be shown through a direct, personal interest in the outcome of a case—often extremely hard to prove. In North Carolina, our constitution provides for a court system without "favor, denial or delay."⁸² This vague guarantee may eventually lead attorneys to international law for supporting authority on which to base complaints, alleging the denial of this right.

Analogous to the "independent and impartial tribunal" requirement is the U.S. requirement that a search warrant be issued by a neutral and detached magistrate.⁸³ The police and prosecutorial officials have been held to inherently lack the required neutrality,⁸⁴ although warrant applications are generally routinely rubber-stamped upon affidavit. Perhaps some sort of warrant challenge based on the method of magistrate appointment or based on statistical evidence of the application/granting ratio could be grounded in part on international standards and used during a motion to suppress hearing.

The Sixth Amendment to the United States Constitution states that in all criminal prosecutions the accused shall enjoy the right to have assistance of counsel for his defense, but it was not until 1932 that this right was interpreted to require the appointment of counsel for an indigent defendant.⁸⁵ This initially limited right to counsel in certain cases was gradually expanded to include the right to appointed counsel in all felony cases in federal courts and to all state felony cases via the due process clause of the Fourteenth Amendment.⁸⁶ Right to counsel now applies to any case in which imprisonment is a possible punishment.⁸⁷

International instruments specifically guarantee the right of all defendants to be assisted by government-appointed counsel. The ICCPR language relating to this issue is that court-appointed attorneys are provided "when the interests of justice so require."⁸⁸ Upon ratification, one may apply this provision to situations other than those guaranteed in the

80. *Delcourt v. Belgium*, 1 Eur. Ct. H.R. 355 (1970).

81. *In re Murchison*, 349 U.S. 133, 136 (1955).

82. N.C. CONST. art. I § 18.

83. *Jackson v. United States*, 333 U.S. 10, 13-14 (1948).

84. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

85. *See Powell v. Alabama*, 287 U.S. 45 (1932).

86. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

87. *See Baldasar v. Illinois*, 446 U.S. 222 (1980).

88. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 14(3)(d).

United States. For instance, the U.S. rights to counsel are rights to counsel at the trial level (and in some cases, the immediate initial appeal). There is no constitutional right to post-conviction representation, including motions for appropriate relief, petitions for certiorari, habeas review, etc. Some states provide for a limited amount of representation, as with our own North Carolina Death Penalty Resource Center. The person who has been unjustly convicted and with new evidence can prove the same may or may not be lucky enough to afford any attorney to assist him. Ratification may be a tool by which he will be afforded an opportunity to petition for assistance.

None of the international human rights texts now pending in the Senate explicitly require that guilt be proved "beyond a reasonable doubt," a fundamental guarantee of U.S. due process.⁸⁹ The Human Rights Committee, however, has interpreted the ICCPR as requiring this standard for criminal cases.⁹⁰ Nevertheless, the United States appears to offer stronger individual protection when considering this issue; such is not the case with the right to expert assistance.

Indigent defendants in the United States routinely petition the court for assistance with their defense, requesting investigators, psychiatrists, fingerprint analysts, or the like. Though the Supreme Court has stated that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake,"⁹¹ courts have been reluctant to grant requests for assistance. The Supreme Court did, however, provide for the appointment of a psychiatric expert in *Ake v. Oklahoma*, where a defendant made a threshold showing that his sanity will be an issue at trial.⁹² Decisions regarding the implementation of this right were left to the states, and North Carolina has essentially followed the strict *Ake* rule.⁹³ The defendant, notwithstanding the obvious disparity of his resources as compared with the state or an affluent defendant, is not even given his choice of experts. In North Carolina, appointment of a fingerprint expert was finally allowed in *State v. Bridges*,⁹⁴ where the defendant showed not only, "specific necessity," "particularized need," and "significant factor in defense," but also that he could be deprived of a fair trial without the appointment.

Although the *Bridges* test may be difficult to meet, but one can certainly look to international standards for support in making the necessary showing. International law acknowledges "equality of arms;" this

89. H. HANNUM, *supra* note 51, at 9.

90. *Id.*

91. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

92. *Id.*

93. *State v. Gambrell*, 347 S.E.2d 390 (1986).

94. 385 S.E.2d 337, 338 (1989).

concept highlights many questions of procedural inequality that could jeopardize the fundamental fairness of a criminal proceeding. For example, the European Court of Human Rights found a violation of procedural equality where an expert prosecution witness was granted far wider rights to trial participation—including attendance throughout the hearings and the possibility of questioning witnesses and the accused.⁹⁵ While the expert was considered to be a neutral and impartial auxiliary of the court, a procedural violation of fundamental fairness was found to have occurred. While not completely analogous to the situation of expert appointment, the principle of adversarial equality reflected in the decision can be used to the advantage of the accused. Though the ICCPR or Universal Declaration do not specifically refer to the right of expert assistance, counsel can utilize the fair trial provisions of these instruments to support the appointment of the requested expert. Financial disparity alone can render a trial fundamentally unfair unless the system under which we are operating recognizes the need for an “equality of arms.”

Ratification, also, may have profound impact on the laws of evidence relating to search, seizure, and self-incrimination. The exclusion of improperly obtained evidence is not generally required under international norms, but the requirements of a fair trial may lead to the conclusion that the use of certain evidence has interfered with the defendant's rights. One might attack improperly obtained evidence based on an individual's right to privacy, together with the citation of general prohibitions against arbitrary, unlawful, or abusive interference with privacy by the police.⁹⁶ Questions of illegal searches and seizures have arisen often in the civil international context, but this approach does not have much supportive international precedent.

In *Malone v. U.K.*,⁹⁷ the European Court of Human Rights held that the standards for executive-order wiretapping directed against suspected criminals in the United Kingdom were so uncertain and obscure that the interference with privacy could not be in accordance with the law of the European Convention of Human Rights. The Court came to a similar conclusion with respect to telephone metering, where numbers called were monitored. Compare *Malone* to *Smith v. Maryland*,⁹⁸ where the use of a pen register to keep a record of telephone numbers dialed was not considered to be a “search.” The *Smith* case certainly appears to be inconsistent with the international approach, and attorneys can look

95. *Bonishch v. Austria*, 9 Eur. Ct. H.R. 191 (1985).

96. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 17(1).

97. 7 Eur. Ct. H.R. 14 (1984).

98. 442 U.S. 735 (1979).

to decisions such as *Malone* in an attempt to bolster claims of privacy intrusion under the Fourth Amendment.

Unfortunately, international criminal precedents have not been quite so kind; the admission of evidence allegedly planted by the police, surprise evidence, and certain types of hearsay have been held not to violate the right to a fair trial.⁹⁹ There is no specific international equivalent to the fourth amendment "exclusionary rule," prohibiting unreasonable searches and seizures, applicable to the states through the Fourteenth Amendment.¹⁰⁰ Nor do international human rights laws address the issue of sanctioning or deterring police practices, outside of awarding compensation to those whose rights have been violated.

International precedent supports fifth amendment violation claims in addition to the law of arrest issues. In fact, the European Court of Human Rights has found that statements given by a defendant to police that were admitted at trial despite the defendant's refusal to testify amounted to a violation of international law.¹⁰¹ By refusing to give evidence in court, a defendant effectively prohibits the prosecution from examining him about statements given. When such statements come in without explanation, they are often taken to be the truth by the factfinder. Accordingly, constitutional provisions and international precedent must be cited to prohibit this evidentiary violation of individual rights. In the United States, we have numerous hearsay exceptions that allow certain non-testifying witness statements to come into evidence, and we also have rules allowing admissions absent testimony. To analyze all the possible factual circumstances would be impossible, suffice it to say, ratification of international agreements could trigger the use of international judicial precedents that could revamp some of these hearsay and admission rules of evidence.

A final "fair trial" area to consider is the issue of a speedy trial. The ICCPR imposes the requirement of trial "within a reasonable time."¹⁰² Most jurisprudence of the Human Rights Committee in cases arising under the ICCPR concern Uruguay during its period of military control in the late 1970s and early 1980s. The Committee regularly found violations of the Covenant in the context of lengthy detention without trial under Uruguay's "prompt security measures."¹⁰³ Note that the application of this right is not limited to those in detention; Article 14(3) of the ICCPR requires governments to try all individuals "without undue delay." This standard parallels the sixth amendment to the U.S. Con-

99. H. HANNUM, *supra* note 51, at 96.

100. See generally M. CURTIS, NO STATE SHALL ABRIDGE (1986).

101. See *Unterpertinger v. Austria*, App. No. 9120/80, Eur. Court H.R., Judgment of 24 Nov. 1986, Ser. A No. 110.

102. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art 9(3).

103. H. HANNUM, *supra* note 51, at 106.

stitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. North Carolina recently repealed its Speedy Trial Act; however, the Sixth Amendment issues may obviously still be raised.

The central issue is what amounts to a "reasonable time" or "undue delay." This determination depends on the circumstances of each case and includes consideration of the complexity of the case, the conduct of the accused and the prosecution. In the case of *Barker v. Wingo*,¹⁰⁴ the Supreme Court articulated a balancing test that identified the following four criteria as among those that courts should consider: the length of delay, the reason for delay, whether the defendant asserted the right to a speedy trial, and whether the defendant was prejudiced by the delay.¹⁰⁵ Ratification of the ICCPR would not necessarily change this criteria, but the available international precedent could be used to support speedy trial motions. An interesting question that ratification would pose would be the issue of attachment of the sixth amendment rights to appellate stages of a criminal case, which is provided for internationally but not within the United States.¹⁰⁶

Perhaps the most significant and far-reaching impact of ratification upon the United States criminal justice system involves the death penalty. The convoluted history of the death penalty, the Supreme Court, due process, and the eighth amendment need not be repeated. It is significant that the United States is one of only a few nations that still legally sanction the execution of children under the age of eighteen. Of the thirty-seven states that permit capital punishment, fifteen (including North Carolina) decline to impose it on 16 year-olds and twelve decline to impose it on 17 year-olds.¹⁰⁷ Internationally recognized legal standards condemn the punishment of death for crimes of juvenile offenders under age eighteen. Under the ICCPR, the death sentence may not be imposed for crimes committed by persons "below eighteen years of age."¹⁰⁸ The Second Optional Protocol of the ICCPR, adopted on December 15, 1989, requires ratifying nations to take all necessary measures to abolish the practice of executing minors and the mentally retarded (which, pursuant to *Penry v. Lynaugh*,¹⁰⁹ is also legal in the United States). Finally, the U.N. Convention on the Rights of the Child also prohibits the execution of those under eighteen.¹¹⁰

104. 407 U.S. 514 (1972).

105. *Id.*

106. See *Douglas v. California*, 372 U.S. 353 (1963).

107. *Stanford v. Kentucky*, 492 U.S. 937 (1989).

108. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art 6(5).

109. 492 U.S. 302 (1989).

110. A. Miller, Remarks at the Amnesty International Legal Support Network National Conference, Urban Morgan Institute of Human Rights, University of Cincinnati Law School (2-24-90).

The effect of ratification speaks for itself. A present use value of the above treaties exists, however, when contesting the execution of a juvenile within the United States. As recognized by the U.S. Supreme Court in 1910, the eighth amendment prohibition against cruel and unusual punishment is "not fastened to the obsolete."¹¹¹ A half-century later, the Court again emphasized that the eighth amendment must "derive its meaning from evolving standards of decency that mark the progress of a maturing society."¹¹² American society is not the only benchmark for determining what amounts to evolving standards of decency. For example, in *Coker v. Georgia*,¹¹³ the Supreme Court noted that, as of 1965, only three major nations in the world retained the death penalty for rape. That international perspective served as the basis for the *Coker* decision that the imposition of the death penalty for the rape of an adult woman is "cruel and unusual" within the meaning of the eighth amendment.¹¹⁴ In *Enmund v. Flilrida*,¹¹⁵ the Supreme Court again turned toward the "climate of international opinion" as one basis for the determination that imposition of a death sentence on one who had not intended to kill is cruel and unusual punishment.

Though the constitutional issue of executing children in the United States was settled for the immediate future in the *Stanford v. Kentucky* decision,¹¹⁶ we can still utilize the laws and practices within other nations, as well as the numerous international treaties, declarations, and resolutions, to demonstrate that evolving standards of decency of a maturing international community prohibit the execution of juvenile offenders. We can also use these treaties in adult capital cases, though most major international conventions do permit imposition of the death penalty along strict guidelines. There does appear, however, to be a growing international trend towards abolition.¹¹⁷ Among countries for which information is available, forty-one have legally abolished the death penalty; two have ceased it in practice; nine have had no executions in the past ten years; and one-hundred and fifteen retain the death penalty.¹¹⁸ Of the Western nations, only the United States retains capital punishment during peacetime.¹¹⁹ This number should not increase in light of the ICCPR prohibition against reintroduction of the death penalty once it has been abolished. Attorneys can rely on these statistics, treaties and trends for supporting authority when raising eighth amendment issues.

111. *Weems v. United States*, 217 U.S. 349, 378 (1910).

112. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

113. 433 U.S. 584, 596 n.10 (1977).

114. *Id.*

115. 458 U.S. 782, 796 n.22 (1982).

116. 492 U.S. 937 (1989).

117. H. HANNUM, *supra* note 51, at 72.

118. *Id.*

119. *Id.*

Notwithstanding *Penry*, future litigation concerning the issue of executing the mentally retarded may have additional international backing. Under many, if not most legal systems, insanity is grounds to vitiate criminal responsibility and even to prevent trial. It is also possible for people to become insane after conviction. In 1984, the U.N. Economic and Social Council addressed this issue and concluded that a death sentence is not to be carried out on mentally incompetent persons.¹²⁰

Other issues also abound regarding the death penalty, such as the American Convention of Human Rights' prohibition of the execution of defendants over age seventy,¹²¹ and the ICCPR's ban on executing pregnant women.¹²² How these and the many other international death penalty related legalities come to effect our criminal justice system will be an imaginative theoretical journey. Ratification of the ICCPR and/or certain other treaties with criminal law implications may answer some of the questions, but ratification will also trigger interpretative battles that will be waged differently in jurisdictions throughout the country. Until these debates occur, customary international law will draw on these treaties and international precedents for use as supplemental eighth amendment authority within the United States.

CONCLUSION

The major problem with international human rights law is that most people know little about it. Even many of the people who do know something about it think that it really isn't law. There is a modern parallel in the current law of civil liberties and civil rights in the United States, for some people don't think that the Rehnquist Court is as receptive towards civil liberties issues as was the Warren Court. These people have looked around for alternative channels and discovered the benefit of the different state constitutions. Lawyers are beginning to realize that rights under state constitutions can be broader than those recognized by the Supreme Court. Law students, however, rarely study the state constitutions, taking only a required course in federal constitutional law.

This same phenomenon is true of international human rights law. Many law students have no idea that it exists and are certainly not versed in the possible ways that domestic court application can occur. In the next decade, however, legal theorists will be amazed at the amount of international human rights groundbreaking that will be utilized in American courts.

We have an international bill of rights now in existence, through the ICCPR, Universal Declaration, as well as customay international law.

120. N. RODLEY, *supra* note 29, at 182.

121. *Id.*

122. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 6(5).

We have domestic court precedent that looks to international standards. What we don't have, however, is an unbridled adherence and commitment to these global individual civil rights milestones. Perhaps it takes a psychoanalyst to explain why our nation, whose officials repeatedly pronounce public support for human rights on an international basis, refuse to ratify these treaties, which advance the cause of justice on a universal scale. United States ratification is the singularly most important step for human rights that must be taken. Although many countries have adopted the covenants and conventions, they will not reach their full potential to influence the behavior of governments until the United States is a formal party. With ratification, the moral and political force of human rights law will be strengthened. With that force, we can do more to protect those who are imprisoned illegally, tortured, and executed. Let not the Senate pass by this opportunity.