INDIRECT INCORPORATION OF HUMAN RIGHTS TREATY PROVISIONS IN CRIMINAL CASES IN UNITED STATES COURTS

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I. INTRODUCTION

A. *The Treaties*

The recent ratification by the United States of the International Covenant on Civil and Political Rights (ICCPR)[1] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[2] raise important possibilities for the rights of criminal defendants in United States courts. Although the treaties are both non–self executing and encumbered with reservations, declarations and understandings that blunt their force in domestic tribunals, they can still be useful to criminal defendants in strengthening constitutional and statutory claims[3] through "indirect incorporation." Essentially, indirect incorporation uses international human rights law to infuse interpretation of domestic law, both constitutional and statutory.[4]

1. ICCPR

The ICCPR contains a number of provisions that can be indirectly incorporated into constitutional and statutory defenses and claims. Article 6 recognizes that every human being has an inherent right to life and a right not to be arbitrarily deprived of life. Where it exists, the death penalty may be imposed only for the most serious crimes, and not for crimes committed by persons under the age of eighteen, nor carried out on pregnant women. Article 7 provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. Article 9 guarantees the right to liberty and personal security, and prohibits arbitrary arrest and detention. Article 10 provides that detainees and prisoners be treated humanely, and for

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1. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), *reprinted in* 23 I.L.M. 1027 [hereinafter Torture Convention].

3. The reservations, declarations, and understandings to the ICCPR can be found in UNITED STATES DEPARTMENT OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 214 (1994). The reservations, declarations, and understanding to the Torture Convention can be found in S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. (1990).

4. *See* Gordon Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3 (1983); 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 (1990); Richard B. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 228, 239–40 (H. Hannum ed., 2d ed. 1992).

the segregation of accused from convicted persons, and juveniles from adults. Finally, article 14 provides for the equality of all persons before the courts and for due process guarantees in criminal proceedings, including the right to the presumption of innocence, to have adequate time to prepare a defense, and to be tried in one's presence.

Importantly, under article 28, the ICCPR has an active supervisory organ, the United Nations Human Rights Committee. Under article 40, all states parties must submit periodic reports to the Committee evaluating their own compliance with the ICCPR. The Committee then meets with representatives of the states parties to ask questions about their reports. Following theses meetings, the Committee issues comments on the reports and the subsequent question-and-answer sessions. The United States submitted its first report to the Committee in 1994, and representatives of the United States Government — including Assistant Attorney General for Civil Rights Deval Patrick, Assistant Secretary of State for Democracy and Human Rights John Shattuck, and State Department Legal Adviser Conrad Harper - met with the Committee in early 1995. The Committee issued its comments on the United States report in the spring of 1995.[5]

In addition, the Committee also issues general comments, similar to advisory opinions, regarding the interpretation of the treaty. These comments may address a specific treaty provision, such as a comment addressing the meaning of "cruel, inhuman or degrading treatment or punishment," or a general treaty practice, such as a comment addressing the attachment of reservations, declarations, and understandings by states parties.[6]

Finally, a number of states parties have also ratified the Optional Protocol to the ICCPR which permits individuals to pursue claims against states parties before the Committee.[7] As a result, the Committee has begun to compile a substantial human rights jurisprudence.

2. Torture Convention

The Torture Convention also contains provisions that can be incorporated indirectly into constitutional and statutory defenses and claims. Article 1 defines "torture" as the intentional infliction of severe physical or mental pain and suffering, carried out by a public official or

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5. Consideration of Reports Submitted by States Parties Under article 40 of the Covenant: Comments of the Human Rights Committee, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995).

6. *See* Gen. Comm. No. 24 (52) 1/, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (commenting on issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant).

7. U.N. Doc. CCPR/C/3/Rev.2 (1989).

person acting in an official capacity, for purposes of obtaining a confession, meting out punishment, intimidation, or for any reason based on discrimination. Article 3 prohibits the expulsion, return ("refouler") or extradition of a person to another state if that person would be in danger of being subjected to torture. Article 16 requires each state party to prevent acts by public officials or persons acting in an official capacity that, while not amounting to torture, amount to cruel, inhuman or degrading treatment or punishment.

The supervisory organ to the Torture Convention, the Committee Against Torture, provided for by article 17, operates in similar fashion to the Human Rights Committee. States Parties are required to submit regular reports on compliance and must meet with the Committee to discuss their reports. At this point, the Committee Against Torture is just beginning to develop it jurisprudence, so the breadth of interpretation of treaty provisions is somewhat limited. However, because there is some overlap among provisions of the ICCPR and the Torture Convention, interpretations of the Human Rights Committee on similar provisions of the ICCPR can help in explaining and understanding the provisions of the Torture Convention.

B. Declarations, Reservations and Understandings: The Challenge Posed by Non-Self-Execution and Indirect Incorporation as a Solution for Criminal Defendants

Both the ICCPR and Torture Conventions were ratified by the United States pursuant to specific reservations, declarations, and understandings. In terms of the legal effect of the treaties in domestic tribunals, perhaps the most important declarations in both treaties are the ones indicating that the treaties are non-self-executing. In other words, the provisions of the treaties that establish certain rights, as ratified by the United States, cannot stand alone as the legal basis of a defense or cause of action in a domestic court.

To make matters even more difficult, the aggregate substantive effect of the United States' reservations, declarations, and understandings to the ICCPR and Torture Convention is to limit the scope of the treaties' provisions to that of similar provisions contained in the United States Constitution. In other words, the United States *reserves* the right to consider itself bound by certain treaty provisions only to the extent of their meaning in United States domestic law.

The issues of non-self-execution and the aggregate, substantive effect of the reservations, declarations, and understandings to the ICCPR and the Torture Convention pose at least two significant challenges for criminal defendants intending to raise treaty-based international human

rights defenses or claims. First, non-self-execution requires that human rights treaty provisions and international jurisprudence interpreting treaty provisions be raised in conjunction with domestic constitutional and statutory defenses and claims. In this regard, ICCPR and Torture Convention provisions and interpretations via the respective United Nations supervisory organs can only be used to bolster constitutional and statutory defenses and claims.

Second, the substantive effect of the reservations, declarations, and understandings requires criminal defendants to fully and persuasively integrate domestic constitutional and statutory (e.g., civil rights) law with international human rights law. In this connection, the ultimate purpose of indirect incorporation is to persuade domestic tribunals, first, that the United States, by ratifying the ICCPR and Torture Convention, has again recognized that protection of the individual from the arbitrary encroachments of the state is of the highest priority; and, second, that because the state is prone to violate its international human rights obligations in the pursuit of justice, just as it is with its domestic constitutional obligations, domestic constitutional and statutory interpretation must now also conform with international human rights standards.

II. ANALYSIS OF INDIRECT INCORPORATION

A. International Human Rights Law in United States Courts

1. Dealing With Non-Self-Execution by Not Dealing With It

This analysis assumes that federal and state courts will give legal effect to the non-self-execution declarations contained in the ICCPR and Torture Conventions.[8] While, from a human rights perspective, the non-self-executing nature of the ICCPR and Torture Convention is unfortunate, the futility of challenging the relevant declarations in United States courts must be appreciated. However, acquiring such an appreciation is not the same as admitting defeat. Rather, it allows a lawyer's creative energies to be employed elsewhere. In this regard, human rights lawyers must recognize that, simply because human rights treaty provisions cannot alone provide the legal basis for a defense or claim, they can inform a court's interpretation of domestic law.

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8. *See* Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

2. Indirect Incorporation

Basically, the provisions of the ICCPR and Torture Convention must be invoked as persuasive authority, bolstering constitutional and statutory defenses or claims, and must be connected to customary international law. Unlike treaty law, customary law, "at least where the United States has not persistently objected to a particular norm during its formation, ipso facto becomes supreme federal law and hence may regulate activities, relations, or interests within the United States."[9]

Perhaps the most successful infusions of customary international human rights law and, more recently, international human rights treaty law into United States domestic law have been in cases involving the Alien Tort Claims Act (ATCA).[10] The seminal case in this area is the 1980 case of *Filartiga v. Pena-Irala*.[11] In that case, two Paraguayan plaintiffs brought an action against another citizen of Paraguay for the torture and death of their son and brother, basing their claim on the Alien Tort Claims Act. The statute, part of the Judiciary Act of 1789, provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Notably, *Filartiga* took place prior to United States ratification of the Torture Convention. Thus, jurisdiction under the statute turned upon whether torture violated customary international law. Ultimately, the United States Court of Appeals for the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[12]

More recently, in *Kadic v. Karadzic*,[13] a 1996 case that followed United States ratification of the ICCPR and Torture Convention, the United States Court of Appeals for the Second Circuit reversed a district court order dismissing an action under the ATCA initiated by Bosnian Muslims who claim they were tortured by Bosnian Serbs under the leadership of Radovan Karadzic. The court of appeals held, *inter alia*, that certain forms of conduct, such as torture, violate the law of nations whether undertaken by persons acting under the auspices of a state or only as private individuals. For instant purposes, however, the actual holding

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9. Lillich, *supra* note 4 at 235 (citing The Paquete Habana, 175 U.S. 677 (1900) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1)- (3) cmts. c, d, reporters' notes 2 ,3 (1987)).

10. 28 U.S.C. § 1350 (1988).

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

12. *Id.* at 884.

13. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1996).

of the court is less important than the method by which it arrived there. In addition to discussing *Filartiga*, the Second Circuit examined customary international human rights law on genocide, war crimes and torture, and treaty law covering these subject areas, including the Torture Convention.

In addition to *Filartiga* and *Kadic*, United States courts have held that torture, prolonged arbitrary detention and *causing the disappearance* of individuals are prohibited by customary international law. Further, Section 702 of the Restatement contains a list of the international human rights that have achieved customary international law status. In addition to those already listed, these include genocide; slavery or slave trade; cruel, inhuman or degrading treatment or punishment; and systematic racial discrimination.[14]

Although the ATCA cases involve civil actions by aliens against alien tortfeasors, the ATCA cases bear striking resemblance to successful cases initiated pursuant to both civil actions and criminal prosecutions brought under federal civil rights statutes. Thus, plaintiffs and prosecutors in federal civil rights cases might be able to bolster their domestic statutory claims by using international human rights law, both customary and treaty-based. Further, because federal civil rights laws are based on the protection of rights embodied in the Bill of Rights, criminal defense counsel should bolster constitutional arguments by using international human rights law, both customary and treaty-based.

As evidenced by the ATCA cases, despite certain judicial trends which seem to militate against making international human rights law arguments in domestic courts, there is another, more subtle trend that favors such arguments. However, in order to further this trend, international human rights law arguments must be especially artfully crafted, connecting domestic law, with customary international law and, then, treaty law. If they are not, they could very well set back the advancement of international human rights in United States courts.

B. Relevant ICCPR and Torture Convention Provisions Lending Themselves to Indirect Incorporation in the Criminal Context

1. Arrest, Initial Detention and Detention on Remand

a) Police Conduct Prior to and During Arrest

The United States faces continuing difficulties regarding ill treatment of persons in police custody. According to Amnesty

14. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

International, instances of police brutality are particularly prevalent in metropolitan police departments such as the New York City Police Department and the Los Angeles Police Department.[15] Citing cases such as that of Rodney King in Los Angeles and those uncovered by the Mollen Commission in New York City, Amnesty's allegations included use of excessive physical force, and inappropriate use of police weapons such as batons, pepper spray and firearms.[16] The Washington, D.C. Metropolitan Police Department also has had serious problems of excessive force used by police against civilians.[17] At the federal level, the misuse of force by the federal government against alleged white separatists, and members of religious cults has been well documented.[18]

Article 7 of the ICCPR and article 16 of the Torture Convention each require states parties to prevent acts by public officials or persons acting in an official capacity that, while not amounting to torture, amount to cruel, inhuman or degrading treatment or punishment. These provisions, when combined with ATCA jurisprudence, the customary international human rights law analyzed in ATCA jurisprudence, and Human Rights Committee commentary defining "cruel, inhuman or degrading treatment or punishment," might lend themselves to use by both civil plaintiffs and prosecutors to bolster claims and prosecutions brought under the Civil Rights Act of 1871. The Human Rights Committee, in General Comment 20, addressing article 7, specifically refused to "draw up a list of prohibited acts or establish sharp distinctions between the different kinds of punishment or treatment."[19] According to the Human Rights Committee "the distinctions depend on the nature, purpose and severity of the treatment applied."[20]

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15. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA-HUMAN RIGHTS VIOLATIONS: A SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS 5–11 (1995) (hereinafter AMNESTY REPORT I).

16. *Id.*

17. *See* D. Tillotson, . . . *And A Little Fear of Punishment*, WASH. POST, Jan. 9, 1994, at C8. *See generally* U.S. COMMISSION ON CIVIL RIGHTS, 1 RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION–THE MOUNT PLEASANT REPORT (1993) (analyzing racial and ethnic tensions in the District of Columbia).

18. AMNESTY REPORT I, *supra* note 15, at 11–12; George Gardner, *Ex-FBI Aide Charged in Siege Probe: Prosecutors Allege Coverup of Report on Ruby Ridge*, WASH. POST, Oct. 23, 1996, at A1.

19. Human Rights Committee, General Cmt. 20, art. 7 (44th Sess., 1992), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1, at 30 (1994).

20. *Id.*

Similar to ATCA, under which an alien can initiate a civil damages action for acts of torture committed by an alien who is either a state actor or acting under color of state law, the Civil Rights Act of 1871 provides both civil and criminal remedies where a person is deprived of his or her civil rights under color of state law. While police misconduct prior to and during arrest, such as that at issue in the Rodney King case, may not amount torture, it can be credibly argued that where such acts deprive a person of his or her civil rights, they also amount to "cruel, unusual or degrading treatment" under customary international law as reinforced by the ICCPR, Torture Convention and relevant commentary. Thus, relevant international norms can inform a court's articulation of the proper legal standards under domestic civil rights law. That way, courts will be reconciling United States statutory law with the law of nations.

International human rights legal norms can similarly inform state court interpretations of state statutory and constitutional law — for example, laws that create an administrative process for complaints of police misconduct. Since international law applies to both the federal government and the states, international legal norms can be used as *independent state grounds* for a court decision. As such, the decision would remain insulated from United States Supreme Court review.

b) Police Conduct Following Arrest

The Fifth Amendment to the United States Constitution guarantees an individual's right not to self-incriminate and the right to be free from deprivations of life, liberty or property without due process of law. It is not unheard of for law enforcement officers in the United States to attempt to physically coerce persons under arrest and interrogation into confessing to a crime.

United States courts have indicated that post-arrest law enforcement conduct that shocks the conscience can result in a violation of the Fourth Amendment's guarantee against unreasonable searches and seizures, and the Fifth Amendment's due process requirement.[21] In this regard, articles 7, 10 (right of detainees to be treated humanely), and 14 (right to due process) of the ICCPR, and article 16 of the Torture Convention might be taken into account in determining constitutional standards in post–arrest misconduct cases.

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21. United States v. Toscanino, 500 F.2d 267 (1974); *See also* United States v. Birdsell, 346 F.2d 775 (5th Cir. 1965); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970). *But see* United States *ex. rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975) (holding that where facts similar to those in *Toscanino* but without claim of torture or United States involvement in the interrogation, *Toscanino* relegated to cases involving "torture, brutality and similar outrageous conduct.").

Notably, in General Comment 7, the precursor to General Comment 20 to article 7 of the ICCPR, the Human Rights Committee indicated that "the scope of protection required goes far beyond torture as normally understood."[22] Further,

> [a]mong the particular forms of punishments and practices the application of which have attracted the attention and sometimes the criticism of [Human Rights Committee] members have been certain interrogation methods, the evidential use of illegally obtained information . . . stoning and flogging, whipping, 30 - 40 years rigorous imprisonment . . . , and deprivation of civil and political rights for extended periods.[23]

2. Sentencing, Capital Punishment and Prison Conditions

a) Discrimination in Sentencing and Capital Punishment

Recently, certain aspects of the United States Sentencing Guidelines and state capital punishment statutes have been the subject of criticism alleging disparate impact on African Americans. The Fifth Amendment's due process clause contains an equal protection component, and the Fourteenth Amendment explicitly states that no state shall deprive any person of the equal protection of the laws. United States Supreme Court equal protection jurisprudence has increasingly required evidence of individualized discrimination in order for a claimant to succeed, rather than evidence indicating a pattern of discrimination giving rise to a disparate impact. However, article 14 of the ICCPR contains an equal protection clause. This clause, combined with international legal norm recognizing that systematic racial discrimination violates the law of nations, may assist federal courts, including the United States Supreme Court, in understanding that there need not be a conscious, discriminatory motivation in order for a law to violate the concept of equal protection if the law disparately impacts adversely a particular racial or ethnic group.

With regard to capital punishment and racial discrimination specifically, article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. In the United States, such arbitrariness is evidenced by the history of 1) racial discrimination in death penalty cases; 2) ineffective assistance of

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22. Human Rights Committee, General Cmt. 7, art. 7 (16th Sess., 1982), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev. 1, at 7 (1994).

23. DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 365 (2d ed. 1994).

defense counsel where a capital defendant is indigent; and 3) by recent federal legislation and jurisprudence restricting the habeas corpus rights of capital defendants. Further, article 6(5) of the ICCPR prohibits application of the death penalty to "persons below eighteen years of age."

Studies show that race continues to play an important role in the process of who will be sentenced to death. Further, the disparity in resources available to the prosecution and defense for capital cases in the United States ensures that capital trials are unfair. Finally, the United States Supreme Court and the United States Congress have both acted to limit the right to appeal a capital conviction at the federal level after a trial and post-conviction appeal at the state level, thereby eroding a fundamental safeguard in ensuring a fair outcome. In this regard, article 6(1) and article 14 might be combined with constitutional due process and equal protection arguments to persuade courts reviewing capital cases that the imposition of the death penalty is arbitrary in the particular case.

Notably, in the 1988 case of *Thompson v. Oklahoma*,[24] the United States Supreme Court consulted extensively the law of nations in concluding that execution of a person who is sixteen years of age or younger at the time of the offense violates the Eighth Amendment's guarantee against cruel and unusual punishments. Thus in cases involving the execution of juveniles and mentally retarded persons whose mental age is below eighteen, Eighth Amendment arguments can be combined with articles 6(5) and 7 of the ICCPR and article 16 of the Torture Convention in an attempt to persuade courts that, if capital punishment must be carried out, only adults, signified by the age of eighteen, should be subject to it.

b) Prison Conditions

Certain prison conditions in the United States arguably violate the ICCPR article 7 and Torture Convention article 16 requirements that each state party prevent acts by public officials or persons acting in an official capacity that, while not amounting to torture, amount to cruel, inhuman or degrading treatment or punishment. Particularly disturbing are current trends in federal and state criminal justice policies that may encourage violations of articles 7 and 16 by law enforcement and corrections officials.[25]

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24. Thompson v. Oklahoma, 487 U.S. 815 (1988).

25. *See Crime in America: Violent & Irrational - and That's Just the Policy*, THE ECONOMIST, (June 8, 1996), at 23-25. *See also,* National Council on Crime & Delinquency, District of Columbia Department of Corrections Study: Final Report (January 1996); Amnesty Report I, *supra* note 15; Amnesty International, 1995 Report on Human Rights Around the World 302–05 (1995) (hereinafter Amnesty Report II); HUMAN RIGHTS WATCH, WORLD REPORT 1996 321–28 (1996); Paula Mergenhagen, *The Prison Population Bomb,* AM. DEMOGRAPHICS 36, Feb. 1996, at

With regard to conditions of detention specifically, alleged conditions that can violate article 7 have included

> incommunicado detention in a small cell (1 m. by 2 m.) in solitary confinement for eighteen months; solitary confinement for several months in a cell almost without natural light; detention in a garage with open doors, sleeping uncovered on the floor, with no change of clothing, blindfolded, hands bound, having only two cups of soup per day; detention in overcrowded cells with 5 cm. to 10 cm. of water on the floor, being kept indoors all day, insufficient sanitary conditions, hard labour, poor food, periods of incommunicado detention, chained to a bed spring on the floor with minimal clothing, and severe rationing of food. The [Human Rights Committee] described these as inhuman conditions.[26]

i. Overcrowding

As of June 1996, the United States prison population stood at 1.1 million.[27] Because of increasingly strict federal and state laws regarding mandatory prison time,[28] incarceration rates are high, making it difficult for federal and state governments to keep up with demand for bed space. This has led to double-and triple-bunking in facilities originally intended to single – cell inmates; deteriorating physical conditions and sanitation; reduced levels of basic necessities, such as staff supervision, health care and counseling services, and recreational facilities. Moreover, overcrowding is directly linked to the spread of airborne diseases, such as

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36; Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, SPECTRUM: THE JOURNAL OF STATE GOVERNMENT, June 22, 1995, at 16; *Without the 'Rock,' Florida Criminals Get the Hard Place*, WASH. POST, Oct. 30, 1994, at A1; *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at 1.

26. MCGOLDRICK, *supra* note 23, at 372.

27. *Crime in America: Violent & Irrational – and That's Just the Policy*, *supra* note 25, at 24.

28. JOINT WORKING GROUP OF NON-GOVERNMENTAL CIVIL, POLITICAL AND HUMAN RIGHTS ORGANIZATIONS IN THE U.S., THE STATUS OF HUMAN RIGHTS IN THE UNITED STATES: AN ANALYSIS OF THE INITIAL U.S. GOVERNMENT REPORT TO THE HUMAN RIGHTS COMMITTEE OF THE UNITED NATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 26 (1995) (citations omitted) (hereinafter U.S. NGO WORKING GROUP REPORT); HUMAN RIGHTS WATCH, *supra* note 25, at 322.

tuberculosis. In addition, HIV infected individuals are more at risk in contracting TB and the MDR-TB strain of the disease.[29]

Both the Violent Crime Control and Law Enforcement Act of 1994 and the 1996 Prison Litigation Reform Act restrict the ability of prisoners to challenge confinement conditions, the latter by directing that prospective relief extend no further than necessary to correct the violation of the federal right of a particular prisoner or prisoners.[30] Constitutional challenges to prison conditions brought pursuant to the Fifth, Eighth and Fourteenth Amendments, and statutory challenges to prison conditions based on deprivations of civil rights might be combined with customary international law recognizing the right to be free from cruel, unusual or degrading treatment or punishment, article 7 of the ICCPR and article 16 of the Torture Convention.

ii. Control Units

Criminal justice policy in the United States has increasingly encouraged the use of so-called "control units," "security housing units," and "super-max" units in state and federal prisons.

> The term 'control unit' was first coined at United States Penitentiary (USP) at Marion, Illinois in 1972 and has come to designate a prison or part of a prison that operates under a 'super-maximum security regime. Control unit prisons may differ from each other in some details but all share certain defining features:
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> 1. Prisoners in a control unit are kept in solitary confinement in tiny cells (six by eight feet is usual) for between twenty-two and twenty-three hours a day. There is no congregate dining, no congregate exercise, no work opportunities and no congregate religious services.
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> 2. These conditions exist permanently (temporary lockdowns occur at almost every prison) and as official policy.
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> 3. The conditions are officially justified not as punishment for prisoners but as an *administrative* measure.

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29. *Id.* at 26–27. *See* Violent Crime Control & Law Enforcement Act, Pub. L. No. 103–322, §20409 108 Stat. 1827.

30. Prison Litigation Reform Act, 64 U.S.L.W. 2708 (May 14, 1996).

> Prisoners are placed in control units in *administrative* moves and since there are no rules governing such moves (in contrast to *punitive* moves), prisoners are denied any due process and prison officials can incarcerate any prisoner in a control unit for as long as they choose, without having to give any reason.[31]

As of 1994, at least thirty-six states were reported to have constructed super-max units.[32] There is one federal super-max prison, located at Florence, Colorado[33] which assumed the operations of the former federal super-max at Marion, Illinois.

In January 1995, in *Madrid v. Gomez*,[34] a federal court in California found that conditions of the Security Housing Unit (SHU) at Pelican Bay State Prison, operated by the California Department of Corrections, violated the constitutional rights of a class of defendants. The 344 page opinion condemned

> what [the court] described as a pattern of brutality and neglect at Pelican Bay State Prison, California, a high security prison complex which opened in 1989. The ruling called upon the state to discontinue practices which included repeated assaults on prisoners; a pattern of punitive violence toward prisoners during 'cell extractions' (the forcible removal of prisoners from cells); the punitive shackling of inmates to toilets or other cell fixtures; and grossly inadequate medical and mental health care. The ruling also found that guards resorted to firearms too quickly and in circumstances that did not warrant the use of lethal force. The ruling referred to a number of individual cases including the case of Vaughn Dortch, a mentally disturbed prisoner who suffered third-degree burns over a third of his body after guards forced him, handcuffed behind his back, into a bath of scalding water. Another prisoner, Arturo Castillo, who refused to hand over his food tray, had a gas gun fired into his cell, was knocked unconscious and beaten so severely that a piece of

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31. COMMITTEE TO END THE MARION LOCKDOWN, FROM ALCATRAZ TO MARION TO FLORENCE — CONTROL UNIT PRISONS IN THE UNITED STATES 1 (1992) < http://www.unix.olt.umass.edu/~kastor/ceml.html >.

32. AMNESTY REPORT I, *supra* note 15, at 14.

33. *See* U.S. NGO WORKING GROUP REPORT, *supra* note 28, at 28.

34. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

> his scalp became detached. The judge also found that the guards were rarely disciplined for excessive force and that their accounts of incidents were routinely accepted at face value, ignoring any other evidence. The judge also ordered the state to cease holding mentally ill prisoners in the prison's Security Housing Unit . . . on the ground that the conditions could exacerbate their condition.[35]

Amnesty International has documented conditions at other super-max prison units. The H-Unit at the Oklahoma State Penitentiary at McAlester opened in 1991 to house prisoners in administrative or disciplinary segregation as well as the state's death row population.[36] Inmates are housed two to a small, windowless cell for all but five hours per week. Guards are isolated, from inmates and serious health problems go untreated and inmate conflicts undetected. Opportunities for exercise and programs were lacking. Some prisoners were reported to have become seriously mentally ill while on H-Unit but to receive little or no psychiatric care.[37] Amnesty concluded that such conditions "amounted to cruel, inhuman or degrading treatment"[38] and that certain conditions also violated the United Nations Standard Minimum Rules for the Treatment of Prisoners[39] and the standards of the American Correctional Association.[40] Oklahoma authorities have not acted on any of Amnesty's recommendations to bring the facility into compliance.[41]

Amnesty also reported on conditions at the Maximum Control Complex (MCC) at Westville, Indiana, a control unit which opened in 1991. The practices at MCC mirrored those at Pelican Bay, the McAlester H-Unit and other control unit prisons despite an agreement by authorities to change conditions following a lawsuit filed by prisoners.[42]

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35. AMNESTY REPORT I, *supra* note 15, at 13-14. *See also* Holly J. Burkhalter, *Torture in U.S. Prisons*, THE NATION, July 3, 1995, at 17; Paige Bierma, *Torture Behind Bars: Right Here in the United States of America*, THE PROGRESSIVE , July 1994, at 21.

36. *See* Amnesty International, USA: CONDITIONS FOR DEATH ROW PRISONERS IN THE H-UNIT, OKLAHOMA STATE PENITENTIARY (1994).

37. AMNESTY REPORT I, *supra* note 15, at 17.

38. *Id.*

39. U. N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11; U.N. Doc. E/3048 (1957, amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35; U.N. Doc. E/5988 (1977), Rule 10, 11.

40. AMNESTY REPORT I, *supra* note 15, at 17.

41. *Id.*

42. *Id.*

Problems persist at other control unit prisons. Trenton State Prison in New Jersey utilizes a Management Control Unit in which inmates must use an activity module, measuring fifteen inches by fifteen inches and made of tubular steel and chain–link fencing, for group meals, indoor recreation, haircuts, meetings with counselors and classes.[43]

In Maryland, control units exist at the Maryland Correctional Adjustment Center (MCAC) and the Maryland House of Corrections Annex (MHC Annex). The MCAC's first warden was forced to leave because of an alleged pattern of sexual harassment of female employees. More disturbingly,

> [t]here were stories of a 'pink room,' where prisoners were taken for 'disciplinary segregation.' Many reported being stripped naked there and chained in a three-piece shackle, where they were often beaten by guards and left to shiver in forty-five degree air, blown in by the powerful fans of an air conditioner.[44]

In 1995, the United States Department of Justice initiated an investigation of the MCAC. The investigation found, among other things, that inmates are subjected to extreme social isolation by being confined to single person cells twenty-four hours a day; food is served lukewarm or cold; access to meaningful sick call is inadequate; inadequate staffing; mental health care that is inadequate to satisfy minimum constitutional standards; less than an hour of indoor out-of-cell time every second or third day; total lack of outdoor exercise or exposure to fresh air and natural light; and indefinite segregation. The investigation confirmed use of a "pink room," which was

> an unheated strip cell inappropriately located in the medical unit where an inmate was held in isolation for punishment. The cell was made of concrete and contained no furniture or mattresses. Inmates remained in the pink room sometimes as long as four days, wearing only underwear and a three piece restraint (leg irons, handcuffs, and a waist chain connected to the handcuffs and holding the hands very close to the body). Inmates used a hole in the floor as a toilet. The cell was filthy, covered with old feces and urine. Because hands were chained to waists,

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43. *'Modules' or 'Cages'? TSP Enclosures Stir Protest*, THE TIMES (Trenton), Aug. 17, 1991, at A1.

44. BALTIMORE ANARCHIST BLACK CROSS, CONTROL UNIT PRISONS IN MARYLAND 2 (1995) <http://www.charm.net/g~barren/abc/cu.html>.

> inmates were usually forced to urinate or defecate on themselves. Inmates in the pink room could not feed themselves with their hands due to the restraints. There was no running water in the pink room.[45]

The pink room was closed just prior to the Justice Department investigation. Since then, the pink room has been replaced by "cadre cells," which are normal cells, located in an isolated area, which are used for disciplinary purposes. "The doors to the cadre rooms have large metal closers on the inside of the doors which present a suicide risk."[46] Although the Justice Department was unable to uncover evidence of a pattern of physical abuse by MCAC staff against inmates, the report noted that the Department has "received and continue to receive a substantial number of inmate allegations that staff at Supermax are using excessive force against the inmates out of the range of Supermax cameras."[47] In response to the Department of Justice's letter informing the state of its findings, the State of Maryland stated: "[T]he conclusions contained in your May 1 letter are supported by neither law nor fact. Instead, the letter reflects your Division's philosophical opposition to "super maximum" facilities without regard to constitutional criteria."[48] The state's response also generally challenged the Justice Department's jurisdiction to investigate the facility, stating that "absent any . . . wholesale constitutional misconduct, the DOJ simply has no right to proceed against a state in the management of its prisons."[49] Ultimately, the state rejected the Justice Department's findings.

Again, cases brought by either individual plaintiffs or governmental entities, as in *Madrid* and the Maryland MCAC, challenging prison conditions pursuant to the United States Constitution and federal civil rights statutes, should be combined with customary international human rights laws and relevant treaty provisions in order to strengthen the constitutional and statutory legal standards.

iii. Prison Rape and Sexual Abuse

Rape and sexual abuse of prison inmates – both women and men – by guards and other inmates remains a problem in the United States. In

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45. Letter from Deval L. Patrick, Assistant Attorney General for Civil Rights to Parris N. Glendening, Governor of Maryland 9-10 (May 1, 1996).

46. *Id.* at 10.

47. *Id.*

48. Letter from Stuart M. Nathan, Assistant Attorney General for the State of Maryland and Stephanie Lane-Weber, Assistant Attorney General for the State of Maryland, to Deval L. Patrick, Assistant Attorney General for Civil 1 (Jun. 19, 1996).

49. *Id.* at 2.

1993 the Justice Department began investigating allegations of widespread sexual abuse by guards of inmates at the Georgia Women's Correctional Institution. The abuses included coercion of inmates into having sex with guards and forcing inmates into guardrun prostitution rings.[50] Criminal charges were brought against at least twelve prison employees and others were either dismissed or transferred.[51]

From 1993-95 Human Rights Watch found that women incarcerated in state prisons in California, Georgia, Illinois, Michigan, New York and the District of Columbia

> face a serious and potentially pervasive problem of sexual misconduct by prison officials. Male officers have engaged in rape, sexual assault, inappropriate sexual contact, verbal degradation, and unwarranted visual surveillance of female prisoners.
>
> In virtually every prison . . . , state prison authorities were allowing male officers to hold contact positions over female prisoners with no clear definition of sexual misconduct, no clear rules and procedures with respect to it, and no meaningful training on how to avoid it. Prison officials were also failing to equip female prisoners to deal with the potential abuse in the cross-gender guarding situation. They rarely, if ever, informed female prisoners of the risk of sexual misconduct in custody. Nor did they advise them of the mechanisms available – to the extent that any existed – to report and remedy such practices.
>
> Two prison systems . . . in Georgia and the District of Columbia, had taken initial steps to address this problem. But most states were failing to address adequately custodial sexual misconduct and had yet to train officers to avoid such misconduct or to put in place administrative measures and, where appropriate, to apply criminal sanctions to prohibit and punish this abuse. Moreover, the federal government was failing to meet its international obligations to ensure that custodial sexual violence was not only prohibited but also remedied by the states. In fact, the United States government had allowed custodial sexual

50. AMNESTY REPORT I, *supra* note 15, at 15.

51. *Id.*

> misconduct at the state level to fall into a kind of legal and political vacuum where in large measure neither international, nor federal, nor state law was seen to apply.[52]

With regard to the situation of rape and sexual assault against male inmates, in *Mathie v. Fries*,[53] an inmate alleged that the Chief of Security at the Suffolk Jail on Long Island handcuffed him and raped him repeatedly between January and April 1990. The inmate was diagnosed in April 1990 with post traumatic stress disorder, specifically, rape trauma syndrome. An investigation undertaken in 1980 by the Federal Bureau of Investigation uncovered a pattern of sexual misconduct with prisoners by the Chief of Security going back to 1972 with a number of corroborating witnesses. However, the Department of Justice declined to prosecute.

In *Bell v. Phenster*,[54] an inmate at the Indiana Youth Center complained to several officials that he was in danger of sexual abuse from a fellow inmate. Following his complaint, he was moved to a cell with his pursuer, and was anally raped by him on August 23, 1994. After reporting the rape, the inmate was treated at a hospital and diagnosed as a rape victim. He was then placed in solitary confinement. He was shackled hand and foot to a steel bunk, face down, with arms and legs crossed, wearing only underwear, with the window open and rain coming through. He was kept without hot food until he agreed to withdraw his demand for an investigation. In April 1995, the inmate was denied asthma medication for one week and was near death when brought to the hospital. He was charged thirty times with violating prison rules which led to a rescheduling of his release date. He was again placed in solitary confinement.

Rape of inmates by other inmates in particular, a frequent occurrence that is often exacerbated by the actions and policies of corrections officials, is accompanied by the pervasive transmission of HIV and AIDS. One of eight New York state prisoners is HIV positive, and half of HIV/AIDS prisoners are in New York, Florida and Texas.[55] In this regard, the United States Supreme Court's interpretation of the Eighth Amendment's proscription against cruel and unusual punishment which requires inmates to demonstrate prison officials' deliberate indifference to

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52. HUMAN RIGHTS WATCH, *supra* note 25, at 347.

53. Mathie v. Fries, 939 F.Supp. 1284, 1285 (E.D.N.Y. 1996).

54. Bell v. Phenster IP95–0205C (S.D. Ind. 1995).

55. Mergenhagen, *supra* note 25.

cruel and unusual conditions[56] may offer little protection in such circumstances.[57] Under such a standard, it might be helpful to those seeking relief to combine their claims with customary international human rights law, relevant provisions of the ICCPR and Torture Convention, and Human Rights Committee and Committee Against Torture jurisprudence, if any, that provides examples of similar treatment held to violate the ICCPR.

iv. Treatment of Women Prisoners Involving Problems Other than Rape and Sexual Abuse

The number of women in prison in the United States is increasing. Between 1980 and 1990, the number of women in state and federal prison increased from 12,331 to 43,845.[58] However, women still only comprise approximately 6.1 percent of all prisoners in the United States.[59] Problems other than rape and sexual abuse experienced by women inmates include being housed far from home, and fewer recreational and vocational opportunities than are available to male inmates.[60] Some federal courts have held such conditions to violate the United States Constitution's Fourteenth Amendment guarantee of equal protection of the laws; but other courts have disagreed with employing equal protection analysis.[61] Possibly combining article 14 of the ICCPR with equal protection claims may strengthen the constitutional standard.

On April 4, 1996 women prisoners housed at two large California prisons, the Central California Women's Facility (CCWF) at Chowchilla and the California Institution for Women (CIW) in at Frontera, filed a federal class action charging "that the prisons' dramatically deficient medical care for chronically and terminally ill women has caused needless pain and suffering and threatened their health and lives."[62] According to the lawsuit:

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56. Wilson v. Seiter, 501 U.S. 294 (1991); Farmer v. Brennan, 511 U.S. 825 (1994).

57. *See* David M. Siegal, *Rape in Prison & AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REV. 1541, 1551-78 (1992).

58. Cliffor Krauss, *Women Doing Crime, Women Doing Time*, N.Y. TIMES, July 3, 1994, at E3.

59. U.S. NGO WORKING GROUP REPORT, *supra* note 28, at 28-29.

60. *Id.* at 29.

61. *Id.*

62. *California Women Prisoners Sue Over Deficient, "Life Threatening" Medical Care*, ACLU OF NORTHERN CALIFORNIA PRESS RELEASE, Apr. 4, 1996 [hereinafter ACLU PRESS RELEASE]. *See* Shumate v. Wilson, No. Civ. 5–95–619 WBS JFM (N.D. Cal.) at 1.

> Lead plaintiff Charisse Shumate is incarcerated at CCWF and suffers from sickle cell anemia, serious heart problems, pulmonary hypertension and asthma. In spite of her life-threatening condition, Ms. Shumate frequently has been denied necessary medication and appropriate medical care and treatment. She does not receive a diet necessary to maintain her health. . . .
>
> The lawsuit describes case after case of shockingly deficient treatment:
>
> –a seizure patient at CCWF who is paralyzed on her left side has never been given occupational or physical therapy;
>
> –a sixty-eight year old woman at CIW with asthma and cardiac problems who was placed in a locked room for approximately twelve hours without oxygen, necessary medication or treatment;
>
> –a woman at CCWF who suffered burns over 54 percent of her body has gradually lost mobility because she was denied the special bandages which would prevent her burned skin from tightening;
>
> –a prisoner at CCWF was confined naked in a filthy cell where she ingested her own bodily waste. She died of untreated pancreatis that went undiagnosed until she was terminally ill;
>
> –a women at CCWF unsuccessfully begged staff for months to allow her to see a doctor. She was finally diagnosed with cancer. Though in enormous pain, she received almost no pain medication. Because of swelling in her legs, she could barely walk, yet she was required to walk to the dining hall if she wanted to eat. She died approximately nine months after the diagnosis.[63]

63. ACLU PRESS RELEASE, *supra* note 62, at 2-3.

Notably, only twenty-nine percent of the guards at CCWF are women.[64] Once again, in cases such as this, international human rights norms, customary international law and relevant treaty provisions and supervisory organ jurisprudence should be used to strengthen domestic claims.

v. Treatment of Juveniles

Current trends in juvenile justice policy and practice in the United States also pose problems under article 10(3) of the ICCPR, which mandates that juvenile offenders "be accorded treatment appropriate to their age and legal status" and article 16 of the Torture Convention. Increasingly, states are passing legislation which subjects, in certain cases, juvenile offenders as young as fourteen years of age to prosecution as an adult. The 1994 Violent Crime Control and Law Enforcement Act "permits the federal government to prosecute juveniles as young as 13 as adults in federal court."[65]

Children are increasingly involved in the criminal justice system. Between 1989 and 1993, the number of juveniles arrested for violent crimes increased 36 percent.[66] During the same period, due to the major increase in weapons use among young people, arrests for homicide have increased nearly 40 percent.[67] Further, "a growing proportion of convicted criminals are children. Nearly 600,000 juveniles were under some type of correctional supervision in 1991, according to the [Bureau of Justice Statistics]" 100,000 of whom were in prisons, juvenile detention facilities or jails.[68]

The problems associated with the conditions of juvenile confinement are serious. According to a 1994 OJJDP report, "substantial" and "widespread" problems exist with regard to living space, health care, security, and control of suicidal behavior.[69] The research team that compiled the report visited ninety-five randomly selected public and private juvenile facilities. Notably, the team found that "deficiencies were distributed widely across facilities. Most had several deficiencies, and the

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64. Adrian Nicole LeBlanc, *A Woman Behind Bars Is Not a Dangerous Man*, N.Y. TIMES MAG. June 2, 1996, at 35.

65. U.S. NGO WORKING GROUP REPORT, *supra* note 28, at 86.

66. JUVENILE OFFENDERS & VICTIMS: A FOCUS ON VIOLENCE, OJJDP STATISTICS SUMMARY 1-4 (May 1995).

67. *Id.*

68. Mergenhagen, *supra* note 25.

69. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONAL FACILITIES–RESEARCH REPORT EXECUTIVE SUMMARY 5 (1994).

types of deficiencies at these facilities varied considerably."[70] The report noted specific problems related to "crowding," insufficient staffing, insufficient screening for suicidal behavior, and untimely health screenings.

In 1995 Human Rights Watch reported pervasive physical brutality and lack of a formal complaint system in the juvenile detention system of the state of Louisiana.[71]

> Moreover, children are confined unnecessarily in restraints such as handcuffs and shackles, and are kept in isolation for as long as five days, contrary to international standards. In addition, many children told [Human Rights Watch] that they were hungry. The overall environment of the institutions failed to meet the primary goal required by international standards for any form of juvenile incarceration: to create an environment that will ensure children's successful integration into society.[72]

The juvenile justice system of the District of Columbia, like its adult prison system,[73] has become notorious as an institution unable to protect its population. The District of Columbia's juvenile justice system has been the subject of serious litigation since 1970.[74] Despite the presence of a court-appointed monitor to oversee implementation of a 1986 consent decree entered into by the city and juveniles comprising a class that initiated legal action,[75] the District of Columbia has failed to implement the terms.[76] Conditions at Oak Hill, the District's remaining juvenile detention facility, have improved over the past ten years. However, there are still instances of failure to comply with the consent decree. Problems continue

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70. *Id.*

71. HUMAN RIGHTS WATCH, *supra* note 25, at 341. *See* HUMAN RIGHTS WATCH CHILDREN'S RIGHTS PROJECT, UNITED STATES: CHILDREN IN CONFINEMENT IN LOUISIANA (1995).

72. HUMAN RIGHTS WATCH, *supra* note 25, at 341.

73. Jonathan Smith, *Overview of the Crisis in the District of Columbia's Correctional System, in* WASHINGTON LEGAL CLINIC FOR THE HOMELESS, COLD, HARSH AND UNENDING RESISTANCE: THE DISTRICT OF COLUMBIA'S GOVERNMENT'S HIDDEN WAR AGAINST ITS POOR AND ITS HOMELESS 279-318 (1993).

74. *In re* Savoy, 98 D.W.L.R. 1937 (D.C. Juv. Ct. 1970).

75. *See* Jerry M. v. District of Columbia, C.A. No. 1519-85 (D.C. Super. Ct.), certain memorandum orders *aff'd* in part and *rev'd* in part, 521 A.2d 178 (D.C. 1990).

76. Elizabeth M. Brown & Anne R. Bowden, *Juvenile Justice, in* WASHINGTON LEGAL CLINIC FOR THE HOMELESS COLD, HARSH AND UNENDING RESISTENCE: THE DISTRICT OF COLUMBIAS GOVERNMENTS HIDDEN WAR AGAINST ITS POOR AND ITS HOMELESS. *See* Jerry M. v. District of Columbia, C.A. No. 1519–85 (IFP), Thirtieth Report of the Monitor (Nov. 20, 1995).

in such areas as extended stays between detention and trial, delay in community placement, allegations of sexual abuse by staff against female residents, occasional overcrowding in the girls' unit, unfair treatment of residents by staff, understaffing of professional social services personnel, and a "crumbling, poorly maintained, and dirty" physical plant.[77]

One of the more popular trends in juvenile justice has been the creation of military-style "boot camps" as alternatives to institutionalization. A research report sponsored by the Justice Department's National Institute of Justice found that although the camps were successful in some areas, such as program completion rates; improvement in educational performance, physical fitness and behavior; and cost-effectiveness, problems persisted in achieving a healthy balance between programming emphasizing military discipline and programming focusing on remedial education and counseling; and high levels of absenteeism and non completion in aftercare (including re-arrest).[78]

Like the situation in *Thompson v. Oklahoma*, this situation raises potential Eighth amendment and international human rights concerns, albeit in a non-capital punishment context.

vi. Prison Labor and Chain Gangs

Current trends in prison construction, management and labor in the United States also pose problems under article 7 of the ICCPR and article 16 of the Torture Convention. With regard to the public policy effects of the prison construction industry:

> [w]hat is new in criminal justice policy in the last decade is the growth of . . . private prison companies . . . . The American prison-industrial complex involves some of the largest investment houses on Wall Street. Goldman Sachs and Co. and Smith Barney Shearson Inc. compete to underwrite jail and prison construction with private, tax-exempt bonds that do not require voter approval. Titans of the defense industry such as Westinghouse Electric and Alliant Technisystems, Inc. have created special divisions to retool their products for law enforcement. Publicly traded prison companies such as the Corrections Corp. of America and Wackenhut Corp., as well as correctional

77. Jerry M. v. District of Columbia, C.A. No. 1519–85 (IFP), Thirty–first Report of the Monitor (Feb. 26, 1996), at 19.

78. NATIONAL INSTITUTE OF JUSTICE, BOOT CAMPS FOR JUVENILE OFFENDERS (1996).

> officers unions, also exercise a growing influence over criminal justice policy.[79]

One of the primary problems caused by the privatization of prisons is that, since the companies are for-profit entities, "there is inherent pressure to provide a minimum of services in order to maximize profits."[80] Indeed, Esmor Correctional Services, the corporation responsible for operating an private detention facility in Elizabeth, New Jersey "hired correctional staff with little or no experience, served a substandard diet to the inmates and shackled detainees in leg irons when they met their lawyers."[81] Certainly, there are some prison companies, such as Corrections Corporation of America, that are providing a positive atmosphere in their facilities. However, as the industry continues to grow, so might abuses.[82]

Also troubling is the extent of influence of corrections officers' unions. The California Correctional Peace Officers Association is that state's second-largest campaign donor.[83]

Trends in prison labor in the United States are also disturbing. At the Lockhart Work Program Facility, a Texas prison facility operated by Wackenhut, private employers locate production operations there and employ prison labor.[84] Current employers include a circuit board assembler, an eyeglass manufacturer, and a maker of valves and fittings. Prisoners built the factory assembly room. Those working on the assembly line are paid minimum wage, of which the prison deducts eighty percent for room and board, victim restitution and other fees. The state pays for workers' compensation and medical care. The company pays one dollar per year in rent and receives a tax abatement from the city of Lockhart. The Local AFL-CIO has charged that Wackenhut and Texas have violated federal law by not consulting with the AFL-CIO regarding

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79. Steven Donziger, *The Prison Industrial Complex: What's Really Driving the Push to Lock 'Em Up*, WASH. POST, Mar. 17, 1996, at C3; *but see* John J. DiIulio, Jr., *No Angels Fill Those Cells: The Numbers Don't Lie: It's the Hard Core Doing Hard Time*, WASH. POST, Mar. 17, 1996, at C3.

80. Donziger, *supra* note 79.

81. *Id.*

82. *Privatizing America's Prisons, Slowly*, N.Y. TIMES, Aug. 14, 1994, §3, at 1 ("Not everybody is Corrections Corporation," said John J. DiIulio Jr., a professor at Princeton University, "I'm worried about the fly-by-night companies.")

83. *Id. See also Crime in America: Violent and Irrational — and That's Just the Policy*, *supra* note 25, at 25.

84. Reese Erlich, *Prison Labor: Workin' for the Man*, ARM THE SPIRIT < http://burn.ucsd.edu/~ats >.

the effect of the prisoner-manned assembly line on the local civilian workforce. Notably, in 1992, the United Auto Workers successfully challenged an auto parts manufacturer in Ohio that had hired prisoners at two dollars and five cents per hour, of which the prisoners received thirty-five cents. The UAW stated that prison labor undercut the civilian workforce and pressured the auto parts manufacturer to eliminate its prison labor contract.[85]

Yet another disturbing trend at the state level is the reinstitution of chain gangs. Currently, Alabama, Florida and Arizona have reintroduced the punishment. Wisconsin and California are considering it.[86] However, the new chain gangs are much different from the old system, which was dismantled in the 1960s. Unlike the prior system which provided cheap labor for both private and public projects, today's chain gangs do not engage in large scale private or public works and are not bound together by heavy-gauge chains. Rather, the primary purpose of today's chain gangs is humiliation.[87]

Chain gangs at Limestone Correctional Facility in Alabama began by cutting weeds and picking up trash along the highways. Now they break rock. Prisoners are shackled together with lightweight leg irons, walk into a barbed wire pen, and work on the rock pile with sledge hammers.[88] Interestingly, chain gangs are cost efficient, an important factor in light of increasing prison populations. "One officer can guard 40 chained prisoners but only 20 without chains."[89] Facility officials take pride in showing the chain gangs to the media and tourists.[90]

In Arizona, members of chain gangs are shackled at the ankles but not to each other. Prisoners are used for road clean-up.[91]

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85. *Id.*

86. Pat Flynn, *Chain Gangs: Alabama Brought it Back. Now California Considers Adopting the Old Prison Practice Some Think is Just and Some Consider Humiliating*, SAN DIEGO UNION-TRIB., Feb. 25, 1996, at A1; *Working on the Chain Gain, in Wisconsin?*, CAPITAL TIMES (Madison), Sept. 4, 1995, at 1A.

87. William Booth, *Link to the Past: The Return of Chain Gangs is Not About Hard Labor. For Alabama, It's Good PR In a Crime-Weary World. For Inmates, It's Humiliation That Weighs Heavier Than Leg Irons*, L.A. TIMES, Jan. 8, 1996, at E1.

88. *Id.*

89. *Id.*

90. *Id. See also* Christy Parsons, *Tourists, Other States Curious About Alabama Chain Gangs; But Some Critics Say Humiliation Won't Help Rehabilitate Inmates*, CHI. TRIB., May 10, 1996, at 10.

91. Norm Parish, *Link to Slavery: Chain Gangs Inhumane and Offensive, Critics Charge*, ARIZ. REP., May 29, 1995, at A1.

Challenges to prison labor and chain gang policies brought pursuant to constitutional and statutory law should be combined with customary international law and relevant treaty provisions.

3. Right to Counsel and Equality of Arms

The United States has been aggressively using civil in rem forfeiture against the property of criminal defendants. Asset forfeiture and seizure can result in the indigence of a criminal defendant and, therefore, reduce significantly the defendant's ability to mount an effective defense. Thus, asset forfeiture may lead to a deprivation of due process, ineffective assistance of counsel, and inequality of arms.[92]

Although the United States Supreme Court recently ruled, in *Bennis v. Michigan*,[93] that civil in rem forfeiture does not violate the Fourteenth Amendment's due process clause, the opinions in the case indicate that there may be some room for movement, especially in cases of egregious conduct by the state, including conduct that may leave the defendant a pauper. In such cases, constitutional claims should be combined with customary international human rights law recognizing the right against cruel, inhuman or degrading treatment or punishment, and relevant treaty provisions regarding such treatment or punishment, and due process.

4. Expulsion, Return and Extradition

Article 3, paragraph 1 of the Torture Convention states a general prohibition against expulsion, return and extradition of persons where substantial grounds exist for believing that they would be in danger of being subject to torture.[94]

Traditionally, the United States government has not considered its obligations under multilateral human rights treaties and conventions as affecting its role in expelling, returning or extraditing from the United

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92. *See* Richard J. Wilson, *Human Rights and Money Laundering: The Prospect of International Seizure of Defense Attorney Fees*, 3 CRIM. L.F. 85 (1991).

93. Bennis v. Michigan, 64 U.S.L.W. 4124 (U.S. Mar. 4, 1996).

94. *See* Khan v. Canada, Communication No. 15/1994, U.N. Doc. A/50/44, at 46 (Thirtieth Session 1995) (Committee against Torture held that Canada may not deport Kashmiri author to Pakistan because substantial grounds exist to believe he would be subject to torture in Pakistan); Mutombo v. Switzerland, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994) (Committee against Torture held that Switzerland may not deport Zairian of Luba ethnicity active in democracy movement because substantial grounds exist to believe that he would be subject to torture in Zaire).

States persons accused or convicted of crimes elsewhere.[95] However, the United States routinely considers its international non-return (i.e., *non-refoulment*) obligation in refugee cases governed under the Convention and Protocol Related to the Status of Refugees.[96] This opens the door for United States courts to consider its non-refoulment obligations under the Torture Convention in expulsion and return cases in the criminal context, as well as extradition cases.

Expulsion from the United States in the criminal context occurs when a non-citizen in the United States is convicted of a crime and, subsequently, faces deportation. Traditionally, such persons are required to serve their full sentence in the United States, at the conclusion of which they are subject to the deportation process. Within the deportation process, and depending on the type of crime for which the person was convicted, the person may attempt to raise issues relating to the possible deprivation of his or her human rights in the receiving country. Recently, however, the United States has embarked on a policy of expelling such persons prior to completion of their sentences and, simultaneously, narrowing the avenues for recourse.

In a 1994 agreement between the United States Immigration and Naturalization Service (INS) and the State of Florida, undocumented prisoners serving time for non-violent offenses such as drug possession and burglary, were to be granted early release.[97] Each case was to be reviewed by the Florida state clemency board, and the board would recommend commutation of the sentences of only those prisoners who give their consent to deportation. Because of the consent requirement, there is no inquiry into the possibility that the person would be subject to torture once returned to his or her home country. This could place an inmate subject to the agreement in the interesting position of having to either remain in prison in the United States, or be granted clemency and take the chance that they will not be tortured once they arrive back home.

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95. Donald K. Piragoff & Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, 3 CRIM. L.F. 225, 238 (1992).

96. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. With regard to the self-executing nature of the Convention and Protocol in the United States, *see* Richard B. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 228, 233-35 (H. Hannum ed., 1992); Carlos Manuel Vasquez, *The "Self-Executing" Character of the Refugee Protocol's Non-Refoulment Obligation*, 7 GEO. IMMIGR. L.J. 39 (1993).

97. *See U.S. Actively to Deport Prisoners in Florida*, 10 INT'L ENFORCEMENT L. REP. 139 (1994).

Notably, a statute similar to the INS-Florida agreement has been enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996.[98] Importantly, the statute does not provide for prisoner consent to deportation and does not provide for inquiry regarding the possibility of torture upon return to the receiving country. The 1996 Act also narrows the ability for persons subject to deportation as criminal aliens to challenge the validity of a deportation order via collateral attack,[99] makes "certain criminal aliens who are not permanent residents" presumptively deportable, denies such persons discretionary relief from the government, and judicial review of any issue other than whether the person "is in fact an alien."[100]

Return from the United States in the criminal law context may arise in the context of cases involving international cooperation in criminal matters — for example, when the United States requires testimony from a witness who is a foreign national in foreign custody and who must be brought to the United States to testify. Such cases are rare, but it appears as though the United States government does not inquire into the human rights implications of returning the person to the country cooperating with the United States. As a result, it has been left up to the individuals subject to return to raise human rights claims before a United States court. It is then up to the court to determine whether it should inquire and, if so, to what extent.

In *Wang Zong Xiao v. Reno*[101] a Chinese witness in the custody of the People's Republic of China (PRC) was brought to the United States to testify in a heroin smuggling case in federal district court. The witness had been arrested on drug charges and subjected by PRC authorities to detention without trial, forced confession, physical and mental torture, and was scheduled to be executed. Although the United States government had knowledge of the witness's torture and the potential for further torture upon his return to the PRC, the government failed to inform the court. The United States government also interfered in the witness's attempt to obtain political asylum once he was in the United States. Although the district court held that the United States government's conduct was shocking to the conscience and deprived the witness of his substantive due

98. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214, 1275, § 438 (1996).

99. *Id.* § 441.

100. *Id.* § 442.

101. Wang Zong Xiao v. Reno, 837 F.Supp. 1506 (Cal. Dist. 1993), *aff'd* slip op. 93–17262 (9th Cir. 1994).

process rights under the United States Constitution,[102] the court dismissed the witness's international human rights claims for technical reasons.[103]

Extradition refers to the return of a fugitive to a requesting state via either bilateral or multilateral treaty, or irregular rendition. The United States government possesses virtually sole discretion to inquire whether a person requested for extradition will be subject to torture upon delivery to the requesting state.[104] Federal courts, following the "rule of non-inquiry," traditionally have deferred to the government in making the extradition determination.[105] However, in some cases, federal courts have examined human rights claims raised by persons subject to extradition.[106] Still, even in such cases, United States courts do not typically refer to international human rights treaties or conventions that have been ratified by the United States. Ultimately:

> [i]n view of the Department of State's superior position to inquire into the alleged extra-legal dangers faced by . . . a person, to set conditions on his surrender to satisfy any concern raised by its inquiry, and to monitor compliance with those conditions after surrender, courts have uniformly ceded to the Executive the sole responsibility to pass upon such a claim by a requested person.[107]

Some United States courts have explicitly rejected any responsibility to inquire regarding the potential treatment of the requested person by the requesting country.[108] However, at least one district court has inquired about such treatment, citing, *inter alia*, the Torture Convention. That court, examining Israel's extradition request of a suspected terrorist, stated that the court "'must be satisfied that it is more probable than not that the requesting country will treat the accused unfairly, denying him or her the fundamental protection of due process, and will take inadequate measures to prevent cruel and inhuman

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102. *Id.* at 1551-59.

103. *Id.* at 1563.

104. Piragoff & Kran, *supra* note 95, at 239 (citing Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1315 (1962)).

105. *Id.* at 238-39.

106. *Id.* (citing Leslie Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings*, MICH. Y.B. INT'L LEGAL STUD. 153 (1983)).

107. 5 MICHAEL ABBELL & BRUNO RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL-EXTRADITION 231 (1990). *See also* Piragoff & Kran, *supra* note 95.

108. Piragoff & Kran, *supra* note 95, at 258–59 (citing *In re* Singh, 123 F.R.D. 127 (D.N.J. 1987)).

treatment.'"[109] Although the district court permitted the extradition to forward, the Court of Appeals rejected the district court's inquiry into Israel's justice system.[110]

Based on the recent ratification of the Torture Convention, combined with existing *non-refoulment* jurisprudence under the Refugee Convention and Protocol as well as constitutional and statutory issues that arise in expulsion, return and extradition cases, this area appears to be fertile ground for raising international human rights law as persuasive authority informing the interpretation of domestic law.

III. CONCLUSION

Hopefully, it has become clear from the admittedly incomplete laundry list included herein, that it is not necessary to engage in a frontal attack on the state, through challenges to the ICCPR and Torture Convention's reservations, declarations and understandings, in order to engage United States courts, both federal and state, on issues of international human rights. Of course, there is no doubt that indirect incorporation is far more difficult than direct incorporation. It requires artful advocacy and a solid understanding of both domestic "human rights" and international human rights laws, for the advocate must weave them together in a persuasive way. However, as highlighted by the ATCA jurisprudence and cases such as *Thompson v. Oklahoma*, domestic courts are not averse to arguments using international human rights norms, customary international law and relevant treaty provisions to inform the interpretation of domestic law.

The recent United States ratifications of the ICCPR and the Torture Convention provide further incentive for civil rights plaintiffs, prosecutors bringing criminal civil rights claims, and criminal defense counsel to attempt indirect incorporation. The ratifications have legitimized the use of relevant treaty provisions combined with customary international law and international human rights norms. Now, the primary question is: How best to do it? The answer can only come, literally, through trial and error. However, some error has already occurred, as has some success. The time has come to examine these mistakes and victories more closely and to learn from them.

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109. *Id.* at 259-60 (quoting Ahmad v. Wigen, 726 F. Supp. 389, 416 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990)).

110. *Id.* at 260-61 (citing *Ahmad*, 910 F.2d at, 1067.