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What Is Next After *Roper*? Part 2

The previous column (Spring 2006) addressed the new landscape for juvenile justice in the wake of the United States Supreme Court's historic juvenile death penalty decision in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), especially with regard to the relevance of international law to domestic decision making. That column pointed to the Court's citation of both the practices of other countries and "the opinion of the world community" on the one hand and the relevance of international human rights law as contained in conventions, covenants, and treaties on the other hand, and it suggested that those interested in juvenile justice reform need to become familiar with international law as it pertains to children. This column seeks to flesh out that understanding at a fairly basic level.

Foreign law

To the extent that juvenile law practitioners become familiar with practices and procedures in other countries regarding juvenile offenders, those examples can be used to argue for the substitution of the best of those practices for what may be common in the lawyer's jurisdiction, just like practices from other U.S. states. For example, one issue attracting considerable attention at this time is the problem of false confessions, especially by juveniles or mentally deficient adults, and the development of rules regarding the video- or audiotaping of police interrogations involving such suspects. A few states now require the recording of interrogations, but Great Britain has utilized the practice for about a decade because of some highly publicized false confession cases. (*See Stephan v. State*, 711 P.2d 1156 (Alaska 1988); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); *In re Jerrell C. J.*, 283 Wis. 2d 145, 699 N.W.2d 110 (2005); Steven Drizin & Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004).) In another high-profile case, the so-called *Bulger* case, the European Court of Human Rights ordered Great Britain to retry two murder codefendants, ages nine and 10, partly because the trial court did not make accommodations for their youthfulness and developmental stage when it failed to allow regular recesses for them to nap and participate in physical recreation so they could remain alert and cooperate in their defenses. (*V. v. The United Kingdom*, 24888/94 [1999] ECHR 171 (16 December 1999).) Although, as in the *Bulger* case, there were international human rights issues, the practices referred to in this category may simply be imported through the use of ordinary comparative law.

International human rights law

There are two primary sources of international human rights law. First, treaty law consists of written international agreements, treaties, conventions, and covenants that specifically delineate the rights and obligations of those countries that have ratified or acceded to the agreement. Second, there is customary law, which is a norm or practice that prevails among nations out of a sense of legal or moral obligation, but which might not be incorporated in any written international agreement. Obviously, the development of international human rights law is determined more by treaty law than customary law. It is difficult enough to get American courts to recognize and apply treaty law without having to argue customary law. There is also a subcategory of customary law called peremptory or jus cogens norms, those nontreaty views of customary law that are considered so basic or fundamental that they are given a higher status, such as the prohibitions against slavery and genocide.

A treaty becomes influential in a country, such as the United States, in several ways and with varying degrees of enforceability. If a treaty or convention is signed by the executive branch and then ratified by the Senate, it becomes binding in the United States. However, a provision of such a treaty or convention has the force of domestic law only if it is self-executing—that is, it becomes domestic law

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under the Supremacy Clause solely upon ratification, or if there is separate enabling legislation incorporating provisions of the treaty or convention. When ratifying a treaty, a country may also attach limitations on the applicability of certain provisions—known as "reservations, understandings, and declarations" (RUDs), and these limitations are recognized by other countries as long as they are not prohibited by the treaty itself and are not incompatible with the purposes of the treaty. The United States frequently adds RUDs when it ratifies international human rights treaties, and the effect of these RUDs is often the subject of much debate. A treaty, such as the United Nations Convention on the Rights of the Child, may be signed by the executive branch and not ratified by the Senate, in which case the document may be morally persuasive, but not binding on U.S. courts, as is the case with the Convention.

Resolutions of international organizations

International organizations, such as the United Nations, also may use resolutions to articulate shared values and opinions. There are four UN resolutions directly relevant to juvenile justice: Rules for the Protection of Juveniles Deprived of Their Liberty (1990); Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines") (1990); and Standard Minimum Rules for Non-Custodial Measures ("Tokyo Rules") (1990); Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (1985). The United States was frequently active in drafting, negotiating, or speaking in favor of or voting for a resolution, which may be influential in advocating reference to such documents. These resolutions are not binding on UN member countries but may be influential in policy development in a nation.

Treaties and conventions relevant to juvenile justice

There are three international human rights treaties or conventions with provisions directly relevant to juvenile justice: the International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States with RUDs in 1992); the American Convention on Human Rights (Organization of American States) (signed but not ratified by the United States); and the United Nations Convention on the Rights of the Child (CRC) (signed but not ratified by the United States). For juvenile justice purposes, there are two RUDs the United States attached to the ICCPR, the only one of the three ratified by the U.S. government. One is that the United States reserves the right to continue to process youth under the age of 18 through the adult criminal justice system "in exceptional circumstances," and the other is the understanding that the treaty does not require that an indigent juvenile defendant be provided counsel of his or her own choice when the juvenile is provided a court-appointed lawyer. These three treaties were argued in briefs filed in the United States Supreme Court in *Roper* and reference is made to their existence in Justice Stevens's opinion for the Court. As noted in the previous column, the ICCPR prohibits the incarceration of youth in detention or correctional facilities with confined adults, and the United States took a reservation to this Article 10(3) during its ratification process "in extraordinary cases;" yet there are now more than 12,000 juveniles being held in adult facilities in the United States—hardly an exceptional or extraordinary practice any longer. Similarly, Article 37 of the CRC not only prohibits the use of the death penalty for persons under 18, but it also proscribes the use of a sentence to life without possibility of parole. The Michigan ACLU and the American Civil Liberties Union, with the assistance of the Human Rights Clinic at Columbia Law School, have recently filed a petition with the Inter-American Commission on Human Rights alleging a violation of this provision by the State of Michigan in holding 32 persons in correctional facilities on life without parole sentences in violation of international human rights law. (*Petition Alleging Violations of the Human Rights of Juveniles Sentenced to Life Without Parole in the United States of America*, filed on February 21, 2006.) It is important to note that the Inter-American Commission previously considered a petition filed by a Nevada youth sentenced to death and concluded that a peremptory norm existed that prohibited the execution of offenders who were under the age of 18 at the time of their offenses. (*Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report Bo. 62/02 (2002).) Although not binding on the United States, the opinion continued to give impetus to the juvenile death penalty abolition movement in this country.

This column and the previous (Spring 2006) only give a taste of the richness that international law affords to legal advocates for children involved in the juvenile justice system. The resolutions deal with practices and procedures in juvenile justice that are largely consistent with the IJA-ABA Juvenile Justice Standards, and the treaties, covenants, and conventions address more fundamental policy issues and questions that arise frequently in juvenile court practice.