NATIONAL JUVENILE DEFENDER CENTER

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International Human Rights:
Law & Resources for Juvenile Defenders & Advocates

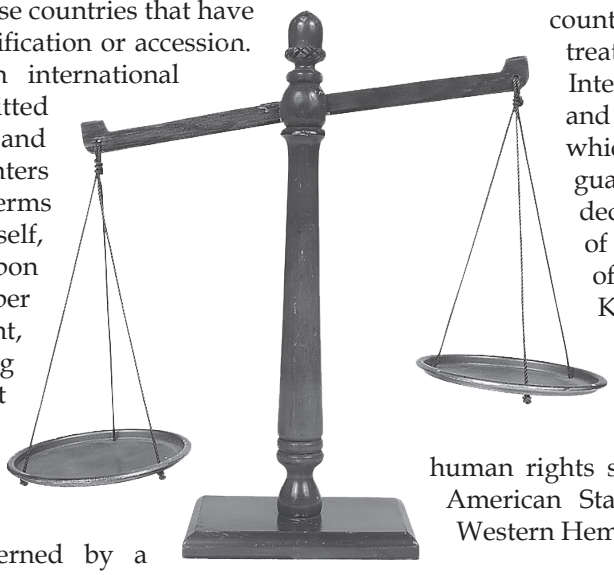
The evolution of international human rights law since the Second World War has fueled a movement to secure core rights and freedoms for all individuals across the globe. As international protections strengthen in the arena of juvenile justice, US juvenile defenders and other child advocates should become more informed about human rights law. NJDC hopes that this briefing paper will help defenders integrate new resources into their daily and systemic legal efforts.

The rights of court-involved children are addressed in numerous international treaties and documents. This paper introduces these sources of human rights law, considerations that affect their enforceability in US courts, and key standards. NJDC welcomes comments on this briefing paper and encourages you to adapt it for your own use.

Sources of International Human Rights Law

Intergovernmental Human Rights Treaties

There are two main sources of international law: treaties and custom. Treaty law consists of written international agreements that specify states' rights and obligations. A treaty is binding only on those countries that have accepted its terms through ratification or accession. A treaty is drafted through international negotiation and then submitted to countries for signing and ratification. A treaty "enters into force" according to terms prescribed by the instrument itself, usually on a specified date or upon ratification by a certain number of countries. At this point, the treaty becomes a binding obligation on all countries that have already ratified the treaty as well as those that ratify subsequently.



Human rights are not governed by a single institution or body of law, but by a set of coexisting systems that operate in overlapping geographic regions. Within these systems, treaties – usually titled conventions in the human rights context – have been the primary legal mechanism to articulate and promote human rights. The United Nations (UN) and major regional intergovernmental organizations have each promulgated several major human rights treaties that are relevant to juvenile justice.

The specialized UN Convention on the Rights of the Child (CRC) entered into force in 1990 and contains strong protections for children's due process rights, but the US, Somalia, and South Sudan are the only countries that have not ratified this treaty.[1] The US has ratified the International Covenant on Civil and Political Rights (ICCPR), which contains due process guarantees for all individuals, but declined to join fully the portions of the treaty that address transfer of children into adult court. Key provisions of these treaties are highlighted below. In addition to participating in the UN system, the US falls within the Inter-American human rights system of the Organization of American States (OAS), which spans the Western Hemisphere.

Human rights treaties generally establish administrative bodies to monitor countries' compliance. Under the United Nations treaties, state parties submit periodic reports to a committee. The committee reviews the information provided by the state and other interested

parties and hears an oral presentation by the state party. The committee then issues concluding observations on the country report to identify areas of insufficient compliance with the treaty. Nongovernmental organizations (NGOs) routinely attend committee meetings and prepare "shadow" or alternative reports to supplement and critique the report submitted by a state.

Another potentially influential organization is the UN Human Rights Council. The 47-member Council is made up of UN member nations elected for 3-year terms. While the Council has been plagued by criticism that it puts political wrangling above human rights investigations, recent years have shown encouraging momentum in addressing human rights crises around the world.[2]

Customary Law and Peremptory (*Jus Cogens*) Norms

Customary laws are rules derived from a consistent pattern of behavior that prevails among states and to which states conform out of a sense of legal obligation.[3] Customary law is binding on all countries except for any that have consistently rejected the practice on which the norm is based. Country practices used to determine whether a customary norm exists are generally limited to official government conduct, but include a broad range of activities such as domestic legislation, international and domestic judicial rulings, treaty obligations, the practice of international and regional governmental organizations, and statements of domestic policy or law.[4]

> Peremptory norms are considered so fundamental that no state is exempt from their mandates.

It is possible for human rights principles to enter into customary law and become binding on states without a treaty. Customary law, however, has not been emphasized as a way to advance human rights. Some human rights principles are very broad, making it difficult to identify a relevant pattern of state behavior that constitutes a custom. Additionally, many countries violate certain rights of their citizens, thereby preventing the formation of a customary law that would safeguard those rights.

Some human rights are protected by a narrow category of customary law called peremptory norms, also known as *jus cogens* norms. Peremptory norms are considered so fundamental that no state is exempt from their mandates. Unlike ordinary customary law, countries cannot evade a peremptory norm through consistent refusal to follow it. These norms can never be superseded by domestic law or by international treaty, but can only be altered by the formation of a subsequent and contrary norm that is recognized as equally fundamental by the world community.[5] Any treaty that violates a peremptory norm is automatically nullified.[6] Examples of customary laws that have achieved the status of peremptory norms are the prohibitions on slavery and genocide.

Peremptory norms represent exceptionally powerful statements of international values. In 2002, the Inter-American Commission on Human Rights considered the petition of Michael Domingues, a Nevada youth sentenced to death for an offense committed when he was 16.[7] After analyzing international laws and practice, the Commission concluded that a peremptory norm exists prohibiting the execution of offenders who were under 18 at the time of the crime.[8] The Commission had considered this question previously in 1987, but was unable at that time to find an international consensus regarding the age of majority in the death penalty context.[9] Although the standard for recognizing a peremptory norm is extremely rigorous, the *Domingues* case illustrates how norms evolve over time. As international views about treatment of delinquent youth advance, the body of peremptory norms may come to include additional principles useful to children's advocates in the US.

Resolutions of Intergovernmental Organizations

Intergovernmental organizations such as the UN and the OAS may use resolutions to express shared views on a variety of topics. A resolution is proposed by any member country and then debated and voted upon by the organization's assembled member countries. Although a resolution is generally passed with majority support, resolutions may be seen as more influential when they are supported by a higher proportion of member countries. The legal force of these resolutions is open to some discussion, but US legal scholars generally view them as not binding on member nations unless they can be deemed customary international law. Much like a "Sense of the Senate" resolution in the US, intergovernmental resolutions are valued as statements of principle.

International organizations regularly use the resolution process to adopt general formulations of human rights. This type of resolution, typically called a declaration, tends to be worded so broadly that it would be difficult

for a court to determine whether it can be deemed customary law. However, human rights declarations articulate widely-accepted moral principles and could be cited to argue for the recognition of a more specific right or prohibition. Juvenile justice practitioners should be aware of two landmark declarations joined by the United States: the American Declaration of the Rights and Duties of Man (1948) and the United Nations Declaration of the Rights of the Child (1959).

The resolution process can also be used to adopt detailed rules or guidelines that are intended to influence member nations' domestic policies. In the field of juvenile justice, the UN General Assembly (in which all member countries participate) has passed several resolutions that set forth advisory rules on conditions of confinement, delinquency prevention, and the administration of justice. These rules are summarized below. As with other resolutions, these rules are not binding on member countries of the UN. However, UN-approved rules and guidelines may be useful for policy development in the US because they provide highly specific recommendations for justice systems. Moreover, US involvement in passing resolutions can be a persuasive indicator of US policy positions. The US might indicate its support for a human rights principle by sponsoring, drafting, negotiating, speaking in favor of, or voting for a resolution. Courts and advocates should take these activities into account when evaluating the significance of international resolutions for US citizens.

Quick Look: Key Documents

The full text and status of these documents can be found on the websites of the UN High Commissioner for Human Rights (www.unhchr.ch) or the Inter-American Human Rights Commission (www.cidh.org).

Declarations

- United Nations Declaration of the Rights of the Child (1959)
- American Declaration of the Rights and Duties of Man (1948)

Treaties

- International Covenant on Civil and Political Rights (ICCPR) - Ratified by the United States in 1992
- American Convention on Human Rights - Signed but not ratified by the United States
- United Nations Convention on the Rights of the Child (CRC) - Signed but not ratified by the United States

Advisory Rules adopted by UN Resolution

- Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines") (1990)
- Standard Minimum Rules for Non-custodial Measures ("Tokyo Rules") (1990)
- Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (1985)

Human Rights in United States Courts

Judicial Opinions of International Courts

In addition to the primary human rights documents generated by countries' acts, advocates should also be aware of the views of international judicial and administrative bodies charged with clarifying and expanding upon the primary text. Alongside the Inter-American Court, the European Court of Human Rights has issued opinions protecting the rights of child delinquency respondents. For example, the Court ruled that where two boys aged nine and ten were tried as adults in criminal proceedings, their right to a fair trial was violated by the failure to provide accommodations suited to their developmental stage and the respondents' consequent inability to assist counsel in preparing their own defense.[10] In addition to the decisions of judicial authorities, US juvenile justice advocates may wish to consult the statements of relevant UN monitoring bodies such as the Committee on the Rights of the Child, the Committee on Civil and Political Rights, and the Human Rights Commission.

Foreign judicial rulings, especially from similar legal systems, may also be helpful for understanding human rights law and determining how to use it. In Canada, for example, the CRC was the partial basis for a successful 2003 Québec Court of Appeal challenge by the government of Québec against the federal government on the ground that its newly enacted Youth Criminal Justice Act was unconstitutional and violated international law by placing insufficient emphasis on rehabilitation.[11]

Making Human Rights Treaties Enforceable

Many steps are required before an international human rights treaty is enforceable in US courts. The US executive branch signs and ratifies international treaties subject to the advice and consent of the Senate. According to the Vienna Convention on the Law of Treaties, a signatory nation that has not yet ratified a treaty is nevertheless expected to "refrain from acts which would defeat the object and purpose

of a treaty[.]"[12] However, without ratification, the US is legally bound to follow a treaty only to the extent (if any) that its provisions can be deemed customary law.

US policymakers reluctant to join human rights agreements typically argue that treaties will limit national sovereignty or add nothing to the rights already guaranteed by domestic law. The ratification process can therefore be extremely slow, and the US has signed but not yet ratified several major human rights conventions, including the American Convention on Human Rights and the CRC.

Furthermore, ratification of a convention may not automatically create a human rights cause of action in US courts. Treaty provisions have the force of domestic law only if they are "self-executing" (becoming domestic law upon ratification) or are implemented through separate enabling legislation. The enforceability of treaty obligations is often unclear, and US courts have generally been reluctant to find that treaty provisions are self-executing.[13]

Countries may also attach limitations when ratifying a treaty. These limitations are known as "reservations, understandings, and declarations" (RUDs) and are permitted as long as they are not prohibited by the treaty and are not incompatible with the treaty's purpose.[14] The United States has frequently added RUDs when ratifying human rights conventions. In particular, upon ratifying the ICCPR, the US reserved the right to process youth in adult criminal systems "in exceptional circumstances[.]"[15] The US also expressed its understanding that the ICCPR does "not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed."[16]

As the foregoing shows, there are significant limitations on the enforceability of international human rights in US Courts. (See Appendix A for a decision tree on analyzing enforceability.) Nevertheless, international human rights instruments represent powerful statements of world opinion and have great moral force. The fact that states and municipalities in the US have passed human rights legislation and established monitoring commissions shows the growing influence of human rights discourse in US policy. Even if the Senate has not given its advice and consent to a specific human rights instrument, individual provisions from the treaty may influence the views or initiatives of legislators.

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Using Human Rights Law to Interpret the United States Constitution

Integrating human rights law into a domestic system is not uncommon. For example, Canada has ratified the CRC and the treaty is cited in the preamble to the Canadian Youth Criminal Justice Act of 2003. Canadian courts have several times referenced the CRC in interpreting domestic legislation and rights, including in cases ruling that youth status is relevant to the application of DNA testing rules[17] and that the term "violent offense" should be narrowly construed for the purpose of deciding whether a custodial disposition is permitted.[18]

In *Roper v. Simmons*, the 2005 decision finding the juvenile death penalty to be unconstitutional, the US Supreme Court similarly recognized some role for international and foreign law in interpreting our Constitution.[19] While the US has not ratified the CRC, the Court twice stated that international authority and foreign laws are "instructive" but "not controlling" in its task of interpreting the Eighth Amendment.[20] International legal instruments embody "the opinion of the world community" and, therefore, serve as a source of "respected and significant confirmation" for the Court's own conclusions.[21]

Nevertheless, the *Roper* majority decision has been widely construed to signal an expanded influence of international law on constitutional jurisprudence, including by Justice Scalia in his dissent. In *Graham v. Florida*, the Supreme Court again pointed to international law—and the CRC in particular—as instructive in its decision to overturn juvenile life without parole for non-homicide crimes.[22] *Roper* and *Graham* recognize that international law sometimes works in tandem with US Constitutional guarantees and indicates that these areas of agreement can be a tool for advocates. Even as US law remains the sole source of controlling rules, the Court explained that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[23]

The Inter-American Human Rights System

The Organization of American States established and administers the Inter-American human rights system. The primary documentary instruments of the Inter-American system are the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. The OAS has not yet promulgated any specialized treaties on children's rights, but its core documents do address the rights of young people.

Compliance with the American Convention on Human Rights is monitored by two complementary institutions: the Inter-American Commission, which predated the Convention itself, and the Inter-American Court, which was created by the Convention. The Court and the Commission each have seven members who are nationals of OAS member states, elected by the OAS General Assembly, and serve in a nongovernmental capacity.

The Inter-American Commission on Human Rights was created in 1959 to investigate human rights violations in all member countries of the Organization of American States. Today, the Commission also processes individual complaints and decides whether to refer them to the Inter-American Court for resolution. The Inter-American Court began its work when the Convention entered into force in 1978. The Inter-American Court has both advisory and contentious jurisdiction. Under its contentious jurisdiction, the Court resolves claims against OAS member countries that recognize the Court's jurisdiction. Member countries may bring their own claims before the Court, but individual claims must be referred by the Commission. The Inter-American Court may render advisory opinions at the request of OAS member countries or OAS bodies, including the Commission.

Reconciling Due Process & "Best Interests" in Children's Human Rights

Juvenile defenders in the US are ethically obliged to represent the legitimate expressed interests of each child client, even if the defender does not agree with the child's choices.[24] This model of representation has superseded earlier views that defenders, like guardians *ad litem*, should guide the representation according to their own views of the child's best interests. Yet international human rights instruments commonly promote and protect the "best interests" of the child in provisions related to juvenile justice as well as child welfare.[25] Despite this apparent inconsistency of terminology, human rights law should be understood as reinforcing children's due process right to express their own views through counsel.

In 2002, the Inter-American Court of Human Rights issued an advisory opinion discussing the possible conflict between the American Convention's promise to children of special protection (Article 19) and its due process and fair trial guarantees (Articles 8 and 25).[26] The Inter-American Commission requested the advisory opinion based on a concern that governmental authorities, "in making decisions based on what they believe to be the 'best interests of the child,' attach less importance to those [due process] guarantees."[27]

After reviewing regional and international agreements on children's human rights, the Court explained that "[the] phrase 'best interests of the child', set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development *and full enjoyment of their rights* must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives."[28] This includes enjoyment of the right to counsel, the right to be heard in judicial proceedings, and other due process rights guaranteed to children.[29] Article 12 of the CRC also supports an expressed interests model of representation by providing that any child capable of forming her own views has the right to express those views, personally or through a representative, and to have those views given due weight in judicial and administrative proceedings that affect her. The Court noted that international standards encourage diversion and other informal resolutions of charges against youth, but that these programs should not operate at the expense of due process.[30]

The Inter-American Court's characterization of children as individuals entitled to full rights is consistent with worldwide trends in human rights discourse. The CRC "reflects a new vision of the child" in which each child is an individual "with rights and responsibilities appropriate to his or her age and stage of development."[31] As the Inter-American Court concluded, countries' responsibility to protect children paternalistically does not overcome children's due process protections against government intervention.

Four Things Juvenile Defenders Can Do

- Cite international law
- Litigate in the Inter-American system
- Contribute to shadow or alternative reports to treaty monitoring committees
- Support US ratification of the Convention on the Rights of the Child

Cite international law

Although the US Supreme Court did not rely on human rights law to invalidate the juvenile death penalty, it did recognize international law as a "respected and significant" influence.[32] It may seem futile to cite international law in your local juvenile court, but unless these issues are preserved they cannot be heard on appeal. Citing human rights laws routinely will habituate courts to these important principles and could set the stage for an influential appellate decision.

Litigate in the Inter-American system

Individual petitioners and organizations may submit complaints to the Inter-American Commission on Human Rights, located in Washington, DC. A complaint against the United States must allege a violation of the American Declaration of the Rights and Duties of Man, because the US has not yet ratified other major instruments in the Inter-American legal system. The petitioner must file at the Commission within six months of exhausting remedies available through domestic law. For instructions on how to submit a petition, see *Human Rights: How to Present Petitions in the Inter-American System*, available from the website of the Inter-American Commission on Human Rights (www.iachr.org).

Contribute to a shadow report

Nongovernmental advocacy groups frequently file "shadow" or alternative reports alongside state parties' submissions to human rights monitoring committees. The US is required to report periodically on its implementation of the International Covenant on Civil and Political Rights (ICCPR). Information on shadow reports submitted under the CRC can be found at the website of the Child Rights Information Network, www.crin.org.

Support US ratification of the Convention on the Rights of the Child

The US, Somalia, and South Sudan are the only countries in the world that have not ratified the CRC. Somalia is considered unable to ratify because it lacks an organized government[33] and South Sudan only became an independent country in 2011. Ratification of the CRC would represent a significant advancement of children's human rights in the US and make more legal tools available to children's advocates. You can learn more about or join the nationwide campaign for ratification at www.childrightscampaign.org.

Human Rights Principles for Juvenile Justice Advocates

Despite the limits on enforceability described above, international human rights principles can be a source of inspiration and persuasion for US juvenile justice advocates. As with any body of law, be sure to research each provision's applicability and citation conventions before integrating it into your juvenile court practice or impact litigation.

I. The Right to State Protection

- "[A]ll children have the right to special protection, care and aid." American Declaration of the Rights and Duties of Man art. VII.
- "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection … [t]he child shall enjoy special protection [and in] the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." UN Declaration of the Rights of the Child, Preamble and Principle 2.
- "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." American Convention on Human Rights art. 19.
- Delinquency prevention should be guided by the "[c]onsideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood[.]" Riyadh Guidelines 5(e).

II. Juvenile Court Administration

Specialization

- Countries should have laws and institutions specific to the administration of juvenile justice. CRC art. 40(3); Beijing Rules 2.3.
- Police who frequently or exclusively deal with juvenile crime prevention or offenders should be specially trained. Beijing Rules 12.1.
- Juvenile delinquency procedures shall be designed to take account of children's age and the desirability of promoting their rehabilitation. ICCPR art. 14(4) (but note that the US reserved the right to treat juveniles as adults in extraordinary cases).

Minimum age of jurisdiction

- Jurisdictions should set a minimum age of criminal responsibility. CRC art. 40(3)(a).
- Jurisdictions should not set the age of juvenile criminal responsibility too low, considering the issues of emotional, mental and intellectual maturity. Beijing Rules 4.1.

Confidentiality

- Children have a right to privacy in juvenile justice procedures to avoid the harms of publicity or labeling. Beijing Rules 8.1.
- No identifying information for juvenile offenders should be published, especially to protect youth from appearing in the mass media. Beijing Rules 8.2 and commentary.
- Records of juvenile offenders shall be kept strictly confidential. Beijing Rules 21.1.
- Juvenile records shall not be used in adult proceedings in subsequent cases. Beijing Rules 21.2.

III. Detention

Prompt due process

- Detention may not be unlawful or arbitrary. CRC art. 37(b).
- A child deprived of liberty has a right to prompt access to legal and other appropriate assistance. CRC art. 37(d).
- A child has the right to have her detention reviewed by a court without delay. CRC art. 37(d); Beijing Rules 10.2; UN Rules for the Protection of Juveniles Deprived of their Liberty 17.
- A child has the right to appeal a detention decision. Tokyo Rules 6.3.

Preventing unnecessary detention

- Detention should be used as a last resort or only in exceptional circumstances, and for the shortest possible time. CRC art. 37(b); Beijing Rules 13.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 17.
- Alternatives to secure detention should be used whenever possible. UN Rules for the Protection of Juveniles Deprived of their Liberty 17; Beijing Rules 13.2; Tokyo Rules 6.1, 6.2.
- Alternatives to detention should be used as early as possible. Tokyo Rules 6.2.

Separation inside the facility

- Pre-adjudication detainees should be separated from adjudicated juveniles. UN Rules for the Protection of Juveniles Deprived of their Liberty 17.
- Youth in detention facilities shall be kept in a separate institution or part of an institution from confined adults. Beijing Rules 13.4; UN Rules for the Protection of Juveniles Deprived of their Liberty 29; CRC art. 37(c); ICCPR art. 10(3) (but note that the US reserved the right to treat juveniles as adults in extraordinary cases).
- Confined youth may come into contact with adults through a controlled program shown to benefit youth. UN Rules for the Protection of Juveniles Deprived of their Liberty 29.

IV. Diversion

- Diversion from formal processing should be possible and considered whenever appropriate. Beijing Rules 11.1, CRC art. 40(3)(b).
- Diversion decisions should be made in accordance with established criteria. Beijing Rules 11.2, Tokyo Rules 5.1.
- Community programs should be developed to facilitate diversion. Beijing Rules 11.4.
- To minimize pressure on youth, diversion from formal processing requires the consent of the child or parents and must be appealable. Beijing Rules 11.3; Tokyo Rules 3.4, 3.5.

V. Status Offenders

The Riyadh Guidelines on delinquency prevention promote a non-punitive approach to status offending by young people. Specifically:

- Alcohol, drug, and other substance abuse among youth should be addressed through comprehensive policies, teacher training, and student education. Riyadh Guidelines 25.
- Truancy or dropping out should be met with special assistance. Riyadh Guidelines 30.
- Harsh or degrading punishment should never be imposed at school or elsewhere. Riyadh Guidelines 54.
- Status offenses should not be criminalized. Riyadh Guidelines 56, *see also* Riyadh Guidelines 5.

VI. Right to Counsel

- A child capable of forming her own views has the right to express those views, personally or through a representative, and to have those views given due weight in judicial and administrative proceedings that affect her. CRC art. 12; Beijing Rules 14.2.
- A child has the right to legal assistance in preparing and presenting a defense. ICCPR art. 14(3)(b); CRC art. 40(2)(b)(ii); Beijing Rules 7.1, 15.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 18(a).
- A child has the right to apply to free legal aid if available in her country. Beijing Rules 15.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 18(a).
- A child has the right to communicate regularly, privately, and confidentially with her legal advisors. UN Rules for the Protection of Juveniles Deprived of their Liberty 18(a).
- Every child deprived of liberty has the right to prompt access to legal and other appropriate assistance. CRC art. 37(d).
- The presence of parents at adjudication is not intended to provide legal assistance, but rather emotional support. Commentary to Beijing Rules 15.1, 15.2.

VII. Procedural Fairness

Every child accused of delinquency has the following due process rights:

- To be free of unlawful or arbitrary arrest, detention or imprisonment. CRC art. 37(b).
- To prompt judicial review of the legality of any deprivation of her liberty. CRC art. 37(d).
- To be free from *ex post facto* laws. American Convention on Human Rights art. 8; CRC art. 40(2)(a).
- To be presumed innocent. American Convention on Human Rights art. 8; CRC art. 40(2)(b)(i); Beijing Rules 7.1.
- To prompt notice of the charges against her. American Convention on Human Rights art. 8; CRC art. 40(2)(b)(ii).
- To a speedy adjudication. American Convention on Human Rights art. 8; CRC art. 40(2)(b)(iii); ICCPR art. 10(2)(b).
- To have her parents present at adjudication unless this is not in child's interest. American Convention on Human Rights art. 8; CRC art. 40(2)(b)(iii); Beijing Rules 7.1, 15.2.
- To be free of compelled testimony or confession. American Convention on Human Rights art. 8(2)(g); CRC art. 40(2)(b)(iv); Beijing Rules 7.1.
- To confront and examine witnesses against her. American Convention on Human Rights art. 8(2)(f); CRC art. 40(2)(b)(iv); Beijing Rules 7.1.
- To compel the attendance of favorable witnesses to the same extent that the prosecution may compel the attendance of adverse witnesses. American Convention on Human Rights art. 8(2)(f); CRC art. 40(2)(b)(iv).
- To have a language interpreter at no cost if she does not speak or understand the language used in the proceedings. American Convention on Human Rights art. 8(2)(a); CRC art. 40(2)(b)(vi).
- To have her privacy respected at all stages of the proceedings. CRC art. 40(2)(b)(vii).
- To appeal her adjudication and disposition to a competent and impartial body. American Convention on Human Rights art. 8; CRC art. 40(2)(b)(v); Beijing Rules 7.1.
- To be treated in "a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." CRC art 40(1).

VIII. Formal Disposition

General principles

- Disposition should be proportional to the circumstances of both the offender and the offence. CRC art. 40(4); Beijing Rules 5.1, 17.1(a).
- Disposition should be preceded by a prior investigation of the offense and the child's circumstances. Beijing Rules 16.1.
- Non-secure facilities and alternatives to institutions should be established to avoid institutionalizing children; a variety of dispositions shall be available. CRC art. 40(4); Beijing Rules 18.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 30; Tokyo Rules 9.1.
- Imprisonment and other restrictions on liberty should be imposed cautiously, kept to a minimum, or limited to repeat or violent offenders. Beijing Rules 17.1(b), 19.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 1, 2.
- Neither capital punishment nor life imprisonment without possibility of parole shall be imposed for offenses committed under the age of 18. CRC art. 37(a).
- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. CRC art. 37(a).
- A child is entitled to periodic review of any placement and the underlying relevant circumstances. CRC art. 25.
- The court should determine the length of disposition and allow for early release. UN Rules for the Protection of Juveniles Deprived of their Liberty 2.

Non-secure dispositions

The primary document relevant to non-secure dispositions is the UN Standard Minimum Rules for Non-Custodial Measures ("Tokyo Rules"), a detailed set of guidelines approved by resolution of the UN General Assembly. Tokyo Rule 2.2 specifies that the guidelines apply to all persons regardless of age.

- Needed treatment should be provided, individualized and adjusted as necessary. Tokyo Rules 10.3, 10.4.
- If a child receives a disposition of conditional release, the release conditions imposed should be:
  - Explained orally and in writing, Tokyo Rules 12.3; and
  - Practical, precise, and as few as possible, with the goal of reducing the likelihood of recidivism and promoting reentry to the community, Tokyo Rules 12.2.
- Treatment as a part of disposition should be:
  - Provided when needed, Tokyo Rules 10.4, 13.1;
  - Based on an effort to understand the offender and the circumstances of the offense, Tokyo Rules 13.3; and
  - Delivered by trained and experienced professionals, Tokyo Rules 13.2.
- Modification or revocation of non-custodial measures:
  - May be done by a competent authority according to statute and the offender's progress, Tokyo Rules 12.4;
  - Should entail, if possible, an alternative non-custodial measure, with imprisonment imposed only if there is no alternative, Tokyo Rules 14.4; and
  - Must be appealable, Tokyo Rules 14.6.
- Children should not be "bootstrapped" into custodial placements as an automatic consequence of violating supervised release conditions. Tokyo Rules 14.3, 14.4.
- The effectiveness of non-custodial programs and disposition orders should be regularly evaluated. Tokyo Rules 21.2, 21.3.

Reentry to the community

- Courts should grant conditional release early and often. Beijing Rules 28.1.
- Youth on conditional release shall receive assistance and supervision from an appropriate authority, as well as community support. Beijing Rules 28.2.
- Jurisdictions should try to establish less restrictive institutions, such as half-way houses and day reporting centers, to aid juvenile reentry. Beijing Rules 29.1.

IX. Conditions of Confinement

The primary document relevant to confinement of youth is the UN Rules for the Protection of Juveniles Deprived of their Liberty, a detailed set of guidelines approved by resolution of the UN General Assembly. The main themes of the Rules are highlighted here, but the Rules are worth reviewing in their entirety.

Separation from adults

- Youth in detention or correctional facilities shall be kept in a separate institution or in a part of an institution separate from confined adults. Beijing Rules 13.4, 26.3; UN Rules for the Protection of Juveniles Deprived of their Liberty 29; CRC art. 37(c); ICCPR art. 10(3) (but note that the US reserved the right to treat juveniles as adults in extraordinary cases).
- Confined youth may come into contact with adults through a controlled program shown to benefit youth. UN Rules for the Protection of Juveniles Deprived of their Liberty 29.

Facility design

- Facilities should be small, decentralized, and integrated into the community. UN Rules for the Protection of Juveniles Deprived of their Liberty 30.
- The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment. UN Rules for the Protection of Juveniles Deprived of their Liberty 32.

Treatment and programming

- The aim of confinement is the reformation and social rehabilitation of offenders. ICCPR art. 10(3).
- Facilities should allow children to have access to their families. UN Rules for the Protection of Juveniles Deprived of their Liberty 59, 60, 61.
- Children in confinement shall receive meaningful activities and programs, as well as the care which they require. Beijing Rules 13.5, 26.2; UN Rules for the Protection of Juveniles Deprived of their Liberty 12, 38-48.
- Girl offenders in confinement deserve special attention, shall be treated fairly, and shall not receive less treatment or programming than boys. Beijing Rules 26.4.
- Confined children of school age have a right to suitable education, and children above compulsory school age should be permitted and encouraged to continue their education. UN Rules for the Protection of Juveniles Deprived of their Liberty 38, 39.
- Children should have a right to vocational training. UN Rules for the Protection of Juveniles Deprived of their Liberty 42.
- A child has the right to a health screening by a physician on admission to confinement. UN Rules for the Protection of Juveniles Deprived of their Liberty 50.
- A confined child shall receive adequate preventive and remedial health care, including dental care, special diets, and prescription drugs. UN Rules for the Protection of Juveniles Deprived of their Liberty 49.
- A child with mental illness should be treated in a specialized institution and steps should be taken to ensure continuity of treatment at release. UN Rules for the Protection of Juveniles Deprived of their Liberty 53.
- Facilities should have substance abuse programs and detoxification facilities that are age-appropriate and run by trained personnel. UN Rules for the Protection of Juveniles Deprived of their Liberty 54.
- A confined child has the right to a free language interpreter, especially for medical care and disciplinary proceedings. UN Rules for the Protection of Juveniles Deprived of their Liberty 6.

Management and discipline

- The UN Standard Minimum Rules for the Treatment of Prisoners are applicable as far as relevant to youth in detention and correctional facilities. Beijing Rules 27.1.
- On admission, youth should receive a copy of the facility rules, their rights and obligations, and the address for grievances in understandable language. UN Rules for the Protection of Juveniles Deprived of their Liberty 24.
- Every child should have a thorough and confidential file. UN Rules for the Protection of Juveniles Deprived of their Liberty 19.
- Medication shall only be administered for health reasons and after informed consent if possible – never as punishment or restraint or in order to elicit information. UN Rules for the Protection of Juveniles Deprived of their Liberty 55.

- Instruments of force and restraint can be used only exceptionally, when other methods have failed, and as authorized. They must not be humiliating or degrading and should be used for the shortest possible period of time. UN Rules for the Protection of Juveniles Deprived of their Liberty 64.
- Disciplinary measures should be imposed in accordance with regulations and only after the youth has received notice, an opportunity to contest the charges, and a right of appeal. UN Rules for the Protection of Juveniles Deprived of their Liberty 70.
- A child should have the right to make a complaint about conditions with help from family, legal advisors, advocacy groups or others. UN Rules for the Protection of Juveniles Deprived of their Liberty 78.

X. Evaluating the Juvenile Justice System

- Jurisdictions should establish an evaluation mechanism to collect data and to assess and improve the juvenile justice system on a regular basis. Beijing Rules 30.3.
- Independent inspectors should regularly review confinement facilities. UN Rules for the Protection of Juveniles Deprived of their Liberty 14, 72.
- Inspectors should have full access to all youth and staff of facilities and be able to conduct unannounced inspections. UN Rules for the Protection of Juveniles Deprived of their Liberty 72.

Online Resources

Office of the United Nations High Commissioner for Human Rights
www.ohchr.org
Includes the text, status, and reservations for all major human rights instruments.

United Nations Children's Fund (UNICEF) information on the Convention on the Rights of the Child
www.unicef.org/crc/index_30160.html
Information on the CRC from the UN body that monitors children's well-being worldwide.

Inter-American Court of Human Rights
www.corteidh.or.cr/index_ing.html
Information about the Court, the Inter-American system, and the full text of Court opinions and publications.

Inter-American Commission on Human Rights
http://www.cidh.org/
Includes a form for submitting a human rights complaint, as well as the full text of the Commission's annual reports, special reports, and published cases.

Child Rights Information Network
www.crin.org
Designed to promote advocacy and networking among advocacy organizations, this website is a good way to keep up with developments in children's rights and has a section on children in conflict with the law.

Glossary of Selected Human Rights Terms

Accession: A procedure used in some countries (not the United States) to join international treaties. As opposed to signature and ratification, accession is a one-step process and allows a country to join a treaty without the preliminary phase of signature.

Child: Article 1 of the UN Convention on the Rights of the Child defines a child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." More specifically, the UN Human Rights Committee has interpreted the provisions on youth offenders in the International Convention on Civil and Political Rights to mean all persons under the age of 18.

Customary law: A legal rule derived from a consistent pattern of behavior that prevails among states and to which states conform out of a sense of legal obligation. Customary law is binding on all countries except for any that have consistently rejected the practice on which the norm is based.

Declaration: A declaration is a statement of principles issued by an intergovernmental organization such as the United Nations, but is not binding on member nations and is not a guarantee of rights.

Peremptory (*jus cogens*) norm: A norm of customary law so fundamental that no derogation is permitted by any country. A peremptory norm can never be superseded by domestic law or international treaty. Examples are the prohibitions on slavery and genocide.

Ratification: In the United States and other countries, ratification is the procedure by which a country joins an international treaty and signals agreement to be legally bound by the treaty's terms. The United States executive branch ratifies a treaty through an official exchange of documents, and may only do so after the Senate has given its advice and consent.

Reservations, understandings and declarations (RUDs): Countries may join an international treaty subject to these enumerated limitations or interpretive statements attached at the time of ratification or accession. RUDs are permitted as long as they are not prohibited by the treaty and are not incompatible with the treaty's purpose

Resolution: The resolution process in intergovernmental organizations can be used to issue human rights declarations (see above) or to adopt advisory rules for policy in member countries. Resolutions require the support of a majority of member countries and are not considered legally binding.

Treaty: A written international agreement that specifies states' rights and obligations and is binding on countries that have accepted its terms through ratification or accession.

Endnotes

1 Ratification status of the Convention on the Rights of the Child is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited September 25, 2012).
2 Human Rights Watch, *Keeping the Momentum: One Year in the Life of the UN Human Rights Council*, 2011.
3 Restatement (Third) of Foreign Relations Law § 102(2) (1987).
4 *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02 ¶ 47 (2002).
5 Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.
6 *Id.*
7 *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02 (2002).
8 *Id.* ¶ 85.
9 *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Annual Report 1986-87.
10 *V. v. the United Kingdom*, 30 Eur. H.R. Rep. 121, 12 Fed. Sent.R. 266 (2000).
11 *Minister of Justice of Québec v. Minister of Justice of Canada*, [2003] Q.J. No. 2850 (2003).
12 Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The United States has not ratified this convention but is bound to comply with its provisions to the extent that they codify customary law.
13 Frederic L. Kirgis, "Reservations to Treaties and United States Practice," *ASIL Insights* (May 2003), *available at* http://www.asil.org/insights/insigh105.htm.
14 Vienna Convention on the Law of Treaties art. 19, subpara. (c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.
15 The list of reservations, understandings, and declarations to the International Convention of Civil and Political Rights is *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.
16 *Id.*
17 *The Queen. v. R.W.C.*, 2005 SCC 61.
18 *The Queen v. C.D.*, 2005 SCC 78.
19 *Roper v. Simmons*, 125 S.Ct. 1183, 1198-1200 (2005).
20 *Id.* at 1198, 1200.
21 *Id.* at 1200.
22 *Graham v. Florida*, 130 S.Ct. 2011, 2033-34 (2010).
23 *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005).
24 IJA-ABA Juvenile Justice Standards, *Standards Relating to Counsel for Private Parties*, Standard 3.1.
25 *See, e.g.*, Convention on the Rights of the Child arts. 3(a), 20, 37(a); Beijing Rules 14.2.
26 Legal Status and Human Rights of the Child, 2002 Inter-Am. Ct. H.R. (Ser. A) No. 17, *available at* http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html.
27 *Id.* ¶ 3.
28 *Id.* ¶ 2 (emphasis added).
29 *Id.* at Conclusion 10.
30 *Id.* at Conclusion 13.
31 UNICEF Frequently-Asked Questions on the Convention on the Rights of the Child, http://www.unicef.org/crc/index_30229.html (last visited September 25, 2012).
32 *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005).
33 UNICEF Frequently-Asked Questions on the Convention on the Rights of the Child, *supra* note 31.

by Julia Kernochan (2006)
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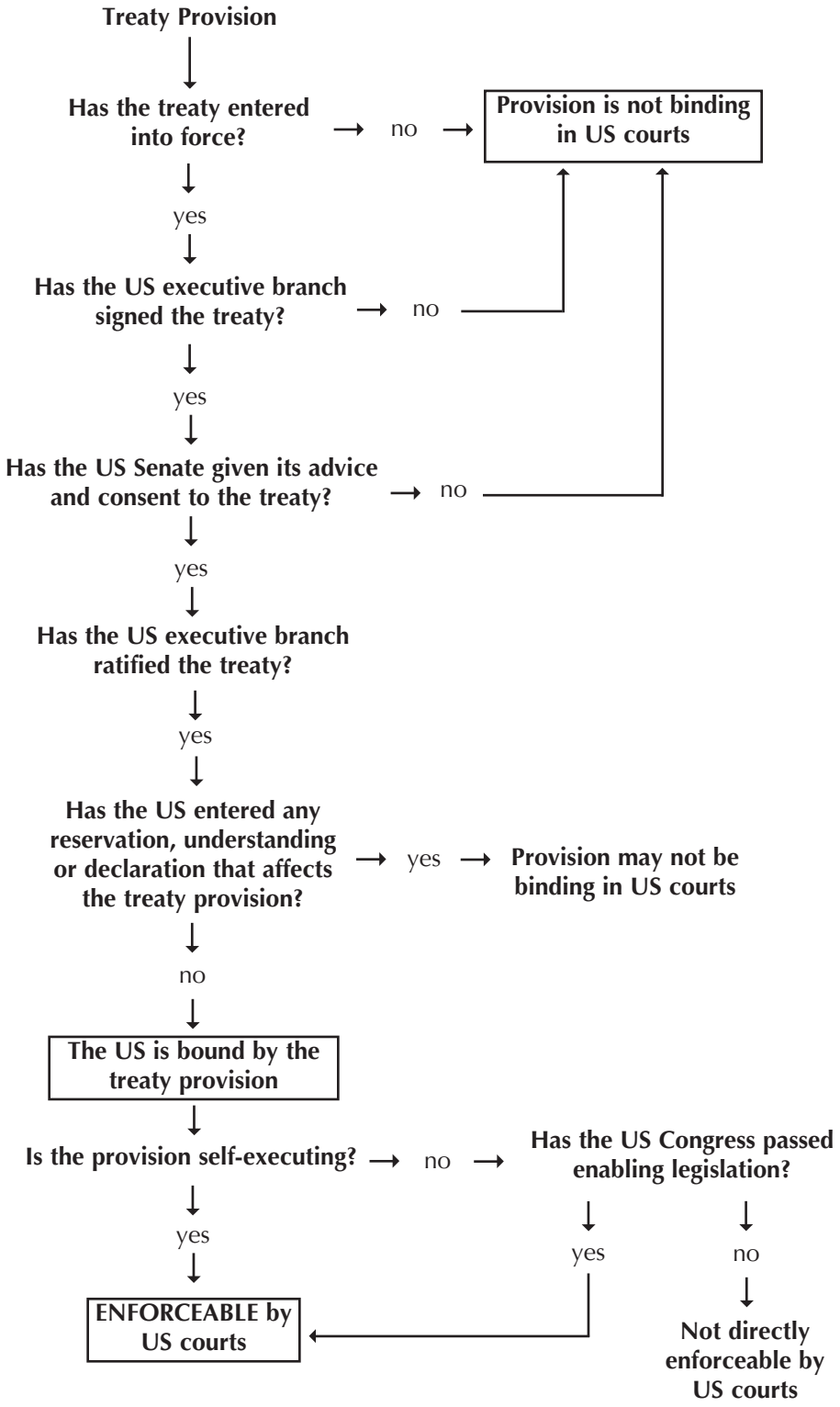
Appendix A

Analyzing the Enforceability of International Human Rights Treaty Provisions in US Courts



Note: Even if the treaty provision is not enforceable, the right may be enforceable if it is incorporated into customary international law.

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