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CONTINUED VIOLATIONS OF INTERNATIONAL LAW BY THE UNITED STATES IN APPLYING THE DEATH PENALTY TO MINORS AND POSSIBLE REPERCUSSIONS TO THE AMERICAN CRIMINAL JUSTICE SYSTEM

INTRODUCTION

On August 28, 2002 the American judicial system took yet another step backwards in the eyes of the international community when the United States Supreme Court issued its opinion denying a stay of execution to Toronto M. Patterson despite the dissenters' urging that it reconsider his claim arising out of the Eighth Amendment to the United States Constitution.¹ With total disregard of international human rights standards, the Court allowed Toronto Patterson to be executed for a crime that he committed as a juvenile.² The Texas Court of Criminal Appeals affirmed his conviction and sentence and the United States Supreme Court denied his petition for a writ of habeas corpus³ ultimately sending Toronto Patterson to his death. This Comment suggests that in doing so, the Court violated international treaties, customary international law, and *jus cogens*.⁴

This Comment explores the tension between the United States Supreme Court's validation of the application of the

1. *Patterson v. State of Texas*, 536 U.S. 984 (2002).

2. *Id.* For the purposes of this Comment a juvenile is any child under the age of eighteen years.

3. *Id.*

4. See Convention on the Rights of the Child, Dec. 16, 1996, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37, U.N. Doc. A/44/49 (1989) (entered into force Nov. 10, 1989; not in force for the United States), 28 I.L.M. 1448, 1456-76 (1989) [hereinafter CRC]; American Convention on Human Rights, open for signature Nov. 22, 1969, art. 4, para. 5, 1144 U.N.T.S. 143, 146 [hereinafter American Convention]; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 5, 999 U.N.T.S. 171, 174-75 [hereinafter ICCPR]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 art. 68, 75 U.N.T.S. 287, 330 [hereinafter Fourth Geneva Convention].

death penalty to children who were convicted of offenses they committed at the ages of sixteen and seventeen and the current treaty obligations of the United States concerning the execution of minors.⁵ Part I examines prior case history involving the death penalty as it relates to minors. Part II provides an in-depth explanation of the effect of reservations and the self-executing treaty doctrine on the United States' ratification and signatory status of several international treaties governing the juvenile death penalty. Subsequent analysis focuses on the international consensus banning the execution of juvenile criminal offenders through customary international law and jus cogens in Part III. Thereafter, Part IV turns to an alternative argument focusing on the internal corruption of the American judicial system if it continues to practice juvenile execution. This section will analyze the concept of procedural due process and its application in cases like those of Zacarias Moussawi and Lee Boyd Malvo, where our execution practices may be the reason that other countries do not provide the evidence or witnesses necessary for a full and fair trial of these, and other, individuals in the United States. This would cause irreparable harm to the American judicial system.

I. PRIOR SUPREME COURT CASE LAW ON CAPITAL PUNISHMENT, JUVENILES, AND INTERNATIONAL PRACTICES

In 1972, in *Furman v. Georgia*,⁶ for the first time in history the United States Supreme Court declared the death penalty, as then applied, to be cruel and unusual punishment under the Eighth Amendment.⁷ However, the opinion was per curiam

5. In discussing the execution of minors the author is referring to the juvenile death penalty or the execution of individuals who committed the crimes for which they are sentenced to death as children ages 16 and 17. The term "juvenile death penalty" was taken from a case comment authored by Elizabeth A. Reimels. See Elizabeth A. Reimels, Comment, *Playing For Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only if It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 306 (2001).

6. *Furman v. Georgia*, 408 U.S. 238 (1992) (holding that the arbitrary imposition of the death penalty on felons convicted of rape or murder was cruel and unusual).

7. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VII. See also

with each of the five Justices in the majority writing his own concurring opinion exemplifying vastly different reasoning, ranging from categorical opposition to the death penalty to concern over the arbitrary nature of death sentences at the time.⁸ As a result, thirty-five states revised their Death Penalty statutes in an effort to conform to Supreme Court guidelines⁹ and four years later the Court rejected the view that the death penalty is per se cruel and unusual punishment.¹⁰ In *Gregg v. Georgia*, the Court upheld a Georgia capital punishment law that utilized certain trial procedures and appeals designed to prevent the penalty from being imposed arbitrarily.¹¹ The Court noted that based on the legislative response following *Furman*, indicating society's endorsement of the death penalty, the evolving standard of decency argument, which had prevailed in *Furman*, could not be used to strike down capital punishment,¹² therefore the death penalty should be reinstated.

BARRY LATZER, DEATH PENALTY CASES – LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 19–44 (Butterworth-Heinenmann 1998).

8. Latzer, *supra* note 7, at 4. In the concurring opinions of Justice Brennan and Justice Marshall both Justices expressly contended that the death penalty was per se unconstitutional. Justice Brennan focused on the unusual severity of the punishment of death because of its “finality and enormity;” *Furman*, 408 U.S. at 289 (Brennan, J., concurring); while Justice Marshall mainly discussed the lack of any legitimate legislative purpose; *id.* at 359 (Marshall, J., concurring). Whereas Justices Stewart and White do not believe that the death penalty is constitutionally impermissible under all circumstances; they instead indicated that given reforms to the statutes, more clearly defining the categories of crimes that require imposition of the death penalty, their votes might be swayed to form a new majority in favor of the death penalty. *Id.* at 306–14 (Stewart, J., concurring).

9. *Id.* at 245.

10. *Gregg v. Georgia*, 428 U.S. 153 (1976). See also Latzer, *supra* note 7, at 4.

11. *Id.*

12. *Gregg*, 428 U.S. at 155. After the decision in *Furman*, 35 states rewrote their death penalty statutes in an effort to conform to the guidelines that were set forth. Here the Georgia statute was amended to rectify the problem of arbitrariness that plagued Justice Stewart and Justice White in *Furman* by stating that the imposition of the death penalty was only permitted when trial judges and juries were sentencing defendants for homicides having certain characteristics, called aggravating factors, and only where there were insufficient mitigating factors (factors that make the offense less reprehensible). *Id.* at 163. See also Latzer, *supra* note 7, at 45. Moreover the Georgia statute provided for bifurcated trials, which consists of a trial and then a separate sentencing proceeding after the defendant was found guilty,

Thirteen years later, Americans saw the policy of capital punishment further broadened when the Supreme Court upheld the legality of the use of the death penalty for sixteen and seventeen year old offenders in *Stanford v. Kentucky*.¹³ There, the Court looked at two consolidated cases where the defendants were convicted and sentenced to death. In one case, a Kentucky minor was seventeen years and four months old when he and his accomplice raped, sodomized, and eventually killed their victim.¹⁴ The other case involved a Missouri minor who was sixteen and a half years old when, during the commission of a robbery of a convenience store, he killed the sales clerk.¹⁵ Both defendants argued that the application of the death penalty in their respective cases violated the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁶ The Court considered state and federal statutes as well as the behavior of prosecutors and juries as "objective indicia that reflect the public attitude toward a given sanction"¹⁷ to determine if a "societal consensus" against the juvenile death penalty existed. The Court concluded that according to the "evolving standards of decency" the punishment was not cruel and unusual and instead fell within the "demonstrable current standards of our citizens."¹⁸

Of great significance was the fact that the majority's opinion in *Stanford* was devoid of any discussion or analysis of international views and norms, concerning the execution of convicts who committed the punishable offense while they were minors, save for a footnote stating that this type of analysis would not be done.¹⁹ Conversely, only one year prior to the decision in *Stanford*, the Court focused on international law standards

as well as direct appeals of capital convictions to the state's highest court. *Id.* These procedures allayed the Justices' fears and caused Justice Stewart and Justice White to change their anti-death penalty opinions, illustrated in *Furman*, to a pro-death penalty stance here. This resulted in a new majority that upheld Georgia's death penalty statute. *Gregg*, 428 U.S. 153.

13. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

14. *Id.* at 368.

15. *Id.*

16. *Id.*

17. *Id.* at 370.

18. *Id.* at 378.

19. *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989). *See also* Reimels, *supra* note 5, at 306.

when it addressed the similar question of whether or not the execution of children younger than sixteen years of age was constitutional in *Thompson v. Oklahoma*.²⁰ There, the Court concluded in a plurality opinion that imposing the death penalty on a fifteen year old offender would “offend civilized standards of decency” in violation of the cruel and unusual punishment clause of the Eighth Amendment.²¹ The plurality decision relied upon the views of the international community regarding the juvenile death penalty.²² The Court looked to several nations’ attitudes against the juvenile death penalty in reaching its conclusion that a consensus existed among the international community opposing the execution of children.²³ In addition, Justice Stevens noted three current international treaties which prohibit the use of the death penalty on juvenile offenders.²⁴ These treaties included: Article 6 Paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR) — a global civil rights treaty prohibiting the execution of minors

20. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Stevens, J., plurality opinion). *Thompson* stands for the proposition that the imposition of the death penalty on juveniles is too extreme a punishment due to the fact that fifteen year olds do not possess the requisite culpability to be death penalty eligible because “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.” *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 86, 104, 115–16, n.11 (1958)).

21. *Id.* at 821. *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J. plurality opinion) (holding that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”) *Id.* at 100–01.

22. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., plurality opinion).

23. The Court stated that “[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed ... by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” *Id.* at 830. Subsequently the Court mentioned the fact that several nations had either abolished the death penalty or restricted its use by excluding juveniles, *id.* at 830–31, specifically noting that the United Kingdom, New Zealand, and the Soviet Union prohibit the execution of juveniles; that Canada, Italy, Spain, and Switzerland allow capital punishment only for “exceptional crimes such as treason[;]” and that West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries forbid capital punishment. *Id.*

24. *Id.* at 831 n.34.

under eighteen years of age,²⁵ Article 4 Paragraph 5 of the American Convention on Human Rights — a regional human rights treaty prohibiting the execution of minors under eighteen years of age,²⁶ and Article 68 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) — which prohibits executing minors during wartimes who are under eighteen at the time of their offense.²⁷ Justice O'Connor, in a concurring opinion, also relied on international sources and authority, pointing to the Senate's ratification of the Fourth Geneva Convention to determine that there could be no inference of a senatorial sanction of the juvenile death penalty through past legislation.²⁸

Admittedly, the United States Supreme Court abandoned its reliance on the use of international standards and treaty obligations to determine what “evolving standards of decency” are within the confines of the United States in deciding whether the imposition of the death penalty on juveniles constitutes cruel and unusual punishment in violation of the Eighth Amendment. However, it is significant to note that the Court did in fact use this type of analysis. By mentioning international standards, the Court seems to be indicating that the norms of the global community are important to its determination of a consensus regarding the juvenile death penalty.²⁹ Furthermore, the United States has ratified the ICCPR³⁰ and signed the United Nation's Convention on the Rights of the Child³¹ since the Court last heard a case involving the execution of a juvenile

25. ICCPR, *supra* note 4, at art. 6, para. 5.

26. American Convention, *supra* note 4, at art. 4, para. 5.

27. Fourth Geneva Convention, *supra* note 4, at art. 68. *See also* Reimels, *supra* note 5, at 307.

28. *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988) (O'Connor, J. concurring). In referencing the obligations that the United States had undertaken by ratifying the Geneva Convention, which prohibited the wartime execution of children under the age of eighteen at the time of their offense, Justice O'Connor undermined the dissent's assertion that the Senate had, through other legislation, authorized and approved the death penalty for minors as young as fifteen. *See* Reimels, *supra* note 5, at 308.

29. Reimels, *supra* note 5, at 309.

30. ICCPR, *supra* note 4, at art. 6, para. 5. *See also* Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, 31 I.L.M. 645 (1992) [hereinafter Senate Report].

31. CRC, *supra* note 4, at art. 6, art. 37.

offender, so it is possible that the next juvenile death penalty case it decides will come out differently.³² Thus, this Comment will now turn to an examination of the laws governing treaties in the United States with a focus on treaties concerning the Juvenile Death Penalty.

32. Moreover, in June of 2002, the United States Supreme Court ruled that subjecting the mentally retarded to the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304 (2002). That same year, in *In re Stanford*, the Court denied *certiori* to Kevin Stanford - another individual sentenced to death for a crime he committed as minor - over a strong dissent authored by Justice Stevens and joined by Justices Breyer, Ginsberg, and Souter. These four Justices wanted not only to revisit the issue of the juvenile death penalty, but they were ready to declare it unconstitutional. *In re Stanford*, 537 U.S. 968 (2002) (Stevens J., dissenting). Justice Stevens went so far as to state that the Court should follow the majority's analysis in *Atkins* and find that executing juvenile defendants offends evolving standards of decency under the Eighth Amendment. *Id.* Justice Stevens opined that most of the reasons supporting the prohibition of executing the mentally retarded in *Atkins* were present regarding the juvenile death penalty and thus, the Court should grant Stanford's habeas corpus petition. *Id.* Interestingly, the only factor present in *Atkins* but absent in *Stanford* was the number of States expressly forbidding the juvenile death penalty; twenty-eight states ban the execution of juvenile offenders whereas thirty states banned the execution of the mentally retarded. *Id.* Regardless, unlike Toronto Patterson, Kevin Stanford's life was spared when the Governor of Kentucky granted him clemency on December 8, 2003 and commuted his death sentence to life imprisonment evincing further evidence of anti-juvenile death penalty sentiments. Thus, not only has the international consensus been solidified against the juvenile death penalty but there also appears to be a concomitant national consensus forming on the subject as well. See also Jeffrey M. Banks, *In Re Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48. S.D. L. REV. 327, 353 (2003).

II. INTERNATIONAL TREATIES AND THEIR APPLICATION IN THE UNITED STATES COURT SYSTEM

A. Treaties in General and the Impact of Senate Reservations and the Self-Executing Doctrine on Their Implementation

1. Overview of the Laws Governing Treaties in the United States and Abroad

A treaty is “an international agreement concluded between States in written form and governed by international law.”³³ Since treaties are the principal source of international law,³⁴ it was important to codify that law through the Vienna Convention on the Law of Treaties (Vienna Convention).³⁵ Although the United States is not a party to the Vienna Convention, its Department of State as well as its courts have indicated that they consider the Vienna Convention an accurate restatement of the customary international law of treaties; thus the Restatement (Third) of The Foreign Relations Law of the United States (Restatement) adopted most of its text from that treaty.³⁶ However, supplementing governance by the Vienna Convention, treaties are also subject to the constraints of the United States Constitution, customary international law, and domestic and international judicial decisions in addition to the influence of the academic writings of legal scholars.³⁷

According to the Constitution, treaties are the “supreme Law of the Land.”³⁸ While early in our nation’s history treaties were

33. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980; not in force for the United States) [hereinafter Vienna Convention].

34. *Id.* at 332.

35. *Id.*

36. Stefan A. Riesenfeld & Fredrick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusions and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 574 (1991). See also RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS: PART III INTERNATIONAL AGREEMENTS, Introductory Note (1987) (referring to the State Department’s statements that “although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.”) (quoting S. Exec. Doc. L., 92nd Cong., 1st sess. (1971) p.1.) [hereinafter RESTATEMENT].

37. *Id.* See also Reimels, *supra* note 5, at 311.

38. U.S. CONST. art. VI, cl. 2 providing that: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

believed to be extra-constitutional, it is now widely accepted that agreements with foreign nations can only grant power to a branch of our government subject to Constitutional restraints.³⁹ Furthermore, whereas the Constitution takes precedence over a treaty, a treaty is understood to be the equivalent of a federal statute.⁴⁰ Nevertheless, where a treaty and a federal statute are found to be conflicting, the most recently enacted instrument supercedes the other; this gives rise to the “last in time doctrine.”⁴¹ However, the last in time rule only applies to interactions between treaties and federal law; thus a treaty is superior to state law as well as any state constitution.⁴²

Article II Section 2 of the United States Constitution confers on the President the power to enter the United States into treaties with the advice and consent of two thirds of the Senate.⁴³ After a treaty has been negotiated by the Executive branch, it is sent to the Foreign Relations Committee of the Senate, which prepares a report and recommends to the full Senate whether or not to ratify the treaty.⁴⁴ This recommendation can include proposed amendments to the treaty such as reservations, understandings, declarations or provisos.⁴⁵ After assent of the

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *See also* Riesenfeld & Abbott, *supra* note 36, at 576.

39. *See Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (holding that a treaty cannot be used to deprive a citizen of a constitutional right). *See also* Reimels, *supra* note 5, at 310.

40. *Id.* at 18. *See also* RESTATEMENT, *supra* note 36, § 115.

41. *See* Chinese Exclusion Case, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884); *Cherokee Tobacco Case*, 78 U.S. (11 Wall.) 616 (1870). These cases all illustrate the concepts that treaties cannot exceed the boundaries of rights and duties created by the United States Constitution, that a treaty supersedes a prior inconsistent federal statute, and that a subsequent inconsistent federal statute supersedes a treaty; creating the “last in time doctrine.” *See also* Riesenfeld & Abbott, *supra* note 36, at 577; Reimels, *supra* note 5, at 310.

42. *Missouri v. Holland*, 252 U.S. 416 (1920).

43. “He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

44. Riesenfeld & Abbott, *supra* note 36, at 580.

45. *Id.* *See also infra* pp. 1256–60 on reservations. In United States practice, an “understanding” generally refers to a statement by which the govern-

Senate is given, the President may ratify the treaty as long as any additional conditions attached to the resolution of ratification are fulfilled.⁴⁶ Furthermore, since the President has the power to execute the laws of the land and a treaty is the law of the land, it is the President's role to carry out a treaty's terms.⁴⁷ However, the Supreme Court is granted the final power to interpret treaties under Article III of the United States Constitution.⁴⁸

2. Reservations to Treaties

Part I Article 2 of the Vienna Convention defines a reservation as "a unilateral statement ... made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that

ment expresses its interpretation, clarification, or elaboration of a particular treaty provision and a "declaration" generally refers to a statement by which the government states its position with respect to the applicability or non-applicability of the rules of a separate treaty or international law to the treaty in question. See Riesenfeld & Abbott, *supra* note 36, at 602. The third type of Senate condition or understanding is a proviso which "includes those [conditions] which are not intended to be included in the formal instruments of ratification because they do not involve the other parties to the treaty but instead relate to issues of U.S. law or procedure." *Id.* at 619 (quoting Congressional Research Service, *Treaties and Other International Agreements: The Role of The United States Senate, A Study Prepared for the Committee on Foreign Relations by the Congressional Research Service, S. Rpt. No. 98-205, 110, 98th Cong., 2d Sess. (1984)*).

46. *Id.* "The Senate does not itself ratify a treaty, but rather passes a resolution of ratification authorizing the President to ratify. Reservations, understandings and declarations are included in the [S]enate's resolution of ratification and transmitted to the President for inclusion in the instrument of ratification" *Id.* at n.59.

47. U.S. CONST. art. II, § 1, providing that: "The executive Power shall be vested in a President of the United States of America." See also RESTATEMENT, *supra* note 36, § 1 reporter's note 2 & § 326 cmt. a.

48. U.S. CONST. art. III, § 1, providing that: "The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, U.S. CONST. art. III, § 2 provides that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"

State.”⁴⁹ Part II Section 2 Articles 19 through 23 of the Vienna Convention govern reservations. Generally, a reservation made by a party to a treaty is valid and effective if it does not defeat the object and purpose of the treaty and it is not prohibited by the terms of the treaty.⁵⁰ Another party to the treaty can object to the reservation but that objection does not necessarily make the treaty, as a whole, per se invalid between the reserving and objecting parties.⁵¹ Instead the objection excludes the provision in the treaty to which the reservation and objection apply as between those two parties.⁵² Only if the objecting party expressly articulates that it does not intend to be bound by the treaty as a whole will the objection preclude the entry into force of the treaty as between the reserving and objecting parties.⁵³ Moreover, if a party to a treaty does not object to the reservation in a timely manner, then that party is presumed to have accepted the reservation and to be willing to be bound with the reserving party.⁵⁴ Therefore, reservations and objections only apply to the parties to whom they have been addressed and have no effect on the treaty obligations of other parties in a multilateral treaty.⁵⁵

The Senate routinely attaches reservations to treaties which it receives for advice and consent.⁵⁶ Recently, the Senate has attempted to expressly reserve the supremacy of the internal law of the United States⁵⁷ by making reservations which modify the results of treaty obligations domestically from the original intent of the treaty negotiators.⁵⁸ As one scholar notes, “[b]y its

49. Vienna Convention, *supra* note 33, at art. 2(1)(d).

50. *Id.* at art. 19. See also RESTATEMENT, *supra* note 36, § 313. Furthermore, according to general international law a reservation is also invalid if it violates customary international law or if it conflicts with a newly emergent peremptory norm of international law (*jus cogens*). Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F.L. L. Rev. 735, 754 (1998).

51. *Id.* at art. 20.

52. *Id.* at art. 21.

53. *Id.*

54. *Id.* at art. 20.

55. *Id.* at art. 21. See also Riesenfeld & Abbott, *supra* note 36, at 586.

56. Riesenfeld & Abbott, *supra* note 36, at 586.

57. *Id.* at 573.

58. Reimels, *supra* note 5, at 311. See also *infra* pp. 1271–75 discussing the United States reservations to the ICCPR.

reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below International standards.⁵⁹ While it is true that some reservations facilitate the ratification of treaties,⁶⁰ as well as help bring them into compliance with the United States Constitution, many reservations recently issued have been much broader than necessary.⁶¹ As reservations have historically identified specific domestic legislation with which the treaty may be incompatible, leading scholars believe that broad reservations might prove impermissible.⁶²

Moreover, if a reservation is deemed invalid,⁶³ it can either be severed from the party's accession to the treaty, in which case the party is still bound by the original treaty provisions, or if the invalid reservation cannot be separated, then the State would no longer be a party to the instrument.⁶⁴ A growing international consensus has concluded that an invalid reservation

59. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 342 (1995). However, Professor William A. Schabas makes a valid point that article 27 of the Vienna Convention does not allow a party to a treaty to invoke the provisions of its internal law as a justification for its failure to perform a treaty. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 284 (1995). Even though the United States is not a party to that treaty it does use the treaty as a guide for foreign relations law and as such should prohibit the use of domestic law as an excuse for violations of its treaty obligations through reservations. *But See* RESTATEMENT, *supra* note 36, § 115 (stating that the "last in time rule" applies to conflicting treaty and federal statute terms but not state statute or state constitutional terms).

60. Schabas, *supra* note 59, at 287.

61. Reimels, *supra* note 5, at 311 (citing Henkin, *supra* note 59, at 342-44). It is argued that the reason for these over broad reservations is to curtail the effect of the treaty, to which they apply, when implementing it domestically.

62. Schabas, *supra* note 59, at 283, 291. For example, Norway and Ireland both issued reservations to article 6, paragraph 5 of the ICCPR which prohibits the imposition of the death penalty for crimes committed when an individual is younger than eighteen years-of-age. There, both countries identified a specific paragraph in article 6 with which their domestic law did not comply; on the other hand the United States' reservation encompassed practically all of the provision. *Id.* at 291.

63. *See also supra* pp. 1256-57 and n.50 for a discussion of what invalidates a treaty.

64. Schabas, *supra* note 59, at 278. *See also* RESTATEMENT, *supra* note 36, § 311 cmt. b & reporter's notes 2-3.

should be severed from the document of instrumentation.⁶⁵ A noteworthy illustration of this was made by the European Court of Human Rights in the case of *Belilos v. Switzerland* where, in conformity with the Vienna Convention, a Swiss statement to the Court was determined to be an invalid reservation to the European Convention on Human Rights due to its inconsistency with the express terms as well as the object and purpose of the treaty.⁶⁶ There, the European Court of Human Rights held that if a non-essential (derogable) reservation is invalid, it is severed from the treaty and the country submitting the reservation is still a party to the treaty and, as such, is bound by the provision without the reservation.⁶⁷ This marked the first decision of an international tribunal with respect to the international law of treaties and treaty reservations that nullified the reservation and applied the treaty in its totality to the reserving State.⁶⁸

Significantly, with respect to human rights treaties, reservations have frequently been criticized for weakening the overall effectiveness of the norms that they are trying to create as minimum standards.⁶⁹ The difference between human rights treaties and other types of treaties is that “parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties take on obligations con-

65. See Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041, 1053. See also Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347 (1989).

66. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. H.R. Rep. 466 (1988).

67. *Id.* See de la Vega, *supra* note 65, at 1053. In deciding whether the reservation was non-essential the Court considered whether the country's overriding intention was to accept the obligations under the treaty. *Id.* See also Bourguignon, *supra* note 65, at 382.

68. Riesenfeld & Abbott, *supra* note 36, at 588–89. Similarly, in an advisory opinion issued by the Inter-American Court on Human Rights, a Guatemalan death penalty reservation was invalidated because it sought to suspend a non-derogable fundamental right of the treaty and thus was incompatible with the object and purpose of the American Convention. de la Vega & Brown, *supra* note 50, at 755 (quoting Edward Sherman, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treat Formation*, 29 TEX. INT'L L.J. 69, 79 (1994)).

69. Schabas, *supra* note 59, at 287.

cerning their actions with respect to each other.”⁷⁰ The object and purpose of human rights conventions are to promote respect for the basic rights of individual human beings by having party states mutually assume legal obligations to ensure those recognized rights within their borders in accordance with international standards.⁷¹ Thus, reservations to human rights treaties that make general allusions to domestic law are disapproved of and often provoke formal objections⁷² because in essence, by adhering to human rights conventions subject to these reservations, the State is “pretending to assume international obligations but in fact ... undertaking nothing.”⁷³

3. The Self-Executing Doctrine in the Application of Treaties to Domestic Law

The self-executing doctrine, like Senate imposed reservations to treaties, has a significant impact on the execution and enforcement of treaties. The Supremacy Clause of the United States Constitution states that treaties are the supreme law of the land.⁷⁴ This Clause effectuated “a wholesale incorporation of U.S. treaties into domestic law, dispensing with the need for retail transformation of treaties into domestic law by Congress.”⁷⁵ The self-executing treaty doctrine is a judicially cre-

70. de la Vega & Brown, *supra* note 50, at 754.

71. Henkin, *supra* note 59, at 343. See also The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-Am. C.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983); de la Vega & Brown, *supra* note 50, at 754.

72. Schabas, *supra* note 59, at 284. For example the U.S. reservations to articles 6 and 7 of the ICCPR were answered with objections from eleven party States. *Id.* at 310.

73. Henkin, *supra* note 59, at 344.

74. U.S. CONST. art. VI, cl. 2.

75. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 699 (1995). This was done in response to the rule in Great Britain that all treaties required, and still require, implementing legislation passed by Parliament before they would be enforced by officials applying domestic law, regardless of the treaty's terms or intents. *Id.* at 698. During the time of the Articles of Confederation, Great Britain repeatedly violated the Treaty of Peace. *Id.* Moreover, treaties concluded by the Continental Congress were not enforceable as law in the courts of the states if there was conflicting state legislation and no repealing acts of legislation were passed. *Id.* Therefore, to combat these problems with the implementation of treaties

ated rule developed as a qualification to the Supremacy Clause.⁷⁶ Generally, a self-executing treaty is one that may be enforced, once it is ratified, without requiring prior domestic legislation to take effect, whereas a non-self-executing treaty is one that may not be enforced in the courts without prior legislative implementation.⁷⁷ Courts have applied several different theories in determining whether a treaty is self-executing.⁷⁸

Professor Carlos Vazquez identified four distinct doctrines of self-executing treaties.⁷⁹ The first and most widely accepted of these doctrines is the intent-based doctrine⁸⁰ which was introduced into United States jurisprudence by the Supreme Court in *Foster v. Neilson*.⁸¹ The dispute arose over a claim to a tract of land in Florida on the basis of a grant from Spain.⁸² The Court ultimately held that it could not recognize the grant as valid under domestic law because the language of the treaty indicated the intention that Congress enact legislation confirm-

the Framers adopted the Supremacy Clause declaring treaties as the supreme law of the land and directing courts to give them effect without awaiting actions by the legislatures of either the states or the federal government. *Id.* at 699.

76. *Id.* at 697–98. See generally Connie de la Vega, *Civil Rights during the 1990's: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997).

77. Vazquez, *supra* note 75, at 695.

78. *Id.* While Professor Vazquez's determination of four distinct doctrines of the theory of self-executing treaties has been the most widely accepted, there are other legal scholars who have discovered different tests of the self-executing nature of treaties. For example, Professor de la Vega has distinguished three tests that courts in the United States have used to decide whether a clause of a particular treaty is self-executing. de la Vega, *supra* note 76, at 448. In the first test, the Court establishes whether or not the treaty is equivalent to a legislative act and if it is then the treaty is self-executing. *Id.* In the second test the Court examines the responsibilities mandated by the treaty provision to see if they require self execution. *Id.* Finally, the third test that Professor de la Vega describes is intent based. *Id.* at 446–47. Here, there has been some debate because courts have differed as to where they find this intent to make the treaty self-executing. Some courts have looked for the "intent of the parties" as reflected in the words of the treaty alone whereas others have determined the intent through looking at the words of the treaty in addition to the circumstances surrounding its execution. de la Vega, *supra* note 65, at 1041.

79. *Id.* at 696.

80. *Id.* at 699–700.

81. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

82. *Id.* at 253.

ing the grant.⁸³ However, the Court also noted that because the Constitution makes a treaty the law of the land it is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”⁸⁴ The Court narrowed the scope of non-self-executing treaties in *United States v. Percheman* when, by focusing on both the Spanish and English text of the treaty, it held that the treaty did “operate of itself” and could be applied by the courts without legislative implementation.⁸⁵ Thus, the decisions in *Foster* and *Percheman* recognized the general rule that treaties do not require legislative implementation in the United States “by their nature,” but may require legislative implementation through the affirmative agreement of the parties clearly stating that it is the parties’ intent to alter that rule.⁸⁶

Recently, however, the courts have changed their focus when determining intent for self-execution doctrine purposes. Lower courts have sought to discern the intent of the United States negotiators of the treaty, the President and the Senate, instead of the intent of all of the parties to the treaty and have done so by looking beyond the actual terms of the treaty.⁸⁷ Indeed, the courts have begun to perceive the inquiry as a search for the unilateral intent of the President in ratifying the treaty or the Senate in giving its advice and consent.⁸⁸ The Restatement adopts this test of determining intent by reasoning that if there is no language in the international agreement as to its self-executing character and the intention of the United States is unclear, “account must be taken of any statement by the President in concluding the agreement, or in submitting it to the Senate for consent, or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.”⁸⁹

83. *Id.* at 314.

84. *Id.* See also Vazquez, *supra* note 75, at 700.

85. *United States v. Percheman*, 32 U.S. (2 Pet.) 51 (1833).

86. Vazquez, *supra* note 75, at 702, 704.

87. *Id.* at 705.

88. *Id.*

89. RESTATEMENT, *supra* note 36, § 111 cmt. h. See also RESTATEMENT, *supra* note 36, § 314 cmt. h, d & § 303 cmt. d. However, there has been much debate as to whether the intent of only one of the parties would determine the effect of a particular clause in the case of multilateral agreements. de la Vega, *supra* note 76, at 448.

Moreover, the courts seem to have reversed the *Foster* and *Percheman* principle that, absent a clear statement of intent by the parties to have a treaty be subject to implementing legislation, it is self-executing; courts now look for evidence of an intent on the part of the United States officials to make the treaty self-executing and without it will presume that the treaty is non-self-executing and thus not enforceable in the courts without legislative implementation.⁹⁰ Furthermore, even the intention of the parties that the Court is trying to determine has become confused. For example, recently the intent relevant to the self-execution inquiry has been described as an intent to create “private rights,” or “judicially enforceable private rights,” or as “private rights of action,” or as an intent that the provision be judicially enforceable at the behest of individuals.⁹¹ The problems with this are that it leads to the misassumption that a treaty’s judicial enforceability is always a matter of intent, whereas that is not always the case, and it does not clarify the kind of intent necessary to make a treaty self-executing.⁹²

The second doctrine noted by Professor Vazquez is the justiciability doctrine.⁹³ Under this doctrine, the inquiry does not involve a “search for evidence of an intent regarding whether the ultimate object of the treaty was to be accomplished through future acts of legislation.”⁹⁴ Instead courts have viewed a treaty’s self-executing or non-self-executing nature as “a characteristic that exists independently of any intent to require legislation” and have discerned this essence through any guidance that they find useful.⁹⁵ An illustration of this approach is contained in the decision in *Frolova v. USSR*, where the 7th Circuit Court of Appeals enumerated the factors that it considered relevant to the inquiry into whether the treaty was intended to

90. Vazquez, *supra* note 75, at 708. See RESTATEMENT, *supra* note 36, § 111 cmt. h.

91. *Id.* at 710. While the concepts of the private right of action and the self-executing treaty doctrine are distinct, Professor Vazquez has deciphered at least one self-executing treaty doctrine that considers whether the treaty has created a private right of action for individuals in determining the self-executing nature of that treaty.

92. *Id.* This concept will be further discussed *infra* pp. 1263–69 when we turn to the other three self-executing treaty doctrines described by Vazquez.

93. *Id.*

94. *Id.* at 711.

95. *Id.*

be self-executing.⁹⁶ The Court in *Frolova* did not search for actual intent or even an inference of intent; instead it imputed intent based on factors that addressed reasons, unrelated to intent, as to why the treaty obligation should not have been judicially enforceable.⁹⁷

Other factors that some courts have considered in determining whether particular treaties are self-executing, and therefore judicially enforceable without additional legislation by Congress, are the precatoriness of certain provisions, the indeterminateness of a provision, and the case-by-case analysis of a treaty.⁹⁸ These types of provisions are deemed judicially unenforceable not because of the parties' intent but because in our domestic system of separated powers the object of the provision is considered to be a political task and not one for the courts to perform.⁹⁹ Other provisions have been held unenforceable because they did not set forth "sufficiently determinate standards for evaluating the conduct of the parties and their attendant rights and liabilities."¹⁰⁰ Today, lower courts have tried to answer the self-execution question by inquiring as to whether a

96. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 370–76 (7th Cir. 1985). Those factors included:

(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of the alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (4) the capability of the judiciary to resolve the dispute.

97. *Vazquez*, *supra* note 75, at 711.

98. *Id.* at 712–17. Precatory treaty provisions do not impose obligations but instead set forth aspirations. *Id.* at 712.

99. *Id.* at 713. Moreover, it is interesting to note that this test for discerning the self-executing nature of a treaty was not the same as that originally applied in *Foster* and *Percheman*. There, the question was whether intent to have a self-executing or non-self-executing treaty could be inferred from the text of the treaty itself. *Id.* at n.77. In contrast, using the precatory nature of a provision as a reason to say it is non-self-executing makes the provision judicially unenforceable without regard to the parties' intent concerning judicial enforcement. *Id.*

100. *Vazquez*, *supra* note 75, at 713. This variant on the issue of self-execution originates from dicta in the Supreme Court's decision in the *Head Money Cases*, where the Court said that a treaty can be judicially enforced by private individuals when it "prescribes a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. 580, 598–99 (1884). *See also Vazquez*, *supra* note 75, at 714.

treaty is “too vague for judicial enforcement,”¹⁰¹ or if it “provides specific standards,”¹⁰² or if it is “phrased in broad generalities.”¹⁰³ The Restatement has fortified this modification of the self-executing treaty doctrine by stating that a treaty is self-executing if it “can be readily given effect without further legislation.”¹⁰⁴ Furthermore, some lower courts have treated the self-executing inquiry as a more “free-wheeling inquiry” into the treaty’s judicial enforceability, taking into account many factors in addition to precatoriness and indeterminateness.¹⁰⁵ Thus this third and final variant of the justiciability doctrine seems to ask courts to engage in an “open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea.”¹⁰⁶

101. *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

102. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). *See also* *American Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (S.D. Cal. 1989).

103. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985).

104. RESTATEMENT, *supra* note 36, § 111 reporter’s note 5. Similar to the line between precatory and obligatory provisions, the line between vague and “judicially discoverable and manageable standards,” *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), is a domestic constitutional divide that also serves to allocate powers between the courts and the legislature. *Vazquez*, *supra* note 75, at 714–15. For example, in *People of Saipan* the Court listed the following factors as relevant to determining whether a treaty “establishes affirmative and judicially enforceable obligations without implementing legislation: ... the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non-self-execution.” *People of Saipan*, 502 F.2d at 97.

105. *Vazquez*, *supra* note 75, at 715.

106. *Id.* Moreover, it is important to note the differences between the “intent-based” branch of self-execution and the “justiciability-based” branch. The justiciability-based branch calls for a constitutional separation-of-powers determination analogous to a political question decision. *Id.* at 717. This kind of determination affects not only the particular treaty or treaty provision in question but also all provisions like it that may come before the court. *Id.* at n.102. In contrast, with regard to the intent-based branch, the parties to the treaty may make a treaty judicially unenforceable for any rational reason and their decision does not have any necessary implications regarding the judicial enforceability of other similar treaties. *Id.*

The third self-executing treaty doctrine identified by Professor Vasquez is the constitutionality doctrine.¹⁰⁷ According to the Restatement “[a]n international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies within the exclusive law-making power of Congress under the Constitution.”¹⁰⁸ Although there is no definitive judicial authority endorsing this variant of the self-executing treaty doctrine,¹⁰⁹ Professor Vasquez finds support for it in the Supremacy Clause.¹¹⁰ The test here is whether the treaty - makers possess the power to accomplish what they have set out to do in the treaty; if so the treaty is self-executing and if not, because the power lies with Congress, the treaty is non-self-executing.¹¹¹ However, due to the dearth of case law dealing with the constitutionality version of the self-executing doctrine, this category appears to have limited practical significance.¹¹²

The fourth and final category of the self-executing doctrines documented by Professor Vasquez is the private right of action doctrine.¹¹³ This variant on the doctrine asks the question of

107. *Id.* at 718.

108. RESTATEMENT, *supra* note 36, § 111 cmt. i.

109. RESTATEMENT, *supra* note 36, § 111 reporter’s note 6.

110. Vasquez, *supra* note 75, at 717. By illustrating how treaties are subject to all of the provisions of the Constitution the professor concludes that treaties are unable to accomplish goals which would not be consistent with the freedoms guaranteed by it, thus making those types of treaties unenforceable. *Id.*

111. *Id.* Significantly, this category of self-executing treaty doctrine differs considerably from the intent-based category in that in the latter, the treaty’s non-self-executing character is derived from the intent of the parties or the treaty makers, whereas in the former the treaty is non-self-executing because of the treaty makers’ constitutional disability. *Id.* “Additionally, while the constitutionality version of the doctrine is similar to the justiciability version because both require judgments about constitutional allocations of power, the justiciability version requires a judgment about the distribution of the power to *enforce* particular kinds of treaty provisions between the courts and the legislature and the constitutionality version requires a judgment about the distribution of the power to *accomplish* certain ends between the treaty makers and the lawmakers.” *Id.*

112. *Id.*

113. Vasquez, *supra* note 75, at 719. The concept that a treaty is self-executing and thus judicially enforceable only if it creates a private right of action found its origin in the District of Columbia Circuit Court of Appeals case *Tel-Oren v. Libyan Arab Republic* when Judge Bork in his concurring

whether the treaty at issue confers a “private right of action” such that private parties can maintain an action in court to enforce the treaty.¹¹⁴ However, it is incorrect to assume that a treaty can be enforced in court by private parties only if it confers a private right of action itself.¹¹⁵ Even if a treaty, like many constitutional provisions and federal statutes, imposes primary obligations on individuals without expressly addressing matters of enforcement, it may still be judicially enforceable.¹¹⁶ This is due to the fact that treaties may be supplemented by the common law¹¹⁷ as well as state¹¹⁸ and federal¹¹⁹ statutory law that confer “rights of action.”¹²⁰ Given that the purpose of the domestic courts in our governmental system, since *Marbury v. Madison*,¹²¹ has been to provide a remedy for the infringement of individual rights, “by implication the Supremacy Clause, as it concerns treaties, was intended to confer rights upon individuals.”¹²² Significantly, even without a private right of action private individuals may “enforce such treaties defensively if they

opinion considered “whether a right of action could be found in the treaties invoked by the plaintiffs [to determine the self-executing nature of the treaty].” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

114. *Id.* However, according to the Restatement, “[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.” RESTATEMENT, *supra* note 36, § 111 cmt. h. Professor Vazquez rebuts this by noting that while a treaty that does not itself confer a private right of action can correctly be described as non-self-executing, if the Restatement is read as discussing the distinction introduced in *Foster* regarding self-executing treaties, then the private right of action self-executing treaty doctrine is not in conflict with the Restatement. Vazquez, *supra* note 75, at 719, n.134.

115. *Id.*

116. *Id.*

117. Actions of debt and ejectment are two examples of instances where treaties have been enforced in court through common law forms of action. *See, e.g.*, *Florida v. Furman*, 180 U.S. 402, 428 (1901) (action to remove cloud on legal title); *Botiller v. Dominquez*, 130 U.S. 238, 243 (1889) (action in the nature of ejectment).

118. *See, e.g.*, *Jordan v. Tashiro*, 278 U.S. 123, 125 (1928) (state mandamus action).

119. *See, e.g.*, *Baldwin v. Franks*, 120 U.S. 678 (1887) (civil rights legislation).

120. Vazquez, *supra* note 75, at 720.

121. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

122. Reimels, *supra* note 5, at 315. *See also* *Reid v. Covert*, 354 U.S. 1 (1957); *Missouri v. Holland*, 252 U.S. 416 (1920).

are being sued or prosecuted under statutes that are inconsistent with [the] treaty provisions.”¹²³ This defensive use of a treaty is a judicially accepted means for litigants to successfully enforce treaty provisions without asking courts to determine whether the provisions are self-executing.¹²⁴ Therefore, while a court ruling or Senate proclamation that a treaty is non-self-executing may prevent bringing a direct cause of action under the treaty, the treaty can still be relied upon as a defense to a criminal charge¹²⁵ or the imposition of a sentence such as the death penalty.

Professor Vazquez’s four variants on the self-executing treaty doctrine shed some light on yet another aspect of treaty interpretation and enforcement. While all of the different theories of the self-executing doctrine have played an important part in the history of treaty law, it is the final category, that of the private right of action, that seems to have attracted the most attention lately. As another prominent legal scholar has pointed out, the recent pattern of Senate declarations that a treaty is non-self-executing, and thus does not confer a private right of action on individuals, “threatens to subvert the constitutional treaty system.”¹²⁶ This problem most often arises in the case of human

123. *Id.* For example in *Patstone v. Pennsylvania* the defendant, a foreign born Pennsylvania resident, was convicted under state law for owning a shotgun. *Patstone v. Pennsylvania*, 232 U.S. 138 (1914). The defendant asserted the defense that the statute violated a treaty between Italy and the United States. *Id.* While the Supreme Court recognized the defense under the treaty, it ultimately concluded that there was no conflict between the treaty and the state law. *Id.* at 145. Similarly in *Kolovrat v. Oregon*, the state filed petitions under its law for escheatment to obtain the land of an intestate decedent whose only next of kin lived in Yugoslavia. *Kolovrat v. Oregon*, 336 U.S. 187 (1961). The Yugoslavian relatives of the deceased argued that a treaty between the United States and Yugoslavia allowed for reciprocal rights of inheritance and that they were therefore eligible heirs to the estate. *Id.* The Supreme Court agreed, holding that, under the treaty to inherit property, the next of kin did not have to reside in the United States. *Id.* at 197. *See also de la Vega & Brown, supra* note 50, at 763.

124. *de la Vega, supra* note 65, at 1056.

125. *Reimels, supra* note 5, at 316.

126. *Henkin, supra* note 59, at 348. It is submitted that there is no justification for using a non-self-executing declaration to preserve an inconsistent statute that predates the treaty because this practice would create an indefensible gap between domestic law and international obligations. Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 *CHI.-KENT L. REV.* 515, 530 (1991). The

rights treaties where, in order to achieve the goals set forth in the treaty, the individual signatories must pass subsequent domestic legislation to conform to the treaty requirements.¹²⁷ This insufficiency can result in a whole class of non-self-executing treaties whose main purpose is the protection of individuals who cannot create legislation to protect themselves. This shall be discussed in the next section examining treaties dealing with the juvenile death penalty.

B. International Treaties Governing the Juvenile Death Penalty

There are two central issues involved in any discussion of the domestic impact of an international human rights treaty: the legal implications of reservations and the status of the treaty as self-executing or non-self-executing.¹²⁸ If one would like to invoke a provision of a treaty upon which a reservation has been attached, one must show that the reservation is invalid because it violates both the object and purpose of the treaty as well as the non-derogable nature of the provision.¹²⁹ Moreover, if the reservation declares the treaty to be non-self-executing, it is necessary to introduce counterarguments asserting that the treaty is self-executing and enforceable because either the original intent of the parties was to make it self-executing and to directly confer rights on individuals, or regardless of the treaty's self-executing nature its use as a defense is just.¹³⁰

Modern human rights treaties are not multilateral treaties of the traditional kind that are created to accomplish a reciprocal exchange of rights for the mutual benefit of the contracting

effect of a non-self-executing declaration attached by the Senate to an otherwise self-executing treaty would be to allow prior inconsistent statutory law to prevail, even though the courts would have allowed the treaty to supercede the statute in the absence of the declaration as a result of the last in time doctrine. *Id.*

127. Cele Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699, 715 (1995). This is done because some countries, like Great Britain, require implementing legislation for the execution of any treaty.

128. Reimels, *supra* note 5, at 316.

129. See also Christian A. Levesque, Note, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. U. L. REV. 755, 782 (2001).

130. *Id.* at 792.

states.¹³¹ The object and purpose of these treaties is “the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.”¹³² In concluding human rights treaties, the party states submit themselves to a legal order by assuming various obligations, not in relation to other states, but for the common good of all individuals in their jurisdiction.¹³³ Multilateral treaties seldom make clear the mechanism by which parties are to incorporate their provisions into national law¹³⁴ due to the fact that some countries require implementing legislation for all treaties whereas others, such as the United States, do not.¹³⁵ Further, while few courts in the United States have considered whether human rights treaties are self-executing,¹³⁶ the test that applies to multilateral treaties¹³⁷ of this nature is whether the treaty provision in question addresses the rights and duties of individuals and has extremely clear prohibitory language indicating that no further legislation is needed for it to take effect;¹³⁸ if the treaty comports with these two requirements, then it is self-executing.

With all of the previously discussed treaty law jurisprudence in mind, this Comment will now more closely examine interna-

131. de la Vega & Brown, *supra* note 50, at 754.

132. *Id.*

133. *Id.* at 755. See also Sherman, *supra* note 68, at 79–80.

134. de la Vega, *supra* note 76, at 449.

135. See *supra* n.75 and accompanying text for a further explanation of this topic.

136. de la Vega, *supra* note 76, at 450. For example, the United States Supreme Court has not directly ruled on whether the United Nations Charter’s human rights clauses are self-executing. *Id.* However, in *Oyama v. California* four Justices did support the idea that the United Nations Charter should be binding on courts in the United States. *Id.* See also *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring).

137. Bourguignon, *supra* note 65, at 348.

138. See Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 WHITTIER L. REV. 215, 220 (1999). See also de la Vega, *supra* note 76, at 449 (citing Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT’L L. 548, 550 (1970)). Regardless of which test is applicable for use by the courts in determining whether a treaty is self-executing, recently the United States has taken to declaring all the human rights agreements that it ratifies as non-self-executing. Henkin, *supra* note 59, at 346.

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tional treaties that ban the execution of individuals who committed the crime, for which they were convicted and sentenced, while they were minors. The United States is a party to two treaties that prohibit the execution of persons under the age of eighteen (either at the time of the crime and/or at the time of execution): the International Covenant on Civil and Political Rights (ICCPR) and the Fourth Geneva Convention Relative to the Protection of Civilians. The United States is also a signatory¹³⁹ to the United Nations Convention of the Rights of the Child and the American Declaration of Human Rights. Each treaty will be examined in turn; however, special attention will be given to the ICCPR because it has the greatest potential to be used as persuasive authority in juvenile death penalty defense motions.¹⁴⁰

1. The International Covenant on Civil and Political Rights

a. The United States Reservation to Article 6 of the International Covenant on Civil and Political Rights is Invalid

The International Covenant on Civil and Political Rights (ICCPR) has been categorized as “nothing less than an international bill of rights [which was] part of an effort to codify the Universal Declaration of Human Rights, the United Nations’ post-war proclamation of the rights of man.”¹⁴¹ In 1966, the United Nations General Assembly approved the text of the treaty and opened the ICCPR for ratification.¹⁴² President

139. A signatory to a treaty is a country that has signed the treaty but not yet ratified it. While that State has not yet manifested its intent to be bound by the treaty through its ratification, the State is still required to comply with all the terms and provisions of the treaty. Moreover, once a State signs a treaty it also agrees not to pass any laws that contradict the treaty provisions even though that treaty is technically not the law of the land until ratified. See de la Vega & Brown, *supra* note 50, at 759.

140. Reimels, *supra* note 5, at 317.

141. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 59 (1993).

142. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

Carter made the United States a treaty signatory¹⁴³ and asked the Senate to give its advice and consent to ratification of the ICCPR in 1977.¹⁴⁴ Nothing was done for the twenty-six years after the United Nations General Assembly unanimously adopted the treaty and the sixteen years after it went into effect internationally. Then, on April 2, 1992 the ICCPR was ratified by the United States Senate, on June 8, 1992 President Bush deposited the signed ratification instrument with the United Nations Secretary General,¹⁴⁵ and three months later on September 8, 1992 the treaty entered into force in the United States.¹⁴⁶ Between 1966 and 1992, many Senate and executive administration debates were held dealing with the treaty, illustrating the tension between the United States' commitment to human rights and its reluctance to implement the ICCPR into domestic law.¹⁴⁷ As a result, when the United States finally ratified the treaty it did so subject to several reservations, declarations, and understandings.¹⁴⁸ Eleven states filed objections to the reservations, asserting that they were invalid because they conflicted with the "object and purpose" of the ICCPR.¹⁴⁹ Further, the United Nations Human Rights Committee concluded that under the Vienna Convention, which is the guiding authority on current treaty law,¹⁵⁰ the United States' reservation to

143. 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 5, 1977), *reprinted in* 77 DEP'T ST. BULL. Oct. 1977.

144. 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978), *reprinted in* 78 DEP'T ST. BULL. Apr. 1978.

145. 28 WEEKLY COMP. PRES. DOC. 1008 (Sept. 10, 1992), *reprinted in* 92 DEP'T ST. BULL. Sept. 1992.

146. *See* Senate Report, *supra* note 30, at 645. *See* Quigley, *supra* note 141, at 60.

147. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1170-72 (1993). *See also* United Nations, Multilateral Treaties Deposited with the Secretary General: Status as at 31 Dec. 1999, at 134, U.N. Doc. ST/LEG/SER.E/18 (Vol. I) (1999) [hereinafter ICCPR Status Report].

148. ICCPR Status Report, *supra* note 147, at 134. *See also supra* p. 1255 n.45 and accompanying text on reservations, understandings, declarations, and provisos.

149. *See id.* at 144-48 (listing Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden). *See also* Schabas, *supra* note 59, at 277.

150. *See supra* text pp. 1254, 1256-59.

Article 6 is invalid because it contradicts the ICCPR's "object and purpose."¹⁵¹

The ICCPR, like most human rights treaties, attempts to place legal obligations on how states handle the people living within their borders.¹⁵² The object and purpose of the ICCPR, and in particular Article 6, is to "protect the right to life through prohibiting the imposition of the death penalty on juvenile offenders."¹⁵³ Article 6 paragraph 5 states that the "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."¹⁵⁴ The United States attached a reservation to this provision of the treaty, stating that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person [other than a pregnant woman] duly convicted under existing or future laws permitting the imposition of capital punishment including such punishment for crimes committed by persons below eighteen years of age."¹⁵⁵ Since a reservation is invalid if it contradicts the object and purpose of the treaty,¹⁵⁶ the Senate reservation, which does just that, is void.

The consequences of invalidating the reservation are two-fold. First, if an invalid reservation can be severed from the treaty as a whole, the United States remains bound by the entire treaty.¹⁵⁷ Thus in the case of the ICCPR, the United States would be bound to the entire treaty including the prohibition against the execution of minors who are sixteen and seventeen at the time of their offense.¹⁵⁸ The other possibility is that, in light of the reservation and subsequent objections, the United

151. de la Vega & Fiore, *supra* note 138, at 217–18. See also Schabas, *supra* note 59, at 278 (citing *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*; U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. at 4, U.N. Doc. CCPR/C/79/Add.50 (1995) [hereinafter *Comments of the Human Rights Committee regarding the ICCPR*]).

152. Reimels, *supra* note 5, at 321.

153. de la Vega & Fiore, *supra* note 138, at 218.

154. ICCPR, *supra* note 4, art. 6, para. 5.

155. Senate Report, *supra* note 30, at 653.

156. Vienna Convention, *supra* note 33, at art. 19. See also the accompanying text.

157. Schabas, *supra* note 59, at 278. See also Reimels, *supra* note 5, at 320.

158. *Id.*

States is no longer a party to the treaty.¹⁵⁹ However, as a result of the “growing international consensus that an invalid reservation is severed from the ratification”¹⁶⁰ and the corollary concept that the reserving State is still a party to the treaty, it can be concluded that the United States’ present practice of imposing capital punishment on juvenile offenders is illegal under the ICCPR, to which the United States is still a party.

Moreover, the reservation to Article 6 of the ICCPR can be invalidated due to the fact that it attempts to annul that non-derogable provision. Article 4 paragraph 2 of the ICCPR states that “[n]o derogation from Articles 6, 7, 8 (paragraphs one and two), 11, 15, 16, and 18 may be made under this provision.”¹⁶¹ The Inter-American Commission on Human Rights issued an opinion linking the non-derogable provisions of a treaty with the incompatibility principle of the Law of Nations.¹⁶² That Commission defined the incompatibility doctrine by stating that a reservation which violates a non-derogable fundamental right is incompatible with the object and purpose of the treaty and therefore is not permitted.¹⁶³ Further, “implicit in the ... opinion linking non-derogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.”¹⁶⁴ More telling still is that the United Nations Human Rights Committee, which was established under the ICCPR and is another major international organization dealing with the issue of the juvenile death penalty,¹⁶⁵ declared the United States’ death penalty reservation to be invalid by concluding that some components of the reser-

159. *Id.*

160. *See generally* Bourguignon, *supra* note 65. *See also* Belilos Case, 132 Eur. Ct. H.R. (ser. A) (1988), *reprinted in* 10 Eur. H.R. Rep. 466 (1988) (holding that if a non-essential reservation is invalid it is severed and the country submitting the reservation is still a party to the treaty and bound by the provision without the reservation); de la Vega & Fiore, *supra* note 138, at 219.

161. ICCPR, *supra* note 4, art. 4, para. 2.

162. *See* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), at 23 I.L.M. 320 (1984).

163. *See id.* at 61, 23 I.L.M. at 341. *See also supra* n.67.

164. Sherman, *supra* note 68, at 79.

165. *See* ICCPR, *supra* note 4, art. 28, para. 1.

vation may be incompatible with the non-derogable provision of the treaty that states its object and purpose.¹⁶⁶ In conclusion, because the Senate's reservation conflicts with the object and purpose of the treaty and is in fact in derogation from a non-derogable provision it is void, thus signifying the non-compliance of United States with its international obligations under Article 6.

b. The International Covenant on Civil and Political Rights is Self-Executing

In addition to the reservation to Article 6(5), in which the Senate attempted to maintain the right of the United States to impose the juvenile death penalty, the Senate declared that the ICCPR is non-self-executing, thus barring the use of any of the treaty provisions as a basis for private causes of action.¹⁶⁷ However, by applying the self-executing treaty test for multilateral human rights treaties as well as the intent-based and justiciability doctrines identified by Professor Vazquez, it becomes clear that the ICCPR should be categorized as a self-executing treaty.

First, Article 6 paragraph 5 of the ICCPR is self-executing because it fulfills the conditions for multilateral human rights treaties, requiring that the provision involve the rights and duties of individuals and that the prohibitory language be extremely clear, indicating that no further legislation is needed for it to take effect.¹⁶⁸ The rights of individuals involved under this provision are those of juvenile offenders and the prohibitory language clearly states that the death penalty "shall not be imposed for crimes committed by persons below eighteen years of age."¹⁶⁹ Consequently, implementing legislation should not be necessary to put into operation the prohibition against the juvenile death penalty for parties to the ICCPR.¹⁷⁰

166. See Comments of the Human Rights Committee regarding the ICCPR, *supra* note 151, at 3. See also de la Vega & Brown, *supra* note 50, at 767 (citing de la Vega, *supra* note 76, at 461).

167. See ICCPR Senate Report, *supra* note 30, at 659. See also Reimels, *supra* note 5, at 322.

168. de la Vega & Fiore, *supra* note 138, at 220.

169. ICCPR, *supra* note 4, at art. 6, para. 5. See also *id.*

170. See de la Vega & Fiore, *supra* note 138, at 221.

Further, under the intent-based self-executing treaty doctrine,¹⁷¹ both the actual language and the meaning of the ICCPR, in addition to the surrounding circumstances of executing the treaty when the language is unclear, make it self-executing.¹⁷² Article 2 paragraph 3(a) of the ICCPR states that, “[e]ach State Party to the present Covenant undertakes: [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”¹⁷³ United States Senate Declaration 1 of the ICCPR states that, “the provisions of articles 1 through 27 of the Covenant are not self-executing.”¹⁷⁴ Due to the fact that Article 2 of the ICCPR mandates that the United States create a system of enforcement, the Senate’s declaration, which lacks the full authority of a reservation,¹⁷⁵ does not alleviate this obligation.¹⁷⁶

171. See Section II.A.3 *supra* for an in depth explanation of the several self-executing treaty doctrines set forth by Professor Vazquez.

172. See *Air France v. Saks*, 470 U.S. 392, 397 (1985) (noting that interpretation of a treaty must begin with the text of the treaty and the context in which words are written and used (citing *Maximov v. United States*, 373 U.S. 49, 53–54 (1963))); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32, (1943) (stating that courts should interpret treaties more liberally than private agreements and that the Court may look at history, negotiations, and practical construction so as to maintain the spirit of the treaty). See also *Levesque*, *supra* note 129, at 772.

173. ICCPR, *supra* note 4, art. 2, para. 3(a).

174. ICCPR Status Report, *supra* note 147, declaration 1, at 139. “Declarations are simply statements of policy, purpose, or position relating to the subject matter of the treaty, but not necessarily affecting its provisions.” *de la Vega*, *supra* note 76, at 452.

175. *Quigley*, *supra* note 141, at 64. “The declaration has effect only insofar as it bears upon judicial appraisal of the Covenant’s force. This appraisal is not a *fait accompli*; it is not clear how much weight the Senate’s declaration will carry on the courts.” *Id.* See, e.g., *Power Authority of N.Y. v. Federal Power Comm’n*, 247 F.2d 538 (D.C. Cir. 1957) (holding that a qualification statement made by the Senate in a resolution of consent to a treaty, but not made as a reservation, did not have the force of domestic law in the United States).

176. *Id.* See also ICCPR, *supra* note 4, at art. 2, para. 3(b) (the parties agree to provided remedies enforceable “by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibility of judicial remedy”). Additionally, because the United States has not created an enforcement mechanism in other branches of the government, the judiciary is “called

The ICCPR cannot be internationally binding and contain language invoking a remedy for individual violations and yet not create a basis for implementation domestically.¹⁷⁷ However, since a discrepancy between the language and interpreted meaning of the ICCPR is created when reading the Senate's Declaration in conjunction with Article 2, courts must look for intrinsic evidence surrounding the treaty's execution to determine whether the treaty provision is in fact self-executing.¹⁷⁸ While the Senate's Declaration that the treaty is non-self-executing carries weight, the force ascribed to the ICCPR by other states provides substantial support to the notion that the parties to the treaty intended for it to be self-executing.¹⁷⁹ For instance, the United Kingdom, a party to the ICCPR, has permitted private causes of action under the treaty even though it has not expressly written the ICCPR into its domestic law as British law requires.¹⁸⁰ Moreover, many other countries which are a party to the treaty have expressed the view that the ICCPR creates rights that are enforceable without enacting legislation.¹⁸¹ Therefore, it is readily apparent that the other party states believe that direct causes of action are allowed under the ICCPR. Admittedly, under the Restatement approach to treaty interpretations, the only intention considered in determining

upon to enforce the ICCPR's obligations. Quigley, *supra* note 141, at 64. Professor Quigley opines that the courts should decide on this basis that the prescriptive provisions of the Covenant are self-executing." *Id.*

177. Levesque, *supra* note 129, at 773.

178. *Id.*

179. *See* Quigley, *supra* note 141, at 64.

180. *Id.* In the United Kingdom treaties are not the "law of the land," as they are here under the Supremacy Clause. Instead, there, a treaty must be explicitly transformed into law by an act of parliament in order to become domestic law. *See also supra* n.75.

181. *Id.* *See, e.g.,* Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 44, at para. 194 (Netherlands stating that "any legislative act contrary to a provision of the Covenant would become inapplicable"); *id.* para. 549 (Italy stating that the ICCPR is frequently invoked by their courts). Report on the Human Rights Committee, U.N. GAOR, 43rd Sess., Supp. No. 40, para. 368, U.N. Doc. A/43/40 (1988) (France stating that its courts rely on the ICCPR); *id.* at para. 588 (Japan stating that the ICCPR prevails over domestic legislation in Japanese courts). *See also* Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUMAN RIGHTS Q. 295, 317-20 (1991).

the self-executing question is that of the United States.¹⁸² However, "it is questionable [as to whether] in multilateral agreements the intent of only one of the parties ... determine[s] the effect of a particular clause."¹⁸³ Further, under the rule promulgated in *Foster v. Nelson*,¹⁸⁴ which introduced the concept of the self-executing treaty doctrine, the intent of all the negotiating parties is most important; under that theory it would be clear that the ICCPR is self-executing.

Moreover, the ICCPR should also be classified as self-executing under the justiciability doctrine introduced by Professor Vazquez. Under this doctrine, the self-executing question is determined based on independent factors and reasons, unrelated to intent, that illustrate why the treaty should or should not be judicially enforceable without implementing legislation.¹⁸⁵ These factors were fashioned by the court in *Frolova v. USSR*¹⁸⁶ and should act as a guideline and not a rigid test of self-execution.¹⁸⁷ However, by applying the factors to Article 6 paragraph 5 of the ICCPR they lead to the conclusion that it is self-executing. First, the language, object, and purpose of the treaty in its entirety are clear: it intends to protect the human rights of individuals.¹⁸⁸ Second, as noted before, the circumstances surrounding the execution of the treaty indicate that it is self-executing due to the fact that many parties to the ICCPR have allowed private rights of action under the treaty without first enacting implementing legislation.¹⁸⁹ Third, Article 2 unmistakably imposes an obligation on party states to supply effective remedies.¹⁹⁰ Fourth, because the United States has not ratified the Optional Protocol to the Convention on Civil and Political

182. RESTATEMENT, *supra* note 36, § 111 cmt.h. *See also* Reimels, *supra* note 5, at 322.

183. de la Vega, *supra* note 76, at 448. *See also* United States v. Toscanino, 550 F.2d 267, 270 (2d. Cir. 1974).

184. *Foster v. Nelson*, 27 U.S. (2 Pet.) 51 (1833).

185. Vazquez, *supra* note 75, at 711.

186. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985). For a more in-depth discussion of the factors see n.96 on p. 1264.

187. Levesque, *supra* note 129, at 772.

188. *See* ICCPR, *supra* note 4. *See also* de la Vega, *supra* note 65, at 1055.

189. Quigley, *supra* note 141, at 64. *See also supra* n.180 and accompanying text.

190. ICCPR, *supra* note 4, at art. 2, para. 3. *See also* de la Vega, *supra* note 65, at 1055.

Rights, which provides for an individual right to petition the Human Rights Committee,¹⁹¹ there are no other enforcement or implementation mechanisms available.¹⁹² Fifth, since the treaty provides rights to individuals, there is no reason to “believe that individuals should not have a private cause of action to enforce the provisions.”¹⁹³ Lastly, as there is no other enforcement mechanism in any other branch of the United States government, this job falls to the judiciary.¹⁹⁴ The judiciary is the most capable institution for addressing the question of whether a treaty has been violated because it has customarily been the means through which individuals in the United States have enforced their constitutional rights.¹⁹⁵ Thus, under the *Frolova* factors of the justiciability variant of the self executing treaty doctrine, the ICCPR should be self-executing.¹⁹⁶

Furthermore, despite the clarity of the ICCPR provisions, if the Senate Declaration that the treaty is non-self-executing is given effect then it should only apply to private causes of action. When the Senate Foreign Relations Committee declared the ICCPR to be non-self-executing, it did so only with respect “to

191. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976; not in force for the United States), 999 U.N.T.S. 302.

192. de la Vega, *supra* note 65, at 1055

193. *Id.*

194. Quigley, *supra* note 141, at 64.

195. de la Vega, *supra* note 65, at 1055. It is important to remember that the courts and not the Senate usually decide when treaty provisions are self-executing. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 42–47 (1992); Damrosch, *supra* note 126, at 526; David Weissbrodt, *The United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 67 (1978).

196. While they are somewhat weaker arguments, the ICCPR might also be considered self-executing under the constitutionality and private right of action self-executing treaty doctrines. First, under the constitutionality doctrine, banning the execution of minors does not appear to be a goal that lies exclusively within the lawmaking powers of Congress. Therefore, under that limited doctrine the ICCPR may be self executing. Secondly, while the concepts of a private right of action and the self-execution of a treaty are distinct, according to Professor Vazquez, one can consider the provision of a private right of action through a treaty informative regarding its self-executing nature. The ICCPR appears to provide a private right of action, thus it should be considered self-executing. For more information regarding these variants on the self-executing treaty doctrine, see *supra* Section II.A.3.

private causes of action.”¹⁹⁷ The legislative history of the declaration does not make the same statement regarding the use of the ICCPR provisions as a defense; thus because a party seeking to invoke the treaty provision, such as Article 6 paragraph 5, is not invoking a separate cause of action, the non-self-executing declaration is inapplicable to such parties.¹⁹⁸ Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, whereas parties to other treaties create state to state obligations;¹⁹⁹ therefore, if a right is created in a human rights treaty but there is no corresponding private right of action to enforce it domestically then there will be an individual right without a remedy — that is unless the treaty can be used defensively. Moreover, “the defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without [forcing the courts] to determine whether the treaty is self-executing.”²⁰⁰ Accordingly,

197. S. Exec. Rep. No. 102-23, at 19, reprinted in 31 I.L.M. at 657 (“For the reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.”). See also Levesque, *supra* note 129, at 775.

198. de la Vega & Brown, *supra* note 50, at 763.

199. *Id.*

200. de la Vega & Fiore, *supra* note 138, at 221. The seminal case regarding this theory is *United States v. Rauscher*, in which the Supreme Court “implicitly held that a direct beneficiary of a treaty may invoke that treaty as a defense even if the defendant was an unintended beneficiary or the treaty does not expressly grant the defendant or individuals in his class any rights.” *United States v. Rauscher*, 119 U.S. 407, 432–33 (1886) (The defendant had been extradited from Great Britain to the United States for allegedly murdering a crewmember aboard an American vessel. However, when he was brought to the United States he was not charged with murder but with inflicting cruel and unusual punishment upon a crew member.). There the Court focused on the defendant’s use of the extradition treaty as a defense and only indirectly discussed the issue of self-executing treaties. *Id.* at 420. The Court held that treaties confer certain rights on private citizens when the treaty prescribes a rule governing a right that is “of the nature” of rights enforceable in the courts. *Id.* at 419. Thus the defendant had a right to raise the treaty as a defense because the Court did not have jurisdiction over those offenses that fell beyond the scope of the treaty under which he was extradited. *Id.* at 430. Further, even the dissent in *Rauscher* supported the contention that an individual may raise a treaty as a defense to a prosecution; it only disagreed with the actual interpretation of the treaty in question in the case. *Id.* at 434 (Waite, C.J., dissenting). See also Levesque, *supra* note 129, at 777.

juvenile offenders sentenced to death should be allowed to use Article 6 paragraph 5 of the ICCPR as a defense to challenge the imposition of the juvenile death penalty.

Thus, since the Senate reservation to Article 6 paragraph 5 of the ICCPR is invalid based on the fact that it conflicts with the object and purpose of the treaty and the fact that the Senate Declaration of non-self-execution is both contrary to the intent of the parties and inapplicable when the treaty is invoked as a defense, the ICCPR should be called upon in cases dealing with the juvenile death penalty. Without bypassing the Senate reservation and declaration, the United States adherence to the ICCPR remains essentially empty by keeping United States judges from ruling on domestic human rights conditions using the more stringent international standards.²⁰¹

2. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

The first treaty that the United States ratified that explicitly prohibited the application of the death penalty to juvenile offenders was the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).²⁰² The Fourth Geneva Conventions are the most widely ratified treaties in the history of the modern world.²⁰³ The United States is a party to this treaty which was both signed and ratified in 1949.²⁰⁴ Article 68 of the Fourth Geneva Convention states that “[i]n any case, the death penalty may not be pronounced against a protected person [held by a party to the conflict or an occupying force of which he or she is not a national] who was under eighteen years of age at the time of the offence [sic].”²⁰⁵ While the Fourth Geneva Convention applies only in times of international armed conflict, it is important to note that it prohibits the execution of juvenile offenders. The United States did submit a reservation to Article 68,²⁰⁶ but in-

201. Henkin, *supra* note 59, at 346.

202. Fourth Geneva Convention, *supra* note 4, at art. 68.

203. See Reimels, *supra* note 5, at 322. 186 States are parties to the 1949 Geneva Convention. *Id.*

204. Fourth Geneva Convention, *supra* note 4, at art. 68.

205. *Id.*

206. Schabas, *supra* note 59, at 305–06. Article 68, paragraph 2 stating that the death penalty “may not be imposed in wartime on civilian popula-

terestingly it was not to the prohibition of the juvenile death penalty.²⁰⁷

Additionally, the 1977 Protocols to the Geneva Conventions explicitly prohibit the imposition of capital punishment on those who committed the crimes that they were convicted of while they were minors under the age of eighteen.²⁰⁸ The Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I) states in Article 77 paragraph 5 that “the death penalty related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence [sic] was committed.”²⁰⁹ The Additional Protocol relating to the Protection of Victims of Non-

tions by an occupying power if it has previously been abolished in peacetime” has been the only provision in the Fourth Geneva Convention to provoke reservations. *Id.* See also Fourth Geneva Convention, *supra* note 4, at art. 68 para. 2. Reservations were filed by the United States, Australia, Canada, the United Kingdom, New Zealand, and the Netherlands for the purpose of protecting “... the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.” *Id.* at 432.

207. *Id.* This may have been due to the fact that at the time of the signing and ratification of the Geneva Convention the United States federal government had a de facto moratorium on its use of the death penalty against juvenile offenders. See Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1332 (1993). See also VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES 55* (Bloomington, IN: Indiana University Press) (1987). Additionally, it was not until 1962 that the United States Supreme Court ruled that the Cruel and Unusual Punishments Clause of the Eighth Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment. Nanda, *supra* note 207, at 1318. Therefore, until that time the state supreme courts heard most, if not all challenges to the death penalty. *Id.* Then, significantly, between 1964 and 1985, the United States did not execute any persons for crimes committed while under eighteen years of age. *Id.*

208. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, art. 77, para. 5, 1125 U.N.T.S. 3, 39 (entered into force Dec. 7, 1978; not in force in the United States); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, art. 6, para. 4, 1125 U.N.T.S. 609, 613–14 (entered into force Dec. 7, 1978; not in force in the United States) [hereinafter Protocol II]. See also Nanda, *supra* note 207, at 1330.

209. *Id.* at art 77, para 5, at 39.

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International Armed Conflicts (Protocol II) states in Article 6 paragraph 4 that “the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence [sic]”²¹⁰ Despite the United States’ tacit endorsement of the prohibition against the juvenile death penalty by ratifying the Fourth Geneva Convention, it did not become a party to the Additional Protocols of 1977.²¹¹ While the Fourth Geneva Convention, to which the United States is a party, only applies to times of international armed conflict and the Additional Protocols of 1977 were not accepted by the United States, the provisions within those instruments dealing with the juvenile death penalty illustrate the international consensus for the prohibition of the death penalty on juvenile offenders.²¹²

3. The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is the first international human rights treaty specifically devoted to children.²¹³ On November 20, 1989, the General Assembly of the United Nations adopted the CRC,²¹⁴ a treaty that consists of fifty-four articles and provides the children of the international community with “civil, political, economic, social and cultural rights.”²¹⁵ The United States signed the CRC in February of 1995²¹⁶ and is one of only two countries worldwide, the other being Somalia — a country without a government,

210. Protocol II, *supra* note 208, art. 6, para. 4, at 613–14.

211. *Id.* See also Reimels, *supra* note 5, at 324–25.

212. This will be very important in the later discussion of customary international law and jus cogens norms. See *infra* pp. 1288–1298.

213. Jennifer D. Tinkler, Note, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 470 (1992). See also Per Miljeteig-Olssen, *Advocacy of Children’s Rights – The Convention as More than a Legal Document*, 12 HUM. RTS. Q. 148, 148 (1990).

214. The treaty came into force on September 2, 1990. CRC, *supra* note 4, at 44 n.1.

215. Tinkler, *supra* note 213, at 469. See also Michael Jupp, *The UN Convention on the Rights of the Child: An opportunity for Advocates*, 12 HUM. RTS. Q. 130, 130 (1990).

216. See The White House, Office of the Press Secretary, Press Release, Feb. 10, 1995. See also de la Vega & Fiore, *supra* note 138, at 224.

which has not yet ratified the treaty.²¹⁷ The sentiment reflected in the CRC is “that every child deprived of liberty be treated in a manner which takes into account the needs of persons of his or her age [and] calls for a variety of dispositions in criminal convictions that ensure children are dealt with in a manner appropriate to their well-being [that is] proportionate to the circumstances of their offense.”²¹⁸

Article 37 of the CRC specifies the rights that children enjoy when they are deprived of their liberty, including rights granted to children after they are convicted or adjudicated delinquent.²¹⁹ That provision of the CRC explicitly abolishes capital punishment and life imprisonment without the possibility of release for juvenile offenders.²²⁰ Article 37 section (a) states that “[n]o child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of parole shall be imposed for offences [sic] committed by persons below eighteen years of age.”²²¹ Further, Article 18 of the Vienna Convention requires a government that has signed, but not yet ratified, a treaty “to refrain from acts which would defeat the object and purpose of [the] treaty ... until it shall have made its intentions clear not to become a party.”²²² Similarly, under the Restatement “[p]rior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement.”²²³ Therefore,

217. de la Vega & Brown, *supra* note 50, at 753. *See also* Rights of the Child: Status of the Convention on the Rights of the Child, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 13, at 2, Annex I, U.N. Doc. E/CN.4/2001/74 (2000).

218. Barbra Frey, *International Standards and the Execution of Juvenile Defendants*, 22 AM. J. CRIM. L. 261, 262 (1994).

219. Tinkler, *supra* note 213, at 476.

220. Hancock, *supra* note 127, at 699.

221. CRC, *supra* note 4, at art. 37(a), at 55.

222. Vienna Convention, *supra* note 33, at art. 18(a). As mentioned before, while the United States is not a party to the Vienna Convention the RESTATEMENT has adopted most of the language of the treaty. *See supra* text accompanying n.36. Therefore, Article 18(a) of the Vienna Convention applies to the CRC.

223. RESTATEMENT, *supra* note 36, § 312(a) & cmt. i. *But see* RESTATEMENT, *supra* note 36, § 312 cmt. d (stating that signatures are subject to later ratification of the treaty and thus have no binding effect on the State; however,

the United States is obligated to adhere to the object and purpose of the CRC to protect the youth from harm including that of the most severe kind — the death penalty.²²⁴

Moreover, it is significant that during the drafting of the CRC, there were four areas covered in the treaty that were considered controversial issues in the international community; those issues included “the rights of the unborn child, the right to foster care and adoption, freedom of religion, and the minimum age for participation in armed conflict.”²²⁵ The juvenile death penalty was noticeably lacking in that list of controversial issues.²²⁶ Thus, in considering the large number of states that have ratified and actively observed the CRC, in addition to the fact that as a signatory to the treaty the United States has an obligation to uphold its principles, this treaty should also be applicable as a defense to criminal prosecutions of juvenile defendants. Further, this international consensus gives even more credence to the notion that the United States is violating customary international law because the juvenile death penalty is contrary to the practices of most other states.

4. The American Declaration of Human Rights

The last treaty to be examined in this Comment is the American Convention on Human Rights (American Convention).²²⁷ This agreement was adopted in 1970²²⁸ and states, in pertinent

they are considered to represent political approval and at least a moral obligation to ratify and adhere to the treaty by not passing domestic laws adverse to its object and purpose).

224. de la Vega & Fiore, *supra* note 138, at 224. Furthermore, the death penalty differs from all other types of criminal punishment, not in degree but in kind. Tinkler, *supra* note 213, at 494. It is unique in its total irrevocability, it is unique in its rejection of rehabilitation of the convict (which is central to juvenile justice) and it is unique in its absolute renunciation of all that is embodied in our concept of humanity. *Id.* See also *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Thus we must be extra careful when attempting to impose the death penalty on minors, who by the very nature of their age, are not assumed to have the maturity to be held liable for all of their actions.

225. Cynthia Price Cohen, United Nations: Convention on the Rights of the Child: Introductory Note, 28 I.L.M. 1448, 1450 (1989).

226. Reimels, *supra* note 5, at 323–24.

227. American Convention, *supra* note 4, at art. 4, para. 5.

228. See American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1 corr. 2 (1970).

part, that “[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age”²²⁹ Despite being heavily involved in the drafting of the agreement the United States is one of only two members of the Organization of American States (OAS), which is made up of twenty-four member states,²³⁰ that has signed but not yet ratified the American Convention.²³¹ During the drafting phase, the United States did not object to the prohibition of the execution of juvenile offenders in the American Convention.²³² Instead, the United States argued against setting a specific age limit because of the “already existent trend” toward the abolition of the death penalty altogether.²³³ Due to the fact that the drafting Conference would not remove the proscription of capital punishment for certain age groups the United States abstained on Article 4, which dealt with the juvenile death penalty.²³⁴ Interestingly, of the twenty-four OAS member States only Barbados made a reservation to Article 4(5), and even they “brought themselves into line” in 1994.²³⁵

Moreover, the Inter-American Commission on Human Rights (Inter-American Commission), which was established under the

229. American Convention, *supra* note 4, at art. 4, para. 5, at 146.

230. The Organization of American States maintains a list of signatories and ratifications to the American Convention, *available at* <http://www.oas.org> (last visited on Apr. 16, 2004).

231. de la Vega, *supra* note 65, at 1046.

232. See Brief of Amicus Curiae Amnesty International in Support of Petitioner, *Wilkins v. Missouri*, 492 U.S. 361 (1989).

233. *Id.* See also Nanda, *supra* note 207, at 1328.

234. Nanda, *supra* note 207, at 1329. See also American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, doc. 65 rev. 1 con. 1 (1970).

235. de la Vega, *supra* note 65, at 1046. When Barbados ratified the American Convention in 1982, it made a reservation to article 4, paragraph 5 stating that “while youth or old age may be factors to be considered by the Privy Council in deciding whether the death penalty should be carried out, Barbadian legislation allowed the execution of persons over sixteen and set no upper age limit.” Schabas, *supra* note 59, at 303. Similarly, Trinidad and Tobago ratified the American Convention with a reservation to article 4, paragraph 5 noting that its laws do not prohibit the execution of a person over age seventy. *Id.* at 304. Significantly, Professor Schabas points out that the reservations by Barbados and Trinidad and Tobago only attempted “to account for existing legislation not in line with the international obligations being undertaken, [they were] not aimed at preserving a state’s freedom to maneuver on the question [of the death penalty] in the future.” *Id.*

American Convention and is another branch of the OAS,²³⁶ has ruled on the juvenile death penalty in the United States. While the United States is not party to the American Convention, it is still subject to the provisions of the American Declaration of Human Rights and the recommendations of the Inter-American Commission because it is a member of the OAS as well as a signatory of the Charter of the OAS.²³⁷ The Inter-American Commission was concerned with the differences in United States state laws regarding the execution of minors and ruled that “by leaving [these] decisions ... to state legislatures, the United States [was creating] a patchwork pattern of legislation whose arbitrariness violated [the] rights to life and equality before the law.”²³⁸ Indeed, the Inter-American Commission in 1987 found that the United States was in violation of a rule of jus cogens by its practice of executing juvenile offenders.²³⁹

Therefore, in examining the four treaties that the United States has either ratified — the ICCPR and the Fourth Geneva Convention — or signed — the CRC and the American Conven-

236. The Inter-American Commission on Human Rights (Inter-American Commission) is the body responsible for the protection of fundamental freedoms, through the implementation of the American Declaration, in the Organization of American States, of which the United States is a member. de la Vega, *supra* note 65, at 1045. See also American Convention, *supra* note 4, at arts. 52–73 (discussing how the Commission has dealt with the United State’s practice of executing juvenile offenders). *Id.*

237. Schabas, *supra* note 59, at 323.

238. Quigley, *supra* note 141, at 75. See also Terry Roach and Jay Pinkerton v. United States, Res. No. 3/87, Case 9647, Inter-Am. C.H.R., 925th Sess., Mar. 27, 1987. This case involved the executions of James Terry Roach and Jay Pinkerton who were both seventeen at the time of their crimes. Mr. Roach and Mr. Pinkerton filed a complaint requesting the Inter-American Commission consider whether their impending executions violated the American Declaration of the Rights and Duties of Man prohibiting the execution of juveniles. de la Vega & Brown, *supra* note 50, at 765. The Inter-American Commission was most concerned with the fact that each state had its own laws on capital punishment and minimum ages therfor and thus stated that the inconsistent sentencing reflected the location of the crime more than its nature. Nanda, *supra* note 207, at 1330. “Although the Commission did not determine whether the United States had violated customary international law or was bound by article 4 paragraph 5 of the American Convention, the Commission did find that the United States practice violated a newly emerged peremptory norm of international law.” de la Vega & Brown, *supra* note 50, at 765.

239. de la Vega & Brown, *supra* note 50, at 765.

tion — there appears to be a substantial international consensus advocating for the abolition of the use of capital punishment on juvenile offenders. To that end, part III of this Comment will now focus on examining the international consensus banning the juvenile death penalty.

III. THE CONCEPT OF THE ABOLITION OF THE JUVENILE DEATH PENALTY HAS REACHED THE LEVEL OF CUSTOMARY INTERNATIONAL LAW AND MAY HAVE EVEN REACHED THE LEVEL OF A JUS COGENS NORM

A. Customary International Law as Applied to the Juvenile Death Penalty

Customary international law is “an emerging form of international law and is considered by some to be the equivalent [of] treaty law or federal common law.”²⁴⁰ It is defined as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”²⁴¹ Human rights obligations in customary international law generally are obligations to other countries for the benefit of individuals including nationals, residents, and others subject to the jurisdiction of the promisor country.²⁴² Moreover, the customary international law of human rights is part of the law of the United States and must be applied as such by both the state and federal courts.²⁴³ In order for a treaty obligation to evolve to the level of customary international law, the treaty clause must be a norm creating provision or one which has generated a rule that has since passed into the general corpus of international law, such that it is binding even for countries which are not a

240. Hancock, *supra* note 127, at 718.

241. RESTATEMENT, *supra* note 36, § 102(2). The practice of the states referred to in §102(2) that is necessary to create customary international law may be of comparatively short duration, but it must be “general and consistent.” *Id.* §102 cmt. b. A practice can be general even if it is not universally followed and there is no precise formula to indicate how widespread a practice must be, “*but it should reflect a wide acceptance among the states particularly involved in the relevant activity.*” *Id.* (emphasis added). If a significant number of states do not adopt the practice it may be prevented from becoming general customary international law. *Id.*

242. RESTATEMENT, *supra* note 36, § 701 cmt. c.

243. RESTATEMENT, *supra* note 36, § 702 cmt. e.

party to the treaty.²⁴⁴ Thus, there are two criteria that must be fulfilled before a provision is considered customary law: (1) the provision or prohibition must be state practice evidenced by long-term, widespread compliance by many states; and (2) the provision or prohibition must be *opinio juris*, meaning that states must believe that compliance with the standard is not merely desired but is mandatory and required by international law.²⁴⁵

Enough evidence exists to deem the prohibition on imposing capital punishment on juvenile offenders a customary international law norm.²⁴⁶ The first element of the customary international law doctrine, state practice, which requires widespread acceptance of the abolition of capital punishment for juvenile offenders, is easily established by the fact that scarcely any countries in the world currently retain the juvenile death penalty.²⁴⁷ Only eight countries worldwide have executed juvenile offenders since 1990; those countries include China, the Democratic Republic of the Congo, Nigeria, Pakistan, Saudi Arabia, Yemen, Iran, and the United States.²⁴⁸ Besides those nations,

244. See North Sea Continental Shelf Cases (F.R.G. v. Dem; F.R.G. v. Neth.), 1969 I.C.J. 3. The passage cited to was from the International Court of Justices case and was referring to Article 6 of the Geneva Convention of 1958 regarding the principal of equidistance. See also Reimels, *supra* note 5, at 329.

245. de la Vega & Brown, *supra* note 50, at 756. See also Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 148, 148 (1996).

246. *Id.* at 757.

247. See *id.* See also Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – December 31, 2003*, (Dec. 31, 2002), available at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> (last visited Apr. 16, 2004). One-hundred-seventeen countries are abolitionists either by law or by practice, whereas only seventy-eight countries are retentionist with regard to the death penalty (and only eight countries practice the juvenile death penalty). Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (Feb. 1, 2004) (AI Index: ACT 50/005/2004), available at <http://www.web.amnesty.org/library/index/engact500052004?open> (last visited Apr. 16, 2004).

248. See Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders* (Jan. 2, 2004) (AI Index: ACT 50/001/2004), available at <http://www.web.amnesty.org/library/index/engact500012004?open> (last visited Apr. 16, 2004). See also *Juvenile Death Penalty in Other Countries*, Death Penalty Info. Center (Aug. 30, 2002), available at <http://www.deathpenaltyinfo.org/juvintl.html> (last visited Apr. 16, 2004); Amnesty Interna-

all other countries have either de facto abolished the juvenile death penalty or enacted legislation to prohibit the execution of juvenile offenders.²⁴⁹ The United Nations reported that Yemen, Barbados, and Zimbabwe changed their law and increased the death penalty age to eighteen in 1994,²⁵⁰ and China and Nigeria followed suit in 1997.²⁵¹ Pakistan promulgated the Juvenile Justice System Ordinance in July of 2000 and in 2001, in furtherance of the new law banning the death penalty for anyone under eighteen at the time of the crime, Pakistan's President Musharraf commuted the death sentences of one-hundred young offenders to imprisonment.²⁵²

Significantly, even though there have been recent reports of juvenile offender executions in Pakistan (1 in 2001), Nigeria (1 in 1997), Saudi Arabia (1 in 1992), the Democratic Republic of the Congo (1 in 2000), Iran (1 in 2004), and China (1 in 2003),²⁵³ most if not all of these countries have either adamantly denied any execution took place or that a minor was sentenced to death.²⁵⁴ These denials are so important because they "indicate

tional, *Democratic Republic of Congo: Killing Human Decency 12 (2000)* (AI Index: AFR 62/007/2000), available at <http://www.web.amnesty.org/library/index/engaf620072000?open> (last visited Apr. 16, 2004).

249. de la Vega & Fiore, *supra* note 138, at 222.

250. Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General, U.N. ESCOR, Subst. Sess., para. 21, 90, U.N. Doc. E/2000/3 (2000).

251. *Id.*

252. See Amnesty International, Report 2001 186 (2001) (AI Index: POL 10/001/2001); Juvenile Justice Systems Ordinance 2000, available at http://1hrla.sdnpc.org/link/jul_oct00/JUVENILE_ORDINANCE.HTML (last visited Apr. 16, 2004). See also Press Release, Amnesty International Irish Section, Pakistan: Young Offenders Taken Off Death Row (Dec. 13, 2001), available at <http://www.amnesty.ie/new/2001/pakistan4.shtml> (last visited Apr. 16, 2004).

253. Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990* (2002) (AI Index: ACT 50/007/2002), available at <http://www.web.amnesty.org/library/index/engact500072002?open> (last visited Apr. 16, 2004).

254. See Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990* (2000) (AI Index: ACT 50/010/2000), available at <http://www.web.amnesty.org/library/index/engact500102002?open> (last visited Apr. 16, 2004). See also United Press International, May 29, 2001 (AI Index: ACT 53/003/2001), available at <http://www.web.amnesty.org/library/index/>

that those countries have in fact accepted the customary international norm” prohibiting the execution of juvenile offenders.²⁵⁵ Hence, only the United States has not accepted the norm against the execution of juvenile offenders,²⁵⁶ thus the first criterion of state practice is satisfied.

The second criterion for customary international law demands that nations prohibiting the juvenile death penalty do so because they believe that such a proscription is mandatory and required by customary international law.²⁵⁷ This second element, *opinio juris*, is more complicated but possible to establish.²⁵⁸ As discussed above, at least four international agreements expressly prohibit the execution of juvenile offenders: the ICCPR Article 6 paragraph 5, the Fourth Geneva Convention Article 68, the CRC Article 37, and the American Convention

engact530032001?open, (regarding the execution of a minor in Iran in 2001) (last visited Apr. 16, 2004); Amnesty International, Report 2002 (May 28, 2002) (AI Index: POL 10/001/002), available at <http://www.web.amnesty.org/library/index/engpol10001002?open> (last visited Apr. 16, 2004).

255. de la Vega, *supra* note 65, at 1047.

256. Capital punishment has been abolished in the United States in thirteen states. Streib, *supra* note 247, at 8. However, forty jurisdictions in the United States still authorize the death penalty for capital crimes. *Id.* at 7. Of those forty jurisdictions consisting of thirty-eight states and the federal government (both civilian and military) authorizing the death penalty, nineteen jurisdictions (48%) have expressly mandated that a criminal must be eighteen years-of-age at the time that they committed the crime to be sentenced to death. *Id.* The other twenty-one death penalty jurisdictions permit the execution of individuals who were convicted of crimes they committed while they were sixteen or seventeen years-of-age. *Id.* However, in the United States since 1976 when the juvenile death penalty was reintroduced to American jurisprudence, only twenty-two people have been executed for crimes that they committed as minors. *Id.* at 4. Of these twenty-two executions, Texas has accounted for thirteen (59%), Virginia for three (14%), and Oklahoma for two (9%). *Id.* at 6. Thus, these three states are responsible for 81% of all juvenile executions and no other state has executed a criminal convicted of a crime that they committed as a minor for the past ten years. *Id.* This shows that, like the international community, there is no domestic consensus approving of the juvenile death penalty.

257. de la Vega & Fiore, *supra* note 138, at 221–22. See also Allyssa D. Wheaton-Rodriguez, Comment, *The United States' Choice to Violate International Law by Allowing the Juvenile Death Penalty*, 24 HOUS. J. INT'L L. 209, 214 (2001).

258. de la Vega & Brown, *supra* note 50, at 757.

Article 4 paragraph 5.²⁵⁹ With most nations having signed or ratified one or more of those four treaties prohibiting the juvenile death penalty, it appears that the second element, demanding that nations believe their prohibitions are required by customary international law, is satisfied.²⁶⁰ While it is difficult to distinguish between “those habitual practices that are regarded as binding legal obligations [and] those [practices] that result simply from courtesy or diplomatic protocol, or from domestic policy considerations, and from which departure can ensue without breach of international law,”²⁶¹ sentiments expressed by states when they are preparing treaties are excellent indicators of the parties’ view of the law.²⁶² Therefore, because multilateral treaties in general, and more importantly human rights treaties, clearly enunciate the intentions of the drafters — the countries of the world — their provisions can be interpreted to consist of globally approved international law.²⁶³

Moreover, in addition to proof of customary international law through treaties, the Inter-American Commission on Human Rights and the United Nations Human Rights Committee have both stated that there is a customary international norm prohibiting the juvenile death penalty, though both groups were hesitant in setting the minimum age at eighteen.²⁶⁴ Even though the United States filed a reservation to the relevant provision in the ICCPR, the United Nations Human Rights

259. ICCPR, *supra* note 4, art. 6, para. 5; Geneva Convention, *supra* note 4, art. 68; CRC, *supra* note 4, art. 37; American Convention, *supra* note 4, art. 4, para. 5.

260. Wheaton-Rodriguez, *supra* note 257, at 215.

261. Nanda, *supra* note 207, at 1333. *See also* de la Vega & Brown, *supra* note 50, at 757.

262. de la Vega & Brown, *supra* note 50, at 757. For instance, when the ICCPR was being prepared the parties to it expressed their opinions concerning the juvenile death penalty when they asked the question “what is the source of the nations’ disinclination to execute juvenile offenders other than a shared sense of the moral reprehensiveness of the practice?” Nanda, *supra* note 207, at 1334. *See also* Joan F. Hartman, *Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 671 (1983).

263. de la Vega & Brown, *supra* note 50, at 757.

264. *See* Wheaton-Rodriguez, *supra* note 257, at 215; William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 813 (1998).

Committee concluded that said reservation was invalid.²⁶⁵ Subsequently, on May 3, 2001, the United Nations Human Rights Committee voted to unseat the United States from itself.²⁶⁶ This is even further evidence of a worldwide customary international law norm, banning the juvenile death penalty, which is observed by almost every other country except for the United States.

Furthermore, the United States is not a persistent objector so it cannot evade its responsibilities under customary international law to abstain from executing juvenile offenders. While persistent objectors cannot prevent the development of customary international law norms by the rest of the world, those norms do not bind the State that has persistently objected to them.²⁶⁷ This doctrine allows a “state to avoid being involuntarily subjected to a rule it finds unacceptable” but it does not permit “a state to reap the benefits of being a party to a treaty without having to conform to its terms and undergo domestic change.”²⁶⁸ However, a country cannot use the persistent objector doctrine to make reservations, declarations, understandings, or provisos to treaties with which it suddenly disagrees.²⁶⁹

The United States is not a persistent objector to the practice of executing juveniles for the following reasons: (1) the United States did not object to the prohibition when drafting, signing, and ratifying the Fourth Geneva Convention, (2), the United States did not object to the prohibition in the ICCPR during its drafting and signing, (3) the United States did not object to the prohibition at the drafting and signing of the American Convention and, (4) the United States signed the CRC which contained the prohibition.²⁷⁰ Significantly, during the drafting of the

265. See *supra* pp. 1271–75 on the invalidation of the United States reservation to the ICCPR.

266. See Thalif Deen, *Politics: U.S. Ouster from Rights Body Reflects Hostility*, Int'l Press Serv., May 4, 2001, available at 2001 WL 20829289. This could have been due, in part, to the United States disregard for international treaties and the United Nations as evidenced by its conduct during the ratification process of the ICCPR. See generally Wheaton-Rodriquez, *supra* note 257.

267. de la Vega & Brown, *supra* note 50, at 758.

268. Sherman, *supra* note 68, at 91.

269. de la Vega & Brown, *supra* note 50, at 758.

270. *Id.* See also Wheaton-Rodriquez, *supra* note 257, at 217. The United States could say that it has been a persistent objector to the norm prohibiting the execution of juvenile offenders due to its ratification of the ICCPR with a

American Convention the United States not only failed to object to the prohibition but argued that setting a specific age limit went against the “already existent trend toward the abolition of the death penalty altogether.”²⁷¹ Even more important is the fact that the United States only resurrected the juvenile death penalty after signing the ICCPR and before filing a reservation to Article 6 paragraph 5.²⁷² While a treaty does not become the law of the land until it is ratified, by signing the ICCPR the United States was agreeing to try and follow its provisions and not pass contradictory laws; thus the United States’ reservation is invalid and of no value to the argument that the United States is a persistent objector to the norm.²⁷³

Therefore, “it is fair to argue that under evolving international standards, there is an emerging customary international law under which capital punishment of juveniles is prohibited.”²⁷⁴ Due to the fact that the United States is not a persistent objector, because it has not consistently disavowed the prohibition, it should be held to the customary international law standard concerning the execution of juvenile offenders and is thus in violation of that law.

B. The Prohibition Against the Juvenile Death Penalty Has Reached the Level of a Jus Cogens Norm

Even if considered to be a persistent objector to an emerging rule of customary international law prohibiting the execution of minors, the United States is still bound by established norms of

juvenile death penalty reservation, its refusal to ratify the American Covenant without a juvenile death penalty reservation, and its refusal to ratify the CRC. de la Vega & Brown, *supra* note 50, at 758. However, the better argument is that the United States has not been a persistent objector at all. *Id.* It is particularly important to note that at the time of the negotiation, drafting, and opening for signature of the ICCPR, the Protocols to the Geneva Convention, and the American Convention the United States had discontinued its use of the death penalty on juvenile offenders. *Id.* See also Nanda, *supra* note 207, at 1332. Therefore, “if indeed the prohibition against the juvenile death penalty is customary international law, under any reading of U.S. practice in this area [the United States is not a persistent objector.]” de la Vega & Brown, *supra* note 50, at 758.

271. Nanda, *supra* note 207, at 1329.

272. de la Vega & Brown, *supra* note 50, at 758.

273. *Id.* at 759. See also *supra* n.138.

274. Nanda, *supra* note 207, at 1328.

jus cogens.²⁷⁵ Article 53 of the Vienna Convention defines jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁷⁶ Jus cogens norms are distinguished from ordinary international law because jus cogens are “based on natural law propositions applicable to all legal systems, all persons, or the system of international law.”²⁷⁷ Thus these norms cannot be avoided by a persistent objector state and they prevail over any conflicting international rule of law.²⁷⁸ The Restatement adopted the Vienna Convention definition and added that “these rules prevail over and invalidate international agreements and other rules of international law in conflict with them.”²⁷⁹ Thus, it follows that jus cogens norms are so important, both internationally and nationally, that they could also invalidate conflicting domestic laws.²⁸⁰ Moreover, Article 53 of the Vienna Convention sets out four criteria for identifying peremptory norms (jus cogens norms): the norm is (1) one of general international law; (2) accepted by the international community as a whole; (3) immune from derogation; and (4) modifiable only by a new norm having the same status.²⁸¹

The prohibition of the juvenile death penalty satisfies the four criteria and therefore reaches the level of a jus cogens norm. First, the prohibition against the imposition of capital punishment on a juvenile offender has become a norm of general international law; as discussed above, treaty law,²⁸² decisions of the Inter-American Commission on Human Rights and

275. de la Vega & Brown, *supra* note 50, at 759. See also Sherman, *supra* note 68, at 74.

276. Vienna Convention, *supra* note 33, at art. 53.

277. de la Vega & Brown, *supra* note 50, at 759 (quoting Johnathan A. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993)).

278. *Id.* at 759–60.

279. RESTATEMENT, *supra* note 36, § 102 cmt. k.

280. de la Vega & Brown, *supra* note 50, at 760.

281. Vienna Convention, *supra* note 33, at art. 53. See also de la Vega & Fiore, *supra* note 138, at 225.

282. See *supra* pp. 1291–94 and corresponding footnotes concerning treaty law supporting the concept that the prohibition against the juvenile death penalty has become a customary international law norm.

the United Nations Human Rights Committee,²⁸³ and resolutions passed by the United Nations Commission on Human Rights and the United Nations General Assembly²⁸⁴ exemplify the sentiments of the majority of the world that the juvenile death penalty is a norm from which there can be no derogation. Second, the fact that only eight countries have executed juvenile offenders within the last fourteen years is extremely strong evidence that a very large majority of nations have accepted the prohibition as a norm.²⁸⁵ The Restatement further explained this criterion by requiring that the norm “be accepted and recognized by a very large majority of states even if over dissent by a very small number of states.”²⁸⁶ As previously discussed, the United States is alone, as it is the only nation worldwide to not just allow for the execution of juvenile offenders but to also show no remorse in light of worldwide consensus against the practice.²⁸⁷ Furthermore, while United States courts have found that the prohibition against torture has attained the status of a *jus cogens* norm,²⁸⁸ over one-hundred-twenty-five countries have

283. See *supra* n.264 and corresponding text.

284. The United Nations Commission on Human Rights passed resolutions calling on states to abolish the death penalty generally and has specifically asked countries not to impose it on juvenile offenders. de la Vega, *supra* note 65, at 1044. See, e.g., The Question of the Death Penalty, U.N. Commission on Human Rights, 58th Sess., Res. 2002/77, U.N. Doc. E/CN.4/RES/2002/22 (2002). Similarly in 1985 the United Nations General Assembly, by consensus, adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the “Beijing Rules,” which also prohibited the execution of juvenile offenders. de la Vega, *supra* note 65, at 1044. See also G.A. Res. 40/33, U.N. GAOR, 40th Sess., Annex, Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

285. See *supra* pp. 1288–91 and corresponding footnotes dealing with international death penalty statistics proving the worldwide acceptance of the prohibition of the juvenile death penalty.

286. RESTATEMENT, *supra* note 36, § 102 reporter’s note 6.

287. See text and footnotes discussing international death penalty statistics *supra* pp. 1288–91. See also de la Vega, *supra* note 65, at 1047.

288. See, e.g., *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992) (holding that torture was a violation of *jus cogens* but that because the violation was committed by a government outside of the United States, there was no jurisdiction over Argentina under an exception in the Foreign Sovereign Immunities Act). The Court also observed that “because *jus cogens* norms do not depend solely on the consent of states for their binding force, they ‘enjoy the highest status within international law.’” For example, a

violated that norm in 2001.²⁸⁹ By contrast, only three countries have violated the norm prohibiting the juvenile death penalty in the past year.²⁹⁰ Third, the prohibition against the execution of juvenile offenders is a non-derogable norm.²⁹¹ The ICCPR in Article 4 stated that there was to be “[n]o derogation from articles 6, 7, 8, 11, 15, 16, and 18 ... under [that] provision.”²⁹² Thus the international intent for the prohibition against the death penalty for juvenile offenders is per se non-derogable.²⁹³ Finally, there is no emerging norm, of the same status as that of the prohibition of the execution of juvenile offenders, which contradicts or modifies this current norm.²⁹⁴

Additional factors relevant to the determination of whether there is a jus cogens norm prohibiting the execution of juvenile offenders include the strength and conviction of the supporting states and the significance of the opposing states.²⁹⁵ The juvenile death penalty appears to be a perfect example of a jus cogens norm because such an overwhelming majority of the countries support the prohibition.²⁹⁶ While the United States is considered a significant force in the international community, the

treaty that contravenes jus cogens is considered ... to be void” *Id.* at 715. *See also* de la Vega & Fiore, *supra* note 138, at 227–28.

289. *See* Amnesty International Report 2001, *supra* note 250. *See also* de la Vega, *supra* note 65, at 1049.

290. *See* Amnesty International, *Facts and Figures on the Death Penalty* (2004) (AI Index: ACT 50/008/2004), available at <http://www.web.amnesty.org/library/index/engact500082004?open> (last visited Apr. 16, 2004). Amnesty International recorded two executions of child offenders in 2003, one of them in China and one in the United States. *Id.* Another child offender was executed in Iran in January of 2004. *Id.* *See supra* pp. 1288–91 and corresponding footnotes. *See also* de la Vega, *supra* note 65, at 1049.

291. de la Vega & Brown, *supra* note 50, at 761.

292. ICCPR, *supra* note 4, art. 4. *See also* de la Vega & Brown, *supra* note 50, at 761.

293. *See* de la Vega & Brown, *supra* note 50, at 761. This express provision in the ICCPR, coupled with the wide acceptance of the prohibition against the execution of juveniles, as evidenced by treaties, resolutions such as those of the United Nations Commission on Human Rights calling for the abolition of the death penalty (and the execution of juvenile offenders especially) and national laws and practice, all lead to the conclusion that the anti-juvenile death penalty norm is non-derogable. de la Vega, *supra* note 65, at 1050.

294. de la Vega, *supra* note 65, at 1049.

295. Charney, *supra* note 277, at 542. *See also* de la Vega & Brown, *supra* note 50, at 761.

296. *See* Wheaton-Rodriguez, *supra* note 257, at 212.

fact that only three other countries have executed juvenile offenders in the past year gives tremendous weight to the argument that the opposition is insufficient to thwart the establishment of a jus cogens norm.²⁹⁷ Thus, the abolition of the juvenile death penalty rises to the level of jus cogens status from which no state can derogate.

Therefore, the treaty law dealing with the prohibition of the execution of juvenile offenders has, at the very least, risen to the level of customary international law and may very well even be a jus cogens norm. As the United States has recently passed the 100th anniversary of the *Paquete Habana* decision it is important to remember that now, more than ever, “international law is part of our law and must be ascertained [and respected] by the courts of justice of appropriate jurisdiction.”²⁹⁸ As such, the United States is in violation of the international law abolishing the juvenile death penalty and should change its practices to conform to the international norms and standards and the courts should use these laws to determine juvenile death penalty cases like Toronto M. Patterson’s.²⁹⁹

IV. POSSIBLE REPERCUSSIONS THAT THE UNITED STATES JUDICIAL SYSTEM MAY FACE IF IT DOES NOT CHANGE ITS DEATH PENALTY PRACTICES.

While the United States judicial system is obligated under Article VI Section 2 of the United States Constitution to treat all ratified international agreements as the “supreme law of the land”³⁰⁰ as well as to take into consideration the international consensus on a subject in the form of established customary international law and/or jus cogens norms, there are other impor-

297. de la Vega & Brown, *supra* note 50, at 761.

298. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (one of the most influential cases on the application of international law in our domestic courts) (emphasis added). Moreover, the Restatement provides that “[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States” and “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States.” RESTATEMENT, *supra* note 36, § 102. This principle that customary international law is a part of United States law applies with even greater force when considering a peremptory norm, such as the juvenile death penalty. See de la Vega, *supra* note 65, at 1051.

299. *Patterson v. State of Texas*, 536 U.S. 984 (2002).

300. See U.S. CONST. art. VI, cl. 2.

tant reasons that the United States should amend its death penalty practices. Of the multiple domestic problems which can arise out of the practice of the United States allowing for capital punishment, and more specifically the execution of juvenile offenders, the most troublesome is the potential inability to obtain evidence or witnesses for death penalty cases from countries that prohibit the practice. This issue has played an integral role in the recent developments of the cases against Zacarias Moussaoui (the alleged twentieth September 11th hijacker) and Lee Boyd Malvo (the convicted D.C. area sniper).

With regard to the case against French national Zacarias Moussaoui, there were recent difficulties in obtaining evidence. French and German authorities were in possession of important documents that could establish a link between Mr. Moussaoui and the al Qaeda terrorist network.³⁰¹ These crucial pieces of evidence included records of money transfers from a member of the Hamburg-based terrorist cell that carried out the September 11, 2001 attacks on the World Trade Center and the Pentagon and were vital to the prosecution's case.³⁰² However, the German Constitution forbids "submission of any material that could lead to the death penalty."³⁰³ Since the prosecution planned to seek capital punishment for Mr. Moussaoui, the German government was unwilling to release the documents that they had compiled on Mr. Moussaoui.³⁰⁴ Thus, from a practical standpoint, the prosecution stood the chance of having the case dismissed or transferred to a Military Court if they could not produce enough evidence for the criminal trial.³⁰⁵

Intelligence-sharing in criminal cases involving the death penalty "has long been an issue between the United States and its Western European Allies."³⁰⁶ Fortunately, however, the three countries involved — the United States, France, and

301. Dan Egan, *U.S. to Get Moussaoui Data From Europe; French, Germans Strike Deal Barring Use of Documents to Seek Death Penalty*, WASH. POST, Nov. 28, 2002, at A19.

302. *Id.* See also Philip Shenon, *Threats and Responses: Terror Suspect; Germany Urges U.S. to Drop Death Penalty Plan*, WASH. POST, Oct. 26, 2002, at A9.

303. *Id.*

304. *Id.*

305. *See id.*

306. Shenon, *supra* note 302, at A9.

Germany — were able to reach an agreement with regard to the material. Germany consented to granting the United States the evidence needed, under the condition that the United States would not use that material to seek the death penalty.³⁰⁷ The United States conceded, and, in reality, did not really give up much except for the use of the material obtained by Germany in the sentencing trial after Mr. Moussaoui is convicted,³⁰⁸ but the possible ramifications of this concession by the federal government could have disastrous effects in the future. As a result, there is a question as to how the government will handle other conditions on the acquisition of evidence abroad in cases where the death penalty is sought. This uncertainty could pose an enormous burden on prosecutors and could result in cases being dismissed due to the inability of the prosecutor to obtain enough evidence to make a prima facie case, even if that information is available but located in a country with abolitionist laws. Moreover, a defendant's procedural due process right³⁰⁹ could be infringed upon if the defense cannot obtain exculpatory evidence from foreign countries that are unable or unwilling to supply information that will be used in a trial involving capital punishment. Thus, the death penalty, regardless of the age of the defendant to be tried, has and will continue to bar the effective and efficient implementation of our judicial system.

In considering Lee Boyd Malvo's case, a situation arose that was intricately intertwined with the arguments made in this Comment. Lee Malvo, the seventeen year old suspected "D.C. sniper," was indicted by a Virginia grand jury for capital murder in connection with the death of Linda Franklin, an FBI analyst who was shot and killed as she left a Home DepotTM store in

307. Egan, *supra* note 301, at A19.

308. *Id.* This of course has all become moot, at least for the moment, because presiding judge Leonie M. Brinkema has held that the government cannot seek the death penalty against Mr. Moussaoui because he was denied access to witnesses held overseas who helped plan the September 11th attack and under the Sixth Amendment criminal defendants are afforded the right to confront accusers and seek out testimony that might prove their innocence. Shenon, *supra* note 302, at A9. However, the Justice Department has appealed the judge's ruling, so this issue may reappear again in the future. Philip Shenon, *U.S. to Appeal Ruling on 9/11 Terror Suspect*, WASH. POST, Oct. 8, 2003, at A28.

309. *See* U.S. CONST. amend. IV.

Virginia.³¹⁰ The Court decided to try Lee Malvo as an adult and because Virginia does not specify a minimum age in its capital punishment statute, the seventeen year old would have to face the death penalty if he was convicted.³¹¹ On December 18, 2003, after deliberating for fourteen hours, the jury found Lee Malvo “guilty of capital murder as an act of terrorism for killing [Linda] Franklin and demanding \$10 million from the government, and guilty of capital murder for killing more than one person in three years.”³¹² Although the jury ultimately spared Lee Malvo’s life,³¹³ Lee Malvo almost joined the ranks of Toronto M. Patterson as the newest juvenile offender sentenced to death.

From the perspective of international law, one of the most interesting aspects of this case was the fact that Lee Malvo was an illegal immigrant from Jamaica, who had come to the United States with his mother Una James in late 1999 or early 2000.³¹⁴ His mother was deported on November 20, 2002 after deciding not to appeal a deportation order issued by an immigration judge on November 19, 2002.³¹⁵ This became a significant issue during Lee Malvo’s capital murder trial and later during the sentencing phase. Evidence and witnesses located abroad in the Caribbean were necessary for the defense’s case.³¹⁶ The defense needed the testimony of several Jamaican nationals, friends and family of Lee Malvo, as exculpatory evidence in addition to evidence of mitigating factors that might persuade the jury to spare Lee Malvo’s life.³¹⁷ Such witnesses and evidence

310. See Stephan Kiehl, *Va. Judge Bans Broadcast of Muhammad Trial; He Will Allow Still Cameras If They Aren’t a Distraction*, BALT. SUN., Dec. 13, 2002, at A14.

311. See Va. Code. Ann. § 18.2-31.

312. Tom Jackman, *Malvo Guilty of Capital Murder; Sniper Trial Jury to Choose Life or Death Sentence*, WASH. POST, Dec. 19, 2003, at A01.

313. Tom Jackman, *Malvo is Spared Death Penalty; Jury Gives Teen Life Sentence for His Role in Sniper Slayings*, WASH. POST, Dec. 24, 2003, at A01.

314. See Mary Beth Sheridan & Maria Glod, *Malvo’s Mother Being Deported to Jamaica; Documents Describe Una James’s Efforts to Leave Homeland, Get U.S. Residency*, WASH. POST, Dec. 14, 2002, at B01.

315. *Mother of Teen Suspect in Sniper Case Deported*, HOUS. CHRON., Dec. 14, 2002, at A15.

316. Tom Jackman, *Malvo’s Prosecutors Resist Video Testimony; Defense Has Witnesses in Caribbean*, WASH. POST, Oct. 15, 2003, at B05.

317. Jackman, *supra* note 312, at A01.

had to be brought to the United States, and Jamaica, a country which does not allow for the execution of juvenile offenders, could have refused to send the evidence or extradite the witnesses (similar to the situation in the Moussau case). This refusal could have, in effect, crippled the defense's efforts in effectively making a case. As it was, defense attorneys filed several motions to either allow key witnesses into the country who were barred from re-entry — like Lee Malvo's mother — or to permit the use of video conferencing for those witnesses.³¹⁸ Ultimately, the necessary witnesses were allowed to testify in court³¹⁹ but if they had not, either due to United States laws or Jamaican laws, and no video conferencing was offered, then there would have been a constitutional violation and possible mistrial.³²⁰

It is not unusual for the United States to seek extradition of criminal defendants or witnesses from other countries. However, the practice of extraditing individuals on the condition that they are not subject to capital punishment also has a long history, originating in the mid-nineteenth century when states began abolishing capital punishment in their domestic legal systems.³²¹ Several model multilateral extradition treaties, such as Article IV of the 1990 Model Treaty on Extradition proposed by the Eighth United Nation's Congress on the Prevention of Crime and Treatment of Offenders,³²² include references to restrictions on extradition in cases where the death penalty could

318. Jackman, *supra* note 316, at B05.

319. Henri E. Cauvin, *At the Core of the Case: Should a Life Be Spared?*, WASH. POST, Dec. 19, 2003, at A01.

320. Jackson, *supra* note 316, at B05. Moreover, Lee Boyd Malvo is not yet out of the danger of the juvenile penalty. He may have to face the death penalty again as he has been charged with capital murder in Prince William and Spotsylvania counties in Virginia, as well as in Louisiana and Alabama. Jackman, *supra* note 313, at A01.

321. William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581, 584 (2003).

322. Model Treaty on Extradition, U.N. GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116 (1991) (stating that "Extradition may be refused in any of the following circumstances ... [i]f the offence [sic] for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurances as the requested States considers sufficient that the death penalty will not be imposed, or if imposed, will not be carried out." Article 11 of the European Convention on Extradition also includes such language.

be imposed. The seminal case on this issue was *Soering v. United Kingdom*, where the defendant fled to Great Britain after murdering his girlfriend and her parents in Virginia.³²³ There, the defendant, Jans Soering, petitioned the European Commission of Human Rights to stop his extradition to the United States on the ground that he would be subjected to the death penalty if he were tried there.³²⁴ However, if he were to remain in the United Kingdom, he would not face that punishment.³²⁵ The European Court of Human Rights ultimately held that the extradition of the defendant was barred because it violated the prohibition against “inhuman or degrading treatment or punishment” in the European Convention.³²⁶ After *Soering*, member countries of the Council of Europe would no longer extradite witnesses, evidence, or suspects to states where it was probable that the death penalty would be imposed.

Furthermore, a State sending witnesses, evidence, or suspects to a requesting State could be in violation of the relevant extradition treaty law as well as customary international law if they extradite to a State practicing capital punishment without first acquiring guarantees from that receiving State that the death penalty will not be imposed. For example, Article VI of the 1976 Extradition Treaty between Canada and the United States entitles the sending country to insist upon sufficient guarantees that the death penalty will not be imposed as a condition for extradition.³²⁷ However, Canada had been extraditing individuals to the United States without assurances against the use of capital punishment for many years.³²⁸ This caused a split between Canada and the other members of the United Nations Commission on Human Rights and then in 2001, in *United States v. Burns*, the Supreme Court of Canada reversed its position by refusing to allow extradition of a man who faced murder charges and a death penalty trial in the United States.³²⁹ The

323. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

324. *Id.*

325. *Id.*

326. *Id.*

327. Extradition Treaty Between Canada and the United States of America, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 1976 Can. T.S. No. 3. *See also*, Schabas, *supra* note 321, at 585.

328. *See* Schabas, *supra* note 321, at 598.

329. *United States v. Burns*, 2001 S.C.C. 7 (Feb. 15, 2001).

Court held that extradition would impose cruel and unusual punishment on the defendant and thus would violate its abolitionist laws.³³⁰

Similarly in the case of Pietro Venezia,³³¹ Italy would not honor the terms of its extradition treaty with the United States to send the suspect to the United States for trial, even though it had been given assurances that capital punishment would not be sought.³³² The Italian Constitutional Court declared that certain provisions of its Code of Penal Procedure, designed to give effect to the extradition treaty between Italy and the United States, were contrary to Article 2 of the Italian Constitution which guarantees to Italian citizens the right to life as an inviolable human right.³³³

Therefore, in cases like Lee Boyd Malvo's, if witnesses or evidence were required then Jamaica, or a country in a similar position, could also argue that it would not send the information because it might ultimately result in the imposition of the death penalty on a juvenile offender, a consequence that offended its domestic laws and customary international law. Thus the death penalty policies of the United States, in regard to both adults and minors, may in effect hamper the very judicial system on which our nation is based. At the very least, the United States should comply with international law standards and abolish the juvenile death penalty.

CONCLUSION

In continuing to execute juvenile offenders the United States has violated its duties under international law. First, since the United States ratified the Fourth Geneva Convention and the ICCPR, both of which call for the abolition of the juvenile death penalty, it has breached its obligations under those treaties by continuing the practice. The fact that the United States filed a reservation to the ICCPR is irrelevant because that reservation goes against the very purpose of the treaty and as such is invalid. Moreover, regardless of whether a defendant can bring a

330. *Id.*

331. Venezia v. Ministero di Grazia e Giustizia, Corte Cost., 27 June 1996, 79 Rivista di Dritto Internazionale 815 (1996).

332. *Id.*

333. See Schabas, *supra* note 321, at 597.

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private action under the ICCPR in a United States court, defendants must still be allowed to use that treaty, in addition to the Fourth Geneva Convention, the American Convention, and the CRC, as a defense to prosecution against them. Furthermore, the prohibition of the juvenile death penalty has reached the level of customary international law and may even be a non-derogable jus cogens norm. Thus, the United States has violated that international norm and must conform to the newly emerged international consensus. Finally, even if the United States refuses to recognize and comply with the international standards that prohibit the juvenile death penalty, it should abolish the practice as a practical matter because of its possible deleterious effects on the American judicial system.

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