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The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts

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The International Covenant on Civil and Political Rights: A Primer for
Raising a Defense Against the Juvenile Death Penalty in Federal Courts

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: A PRIMER FOR RAISING A DEFENSE AGAINST THE JUVENILE DEATH PENALTY IN FEDERAL COURTS

CHRISTIAN A. LEVESQUE*

Introduction.....	756
I. The Death Penalty for Juveniles and Article Six of the International Covenant on Civil and Political Rights.....	761
A. Overview of Death Penalty.....	761
B. Jus Cogens Norm.....	765
II. Argument One: The ICCPR is Self-Executing.....	767
A. The ICCPR is Self-Executing Because the United States Intended the Declaration to Apply Only to Private Rights of Action.....	771
B. The ICCPR, When Raised as a Defense, May be Judicially Applied Even in the Absence of Implementing Legislation.....	776
C. A Defense Under Article Six is Easily Justiciable.....	779
III. Argument Two: The Reservation to Article Six of the ICCPR is Invalid.....	782
IV. Argument Three: Recognizing Article Six as a Defense Does not Threaten the Integrity of Federalism or the Separation of Powers Doctrine.....	786
A. Separation of Powers and the Political Question.....	786
B. Concerns of Federalism.....	790
Conclusion.....	791

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INTRODUCTION

Almost ten years ago, the American Bar Association, in its Final Report on Judicial Education on International Law, stated that:

the applicability of international legal norms in specific cases may be, and frequently is, limited by the considerations of jurisdiction, equity and due process that bear upon all proceedings before U.S. courts. A decent respect for the opinions of mankind, however, as well as for our own judicial traditions, demands that such considerations not be invoked merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.¹

The above quote is telling for several reasons. Although it alludes to the reluctance of U.S. courts to apply international law, it also acknowledges a nexus between our nation's own judicial traditions and the "opinions of mankind."²

Federal courts have ruled throughout their history that international law is an integral part of the domestic legal system.³ Nonetheless, the Supreme Court appears reticent to integrate

1. *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT'L L. 903, 914-15 (Fall 1990) [hereinafter *ABA Final Report*].

2. *See id.* at 908; *see also* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1105 (1999). Bradley describes the broadening scope of international law and how this area of law now regulates what was formerly regulated only by domestic law. *See id.* Professor Henkin also discusses the related issue of changes in international treaty commitments. *See* Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 36 (1996). He states that, "[h]uman rights law has shaken the sources of international law, reshaped its character, enlarged its domain Human rights law has been established largely by treaty" *Id.* For a historical account of the development of international law, *see* LOUIS HENKIN, INTRODUCTION TO THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1-31 (1981), and Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982) (discussing the history of international law concerning human rights).

3. *See* *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing *The Charming Betsy* for the rule of statutory construction, which requires that courts construe legislation to avoid violating international law). *Cf.* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (stating that under Article Six of the Constitution a treaty is considered the supreme law of the land); *United States v. Rauscher*, 119 U.S. 407, 419 (1886) ("The treaty of 1842 is, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty"); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (stating that a treaty is the supreme law of land).

international law without implementing legislation.⁴ Justice Blackmun articulated this sentiment when he said, “at best, the present Supreme Court enforces some principles of international law and some of its obligations some of the time.”⁵

The implementing legislation, referred to above, has codified international law and human rights standards—examples include the Foreign Affairs Reform and Restructuring Act of 1998,⁶ the Alien Tort Claims Act (ATCA),⁷ and the Torture Victim Protection Act of 1991 (TVPA).⁸ In addition, customary international law,⁹ and more

4. See Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 225 (1996) (stating that whether there is implementing legislation or not, United States courts deeply resist “incorporating” developing international customary human rights law). Cf. 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, 1171 (1993) (noting that “[t]here is substance to claims that a double standard exists between U.S. policies and U.S. practices concerning human rights”).

5. Harry Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, AM. SOC'Y INT'L L. NEWSL., Mar.-May 1994, at 8; see also Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (quoting LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979)). Justice Blackmun dissented in several prominent cases in an attempt to uphold principles of international law. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 681 (1992) (Stevens, J., dissenting and joined by Blackmun, J.) (“When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind.” (quoting Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 JOHN MARSHALL L. REV. 215, 231 (1992) (footnote omitted))); *Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting and joined by Blackmun, J.) (“In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.” (footnote omitted)).

6. Pub. L. No. 105-277, 112 Stat. 2681-761 (1998) (to be codified at 22 U.S.C. § 2242(a)) (implementing Article Three of the Convention Against Torture). Section 2242 discusses the policy of the United States that protects against returning persons to a country when there are “substantial grounds” to believe that the person will be subjected to torture. See *id.*

7. 28 U.S.C. § 1350 (1994). This Act allows an alien within U.S. borders to bring a tort claim against a person alleged to have perpetrated torture “under color of official authority.” Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). Note that the *Filartiga* decision preceded the ATCA; however, it recognizes the role of domestic courts in punishing human rights abusers, such as perpetrators of torture.

8. 28 U.S.C. § 1350(a)(2) (1994). Section 2(a)(1) allows victims who were in the custody or physical control of state actors to bring tort claims in domestic courts against perpetrators of torture.

9. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT] (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). The Restatement further notes that “[t]he customary law of human rights is part of the law of the United States to be applied as such by State as well as Federal courts.” See *id.* § 702 cmt. c. But see M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1078-79 (1999) (listing three potentially disabling ailments of

specifically the doctrine of *jus cogens*,¹⁰ forms a potential basis upon which domestic courts may find a violation of human rights.¹¹ The proliferation of international human rights doctrines, however, has not signaled a commensurate increase in domestic remedies for claims based solely on international human rights law that is not codified in legislation.¹²

International law, in various forms, has been a part of United States history at least since the eighteenth century.¹³ Chief Justice Marshall stated that, in the absence of congressional acts, United States courts are “bound by the law of nations, which is a part of the law of the land.”¹⁴ The famous *Paquete Habana*¹⁵ decision, in which the Supreme Court determined that courts must administer customary law,¹⁶ echoed these earlier declarations of the importance of international

customary international law: (1) there is no authoritative text that can be used as a reference, (2) competency of “law-givers” varies and there is a lack of hierarchy, and (3) compliance and enforcement is problematic).

10. The Vienna Convention defines *jus cogens* as a “peremptory norm of general international law” that is “accepted and recognized by the international community” and from which derogation is not permitted. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 340. This peremptory norm may only be modified if replaced by a more recent norm of general international law that is similar in “character.” See *id.* See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (quoting David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT’L L. 332, 350-51 (1988), for the proposition that *jus cogens* “embraces customary laws considered binding on all nations”).

11. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 233 (2d ed. 1996) (stating that nation-states increasingly enforce international norms and punish violations in domestic courts). Henkin goes on to state that international law is law of the United States and is law for domestic governance. See *id.* at 236; see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) (arguing that although Congress has never declared that international law is self-executing domestic law, both federal and state courts have applied customary international law to cases without expressed legislative action).

12. See Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT’L L. & POL’Y 405, 428 (1996-97) (“Very little, if any, ‘new’ international human rights law has been incorporated in decisions by federal judges without the aid of a statute, despite a tradition in which customary international law is part of U.S. law and treaties are the supreme law of the land.”).

13. See Edwin D. Dickinson, *The Law of the Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952) (“It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land . . .”). Numerous decisions have applied uncodified international law within congressional acts. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *The Paquete Habana*, 175 U.S. 677 (1900); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). For a discussion of the ways in which international law is a part of United States legal history, see *infra* notes 14-22 and accompanying text.

14. *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815).

15. 175 U.S. 677 (1900).

16. See *id.* at 700 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

law in the American legal system.¹⁷ The right to bring a claim rooted in some form of international law,¹⁸ is, therefore, supported by history¹⁹ and threatens to disrupt only the illusory separation between the laws of the United States and the law of nations.²⁰

In international law, human rights treaties pose a particular challenge to advocates who wish to argue a claim in U.S. federal courts.²¹ To raise a claim invoking a human rights treaty requires a skilled navigation of both international law and the domestic legal system.²² The obstacles one must face become even greater when the

17. See *supra* note 13.

18. See Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 399 (1997) (arguing that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), “paved the way for the proper understanding of international law as federal common law.”). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870-71 (1997) (concluding that without implementing authorization, federal courts do not have jurisdiction based on international law); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1664 (1997) (explaining the revisionist view of the federal common law of foreign relations and arguing that the federal common law of foreign relations practiced by courts and analyzed by scholars lacks justification in constitutional history).

19. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824-27 (1998). Professor Koh argues that international law is federal law. See *id.* at 1824. He refutes the “revisionist” challenge, espoused by Professors Curtis Bradley and Jack Goldsmith, to the status of international law in U.S. courts. See *id.* at 1827. Bradley and Goldsmith argue that the importance of customary international law in the American legal system is a modern phenomenon that is not supported by history and departs from understood notions of federal common law, federalism and the separation of powers. See *id.* at 1826. Other scholars also refute the “revisionist” position of Bradley and Goldsmith. See Stephens, *supra* note 18, at 395-97 (arguing that Bradley and Goldsmith’s view is simplistic and overlooks the complex history of international law in the American legal system). See generally Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301, 306-21 (1999) (describing the “Bradley-Goldsmith Errors and Fallacies”).

20. See Susan L. Karamanian, *New Challenges for the American Lawyer in International Human Rights*, 55 WASH. & LEE L. REV. 757, 762-63 (1998) (explaining that “[f]ederal courts frequently cite both the U.N. Charter and the Universal Declaration in defining the law of nations”); see also RESTATEMENT, *supra* note 9, § 102(1)(a),(b),(c) and cmt. h (discussing customary law).

21. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 12 (Hurst Hannum ed., 3d ed. 1999) (noting that most human rights treaties require incorporation of obligations into domestic law with corresponding remedies).

22. The goal of an advocate arguing in a domestic court, regardless of whether a case is steeped in domestic or international law, should be to maintain the integrity of the United States’ rules of law, equity, and the values of our country’s founders. See Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 294 (1994) (discussing, in part, the tactics an advocate uses to urge the courts’ judicial enforcement of fundamental human rights). Judge Re’s response when asked if domestic courts should enforce international human rights was: “I am conservative only in the sense that I believe in (1) preserving those values that have made this the great nation that it is, and (2) giving reality to all the values set forth in our founding documents; some of them have not yet been attained. In addition, my

treaty operates without implementing legislation.²³

The International Covenant on Civil and Political Rights ("ICCPR")²⁴ is an example of international human rights treaty law that is not supported by implementing legislation in the United States.²⁵ Unlike other treaties that are bilateral agreements between sovereign nations, the ICCPR purports to regulate a government's treatment of both its own citizens as well as foreign nationals within its jurisdiction.²⁶

This Comment is a primer that presents a step-by-step analysis for raising a claim based on the ICCPR framework in U.S. domestic courts. Using Article Six of the ICCPR, which prohibits the execution of juveniles,²⁷ this Comment discusses the methodology and process through which the ICCPR may be raised as a defense to a government action that is in violation of the treaty.

Part I of this Comment examines the interaction between the death penalty and Article Six of the ICCPR. Part II analyzes the arguments surrounding the self-executing nature of the ICCPR. Part III discusses the United States' expressed reservation to Article Six and arguments designed to refute this obstacle. Finally, Part IV discusses the domestic ramifications of Article Six on federalism and the separation of powers doctrine.

love is not really contracts. My love is equity . . ." *Id.* (citing Panel Discussion, *International Human Rights in American Courts: The Case of Nelson v. Saudi Arabia*, in 86 AM. SOC'Y INT'L L. PROC. 324, 325 (1992) (statement of Judge Re)). Judge Re's point is that domestic enforcement of international humanitarian law is neither the product of liberalism nor conservatism. Rather, the practice is firmly rooted in the country's judicial history. One advocate arguing before Judge Re implied that the formidable task of an international human rights advocate is to firmly ground the case at hand "in the exact rule of law so that the other side would look like . . . radicals." *See id.* at 293.

23. *See* Bilder, *supra* note 21, at 12 ("The easiest and most effective way to implement human rights is through action within each country's own legal system. If domestic law provides an effective system of remedies for violations of international human rights obligations . . . the authority of a nation's own legal system can be mobilized to support compliance with international norms."); *see also* Joan Fitzpatrick, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 249 (Hurst Hannum ed., 3d ed. 1999) (noting that direct enforcement of human rights treaties against violators that are U.S. officials is an undeveloped area of law in United States).

24. *See* International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U.N.T.S. 171 [hereinafter ICCPR].

25. *See* Fitzpatrick, *supra* note 23, at 249-50 (stating that the ICCPR is "non-self-executing" which means that its terms require further legislation to become enforceable). *But see* discussion *infra* Part II (arguing that ICCPR is self-executing for purposes of raising a defense).

26. *See* ICCPR, *supra* note 24, art. 2(1), 999 U.N.T.S. at 173 (expressing obligations of each State Party to individuals within its own jurisdiction).

27. *See* ICCPR, *supra* note 24, art. 6, 999 U.N.T.S. at 175.

I. THE DEATH PENALTY FOR JUVENILES AND ARTICLE SIX OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. *Overview of Death Penalty*

The ICCPR came into force in the United States on September 8, 1992.²⁸ Between 1966, the year the ICCPR was opened for signature,²⁹ and 1992, when the United States ratified it,³⁰ debates within the Senate and Executive Administrations indicated that the domestic application of the ICCPR was precarious at best.³¹ Most confounding was the United States' supposed commitment to human rights and, at the same time, its reluctance to implement the treaty in domestic law.³² Not surprisingly, the United States ratified the treaty with several reservations, declarations and understandings.³³ Eleven parties objected to the United States' reservations, claiming that they were invalid because they conflicted with the ICCPR's object and purpose.³⁴

Article Six, paragraph five of the ICCPR states that the "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."³⁵ The U.S. Senate, however, has declared a reservation to the above article, which states, "the United States reserves the right,

28. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DEC. 1999, at 134, U.N. Doc. ST/LEG/SERE/18 (Vol. I) (1999) [hereinafter STATUS REPORT]. On June 8, 1992, the United States deposited its ratification with the United Nations. See *id.* at 139.

29. The United Nations General Assembly adopted the ICCPR on December 19, 1966. See ICCPR, *supra* note 24, 999 U.N.T.S. at 171. On October 5, 1977, President Carter signed the ICCPR. See S. EXEC. DOC. NO. C, D, E, and F, at III-IV (1978). President Carter submitted the ICCPR to the Senate for advice and consent on February 23, 1978. See *id.* At that time, President Carter proposed a set of conditions that included the reservation to Article 6(5). See *id.* at XII. In 1979, the Senate Foreign Relations Committee held hearings on the ICCPR, but did not make any recommendations to the full Senate. See S. EXEC. REP. NO. 102-23, at 2 (1992). On August 8, 1991, President Bush again ignited interest in the ICCPR and proposed that the Senate reconsider providing its advice and consent to the ICCPR. See *id.* Additionally, President Bush proposed reservations and declarations similar to President Carter's. See *id.*

30. Finally, the Senate provided its advice and consent to ratification of the ICCPR on April 2, 1992. See 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992).

31. See Bassiouni, *supra* note 4, at 1170-72 (tracing political arguments for and against ratification of ICCPR).

32. See STATUS REPORT, *supra* note 28, at 143-44 (listing reservations, understandings, and declarations); see also Bassiouni, *supra* note 4, at 1170-72 (noting history of the reservation, declarations and understandings, which accompanied the United States' ratification of the ICCPR).

33. See *id.*

34. See *id.* at 144-48 (listing Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden).

35. ICCPR, *supra* note 24, art. 6(5), 999 U.N.T.S. at 175.

subject to its Constitutional constraints, to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age.”³⁶

Domestic discussions of the juvenile death penalty have ebbed and waned over the years. *Domingues v. Nevada*³⁷ is the most recent in a line of cases challenging the death penalty for juveniles.³⁸ In this case, Michael Domingues, then sixteen years-old, murdered a woman and her four-year-old son.³⁹ The trial court found Domingues guilty of first-degree murder with a deadly weapon, and subsequently, sentenced him to death.⁴⁰ Domingues, in a motion for correction of an illegal sentence, argued that the execution of juveniles violates both customary international law as well as Article Six of the ICCPR.⁴¹ The Supreme Court of Nevada held that because the United States Senate ratified the ICCPR with an express reservation to Article Six, this provision of the treaty does not supercede a state law allowing the execution of juveniles.⁴² The U.S. Supreme Court subsequently denied Domingues’s certiorari request.⁴³

The application of the death penalty raises many of the most contentious issues in U.S. legal history.⁴⁴ The periodic evaluation of

36. STATUS REPORT, *supra* note 28, reservation (2), at 143. The meaning and validity of the Senate’s reservation is not uncontested and will be addressed in Part III.

37. 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999). For an analysis of the respondent’s and petitioner’s arguments in this case, see Connie de la Vega & Jennifer Fiore, *Sixteenth Annual International Law Symposium “Rights of Children in the New Millennium”*: *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 Nev.*, 21 WHITTIER L. REV. 215 (1999) (discussing the *Domingues* case and its relation to the ICCPR).

38. *See infra* note 48 (examining additional cases challenging the application of the death penalty toward juveniles).

39. *See Domingues*, 961 P.2d at 1279.

40. *See id.* The court also found Domingues guilty of burglary, robbery with the use of a deadly weapon, and first degree murder. *See id.*

41. *See id.*

42. *See id.* at 1280; *see also* NEV. REV. STAT. § 176.025 (1997) (stating that the death sentence shall not be imposed on persons convicted of a crime under the age of sixteen).

43. *See Domingues v. Nev.*, 528 U.S. 963 (1999).

44. Currently, thirty-eight states and the federal government have statutes authorizing the death penalty for certain types of murder; of these jurisdictions: “sixteen (40%) have expressly chosen age eighteen at the time of the crime as the minimum age for eligibility for that ultimate punishment. Another five (13%) have chosen 17 as the minimum. The other nineteen (47%) of the death penalty jurisdictions use age sixteen as the minimum age, either through an express age in the statute (seven states) or by court ruling (twelve states).” VICTOR STREIB, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILES CRIMES, JANUARY 1, 1973 TO DECEMBER 30, 2000*, at 5 (2001), at <http://www.law.onu.edu/faculty/Streib/juvdeath.htm> (last modified Feb. 2001). Professor Connie de la Vega has researched and written extensively on the subject of the juvenile death penalty in the United States. *See* Connie de la Vega & Jennifer

what is cruel and unusual punishment suggests that this is an area of law constantly in a state of flux due to the naturally “evolving standards” of decency.⁴⁵ This fact, coupled with an overwhelmingly low application of the death penalty for juvenile offenders worldwide,⁴⁶ indicates that the execution of minors will be challenged under any law that forces the United States to comply with changing values.

Within the United States, executing minors had thus far concerned constitutional violations under the Eighth Amendment.⁴⁷ The Court in *Domingues* relied on *Stanford v. Kentucky*⁴⁸ for support that the death penalty is constitutional.⁴⁹ The *Stanford* decision recognized the differentiation between constitutional analysis under the Eighth Amendment and analysis under international agreements and standards of decency that rebuke the use of the death penalty for minors.⁵⁰ The *Domingues* court, however, uses the *Stanford* decision as

Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F.L. REV. 735, 735-50 (1998).

45. See *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (noting that the Court has interpreted the evolving standards of decency in a flexible manner, taking into account contemporary attitudes of the country); see also *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (noting that the Court cannot precisely define the bounds of the Eighth Amendment, but the “[a]mendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

46. See STREIB, *supra* note 44, at 7 (noting the most recent documented application of the death penalty in a foreign country was in Yemen on July 21, 1993). Justice Springer, in his dissenting opinion in *Domingues*, noted that when the United States executes juveniles, it joins hands with countries such as Iran, Iraq, Bangladesh, Nigeria, and Pakistan. See *Domingues*, 961 P.2d at 1281.

47. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

48. 492 U.S. 361, 380 (1989) (holding that Kentucky could execute a seventeen-year-old convicted of murder without violating the Eighth Amendment’s prohibition against cruel and unusual punishment). The Supreme Court has decided several other cases regarding the execution of juveniles. See *Thompson v. Oklahoma*, 487 U.S. 815, 829, 838 (1988) (holding that a fifteen-year-old’s death sentence should be set aside due to lack of national consensus approving execution of minors below sixteen); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (determining that youth must be considered as mitigating factor in applying the death penalty). Note that the Court in *Eddings* did not rule directly on whether the death penalty was cruel and unusual punishment under the United States Constitution. Justice Powell, writing for the majority, stated that “[b]ecause we decide this case on the basis of *Lockett v. Ohio*, we do not reach the conclusion of whether—in light of contemporary standards—the Eighth Amendment forbids the execution of a defendant who was 16 at the time of the offense.” *Id.* at 110 n.5. The decision in *Thompson* staying the execution of a fifteen-year-old marked an expansion of *Eddings*, and for practical purposes made it unconstitutional to impose the death penalty on children below sixteen. See *Thompson*, 487 U.S. at 838.

49. See *Domingues*, 961 P.2d at 1279 (citing *Stanford*, 492 U.S. at 370).

50. See *Stanford*, 492 U.S. at 369 n.1 (relying on American conceptions of decency and rejecting a reliance on sentencing practices of foreign nations). The *Stanford* Court narrowly interpreted evolving standards of decency, believing that even though the practices of other democracies may be relevant, they are not dispositive

evidence that the death penalty, when applied to minors, withstands constitutional scrutiny and complies with treaty obligations.⁵¹ The *Domingues* court's reasoning is partly flawed, however, because it conflates the issues of constitutionality and international treaty obligations.⁵² Assessing the constitutionality of executing minors requires a separate analysis from that which is aimed at determining whether Article Six of the ICCPR supercedes a Nevada criminal sentencing statute. Even though provisions in the ICCPR may not conflict with the U.S. Constitution,⁵³ nothing in either the Constitution or judicial precedent prevents the treaty from providing additional protections to individuals.⁵⁴

Justice Springer, in his dissent in *Domingues*, noted that the United States' rebuke of international objections to the execution of minors place it in the same category as countries notorious for human rights

in the absence of uniform practice within the United States. *See id.* *See also* Michael J. Spillane, Comment, *The Execution of Juvenile Offenders: Constitutional and International Law Objections*, 60 U.M.K.C. L. REV. 113, 116 (1991) (presenting an overview of the execution of juvenile offenders between 1985 and the date of publication, 1991). As of 1991, twenty-four states had statutes allowing the execution of juveniles seventeen years of age, and twenty-one states allowed executions of those sixteen or older. *See id.* at 117-18. The *Stanford* Court found convincing the lack of a national consensus toward the execution of minors. It stated that "[o]f the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." *Stanford*, 492 U.S. at 370. The dissent responded to the issue of consensus by stating that simply because a state's statute permits the execution of juveniles, does not imply that a legislature has taken a moral stand on this issue. *See id.* at 385. In other words, an overwhelming majority of the states could find the execution of juveniles to be morally reprehensible, yet continue to maintain statutes that permit such executions.

51. *See Domingues*, 961 P.2d at 1280 (explaining that "many" jurisdictions have laws allowing the application of the death penalty to minors and citing *Stanford* as evidence that such laws are constitutional).

52. *See id.* (discussing the Senate's reservation to the ICCPR as if it is directly related to the constitutional scrutiny afforded protections under the Eighth Amendment). This discussion implies that the constitutionality of executing minors under the Eighth Amendment lends support to the reservation's validity. *See id.* The two analyses are, however, separate and neither has a direct bearing on the other.

53. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) ("There is nothing in [the] language [of Article VI] intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."); *see also* STATUS REPORT, *supra* note 28, declaration (2), at 144. The ICCPR states in relevant part, "The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations." *Id.*

54. Adding protections beyond what the federal Constitution already affords is not an unfamiliar concept in the U.S. legal system. State governments have always been free to provide enhanced protection of constitutional rights through their state constitutions. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977) (explaining that state governments are permitted to add individual rights through their constitutions but may not lessen the rights afforded by the federal Constitution). The concept of adding more human rights, provided they do not infringe on rights already protected by the U.S. Constitution, is familiar.

abuses, such as Iran, Iraq, Bangladesh, Nigeria, and Pakistan.⁵⁵ The execution of juveniles by only a few countries with a history of human rights abuses, coupled with international treaties and agreements prohibiting the same, would seem to indicate an international norm prohibiting the application of the death penalty to offenders under 18.⁵⁶

B. *Jus Cogens Norm*

International and regional tribunals and courts agree that refraining from executing juveniles is a non-derogable obligation by which States must abide.⁵⁷ Non-derogable obligations are generally defined as involving rights so fundamental that they are not subject to abrogation.⁵⁸ Likewise, *jus cogens*, as defined under Article 53 of the

55. See *Domingues*, 961 P.2d at 1281; see also AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY AND JUVENILE OFFENDERS 74 (1991) (summarizing findings regarding the cases of twenty-three juveniles sentenced to death under present U.S. law). Note that since Amnesty's report, Barbados has raised the minimum age for execution to eighteen. For a more updated calculation of states imposing the death penalty, see Amnesty International, *Juvenile Offender Facing Execution in Virginia—A Step Backwards*, AI Index: AMR 51/76/98 (Oct. 1998). Amnesty International reports that Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen have executed a combined total of nine juveniles since 1990. See *id.* Between January 1, 1973 and December 31, 2000 the United States executed seventeen juvenile offenders, whose age at the time of the crime, with the exception of one, was seventeen. One offender was sixteen at the time of the crime. The ages at execution ranged from twenty-three to thirty-eight. *Id.* at tbl. 1. See Streib, *supra* note 44, at 4, tbl. 1. The United States was the only country to execute juveniles in both 1998 and 1999.

56. See, e.g., Joan F. Hartman, 'Unusual' Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 666-67 (1983) (noting that state practices seem to indicate consistent adherence to prohibitions on juvenile executions, but unreported inconsistencies could confuse data); 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, 295-96 (1995) (stating that the United Nations Human Rights Committee implies in its General Comment that the U.S. reservation to the provision of the Covenant prohibiting executions of persons under eighteen is illegal because it is a violation of customary international norms); Spillane, *supra* note 50, at 130-31 (stating that executing juveniles violates international principles that are *jus cogens*, from which no derogation is possible); Edward F. Sherman, Comment, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 88 (1994) (arguing that several international human rights treaties and accords reflect international consensus on prohibition of the death penalty for juvenile offenders). Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (asserting that the U.N. Declaration to protect all persons from being subject to torture coupled with modern nations' universal renunciation of torture has the effect of binding customary international law).

57. See *infra* notes 59-64 and accompanying text (explaining the *jus cogens* concept and the application of this norm by international courts and tribunals).

58. See Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 83-84 (Louis Henkin ed., 1981) (discussing the non-

Vienna Convention, are peremptory norms recognized by the international community from which derogation is not permitted.⁵⁹ For example, the Inter-American Court of Human Rights⁶⁰ declared the execution of juvenile offenders to be a violation of both international law and the doctrine of jus cogens.⁶¹ The Inter-American Court found that the U.S. practice of allowing the execution of minors violated obligations under the American Declaration.⁶² In addition, the United States is not only in violation

derogable nature of certain rights, such as the right to life and freedom from torture).

59. See Vienna Convention, *supra* note 10, art. 53, 1155 U.N.T.S. 331, 344.

60. The Inter-American Court of Human Rights was established, with the formation of the Organization of American States (OAS), to protect rights that cannot be "genuinely assured unless [the rights] are safe-guarded by a competent court." See Ninth International Conference of American States (Bogota, Colombia, 1948), Resolution XXXI, "Inter-American Court to Protect the Rights of Man," cited in ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 13 (1996). The Court has advisory and adjudicatory jurisdiction over cases submitted by either the Inter-American Commission on Human Rights or State parties to the American Convention who recognize the jurisdiction of the Court. See *id.* at 14. An individual petitioner may not assert a claim directly before the Court. See *id.* The Commission must first hear the case and finalize proceedings before the Court can hear the case. See *id.* Cases brought to the Commission and later referred to the Court generally arise under the American Convention on Human Rights. See *id.* The American Convention is a broad-based human rights document protecting political, social, economic, and cultural rights. See American Convention on Human Rights, O.A.S. Official Records, 1978, OEA/Ser. K/XVI I.1, Doc. 65 Rev. 1 Corr. 2 [hereinafter American Convention]. Like most treaties, the American Convention is only binding on those OAS member states that have formally accepted the agreement. This stands in contrast to the OAS Charter and American Declaration on the Rights and Duties of Man, both of which also establish human rights standards, but are binding on all OAS members even when the states have not formally accepted the Charter or Declaration. See generally Dinah L. Shelton, *The Inter-American Human Rights System, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 121 (Hurst Hannum ed., 3d ed. 1999) (describing Inter-American human rights institutions).

61. See Case 9647, Inter-Am. Ct.H.R. 147, OEA/ser. L./v./II.71, doc. 9 rev. 1 (1987) [hereinafter Case 9647]. Petitioners James Terry Roach and Jay Pinkerton alleged that their death sentences for crimes committed before their eighteenth birthdays constituted a violation of the right to life under the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conf. of Am. States, Article I, O.E.A./Ser. L/V/I.4 (1965) (adopted Mar. 30-May 2, 1948), reprinted in 43 AM. J. INT'L L. 133, 134 (Supp. 1949) [hereinafter American Declaration]. The American Declaration protects many of the same rights as the American Convention. The Convention, however, is more detailed. Cf. American Convention, *supra* note 60. In addition, the American Declaration, because OAS states are bound by its conditions regardless of whether they have officially agreed to it, is sometimes invoked by the Inter-American Commission and Court as a way of holding OAS states accountable when they have not acceded to the American Convention.

62. See American Declaration, *supra* note 60, at 168-73. The United States is a member state of the OAS and as such falls within the jurisdiction of the Inter-American Commission on Human Rights. See Hurst Hannum, *Implementing Human Rights: An Overview of NGO Strategies and Available Procedures, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 19 (Hurst Hannum ed., 3d ed. 1999). All OAS countries are automatically bound by the OAS Charter and the American

of both the ICCPR and the American Convention on Human Rights,⁶³ but also the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁶⁴

II. ARGUMENT ONE: THE ICCPR IS SELF-EXECUTING

Congress has not implemented the ICCPR in domestic legislation.⁶⁵ Without implementing legislation, the courts sometimes determine that treaties are not self-executing.⁶⁶ When courts make such a determination, they often will not recognize an individual right raised under the treaty.⁶⁷ It is, therefore, imperative that the advocate convince the Court that the ICCPR is a self-executing agreement that may be raised as a defense⁶⁸ to the execution of juveniles.⁶⁹

The Supreme Court first articulated a distinction between self-executing and non-self-executing treaties in *Foster v. Neilson*.⁷⁰ In this

Declaration. *See generally* Shelton, *supra* note 60, at 121 (describing Inter-American human rights institutions).

63. *See* American Convention, *supra* note 60, art. 4(5) (“Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.”).

64. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3518, 3520, art. 68, 75 U.N.T.S. 287, 330 (“the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence”). The general provisions of this treaty govern the protection of civilians during armed conflict to ensure that civilians are treated humanely by all parties to the convention. *See id.* at art. 3(I), 75 U.N.T.S. 288, 291.

65. *See* S. EXEC. REP. NO. 102-23, at 19 (1992) (“Existing U.S. Law generally complies with the covenant; hence, implementing legislation is not contemplated.”).

66. *See* RESTATEMENT, *supra* note 9, § 111(4).

An international agreement of the United States is “non-self-executing” (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.

Id.

67. *See id.* at § 111(3) (“Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation.”). It should be noted, however, that the creation of private rights or remedies is a distinct question from whether the treaty is self-executing. *See id.* § 111 cmt. h.

68. For an explanation of the difference between a private right of action and a defense, see *infra* Part II.A.

69. *See* RESTATEMENT, *supra* note 9, § 111 cmt. h (stating that some parts of a treaty may be self-executing while others are not).

70. 27 U.S. (2 Pet.) 253, 314 (1829); *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that self-executing treaties require no implementing legislation to make them operative). *See generally* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 144-52 (1999) (explaining the difference between self-executing and non-self-executing treaties); Carlos Manuel Vázquez, *The Four Doctrines*

case, the Court explained that generally, in countries without a Supremacy Clause,⁷¹ such as Britain,⁷² a treaty is a contract between nations, not a legislative act.⁷³ The Court, however, distinguished this concept from the principles established in the United States when it stated, “[o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates without the aid of any legislative provision.”⁷⁴

of Self-Executing Treaties, 89 AM. J. INT’L L. 695 (1995) (presenting an overview of self-executing treaties and discussing the confusion regarding the distinction between self-executing and non-self-executing treaties).

71. In contrast to Great Britain, Article VI of the U.S. Constitution declares that treaties are the supreme law of the land when made under the authority of the United States. U.S. CONST. art. VI. In addition, the Constitution states that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made.” U.S. CONST. art. III, § 2. As the supreme law of the land, treaties become the functional equivalent of federal congressional statutes. *See, e.g.*, *The Head Money Cases*, 112 U.S. 580, 598-99 (1884) (“A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.”); *Foster*, 27 U.S. (2 Pet.) at 314 (stating that a treaty is considered an act of the legislature when it does not require implementing legislation to become effective); *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564-67 (1984) (stating that in U.S. law, both treaties and customary law are law of the United States and they are equal in status to statutes and subject to the later-in-time principle). A treaty may trump conflicting federal and state law that was enacted before the treaty became effective. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 212 (1962) (“Though a court will not undertake to construe a treaty in a manner inconsistent with a *subsequent* federal statute, no similar hesitancy obtains if the asserted clash is with state law.”) (emphasis added); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (“A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way.”); *see also, e.g.*, Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 531 (1991) (discussing how states’ rights should not be asserted as impediments to full implementation of treaty obligations).

72. In Britain, Australia, and most other Commonwealth countries, the executive branch ratifies treaties without the consent of parliament. *See* Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 213 (1997) (describing traditional approaches to giving domestic legal effect to international agreements). In these countries there is a requirement that the parliament implement the treaty in domestic law. *See id.*

73. *See Foster*, 27 U.S. (2 Pet.) at 314.

74. *Id.* The Court in *Foster* did not actually use the term self-executing. Nonetheless, *Foster* is regarded as the source of the distinction between self-executing and non-self-executing treaties because it distinguished between treaties directed at the political branch versus those that may be interpreted directly by the judicial department. *See* Sloss, *supra* note 70, at 147 (arguing that *Foster* is widely regarded as the origin of non-self-executing doctrine); *see also* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 766-68 (1988) (arguing that all treaties are “self-executing” except those that, by their terms, require implementing legislation). *Cf. Barapind v. Reno*, 72 F. Supp. 2d 1132, 1148 (E.D. Cal. 1999) (stating that, “whether a treaty is self-executing is an issue for judicial interpretation.” (citing RESTATEMENT, *supra* note 9, § 111(h)-(j))); *Connie de la Vega, Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 452-62 (1997) (stating that

The Supreme Court recently applied the doctrine of non-self-executing treaties in *United States v. Alvarez-Machain*.⁷⁵ There, the Supreme Court allowed individuals to raise a defense under a treaty in certain circumstances even without implementing legislation.⁷⁶ The Court reaffirmed that treaties are considered U.S. law⁷⁷ and outlined the responsibility of the Court to enforce a treaty on behalf of individuals when it is self-executing.⁷⁸ The Court did not dispute that a defense may be valid under the extradition treaty that was at issue in the case, but held that the defense was not successful because the United States had not violated the terms of the treaty.⁷⁹ The dissent in this case agreed with the majority that the treaty could be used as a defense.⁸⁰ The dissent argued, however, that the United

the application of treaty provisions in U.S. courts is affected by judicially made doctrine of self-executing treaties); Paust, *supra* note 74, at 760 (arguing that the judicially created distinction between self-executing and non-self-executing treaties is “patently inconsistent with the express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’”). See generally Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT’L L. 627, 635 (1986) (analyzing the U.S. doctrine of self-executing treaties in the light of scholarly developments in Europe).

75. 504 U.S. 655, 667 (1992).

76. The court in *Alvarez-Machain* relied on *United States v. Rauscher*, 119 U.S. 407, 430 (1886), to inform its interpretation of the extradition treaty at issue. See *Alvarez-Machain*, 504 U.S. at 659. In *Rauscher*, the Supreme Court determined that the defendant’s criminal charge fell outside the terms of the Webster-Ashburton extradition treaty and, as a result, the Court found that the defendant successfully raised the treaty as a defense to prosecution. See *Rauscher*, 119 U.S. at 430, cited in *Alvarez-Machain*, 504 U.S. at 659-60. Relying on *Rauscher*, the Court in *Alvarez-Machain* analyzed the terms of the extradition treaty to determine whether forced abductions fell beyond the scope of the treaty. See *Alvarez-Machain*, 504 U.S. at 666. The Court concluded that the terms of the treaty did not support a prohibition of forced abductions, however, the Court *could not* have reached this conclusion without accepting the defendant’s ability to raise the treaty as a defense. See *id.* It was precisely because of the defendant’s contention that the treaty prohibited his prosecution that the case existed at all. See *id.* In addition, the Court relied on several cases, such as *Rauscher*, in which the Court spoke explicitly about raising a treaty as a defense despite the lack of implementing legislation. See discussion *infra* Part II.B (discussing *Rauscher* and raising a defense even in the absence of implementing legislation).

77. See *Alvarez-Machain*, 504 U.S. at 666 (stating that treaties, like statutes, must be construed by looking at its terms to determine the meaning).

78. See *id.* at 663. At issue in this case was whether a defendant may use an extradition treaty as a defense to a court’s jurisdiction when the individual was abducted to the United States. See *id.* at 657.

79. See *id.* at 669 (refusing to imply in the treaty a term prohibiting international abductions, but never denying that the court would recognize a defense under the treaty, language and meaning permitting). The Court found that the forced abduction was conducted outside of the terms of the treaty and was not, therefore, a violation of the treaty itself. See *id.* at 669-70.

80. See *id.* at 674-75 (Stevens, J., dissenting). The dissent, however, read the treaty more expansively and analyzed the scope and objective of the treaty. See *id.* at 675.

States violated the purpose of the treaty.⁸¹ Significantly, both the majority and dissenting opinions argued for the recognition of a defense based on rights grounded in the treaty itself.⁸² The opinions differ only in the interpretations of the treaty's language and purpose.⁸³

Despite decisions such as *Alvarez-Machain*, courts continue to grapple with the question of exactly what determines that a treaty is self-executing.⁸⁴ More specifically, courts have difficulty determining under what circumstances a treaty, having the force of law,⁸⁵ may be applied directly by the judiciary.⁸⁶

81. The dissent believed that the language and purpose of the treaty implied that forced abductions were prohibited. *See id.* at 682. The dissent strongly contested the majority's failure to distinguish "between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law . . . [and] a breach of our treaty obligations." *Id.* The dissent's rationale was that an abduction that was not the result of an executive order, but rather a decision on the part of an individual, meant that the individual was acting in the capacity of a private citizen; therefore, his actions may fall beyond the scope of the treaty. *See id.* at 682.

82. *Compare id.* at 669 (implying, by his silence, that a defense may be raised under the treaty), *with id.* at 678 (Stevens, J., dissenting) ("[T]he Extradition Treaty . . . suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.").

83. *Compare id.* at 666 (stating that "the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms"), *with id.* at 675 (Stevens, J., dissenting) ("In my opinion, 'the manifest scope and object of the treaty itself,' plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party . . . [that] is confirmed by a consideration of the 'legal context' in which the Treaty was negotiated.") (citations omitted).

84. *Compare* *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (stating that the term self-executing meant "no domestic legislation is necessary to give the Warsaw Convention the force of law in the United States"), *with Alvarez-Machain*, 504 U.S. at 667 (holding that where the Treaty has the force of law, the Treaty's status as self-executing determines the Court's power and duty to "enforce [the Treaty] on behalf of an individual"). *See, e.g.,* *Cook v. United States*, 288 U.S. 102, 119 (1933) (explaining that non-self-executing treaties may be enforced in courts only after implementing legislation is enacted); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that when treaty stipulations are non-self-executing they become operative only pursuant to legislation).

85. Some court decisions seem to indicate that non-self-executing treaties are not considered to be the supreme law of the land. *See Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (stating that non-self-executing treaties "are merely executory agreements between the two nations and have no effect on domestic law absent additional governmental action"); *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979) (stating that "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing"). These decisions make it difficult to conceptualize how a treaty can be the supreme law of the land, but at the same time must await implementing legislation before it has any domestic legal effect.

86. *See Vázquez, supra* note 70, at 695 (arguing that courts' application and distinction of self-executing treaties is controversial and one of the "most

Although the Supreme Court has not established explicit criteria to determine the self-executing nature of a treaty, the Ninth Circuit, in *Islamic Republic of Iran v. Boeing Co.*,⁸⁷ applied a four-part test to determine whether a treaty is self-executing.⁸⁸ The court stated that an analysis should consider: (1) the purposes and objectives of the treaty; (2) the existence of domestic procedures and institutions appropriate for direct implementation; (3) the availability and feasibility of alternative enforcement methods; and (4) the immediate and long-range social consequences of self-execution or non-self-execution.⁸⁹ Parts A, B, and C apply the Ninth Circuit's test to the ICCPR.

A. *The ICCPR is Self-Executing Because the United States Intended the Declaration to Apply Only to Private Rights of Action*

Courts, in determining the scope of any treaty, look to the object and purpose of the language and agreement as a whole.⁹⁰ They begin, however, with the literal language of the treaty.⁹¹ When the text is unclear, courts may resort to extrinsic evidence to aid in their interpretation.⁹² In addition, they may look to the history of the treaty, the negotiations, and the construction adopted by the

confounding" distinctions in the law of treaties (citing *Postal*, 589 F.2d at 876; *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992))).

87. 771 F.2d 1279 (9th Cir. 1985).

88. *See id.* at 1283 (discussing the four-part test for a self-executing treaty).

89. *See id.* (quoting *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974)); *see also Barapind v. Reno*, 72 F. Supp. 2d 1132, 1148-49 (E.D. Cal. 1999) (applying Ninth Circuit standard).

90. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) ("International agreements, like other contracts . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the [nations] thereby contracting." (quoting *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912))); *see also Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (stating that courts construe terms of a treaty in line with the ordinary meaning within the international community).

91. *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))); *United States v. M.H. Pulaski Co.*, 243 U.S. 97, 106 (1917) (stating that "there is a strong presumption that the literal meaning [of a treaty] is the true one").

92. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that the drafting history of an international covenant may be consulted to "elucidate" ambiguous text, but when the text is clear, the Supreme Court has no power to insert an amendment (citing *Air France*, 470 U.S. at 392)); *see also 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 the court may look at history, negotiations, and practical construction so as to maintain the spirit of the treaty); *United States v. Choctaw Nation*, 179 U.S. 494, 531 (1900) (stating that if words are ambiguous, courts may resort to written or oral evidence that will disclose circumstances of treaty).

parties.⁹³ Thus, treaties may be liberally construed to carry out the intention of the parties.⁹⁴

In order to prove that the United States intended⁹⁵ to bar only private rights of action under the ICCPR and not defenses,⁹⁶ the advocate should consider and argue several factors.⁹⁷ In *More v. Intelcom Support Services, Inc.*,⁹⁸ the Fifth Circuit considered several of the following criteria to determine the parties' intent in signing the agreement:

- (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 alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.⁹⁹

These factors do not appear to constitute a rigid six-pronged test; as the court in *More* intended, they act as a guideline.¹⁰⁰ In fact, as Professor Vázquez points out, the court simply considered these factors to be relevant to the constructive interest of the treaty makers,

93. See *Air France*, 470 U.S. at 396 (concluding that the language, history, and policy of the Warsaw Convention and the Montreal Agreement were relevant in determining whether liability attached to the airline).

94. See *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (stating that treaties may be susceptible to multiple interpretations, and that parties' intentions in terms of effectuating equality and reciprocity are important in interpretations).

95. Part II.A of this Comment discusses the intent of the Senate to bar only private rights of action. Part II.B, though similar in content, focuses on court precedents and historical interpretations of treaties that support the use of treaties as a defense even when they are not, as a whole, considered self-executing.

96. See *infra* notes 114-123 (discussing the differences between a private right of action and a defense for the purposes of the ICCPR).

97. Professor McDonnell notes that "most parties to an international convention are indifferent as to how individual states carry out their international obligations, as long as they do so." Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1440 (1996).

98. 960 F.2d 466 (5th Cir. 1992).

99. *Id.* at 469 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985)).

100. See *More*, 960 F.2d at 469-72 (stating courts utilize these factors when attempting to determine the meaning of the treaty, but such interpretations are better left to the Executive branch). Note that, although the court utilizes these factors, it has not established an explicit six-prong test, and the analysis is less exacting than a stringent test); see also *Frolova*, 761 F.2d at 373 (stating that if the parties' intent is clear from the treaty's language courts will not analyze other factors). The *Frolova* court also stated that the issue of whether a treaty is self-executing is determined by judicial interpretation. See *id.* at 373 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 154(1) (1965)). In *Frolova*, the court did not explicitly follow each guideline laid out, but rather considered the treaty at issue, the United Nations Charter, more generally, though keeping those factors listed in mind. See *id.* at 373-75.

rather than an actual intent.¹⁰¹ Therefore, the advocate need not address explicitly each of the factors. The advocate should turn first to the language of the treaty. Declaration One of the ICCPR states that, “the provisions of articles 1 through 27 of the Covenant are not self-executing.”¹⁰² Article Two, paragraph 3(a) of the ICCPR, however, 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.”¹⁰³ The ICCPR cannot be internationally binding and contain language invoking a remedy for individual violations and yet not infer a domestic basis for raising this treaty as a defense to offending governmental action.¹⁰⁴

Article Two, when read together with the Senate’s declaration announcing that the ICCPR is non-self-executing, creates a discrepancy between the language and meaning of the ICCPR. Due to the potential for varying interpretations of the parties’ intent regarding a treaty’s self-executing nature, further investigation of the treaty beyond its facial construction is necessary.¹⁰⁵ Assuming that the non-self-executing nature of the ICCPR applies to defenses raised under the treaty, one would logically conclude that an individual cannot find a remedy in United States courts under Article Two, paragraph 3(a).¹⁰⁶ Beyond the general declaration that the ICCPR is non-self-executing, the United States has not declared an understanding or reservation to Article Two of the ICCPR.¹⁰⁷

101. See Vázquez, *supra* note 70, at 711 (explaining also that even more than the intent, courts use these factors to determine whether a treaty has the markings of a self-executing treaty).

102. STATUS REPORT, *supra* note 28, declaration I, at 139.

103. ICCPR, *supra* note 24, art. 2(3)(a), 999 U.N.T.S. at 174. In addition, Article Three, paragraph 3(b), states that “[t]o ensure that any person claiming such a remedy shall have his right thereto determined 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 possibilities of judicial remedy” *Id.*

104. See *United States v. Hongla-Yamache*, 55 F. Supp. 2d 74, 76-77 (D. Mass. 1999) (stating that language of Article 36 of Vienna Convention on Consular Relations establishes an individual right). Although the defendant’s motions were denied in this case, the court nonetheless recognized his individual right (standing) to raise the treaty as a defense to the alleged violations. See *id.* at 77-78 (noting that other courts support the conclusion that individuals’ standing is established by the language of Article 36).

105. See *More*, 960 F.2d at 469 (noting that other courts have considered circumstances surrounding a treaty’s execution, and nature of obligations under a treaty as relevant in determining parties’ intent).

106. See ICCPR, *supra* note 24, art. 2(3)(a), U.N.T.S. at 174.

107. See generally STATUS REPORT, *supra* note 28, at 143-44 (listing five reservations and four understandings, none of which mentions Article Two). An advocate should argue that the United States intends to be bound by Article Two because the

Moreover, if the United States intended the non-self-executing declaration to apply to defense claims as well as private rights of action, Article Two would negate the purpose of the treaty as a human rights agreement established to protect individuals within a government's jurisdiction.¹⁰⁸ These ambiguities between the text of the ICCPR articles affording rights to individuals and declarations that purport to limit these rights should signal to the court the need for further inquiry.

The current Administration and the Senate Committee on Foreign Relations support an interpretation of the ICCPR that allows an individual to raise a defense. The Committee declared the ICCPR to be non-self-executing only with respect "to private causes of action."¹⁰⁹ Indeed, the language used throughout the legislative history to create or limit a private right of action under the ICCPR has differed depending on the executive administration in power at the time.¹¹⁰ For example, there was a historical shift between the Carter administration and the Bush and Clinton administrations. The Carter administration considered non-self-executing provisions of treaties to be such because they did not "supercede prior inconsistent federal law because the 'substantive provisions of the treaties would not of themselves become effective as domestic law.'"¹¹¹ This

declaration concerning the non-self-executing nature of the ICCPR only applies to private rights of action. See SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 19 (1992), reprinted in 31 I.L.M. 645, 657 (1992); cf. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 8 (1994) [hereinafter RACE REPORT] (invoking the "private rights of action" explanation for non-self-executing nature of Race Convention). The Administration did not feel there was a need to create additional avenues for enforcement of the essential requirements of the Convention. See *id.* (noting the pre-existing provisions of U.S. law, which grant sufficient protections and remedies).

108. See U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment] (stating that the purpose of the ICCPR is "that the rights contained therein should be ensured to all those under a state party's jurisdiction").

109. See S. EXEC. REP. NO. 102-23, at 19, reprinted in 31 I.L.M. at 657 ("For 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.") (emphasis added); see also Sloss, *supra* note 70, at 166 (noting that the Bush Administration, under which reservations to ICCPR were made, was the first administration to use the term "private cause of action" to explain the meaning of non-self-executing declaration). The Senate Committee on Foreign Relations *only* states that the ICCPR will be non-self-executing for private rights of action; it does not make the same statement in reference to raising defenses. See S. EXEC. REP. NO. 102-23, at 19, reprinted in 31 I.L.M. at 657.

110. See Sloss, *supra* note 70, at 154-59 (noting that each administration develops its own explanations and interpretations of non-self-executing declarations).

111. *Id.* at 170 (citing *Message from President of the United States Transmitting Four Treaties Pertaining to Human Rights*, S. EXEC. DOC. C, D, E, and F, 95-2 at vi (1978)).

interpretation of self-executing follows the reasoning applied in *Foster*, in which a treaty's self-executing nature is dependent upon whether there is implementing legislation.¹¹²

A private cause of action, which is prohibited when a treaty is non-self-executing, is not synonymous with a defense,¹¹³ and is permitted under the treaty. The Bush and Clinton administrations defined non-self-executing treaties as agreements that do not create "new or independently enforceable private cause[s] of action."¹¹⁴ Under this interpretation it should not matter that Congress has not implemented the ICCPR through legislation.¹¹⁵ Rather, this interpretation focuses on whether the claim is an affirmative legal claim and therefore a new private cause of action.¹¹⁶ The Bush and Clinton definition of non-self-executing treaties is broader and shifts the focus away from whether implementing legislation exists¹¹⁷ and toward whether the claim is affirmative or a defense.¹¹⁸ An advocate should argue that this is another indication of an intent to limit only affirmative claims while allowing defenses raised under the ICCPR, regardless of whether implementing legislation exists.¹¹⁹

112. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring that the widely-held belief that a treaty is a contract does not apply in the United States because the Constitution considers a treaty as the law of the land).

113. See BLACK'S LAW DICTIONARY 221 (6th ed. 1990) (defining cause of action as "[t]he fact or facts which give a person a right to judicial redress or relief against another The right which a party has to *institute* a judicial proceeding.") (emphasis added); cf. *id.* at 419 (defining defense as "[t]hat which is put forward to diminish plaintiff's cause of action or defeat recovery. *Evidence offered by accused to defeat criminal charge.*") (emphasis added).

114. Sloss, *supra* note 70, at 170 (citing Telephone Interview with David Stewart, Office of Legal Adviser, Department of State (Oct. 20, 1998)).

115. See *id.* at 169 (noting that under the private cause of action definition, the courts could apply the treaty directly, thereby bypassing implementing legislation to enforce defendants' rights).

116. See *id.* at 168-69 (arguing that this interpretation of the ICCPR is consistent with the Clinton administration's treatment of the Race Covenant with regard to private causes of action).

117. See *id.* at 170.

118. See *id.* (discussing the private cause of action definition in terms of creating new and independent claims, rather than implementing legislation).

119. See *id.* at 170. A recent decision tacitly approves the distinction between a "private right of action" and a defense for the purpose of determining whether the ICCPR is self-executing. See *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000). This court explains non-self-executing by referencing the Bush Administration's definition, which is that the "Covenant will not create a private cause of action in U.S. courts." See *id.* The court then, however, cites to David Sloss's article, in which the author explains non-self-executing treaties. See *id.* (citing Sloss, *supra* note 70). The article exposes the differences between the use of self-executing treaties for support of private causes of action and as a defense. The Sloss article advocates that a defense raised under the ICCPR is not barred even though the treaty may be considered non-self-executing for the purpose of raising a private right of action. See Sloss, *supra* note 70, at 135. The court in *Ralk* accepted this distinction and used it to support its argument. See 81 F. Supp. 2d at 1380.

B. The ICCPR, When Raised as a Defense, May Be Judicially Applied Even in the Absence of Implementing Legislation

Although though many courts have determined a treaty to be self-executing only when there is a corresponding right to bring a private claim,¹²⁰ the self-executing nature of the treaty is not dispositive when it is raised as a defense.¹²¹ Professor Vázquez supports a distinction between raising a claim under a treaty and raising the treaty as a defense. He points out the potential for erroneously interpreting a defense raised under a treaty as synonymous with maintaining a private action.¹²²

120. See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.”); *More v. Intelcom Support Servs.*, 960 F.2d 466, 469 (5th Cir. 1992); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); *Mannington Mills, Inc. v. Congoleaum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976); *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1148 (E.D. Cal. 1999); *Calderon v. Reno*, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998); *United States v. Roberts*, 1 F. Supp. 2d 601, 606 (E.D. La. 1998); *United States v. Noriega*, 808 F. Supp. 791, 798 (S.D. Fla. 1992); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).

121. In instances where the treaty is raised as a defense, the courts do not reach the issue of whether the treaty is self-executing, but rather assess whether the defense is valid under the treaty, regardless of its self-executing nature. See *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (finding that Oregon could not refuse to uphold petitioner’s treaty rights and therefore could not escheat petitioner’s personal property located in Oregon). The petitioners in *Kolovrat* raised a treaty as a defense to the State’s action of escheating their property. See *id.* (noting that the petitioners had the same rights as a citizen’s next of kin to inherit property); see also *Cook v. United States*, 288 U.S. 102, 121-22 (1933) (concluding that ship’s master had the right to raise the United States government’s violation of a treaty as a defense to personal jurisdiction); *Ford v. United States*, 273 U.S. 593, 600-01 (1927) (raising a treaty as defense to personal jurisdiction); *Patstone v. Pennsylvania*, 232 U.S. 138, 145-46 (1914) (stating that defense under the treaty was not problematic, but ruling that there was no conflict between the treaty and state law); *United States v. Rauscher*, 119 U.S. 407, 420 (1886) (accepting a treaty as a defense to jurisdiction because the extradition treaty was used for an object and purpose beyond securing the trial of a person extradited for a specific offense enumerated in the treaty); *McDonnell*, *supra* note 97, at 1440 (noting that in *Rauscher*, the defense raised was a valid but unintended consequence of treaty); cf. Paust, *supra* note 74, at 772-73 (tracing Supreme Court cases in which a treaty is applied without addressing whether it is self-executing).

122. See Vázquez, *supra* note 70, at 721 (stating that the decision in *Tel-Oren* confused a right of action with self-execution and the defendant’s ability to raise a treaty as a defense to criminal prosecution, because the latter does not require a private right of action). Cf. generally Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-49 (1995) (discussing the non-self-executing declaration of International Convention on the Elimination of All Forms of Racial Discrimination and the ICCPR); Jordan J. Paust, *Avoiding Fraudulent Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1283-84 (1993) (arguing that the attempted non-self-execution policy of the Bush Administration regarding the ICCPR was an abuse of executive power); John Quigley, *The International Covenant on*

The seminal case of *United States v. Rauscher*¹²³ “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.”¹²⁴ In *Rauscher*, the Court focused on the defendant’s use of the treaty as a defense¹²⁵ and only indirectly discussed the difference between self-executing and non-self-executing treaties¹²⁶ between the United States and Great Britain.¹²⁷ The Court reasoned that a treaty, as the law of the land, operates as an act of Congress and as such must be interpreted and enforced by the courts.¹²⁸ The Court found 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.¹²⁹ 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.¹³⁰

The dissent in *Rauscher* also supports the contention that an individual may raise a treaty as a defense.¹³¹ Justice Waite “conceded” that the treaty was a part of the law of the United States, as are congressional statutes.¹³² He agreed with the majority that a defendant may use the treaty as a defense to a prosecution.¹³³ Justice

Civil and Political Rights and the Supremacy Clause, 42 DEPAUL L. REV. 1287, 1302-04 (1993) (determining whether the declaration surrounding the self-executing nature of the treaty has legal authority).

123. 119 U.S. 407, 432-33 (1886).

124. McDonnell, *supra* note 97, at 1447. McDonnell also notes that *Ford v. United States*, 273 U.S. 593 (1927), a case in which defendants also raised a treaty as a defense, supports the conclusion that defendants may be unintended, but judicially recognized, beneficiaries of a treaty. *Id.*

125. The defendant was extradited under the 1842 Ashburton Treaty. *See Rauscher*, 119 U.S. at 410. The treaty governed the boundaries between American and British territories. *See id.* The treaty also aimed to end the African slave trade, and it governed the extradition of criminals in specific cases. *See id.* The treaty did not facially state that a defendant could only be extradited for those crimes explicitly enumerated in the treaty. *See id.* at 410-11. The Court determined, however, that the defendant could not be tried for additional crimes that were not listed in the treaty. *See id.* at 420.

126. *See id.* at 418 (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), in which the Court explained that treaties are the supreme law of the United States and only require political, rather than judicial implementation, when the terms of the treaty require either of the parties to “perform a particular [affirmative] act”).

127. *See id.* at 410.

128. *See id.* at 419 (stating that courts must take judicial notice of the 1842 treaty because it is incorporated as part of the supreme law of the land).

129. *See id.*

130. *See id.* at 430 (“One can only be tried for one of the offenses described in [a] treaty.”).

131. *See id.* at 434 (Waite, C.J., dissenting).

132. *See id.* (Waite, C.J., dissenting).

133. *See id.* (Waite, C.J., dissenting).

Waite dissented because he disagreed with the Court's interpretation of the treaty and felt that the Court had proper jurisdiction over all of the offenses because the extradition complied with the treaty.¹³⁴

More recently, a U.S. District Court reached the merits of a claim without discussing the non-self-executing nature of the ICCPR. In *United States v. Benitez*,¹³⁵ the defendants, charged with assaulting several DEA agents, raised the ICCPR as a defense to their indictment on the grounds that their country of residence already tried and convicted them on the same charges.¹³⁶ The court accepted this defense and did not address the issue of whether the ICCPR is self-executing.¹³⁷ The Court, did however, address the merits, thereby accepting the treaty's application when used as a defense.¹³⁸ The court instead found that the ICCPR did not provide the relief that

134. *See id.* (Waite, C.J., dissenting) (stating that "the treaty under which he was surrendered has granted [the defendant] no immunity, and therefore, it has not provided him with a new defense").

135. 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998). Courts have begun to cite the ICCPR for assistance in interpreting statutory or international law provisions. *See, e.g.,* *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (using the ICCPR to support the proposition that in the context of a claim arising under the Alien Tort Claims Act, there is an international prohibition against arbitrary arrest and detention); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (utilizing international human rights agreements including the ICCPR to determine that arbitrary deprivation of life is a violation of jus cogens norms); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1380 (E.D. La. 1996) (stating that although the ICCPR was not dispositive in that case, the principles outlined in the treaty reinforce plaintiff's substantive and procedural due process rights); *Abebe-Jiri v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at *4 (N.D. Ga. 1993) (using ICCPR as evidence that plaintiffs were subjected to cruel, inhuman, and degrading treatment or punishment).

136. *See Benitez*, 28 F. Supp. 2d at 1363 (holding that Article 14(7) of the ICCPR, which provides that no person shall be subject to double jeopardy, is not applicable in this case because the provision does not refer to convictions in different countries).

137. Unlike the *Benitez* decision, the following courts found the ICCPR to be non-self-executing and therefore unable to sustain a private right of action. The courts did not reach the merits of the ICCPR claim. *See, e.g.,* *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (stating that appellant's right to vote under Article 25 of ICCPR is not a privately enforceable right under U.S. law because the ICCPR is non-self-executing); *Heinrich v. Sweet*, 49 F. Supp. 2d 27, 43 (D. Mass. 1999) (noting that the ICCPR is non-self-executing and plaintiffs have other adequate domestic remedies available for their claims of "crimes against humanity"); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that defendant's civil rights claim under the ICCPR that a stun belt placed on him prior to sentencing violated the treaty could not stand because treaty is non-self-executing); *White v. Paulsen*, 997 F. Supp. 1380, 1386 (E.D. Wash. 1998) (stating that "the United States Senate expressly declared that the relevant provisions of the [Covenant] were not self-executing when it addressed this issue providing advice and consent to the ratification"); *In re Extradition of Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR, because it is non-self-executing, could not support a claim arguing against extradition).

138. *See id.*

the defendants sought.¹³⁹ The court reasoned that the Human Rights Committee itself, established under Article 20 of the ICCPR, had previously held that the treaty did not bar prosecution in a case “almost identical to the present [one].”¹⁴⁰ The Committee’s previous decision was dispositive and the court therefore rejected the defense.¹⁴¹ The Southern Florida District Court also found that the ICCPR, as an international agreement prescribing how each state party must treat individuals within its own jurisdiction, supports the propriety of raising the treaty as a defense to their indictment.¹⁴²

C. A Defense Under Article Six is Easily Justiciable

Article Two, paragraph 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁴³

This section of the ICCPR demonstrates that the treaty only requires legislation or other measures necessary to carry out the rights recognized under the ICCPR when it is appropriate.¹⁴⁴ This section of the ICCPR does not require each country to implement in legislation specific provisions of the ICCPR.¹⁴⁵ Indeed, it is of no consequence to the countries that are parties to the ICCPR *how* other states comply with their obligations, as long as they fulfill their

139. See *Benitez*, 28 F. Supp. 2d at 1363-64 (finding that “the ICCPR . . . bars only successive prosecution by the same governments”); cf. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441-42 (9th Cir. 1996) (finding, without deciding the issue of whether the ICCPR is non-self-executing, that no conflict existed between the ICCPR and the U.S. Cuban Asset Control Regulations). This case is similar to *Benitez* because the court assessed the defense claim on its merits without concluding that the ICCPR was non-self executing.

140. *Benitez*, 28 F. Supp. 2d at 1364.

141. See *id.*

142. See *id.* at 1363-64; see also General Comment, *supra* note 108, at 4 (“The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party’s jurisdiction.”).

143. ICCPR, *supra* note 24, art. 2(2), 999 U.N.T.S. at 174.

144. See Paust, *supra* note 19, at 326 (“[I]t is appropriate to clarify that . . . the Covenant will apply to state and local authorities . . . the intent is not to modify or limit U.S. undertakings under the Covenant . . . [It is] intended to signal to our treaty partners that the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state as appropriate . . .” (quoting Explanation of Proposed Reservations, Understandings and Declarations, S. EXEC. REP. NO. 102-23, at 17-19 (1992), *reprinted in* 31 I.L.M. 645, 657 (1992))).

145. See McDonnell, *supra* note 97, at 1429.

responsibilities under the treaty.¹⁴⁶

The issue of justiciability is related to the self-executing nature of the treaty because the courts must assess how to recognize an individual right in the absence of legislation. Professor Vázquez discusses how the “self-execution” rubric¹⁴⁷ often means that concerns such as “whether the claim is justiciable,” whether an individual has standing to bring the claim, and “whether the litigant has a right of action” are combined into a general analysis of self-execution.¹⁴⁸ United States courts generally require that a treaty’s language be sufficiently specific for an individual to invoke the treaty’s provision in court.¹⁴⁹ Articles of charters and declarations considered overly broad by the courts are interpreted to impose affirmative obligations on a government to improve such things as living conditions and social standards, or to provide universal education or medical care.¹⁵⁰ Courts will find, however, that certain prohibited acts, when they are “specific, universal, and obligatory,”¹⁵¹

146. *See id.* It is instructive to note the difference between the law of nations and treaties generally with respect to domestic obligations. The law of nations allows each state to make its own decisions concerning the enforcement of internationally recognized norms. *See* Henkin, *supra* note 11, at 245 (“[I]nternational law itself, . . . does not require any particular reaction to violations of law Whether and how the United States should react to such violations are domestic questions . . .”). Treaties, however, establish the obligations and the extent to which they are enforceable. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 n.2 (D.C. Cir. 1984). The ICCPR, pursuant to Article Six, established that each state is obligated to abstain from executing juveniles. The ICCPR does not, however, dictate how each country should implement or enforce the provision. The country must only do whatever is necessary to ensure that it fulfills its obligation. *See* ICCPR, *supra* note 24, art. 2(2), 999 U.N.T.S. at 173-74.

147. *See* Vázquez, *supra* note 70, at 711 (referring to the factors examined by courts under the self-execution rubric).

148. *See id.* Vázquez notes that *Frolova* is an example of the courts’ mingling of the concepts surrounding self-execution and justiciability. *See id.* at 711. He claims that the court really did not analyze the intent of the treaty makers, but rather addressed factors unrelated to intent, which advise against judicial enforcement. *See id.* The factors addressed by the court included the purpose of the agreement as a whole and the nature of the obligations imposed by the agreement. *See id.*

149. *See, e.g.,* *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-74 (7th Cir. 1985) (stating that Articles 55 and 56 of the United Nations Charter were phrased in broad generalities and did not indicate a “code of legal rights”); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (explaining that Articles One and Two of the United Nations Charter contain only general “purposes and principles,” some of which are “mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals”); *United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979) (observing that the Convention on the High Seas, as its preamble states, was only intended to be “generally declaratory of established principles of international law”).

150. *See* cases cited *supra* note 149 (explaining courts’ interpretations of broad charters and preambles).

151. *See* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992) (finding that torture is a specific, universal, and obligatory norm that also reaches the level of *jus cogens*).

may form the basis of a private right of action.¹⁵²

The Ninth Circuit in *Siderman de Blake v. Republic of Argentina*¹⁵³ found that torture constituted a specific enough violation of international law to find that a private right of action existed.¹⁵⁴ The same court found in *Hilao v. Estate of Marcos*,¹⁵⁵ however, that the “international law norm against cruel, inhuman, and degrading treatment is not sufficiently specific such that violations of that norm are actionable under § 1350 [of the Alien Tort Claims Act].”¹⁵⁶ Even though “cruel, inhumane, and degrading treatment” is too vague to form a private cause of action, the Ninth Circuit in *Siderman* found torture to be a form of “cruel, inhumane, and degrading treatment,” and specific enough to constitute a private right of action.¹⁵⁷

The specificity requirement increases the claim’s justiciability because in the absence of legislation, courts have a basis upon which to formulate a decision. Negative obligations such as these, which require the government to abstain from action,¹⁵⁸ are more easily justiciable because the meaning of the provision is clear from the language of the treaty and legislation is unnecessary.¹⁵⁹ Article Six of the ICCPR is one such provision. Implementing legislation or regulations are, therefore, unnecessary when the provision clearly states that executing minors is prohibited under all circumstances.

152. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (holding that under the Alien Tort Claims Act specific tortious violations of international law are enough to create a cause of action, even when there is no recourse under other domestic laws).

153. 965 F.2d 699 (9th Cir. 1992).

154. See *id.* at 714-17.

155. 103 F.3d 789 (9th Cir. 1996).

156. *Id.* at 794. Under the Alien Tort Claims Act (ACTA), federal courts have original jurisdiction for torts only over any civil action brought by an alien. This tort must be committed in violation of the law of nations or a U.S. treaty. See 28 U.S.C. § 350 (1994).

157. See *Siderman*, 965 F.2d at 716 (stating that torture is a recognizable violation of the law of nations and it is defined as “universal, obligatory, and definable” (citing *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987))).

158. The Restatement explains why negative treaty provisions are self-executing. RESTATEMENT, *supra* note 9, § 111, reporter’s note 5. It quotes *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878):

[If a treaty states] that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the “supreme law of the land.”

RESTATEMENT, *supra* note 9, § 111, reporter’s note 5.

159. See *id.* (“Obligations not to act, or to act only subject to limitations, are generally self-executing.”).

III. ARGUMENT TWO: THE RESERVATION TO ARTICLE SIX OF THE ICCPR IS INVALID

The reservation to Article Six is the second hurdle facing an advocate once the ICCPR is accepted as a self-executing treaty for the purposes of raising a defense. The advocate should argue that the Senate's reservation to Article Six of the ICCPR is invalid and violates both the object and purpose of the ICCPR as a human rights agreement,¹⁶⁰ as well as the non-derogable nature of the prohibition against executing juveniles.

The Senate's reservation to Article Six of the ICCPR states: "[T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . 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."¹⁶¹

To date, relatively few cases exist in which courts discuss the ICCPR, and even fewer cases analyze the reservation to Article Six. It is important to address potential concerns regarding the reservation to ensure that the courts will address the merits of the claim.¹⁶² In *White v. Johnson*,¹⁶³ the Fifth Circuit determined that a claim challenging his death sentence under the ICCPR was precluded by the Senate's reservation.¹⁶⁴ The petitioner argued that the United

160. Professor Louis Henkin argues that the United States' reservations, understandings, and declarations

appear to be guided by several "principles": (1) the United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution; (2) United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice; (3) the United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions; (4) every human rights treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states; and (5) every international human rights agreement should be "non-self-executing."

Henkin, *supra* note 122, at 341.

161. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (Resolution of Ratification of the International Covenant on Civil and Political Rights).

162. See *infra* notes 163-170 (discussing *White v. Johnson* and explaining the obstacle of the reservation).

163. 79 F.3d 432 (5th Cir. 1996).

164. See *id.* at 437-39 & 440 n.2. In this case, the defendant was convicted of murder and sentenced to death. The defendant filed a petition for habeas corpus relief, claiming that the seventeen-year delay between sentencing and execution constituted cruel and unusual punishment under the Eighth Amendment and international law. See *id.* at 436-37. The Fifth Circuit found that there was no precedent to support the defendant's claim, and that his final conviction in 1990 did not violate international law in effect at that time. See *id.* at 437-39 & 440 n.2. The court also noted the Senate's reservations with respect to the treaty, which state that

States had signed the ICCPR since the time of his conviction.¹⁶⁵ He, therefore, asserted that because the treaty prohibited “torture or cruel, inhuman or degrading punishment or treatment,”¹⁶⁶ his sentence, and more importantly the long delay between his conviction and the execution of the death penalty, violated international law.¹⁶⁷ This case does not, however, restrict or limit a claim such as the one discussed in this primer. In *White*, the petitioner alleged primarily that the length of time he spent on death row violated the Eighth Amendment’s prohibition of cruel and unusual punishment.¹⁶⁸ The petitioner did not argue that the reservation to the ICCPR was invalid and, consequently, the court never addressed the validity of the reservation. Rather, the court merely acknowledged, in a footnote, that the reservation existed and that it may create an obstacle to raising this type of defense.¹⁶⁹ This case, alone, does not bar a claim of the sort discussed in this primer.¹⁷⁰

The Nevada Supreme Court in *Domingues v. Nevada*,¹⁷¹ one of the only other cases where the courts have questioned the validity of the reservation, rejected the defendant’s claim under the ICCPR because

the United States “understands the language . . . to mean ‘cruel and unusual punishments’ as defined by the eighth amendment.” *Id.* at 440 n.2. Interestingly, the court did not state that all reservations bar claims, but rather, the court assumed that, in light of the reservation, the language of the treaty indicated the Senate’s intent to interpret the treaty in regard to the Eighth Amendment and not international laws and standards. *See id.*

165. *See id.* at 440 & 440 n.2.

166. *Id.* at 440 n.2.

167. *See id.*

168. *See id.* at 436.

169. *See id.* at 440 n.2 (discussing in dicta that U.S. Senate filed a reservation).

170. *White* is the only federal appellate court decision that discusses the reservation, even in a precursory manner. There are several district court cases in which the reservation is discussed. The petitioners, however did not raise the *validity* of the reservation and it was not addressed by the court. *See Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 n.222 (N.D. Ala. 1998) (stating that Article Seven of ICCPR, which prohibits torture and cruel and unusual punishment, does not grant protection beyond the Eight Amendment because the United States had declared a reservation to the article). Note, however, that in *Austin*, the plaintiff challenged four policies of the Alabama prison system and alleged that the policies were violations of the First, Fifth, Eighth, and Fourteenth Amendments. *See id.* at 1215. The plaintiff did not even raise the ICCPR in the allegations. Rather, the court included the ICCPR in a discussion of international agreements, all of which were sparked by the plaintiff’s inclusion of a U.N. guide to prison treatment rules in his exhibits. *See id.* at 1260 n.222. *Ralk v. Lincoln County*, 2000 U.S. Dist. LEXIS 763, at *30-31 (S.D. Ga. Jan. 18, 2000), also discusses briefly the United States’ reservation to Article 10 of the ICCPR. Again, the plaintiff did not address the reservation’s validity. *Cf. Grandison v. Corcoran*, 78 F. Supp. 2d 499, 517 (D. Md. 2000) (citing *White* as an indication that the ICCPR does not afford more protection than the Constitution, but never mentioning explicitly reservations to the ICCPR).

171. 961 P.2d 1279 (Nev. 1998).

the United States is not bound by Article Six due to the Senate's reservation.¹⁷² The dissent in *Domingues* urged, however, a complete consideration of the reservation's validity and an evaluation of whether the United States continues to be a party to the ICCPR.¹⁷³ *Domingues* is not dispositive to our case because, again, federal courts are not bound by state court decisions.

As a result of these cases, the advocate should support a defense raised under the ICCPR by analyzing the reservation's validity. Turning first to the language of the treaty, Article 4(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."¹⁷⁴ Although there is no formula to determine under what conditions a reservation may be valid, the Inter-American Court on Human Rights issued an opinion linking the non-derogable provisions of a treaty with the incompatibility principle of the Law of Nations.¹⁷⁵ In this advisory opinion, the court defined the incompatibility doctrine when it stated that a reservation violating a non-derogable right is incompatible with the object and purpose of the treaty and is therefore not permitted.¹⁷⁶ The Human Rights Committee, established under the ICCPR,¹⁷⁷ affirmed that some components of the death penalty reservation may be "incompatible with the object and purpose of the Covenant"¹⁷⁸ causing these reservations to be

172. *See id.* at 1280 (finding the U.S. Senate's express reservation negates Domingues's claim that he was illegally sentenced).

173. *See id.* at 1281 (Rose, J., dissenting) ("The penultimate issue that the district court should have considered is whether the Senate's reservation was valid.").

174. ICCPR, *supra* note 24, art. 4(2), 999 U.N.T.S. at 174.

175. *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).

176. *See id.* at ¶ 61, 23 I.L.M. at 341. The International Court of Justice also addressed the issue of reservations when it stated that a state declaring a reservation continues to be a party to the Genocide Convention if the reservation is compatible with the object and purpose of the Convention. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 29-30 (May 28) (advisory opinion). Advocates should argue that the United States is still a party to the ICCPR, but that its reservation is invalid. Professor Henkin states that the usual consequence of an invalid reservation is that the reservation "will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." *See* Henkin, *supra* note 122, at 350 n.11 (citing U.N. GAOR, Hum. Rts. Comm., ¶18, U.N. Doc. CCPR/C/21/Rev.1/Add.6, (1994)). Defendants, therefore, may assert a defense under Article Six because, in the absence of a valid reservation, the United States continues to be bound by this article.

177. *See* ICCPR, *supra* note 24, art. 28(1), 999 U.N.T.S. at 179 (establishing Human Rights Committee consisting of eighteen members who oversee the implementation of the ICCPR).

178. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg., ¶ 14, at 3, U.N. Doc.

invalid.¹⁷⁹ The Inter-American Court on Human Rights also discussed the object and purpose of treaties, stating that modern human rights treaties, such as the ICCPR, stand for the protection of “basic rights of individual human beings . . . against the State of their nationality and all other contracting States.”¹⁸⁰ In light of the above opinions, the Senate’s reservation is incompatible with the purpose of the treaty and signifies the United States’ non-compliance with its international obligations under Article Six.¹⁸¹

External to the language of the ICCPR and decisions interpreting specific reservations to Article Six, Article 19(c) of the Vienna Convention on the Law of Treaties establishes that a party may not formulate a reservation that is incompatible with the object and purpose of the treaty.¹⁸² Although the United States has not ratified the Vienna Convention, the State Department recognizes this treaty as a guide to international law and practice.¹⁸³

CCPR/C/79/Add.50 (1995).

179. *See id.* (noting the possible incompatibility of the Covenant). Professor Schabas also notes that if the United States’ reservation to the death penalty is invalid, rules governing whether the reservation may be severed from the remaining portions of the treaty have significant legal consequences for the parties involved. *See Schabas, supra* note 56, at 278.

180. *See* 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. Ct. H.R., ser. A: Judgments and opinions, No. 2, ¶ 29 (1982), at 22 I.L.M. 37, 47 (1983).

181. *See* Sherman, *supra* note 56, at 75 (discussing compatibility principle under Vienna Convention on the Law of Treaties). Note that the legal significance of an invalid reservation is unclear. If the invalid reservation cannot be separated from the remaining treaty, the United States is no longer a party. *See Schabas, supra* note 56, at 278. Eleven state parties objected to the United States’ death penalty reservation, agreeing that it was incompatible with the object and purpose of the ICCPR. *See* STATUS REPORT, *supra* note 28, at 139-43. These parties, however, did not view the reservation as an obstacle to their obligations under the treaty between them and the United States. *See* Sherman, *supra* note 56, at 75-76.

182. *See* Vienna Convention, *supra* note 59, art. 19(c), 1155 U.N.T.S. at 337. The Vienna Convention is unique because it governs the law and practice of treaties and does not regulate agreements between states in particular fields such as human rights or trade. *See id.* at art. 3, 1155 U.N.T.S. at 333.

183. The legal advisor to the State Department noted,

[w]hile the United States has not yet ratified the Vienna Convention on the Law of Treaties, [the United States] has consistently applied those of its terms which constitute a codification of customary international law. Most provisions of the Vienna Convention, including Articles 31 and 32 on matters of treaty interpretation, are declaratory of customary international law.

See Amicus Brief for Petitioner at 8, *Domingues v. Nev.*, 528 U.S. 963 (1999) (No. 98-8327) (quoting Marian I. Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT’L L. 142, 147 (1981) (citing *Commentary of the International Law Commission, United Nations Conference on the Law of Treaties*, A/Conf.39/11/Add.2, at 38 (1971))); *see also* RESTATEMENT, *supra* note 9, Part III, Introductory Note.

For the reasons discussed above, the advocate should argue that the United States' reservation to Article Six of the ICCPR is invalid. Only then will a court address the merits of the claim.

IV. ARGUMENT THREE: RECOGNIZING ARTICLE SIX AS A DEFENSE DOES NOT THREATEN THE INTEGRITY OF FEDERALISM OR THE SEPARATION OF POWERS DOCTRINE

The arguments reviewed thus far pertain to whether the ICCPR is self-executing and whether congressional intent prohibiting a private right of action only applies to affirmative claims and not defenses. These arguments form the primary basis upon which the advocate will argue for the court's recognition of a defense raised under the ICCPR. However, the advocate should also briefly address the court's Federalism and Separation of Powers concerns to ensure there are no other factors that will influence the court to abstain, in its discretion, from hearing the case.¹⁸⁴

A. *Separation of Powers and the Political Question*

It is well-established doctrine that claims arising under treaties fall within federal courts' original jurisdiction.¹⁸⁵ Indeed, many court decisions discussed throughout this primer involve the courts' interpretations of treaties and their assessments of private claims. When analyzing a claim under Article Six of the ICCPR, however, the court must delve into the validity of reservations and declarations that the executive and legislative branches have attached to the treaty.¹⁸⁶ The confluence of judicial, executive, and legislative decision-making

184. The brief arguments that follow are prophylactic because they do not form an essential part of the overall argument. The purpose of these additional arguments is to encourage the court to approach the interpretation of the ICCPR in the same manner it would any other treaty that does not involve an individual claim against a citizen's own government. As noted in the introduction, the ICCPR represents a rather new breed of treaty and the advocate should ensure that the Court interprets and renders a decision based on existing precedence.

185. See 28 U.S.C. § 1331 (1994). This statute establishes the original jurisdiction of the Court, including claims arising under federal laws and treaties, and uses the language of the Constitution. In addition, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), gives original jurisdiction to district courts when an alien brings a tort action against the United States for a tort committed in violation of the law of nations or a treaty.

186. For a detailed list of Supreme Court decisions that have interpreted treaties, categorized by the judicial make-up of the Court (the Rehnquist Court, for example), see David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1489 n.98 (1999). Professor Bederman also outlines the cases in which the Court interpreted the treaty with great deference to the executive branch and those fewer decisions in which the Court appeared to decide in a manner that was contrary to the federal government. See *id.* at 1466.

in this regard triggers an inquiry into the political question doctrine¹⁸⁷ and potential “separation of powers”¹⁸⁸ concerns.

The political question doctrine is judicially created and establishes that some legal issues lie beyond judicial resolution and require deference to Executive or Legislative actions.¹⁸⁹ Most relevant to our claim under the ICCPR is the six-prong “political question” test outlined in *Baker v. Carr*.¹⁹⁰ In *Baker*, the Supreme Court asserted that although cases, which are barred from judicial decision because they involve political questions vary, each case has “one or more elements which identify it as essentially a function of the separation of powers.”¹⁹¹ Under *Baker*, the Court asks if there exists: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) an “impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;” (4) an “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made;” or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹⁹² Each

187. See BLACK’S LAW DICTIONARY 1158-59 (6th ed. 1990). The political question doctrine is inextricably linked to the separation of powers. See *id.* It is because of the separation of powers that courts hold certain issues, which are committed to another branch of government, to lie beyond the scope of judicial review.

188. See *id.* at 1365 (defining separation of powers doctrine to mean that the court guards against the potential for one branch of government to encroach upon the domain or to exercise the powers of another branch).

189. The political question doctrine has a long history in the United States’ legal system. J. Peter Mulhern states that the doctrine originated in Chief Justice Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1988). Louis Henkin, however, analyzes whether a cohesive political question doctrine even exists. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 600 (1976). Nonetheless, Henkin agrees with Mulhern that “Marshall was speaking of such political questions as early as *Marbury v. Madison*.” *Id.* at 598 n.4. For a general account of the main cases discussing the political question doctrine, see LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-13, at 98 (2d ed. 1988).

190. 369 U.S. 186 (1962).

191. See *id.* at 217 (holding that a complaint alleging that a state statute effecting an apportionment in violation of the 14th Amendment is a justiciable constitutional cause of action, and did not present a nonjusticiable political question). The Court acknowledged, however, that there are several formulations and factors used in determining the existence of a political question, but only when one of these formulations is inextricably linked to the case itself will the court abstain from hearing the case. See *id.*

192. See *id.* The *Baker* case did not generally involve a treaty. See *id.* Voters from Tennessee brought an action to declare that the state’s apportionment statute violated the equal protection clause under the Fourteenth Amendment. See *id.* at 187-88. The Court held that the action was justiciable and did not present a political

of these factors will be addressed in turn.

The above factors are relevant to the present case involving the ICCPR because in similar treaty cases involving political questions courts have applied the Baker factors “to determine that provisions of self-executing treaties are fully justiciable.”¹⁹³

It is important to remember that generally the court’s interpretation of treaties, as the equivalent of federal statutes, falls squarely within the role of the courts.¹⁹⁴ The Court in *Japan Whaling Ass’n v. American Cetacean Society*¹⁹⁵ stated that “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”¹⁹⁶ The Second Circuit, however, limited the application of the *Baker* test when it held that factors four through six are only relevant if a judicial decision would contradict prior decisions made by a political branch.¹⁹⁷ The Second Circuit thought it best to use a case-by-case analysis to weigh the relevant considerations.¹⁹⁸ Any conflict between branches would need to

question. *See id.* at 237. The Court discussed foreign relations and explained that it is an error to assume that anything “touch[ing on] foreign relations lies beyond judicial cognizance.” *Id.* at 211.

193. Bederman, *supra* note 186, at 1483. The factors used by the Court in *Baker* focus on whether self-executing treaties are justiciable. *See id.* These factors are related to the discussion in Part II.B.3 of this Comment. This section discusses the ways in which a defense under Article Six of the ICCPR is easily justiciable. Part II.A.1 explains that the ICCPR is self-executing for the purpose of raising a defense under the treaty.

194. *See id.* at 1460-61. Professor Bederman lists several questions that courts may ask, and have traditionally asked, without abstention or deference to an executive branch position. *See id.* at 1460. These questions include “1. whether the domestic legal effect a particular treaty obligation was modified by reservation by the Senate; 2. whether a treaty is self-executing or non-self-executing, and if non-self-executing; whether a subsequent piece of legislation effectively implemented the agreement; and 3. whether as a matter of law, a treaty provision has been superseded by a subsequent statute (the ‘last in time’ doctrine).” *Id.* at 1460-61. The courts, however, have deferred to the executive branch on the following issues: “1. whether a treaty is invalid because our partner was incapable, by reason of the operation of the domestic law of that nation, to enter into the agreement; and 2. whether a treaty is terminated, suspended, or modified because of the breach of a treaty partner.” *Id.* at 1461.

195. 478 U.S. 221 (1986).

196. *Id.* at 230.

197. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). In this case, several groups of victims from Bosnia-Herzegovina brought claims under the Alien Tort Claims Act for violations of international law. *See id.* The court diverged from strict interpretation of the political question doctrine in *Tel-Oren* and stated that it did not view certain issues such as foreign relations categorically beyond judicial review. *See id.* Likewise, the court said that it should not invoke the doctrine to avoid difficult human rights issues. *See id.*

198. *See id.* at 249 (noting that even though the jurisdictional threshold may be satisfied, the other consideration relevant to justiciability must be weighed before a case can proceed).

seriously interfere with important governmental interests before the court could decline to hear the case.¹⁹⁹

The political question doctrine, as demonstrated by the courts' limited application,²⁰⁰ is an exception to the courts' responsibility to decide cases or controversies that are properly brought before it. A defense raised under the ICCPR does not fall into any of the factors listed in *Baker*,²⁰¹ and therefore, should not cause a court to abstain from deciding this case. A defense under the ICCPR passes the first *Baker* factor²⁰² because the Constitution grants original jurisdiction to the federal courts to hear cases arising under treaties.²⁰³ The power to decide claims arising under treaties is, therefore, not textually committed to another branch of the government.²⁰⁴ A defense under the treaty passes the second factor because, as the Second Circuit decided in *Filartiga v. Pena-Irala*,²⁰⁵ there are "universally recognized norms of international law that provide judicially discoverable and manageable standards for adjudicating suits."²⁰⁶ The defense passes the third part of the *Baker* test because policy determinations from a coordinate branch of the government are not necessary to decide this case.²⁰⁷ The Executive branch's explanations and Senate Committee reports support a defense under the ICCPR as discussed in this primer,²⁰⁸ and, therefore, the Court does not risk offending one of the coordinate branches of government. Finally, a defense under this

199. *See id.* (stating that not every case dealing with foreign relations is nonjusticiable).

200. *See* Bederman, *supra* note 186, at 1460-61 (explaining ways in which courts have interpreted treaties and circumstances under which courts defer to executive branch); *see also* *Kadic*, 70 F.3d at 249 (suggesting a limitation in abstention based on the political question doctrine).

201. *See Baker*, 369 U.S. at 186.

202. *See supra* Part II.C.

203. *See* U.S. CONST. art. III, cl. 2 ("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 . . .").

204. *See Baker*, 369 U.S. at 217 (listing "textually demonstrable commitment" as one of six factors).

205. 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, citizens of the Republic of Paraguay brought an action against another citizen of Paraguay for the wrongful death of their son resulting from torture. *See id.* at 878. The court held that torture "violates universally accepted norms of the international law of human rights . . ." *Id.* at 878.

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

207. *See id.* (explaining that claims under the Alien Tort Claims Act fell within the jurisdiction of the judicial branch and the issue was "constitutionally committed" to the court (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991))). The court used its authority to hear cases arising under the Constitution as evidence that the case passed the first three *Baker* factors. *See generally* discussion *supra* Part II.C.

208. *See* S. EXEC. REP. NO. 102-23, at 19 (1992) (stating that "U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."); *see also* discussion *supra* Part II (discussing raising a defense under ICCPR).

treaty satisfies the fifth and sixth factors²⁰⁹ because this primer argues that the political and executive branches *intended* for the courts to recognize this defense and there is therefore no risk of multiple or conflicting pronouncements on this issue by another governmental branch.²¹⁰

B. Concerns of Federalism

The jurisdiction of the federal government's treaty power is sweeping and "states' rights" place few limitations on this power.²¹¹ The Constitution states that "[a]ll 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, anything in the Constitution or Law of any State to the contrary notwithstanding."²¹² Since the inception of the United States, there has existed the idea that treaties are national acts that operate "independent of the will and power' of state legislatures."²¹³ Professor Jordan Paust believes that the intent of the founders indicates that treaties are meant to preempt and predominate over state action.²¹⁴

Article 50 of the ICCPR states: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."²¹⁵ Read literally, this provision of the ICCPR indicates that regardless of reservations or declarations, states must abide by the terms of the treaty. In addition, the non-self-executing declaration only applies to Articles 1 through 27.²¹⁶ Article

209. *See id.* (stating that factors four through six are only relevant if a court decision would contradict a particular determination by a coordinate branch of the government and that contradiction "would seriously interfere with important government interests").

210. *See* S. EXEC. REP. NO. 102-23, at 19 ("The intent is to clarify that the Covenant will not create a *private cause of action* in U.S. courts.") (emphasis added). As discussed in Part II of this Comment, a private right of action is not synonymous with a defense, which is not barred under this treaty.

211. *See* Henkin, *supra* note 122, at 345-48 (stating that there is little that is not within the jurisdiction of the United States' treaty power).

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

213. Paust, *supra* note 74, at 761 (explaining the founders' intent with respect to the treaty power). Professor Paust argues that when John Jay was Secretary of Foreign Affairs of the Confederation in 1787, he reported to Congress that a "treaty 'made, ratified and published by Congress, . . . immediately [became] binding on the whole nation, and superadded to the laws of the land . . .'" *Id.* at 760. Paust posits that Congress' adoption of the report indicates an early expectation that treaties should be self-executing. *See id.* at 761.

214. *See id.* at 764. Chief Justice Marshall affirmed this when he declared that both state and federal judges are "bound by duty and oath" to apply treaty law. *See id.* at 765-66.

215. ICCPR, *supra* note 24, art. 50, 999 U.N.T.S. at 185.

216. *See* STATUS REPORT, *supra* note 28, declaration (1), at 144.

50 appears, therefore, to be self-executing and must apply to the states.

Professor Paust²¹⁷ also provides a similar interpretation when he asserts that even if certain portions of human rights treaties are legitimately non-self-executing, “the treaties should still trump inconsistent state law under the Supremacy Clause of the United States Constitution and the doctrine of federal preemption.”²¹⁸ His argument draws strength from the Executive Explanation for the ICCPR, which states that the Covenant will apply to state and local authorities.²¹⁹

In a similar vein, the United States’ fifth understanding to the ICCPR explains that the state governments “may take the appropriate measures for the fulfillment of the Covenant” to the “extent that state and local governments exercise jurisdiction over such matters.”²²⁰ Professor Buergenthal’s interpretation based on the language of this understanding suggests that state courts may apply the Covenant directly to litigation that falls within the states’ jurisdiction.²²¹ Under this line of reasoning, if the state courts can properly adjudicate a case under the treaty, and therefore recognize an individual right and consider the treaty self-executing, the United States Supreme Court can hear the case on appellate review without posing federalist concerns to states’ rights.

CONCLUSION

Treaties are but one way to influence litigation in the United States.²²² Treaties may be used to guide interpretations of existing domestic legislation,²²³ or to assist courts in the application of

217. To the author’s knowledge, the interpretation of the treaty and the Supremacy Clause discussed in the text appears to have originated with Professor Paust.

218. Paust, *supra* note 19, at 323 n.108. Paust argues that under international law, non-self-executing reservations and declarations that are inconsistent with the object and purposes of the treaty are void and have no legal effect. *See id.* at 323. His arguments regarding the application of treaties to the states, however, is valid *even if* the non-self-executing declarations are otherwise valid and apply to the federal government. *See id.*

219. *See* S. EXEC. REP. NO. 102-23, *supra* note 29, at 18 (declaring that states “may take appropriate measures for the fulfillment of the Covenant”).

220. STATUS REPORT, *supra* note 28, Understanding (5), at 144.

221. *See* Buergenthal, *supra* note 72, at 222 (arguing that the treaty is self-executing for those provisions that involve matters that are within the jurisdiction of the state courts).

222. *See* de la Vega, *supra* note 74, at 423 (listing three ways, in addition to treaties, in which international human rights may be used in federal and state courts).

223. *See id.* For cases that have used treaties to aid in the interpretation of domestic statutes, see, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (applying the Warsaw Convention treaty in the absence of

customary international law. This primer has discussed one method for asserting a defense under the ICCPR. Arguments surrounding customary law, though important, should bolster, and not subsume, the role of treaties in upholding principles of international human rights in domestic courts. Treaties may be directly applied only when the United States has ratified them, and the ICCPR is one such treaty. Customary law, on the other hand, by its nature, is not codified and, therefore, is more difficult to enforce in domestic courts. This is not to suggest, however, that advocates should shy away from using customary international law in litigation. Instead, when the United States is a party to a treaty, the advocate should begin by directly applying the treaty to litigation and use customary law as further support.

As a final conclusion, the advocate should: (1) argue that the ICCPR is self-executing; (2) propose, in the absence of asserting that the ICCPR is self-executing in its entirety, the treaty is self-executing with respect to raising the treaty as a defense to executing juveniles; (3) assert that a defense under the ICCPR is easily justiciable, even in the absence of implementing legislation; (4) aver that the United States' reservation to Article Six of the ICCPR is invalid; and (5) claim that recognition of a defense under the ICCPR does not threaten the doctrines of federalism or the separation of powers.

Legislation); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (stating that the application of a U.S. statute should not violate a treaty); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (applying the United Nations Headquarters Agreement to the U.S. Anti-terrorism Act).