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# THE JUVENILE DEATH PENALTY AND INTERNATIONAL LAW

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ABSTRACT

*The United States is almost alone among nations in permitting the execution of juvenile offenders. Citing this fact, along with a variety of legal and historical materials, litigants and scholars are increasingly claiming that the United States' use of the juvenile death penalty violates international law. This Article examines the validity of this claim, from the perspective of both the international legal system and the U.S. legal system.*

*Based on a detailed examination of the United States' interaction with treaty regimes and international institutions since the late 1940s, the Article concludes that the international law arguments against the juvenile death penalty have significant weaknesses. As the Article documents, for a number of reasons, the United States has consistently declined to consent to treaty provisions restricting the juvenile death penalty, and it has consistently declared the human rights treaties that contain such restrictions to be non-self-executing. In addition, since at least the mid-1980s, the United States has persistently objected*

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*to—and thereby legally opted out of—any customary international law restriction on the juvenile death penalty.*

*The Article also argues that, even if the international law arguments against the juvenile death penalty were more persuasive, they would not provide a basis for relief in U.S. courts. For separation of powers reasons, courts properly will decline to apply international law to override the considered choices of the president and Senate in their ratification of treaties. In addition, because of concerns relating to both separation of powers and federalism, courts properly will decline to apply customary international law to override state criminal punishment, especially when (as is the case here) the political branches have expressly declined to do so by treaty. This potential gap between evolving international law norms and U.S. judicial enforcement is less disturbing than some commentators appear to assume—it simply means that the juvenile death penalty issue, like other difficult issues of social policy in the United States, must be resolved through U.S. democratic and constitutional processes.*

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## INTRODUCTION

There is substantial and growing international pressure on the United States to end or curtail its use of the death penalty. Most European nations have abolished the death penalty, and the European Union has become increasingly vocal in its criticism of the U.S. practice. For the last several years, the United Nations (UN) Commission on Human Rights has adopted resolutions calling upon nations to impose a moratorium on the death penalty. Many nations decline to extradite criminal suspects to the United States if the suspects will face the death penalty. And *amicus curiae* filings by international organizations in U.S. death penalty cases are now becoming routine.

Those who favor restriction of the U.S. death penalty are hopeful that this international pressure will have an effect on U.S. practice. In this respect, they have been encouraged by a number of recent developments within the United States that may suggest that the time is ripe for change. These developments include the softening of public support in the United States for the death penalty;[1] the moratoria on the death penalty imposed in Illinois and Maryland (and the subsequent commutation of death sentences by Governor Ryan in Illinois);[2] the exoneration of a number of death row inmates based on

1. Gallup polls indicated that public support for the death penalty had dropped to around 65 percent in the year 2001, down from a high in 1994 of 80 percent. Jim Yardley, *Number of Executions Falls for Second Straight Year*, N.Y. TIMES, Dec. 14, 2001, at A24. However, public support for the death penalty appeared to increase somewhat in late 2001 and early 2002. *See* Jeffrey M. Jones, *In-Depth Analysis: The Death Penalty* 4, *at* http://www.gallup.com/poll/analysis/ia020830iv.asp (Aug. 2002) (on file with the *Duke Law Journal*).

2. *See, e.g.*, Peter Finn, *Foreign Leaders Laud Move on Death Penalty in Illinois*, WASH. POST, Jan. 18, 2003, at A19; Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20; Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

DNA and other evidence;[3] concerns about the death penalty expressed publicly by the Supreme Court's sometimes swing vote, Justice O'Connor;[4] and the Supreme Court's recent decision holding that execution of the mentally retarded violates the Eighth Amendment.[5] Even with these developments, however, it is far from clear that international pressure will be sufficient to change U.S. practice in any significant way. The administration of the death penalty in the United States is largely decentralized, making nationwide change difficult to achieve. Furthermore, there is still significant public support in this country for capital punishment, and the recent softening of this support may not have much to do with international pressure. Indeed, the U.S. government and populace often seem to resist (or ignore) international pressure. The executions in 2001 of Timothy McVeigh and Juan Raul Garza—the first federal executions since 1963,[6] carried out in the face of substantial international criticism—illustrate the continuing U.S. commitment to this form of criminal punishment.[7]

Perhaps as a result of the limited effects of international political pressure, efforts are being made to convert this pressure into legal claims that are cognizable by U.S. courts. The most significant efforts in this regard have concerned the imposition of the death penalty on

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3. *See, e.g.*, Francis X. Clines, *Virginia Man Is Pardoned in a Murder; DNA Is Cited*, N.Y. TIMES, Oct. 3, 2000, at A20 (describing pardon of former death row inmate based on DNA evidence).

4. *See Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16 (commenting on Justice O'Connor's statements questioning the administration of the death penalty); *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9 (same).

5. Atkins v. Virginia, 536 U.S. 304, 350 (2002).

6. Death Penalty Information Ctr., *Execution of Federal Prisoners 1927–2001*, *at* http://www.deathpenaltyinfo.org/fedexec.html (last visited Nov. 8, 2002) (on file with the *Duke Law Journal*).

7. *See* Suzanne Daley, *The McVeigh Execution: The Reaction Abroad; Almost as One, Europe Condemns Execution*, N.Y. TIMES, June 12, 2001, at A20; Peter Slevin & Charles Lane, *Garza Turned Down by High Court, Bush; Late Efforts to Block Execution Fail*, WASH. POST, June 19, 2001, at A3. More recently, the death penalty has been a topic of international controversy with respect to U.S. efforts to obtain custody of and try individuals suspected of involvement in the September 11, 2001, terrorist attacks. Lee Dembart, *Death Penalty? Issue May Split Allies*, INT'L HERALD TRIB., Dec. 13, 2001, at 1; T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals*, WASH. POST, Nov. 29, 2001, at A23; Philip Shenon & Neil A. Lewis, *A Nation Challenged: The 20th Hijacker; France Warns It Opposes Death Penalty in Terror Trial*, N.Y. TIMES, March 28, 2002, at A14. Death penalty cases involving state breaches of the consular notice provisions of the Vienna Convention on Consular Relations have also generated international friction. *See, e.g.*, Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6 (reporting President Vincente Fox's decision to cancel a meeting with President Bush after the U.S. execution of a Mexican citizen).

individuals who commit their capital crimes while under the age of eighteen.[8] Despite arguments that juveniles are less culpable than adults, more susceptible to rehabilitation, and less likely to be deterred by the death penalty, the U.S. Supreme Court has held that it does not violate the Eighth Amendment to impose the death penalty on juvenile offenders, as long as those offenders are at least sixteen years of age at the time of the offense.[9] Currently, twenty-two of the thirty-eight U.S. states that provide for the death penalty permit the execution of juvenile offenders.[10] Internationally, however, the numbers look quite different. Of the approximately 193 nations in the world, only seven (including the United States) have executed juvenile offenders since 1990, and even some of these nations have recently moved to eliminate the practice.[11] Moreover, the other six countries—the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen[12]—are not necessarily the best of company with respect to human rights issues.

Citing these international statistics, as well as a variety of legal materials, juvenile offenders on death row are now challenging their capital sentences on the ground that the juvenile death penalty violates international law. These challenges are based on both treaties as well as "customary international law"—that is, the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[13] To date,

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8. As a shorthand, I sometimes refer in this Article to the execution of individuals who committed their offenses while under the age of eighteen as "juvenile executions" or as involving the "juvenile death penalty." Because of the amount of time involved in adjudicating U.S. death penalty cases, however, juvenile offenders are no longer juveniles at the time of their execution.

9. *See infra* text accompanying notes 46–61.

10. VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–DECEMBER 31, 2002, at 8, *at* http://www.law.onu.edu/faculty/streib/juvdeath.pdf (last visited Jan. 9, 2003) (on file with the *Duke Law Journal*).

11. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 709–10 (3d ed. 2001); AMNESTY INT'L, CHILDREN AND THE DEATH PENALTY: EXECUTIONS WORLDWIDE SINCE 1990, at 5–11, http://www.amnestyusa.org/abolish/children.pdf (Nov. 2000) (ACT 50/10/00) (on file with the *Duke Law Journal*).

12. AMNESTY INT'L, *supra* note 11 at 1.

13. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)].

courts have rejected these challenges.[14] Nevertheless, the issue does not appear to be settled: Several dissenting and concurring judges in these cases have taken the international law arguments seriously.[15] Furthermore, in a case from Nevada, the U.S. Supreme Court requested the views of the Solicitor General before ultimately denying review.[16] And at least two state appellate courts have issued stays of execution in cases raising these arguments.[17] There also has been substantial attention to this issue in the press, most of it sympathetic to the international law arguments.[18] In addition, numerous law review articles have addressed the validity of the U.S. juvenile death penalty, and almost all of them have concluded that this practice violates international law.[19] This is also the position of a number of human rights

14. *E.g.*, Hain v. Gibson, 287 F.3d 1224, 1242–44 (10th Cir. 2002); Beazley v. Johnson, 242 F.3d 248, 263–68 (5th Cir. 2001); *Ex parte* Pressley, 770 So.2d 143, 147–49 (Ala. 2000); *Ex parte* Burgess, 811 So.2d 617, 628–29 (Ala. 2000); Servin v. Nevada, 32 P.3d 1277, 1285–86 (Nev. 2001); Domingues v. Nevada, 961 P.2d 1279, 1280 (Nev. 1998); *see also* Roach v. Aiken, 781 F.2d 379, 380–81 (4th Cir. 1986) (refusing to stay an execution pending a decision by the Inter-American Commission on Human Rights concerning the legality of the juvenile death penalty).

15. *E.g.*, *Pressley*, 770 So.2d at 150–51 (Houston, J., concurring); *Burgess*, 811 So.2d at 630–32 (Houston, J., concurring); *Servin*, 32 P.3d at 1290–92 (Rose, J., concurring); *Domingues*, 961 P.2d at 1280–81 (Springer and Rose, JJ., dissenting). Justice Houston concurred rather than dissented in the Alabama cases because, although he believed that the United States was bound by treaty not to executive juvenile offenders, he also believed that the Supreme Court's denial of certiorari in *Domingues* indicated that the Court had a contrary view. *Pressley*, 770 So.2d at 151.

16. The Solicitor General argued that certiorari should be denied. *See* Brief for the United States as Amicus Curiae at 20, Domingues v. State of Nevada, 528 U.S. 963 (1999) (No. 98-8327) [hereinafter Domingues Brief].

17. Raymond Bonner, *Georgia Execution Is Stayed in Case of Youthful Offender*, N.Y. TIMES, Aug. 23, 2000, at A12; Ed Timms, *Beazley Stay May Not Be About Age*, DALLAS MORNING NEWS, Aug. 17, 2001, at 35A; Jim Yardley, *Texas Execution Is Halted by State Court of Appeals*, N.Y. TIMES, Aug. 16, 2001, at A10. The courts in these cases did not explain the basis for their stays, and it is not clear that the stays were in response to the international law arguments. Before the Texas court issued its stay, the U.S. Supreme Court denied a stay by a vote of 3-3, with the remaining three Justices recusing themselves because of connections they had to the victim's son (a federal judge). Beazley v. Johnson, 533 U.S. 969 (2001); Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES, Aug. 14, 2001, at A1. The Texas court subsequently lifted its stay, the U.S. Supreme Court once again denied a stay, Beazley v. Texas, 122 S. Ct. 2287 (2002), and the execution was carried out. Paul Duggan, *Killer of Judge's Father Executed; Texas Injects Man Charged in Carjack Murder at Age 17*, WASH. POST, May 29, 2002, at A6.

18. *See, e.g.*, Arianne Aryanpur, *U.S. Is Urged to Quit Executing Youthful Offenders*, L.A. TIMES, Sept. 26, 2002, at 21; Editorial, *End the Juvenile Death Penalty*, WASH. POST, Oct. 23, 2002, at A26; Editorial, *The Disgrace of Juvenile Executions*, N.Y. TIMES, Oct. 24, 2002, at A34. *But see* Jeff Jacoby, *The Myth of Executing Children*, BOSTON GLOBE, June 2, 2002, at E7 (suggesting that critics of the juvenile death penalty are using the issue opportunistically as part of a broader effort to end capital punishment).

advocacy groups, including Amnesty International, the Lawyers Committee for Human Rights, Human Rights Watch, the International Human Rights Law Group, and the Children's Defense Fund. And, in October 2002, the Inter-American Commission on Human Rights (a component of the Organization of American States based in Washington, D.C.) issued a decision concluding that the execution of juvenile offenders in the United States violates international law.[20]

Although important on its own terms, the juvenile death penalty issue may also have broader implications for the relationship between U.S. law and international human rights law. Litigants and scholars have met with at least modest success in attempting to have international human rights law incorporated into the U.S. legal system. This success, however, has primarily come in the context of civil lawsuits seeking damages for human rights abuses committed in foreign countries.[21] Increasingly, litigants and scholars are seeking to build on this success and persuade U.S. courts to apply international human rights law internally as a basis for overriding domestic laws and practices.[22] The juvenile death penalty has become a central focus of this effort, and the way in which the international law challenges are resolved in this context may have a significant impact on the viability of other attempts to "domesticate" international human rights law.

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19. *E.g.*, Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735 (1998); Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993); William A. Schabas, *Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793 (1999); David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT'L L. & POL'Y 339 (1988). There are also numerous student notes and comments reaching the same conclusion. *E.g.*, Erica Templeton, Note, *Killing Kids: The Impact of* Domingues v. Nevada *on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV. 1175 (2000). *But see* D. Kirk Morgan II, Comment, *The International Covenant on Civil and Political Rights: A New Challenge to the Legality of the Juvenile Death Penalty in the United States?*, 50 CATH. U. L. REV. 143 (2000) (arguing that the United States is not in violation of international law).

20. *See infra* note 254.

21. Beginning with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a number of courts have construed the Alien Tort Statute, 28 U.S.C. § 1350, as authorizing federal court jurisdiction over international human rights law cases. *See generally* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (discussing the history and current uses of the Alien Tort Statute).

22. *See generally* Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421 (2000) (describing this phenomenon).

This Article considers the international law arguments that have been made against the juvenile death penalty, from the perspective of both the international legal system and the U.S. legal system. Based on a detailed examination of the United States' interaction with treaty regimes and international institutions since the late 1940s, the Article concludes that the international law arguments have significant weaknesses. As the Article documents, for a number of reasons, the United States has consistently declined to consent to treaty provisions restricting the juvenile death penalty, and it has consistently declared the human rights treaties that contain such restrictions to be non-self-executing. In addition, since at least the mid-1980s, the United States has persistently objected to—and thereby legally opted out of—any customary international law restriction on the juvenile death penalty. Such a restriction could bind the United States, therefore, only if it developed before the mid-1980s, which is highly unlikely.

The Article also argues that, even if the international law arguments against the juvenile death penalty were more persuasive, they would not provide a basis for relief in U.S. courts. For separation of powers reasons, courts properly will decline to apply international law to override the considered choices of the president and Senate in their ratification of treaties. In addition, because of concerns relating to both separation of powers and federalism, courts properly will decline to apply customary international law to override state criminal punishment, especially when (as is the case here) the political branches have expressly declined to do so by treaty. This potential gap between evolving international law norms and U.S. judicial enforcement is less disturbing than some commentators appear to assume—it simply means that the juvenile death penalty issue, like other difficult issues of social policy in the United States, must be resolved through U.S. democratic and constitutional processes.

## I. THE UNITED STATES AND THE JUVENILE DEATH PENALTY

The juvenile death penalty has long been a feature of U.S. criminal punishment. Execution of juvenile offenders was permitted under the English, and subsequently the American, common law.[23] Children

23. *See* Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614–16 (1983) (discussing the history of capital punishment for juveniles). For a discussion of the Eng-

under the age of seven were conclusively presumed to have no criminal capacity.[24] That presumption was rebuttable for children aged seven to fourteen, and, if rebutted, the child could be convicted and subjected to adult punishment, including execution.[25] Individuals over the age of fourteen were treated as adults for purposes of criminal punishment.[26] The first reported execution of a juvenile offender in America was a 1642 execution in Plymouth Colony.[27] By 1800, 7 juvenile offenders had been executed; by 1900, 95 had been executed.[28]

Execution of juvenile offenders continued even after the rise of the juvenile justice system in the late 1800s and early 1900s.[29] From 1900 to 1930, 77 persons were executed for crimes committed while under the age of eighteen.[30] Throughout American history, approximately 365 persons have been executed for crimes committed while juveniles, which is slightly less than 2 percent of the total number of executions.[31] Most of these individuals were aged sixteen or over at the time of their offense, but some were younger, especially in the early years of the country's history.[32]

No juvenile executions were carried out in this country between 1965 and 1984,[33] in part because of the Supreme Court's 1972 decision in *Furman v. Georgia*[34] (and the decisions that led up to it), which effectively stopped any use of the death penalty in the United States for a number of years.[35] Between 1976, the year the Supreme Court al-

lish common law concerning juvenile responsibility for crime, see 4 WILLIAM BLACKSTONE, COMMENTARIES *22–24.

24. Streib, *supra* note 23, at 614.

25. *Id*.

26. *Id*.

27. The case involved a sixteen-year-old named Thomas Graunger, who was convicted of bestiality. ROBERT L. HALE, A REVIEW OF JUVENILE EXECUTIONS IN AMERICA 27, 35–36 (1997); VICTOR STREIB, DEATH PENALTY FOR JUVENILES 73 (1987).

28. Streib, *supra* note 23, at 616.

29. *Id.* at 616–19; HALE, *supra* note 27, at 70–71; STREIB, *supra* note 27, at 56.

30. Streib, *supra* note 23, at 617, 630.

31. STREIB, *supra* note 10, at 4.

32. *See* Streib, *supra* note 23, at 619 (providing a table of juvenile executions by age).

33. *See id.* (noting that, in 1983 when the article was published, no juvenile executions had been carried out since 1964); STREIB, *supra* note 10, at 4 (listing juvenile executions carried out since 1985).

34. 408 U.S. 238 (1972).

35. There were no legal executions of any kind in the United States between 1968 and 1976. THE DEATH PENALTY IN AMERICA 13 (Hugo Adam Bedau ed., 1997). For a discussion of the declining use of the death penalty in the United States in the years leading up to this period, see STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 208–230 (2002), and

lowed reinstatement of the death penalty,[36] and December 2002, twenty-one juvenile offenders were executed, which is approximately 2.6 percent of the total number of executions in this period.[37] One of these individuals was sixteen at the time of his offense; the rest were all seventeen.[38] The age of the offenders at the time of their execution ranged from twenty-three to thirty-eight.[39]

As noted, twenty-two of the thirty-eight states that have the death penalty currently allow for the execution of juvenile offenders.[40] As of December 2002, there were approximately eighty inmates, in fifteen states, on death row under sentences received for crimes committed while under the age of eighteen.[41] This was approximately 2 percent of the total death row population of about 3,700.[42] Four juvenile offenders were executed in the year 2000—two in Texas and two in Virginia.[43] Only one juvenile offender was executed in 2001, in Texas.[44] Three juvenile offenders were executed in 2002, all in Texas.[45]

In two decisions, the Supreme Court has considered whether the imposition of capital punishment on juvenile offenders violates the prohibition in the Eighth Amendment against "cruel and unusual punishments" (as applied to the states through the Due Process Clause of the Fourteenth Amendment).[46] In the first decision,

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FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 26–49 (1986).

36. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (holding that the death penalty can be imposed if the jury's discretion is properly channeled).

37. STREIB, *supra* note 10, at 4.

38. *Id*.

39. *Id.* For additional discussion of the statistics associated with the juvenile death penalty, see LYNN COTHERN, COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES AND THE DEATH PENALTY, *at* http://www.ncjrs.org/html/ojjdp/coordcouncil (Nov. 2000) (on file with the *Duke Law Journal*).

40. *See supra* note 10 and accompanying text.

41. STREIB, *supra* note 10, at 13; Death Penalty Information Center, *Juveniles and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/juvchar.html (last visited February 1, 2003) (on file with the *Duke Law Journal*).

42. STREIB, *supra* note 10, at 13.

43. *Id.* at 4.

44. *Id*.

45. *Id*.

46. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The issue also was raised in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court did not reach the issue in that case, however, because it reversed the death sentence on other grounds. *See id.* at 113–17 (remanding for full consideration of mitigating and aggravating factors). It did hold, however, that the sentencer may

*Thompson v. Oklahoma*,[47] a plurality of four Justices concluded that it would violate the Eighth Amendment to execute an individual who was only fifteen years of age at the time of his or her offense.[48] These Justices cited age requirements in a variety of state laws, as well as the actions of prosecutors and juries, as supporting the conclusion that "such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[49] This conclusion was further supported, reasoned these Justices, by the views of organizations such as the American Bar Association and American Law Institute, and by the practices of other nations.[50] In a footnote, these Justices noted that several treaties—the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Fourth Geneva Convention—prohibit the execution of juvenile offenders.[51]

The fifth vote to vacate the death sentence in *Thompson* was provided by Justice O'Connor. In her concurrence, she expressed the view that "a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist," but she said that she was "reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess."[52] Instead, she concluded that the death sentence in the case should be set aside because Oklahoma had not specified a minimum age in its death penalty statute, but instead had simply stated in a different statute that fifteen-year-old murder defendants may be treated as adults in some circumstances.[53] This omission, reasoned Justice O'Connor, meant that there was "considerable risk that the Okla-

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not be precluded from considering "any relevant mitigating evidence," including the youth of the offender, in deciding whether to impose the death penalty. *Id.* at 114.

47. 487 U.S. 815 (1988).

48. *Id.* at 838.

49. *Id.* at 823.

50. *See id.* at 830–31 (noting the opposition of these organizations and nations to the juvenile death penalty). In his dissent, which was joined by Chief Justice Rehnquist and Justice White, Justice Scalia argued that looking to the practice of other nations

> is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding.

*Id.* at 868 n.4 (Scalia, J., dissenting).

51. *Id.* at 831 n.34. I discuss these treaties in Part II.

52. *Id.* at 848–49 (O'Connor, J., concurring).

53. *Id.* at 857–59.

homa Legislature either did not realize that its actions would have the effect of rendering fifteen-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for the death penalty."[54]

The Supreme Court returned to the issue of the juvenile death penalty the following Term in *Stanford v. Kentucky*.[55] In that decision, the Court held, in an opinion authored by Justice Scalia, that the Eighth Amendment does not prohibit the execution of an individual who committed his or her crime at the age of sixteen or seventeen.[56] In the first footnote of the opinion, the Court stated that "it is *American* conceptions of decency that are dispositive," and thereby rejected the contention that the practices of other nations were relevant to its analysis.[57] The Court proceeded to review state and federal death penalty laws and practice, and it concluded that no national consensus could be found against the execution of juvenile offenders.[58]

These two decisions make clear that, under current doctrine, there is no Eighth Amendment prohibition against executing individuals who are at least sixteen years of age at the time of their offense. Given the lack of a majority opinion in *Thompson*, it is less clear whether the Eighth Amendment categorically forbids execution of individuals who commit their offense while under the age of sixteen. In theory, this issue could be tested at some point, since a number of states still do not have statutory minimum age requirements for the death penalty.[59] In practice, however, this issue is unlikely to arise,

54. *Id*.

55. 492 U.S. 361 (1989).

56. *Id.* at 380.

57. *Id.* at 369 n.1. The Court suggested that, if there were a widespread practice in the United States *against* the execution of juvenile offenders, then the practice of other nations, especially other democracies, could be relevant in determining whether the U.S. practice was "not merely a historical accident," but, rather, "'implicit in the concept of ordered liberty.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice Brennan's dissent, which was joined by three other Justices, cited the laws and practices of other nations, as well as several treaties that prohibit the execution of juvenile offenders. *See id.* at 389–90 (Brennan, J., dissenting). His dissent also cited nonbinding United Nations resolutions on the subject. *Id.* at 390 n.10.

58. *Id.* at 370–73. Most of the opinion, including the language about looking only to American conceptions of decency, was written on behalf of a majority of the Court. A number of commentators have nevertheless referred to the opinion as a "plurality," or as simply reflecting the views of Justice Scalia. *E.g.*, de la Vega & Brown, *supra* note 19, at 737–39; Nanda, *supra* note 19, at 1320, 1325–27, 1332.

59. STREIB, *supra* note 10, at 8.

at least in the near future: none of the juvenile offenders executed since 1976, and none of the juvenile offenders currently on death row, was under sixteen years of age at the time of his offense.[60] State prosecutors appear to be treating *Thompson* as if it sets a minimum age requirement of sixteen.

Although *amicus curiae* briefs were filed in *Thompson* and *Stanford* raising international law arguments,[61] none of the various opinions in those cases discussed these arguments. The closest they came was in their discussion of the relevance of international practice to the Eighth Amendment analysis,[62] a somewhat different issue. Thus, these decisions do not themselves foreclose an international law challenge to the juvenile death penalty, although they might provide some indication of the receptivity of particular Supreme Court Justices to such a challenge. It is therefore not surprising, given the state of the case law, that prisoners and human rights groups are increasingly relying on international law, rather than U.S. constitutional law, to challenge the juvenile death penalty.[63]

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60. *Id.* at 4 tbl.1.

61. *See generally* Brief of the Office of the Capital Collateral Representative for the State of Florida as *Amicus Curiae* at 18–20, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-5765); Brief for Amicus Curiae International Human Rights Law Group, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169).

62. *See supra* notes 50–51, 57, and accompanying text.

63. It is possible, of course, that the Supreme Court will reconsider its decision in *Stanford v. Kentucky*. Recently, a majority of the Court concluded that the execution of the mentally retarded violates the Eighth Amendment. Atkins v. Virginia, 536 U.S. 304, 350 (2002). In reaching this conclusion, the Court briefly referred to international practice. *Id.* at 347 n.21. And, in a recent dissent from the denial of certiorari in a death penalty case, four Supreme Court Justices called for reconsideration of *Stanford v. Kentucky* in light of the *Atkins* decision. *In re* Stanford, 123 S. Ct. 472 (2002) (Stevens, J., dissenting) (contending that the reasons supporting the *Atkins* decision "apply with equal or greater force to the execution of juvenile offenders"). On the other hand, the majority in *Atkins* expressly distinguished the juvenile death penalty from the execution of the mentally retarded, noting that there had been little reduction in state laws allowing for the juvenile penalty since the *Stanford* decision. 536 U.S. at 347 n.18. As a result, the Supreme Court may be unlikely to reconsider *Stanford* in the absence of a significant reduction in the number of state laws allowing for the juvenile death penalty.

Notwithstanding *Stanford*, state constitutions and statutes can still be interpreted to prohibit juvenile executions. *See, e.g.*, Brennan v. State, 754 So.2d 1, 7–9 (Fla. 1999) (concluding that a Florida statute allowing for the juvenile death penalty violated the Florida constitution); State v. Furman, 858 P.2d 1092, 1102–03 (Wash. 1993) (construing the Washington state death penalty statute as not applying to juveniles). In November 2002, voters in Florida approved a state constitutional amendment that may have the effect of reinstating the juvenile death penalty in that state. The amendment changes the state's constitutional standard for "excessive punishment" from "cruel *or* unusual" to "cruel *and* unusual," thus mirroring the Eighth Amendment standard in the federal Constitution. FLA. CONST. art. I, § 17; *Florida Capital News, Voters Approve Death Penalty Amendment* (Nov. 6, 2002), *at* http://www.floridacapital

The international law claims can be divided into two categories: claims based on treaties, and claims based on customary international law. I consider these claims in Parts II and III and conclude that they are unpersuasive in light of well-settled international law requirements relating to state consent. As I explain, the record of U.S. interactions with treaty regimes and international institutions since World War II shows the United States has not consented, even implicitly, to a ban on the juvenile death penalty. Furthermore, there is no basis under international law for imposing such a ban on the United States in the absence of its consent. In Part IV, I argue that, even if the international law claims were valid under international standards, they would not provide a right to relief in U.S. courts.

## II. TREATY CLAIMS

The international law challenge to the U.S. juvenile death penalty encompasses a variety of arguments. As might be expected, the challenge begins with a reference to U.S. treaty commitments. Although there are a number of treaties that contain references to the juvenile death penalty, the principal treaty relied upon by those who challenge the U.S. practice is the International Covenant on Civil and Political Rights (ICCPR). This Part examines the arguments relating to the ICCPR in detail, and then briefly considers other potential treaty claims.

### *A. International Covenant on Civil and Political Rights*

The ICCPR, which contains a wide-ranging list of individual rights, is considered by many to be "the cornerstone of modern international human rights law."[64] The United States ratified the ICCPR in 1992, so there is little dispute that the treaty is binding on this country. Furthermore, the ICCPR contains a provision specifically prohibiting the execution of juvenile offenders: Article 6 of the ICCPR, which addresses the right to life and contains a partial exception to that right for the death penalty, states in Subsection 5 that "[s]entence of death shall not be imposed for crimes committed by persons below

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news.com/campaign/stories/110602amend1.htm> (last visited February 1, 2003) (on file with the *Duke Law Journal*).

64. 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, 277 (1995).

eighteen years of age and shall not be carried out on pregnant women."[65]

Given this provision, as well as the U.S. Constitution's inclusion of treaties in its list of supreme federal law,[66] the ICCPR argument looks promising at first glance. It turns out, however, to have significant difficulties. Most importantly, the U.S. ratification of the treaty was subject to a series of "reservations, understandings, and declarations," or RUDs.[67] These RUDs include the following provision specifically reserving the right to continue imposing the death penalty on juvenile offenders:

> [T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.[68]

These RUDs were proposed by the president, adopted by the Senate as a condition of its advice and consent to the ICCPR, and included with the U.S. instrument of ratification deposited with the United Nations.[69] Thus, despite its ratification of the ICCPR, the United States has expressly declined to agree to the prohibition in the ICCPR on juvenile executions. As a result, conventional international law analysis would suggest that the United States' use of the juvenile death penalty does not violate the ICCPR. In the words of the International Court of Justice, "[i]t is well established that in its treaty relations a state cannot be bound without its consent."[70]

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65. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 5, S. EXEC. DOC. E, 95-2, at 25 (1978), 999 U.N.T.S. 171, 173 (ratified by the United States on June 8, 1992) [hereinafter ICCPR]. The drafters of the ICCPR rejected a proposal by the Soviet Union to prohibit capital punishment. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 150–52 (2001).

66. *See* U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

67. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8070 (Apr. 2, 1992) [hereinafter U.S. RUDs].

68. *Id.*

69. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 404 (2000) (detailing the U.S. treatymaking process and the role of proposed conditions in the ratification of treaties).

70. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28); *see also* Vienna Convention on the Law of Treaties, art.

### *B. Validity of the Juvenile Death Penalty Reservation*

Unlike in some treaties, there is no provision in the ICCPR specifically prohibiting reservations.[71] And, indeed, many nations attached reservations to their ratification of the ICCPR. For example, the United Kingdom broadly reserved the right to deviate from the ICCPR in regulating its armed forces and in immigration matters; Belgium reserved the right to engage in sex discrimination with respect to the exercise of royal powers; and France refused to accept Article 27 of the ICCPR, which prohibits denying ethnic, religious, or linguistic minorities the right "to enjoy their own culture, to profess and practice their own religion, or to use their own language."[72]

Commentators and litigants have argued, however, that the U.S. reservation concerning the juvenile death penalty should be disregarded on the ground that it is contrary to the "object and purpose" of the ICCPR.[73] This argument is based on the Vienna Convention on

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34, May 23, 1969, 1155 U.N.T.S. 331, 341 ("A treaty does not create either obligations or rights for a third State without its consent."); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 28 (1995) ("For treaties, consent is essential. No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it."); William W. Bishop, Jr., *Reservations to Treaties*, 2 RECUEIL DES COURS 245, 255 (1961) ("The fundamental basis remains, that no state is bound in international law without its consent to the treaty. This is the starting point for the law of treaties, and likewise for our international rules dealing with reservations."); *cf.* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (1927) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . .").

71. By contrast, the Second Optional Protocol to the ICCPR, which calls for the abolition of the death penalty, states that "[n]o reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, art. 2(1), G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/Res.44.128 (1989) (entered into force July 11, 1991), *reprinted in* 29 I.L.M. 1464 (1990). Only 46 nations have ratified this Protocol, and the United States is not one of them. United Nations Treaty Collection, *at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty17.asp (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*). Another treaty disallowing reservations is the treaty establishing the permanent International Criminal Court. *See* Rome Statute of the International Criminal Court, July 17, 1988, art. 120, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999, 1066 (1998), corrected through July 1999 by U.N. Doc. PCNICC/1999/INF/3 ("No reservations may be made to this Statute.").

72. For these and other reservations to the ICCPR, see the United Nations Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*).

73. A number of the points made in this Section concerning the juvenile death penalty are drawn from the more general discussion of treaty reservations in Bradley & Goldsmith, *supra* note 69.

the Law of Treaties—a treaty that regulates the standards for treaty ratification, interpretation, and termination.[74] This Convention came into force in 1980 and has now been ratified by ninety-four nations.[75] Although the United States has not ratified the Convention, Executive Branch officials have stated that they accept at least much of the Convention as reflecting binding customary international law,[76] and U.S. courts often have looked to the Convention for guidance on the law of treaties.[77] Article 19 of the Convention states that reservations are not allowed, even if they are not expressly prohibited by a treaty, if they are "incompatible with the object and purpose" of the treaty.[78]

The ICCPR's Human Rights Committee—a monitoring body established pursuant to the treaty[79]—has issued two comments that provide support for the object and purpose argument. In a comment on U.S. human rights practices, issued in 1995, the Committee stated, without explanation, that it believed that the U.S. reservation concerning the juvenile death penalty was inconsistent with the object

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74. *See* Vienna Convention on the Law of Treaties, *supra* note 70, art. 19, 1155 U.N.T.S. at 336–37 (stating that a nation may formulate a reservation unless "the reservation is incompatible with the object and purpose of the treaty").

75. United Nations Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/english internetbible/partI/chapterXXIII/treaty1.asp (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*).

76. RESTATEMENT (THIRD), *supra* note 13, at 145 & n.2; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 298–99 (1988); *see also* Domingues Brief, *supra* note 16, at 8 n.3 (stating that the Vienna Convention "is generally considered to be consistent with current treaty law and practice as recognized in the United States"). In submitting the proposed Convention to the President, Secretary of State William Rogers noted that the Convention "sets forth a generally agreed body of rules to govern all aspects of treaty making and treaty observance." S. EXEC. DOC. L, 92-1, at 1 (1971) (Message of the President of the United States transmitting the Vienna Convention on the Law of Treaties).

77. *E.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000); Kreimerman v. Casa Veerkamp, S.A., 22 F.3d 634, 638 (5th Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714–15 (9th Cir. 1992). *See generally* Frankowska, *supra* note 76, at 307–80 (explaining that the Vienna Convention has been relied on or referred to by United States courts rendering treaty decisions).

78. Vienna Convention on the Law of Treaties, *supra* note 70, art. 19, 1155 U.N.T.S. at 336–37. In submitting the proposed Convention to the President, the Secretary of State observed that the object and purpose rule "is widely recognized in customary international law." S. EXEC. DOC. L, 92-1, *supra* note 76, at 2.

79. ICCPR, *supra* note 65, art. 28, S. EXEC. DOC. E, 95-2, at 31, 999 U.N.T.S. at 179.

and purpose of the ICCPR.[80] In a general comment issued a year earlier, in 1994, the Committee had concluded that reservations that violate the object and purpose of the ICCPR should generally be considered severable, "in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."[81] The Committee also expressed the view that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant."[82] When combined, these two comments suggest that the U.S. juvenile death penalty reservation is invalid, and that the proper remedy for this invalidity is to enforce the ICCPR against the United States as if it had never included the reservation.

Both of these conclusions, it turns out, are highly questionable. Before considering the merits of these conclusions, however, it is important to understand the Committee's limited authority. The Committee is not a judicial body, and it has no official power to resolve disputes or issue binding legal interpretations. It is instead charged with receiving reports submitted by nations under the ICCPR's self-reporting provisions, and with issuing "such general comments as it may consider appropriate."[83] The United States did state in a declaration that it attached to its ratification of the ICCPR that it accepted the competence of the Committee "to receive and consider communi-

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80. *Comments on United States of America*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. ¶ 14, U.N. Doc. CCPR/C/79/Add.50 (1995). The U.S. representative on the committee abstained from voting on this comment concerning his country, as is customary. The Committee also stated that the U.S. reservation to Article 7 of the ICCPR was incompatible with the object and purpose of the treaty. *Id*. Article 7 provides in relevant part that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, *supra* note 65, art. 7, S. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 175. The U.S. reservation provided that "the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." U.S. RUDs, *supra* note 67, at 8070.

81. *General Comment 24(52)*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The United States did not have a representative on the committee when this comment was issued.

82. *Id*.

83. ICCPR, *supra* note 65, art. 40(4), S. EXEC. DOC. E, 95-2, at 34, 999 U.N.T.S. at 182. The one hundred nations that have ratified the First Optional Protocol to the ICCPR have agreed to have the Committee "receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant." Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, art.1, 999 U.N.T.S. 302, 302 (1966) (entered into force Mar. 23, 1976). The United States has not signed or ratified the First Optional Protocol.

cations" under Article 41 of the ICCPR, which governs situations in which one nation claims that another nation is not fulfilling its obligations under the ICCPR.[84] But there is no suggestion in this declaration that the United States was delegating any binding interpretive authority to the Committee. And Article 41 itself states only that, if the parties cannot work out the complaint, the Committee can issue a "report" on the matter, which it will "communicate" to the parties.[85] The Committee's views, therefore, are not legally binding on the United States as a matter of international law.[86]

1. *Object and Purpose*. To analyze the object and purpose argument, some background is necessary. Nations have made reservations to treaties since the end of the eighteenth century.[87] International law traditionally imposed strict limitations on the ability of nations to make a reservation and still become a party to a treaty. In a bilateral treaty, a reservation was treated like a counteroffer under domestic contract law; both parties to the treaty had to agree to every reservation before the treaty became valid.[88] For multilateral treaties, the traditional rule was that a reserving state was not a party to a treaty unless every other party to the treaty accepted the reservation.[89]

With the expansion of multilateral treatymaking after World War II, there was concern that the unanimity rule was insufficiently

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84. U.S. RUDs, *supra* note 67, at 8071; ICCPR, *supra* note 65, art. 41(1), S. EXEC. DOC. E, 95-2, at 34, 999 U.N.T.S. at 182.

85. ICCPR, *supra* note 65, art. 41(1)(h)(ii), S. EXEC. DOC. E, 95-2, at 35, 999 U.N.T.S. at 183.

86. *See* Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 299 (1999) ("In order for the Committee to have legal authority over the reservations submitted by states parties, the express consent of the states parties would be required through ratification of an amendment to the Covenant or some similar means."). A chairperson of the Committee has stated that, "[w]hile the general comment did not suggest that the Committee's interpretations were binding, the Committee hoped they would be given careful consideration by State parties." *Summary Record*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1406th mtg. ¶ 3, U.N. Doc. CCPR/C/SR.1406 (1995). Although U.S. courts have sometimes looked to the Committee's views when interpreting the ICCPR, they have done so "only for guidance, *not* to void an action by the Senate." Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001).

87. In the United States, the first reservation to a bilateral treaty was the U.S. Senate's reservation to the Jay Treaty in 1794. An early example of a reservation to a multilateral treaty was Sweden-Norway's reservation to certain parts of the Act of the Congress of Vienna in 1815. Bishop, *supra* note 70, at 260–62.

88. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 54 (1973).

89. *Id.* at 54–56.

flexible and that it thwarted maximum participation in multilateral treaties.[90] Such flexibility was thought to be essential for the making of treaties, especially human rights treaties, among an increasingly large number of countries that were politically and culturally diverse.[91] In 1951, the International Court of Justice (ICJ) embraced a more flexible approach to reservations in its advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[92] The ICJ reasoned that the aim of securing widespread ratification of the Genocide Convention necessitated a more relaxed approach to reservations. It explained that, with respect to such a treaty, "one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."[93] The ICJ therefore held that a reserving state could be a party to the Genocide Convention even if some parties to the Convention objected to the reservation. The ICJ stated, however, that if a state makes a reservation incompatible with the object and purpose of the Genocide Convention, the state "cannot be regarded as being a party to the Convention."[94]

The Vienna Convention on the Law of Treaties, which was opened for signature in 1969 and entered into force in 1980, codified a flexible approach to reservations similar to the one outlined in the *Genocide Convention* decision. As noted, Article 19 of the Vienna Convention allows a party to formulate a reservation to a treaty unless the treaty prohibits reservations or "the reservation is incompatible with the object and purpose of the treaty."[95] Articles 20 and 21 then establish rules for acceptance or rejection of reservations, and the consequences that follow from acceptance or rejection. When a treaty party accepts another nation's reservation, the reserving nation becomes a party to the treaty in relation to the accepting nation.[96] A reservation is deemed accepted by any nation that does not raise an objection to the reservation within twelve months of notification of the reservation, or by the date on which it expressed its consent to be

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90. Bradley & Goldsmith, *supra* note 69, at 431.
91. *Id*.
92. 1951 I.C.J. 15 (May 28).
93. *Id.* at 23.
94. *Id.* at 29.
95. *See supra* note 78 and accompanying text.
96. Vienna Convention on the Law of Treaties, *supra* note 70, art. 20(4)(a), 1155 U.N.T.S. at 337.

bound by the treaty, whichever is later.[97] An objection to a reservation does not preclude entry into force of the treaty between the reserving and the objecting nation unless the objecting nation says so definitively; rather, the provision to which the reservation relates is simply inapplicable between the two nations to the extent of the reservation.[98] This flexible approach, as the United Nations' International Law Commission has explained, is designed to encourage widespread participation in treaty regimes.[99]

Arguably, the Vienna Convention leaves the determination of whether a reservation violates the object and purpose of a treaty to the treaty parties.[100] Under this approach, the U.S. reservation is almost certainly valid. Only 11 of the 147 nations that are parties to the ICCPR formally objected to the United States' juvenile death penalty

97. *Id.* art. 20(5).

98. *Id.* art. 21(3).

99. The International Law Commission, in its comments on the draft terms of the Vienna Convention, explained that "a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty." *Report of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 169, 205, U.N. Doc. A/CN.4/SER.A/1966/Add.1. *See generally* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 508–14 (1970) (discussing the history of the provisions in the Vienna Convention relating to reservations).

100. In its commentary on the draft provision of the Vienna Convention containing the object and purpose limitation, the International Law Commission explained that the admissibility of a reservation "is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States." *Report of the Commission to the General Assembly*, *supra* note 99, at 207. Moreover, in the debates over the reservations provisions of the Vienna Convention, the delegates, like the International Law Commission, rejected a "collegiate" approach, pursuant to which a certain proportion of the parties to the treaty would have to approve a reservation, in favor of a "flexible" approach, pursuant to which each party would decide for itself whether to approve the reservation. *See United Nations Conference on the Law of Treaties, Official Records*, 1st Sess., 24th mtg. at 125–36, U.N. Doc. A/Conf.39/11 (1969); *United Nations Conference on the Law of Treaties, Official Records*, 2nd Sess., 10th Mtg. at 29–30, U.N. Doc. A/Conf.39/11/Add.1, at 29–30 (1970). Under the flexible approach, it is "for each state individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty." SINCLAIR, *supra* note 88, at 61. Some international law commentators have argued, however, that a reservation that violates the object and purpose of a treaty does not become valid merely because the other parties to the treaty accept it. *See* Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y.B. INT'L L. 245, 263–69 (1993) (summarizing the debate over this issue). Even if one accepts this argument, it still might make sense to consider the responses of the treaty parties in evaluating whether a reservation is in fact incompatible with the object and purpose of a treaty. In any event, as a practical matter, in the absence of an authoritative independent adjudication, "it is up to the individual appreciation of States whether a reservation is compatible with the object and purpose of the treaty." *Id.* at 264.

reservation.[101] These numbers stand in sharp contrast, for example, to the standard specified in the International Convention on the Elimination of All Forms of Racial Discrimination, pursuant to which a reservation is considered incompatible with the object and purpose of that treaty if *two-thirds* of the parties to the treaty object to it.[102] Moreover, none of the objections to the U.S. reservation was made within the twelve-month period for objections specified in the Vienna Convention.[103] Under the terms of the Vienna Convention, therefore, the U.S. reservations are deemed accepted. In addition, none of the nations that objected to the reservation refused to be a party to the treaty with the United States as a result of the reservation. The Vienna Convention therefore suggests that, at worst, the United States is a party to the treaty and the juvenile death penalty provision simply does not apply between the United States and the objecting nations.

Even if a more objective test should be imposed, independent of the reactions of the treaty parties, the U.S. reservation would probably satisfy such a test. The ICCPR contains a long list of civil and political rights relating to a wide range of issues, including self-determination, criminal procedure, equal treatment, privacy, and religious freedom. Only one subpart of one article in the treaty addresses the juvenile death penalty. This structure suggests that it was not a central purpose of the ICCPR to prohibit the execution of juvenile offenders. By contrast, the Genocide and Torture Conventions, for example, are both designed to protect a single, overwhelmingly important right.[104] If the United States had ratified those treaties while

101. For documentation of this point, see the United Nations Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*).

102. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 20(2), S. EXEC. DOC. C, 95-2, at 10–11 (1978), 660 U.N.T.S. 195, 236 (entered into force Jan. 4, 1969). There are currently 159 parties to this Convention; thus, more than 100 nations would have to object to a reservation for it to be deemed to violate the Convention's object and purpose under this two-thirds test. United Nations Treaty Collection, *at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty2.asp (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*).

103. Vienna Convention on the Law of Treaties, *supra* note 70, art. 20(5), 1155 U.N.T.S. at 337; United Nations Treaty Collection, *at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty2.asp (last visited Jan 14, 2003) (on file with the *Duke Law Journal*).

104. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

reserving the right to commit genocide or torture, the reservations presumably would have violated the treaties' object and purpose, for little would remain of the obligations under the treaty. But much remains of the United States' obligations under the ICCPR even if the United States is not bound by the juvenile death penalty provision.

2. *Other Challenges*. Another argument that is sometimes made in this context is that the U.S. reservation is invalid because the juvenile death penalty provision is one of a number of treaty provisions declared by the ICCPR to be "nonderogable."[105] As the ICCPR makes clear, however, "derogability" concerns the ability of nations to deviate, in time of emergency, from treaty obligations that *they have already adopted*; it does not concern the ability of nations to reserve out of treaty provisions in the first instance.[106] Moreover, some provisions are deemed nonderogable "merely because their suspension is irrelevant to the legitimate control of national emergency by the state" or because such suspension "is impossible to control."[107] A reservation to a nonderogable treaty provision, therefore, does not necessarily violate the object and purpose of the treaty. Even the ICCPR's Human Rights Committee has agreed with this point.[108] In addition, although the United States was the only nation that adopted a reservation with respect to the juvenile death penalty, a number of

105. *See* ICCPR, *supra* note 65, art. 4(2), S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174 (stating that no derogation is allowed "from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18").

106. *Id.* art. 4(1) (allowing nations to derogate "from their obligations under the present Covenant").

107. Schabas, *supra* note 64, at 294.

108. *See General Comment 24(52)*, *supra* note 81, ¶ 10 (noting that "there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant"). The Inter-American Court of Human Rights, based in Costa Rica, has issued an advisory opinion stating that reservations to the "non-derogable fundamental rights" of the American Convention on Human Rights are inconsistent with the object and purpose of that treaty. Restrictions to the Death Penalty (Articles 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), *reprinted in* 23 I.L.M. 320, 341 (1984). The Court appears to have had in mind a class of rights narrower than all of the nonderogable rights. Moreover, the Court distinguished between reservations that allow for a total deprivation of a fundamental right, and reservations that are designed "merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose." *Id*. Under this analysis, it can be argued that the U.S. reservation to the juvenile death penalty provision—one subpart of the right to life provisions of Article 6 of the ICCPR—merely restricts certain aspects of the fundamental right to life, and does not deprive the right of its basic purpose. In any event, the United States is not a party to the Inter-American Court or the American Convention.

other nations adopted reservations with respect to other nonderogable treaty provisions, further suggesting that there is no inherent conflict between reservations and nonderogability.[109]

It is also sometimes argued that the U.S. reservation is invalid because the prohibition on executing juvenile offenders is not only a treaty norm, but is also a matter of customary international law. As I discuss in Part III, the United States is probably not bound by any customary international law prohibition on the juvenile death penalty. But even if it is, this argument incorrectly assumes that nations are obligated, when they ratify a treaty, to accept all terms in the treaty that reflect customary international law. Although the ICCPR's Human Rights Committee has endorsed that assumption in passing,[110] there does not appear to be any basis for it in international law. A nation's attachment of a reservation to a treaty provision is not itself a violation of the provision. It is simply a decision by the nation making the reservation not to bind itself to the treaty regime, and its associated enforcement procedures, with respect to the provision in question.[111] No one claims that nations have an international law obligation to bind themselves to such treaty regimes and procedures in the first instance. It is not argued, for example, that the United States would have violated customary international law if it had declined to ratify the ICCPR altogether. Nor is it argued that the United States is in violation of international law for having declined to ratify the Vienna Convention on the Law of Treaties, even though there is widespread agreement that at least some of its terms reflect customary international law. Because it is clear that nations can refuse to ratify a treaty with terms that are reflective of customary international law, it is difficult to understand how or why international law would obligate them, when they do ratify the treaty, to accept the treaty in its entirety. Moreover, such a requirement would have undesirable consequences for treatymaking. Given the amorphous nature of customary

109. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 111 (2000). For example, there were reservations to the prohibition in Article 11 on imprisonment for contractual obligations and to the criminal retroactivity provisions of Article 15. Schabas, *supra* note 64, at 293–94.

110. *See General Comment 24(52)*, *supra* note 81, ¶ 8 ("Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations."). The Committee has given effect to reservations, however, that relate to provisions in the ICCPR that arguably reflect customary international law. Schabas, *supra* note 64, at 295 n.95.

111. *See Observations by the United States on General Comment 24*, 3 INT'L HUM. RTS. REP. 265, 265–69 (1996) [hereinafter U.S. Response] ("A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it.").

international law—a point I discuss in Part III—it will often be difficult for nations to know, when they ratify a treaty, whether a particular provision is reflective of customary international law. A rule that outlawed reservations to all treaty terms reflective of customary international law would thus create substantial uncertainty about the validity of treaty reservations and, more broadly, about the status of treaty relationships.

3. *Severability*. The severability analysis of the ICCPR's Human Rights Committee is also flawed. Even if the U.S. reservation were invalid, it would not be proper under international law simply to disregard the reservation and bind the United States to the prohibition on executing juvenile offenders. Consider first the situation of a bilateral treaty. It is well settled that, if a nation attaches a condition to its ratification of a bilateral treaty, the condition operates as a counteroffer, such that there is no binding treaty unless the other party accepts the condition. Multilateral treaties work somewhat differently, in part because of the impracticality of separate negotiations between all the possible pairings of parties. The different rule for multilateral treaties, as set forth in the Vienna Convention on the Law of Treaties, is that a nation can be a party to the treaty even if all the other parties do not accept its conditions. In this situation, the nation that attaches the condition may have a limited treaty relationship, or even no treaty relationship, with the objecting nations, while having a full treaty relationship with the other parties. But this Vienna Convention regime still recognizes the contractual nature of these relationships, such that nations are bound only by the treaty commitments they actually make. As one commentator notes, "[i]t was never the intention of the [International Court of Justice], the [International Law Commission], or the [Vienna Convention on the Law of Treaties] that a State should be bound by a provision to which it had not indicated its consent."[112]

The severability analysis of the Human Rights Committee is inconsistent with this regime. If the U.S. reservation on the juvenile death penalty were severed in the way suggested by the Committee,

112. Redgwell, *supra* note 100, at 267. The Committee's severability analysis is rendered even more problematic by the Committee's conclusion in another general comment that nations may not withdraw from the ICCPR. *General Comment 26(61)*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., Supp. No. 40, ¶ 5, U.N. Doc. A/53/40 (1998). When combined, the Committee's comments suggest that the United States (or another country) could find itself in a treaty regime to which it had never consented, and it would have no legal right to exit from that regime.

the United States would be bound by a treaty provision that it expressly declined to ratify, in conflict with the well-settled rule that treaties bind only nations that consent to them.[113] The United Nations' International Law Commission has expressed support for this conclusion and, along with several individual nations, has criticized the contrary views of the ICCPR's Human Rights Committee.[114] This conclusion seems especially clear where, as here, the United States has stated that its reservations to the ICCPR are "integral parts of its consent to be bound by the Covenant and are not severable."[115] The long and difficult history of U.S. ratification of human rights treaties—whereby the United States refused to ratify any of the major human rights treaties for many years, and then began to ratify the treaties only after the president and Senate agreed upon a carefully formulated package of reservations—further demonstrates the importance of such reservations to the United States' consent.[116]

At first glance, it might appear that two decisions from the European Court of Human Rights provide support for the Committee's views. In these decisions, the European Court held that reservations to the European Convention on Human Rights were invalid, and it

113. *See supra* note 70 and accompanying text.

114. The United States, Great Britain, and France objected to the views of the ICCPR's Human Rights Committee expressed in General Comment 24(52), including its views concerning the proper remedy for invalid reservations. *See Observations by France on General Comment 24 on Reservations to the ICCPR*, 4 INT'L HUM. RTS. REP. 6, 6–8 (1997); *Observations by the United Kingdom on General Comment 24*, 3 INT'L HUM. RTS. REP. 261, 261–69 (1996); U.S. Response, *supra* note 111, at 265–69. In a 1997 preliminary report, the United Nations' International Law Commission similarly rejected a number of the conclusions in General Comment 24(52). *Report of the International Law Commission on the Work of Its Forty-Ninth Session*, U.N. GAOR, 52d Sess., Supp. No. 10, at 107, U.N. Doc. A/52/10 (1997).

115. U.S. Response, *supra* note 111, at 269.

116. For a discussion of this history, see NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990); Bradley & Goldsmith, *supra* note 69, at 410–16. In an important recent article, Professor Ryan Goodman argues that international law should allow for the severability of invalid reservations that are *not* integral to a state's consent to be bound by a treaty. Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 532 (2002). It is not clear how Professor Goodman's proposed approach would work in practice, since he does not specify who should decide the severability question or what evidence should be considered in resolving this question (although he apparently would place the burden of proof on the party seeking to avoid severance). *Id.* at 555–59. In any event, as noted, the United States has made clear that its juvenile death penalty reservation is integral to its consent to be bound, and its contention is supported by the history of U.S. ratification of human rights treaties, so presumably this reservation would not be severed under Professor Goodman's approach. *See supra* notes 67–70, 115, and accompanying text.

enforced the treaty as if the reservations had not been taken.[117] These decisions, however, have little relevance to the U.S. reservations to the ICCPR and other global human rights treaties. In part, this is because the decisions were premised on a finding that the countries intended to be bound by the European Convention regardless of the fate of their reservations.[118] By contrast, the U.S. reservations were clearly a condition of U.S. ratification of the ICCPR. More significantly, the European Court was "not simply applying general principles of treaty law."[119] Instead, it was interpreting the particular provisions of the European Convention in light of the Convention's role as an "instrument of European public order (ordre public)."[120] These principles do not apply beyond Europe and thus cannot supersede the controlling principles of the Vienna Convention and related customary international law.

### *C. Other Treaties*

There does not appear to be any other plausible treaty claim. The only other treaty that the United States has ratified that prohibits the execution of juvenile offenders is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (referred to

117. Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995); Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1988).

118. In the *Belilos* case, Switzerland explicitly conceded this point. *See* Goodman, *supra* note 116, at 550 (quoting a statement made during oral argument by the Swiss representative); *see also* Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347, 382 (1989) ("The Court of Human Rights correctly found that the declaration was severable from the Swiss acceptance of the Convention; that Switzerland's overriding intention was to accept the obligations of the European Convention."); Schabas, *supra* note 64, at 319 (stating that Switzerland admitted its desire to be bound by the European Convention). In the *Loizidou* case, by contrast, the court inferred this intent. 310 Eur. Ct. H.R. at 28; Schabas, *supra* note 64, at 321–22; *see also* Baylis, *supra* note 86, at 302–06 (discussing the *Belilos* and *Loizidou* decisions, and concluding that they do not provide substantial support for the Committee's severability analysis); Morgan, *supra* note 19, at 171 ("Unlike the facts in *Loizidou*, there is no indication that the United States foresaw any treaty body ruling on whether its reservations to the ICCPR were severable or non-severable.").

119. Redgwell, *supra* note 100, at 266; *see also* Susan Marks, *Reservations Unhinged: The* Belilos *Case Before the European Court of Human Rights*, 39 INT'L & COMP. L.Q. 300, 327 (1990) (analyzing the *Belilos* decision and tying it to "structural features of the [European] Convention").

120. *Loizidou*, 310 Eur. Ct. H.R. at 27.

as the "Fourth Geneva Convention"),[121] a treaty that has now been ratified by approximately 180 nations.[122] The last clause of Article 68 of this treaty prohibits imposition of the death penalty on "protected person[s]" (civilians and other noncombatants) who are under eighteen years of age at the time of the offense.[123] The relevant provisions of this treaty, however, apply only in situations involving an armed conflict or military occupation, and Article 68 applies only to individuals who are not nationals of the occupying power.[124] As a result, it has no bearing on the use of the death penalty in domestic criminal cases.[125]

The United States has signed, but has not ratified, the Convention on the Rights of the Child and the American Convention on Human Rights, both of which contain provisions prohibiting the execution of juvenile offenders.[126] A treaty binds only those nations that have "establishe[d] on the international plane [their] consent to be bound" by the treaty.[127] Although this consent can take a variety of

121. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. This treaty also requires, as a condition of imposing the death penalty, that the offense be subject to capital punishment under the preexisting laws of the occupied territory. *Id.* art. 68, cl. 2, 6 U.S.T. at 3560, 75 U.N.T.S. at 330. The United States (like a number of other countries) attached a reservation to its ratification of the treaty declining to agree to this restriction. *Id.* 6 U.S.T. at 3660, 75 U.N.T.S. at 432. It did not, however, attach a reservation concerning the juvenile death penalty.

122. International Committee of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions, and Successions*, *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/77EA1BDEE20B4CCDC1256B6600595596 (last visited Nov. 14, 2002) (on file with the *Duke Law Journal*).

123. Fourth Geneva Convention, *supra* note 121, art. 68, cl. 4, 6 U.S.T. at 3560, 75 U.N.T.S. at 330.

124. *Id.* arts. 2, 4, 68, 6 U.S.T. at 3518, 3520, 3560, 75 U.N.T.S. at 288, 290, 330.

125. I discuss the Fourth Geneva Convention in greater detail in Part III, in connection with claims being made under customary international law. *See infra* notes 179–81. Two protocols to the 1949 Geneva Conventions also prohibit the execution of juvenile offenders. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 77(5), 1125 U.N.T.S. 3, 39 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 6(4), 1125 U.N.T.S. 609, 614 (entered into force Dec. 7, 1978). These protocols, like the Fourth Geneva Convention, do not apply to domestic criminal cases. In any event, the United States has not ratified the protocols.

126. Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), 1577 U.N.T.S. 3, 55 (entered into force Sept. 2, 1990); American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 146 (entered into force July 18, 1978).

127. Vienna Convention on the Law of Treaties, *supra* note 70, art. 2(b), 1155 U.N.T.S. at 333.

forms, the Convention on the Rights of the Child and the American Convention on Human Rights, like other multilateral human rights treaties, require the deposit of an instrument of ratification or accession as the manifestation of consent.[128] Because the United States has not deposited such an instrument, it is not bound by these treaties.[129]

A signatory to a treaty, according to Article 18 of the Vienna Convention on the Law of Treaties, does have an obligation not to do anything that "would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty."[130] Like the ICCPR, however, the Child Convention and the American Convention contain a long list of rights on a variety of subjects and mention the juvenile death penalty as only one subpart of a single article.[131] As a result, they do not appear to have as their object and purpose the abolition of the juvenile death penalty. In addition, the United States has indicated that, if and when it does ratify these treaties, it will attach a reservation declining to agree to the ban on juvenile executions.[132] The U.S. signature of these treaties, therefore, does not show any acceptance of the juvenile death penalty provisions.

## III. CUSTOMARY INTERNATIONAL LAW

Because of the difficulties with the treaty arguments, international law challenges to the juvenile death penalty are increasingly focused on customary law rather than treaties. As noted, customary international law is commonly defined as the law of the international community that "results from a general and consistent practice of

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128. Convention on the Rights of the Child, *supra* note 126, arts. 47–48, 1577 U.N.T.S. at 60; American Convention on Human Rights, *supra* note 126, art. 74, 1144 U.N.T.S. at 161.

129. *See* AUST, *supra* note 109, at 75–92 (explaining the difference between signature and ratification).

130. Vienna Convention on the Law of Treaties, *supra* note 70, art. 18, 1155 U.N.T.S. at 336.

131. The Convention on the Rights of the Child contains a variety of provisions relating to, among other things, discrimination, freedom of expression, freedom of religion, privacy, adoption, health care, and standard of living. Its prohibition on the juvenile death penalty is set forth in a subpart of Article 37. Convention on the Rights of the Child, *supra* note 126, art. 37(a), 1577 U.N.T.S. at 55. The American Convention on Human Rights contains a variety of provisions relating to, among other things, criminal procedure, privacy, freedom of religion, and participation in government. Its prohibition on the juvenile death penalty is set forth in a subpart of Article 4. American Convention on Human Rights, *supra* note 126, art. 4(5), 1144 U.N.T.S. at 146.

132. *See infra* notes 184–85, 225, and accompanying text.

states followed by them from a sense of legal obligation."[133] If customary international law now prohibits the execution of juvenile offenders, it might impose a legal obligation on the United States to eliminate this practice even if the United States is not obligated to do so by treaty.

### *A. Attractions of the Customary International Law Argument*

There are a number of reasons why this customary international law argument might seem more promising than the treaty arguments. Most notably, the "practice of states" component of this argument looks compelling, as almost all nations have now abolished the juvenile death penalty. Indeed, only seven nations (including the United States) are reported to have executed juvenile offenders since 1990, and, as noted, the other six are not necessarily good human rights company.[134] Furthermore, even those nations have now ratified the Convention on the Rights of the Child, which prohibits juvenile executions.[135]

To be sure, these numbers are not by themselves dispositive. At least according to most international law theorists, customary international law requires not only widespread state practice, but also that the nations in question are acting out of a sense of legal obligation. It is unclear, however, whether the nations that have abolished the ju-

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133. RESTATEMENT (THIRD), *supra* note 13, § 102(2). The basic elements of this definition are widely accepted, both inside and outside the United States. The governing statute for the International Court of Justice lists "international custom, as evidence of a general practice accepted as law" as one of the types of law that the Court is to apply. Statute of the International Court of Justice, Oct. 24, 1945, art. 38(1)(b), 59 Stat. 1055, 1060. The Court has stated that, for a rule of customary international law to arise, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

134. *See supra* notes 11–12 and accompanying text.

135. Convention on the Rights of the Child, *supra* note 126, art. 37(a), 1577 U.N.T.S. at 55. All but two nations in the world—the United States and Somalia—have ratified the Convention on the Rights of the Child. *See* United Nations Treaty Collection, *at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty15.asp (last visited Nov. 14, 2002) (on file with the *Duke Law Journal*). This state practice point assumes that it is proper to count only the practice of nation-states, which is the traditional rule. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW § 8 (2000). As customary international law comes to regulate matters traditionally regulated at the local level, it is arguable that the practice of individual states in federal nations should also be counted. If so, one would need to take account of the practices of the U.S. states that still retain the juvenile death penalty.

venile death penalty have done so out of a sense of legal obligation, or at least a sense of legal obligation that is separate from their various treaty commitments.[136] It is possible that they have done so primarily for moral or policy reasons, not because they believe that international law (apart from particular treaties) prohibits the execution of juvenile offenders.[137]

Nevertheless, a plausible case can be made that the widespread international abolition of the juvenile death penalty, the numerous treaties that disapprove of the practice, and various statements by nations and international organizations show the requisite "sense of legal obligation." This is especially so given the uncertain and open-ended nature of modern customary international law formation.[138] Perhaps for these reasons, the Solicitor General's *amicus curiae* brief in the *Domingues* case[139] could be read as suggesting that the customary international law argument should be taken more seriously than the treaty arguments. In that brief, the Solicitor General disputed essentially all aspects of the treaty argument on the merits, maintaining that the petitioner's contentions were "incorrect" and "fall wide of the mark."[140] On the customary international law argument, however, the Solicitor General noted that the claim "raises numerous issues of considerable difficulty and complexity, with potentially far-reaching significance."[141] Although the Solicitor General did contest one aspect of the customary international law claim, his principal argument was that the claim had not been adequately raised and developed below, such that the case was not an "appropriate vehicle" for Supreme Court review.[142]

136. For a discussion of the uncertain relationship between treaties and customary international law, see generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

137. *Cf.* Buell v. Mitchell, 274 F.3d 337, 373 (6th Cir. 2001) ("There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons.").

138. For discussion of the many uncertainties surrounding the formation of modern customary international law, see generally David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198 (1996); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

139. *See supra* note 16 and accompanying text.

140. Domingues Brief, *supra* note 16, at 5, 9.

141. *Id.* at 13.

142. *Id*.

In the next two Sections, I explore the one substantive objection to the customary international law argument that the Solicitor General did raise: that even if customary international law now prohibits the execution of juvenile offenders, the United States has effectively opted out of such a prohibition. As I show, there is substantial evidence that the United States has in fact opted out.

### *B. Persistent Objector Rule*

It is widely accepted that nations that persistently object to a customary international norm while it is being developed are not bound by the norm. The "persistent objector" rule stems from the proposition that, in a world of diverse sovereign nations lacking a central decisionmaker, customary international law draws its legitimacy from national consent. If a nation has persistently objected to a norm prior to its formation, the reasoning goes, the nation has not given even tacit consent to the norm.[143] The persistent objector rule also facilitates the development of new norms of customary international law by preventing them from being blocked, either by a lack of unanimity, or, if unanimity is not required, a lack of agreement on how to count votes.[144]

While not without its challengers,[145] the persistent objector rule is as close to a settled proposition as one can find in international law. It has been endorsed by the International Court of Justice,[146] the Inter-American Commission on Human Rights,[147] most of the major treatises on international law,[148] and the *Restatement (Third) of Foreign Relations Law*.[149] It also was endorsed recently in a comprehensive re-

143. RESTATEMENT (THIRD), *supra* note 13, § 102 reporters' note 2; KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 66 (2d rev. ed. 1993); David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 957 (1986); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 459 (1985); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 434 (1983).

144. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 26 (1974–75).

145. *E.g.*, ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 70 (1971); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985); Kelly, *supra* note 138, at 508.

146. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277–78 (Nov. 20); Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).

147. *See infra* note 219 and accompanying text.

148. *E.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW 29 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10 (5th ed. 1998).

149. RESTATEMENT (THIRD), *supra* note 13, § 102 cmt. d & reporters' note 2.

port by the customary international law committee of the International Law Association.[150] The committee explained that "[a]lthough some authors question the existence of this rule, most accept it as part of current international law."[151] The committee also cited national practice in support of this rule, including national practice of the United States.[152]

Although nations have not historically invoked the persistent objector rule with much frequency, the rule has become more significant in recent years as a result of changes in the process of customary international law formation.[153] If nonbinding materials such as unratified treaties and United Nations resolutions can lead to the creation of binding customary international law (as modern customary international law theory contends), then it becomes especially important to allow nations a means of opting out of these emerging rules. Otherwise, the consensual nature of treaty regimes will be undermined, and international organizations will assume legislative power never delegated to them. Perhaps more importantly, powerful nations like the United States are unlikely to accept this new form of customary international law without the ability to opt out. This is particularly true of customary international law rules that purport to govern matters formerly of only domestic concern, such as human rights standards governing the relationship between governments and their citizens.

Most commentators critical of the U.S. juvenile death penalty purport to accept the persistent objector rule in theory. They nevertheless argue that the United States is unable to rely on this rule for two reasons. First, they contend that the United States has not sufficiently registered its objection to a customary international law prohibition on juvenile executions. Instead of persistently objecting, they say, the United States has essentially remained silent during the development of the prohibition, thereby "acquiescing" in it. Professor Joan Fitzpatrick (formerly Joan Hartman), for example, has described the U.S. position on the juvenile death penalty as a "[m]ere failure to conform to the norm."[154] Similarly, Professor David Weiss-

150. INTERNATIONAL LAW ASSOCIATION, *supra* note 135, § 15.

151. *Id.* cmt. c.

152. *Id*.

153. Stein, *supra* note 143, at 457; J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?*, 13 ILSA J. INT'L L. 1, 6 (1989).

154. Hartman, *supra* note 19, at 686.

brodt describes it as a "single, internal protest."[155] Second, and more dramatically, some commentators argue that the international law ban on the juvenile death penalty now qualifies as a *jus cogens*, or "peremptory," norm, for which there is no right to opt out.[156]

With respect to the first argument, these commentators typically do not go through the history of U.S. interactions with treaty regimes and international institutions in any detail. As I show, this history demonstrates that the United States has a long record of dissenting from any evolving norm against the juvenile death penalty.

1. *Timing Question*. The persistent objector rule does not allow nations to opt out of a customary international law norm after the norm has "crystallized," i.e., after there is widespread national practice in support of the norm, followed by these nations out of a sense of legal obligation.[157] Thus, as an initial matter, one must have some sense of when the alleged norm of customary international law developed. The critics of the juvenile death penalty do not usually specify a particular date, or even a particular time period.

A strong argument can be made that the proper time period is somewhere between 1990 and 2000, and, in any event, no earlier than the mid-1980s. Most of the customary international law arguments against the juvenile death penalty revolve around two treaties—the ICCPR and the Convention on the Rights of the Child. Both of these treaties contain prohibitions on juvenile executions, and it is argued that the widespread ratification of these treaties has led to the creation of a customary international law rule binding on nations that have not ratified the treaties.[158] In terms of the number of ratifying nations, the Child Convention looks more compelling, since all but two nations (the United States and Somalia) are now parties to that

155. Weissbrodt, *supra* note 19, at 369. *See also* Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 171 (1996) ("[T]he objection has been inconsistent, mostly taking the form of silence and acquiescence as the norm developed on the international scene."); Dinah Shelton, Note, 8 HUM. RTS. L.J. 355, 359 (1987) ("United States practice has been neither persistent nor unequivocal.").

156. *E.g.*, de la Vega & Brown, *supra* note 19, at 759–62; Kha Q. Nguyen, Note, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEO. WASH. J. INT'L L. & ECON. 401, 402 (1995).

157. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 13, § 102 cmt. d (stating that dissent must be made "while the law is still in the process of development").

158. For examples of such arguments, see de la Vega & Brown, *supra* note 19, at 756–59; Nanda, *supra* note 19, at 1328–34.

treaty.[159] But that treaty did not become effective until 1990, after it had been ratified by 20 nations, and it obtained widespread ratification only by the mid to late 1990s.[160] The ICCPR took effect much earlier—in 1976, after it had been ratified by 35 nations—but its numbers are less impressive: even today, only 147 of the approximately 193 nations in the world have ratified it.[161] Moreover, almost one-half of these ratifications came in the 1990s.[162]

Additional support for this time period comes from the fact that, for the most part, academic commentators, U.S. litigants, and international bodies did not begin asserting that customary international law prohibited the juvenile death penalty until the 1990s. The *Restatement (Third) of Foreign Relations Law*, published in 1987, sets forth a list of national actions prohibited by customary international human rights law. While the *Restatement (Third)* is generally progressive in its approach to international human rights law, neither the death penalty in general nor the juvenile death penalty is on its list.[163] A survey of U.S. law reviews shows that almost all academic claims that customary international law prohibits the juvenile death penalty have been made after 1990.[164] In U.S. courts, although the juvenile death penalty has been challenged since the early 1980s on Eighth Amendment grounds, it was not directly challenged on international law grounds until the 1990s (although *amicus curiae* briefs were filed asserting international law arguments in the late 1980s). Finally, as I document in subsection 3, while United Nations organizations began criticizing the juvenile death penalty in the early 1980s, they did not begin asserting that it was barred by international law until the 1990s.

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159. *See supra* note 135.

160. United Nations Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty15.asp (last visited Nov. 14, 2002) (on file with the *Duke Law Journal*).

161. United Nations Treaty Collection, *at* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html (last visited Nov. 14, 2002) (on file with the *Duke Law Journal*).

162. *Id*.

163. RESTATEMENT (THIRD), *supra* note 13, § 702.

164. Two notable exceptions are a 1983 article by Professor Joan Fitzpatrick, formerly Joan F. Hartman, *supra* note 19, and a 1988 article by Professor David Weissbrodt, *supra* note 19. Professor Fitzpatrick's article primarily highlighted the difficulties and uncertainties associated with a customary international law argument, although it ultimately expressed support for such an argument. In an article written many years later, Professor Fitzpatrick discussed at length the question, "Is There Any Customary International Law Relating to the Judicial Death Penalty?" Joan Fitzpatrick, *The Relevance of Customary International Law Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165, 168–77 (1995-96).

Assuming I am right about the proper time period, or even if it should be set somewhat earlier, the United States can make a strong argument that it was a persistent objector prior to the formation of the purported customary international law rule. Indeed, as I explain, the United States' argument becomes seriously problematic only if the purported rule of customary international law formed prior to the late 1970s.

2. *1940s–1970s*. The story begins in the late 1940s, with the drafting of the Fourth Geneva Convention. As noted in Part II, this Convention was designed to provide additional protection to "protected persons" (civilians and other noncombatants) during time of armed conflict or military occupation.[165] Article 68 of the Convention was in part a response to the many death sentences carried out during World War II against inhabitants of occupied territories.[166] Article 68 therefore allows imposition of the death penalty on protected persons only for cases of espionage, serious acts of sabotage, and intentional offenses causing death, and only "provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began."[167] The final clause of Article 68 further states that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."[168]

A draft of this Convention was considered and amended at an International Red Cross Conference in Stockholm during the summer of 1948.[169] The juvenile death penalty provision was inserted during that conference at the request of the International Union for Child Welfare.[170] The subsequent drafting history of the Fourth Geneva Convention shows little discussion of the juvenile death penalty provision. This Convention was assigned to "Committee III" of the 1949 Geneva Conference. During the committee negotiations in May 1949, a representative of the United States stated that "[t]he abolition of the death penalty in the case of protected persons under 18 years of

165. *See supra* notes 121–25 and accompanying text.
166. CLAUDE PILLOUD, RESERVATIONS TO THE GENEVA CONVENTIONS OF 1949, at 41–42 (1976).
167. Fourth Geneva Convention, *supra* note 121, art. 68, cl. 2, 6 U.S.T. at 3560, 75 U.N.T.S. at 330.
168. *Id.* cl. 4, 6 U.S.T. at 3560, 75 U.N.T.S. at 330.
169. COMMENTARY ON IV GENEVA CONVENTION 346–47 (Jean S. Pictet ed., 1958).
170. *Id*.

age . . . was a matter which called for very careful consideration before such a sweeping provision was adopted."[171] In the same meeting, a representative of Italy stated that the "age-limit mentioned in the third paragraph should be reduced from 18 to 16 years."[172] At that point, the article containing the juvenile death penalty provision was sent back to a drafting committee. The International Union for Child Welfare later sent a letter to Committee III stating that "[w]e would strongly urge that the prohibition of the death penalty in the case of a protected person under 18 years of age be maintained."[173] In a subsequent meeting in July 1949, the juvenile death penalty portion of the article was agreed to unanimously by the Committee III delegates without discussion.[174] After discussion of other aspects of Article 68 at a plenary meeting in August 1949, the entire article was approved.[175]

The Fourth Geneva Convention was first submitted to the Senate for its advice and consent in the early 1950s, and the United States ratified the treaty in 1955.[176] Like a number of other nations, the United States conditioned its consent to the treaty on a reservation to Article 68. Specifically, it reserved the right "to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins."[177] The Senate Foreign Relations Committee explained that this reservation was necessary to protect U.S. forces against the activities of illegal combatants, and that, without the reservation, an enemy that was about to have its territory occupied might quickly repeal its death penalty laws, "thus opening the way to all kinds of subversive activities against the occupant which would not be punishable by death."[178] The United States did not attach a reser-

171. 2(A) FEDERAL POLITICAL DEPARTMENT (BERNE), FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 673 [hereinafter FINAL RECORD]. The juvenile death penalty provision was contained in "Article 59" of the draft considered by the Committee. When the Convention was finalized, that article became Article 68.

172. *Id.* at 674.

173. 3 *id.* at 131.

174. *See* 2(A) *id.* at 768. The discussion instead focused on the crimes for which the death penalty could be imposed and on whether the death penalty for these crimes had to be authorized under the law of the occupied territory. *Id.* at 766–68, 788–90.

175. 2(B) *id.* at 440–41.

176. International Committee of the Red Cross, *supra* note 122.

177. Fourth Geneva Convention, *supra* note 121, 6 U.S.T. 3660, 75 U.N.T.S. 432.

178. REPORT OF THE COMMITTEE ON FOREIGN RELATIONS ON EXECUTIVES D, E, F, AND G, S. EXEC. REP. NO. 9, at 23 (1955). The United States had attached a similar reservation when

vation, however, with respect to the juvenile death penalty provision. Indeed, there is no mention of that provision in the message of the president conveying the treaty to the Senate, the report on the treaty by the Senate Foreign Relations Committee, or the Senate hearings.

While the Fourth Geneva Convention does not by its terms apply to the domestic use of the death penalty, some commentators have suggested that the United States' willingness to go along with a ban on the juvenile death penalty in the extreme situation of wartime suggests an acceptance of a more general ban on this penalty.[179] There is no direct evidence to support this suggestion, and there is substantial evidence to the contrary. In particular, the United States continued to sentence juvenile offenders to death after ratifying the Convention.[180] Moreover, in the years following U.S. ratification of the Convention, the Convention was not invoked, domestically or internationally, to challenge the U.S. practice. Finally, in this time period, it was not thought that multilateral treaties like this one could generate customary international law obligations, either as to nonparties or as to practices not addressed by the treaty—a proposition that has received widespread support only recently.[181] In a similar situation today, the United States might attach a precautionary reservation to guard against this sort of customary international law claim, but it had no reason to do so in 1955.

By the early 1950s, efforts were underway to draft what became the ICCPR. A general ban on juvenile executions was proposed in the third round of the treaty negotiations, which took place in 1957. The

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it signed the Convention in 1949. *See* I FINAL RECORD, *supra* note 171, at 346 ("The United States reserve the right to impose the death penalty . . . without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.").

179. *See, e.g.*, Shelton, *supra* note 155, at 358 ("As a matter of logic, it would seem anomalous at best for any state party—thus any state in the world—to continue to execute during peacetime those under eighteen years of age when such state has joined all states in recognizing and accepting the illegality of doing so during the demands and exigencies of war.").

180. *See* Streib, *supra* note 23, at 630 (documenting seventeen executions of juvenile offenders from 1950 to 1959 as well as four executions of juvenile offenders in the early 1960s).

181. There was a mild suggestion along these lines in the International Court of Justice's 1969 *North Sea Continental Shelf* decision, *see* RESTATEMENT (THIRD), *supra* note 13, § 102 reporters' note 5 (stating that an international agreement may only serve as evidence of codification of certain rules, but may not be conclusive on the parties to the agreement), but that was still many years after U.S. ratification of the Fourth Geneva Convention. For additional discussion of how the conception of customary international has changed in recent years, see *infra* notes 258–59 and accompanying text; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–42 (1997).

United States abstained from this round of negotiation because, at that time, it had no intention of ratifying the ICCPR.[182] As a result, the United States "expressed no views on the substance of the [ICCPR's] death penalty limitations."[183] This issue arose during the tail end of the Bricker Amendment debates over whether to amend the Constitution to limit the treaty power, and the Eisenhower administration had promised the Senate that it would not seek ratification of any of the major human rights treaties, including the ICCPR.[184] A final draft of the ICCPR was completed in 1966, and the treaty took effect in 1976, all without formal U.S. involvement. The United States did sign the ICCPR in 1977, but President Jimmy Carter quickly followed this signature with proposed conditions on the U.S. ratification, including a condition declining to agree to the juvenile death penalty provision.[185]

In the meantime, the United States was involved in the drafting of the American Convention on Human Rights, a regional treaty involving countries in the Western Hemisphere. The treaty was completed in 1970 and entered into force in 1978. This treaty, like the ICCPR, contains a provision prohibiting the execution of juvenile offenders. In a report on the treaty negotiations, the U.S. delegation stated that the juvenile death penalty provision had been the subject of "considerable debate," and that the U.S. delegation had tried, unsuccessfully, to have the provision deleted from the draft.[186] In earlier written observations on a draft of the Convention, the U.S. delegation stated that the juvenile death penalty provision should be deleted because it "presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the

182. *See* U.N. GAOR Cd. Comm., 12th Sess., 812th mtg. ¶ 17, U.N. Doc. A/C.3/SR.812 (1957) (statement of George Meany) (explaining that "[a]s the United States Government did not intend to ratify the Covenants, the United States delegation would abstain from voting and did not intend to participate in the debate").

183. *Id*.

184. Curtis A. Bradley, *The Treaty Power and American Federalism*, *Part II*, 99 MICH. L. REV. 98, 122 (2000).

185. Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Docs. C, D, E, and F, 95-2, at iii-iv (1978) [hereinafter Message from the President].

186. REPORT OF THE UNITED STATES DELEGATION TO THE INTER-AMERICAN CONFERENCE ON PROTECTION OF HUMAN RIGHTS 18 (1969) [hereinafter REPORT OF THE U.S. DELEGATION], *reprinted in* 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, supp. 15 (Thomas Buergenthal & Robert E. Norris eds., 1982).

death penalty. For this reason, we believe the text will be stronger and more effective if this paragraph is deleted."[187]

Several commentators have seized on this reference to a "general trend . . . for the gradual abolition of the death penalty" to argue that the U.S. delegation simply believed that the juvenile death penalty provision was unnecessary, not that it was objectionable.[188] This construction, however, is undermined by the other statements made by the U.S. delegation, such as its reference to the "substantial debate" over the provision and the "difficulties in law" posed by the provision. In context, the comment about gradual abolition seems merely to have been a tactful effort to make the U.S. objection more palatable to the other delegates.[189]

This conclusion is supported by the fact that the U.S. delegation ultimately abstained from voting on the article containing the juvenile death penalty provision. While noting that the article did not violate the U.S. Constitution, the delegation observed that the article did conflict with some federal legislation, which would mean that, to ratify the treaty, the United States "would apparently have to modify the federal legislation or make reservations to the article."[190] Importantly, in explaining why it did not go further in opposing the juvenile death penalty provision, the delegation stated that, in its view, the provision would not apply to state death penalty laws in the United States. The Convention contains a broad federalism clause pursuant to which federal nations are obligated to implement the Convention only to the extent that their national governments exercise legislative and judicial jurisdiction over the subject matter,[191] and the delegation rea-

187. OBSERVATIONS AND PROPOSED AMENDMENTS TO THE DRAFT INTER-AMERICAN CONVENTION ON PROTECTION OF HUMAN RIGHTS 141, 152 (1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 186, supp. 13.

188. *E.g.*, de la Vega & Brown, *supra* note 19, at 758; Nanda, *supra* note 19, at 1329; Schabas, *supra* note 64, at 305; *see also* Weissbrodt, *supra* note 19, at 369 (describing the U.S. statement as "supporting the development of a norm abolishing the death penalty").

189. The United States later made this clear in a Memorandum it submitted to the Inter-American Commission on Human Rights. *See* Memorandum of the United States to the Inter-American Commission on Human Rights in Case 9647, at 10, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987) (explaining that it had "offered a policy argument for deleting the article which appealed to known sentiments of other delegates").

190. REPORT OF THE U.S. DELEGATION, *supra* note 186, at 19.

191. American Convention on Human Rights, *supra* note 126, art. 28(1), 1144 U.N.T.S. at 152.

soned that the U.S. national government "does not exercise legislative and judicial jurisdiction" over state criminal punishment.[192]

In sum, the record from the late 1940s through the mid-1970s is mainly one of silence and abstention by the United States with respect to the international legality of the juvenile death penalty. The United States did not give express consent to an international law ban on the juvenile death penalty during this period, but it also did not strenuously object to such a ban. Importantly, however, there were essentially no claims being made in this period that customary international law prohibited the execution of juvenile offenders. The focus of the international community, rather, was on developing treaties on this subject, and the United States carefully avoided ratifying any such treaty provisions.

3. *Late 1970s–Present*. In late 1977, the Carter administration submitted four human rights treaties, including the ICCPR and the American Convention on Human Rights, to the Senate for its advice and consent. Anticipating likely senatorial concerns and objections, the administration proposed that the Senate attach various reservations to its advice and consent. Some of these reservations were specifically focused on the juvenile death penalty. For example, the administration noted that U.S. law was not entirely in accord with Article 6 of the ICCPR, which contains a prohibition on juvenile executions. It therefore recommended that the Senate adopt the following reservation: "The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."[193] Similarly, the administration noted that "[m]any of the provisions of Article 4 [of the American Convention on Human Rights] are not in accord with United States law and policy, or deal with matters in which the law is unsettled."[194] The administration suggested, therefore, that the Senate adopt reservations stating that "United States adherence to Article 4 is subject to the Constitution and other law of the United States," and that the United States "reserves the right in appropriate

192. REPORT OF THE U.S. DELEGATION, *supra* note 186, at 20. *See also* Memorandum of the United States to the Inter-American Commission on Human Rights, *supra* note 189, at 11 ("The presence of the federal clause thus vitiates any argument for reliance on Article 4(5) as a standard that the United States might be obligated to adopt and enforce with respect to individual states . . . .").

193. Message from the President, *supra* note 185, at xii.

194. *Id.* at xviii.

cases to subject minors to procedures and penalties applicable to adults."[195]

During the 1979 hearings on these treaties, there was little discussion of the reservations relating to the juvenile death penalty. The Lawyers Committee for International Human Rights did submit objections to those and many other reservations, but its objections to the juvenile death penalty reservations were very brief, simply asserting that the reservations would allow the execution of "pregnant women, or children under 18," and thereby would "make the United States' position seem ridiculous."[196] Importantly, neither the Committee nor anyone else in the hearings suggested that the execution of juvenile offenders would violate customary international law.

In response to the Lawyers Committee's criticism of the juvenile death penalty reservation, the State Department explained that "[t]he purpose of that reservation, like the other reservations, is to avoid the assumption of an international obligation to meet certain standards which U.S. domestic law does not currently meet. Its purpose was certainly not the preservation of any right to execute children or pregnant women, something never done in the United States."[197] Some commentators have cited this statement as an inaccurate assertion by the State Department that the United States does not execute juvenile offenders.[198] This seems unlikely. Presumably the State Department, and everyone else in the hearings, was fully aware that many states allowed for the imposition of the death penalty on offenders under the age of eighteen. Instead, the State Department probably was responding to the concern expressed by the Lawyers Committee that the U.S. reservation did not contain a minimum age requirement, and thus would, in theory, allow the United States to execute even young children. As the State Department noted, the execution of such children, like the execution of pregnant women, is "never done" by the United States in modern times. Indeed, the execution of young

195. *Id*. Although not directly relevant to the persistent objector issue, the administration also proposed that the Senate declare all of the substantive terms of these treaties to be non-self-executing.

196. *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong. 50 (1979). It also noted that an effort to preserve future laws that might be enacted would go beyond even the stated intent of the reservations of not changing existing practice, and that acceptance of the death penalty provision without reservation "would have very little effect on current United States practice." *Id*.

197. *Id.* at 55.

198. *See, e.g.*, Fitzpatrick, *supra* note 164, at 174; Hartman, *supra* note 19, at 685.

children presumably would raise serious Eighth Amendment concerns. Consistent with this reading of the State Department's statement, the reservation that was ultimately adopted by the United States stated that the United States was reserving the right, "*subject to its Constitutional constraints*, to impose capital punishment on any person (*other than a pregnant woman*) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons *below eighteen years of age*."[199] These qualifications thus made clear that the United States was reserving the right to impose the death penalty on individuals who commit their offenses while under the age of eighteen, not a right to impose the death penalty on young children (or pregnant women).[200] Notwithstanding the proposed reservations, the United States did not ratify the ICCPR until 1992 (and it still has not ratified the American Convention).

In the meantime, a case arose before an international organization that directly challenged the legality of the U.S. juvenile death penalty. In 1985 and 1986, two juvenile offenders on death row—one in South Carolina and the other in Texas—brought complaints before the Inter-American Commission on Human Rights.[201] The petitioners argued that the imposition of the death penalty on them would violate several provisions of the American Declaration of the Rights and Duties of Man, a resolution adopted by a group of American states, including the United States, in 1949.[202] The Declaration does not men-

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199. U.S. RUDs, *supra* note 67, at 8070 (emphasis added).

200. Some commentators have subsequently criticized this reservation on the ground that it relies on unstated "constitutional constraints" rather than a specified minimum age, and thus leaves open the possibility of executing very young children. *See, e.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 85 (2d ed. 1997); Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 344 & n.13 (1995).

201. Case 9647, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987). The Inter-American Commission on Human Rights was created in 1959 and held its first session in 1960. Among other things, the Commission visits member countries, observes their human rights practices, and issues country-specific reports. Since 1965, it also has been authorized to receive petitions and complaints regarding specific cases of human rights violations in the member countries. Inter-American Commission on Human Rights, *What is the IACHR?*, *at* http://www.cidh.oas.org/what.html (last visited Jan. 14, 2003) (on file with the *Duke Law Journal*). The Inter-American Commission on Human Rights is different from the Inter-American *Court* of Human Rights. *See supra* note 108.

202. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, at 7, O.A.S. Doc. OEA/ser.L./V./I.4, rev. XX (1948)

tion the death penalty, but it does refer to a "right to life"[203] and a right against "cruel, infamous or unusual punishment."[204] The petitioners argued that these rights, "as informed by customary international law," are violated by the execution of juvenile offenders.[205] Although the Declaration was not originally established as a binding treaty, the Commission has asserted that it became binding on the United States when it ratified a Protocol to the OAS Charter in 1968.[206] The U.S. government has stated, however, that it "categorically rejects" this proposition.[207]

In its briefs to the Commission, the U.S. State Department denied that the American Declaration, even as informed by customary

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203. *Id.* art. 1, at 2.

204. *Id.* art. 26, at 7.

205. Case 9647, 147, 148, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987). Although the Commission asked both the U.S. State Department and the respective state governors to stay the executions while the Commission considered the case, both of the petitioners were executed while their complaints were pending. The State Department informed the Commission that, under the U.S. federal system, there were no domestic legal grounds for Executive Branch intervention in these death sentences. *Id.* at 149–50. In this respect, this case is similar to two recent cases in which U.S. states have carried out executions of foreign citizens notwithstanding preliminary orders by the International Court of Justice stating that the United States was to "take all measures at its disposal" to stay the executions. Federal Republic of Germany v. United States, 526 U.S. 111, 113 (1999); Breard v. Greene, 523 U.S. 371, 378 (1998). For a discussion of the *Breard* case, see generally Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999).

206. *See* Case 2141, Inter-Am. C.H.R. 25, 38 OEA/ser.L./V./II.54, doc. 9 rev. 1, (1981). The Commission's reasoning on this point was not spelled out in any detail. In an article written before the decision, Professor (now ICJ Judge) Buergenthal set forth a complicated argument regarding why the Declaration should be binding. The article noted, among other things, that Article 112 of the Protocol gave the Commission the "principal function" of promoting "the observance and protection of human rights," and of serving as "a consultative organ of the Organization in human rights matters"; Article 150 of the Protocol stated that, "[u]ntil the Inter-American Convention on Human Rights . . . enters into force, this Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights"; and Article 2 of the Statute of the Inter-American Commission provided that, "[f]or purposes of the present Statute, human rights are understood to be . . . . [t]he rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states." Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 834 (1975). The United States disagreed with the Commission's conclusion in *Case 2141* that the Declaration was binding. Memorandum of the United States to the Inter-American Commission on Human Rights in Case 9647, *supra* note 189, at 6–7 & n.6.

207. Case 11.139, Inter-Am. C.H.R. 570, 583 OEA/ser.L./V./II.98, doc. 6 rev. (1998). For a useful overview of all the death penalty litigation against the United States in the Inter-American human rights system, see generally Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159 (2002).

international law, prohibited the execution of juvenile offenders.[208] The State Department pointed out that the age of majority for imposing the death penalty was not, at that time, a matter of uniform national practice.[209] The Department also denied that there was the requisite "sense of international legal obligation" to create a customary international law rule on this issue.[210] In the alternative, the Department argued that, even if customary international law did contain a prohibition on juvenile executions, the United States had opted out of such a prohibition through its persistent objection.[211] It noted, for example, that the United States had declined to participate in the discussions concerning the provision on juvenile executions in the ICCPR, and that it ultimately submitted the ICCPR to the Senate with a proposed reservation to that provision.[212] It also noted that the United States had opposed the ban on juvenile executions in the American Convention, and that this treaty, too, had been submitted to the Senate with a proposed reservation to the juvenile death penalty provision.[213] The Department concluded its brief by stating that "[t]here is no basis in international law for applying to the United States a standard taken from treaties to which it is not a party and that it has indicated it will not accept when it becomes a party."[214]

In early 1987, while this case was pending before the Commission, the State Department transmitted a memorandum to all its diplomatic posts, in which the Department further made clear that the United States did not agree to any international law restriction on the juvenile death penalty.[215] In addition to noting that the United States had not agreed to any treaty restrictions on juvenile executions, the State Department stated as follows:

> [I]t is the view of the United States that customary international law does not establish the age of eighteen as a rigid cutoff for the imposition of the death penalty. Although many countries do prohibit the

208. Memorandum of the United States to the Inter-American Commission on Human Rights in Case 9647, at 3–7, 14–19, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987).

209. *Id.* at 15, 16–17.

210. *Id.* at 15.

211. *Id.* at 17–19.

212. *Id.* at 17–18.

213. *Id.* at 18.

214. *Id.* at 18–19.

215. I CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1981–1988, at 875–77 (1993).

> execution of under-eighteen offenders, the practice of these states falls short of the requirements necessary to create a norm of customary international law. First, the practice is not uniform; a number of states, including the United States, allow the execution of under-eighteen offenders. Second, there is no evidence that states prohibit the execution of under-eighteen offenders out of a sense of legal obligation. Without this element of "opinio juris," state practice is inconclusive as to the existence of a norm of customary international law.[216]

Importantly, the Inter-American Commission agreed with the United States on these points.[217] The Commission stated that, while a customary international law ban on juvenile executions "is emerging," the Commission was "convinced by the U.S. Government's argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty."[218] In addition, citing the proposed U.S. reservations to the American Convention on Human Rights, the Commission stated that, "[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist."[219] Thus, the United States was found, as of 1987, not to be bound by any customary international law ban on the juvenile death penalty.[220]

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216. *Id.* at 876.

217. Case 9647, 147, 165 Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987).

218. *Id.* at 172. The Commission did express the view that, among the member states to the OAS, there was a "regional *jus cogens*" norm against the "execution of children." *Id.* at 168–70. It did not hold, however, that this norm categorically prohibited the execution of any offender under the age of eighteen. For criticism of the Commission's notion of "regional *jus cogens*," see, for example, Donald T. Fox, *Current Development: Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L L. 601, 601–02 (1988) ("Unfortunately, the Commission did not elaborate on the notion of a regional jus cogens, or compare it to the notion of peremptory norm stated in Article 53 of the Vienna Convention . . . ."); WEISSBRODT ET AL., *supra* note 11, at 720–21 (describing criticism of the Commission's reasoning). For additional discussion of *jus cogens* arguments against the juvenile death penalty, see *infra* Part III.C.

219. Case 9647, 147, 168, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987).

220. Despite agreeing with the United States on these points, the Commission held against the United States on the ground that the diversity of capital punishment standards throughout the United States "results in the arbitrary deprivation of life and inequality before the law," in violation of Articles I and II of the American Declaration. *Id*. at 173. One member of the Commission dissented from this part of the Commission's decision, arguing, among other things, that the United States had not consented to any treaty or customary international law limitation on its execution of juvenile offenders. *Id.* at 176–80 (Cabra, Del., dissenting). The U.S. government also strongly objected to the Commission's conclusion in a request for reconsideration, arguing that the conclusion represented a "fundamental misconception of the right to equality before the law as set forth in the Declaration," Request for Reconsideration of Resolution No. 3/87, at 155, 163, Case 9647, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987), and that

Shortly after the Inter-American Commission's decision, in 1988 and 1989, the U.S. Supreme Court addressed the legality of the juvenile death penalty under U.S. constitutional law, in the *Thompson* and *Stanford* decisions. As explained in Part I, the Court ultimately concluded that there was no Eighth Amendment ban on the execution of juvenile offenders at least sixteen years of age.[221] The Court also made clear that it was reaching this conclusion notwithstanding contrary international practice.[222]

At about this time, the United States was involved in negotiations over the text of the proposed Convention on the Rights of the Child. During these negotiations, the U.S. delegation objected to the proposed ban in the Convention on juvenile executions but stated that it would not insist on deletion of that provision "provided it was understood that the United States maintained its right to make a reservation on this point."[223] The first President Bush refused even to sign this Convention, in part because of its death penalty provision.[224] The Clinton administration did sign the Convention in 1995, but President Clinton also stated at that time that he would ask the Senate to attach "a number of reservations and understandings" to "protect the rights of the various states under the nation's federal system of government and maintain the country's ability to use existing tools

"[t]he United States has assumed no international obligation to alter in any way its constitutional structure of government," *id.* Even critics of the juvenile death penalty have questioned the Commission's decision on this point as insensitive to the United States' federal structure. *See, e.g.*, Weissbrodt, *supra* note 19, at 360–61 (stating that "this broad holding is impractical, if not absurd, with respect to United States law").

221. *See supra* notes 55–58 and accompanying text.

222. *See supra* note 57 and accompanying text.

223. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 465 (Sharon Detrick ed., 1992); *see also id.* at 475 ("In joining the consensus the representative of the United States of America reserved the right of his country to enter reservations on this article if ever the United States of America decided to ratify the Convention."); *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. ESCOR, Comm'n on Hum. Rts., 42d Sess., Agenda Item 13, at 24, Doc. E/CN.4/1986/39 (1986); *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Agenda Item 13, at 101, U.N. Doc. E/CN.4/1989/48.

224. Timothy J. McNulty, *U.S. Out in Cold, Won't Sign Pact on Children*, CHI. TRIB., Sept. 30, 1990, at 4C.

of the criminal justice system in appropriate cases."[225] The United States still has not ratified the Convention.

The United States finally ratified the ICCPR in 1992. It did so subject to a variety of reservations, including a reservation declining to agree to a ban on juvenile executions. The Bush administration explained that:

> in light of the recent reaffirmation of U.S. policy towards capital punishment generally, and in particular the Supreme Court's decisions upholding state laws permitting the death penalty for crimes committed by juveniles aged 16 and 17, the prohibition against imposition of capital punishment for crimes committed by minors is not acceptable.[226]

The reservation was adopted despite suggestions by several human rights groups during the 1991 hearings that the juvenile death penalty violated international law.[227]

After ratifying the ICCPR, the United States found itself defending the legality of its reservations to that treaty. As discussed in Part II, the monitoring committee established under the ICCPR issued reports in 1994 and 1995 critical of the U.S. reservations.[228] Among other things, the committee suggested that the U.S. reservation on the juvenile death penalty violated international law standards governing permissible reservations. The U.S. State Department strongly objected to this conclusion, stating, among other things, that "while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law."[229] The State Department also explained that the United States had decided to leave the legality of the death penalty, including

225. Press Release, White House Press Office, Statement on U.N. Decision to Sign U.N. Convention on the Rights of the Child (Feb. 10, 1995). *See also* David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. FIGHTING POVERTY 161, 172–82 (1998) (discussing domestic issues implicated by the Convention and potential reservations).

226. *International Covenant on Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. 10 (1991).

227. *See id.* at 38, 95 (statement of Carole Nagengast, Chair, Amnesty International USA); *id.* at 145 (statement of Charles D. Siegal, Chair, Human Rights Committee of the International Law Association—American Branch); *id.* at 152 (statement of the Minnesota Lawyers International Human Rights Committee); *id.* at 182 (statement of Human Rights Watch).

228. *See supra* notes 79–82 and accompanying text.

229. U.S. Response, *supra* note 111, at 267.

the juvenile death penalty, to its domestic democratic processes.[230] It further "disagreed that customary international law established a clear prohibition at the age of 18."[231] Finally, the State Department argued that the trend among nations to abolish the juvenile death penalty did not make the U.S. approach unlawful:

> We understand that capital punishment has been abolished or severely limited in many countries in the world. In the United States, there is a continuing debate over this issue, including dispute over provisions which permit courts to treat juveniles as adults in certain limited situations. Current U.S. law reflects the democratically-expressed will of the American people. Our Supreme Court has upheld its constitutionality. Capital punishment is not prohibited by the Covenant or, more generally, by international law.[232]

It is at about this point in the story—the mid-1990s—that official international organizations began suggesting that the U.S. juvenile death penalty violated international law. For example, in addition to the reports described in Part II from the ICCPR's human rights committee, the UN Human Rights Commission has issued resolutions every year since 1997 concerning the death penalty. These resolutions, among other things, urge all States that still maintain the death penalty

> to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty . . . for crimes committed by persons below eighteen years of age . . . .[233]

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230. *Summary Record*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1405th mtg. at 5, U.N. Doc. CCPR/C/SR.1405 (1995) (statement of Conrad Harper).

231. *Id*.

232. USUN Press Release No. 49-(95), United States Mission to the United Nations, Statement by Conrad K. Harper, Legal Adviser, U.S. Dept. of State, to the Human Rights Committee at its Fifty-third Session at the United Nations on U.S. Implementation of the International Covenant on Civil and Political Rights, at 5 (Mar. 29, 1995).

233. *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2002/77, U.N. GAOR, 58th Sess., ¶ 4(a), U.N. Doc. E/CN.4/RES/2002/77 (2002); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2001/68, U.N. GAOR, 57th Sess., ¶ 4(a), U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2000/65, U.N. GAOR, 56th Sess., ¶ 3(a), U.N. Doc. E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 1999/61, U.N. GAOR, 55th Sess., ¶ 3(a), U.N. Doc. E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 1998/8, U.N. GAOR, 54th Sess., U.N. Doc. E/CN.4/RES/1998/8 (1998); *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 1997/12, U.N. GAOR, 53d Sess., ¶ 2, U.N. Doc. E/CN.4/RES/1997/12 (1997).

The wording of these resolutions can be read as suggesting that all nations are obligated to end this practice by virtue of existing treaties—even nations that have declined to ratify these treaties or have ratified them subject to reservations. Similarly, the UN's Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions began asserting in late 1996, and the UN's Subcommission on the Promotion and Protection of Human Rights began asserting in 1999, that international law prohibits the execution of juvenile offenders.[234] Prior UN statements, dating back to the 1980s, had urged abolition of the juvenile death penalty on policy grounds but had not asserted that abolition was required by international law.[235]

One of the most recent developments in the story is the *Domingues* case mentioned at the beginning of this Article.[236] In opposing Supreme Court review in that case, the Solicitor General argued that the United States was not obligated by treaty to end the execution of juvenile offenders.[237] He also explained that "[t]he United States has

234. *See Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories* ¶ 88, E/CN.4/1997/60 (1996) ("Capital punishment is prohibited for juvenile offenders under international law."); *The Death Penalty in Relation to Juvenile Offenders*, Sub-Comm'n on the Promotion and Protection of Hum. Rts. Res. 2000/17, U.N. ESCOR, U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (2000), http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2000.17.En?Opendocument (recommending that the U.N. Commission on Human Rights pass a resolution which "confirms that international law concerning the imposition of the death penalty in relation to juveniles clearly establishes that the . . . [juvenile death penalty] is in contravention of customary international law"); *The Death Penalty, Particularly in Relation to Juvenile Offenders*, Sub-Comm'n on the Promotion and Protection of Hum. Rts. Res. 1999/4, U.N. ESCOR, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999), http://www.unhr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1999.4.En?Opendocument (calling upon all States to abolish the death penalty for juvenile offenders and noting that "abolition of the death penalty [would] contribute[] to the enhancement of human dignity and to the progressive development of human rights").

235. For example, in 1984, the UN High Commissioner on Human Rights issued a set of safeguards for protection of those facing the death penalty, which was adopted by a resolution of the Economic and Social Council. The third safeguard states that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death." *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984). Similarly, in a 1985 resolution the U.N. General Assembly adopted a set of Standard Minimum Rules for the Administration of Juvenile Justice (known as the "Beijing Rules"), one provision of which states that capital punishment shall not be imposed for crimes committed by juveniles. G.A. Res. 40/33, U.N. GAOR., 40th Sess., Supp. No. 53, at 210, U.N. Doc. A/40/53 (1985). *See generally* WEISSBRODT ET AL., *supra* note 11, at 714–17 (describing nontreaty instruments that prohibit juvenile executions).

236. *See supra* note 16 and accompanying text.

237. Domingues Brief, *supra* note 16, at 4–11.

in the past taken the position in international fora that customary international law does not prohibit the execution of sixteen-year-old offenders. The United States has also persistently objected to the development and application of such a principle."[238] Among other things, the Solicitor General cited the U.S. statements before the Inter-American Commission on Human Rights in the mid-1980s.[239]

4. *Summary*. The record thus shows that, at least since the late 1970s, the United States has declined to agree to treaty provisions that would outlaw the execution of juvenile offenders, has repeatedly stated before international bodies (such as the Inter-American Commission on Human Rights and the ICCPR's Human Rights Committee) that it objects to an international law ban on the practice, and has continued to allow for the execution of juvenile offenders domestically in the face of international pressure to end the practice. The record also shows that, as international criticism of the juvenile death penalty has increased, and as treaties have been developed to prohibit this practice, the U.S. reservation of a right to continue the practice has become more pronounced. Under conventional international law analysis, this record should be sufficient to demonstrate that the United States is a persistent objector.

### C. *Reliance on the Concept of* Jus Cogens

As discussed, the United States can and does argue that it has opted out of any customary international law ban on the juvenile death penalty. Increasingly, critics of the juvenile death penalty are responding by arguing that the United States is disallowed from opting out because the prohibition on juvenile executions is now a *jus cogens* norm. A *jus cogens* norm (also called a "peremptory norm") is, according to the Vienna Convention on the Law of Treaties, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[240] These norms purport-

238. *Id.* at 15.

239. *Id.* at 15 n.8.

240. Vienna Convention on the Law of Treaties, *supra* note 70, art. 53, 1155 U.N.T.S. at 344; *see also* BLACK'S LAW DICTIONARY 864 (7th ed. 1999) (defining *jus cogens* as "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another"). A number of U.S. courts have recited the Vienna Convention's definition of *jus cogens*. *See, e.g.*, Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149–50

edly transcend requirements of national consent, such that nations are not allowed to opt out of them, even by treaty. Norms frequently described as *jus cogens* norms are the prohibitions (now contained in treaties) on the aggressive use of force, genocide, slavery, and torture.[241]

Critics of the juvenile death penalty point to the widespread ratification of treaties prohibiting juvenile executions and the almost worldwide halt in executing juvenile offenders as "proof" that the prohibition on executing juvenile offenders has attained the status of a *jus cogens* norm. The following argument from a recent article is illustrative:

> The death penalty is disappearing throughout the world. Only in a few countries, including the United States, does the death penalty still have a safe haven. Even fewer countries still execute defendants who committed crimes when under the age of eighteen. Thus, the prohibition of the juvenile death penalty is not only customary international law, but also *jus cogens*, and a norm to which the renegade United States should be bound.[242]

If accepted, this argument would allow opponents of the juvenile death penalty to avoid the usual consent-based restrictions associated with claims based on treaties and customary international law.

As an initial matter, one can reasonably question whether *jus cogens* is meaningful as a legal (as opposed to moral) concept. Although there is widespread agreement on the *jus cogens* concept in the abstract, there is no agreement on either the process by which *jus cogens* norms are formed or the content of these norms.[243] The Vienna Convention does not address these fundamental questions because the treaty delegates could not agree on how to resolve them,[244] which at least raises the question whether the *jus cogens* concept is anything

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(7th Cir. 2001); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988).

241. RESTATEMENT (THIRD), *supra* note 13, § 102 reporters' note 6; *id.* § 702 cmt. n.

242. de la Vega & Brown, *supra* note 19, at 770.

243. *See, e.g.*, AUST, *supra* note 109, at 257 ("There is no agreement on the criteria for identifying which norms of general international law have a peremptory character."); BROWNLIE, *supra* note 148, at 516–17 ("[M]ore authority exists for the category of *jus cogens* than exists for its particular content."); I.A. SHEARER, STARKE'S INTERNATIONAL LAW 49 (1994) ("[T]here is a lack of consensus as to what, at the present time, are norms of jus cogens.").

244. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 58 (7th rev. ed. 1997); Christopher A. Ford, *Adjudicating* Jus Cogens, 13 WIS. INT'L L.J. 145, 165–66 (1994).

other than, in the words of one commentator, a "normative myth masking power arrangements."[245] Nor is it clear that the concept is compatible with the current structure of the international community, which, despite aspirations in some academic circles to the contrary, is still dominated by sovereign nation-states.[246] For example, although the *jus cogens* concept is often analogized to public policy limitations imposed by domestic legal systems on freedom of contract, the analogy is imperfect at best because, unlike in domestic systems, there is no hierarchically superior sovereign in the international legal system.[247]

To be sure, the concept of *jus cogens* is endorsed in the Vienna Convention on the Law of Treaties. Conceptually, however, it may be difficult to justify the nonconsensual doctrine of *jus cogens* from the consensual act of ratifying the Vienna Convention. In any event, only about 90 nations—less than one-half of all nations—are parties to the Vienna Convention, and the United States is not one of them. Moreover, the Vienna Convention invokes the concept of *jus cogens* only as a rule concerning the validity of treaties, not as a limitation on nontreaty conduct.[248] In retaining a juvenile death penalty, however, the United States is not attempting to enforce any treaty. By its terms, therefore, the Vienna Convention is not directly relevant to this situation.

Even if one accepts that *jus cogens* is a meaningful and binding legal concept, and that it applies outside the context of treaty enforcement, there are still significant justifications for resisting the argument that the prohibition on executing juvenile offenders is a *jus cogens* norm. As a normative matter, it may be difficult to justify the placement of capital punishment for sixteen- and seventeen-year-old

245. Gordon A. Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 590 (1988); *see also* Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens*!*, 6 CONN. J. INT'L L. 1, 1 (1990) (noting critically that "the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power").

246. *See generally* Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1089–94 (1996) (providing evidence to show that "the decline of the nation state has been greatly exaggerated").

247. For additional criticism of the public policy analogy, see A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 25–27 (1995).

248. *See* Vienna Convention on the Law of Treaties, *supra* note 70, arts. 53, 64, 1155 U.N.T.S. at 344, 347 (stating simply that treaty provisions that conflict with peremptory norms are void).

murderers in the same category as genocide, slavery, and torture. Indeed, there is a danger that the "shock the conscience" nature of the *jus cogens* concept will be undermined by expanding the category in this way. Although this observation obviously depends to some extent on a subjective assessment, the behavior of nations appears to bear it out. For example, unlike the case of certain *jus cogens* violations—such as genocide and war crimes—there has not been any international effort to prosecute officials who carry out the execution of juvenile offenders.[249]

Furthermore, the purported ban on the execution of juvenile offenders may not have the absolute character usually associated with *jus cogens* norms. Unlike the prohibitions on genocide, slavery, and torture, the purported prohibition on the execution of juvenile offenders is limited and qualified. It does not, for example, rule out the use of capital punishment in general. Nor could it do so, given that almost one-half of all nations (including large nations like China and the United States) still have the death penalty, and only a relatively small number of nations have ratified treaties prohibiting this practice.[250] Moreover, the purported ban on the juvenile death penalty does not even apply to the execution of all youthful offenders, or even all teenagers—just the execution of individuals who happen to be under the age of eighteen at the time of their offense. And the age of eighteen is a rather arbitrary dividing line, as suggested by ongoing debates in the medical and scientific communities about the age of maturity, and by the use of varying age requirements for other issues relating to maturity (such as driving, selective service, use of the juvenile justice system, statutory rape, and consumption of alcohol).

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249. The treaty establishing the proposed International Criminal Court limits the Court's jurisdiction to genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court, *supra* note 71, art. 5(1), 37 I.L.M. at 1003–04.

250. There are several treaties that call for a complete end to the death penalty, none of which the United States has signed or ratified: the Second Optional Protocol to the International Covenant on Civil and Political Rights (which has forty-nine parties), United Nations Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty22.asp (last visited Jan. 16, 2003) (on file with the *Duke Law Journal*); the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (which has nine parties), Inter-American Commission on Human Rights, *at* http://www.cidh.oas.org/Basicos/basic8.htm (last visited Jan. 16, 2003) (on file with the *Duke Law Journal*); and Protocol No. Six to the European Convention on Human Rights (which has forty-one parties), Treaty Office, Council of Europe, *at* http://conventions.coe.int/Treaty/EN/cadreprincipal.htm (last visited Jan. 16, 2003) (on file with the *Duke Law Journal*). For a description of international practices concerning the death penalty, see generally ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (rev. ed. 1996).

Finally, one point frequently emphasized by courts and commentators in concluding that certain norms are within the category of *jus cogens* is that no nation claims the right to engage in the behavior. Some nations may in fact violate the purported *jus cogens* norm, but they typically deny having done so, or promise not to do so in the future. Under such circumstances, one could conclude that a norm has been, to use the language of the Vienna Convention, "accepted and recognized by the international community of States *as a whole*."[251] For example, in concluding in the famous *Filartiga* decision that customary international law prohibits torture, the U.S. Court of Appeals for the Second Circuit emphasized that the court had "been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens."[252] By contrast, the United States consistently has maintained that it does have the right to carry out juvenile executions, and it has not attempted to hide or stop this practice.[253] For all these reasons, the *jus cogens* challenge to the juvenile death penalty seems unpersuasive.[254]

251. Vienna Convention on the Law of Treaties, *supra* note 70, art. 53, 1155 U.N.T.S. at 344 (emphasis added).

252. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

253. Some commentators have claimed that South Africa's apartheid regime violated *jus cogens* norms against racial discrimination, notwithstanding South Africa's insistence on the right to retain this regime. *E.g.*, HENKIN, *supra* note 70, at 39. Assuming for the sake of argument that this claim is correct, it still may be unlikely for a *jus cogens* norm to form when a large and influential nation like the United States is a persistent objector. For example, the UN Security Council—the only organ of the UN with lawmaking power—passed a number of resolutions condemning apartheid and sanctioning South Africa. The United States, by contrast, has veto power on the Council and thus, as a practical matter, will not have its conduct subjected to such resolutions. In any event, the South Africa example may not have involved persistent objection, since South Africa had agreed to equal racial treatment in its ratification of the United Nations Charter. Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 119 (Part V 1982). *But see* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 539–40 n.48 (1993) ("[I]t is difficult to sustain the argument that the Government of South Africa ever knowingly consented to the establishment of legal obligations under the Charter or general international law making its discriminatory laws illegal.").

254. In its 1987 decision the Inter-American Commission on Human Rights stated that there was a "regional *jus cogens*" norm against executing "children." *See supra* note 218. The Commission did not take the position that such a norm prohibited the execution of any offender under the age of eighteen. Moreover, the Commission's *jus cogens* statement is highly questionable, both because *jus cogens* norms are supposed to be universal, not regional, and because the *jus cogens* statement appears to contradict the Commission's own finding that there was no customary international law prohibition on juvenile executions. *See also* Case 9647, 147, 181, Inter-Am. C.H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987) (Cabra, Del., dissenting) (stating that "there can be no 'American *jus cogens*'"); *cf.* Vienna Convention on the Law of Treaties, *supra* note 70, art. 53, 1155 U.N.T.S. at 344 (stating that a *jus cogens* norm is "accepted by the interna-

## IV. ENFORCEMENT IN U.S. COURTS

As I have explained, neither treaties nor customary international law provide strong arguments against the U.S. juvenile death penalty, at least as a matter of conventional international law analysis. To the extent there is uncertainty about this conclusion, it is largely due to efforts to reduce or eliminate traditional international law requirements of national consent. There are efforts, for example, to disallow treaty reservations, even if accepted by the other parties to the treaty; to sever invalid reservations and bind the reserving country to the treaty as if it had never entered the reservation; to derive customary international law from treaties and then apply it to countries that have not ratified the treaties; to restrict or eliminate the persistent objector exception to customary international law; and to broaden the *jus cogens* category.

These efforts have not been universally applauded, even from scholars otherwise supportive of international law. For example, Professor Prosper Weil in his well-known article, *Towards Relative Normativity in International Law?*, argued that the "legal" nature of international law was being undermined by the erosion of state consent requirements.[255] As Professor Weil explained:

> [T]he intention manifested by a state in regard to a given convention is henceforth of little account: whether it signs it or not, becomes party to it or not, enters reservations to such and such a clause or not, it will in any case be bound by any provisions of the convention that are recognized to possess the character of rules of customary or general international law.[256]

This phenomenon is a threat to the legitimacy of international law, he argued, because "[a]bsent voluntarism, international law would no longer be performing its functions."[257] Other scholars, such as Profes-

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tional community *as a whole*" (emphasis added)). Recently, in October 2002, the Commission concluded that "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime" and that "this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*." Report No. 62/02, Inter-Am. C.H.R., Domingues v. United States ¶¶ 84-85 (Oct. 22, 2002). For the reasons in the text, I disagree with the Commission's conclusion.

255. *See generally* Weil, *supra* note 143, at 438–40.

256. *Id.* at 440.

257. *Id.* at 420. The two principal functions of international law, he argued, are: "first, to enable these heterogeneous and equal states to live side by side, and to that end to establish orderly and, as far as possible, peaceful relations among them; second, to cater to the common interests that did not take long to surface over and above the diversity of states." *Id.* at 418.

sors Bruno Simma and Philip Alston, have expressed particular concern with respect to customary international law. Observing that customary international law traditionally had been determined inductively from state practice, Simma and Alston noted with concern that such an approach was being discarded in favor of an approach that focused more on international statements, such as those contained in nonbinding United Nations resolutions, turning customary international law into "a self-contained exercise in rhetoric."[258] More dramatically, Professor Patrick Kelly argued in a 2000 article that customary international law has become too indeterminate and manipulable and, as a result, "should be eliminated as a source of international legal norms and replaced by consensual processes."[259]

Even if these criticisms are overcome, and the efforts to make international law less dependent on national consent are successful, it is unlikely that the international law arguments would provide a basis for judicial invalidation of state death penalty laws in U.S. courts. Indeed, if anything, an erosion of national consent requirements is likely to *reduce* the likelihood that U.S. courts will enforce international law in this way.

### A. *Enforcing the ICCPR*

As I discuss in Part II, in order for an ICCPR-based challenge against the U.S. juvenile death penalty to succeed under international law, a decisionmaker would have to reach two questionable conclusions: that the U.S. reservation violates the object and purpose of the ICCPR, and that the proper remedy under international law is to sever the reservation and enforce the treaty against the United States as if it had never entered the reservation.[260] Even those conclusions, however, would probably be insufficient to provide a *U.S. court* with a basis for disregarding the reservation.

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258. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom,* Jus Cogens*, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89 (1988–89); *see also* Schabas, *supra* note 64, at 309 ("The problem of such wishful thinking among human rights jurists, who invoke ill-defined 'custom' as a substitute for serious and sometimes frustrating efforts at treaty interpretation, is not a new one.").

259. Kelly, *supra* note 138, at 452. For additional criticism of customary international law, see generally Goldsmith & Posner, *supra* note 138; Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000).

260. *See supra* Part II.A.

Article II of the Constitution specifies the procedural requirements for treatymaking: the president has the power to make treaties, "by and with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur."[261] The reservations to the ICCPR, including the reservation to the juvenile death penalty provision, comply with these requirements. The president and at least two-thirds of the senators present accepted these reservations, and they were included with the U.S. instrument of treaty ratification that was deposited by the president with the United Nations.[262] Furthermore, there does not appear to be any basis in U.S. law for imposing on this process any additional limitations derived from the customary international law of treaty reservations. Although the Supreme Court has not addressed this issue directly, it has long held that Congress is not required under U.S. law to comply with treaties,[263] and the lower courts uniformly have held that Congress is not required to comply with customary international law.[264] Furthermore, lower courts generally have held that the executive branch is not required to comply with customary international law.[265] There is no reason to believe that U.S. law imposes a requirement of international law compliance on the Senate and president when making treaties when it does not impose this requirement on Congress or the president outside the treaty process. Consequently, even if a U.S. court accepted the international law arguments, it would not have a basis under U.S. law for disregarding the U.S. reservation.[266]

In fact, enforcement of the juvenile death penalty provision by a U.S. court would not only lack support in U.S. law, it arguably would

261. U.S. CONST. art. II, § 2, cl. 2.

262. *See* Bradley & Goldsmith, *supra* note 69, at 439–56 (discussing customary international law principles of treaty formation in relation to the separation of powers).

263. Under the "last-in-time" rule, when there is a conflict between a federal statute and an earlier-in-time treaty, U.S. courts will apply the statute. Breard v. Greene, 523 U.S. 371, 376 (1998); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

264. *E.g.*, Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453–54 (11th Cir. 1986).

265. *E.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1447–48 (5th Cir. 1993); *Garcia-Mir*, 788 F.2d at 1454–55; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that courts are to apply the law of nations "where there is no treaty, and no controlling executive or legislative act or judicial decision").

266. *Cf.* Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) ("The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.").

violate the U.S. Constitution. Under Articles II and VI of the Constitution, the president and two-thirds of the Senate must agree on the terms of a treaty before it becomes part of the "supreme Law of the Land." If a U.S. court disregarded the U.S. reservation and enforced the juvenile death penalty provision, it would be treating as supreme law of the land a treaty provision that had never been approved by the president and Senate. Even if one were to conclude that the proper *international law remedy* was to sever the reservation and enforce the treaty as if the reservation had never been entered, the procedural requirements of the Constitution would remain unsatisfied. This is true even if a court somehow concluded that the U.S. treatymakers would have ratified the treaty without the reservation if they had known that the reservation was invalid under international law, since Article II refers to what the treatymakers *actually* agreed upon, not to what they *would have* agreed upon.[267]

More generally, courts would likely be reluctant to disregard the U.S. reservation because doing so would involve a substantial judicial intervention into the treaty process. U.S. courts have never exercised judicial review to invalidate either the domestic or international effects of a treaty. In part, this is because the text of the Constitution is relatively silent about the scope and exclusivity of the treaty power. U.S. courts also have recognized that, although treaties are legal instruments, their creation and especially their enforcement are heavily informed by political factors.[268] Recognizing the lack of textual guidance and the importance of political contingency in this context, U.S. courts have taken a largely passive role in the institutional developments concerning the making and enforcement of treaties. They usually defer to the accommodations of the political branches (such as

267. This situation can be contrasted with the usual statutory severability situation, where the issue is whether to enforce a statute *without the severed term or not at all*, not whether to enforce a provision that Congress refused to put into the statute. For additional discussion of severability, see WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 888–89 (3d ed. 2001); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

268. *See* Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.").

the allowance of congressional-executive agreements)[269] or abstain from adjudicating disputes between the political branches (such as over the termination of treaties).[270] Similarly, they consider many matters pertaining to the negotiation, observance, and status of treaties to be "political questions" committed to the discretion of the political branches.[271] They also give "great weight" to the Executive Branch's interpretation of a treaty.[272] And, of course, judicial deference to political branch arrangements is especially strong in situations, as with the reservations to the ICCPR, in which the political branches are in agreement.[273] For all of these reasons, it is highly unlikely that a U.S. court would apply the customary international law of treaty reservations to invalidate the United States' juvenile death penalty reservation to the ICCPR.

### *B. Non-Self-Execution*

Another barrier to domestic enforcement of the ICCPR is that the president and Senate attached a declaration to their ratification of this treaty stating that the substantive provisions of the treaty are "not self-executing."[274] Under U.S. law, if a treaty is not self-executing, it cannot be enforced in U.S. courts unless and until Congress enacts legislation implementing the treaty.[275] As a result, the

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269. *See* Made in the USA Found. v. United States, 242 F.3d 1300, 1311–14 (11th Cir. 2001) (holding that the constitutionality of the NAFTA trade agreement was a political question); Ntakirutimana v. Reno, 184 F.3d 419, 425 (5th Cir. 1999) (allowing extradition pursuant to congressional-executive agreement).

270. *See* Goldwater v. Carter, 444 U.S. 996, 996 (1979) (declining to decide the validity of President Carter's unilateral termination of defense treaty with Taiwan).

271. Edwin D. Dickinson, *International Political Questions in the National Courts*, 19 AM. INT'L L. 157, 158–163 (1925).

272. *E.g.,* United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); RESTATEMENT (THIRD), *supra* note 13, § 326(2); *see also* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701–07 (2000) (discussing this phenomenon).

273. *See* Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) ("When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

274. *See* U.S. RUDs, *supra* note 67, at 8071.

275. *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that if a treaty is not self-executing, "the legislature must execute the [treaty], before it can become a rule for the Court"); United States v. Postal, 589 F.2d 862, 875–76 (5th Cir. 1979) (same); Jama v. INS, 22 F.

ICCPR's provision concerning the juvenile death penalty, even if binding on the United States, cannot be applied by U.S. courts to invalidate state death penalty laws.

Some commentators have suggested that the non-self-execution declaration should be disregarded by U.S. courts because it conflicts with the Supremacy Clause of the Constitution, which states in relevant part that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[276] According to these commentators, the Supremacy Clause mandates that treaties have the status of preemptive federal law, and the U.S. treatymakers therefore do not have the unilateral power to prevent treaties from having that status. As Professor Henkin states, "treaties are declared to be the supreme law of the land . . . . [I]t should not require legislative implementation to convert [a treaty] into United States law."[277] Henkin concludes that the "pattern of non-self-executing declarations [attached to human rights treaties] threatens to subvert the constitutional treaty system."[278]

Although the word "shall" in the Supremacy Clause gives this argument surface plausibility, the argument becomes doubtful once one considers the purposes of the Supremacy Clause and its well-settled application outside the reservations context. By its terms, the Clause obviously does make federal laws supreme over state laws. The Clause does not, however, purport to affect the power of U.S. lawmakers to define the domestic scope of the laws they enact, either as to the states or as to other federal laws. In other words, the Clause does not, as critics of the U.S. reservations suggest, operate as a limit on federal lawmaking power.

Three examples illustrate this point. First, the Supremacy Clause makes federal statutes, like treaties, the supreme law of the land. Nonetheless, Congress frequently specifies that federal statutes do not preempt state law, do not invalidate prior federal law, or do not

Supp. 2d 353, 365 (D.N.J. 1998) ("'Non-self-executing' means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them.").

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

277. Henkin, *supra* note 200, at 346.

278. *Id.* at 348.

create a private cause of action.[279] Second, although congressional-executive agreements—which are equivalent to treaties under international law—are considered part of the supreme law of the land, it is widely accepted that Congress and the president can limit the self-executing effect of these agreements.[280] Third, and most directly relevant, it has long been settled that, notwithstanding the Supremacy Clause, not all treaties are self-executing.[281]

With respect to the last point, critics of the non-self-execution declaration generally concede that not all treaties are self-executing. They argue, however, that the self-execution issue must be resolved solely by reference to the terms of the treaty negotiated with foreign nations, not by conditions unilaterally imposed on the treaty by the Senate or president.[282] Nothing in the language of the Supremacy Clause or in U.S. historical tradition suggests that this is true. As noted, federal lawmakers generally have the power to limit the domestic effects of their enactments, and there is no reason to believe that the treatymakers should have less power in this regard.

In any event, even if it were true that the issue of self-execution had to be determined solely by reference to the terms of the treaty, the United States' non-self-execution declarations are in fact part of the terms of the treaties. They are included with the U.S. instrument of ratification that defines the nature of the U.S. obligations to other countries, and all other parties to the treaties are on notice of them.

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279. *See* 8 U.S.C. § 1158(d)(7) (2000) ("Nothing in this subsection [concerning asylum applications] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."); 15 U.S.C. § 2649(a) (2000) ("Nothing in this subchapter [relating to removal of asbestos] shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common.").

280. *E.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 217 (2d ed. 1996); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 525–26 (1991); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 641 (1991). For example, in the Uruguay Round Agreements Act, which authorizes the latest GATT agreement, Congress stated that: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." Pub. L. No. 103-465, § 102(a)(1), 108 Stat. 4809, 4815 (1994). Congress also stated that no one other than the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements" or challenge "any action or inaction . . . of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent" with one of the agreements. *Id.* § 102(c)(1), 108 Stat. at 4818.

281. *See supra* note 275 and accompanying text.

282. *See, e.g.*, Riesenfeld & Abbott, *supra* note 280, at 296–97.

Moreover, unlike some of the United States' substantive reservations, no nation has specifically objected to the non-self-execution declarations. It would be difficult for any nation to do so, since many nations' constitutions render all treaties non-self-executing, and require separate implementing legislation for the treaties to have domestic force. Thus, even if the treatymakers could control the domestic scope of a treaty only by including limitations within the treaty itself, that is precisely what the non-self-execution declarations accomplish.

Critics of the non-self-execution declarations sometimes quote from early historical materials to the effect that the inclusion of treaties in the Supremacy Clause was designed to reduce treaty violations attributable to the United States. They argue that non-self-execution declarations may contravene this purpose by heightening the risk that the United States will violate international law.[283] None of this historical evidence, however, suggests that the Supremacy Clause was meant to limit the treatymakers' control over the domestic force of treaties. Rather, it shows only that the Founders were concerned about treaty violations *by the states*, and that they wished to give the national government the power to prevent treaty violations *if they so desired*. The inclusion of treaties in the Supremacy Clause, in other words, was designed to enhance the ability of the federal government to compel state compliance with treaties, not to restrict the federal government's flexibility in determining whether and how to comply with international law.[284]

Another argument made by some commentators is that, even if valid, the ICCPR's non-self-execution declaration merely precludes a private cause of action under the treaty, not defensive use of the treaty, such as use of the treaty in a criminal proceeding as a defense

283. *E.g.*, Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 60–62 (1997); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 716–17 (1995).

284. For extensive documentation of this point, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION 24–25 (Max Farrand ed., rev. ed. 1966) (citing Edmund Randolph's observation that, under the Articles of Confederation, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the federal government] cannot punish that State, or compel its obedience to the treaty"). For an explanation of why the non-self-execution declaration does not exceed the scope of the treaty power, see Bradley & Goldsmith, *supra* note 69, at 449–54.

to the imposition of capital punishment.[285] As noted, the judicially developed concept of non-self-execution has traditionally been thought to preclude *all* uses of a treaty in court, both offensive and defensive.[286] There is no evidence that the president and Senate intended to deviate from this traditional understanding in attaching the non-self-execution declaration to the ICCPR. Although there are statements in the ICCPR's legislative history explaining that the non-self-execution declaration would preclude a private cause of action,[287] there are no statements supporting the negative inference that defensive uses of the treaty would be allowed. Indeed, there are a number of statements expressly stating that the ICCPR would not be judicially enforceable at all in the absence of implementing legislation.[288] This is also how courts have interpreted the declaration.[289]

### *C. Object and Purpose of Unratified Treaties*

It seems even less likely that a state death penalty law could successfully be challenged on the basis of the "object and purpose" of a treaty that the United States has signed but not ratified, such as the Convention on the Rights of the Child or the American Convention on Human Rights. Under Article VI of the Constitution, only "Treaties made, or which shall be made, under the Authority of the United States" are part of the supreme law of the land that preempts inconsistent state law.[290] Article II of the Constitution makes clear, however, that a treaty is not "made" until the Senate gives its advice and consent, and the president proceeds to ratify it.[291] Thus, a treaty that has been signed but not ratified by the United States does not have preemptive force under the Constitution.

Although it is true that the Supreme Court has recognized the authority of the president to conclude binding international agree-

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285. *E.g.*, John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 579–88 (1998); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 197–219 (1999).

286. *See supra* note 275 and accompanying text.

287. Bradley & Goldsmith, *supra* note 69, at 420–21.

288. *Id.* at 421–22.

289. Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001); Beazley v. Johnson, 242 F.3d 248, 267–68 (5th Cir. 2001).

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

291. *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

ments on his own authority under certain circumstances,[292] presidents have not attempted to use this "sole executive agreement" power to conclude any human rights treaty, let alone any treaty relating to the juvenile death penalty. Nor has any president claimed that the United States is legally bound to stop the execution of juvenile offenders. Indeed, presidents have consistently proposed reservations to make clear that the United States is *not* under this obligation.[293]

Moreover, if a president did claim that the United States was bound to stop the execution of juvenile offenders by virtue of a presidential signature of a human rights treaty, the claim would likely provoke substantial constitutional debate. The Senate almost certainly would perceive such a claim to be an infringement of its constitutional role in the treaty process.[294] In addition, there probably would be federalism objections to such a claim, since the juvenile death penalty is a feature of state criminal punishment, and the states are not formally represented in the executive branch. In light of these constitutional concerns, a court would likely treat such an object and purpose obligation as, at best, non-self-executing.[295]

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292. Dames & Moore v. Regan, 453 U.S. 654, 682 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937).

293. *See supra* notes 194–95, 223–25, and accompanying text.

294. The Senate has resisted presidential efforts to expand the executive agreement power. For example, in giving its advice and consent to the 1991 Treaty on Armed Conventional Forces in Europe, the Senate attached a declaration stating that international agreements that "reduce or limit the armed forces or armaments of the United States in a militarily significant manner" can be approved only pursuant to the Article II treaty process. 137 CONG. REC. 34,348 (1991). Recently, in response to a suggestion by President Bush that he might conclude an arms reduction pact with Russia by means of an executive agreement, leaders of the Senate Foreign Relations Committee wrote a letter to the president insisting that any such agreement be concluded pursuant to the Article II senatorial consent process. *See* Letter from Jesse Helms, Ranking Member, Senate Committee on Foreign Relations, and Joseph R. Biden, Jr., Ranking Member, Senate Committee on Foreign Relations, to Colin L. Powell, Secretary of State, http://www.armscontrolcenter.org/2002summit/a7.html (Mar. 15, 2002) (on file with the *Duke Law Journal*).

295. Both the political branches and the courts have long assumed that the Constitution's distribution of federal powers is relevant to the self-execution analysis. Thus, for example, treaty provisions calling for the appropriation of money have been treated as non-self-executing in order to preserve Congress's constitutional authority over appropriations. Edwards v. Carter, 580 F.2d 1055, 1058–59 (D.C. Cir. 1978). Similarly, treaties modifying tariff duties have generally been treated as non-self-executing in order to preserve the House of Representatives' role in raising revenue. *See id.* at 1077 n.15 (MacKinnon, J., dissenting) ("'Congress has often insisted that treaties modifying tariffs are not self-executing and require congressional implementation . . . .' (citation omitted)). And, for separation of powers and federalism reasons, U.S. courts typically treat the decisions and orders of international institutions as non-self-executing. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 378 (1998) (declining to enforce a preliminary order of the International Court of Justice); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937–38 (D.C. Cir. 1988) (declining to enforce a final decision of the International Court of Jus-

### *D. Status of Customary International Law*

For customary international law to provide a basis for judicial invalidation of state death penalty laws, it would need to have the status of preemptive federal law. The Supremacy Clause of the Constitution states that there are three types of supreme federal law: the Constitution, treaties, and "Laws of the United States . . . made in Pursuance [of the Constitution]."[296] Customary international law is obviously not the Constitution; nor is it a treaty. It was referred to at the time of the constitutional Founding as a component of the "law of nations," yet the Constitution's only reference to the law of nations is a grant of power to Congress "[t]o define and punish . . . Offenses against the Law of Nations."[297] While the Supreme Court has at times referred to the law of nations as "part of our law,"[298] or "part of the law of the land,"[299] it has never suggested that customary international law is part of the "Laws of the United States" referred to in the Supremacy Clause. And it seems inconceivable that the Founders of the Constitution would have viewed customary international law as "made in Pursuance" of the Constitution. Instead, they likely would have understood this law as stemming from either natural law or the customs of the international community.[300]

Most scholars now agree that, before *Erie Railroad v. Tompkins*,[301] customary international law had the status in the United States of general common law rather than supreme federal law. That is, customary international law, like the "law merchant" applied in *Swift v. Tyson*,[302] was part of a body of law that could be applied by courts as a rule of decision in the absence of controlling positive law to the contrary. This general common law did not preempt state statutory law,

tice); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (declining to enforce a Security Council resolution). *See generally* Curtis A. Bradley, *International Delegations, the Structural Constitution*, *and Non-Self-Execution*, 55 STAN. L. REV. (forthcoming 2003) (discussing this phenomenon).

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

297. U.S. CONST. art. I, § 8, cl. 10.

298. The Paquete Habana, 175 U.S. 677, 700 (1900).

299. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

300. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 630 (2002); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822–24, 832–33 (1989).

301. 304 U.S. 64 (1938).

302. 41 U.S. (14 Pet.) 1 (1842).

and cases arising under this law did not by that fact alone fall within Article III federal question jurisdiction.[303]

The Court in *Erie* famously declared that "[t]here is no federal general common law," and that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[304] This holding might suggest that federal courts should look to *state* law when applying customary international law. Indeed, in *Bergman v. De Sieyes*,[305] the Second Circuit reached precisely that conclusion. In an opinion authored by Judge Learned Hand, the court examined New York state law to determine the customary international law immunity of a diplomat in transit, noting that "although the courts of [New York] look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves."[306]

Nevertheless, since *Erie*, the Supreme Court has allowed for the creation of discrete bodies of federal common law.[307] Unlike general common law, federal common law is supreme federal law binding on the states, and cases arising under it are viewed as falling within Article III federal question jurisdiction. In recent years, many scholars, and the *Restatement (Third) of the Foreign Relations Law of the United States*, have maintained that customary international law should be treated as (or like) post-*Erie* federal common law.[308]

303. RESTATEMENT (THIRD), *supra* note 13, at 41; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276–85 (1996); Jay, *supra* note 300, at 824–25; *see also* Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807, 813–14 (1998) (documenting this point).

304. *Erie*, 304 U.S. at 78.

305. 170 F.2d 360 (2d Cir. 1948).

306. *Id.* at 361. The court also stated, however, that "[w]hether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." *Id*.

307. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 349–84 (3d ed. 1999); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 413–24 (6th ed. 2002).

308. *E.g.*, RESTATEMENT (THIRD), *supra* note 13, at 42; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 342–43; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1569 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824–27 (1998).

Even outside the context of the juvenile death penalty, there are substantial reasons to question this federal common law argument.[309] Although the Supreme Court has not given clear guidance about the conditions under which it is appropriate to create federal common law, the logic of *Erie* arguably requires that federal common law, to be legitimate, must be authorized in some fashion by either the U.S. Constitution or a federal statute.[310] It is difficult to argue, however, that anything in the Constitution or federal statutory law authorizes the wholesale judicial federalization of customary international law. In addition, although a national approach to customary international law might seem desirable from a policy perspective due to concerns about state disuniformity, the Supreme Court has emphasized in recent decisions that federal common law exists only in "few and restricted" instances, and that it will not be recognized merely because of a purported need for uniformity.[311] The Court further has emphasized that it is generally for Congress, not the federal courts, to determine when state law should be displaced.[312]

While a number of lower federal courts have stated in recent years that customary international law has the status of federal common law, they have done so exclusively in the context of adjudicating human rights claims between foreign citizens, and exclusively for the purpose of establishing federal court jurisdiction over the suits.[313] When faced with customary international law claims in domestic cases, courts have almost always rejected them.[314] Furthermore, there

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309. For a more thorough discussion of these reasons, see generally Bradley & Goldsmith, *supra* note 181.

310. *E.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887 (1986); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 287 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 17 (1985).

311. Atherton v. FDIC, 519 U.S. 213, 218 (1997) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

312. *Id*. The Supreme Court's restrictive approach in recent years to implied statutory rights of action, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001), and implied rights of action under the Constitution, *e.g.*, *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66–70 (2001), further suggests that the Court will require congressional authorization for the displacement of state law.

313. *Eg.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502–03 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); *cf.* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (noting the "present uncertainty about the precise domestic role of customary international law").

314. Outside of the death penalty context, see, for example, *Heinrich v. Sweet*, 49 F. Supp. 2d 27, 42 (D. Mass. 1999); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1245 (C.D. Cal.

are essentially no cases in which courts have relied on customary international law to preempt a state law.[315]

In any event, regardless of the general status of customary international law in U.S. courts, there are special separation of powers and federalism reasons for concluding that customary international law does not operate to preempt state law with respect to the juvenile death penalty. First, the U.S. treatymakers have expressly declined to allow the preemption of state laws in this area, by adopting reservations refusing to consent to a restriction of the juvenile death penalty, and by declaring the relevant treaties to be non-self-executing. Given these actions by the federal political branches, it would be highly problematic for courts to apply international law as preemptive federal law, especially since much of the evidence of the purported customary international law on this issue is the widespread treaty practice. Federal common law, after all, is supposed to promote, not undermine, the policy choices made by the political branches.[316]

Second, the Supreme Court has held that criminal law and punishment is an area particularly within the sovereign authority of the states.[317] Preemption of state law with respect to the juvenile death penalty thus poses special federalism concerns. Even if Congress or the treatymakers have the constitutional power to preempt the states on this issue, this would not make it appropriate for *courts* to do so on their own. Courts do not have general legislative power, which was assigned in Article I of the Constitution to Congress, rather than to the judiciary. Nor do states have the structural representation in the

1999); and *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998). *See generally* Bradley, *supra* note 22 (noting the differences in results of international human rights litigation in U.S. courts depending on whether the defendants are aliens or U.S. citizens).

315. I am aware of only one decision in U.S. history in which a court arguably applied customary international law to override a state law. In *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969), the New York Court of Appeals held that the City of New York could not assess taxes against Argentina's consulate property because the assessment would violate customary international law. *Id.* at 704. The court never explained its views about the precise status of customary international law, but the court might have implicitly been accepting Argentina's argument that customary international law had the status of preemptive federal law.

316. *See, e.g.*, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that "[f]ederal common law implements the federal Constitution and statutes, *and is conditioned by them*" (emphasis added)).

317. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that Congress lacked power to provide a civil remedy for gender-motivated crimes of violence); United States v. Lopez, 514 U.S. 549, 566–68 (1995) (holding that Congress lacked power to criminalize possession of firearms near schools).

federal courts that they have in Congress.[318] Not surprisingly, therefore, courts have so far declined to apply customary international law to preempt state death penalty laws.[319]

This conclusion should not change even if the purported customary international law prohibition against the juvenile death penalty has attained the status of a *jus cogens* norm. Although international law may distinguish between ordinary customary international law and *jus cogens* norms, there is nothing in the U.S. Constitution or federal statutory law that makes this distinction, and the distinction has not typically affected the willingness of U.S. courts to adjudicate claims. Thus, for example, courts have rejected the argument that there is a special exception under the Foreign Sovereign Immunities Act for *jus cogens* claims.[320] Conversely, courts have held that the Alien Tort Statute is not *limited* to *jus cogens* claims.[321] As one might expect, therefore, courts that have rejected customary international law challenges to the juvenile death penalty also have rejected *jus cogens* challenges.[322]

### *E.* Charming Betsy *Canon*

Relief is also unlikely to be available under the "*Charming Betsy*" canon of construction. This canon, named after an early Supreme Court decision, *Murray v. The Schooner Charming Betsy*,[323] holds that, if possible, federal statutes should be construed so that they do not violate international law.[324] Although the precise justifica-

318. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 317 n.9 (1981) (noting that "the States are represented in Congress but not in the federal courts").

319. *See, e.g.*, Buell v. Mitchell, 274 F.3d 337, 373–74 (6th Cir. 2001) ("Even if we were to conclude that the abolition of the death penalty was a customary norm of international law or rose to the higher level of being a peremptory norm or *jus cogens*, we do not believe that this would be a sufficient basis for our court to invalidate Ohio's death penalty statute.").

320. Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir. 2001); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 245 (2d Cir. 1996); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1991).

321. *E.g.,* Alvarez-Machain v. United States, 266 F.3d 1045, 1049–50 (9th Cir. 2001). The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

322. *E.g.*, Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002); *Buell*, 274 F.3d at 374.

323. 6 U.S. (2 Cranch) 64, 118 (1804).

324. *Id.* The precise strength of the canon is uncertain. In *Charming Betsy*, the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id*. For a somewhat softer description of the canon, see

tions for this canon are unclear, it is a fairly well-settled feature of U.S. law.[325]

This canon is not directly relevant to the juvenile death penalty issue. The canon applies to the construction of federal statutes, but federal law does not provide for the execution of juvenile offenders. Despite suggestions to the contrary by one scholar,[326] states are probably not required to apply the canon in construing their own statutory law. If, as is commonly assumed, the canon is designed to reflect likely congressional intent, it is difficult to see how it is relevant to the intent of a state legislature. Similarly, if the canon is conceived of as a separation of powers limitation concerning the relationship between the federal courts and the federal political branches, as courts have sometimes suggested, it would not seem to govern the relationship between state courts and state legislatures.[327] Not surprisingly, there are no reported decisions in which state courts have applied the canon, and there are no federal court decisions ordering them to do so.

Even if the canon did apply to state statutes, it would apply only when the state statute was susceptible to a construction that would avoid the purported violation of international law. Most of the state death penalty laws at issue, however, clearly allow for the execution of juvenile offenders. Thus, there does not appear to be any room for the canon to influence the construction of these statutes.

Some scholars have argued that the canon should be applied to the construction of the U.S. Constitution.[328] There is no direct precedent for applying the canon in this way, and the typical justifications

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RESTATEMENT (THIRD), *supra* note 13, § 114 ("*Where fairly possible*, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." (emphasis added)); *see also* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 490–91 (1998) (discussing the strength of the canon).

325. *See generally* Bradley, *supra* note 324; Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). For a recent decision invoking the canon, see Kim Ho Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000), *aff'd and amended after remand*, Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1115–16 (9th Cir. 2001).

326. Steinhardt, *supra* note 325, at 1113–14 n.45.

327. For additional discussion of these points, see generally Bradley, *supra* note 324, at 533–36.

328. *E.g.*, Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 36 (1983); Fitzpatrick, *supra* note 164, at 179; Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987).

for the canon—such as generalizations about likely congressional intent—would not seem to apply to the Constitution. The Supreme Court's decision in *Stanford v. Kentucky*,[329] could also be read as an implicit rejection of the *Charming Betsy* canon in the context of the Eighth Amendment.

Furthermore, in considering the role of the canon in this context, it is important to remember that the Eighth Amendment, even as currently construed, does not *require* the juvenile death penalty. To the extent that juvenile offenders are executed in the United States, it is not because such executions are prescribed by the Eighth Amendment, but rather because they are prescribed by state death penalty statutes. Thus, even if customary international law prohibits the execution of juvenile offenders, the Eighth Amendment, as currently construed, does not violate this prohibition. International law, after all, does not require the embodiment of international law proscriptions in national constitutions.[330] As a result, the *Charming Betsy* canon—which is designed to avoid the construction of enactments that would place the United States in violation of international law—does not appear to provide a basis for relief with respect to the juvenile death penalty.[331]

## CONCLUSION

The juvenile death penalty is shaping up to be one of the central testing grounds for the enforcement of international human rights law in U.S. courts. Among other things, this practice implicates the validity of the United States' reservations to human rights treaties, the ability of the United States to "opt out" of emerging customary international law norms, and the status of international law in the U.S. le-

329. *See supra* notes 55–58 and accompanying text.

330. *See, e.g.*, LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 160–61 (4th ed. 2001) ("International law requires a state to carry out its international obligations but, in general, how a state accomplishes that result is not of concern to international law or to the state system.").

331. *Cf.* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1152–55 (7th Cir. 2001) (declining to construe the Foreign Sovereign Immunities Act as allowing suits against foreign sovereigns to the extent permitted by international law because this construction was not necessary to avoid a violation of international law). As I note in Part I, one could still argue that international practice should be considered in determining whether a criminal punishment is "cruel and unusual" for purposes of the Eighth Amendment. Although a majority of the Supreme Court rejected reliance on such evidence in *Stanford v. Kentucky*, a new majority was somewhat more receptive to such evidence in the recent *Atkins* decision concerning execution of the mentally retarded. *See supra* note 63.

gal system. Given the large number of countries that have abandoned the juvenile death penalty, it is understandable that litigants, advocacy groups, and scholars are increasingly focusing their attention on this practice.

Despite the widespread international criticism of the juvenile death penalty, the international law arguments against it have significant weaknesses. The United States has carefully avoided consenting to treaty provisions that prohibit the juvenile death penalty. It also has persistently objected to claims that it is bound by customary international law to end this practice. While *jus cogens* claims concerning the juvenile death penalty are by their nature more difficult to evaluate, there are a number of reasons to conclude that the *jus cogens* concept does not apply in this context. In addition, even if these international law arguments were more persuasive, it is unlikely that they would provide a basis for relief in U.S. courts.

I do not intend to suggest in this Article that the juvenile death penalty reflects wise policy or that it should be retained. Nor am I arguing that international practice is irrelevant to this policy question, or even to the Eighth Amendment analysis of what is cruel and unusual. My argument, rather, is that these policy and legal questions must ultimately be decided by the United States, in accordance with its constitutional processes. Claims by advocacy groups and scholars that these decisions have already been made for the United States distort the actual requirements of international law and, in any event, are not likely to be persuasive to U.S. decisionmakers.