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## Young Enough to Die - Executing Juvenile Offenders in Violation of International Law

### Keywords

Criminal Law, International Law: History, Juvenile Offenders, Juveniles, Age, Capital Punishment, Minors, States

# YOUNG ENOUGH TO DIE?

## EXECUTING JUVENILE OFFENDERS IN VIOLATION OF INTERNATIONAL LAW\*

Annika K. Carlsten \*\*

There is now an almost global consensus that people who commit crimes when under 18 should not be subjected to the death penalty. This is not an attempt to excuse violent juvenile crime, or belittle the suffering of its victims and their families, but a recognition that children are not yet fully mature – hence not fully responsible for their actions – and that the possibilities for rehabilitation of a child or adolescent are greater than for adults. Indeed, international standards see the ban on the death penalty against people who were under 18 at the time of the offense to be such a fundamental safeguard that it may never be suspended, even in times of war or internal conflict. However, the US authorities seem to believe that juveniles in the USA are different from their counterparts in the rest of the world and should be denied this human right.<sup>1</sup>

### INTRODUCTION

In the first year of the ‘new millennium’, in the midst of an atmosphere of progress and new beginnings, the United States instead continued a tradition it has practiced virtually nonstop for over 350 years. At a steady pace, the United States executed eighty-five individuals: eighty-three men and two women.<sup>2</sup> This brisk rate of

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\* The author would like to dedicate this article to the memory of Aaron Joshua Haines. *“The life I could not save, traded now for one I might . . .”*

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1. Amnesty Int’l, ON THE WRONG SIDE OF HISTORY: CHILDREN AND THE DEATH PENALTY IN THE USA, October 1998, AI Index: AMR 51/58/98 [hereinafter *On the Wrong Side of History*].

2. USA Executions 2000 as of 12/19/00, at <http://www.smu.edu/~deathpen/exec00.html> (last visited Jan. 19, 2001). 2000 was the first

executions averages *one person killed every four days*. 'Execution friendly' Texas reached a record high: forty individuals, including a 'rare' double execution when Texas killed two men by lethal injection just one hour apart.<sup>3</sup> To a growing number of Americans, these executions are, in and of themselves, a violation of the basic human right to life. Four of these eighty-five executions, however, not only offend people's sense of morality and compassion; they are also a violation of international law. In direct violation of the spirit and language of numerous international treaties and conventions, these individuals were executed for crimes they committed as children.

This article will examine the United States' continued practice of executing juvenile offenders in spite of numerous international treaties that forbid the practice, and growing international condemnation of the United States for doing so. Section I begins with an overview of the history of juvenile executions in the United States, and relevant U.S. case law governing the practice. Section II details the international perspective, with an emphasis on the various treaties that forbid the execution of juvenile offenders. Section III examines current international objections, recent executions of juvenile offenders, and contemporary legal challenges based upon relevant principles of international law. The article concludes with observations on the current status of the death penalty in the United States, and a discussion of various strategies which could lead to recognition of the death penalty as a crucial human rights concern, and in turn, to absolute and universal abolition.

#### JUVENILE EXECUTIONS IN THE UNITED STATES

At this time of unprecedented growth and prosperity, the U.S. finds itself in an uncomfortable position in the global human rights debate. While aggressively criticizing the human rights records of countries such as China, Cuba, and Afghanistan, the U.S. also must defend its continued and expanding use of the death penalty. In direct opposition to the universal status quo, the United States remains one of only five countries still known to execute people for crimes they committed while

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post-*Furman* year in which two women were put to death: Betty Lou Beets on February 24, 2000 and Christina Marie Riggs on May 2, 2000. *Id.* At least one woman was executed in 2001: Wanda Jean Allen on January 11, 2001. See *Executions in the USA in the Year 2001* at <http://www.amnestyusa.org/abolish/usexec.2001.html> (last visited Feb. 15, 2001).

3. See Texas Department of Criminal Justice, *Executed Offenders* at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Jan. 19, 2001). See also Amnesty International, *Double Executions Scheduled in Texas* at <http://www.amnesty-usa.org/abolish/archive.htm> (last visited Aug. 8, 2000). Oliver Cruz and Brian Roberson on Aug. 9, 2000. *Id.* Double executions occurred on only three other occasions. *Id.*

under the age of eighteen.<sup>4</sup> As the saying goes, 'politics makes strange bedfellows'. The other four countries are hardly ones that the U.S. traditionally aligns itself with in any other policy area. These countries (Iran; Iraq; Saudi Arabia; and Nigeria) are the very countries the United States often tries to portray as uncivilized, barbaric, and lacking in the trappings of a functioning democracy.<sup>5</sup> Moreover, the number of nations willing to engage in the practice is steadily shrinking. Yemen, which previously allowed the execution of juvenile offenders, abandoned the practice in 1998.<sup>6</sup> A sixth country, Pakistan, recently announced that they would no longer sentence juveniles to death.<sup>7</sup> In Pakistan, the announcement came from leaders of the military government.<sup>8</sup> Even they recognized the inherent distinction of a child from an adult, and the need for a separate juvenile justice system in which governments simply will not kill their own children.<sup>9</sup>

Despite these changes and growing opposition, the United States remains adamant in its 'right' to continue this practice. The U.S. has now executed more individuals in the last ten years for crimes they committed as children than any other country.<sup>10</sup> Since 1990, the US has executed seventeen people for juvenile crimes. The other five countries combined have executed a documented nine individuals.<sup>11</sup> The U.S. is also the only country in the world known to have executed a juvenile offender since 1997.<sup>12</sup>

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4. Sister Helen Prejean, Address at the University of Colorado (Nov. 16, 2000) (author's impressions).

5. See Mike Farrell, *On the Juvenile Death Penalty*, 21 WHITTIER L. REV. 207, 209 (1999).

6. See *id.*

7. See *id.* On July 1, 2000, Pakistan announced a series of legal reforms, including changes to the law which had previously allowed for the imposition of the death penalty on offenders as young as fourteen. See Rick Halperin, DEATH PENALTY NEWS (July 2, 2000), at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/jun00/0082.html>. Other changes included an end to the physical punishment of accused juveniles, and the use of handcuffs or chains on juveniles unless necessary to prevent escape. *Id.*

8. See Halperin, *supra* note 7.

9. See *id.* Additional changes to the legal system in Pakistan include guaranteed legal representation for all accused juveniles, at the expense of the state, and a separate juvenile court system for all juveniles cases; juveniles will no longer be tried as adults and their names will not be published publicly. See *id.*

10. See Jeff Glasser, *Death be not Proud*, U.S. NEWS & WORLD REP. Jan. 17, 2000, at 26.

11. Amnesty Int'l, *Execution of Child Offenders*, at <http://www.amnestyusa.org/abolish/juvexec.html> (last visited May 21, 2001) [hereinafter *Execution of Child Offenders*].

12. See Glasser, *supra* note 10, at 26. Since 1997, the United States has executed eight men for crimes they committed as juveniles: Joseph Cannon of Texas on Apr. 24, 1998; Robert Anthony Carter, also of Texas on May 18, 1998; Dwayne Allen Wright of Virginia on Oct. 21, 1998; Sean Sellers of Oklahoma on Feb. 4, 1999; Douglas Christopher Thomas of Virginia on January 10, 2000; Steve Edward Roach, also of Virginia, on Jan. 13, 2000; Glen McGinnis of Texas on Jan. 25, 2000; and Gary Graham (Shaka Sankofa),

As of July 2000, there were seventy-seven people living on Death Row in the United States for acts they committed while under the age of eighteen.<sup>13</sup> Since 1973, at least 196 children have been sentenced to death.<sup>14</sup> Of the thirty-nine states authorizing the death penalty, twenty-four currently have legislation allowing prosecutors to seek the execution of a minor who commits murder.<sup>15</sup> In nineteen of these states, the defendant can be as young as sixteen.<sup>16</sup>

Sixteen was designated as the minimum age of eligibility for death by two Supreme Court cases in the late 1980's, *Thompson v. Oklahoma*<sup>17</sup> & *Stanford v. Kentucky*<sup>18</sup>. In *Thompson*, the Supreme Court held that the imposition of the death penalty on children under the age of sixteen was unconstitutional under the Eighth Amendment ban on 'cruel and unusual punishment'.<sup>19</sup> Under a legal standard first pronounced in *Trop v. Dulles*, questions of whether a particular punishment violates the Eighth Amendment are answered in light of "the evolving standards of decency that mark the progress of a maturing society."<sup>20</sup> According to Justice Stevens, "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense."<sup>21</sup> In reaching this conclusion, the Court noted, "the importance of 'the experience of mankind, as well as the long history of our law, recognizing that there are differences which must be

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again of Texas, on June 22, 2000. See *Execution of Child Offenders*, *supra* note 11. Author's note: An additional juvenile was executed after this article was written: Gerald Mitchell, put to death by the State of Texas on October 22, 2001. See *Texas Executes Juvenile Murderer*, MORNING STAR, Oct. 24, 2001.

13. See *id.*

14. Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, Jan. 1, 1973 - June 30, 2000, at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> (last visited June 21, 2001) [hereinafter *The Juvenile Death Penalty Today*].

15. See *The Juvenile Death Penalty Today*.

16. See *id.* Sixteen years of age has been established as the minimum in these states by either state law or by court ruling. See *id.*

17. 487 U.S. 815 (1998).

18. 492 U.S. 361 (1989).

19. *Thompson*, 487 U.S. at 822-3.

20. 356 U.S. 86, 101 (1958). It is also interesting to note that in *Trop*, the Court considered the relevant international standards in determining that it would be 'cruel and unusual' to deny Trop his citizenship as punishment for desertion. 356 U.S. at 89.. However, such consideration of international standards has been specifically rejected by Justice Scalia in relation to the execution of juveniles: "The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries. . . is totally inappropriate as a means of establishing the fundamental beliefs of this nation. . . We must never forget that it is a Constitution for the United States that we are expounding. . . where there is not a consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Thompson*, 487 U.S. at 869 (footnote 4) (Scalia, J. dissenting).

21. *Thompson*, 487 U.S. at 830.

accommodated in determining the rights and duties of children as compared with those of adults'.<sup>22</sup> Considering these factors, the Court concluded that, "such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."<sup>23</sup>

The Court apparently did feel, however, that a sixteen or seventeen-year-old could be capable of such a 'degree of culpability'.<sup>24</sup> In *Stanford*, brought the following year, the Court affirmed the use of the death penalty on individuals who were at least sixteen at the time of their offense.<sup>25</sup> Relying on the fact that a majority of states that permit the death penalty had not prohibited its use for sixteen and seventeen year old offenders, Justice Scalia stated that there was no national consensus against such executions.<sup>26</sup> In his words, the Court could, "discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly. . . such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."<sup>27</sup>

As a result of this decision, states which fail to specify a minimum age for the death penalty, or statutorily allow the death penalty for offenders younger than sixteen, may only pursue the death penalty for anyone sixteen or older.<sup>28</sup>

This does not mean, however, that the minimum age requirement could not drop in the future. As a result of recent and highly publicized acts of juvenile violence, various politicians have advocated the use of the death penalty for children at younger and younger ages. New Mexico Governor Gary Johnson proposed use of the death penalty on thirteen-year-olds.<sup>29</sup> California Governor Pete Wilson once recommended capital punishment for fourteen-year-old offenders.<sup>30</sup> One

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22. *Id.* at 823, quoting *Goss v. Lopez*, 419 U.S. 565, 590-591 (1975) (Powell, J. dissenting).

23. *Thompson*, 487 U.S. at 823.

24. *Id.* at 824-28.

25. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). Kevin Stanford, the seventeen year-old subject of *Stanford v. Kentucky*, continues to appeal his death sentence on the grounds that he was inadequately represented at trial. See *Juvenile Death Row Inmate*, AKRON BEACON JOURNAL, Feb. 12, 2001. He is now thirty seven, and has spent more than half of his life on death row. See *id.*

26. See *Stanford*, 492 U.S. at 373.

27. *Id.* at 380.

28. See *Execution of Child Offenders*, *supra* note 11. There are currently eight states which do not specify a minimum age (Arizona, Idaho, Louisiana, Montana, Pennsylvania, South Carolina, South Dakota, and Utah) and twelve which specify a minimum age of fifteen or younger (Alabama, Arkansas, Delaware, Florida, Indiana, Kentucky, Mississippi, Missouri, Nevada, Oklahoma, Virginia, and Wyoming). See *id.* State Court ruling may also effect the minimum age of eligibility. See also Streib, *supra* note 14.

29. See Farrell, *supra* note 5, at 211.

30. See *id.*

Texas lawmaker, Rep. Jim Pitts of Waxahachie, went even further and advocated the imposition of the death penalty on children as young as eleven.<sup>31</sup> Shortly after the fatal school shootings in Jonesboro, Arkansas, Pitts announced he would introduce legislation lowering the minimum age to eleven in capital murder cases seeking the death penalty.<sup>32</sup> The legislation was unsuccessful, and undoubtedly would have faced Constitutional challenges, but it acts as testimony to a growing willingness to execute younger and younger offenders.

California took more aggressive steps to expand the use of the death penalty. "Proposition 21", a recent ballot measure in California that succeeded in the 1999 general elections, requires adult trials for anyone fourteen or older who is charged with murder, and establishes the death penalty for gang-related murders.<sup>33</sup> California law currently prohibits the execution of juvenile offenders. However, this practice could change due to growing public concern over perceived youth violence.<sup>34</sup> Proposition 21 has been embroiled in numerous legal challenges, with varying levels of success.<sup>35</sup> Future attempts by the state legislature to lower the minimum age, possibly to fourteen or fifteen, would lead to inevitable constitutional challenges.<sup>36</sup> It is not inconceivable that such challenges could result in a subsequent U.S. Supreme Court ruling lowering the minimum age of eligibility.<sup>37</sup>

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31. Peggy Fikac, *Death Penalty at Age 11 Urged; As Lawmaker Proposes Extending Capital*, AUSTIN AM. STATESMAN, Apr. 7, 1998.

32. *Id.*

33. *Death Penalty News --- TEXAS, TENN., CALIF. (May 11, 2000)* at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/apr00/0255.html> (last visited May 21, 2001).

34. *Id.* In the aftermath of the fatal school shooting in San Diego in March 2001, the San Diego District Attorney was quick to point out that the 15-year-old defendant was ineligible for the death penalty due to his age. See *Shooting at Santana High School in Santee, California*, NBC NEWS TRANSCRIPTS, Mar. 6, 2001.

35. See Stacy Finz, *Top State Court Won't Hear Challenge to Prop. 21*, SAN FRAN. CHRON., May 11, 2000 at A3.

36. See Bob Egelko, *Court Curbs New Youth Crime Law*, SAN FRAN. CHRON., Feb. 11, 2001 at A1. There is also discussion within the abolitionist community as to whether or not the constitutionality of a statute is relevant at the time of sentencing or at the time of actual execution. Therefore, some believe such a death sentence could be imposed but never carried out. This may explain why several states continued to sentence defendants under the age of sixteen to death even after *Thompson*. See Streib, *supra* note 14. (Including a comprehensive list of every juvenile sentenced to death since January 1, 1973).

37. For an example of the Supreme Court's willingness to disregard *stare decisis* in cases concerning capital punishment, see *Payne v. Tennessee*, 501 U.S. 808 (1991). Given the current conservative and pro-death penalty tone of the Supreme Court, interpretations of the Eighth Amendment and 'evolving standards of decency' could conceivably regress to allow the execution of children as young as fourteen or fifteen who commit extremely brutal crimes.



## INTERNATIONAL TREATIES AND THE INTERNATIONAL LAW PERSPECTIVE

Since the first juvenile execution in 1642, 361 people have been put to death in the United States for crimes they committed when they were children; seventeen since the reinstatement of the death penalty in 1976.<sup>38</sup> These executions have not gone unnoticed by the international community, which has widely condemned the practice.<sup>39</sup> Numerous international treaties, declarations, and resolutions are evidence of the international consensus against the execution of juveniles. Increasingly, the United States appears in violation of global human rights accords and customary international law.

Many international objections assert that the United States is acting in direct violation of the International Covenant on Civil and Political Rights ("ICCPR").<sup>40</sup> According to Article 6(5) of the ICCPR, "the sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . . ."<sup>41</sup> One hundred ninety-nine countries have signed this agreement. Of those, 140 countries have ratified the ICCPR. The United States signed it on October 5, 1977, and ratified it on June 8, 1992.<sup>42</sup> However, in ratifying the ICCPR, the U.S. stated a specific reservation addressing the executions of juveniles, "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."<sup>43</sup>

The United States was the only country to sign the ICCPR with any such reservation, which outraged and angered many in the international community.<sup>44</sup> Formal objections were filed by Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden.<sup>45</sup> Moreover, when the United States first signed the ICCPR, it agreed, "not to do anything which would defeat the object and purpose of the treaty, pending a decision whether to ratify it."<sup>46</sup> Essentially, the U.S. was bound to obey the spirit and intent of the Act

38. See Glasser, *supra* note 10 at 26. See also *Execution of Child Offenders*, *supra* note 11.

39. See *Execution of Child Offenders*, *supra* note 11.

40. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E., 95-2 (1978), 999 U.N.T.S. 171 (adopted by the U.S. Sept. 8, 1992).

41. *Id.* at art 6(5). See also Farrell *supra* note 5 at 209.

42. See Farrell *supra* note 5 at 209.

43. 138 CONG. REC. S4783 (1992)

44. See Farrell, *supra* note 5, at 210.

45. See *id.*

46. *On the Wrong Side of History*, *supra* note 1, at 4.

until it was either ratified or rejected. As a sign of support, the U.S. even praised the ICCPR as, "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II."<sup>47</sup> Yet, in obvious disregard for the ICCPR, during the fifteen-year period between signing and ratifying the ICCPR, the U.S. sentenced more than 70 children to death and executed five.<sup>48</sup>

Furthermore, the U.S. reservation to Article 6 of the ICCPR is illegal according to the Inter-American Court of Human Rights.<sup>49</sup> In 1995, the United Nations Human Rights Committee also determined that the objection was incompatible with the very purpose of the ICCPR, and should be revoked.<sup>50</sup> Three years later, the UN Special Rapporteur on Extra Judicial, Summary, and Arbitrary Executions agreed that the reservation was incompatible and should be withdrawn.<sup>51</sup> In his report, the UN Special Rapporteur outlined the U.S. reservation to the ICCPR, while clarifying that reservations are only allowed if they do not nullify the spirit and intent of the treaty:

At the time of ratification of the ICCPR, the United States entered reservations concerning certain rights contained in the Covenant. By entering a reservation, a State purports to exclude or modify the legal effect of a particular provision of the treaty in its application to that State. According to the Vienna Convention on the Law of Treaties, reservations to multilateral treaties are allowed, *providing that the reservation is compatible with the object and purpose of the treaty itself.*<sup>52</sup>

After numerous parties to the ICCPR lodged objections to the United States reservation, the Human Rights Committee expressed concern that the reservation was "incompatible with the object and purpose of the ICCPR."<sup>53</sup> The Committee elaborated, explaining, "[t]he content and scope of reservations may 'undermine the effective

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47. Farrell, *supra* note 5, at 209.

48. *Id.*

49. Amnesty Int'l, *Death Penalty Facts*, at <http://www.amnestyusa.com/abolish/juveniles.html> (last visited May 21, 2001).

50. *Death Penalty Debate*, at <http://leonardo.gprep.pvtk12.md.us/~stevens/juvdeath.html> (last visited May 8, 2000).

51. *Id.*

52. *Question of the Violation of Human Rights and Fundamental Freedoms, In Any Part of the World, With Particular Reference to Colonial and Other Dependant Countries and Territories. Extrajudicial, Summary or Arbitrary Executions.: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. ESCOR Commission on Human Rights, 54<sup>th</sup> Sess., U.N. Doc.E/CN.4/1998/68/Add.3 (Mr. Bacre Waly Ndiaye)(emphasis added) [hereinafter Ndiaye].

53. Amnesty Int'l, *Juveniles and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/11/98, Nov. 1998 [hereinafter *Juveniles and the Death Penalty*].

implementation of the Covenant and tend to weaken respect for the obligations of States parties'.<sup>54</sup>

Beginning in 1994, the Special Rapporteur made several overtures to the United States Government, requesting an invitation to examine these concerns and the status of executions in the United States.<sup>55</sup> After several years of silence on the part of the United States, he received an invitation in late 1996.<sup>56</sup> According to the Special Rapporteur, "the request for a visit to the United States was based on persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death penalty were not being fully observed."<sup>57</sup>

Following his fact-finding mission to the United States, the Special Rapporteur issued a report in which he concurred with the Human Rights Committee's opinion that the U.S. reservation was inappropriate. The report to the UN Economic and Social Council addressed specific discrepancies and made several recommendations:

The Special Rapporteur shares the view of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void. . .

...

The Special Rapporteur believes that the current practice of imposing death sentences and executions of juveniles in the United States violates international law. He further believes that the reintroduction of the death penalty and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed.<sup>58</sup>

The Special Rapporteur also addressed the Federal Government's failure to make State Governments comply with the requirements of the ICCPR:

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54. Ndiaye, *supra* note 52.

55. *See id.*

56. *See id.*

57. *Id.*

58. Ndiaye, *supra* note 52.

Not only do the reservations entered by the United States seriously reduce the impact of the ICCPR, but its effectiveness nationwide is further undermined by the absence of active enforcement mechanisms to ensure its implementation at state level

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a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government . . . the ICCPR appears not to have been disseminated to state authorities and . . . knowledge of the country's international obligations is almost nonexistent at state level. Further . . . the Federal Government cannot claim to represent the states at the international level and at the same time fail to take steps to implement international obligations accepted on their behalf.<sup>59</sup>

Although the Federal Government has established eighteen as the minimum age for imposing the death sentence in federal cases, that does not relieve it of the responsibility to comply with international law in other ways. Under the Supremacy Clause, "[A]ll Treaties made . . . under the authority of the United States shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."<sup>60</sup> Thus, the federal government is not only bound by the treaties it enters, but is also responsible for ensuring that international treaties signed by the government are respected as the 'supreme law of the land' on every level. "[T]he fact that it has set 18 as the minimum age of eligibility for federal death row does not absolve it from its responsibility to ensure that state governments do the same."<sup>61</sup>

As Alexander Hamilton articulated two centuries ago, the Executive Branch has a responsibility to "keep the Nation informed of the requirements of existing laws and treaties as part of the faithful execution of the laws. . ."<sup>62</sup> It is not acceptable for the government to simply ignore state laws that allow the execution of juvenile offenders when the practice is so clearly in contradiction with international law. Furthermore, in 1997, Congress considered a bill that would have lowered the federal government's minimum age requirement to sixteen.<sup>63</sup> The legislation was unsuccessful, but the fact that Congress actively considered such legislation testifies to their continued willingness to flout the obligations of international law.

Moreover, despite the Special Rapporteur's report and increased

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59. *Id.*

60. U.S. CONST., art. VI, § 2.

61. *On the Wrong Side of History*, *supra* note 1, at 5.

62. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 402-403 (3<sup>rd</sup> ed. 1996).

63. *See* Farrell, *supra* note 5, at 211.

international pressure to comply with the ICCPR, the U.S. has refused to do so. Following the Special Rapporteur's announcement, the U.S. Congress adopted a legislative amendment which would have forced the Human Rights Committee to accept the U.S. reservation before the U.N. could receive any related funding from the United States.<sup>64</sup> Although Congress adopted the resolution, President Clinton vetoed it.<sup>65</sup> Following subsequent reports by the Special Rapporteur in 1998, the Chairman of the Republic National Committee, "called on the U.S. Administration to 'publicly renounce' it and ensure that none of the U.S. debts to the U.N. were paid until the report was 'formally withdrawn and apologized for'."<sup>66</sup> During this period, the U.S. continued to both execute juvenile offenders and condemn additional ones to death, in obvious disregard for the Special Rapporteur's concern and disapproval.

The ICCPR is not the only international agreement in question. The US policy of sentencing juveniles to death currently violates several other treaties. These include the Convention on the Rights of the Child, the American Convention on Human Rights, and the Beijing Rules. Each of these contains language specifically prohibiting the execution of juvenile offenders, recognizing that juveniles have a great potential to change, and should be given an opportunity for redemption.

Article 37(a) of the Convention on the Rights of the Child ("CRC") specifically states that, "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age. . ."<sup>67</sup> By prohibiting not only the use of the death penalty, but the notion of life imprisonment with no prospect of parole, the CRC testifies to the belief that juveniles are capable of change, and should not be denied the possibility of future growth. Unfortunately, many U.S. legislators seem to believe that such juvenile offenders are 'beyond hope'. As of 1999, 192 states have ratified the CRC.<sup>68</sup> Only two countries have failed to ratify this treaty, the United States and Somalia, which currently lacks a functioning government.<sup>69</sup> Further, "the nearly universal ratification of the Convention on the Rights of the Child is an especially strong sign of an international consensus that the death penalty should not be used against juvenile offenders."<sup>70</sup>

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64. See *On the Wrong Side of History*, *supra* note 1, at 4.

65. See *id.*

66. See *id.* at 5.

67. Convention on the Rights of the Child, art. 37(a), adopted Nov. 20, 1989, G. A. Res. 44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/RES/44/736 (1989).

68. See *On the Wrong Side of History*, *supra* note 1, at 6.

69. See Farrell, *supra* note 5, at 210.

70. *Juveniles and the Death Penalty: Executions Worldwide Since 1990*, *supra* note 43.

Moreover, all of the countries that have ratified the CRC have done so with no reservations to Article 37(a), "further demonstrating the almost global acceptance of the prohibition against the use of the death penalty against those under 18 at the time of the crime."<sup>71</sup> However, the U.S. has made it clear that when, and if, it ratifies the CRC, it will include a reservation similar to that of the ICCPR.<sup>72</sup> Since the USA signed the CRC in February, 1995, it has executed [eight] juvenile offenders and sentenced over twenty others to death.<sup>73</sup> It is apparent that even if the U.S. eventually ratifies the CRC, it will continue to act in a manner incompatible with the letter and spirit of the agreement.

The American Convention on Human Rights ("ACHR"), sponsored by the Organization of American States ("OAS"), also prohibits states from sentencing juvenile offenders to death. According to Article 4(5) of the ACHR, "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . ."<sup>74</sup> Despite participating in the creation of the ACHR, and having signed the agreement without reservation, the United States has failed to ratify the treaty as of January 2001.<sup>75</sup> However, it is noteworthy that, "as a member of the OAS, the United States is subject to the recommendations of the Inter-American Commission on Human Rights," whether or not it ratifies the ACHR.<sup>76</sup>

In addition, "international norms since at least the end of World War II have prohibited the juvenile death penalty."<sup>77</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, created August 12, 1949, specifically forbids the use of the death penalty against children.<sup>78</sup> Article 68 states, "In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offense."<sup>79</sup> Although the U.S. ratified this convention, it continues to ignore the obvious incompatibility of its current practice and 50 years of treaty obligations.

Additions to the Geneva Convention have confirmed the intended prohibition of executing juveniles. Two protocols added in 1977 address concerns related to the 'Protection of Victims of International Armed

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71. *See On the Wrong Side of History*, *supra* note 1, at 6.

72. *Id.*

73. *Id.*

74. American Convention on Human Rights, art. 4(5), Nov. 22, 1969, 9 I.L.M. 673, 676.

75. Cathleen E. Hull, "Enlightenment by a Humane Justice": *An International Law Argument Against the Juvenile Death Penalty*, 47 KAN. L. REV. 1079, 1091 (1999).

76. *Id.*

77. Victor Streib, *American Death Penalty for Juveniles: An International Embarrassment*, 5 GTWN. J. FIGHT. POV. 219, 220 (1998).

78. *See Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949*, 3516.

79. *Id.* at art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 3560,

Conflicts.<sup>80</sup> Drafters designed these amendments to protect civilians who were living in areas engaged in armed conflict.<sup>81</sup> The first, Protocol One of 1977 Additional to Geneva Convention of August 12, 1949, Article 77(5) provides that “[t]he death penalty for an offense related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offense was committed. . . .”<sup>82</sup> Protocol Two 1977 Additional to Geneva Convention of August 12, 1949, Article 6(4) simply states that, “[t]he death penalty shall not be pronounced on persons who were under the age of eighteen at the time of the offense. . . .”<sup>83</sup> Both of these articles reflect the international belief that the ban on executing minors is such a crucial protection of children that it is not to be waived even in times of war.

The United Nations has taken more recent steps to show their disapproval of executing juvenile offenders. In May 1984, the UN Economic & Social Council passed a resolution concerning “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.”<sup>84</sup> Among the safeguards, “[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.”<sup>85</sup> The Resolution was endorsed by the General Assembly, and then adopted without a vote on Dec. 14, 1984.<sup>86</sup> The Safeguards are “not legally binding but were endorsed by the UN General Assembly without a vote, a sign of a strong consensus among nations that their provisions should be observed.”<sup>87</sup>

In March 2000, the European Union also reiterated their dissatisfaction with the United States’ use of the death penalty. In an official “Memorandum on the Death Penalty”, European Union officials described their continued and adamant opposition to the death penalty, particularly in cases involving juvenile offenders:

The European Union (EU) is opposed to the death penalty in all cases

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80. See Protocol I to the Geneva Conventions of 1949, art. 77(5), June 8, 1977, 16 I.L.M. 1391, 1425 [hereinafter Protocol I]; See also Protocol II to the Geneva Conventions of 1949, art. 6(4), June 8, 1977, 16 I.L.M. 1391, 1446 [hereinafter Protocol II].

81. Amnesty International, *Juveniles and the Death Penalty*, *supra* note 53.

82. Protocol I, *supra* note 83.

83. Protocol II, *supra* note 83.

84. See *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, UN High Commissioner for Human Rights, adopted by E.S.C. Res. 1984/50, U.N. ESCOR, 36<sup>th</sup> Sess., U.N. DOC. E/CN.4/SUB.2/RES/1984/50 (1984), available at [http://www.unhchr.ch/html/menu3/b/h\\_comp41.htm](http://www.unhchr.ch/html/menu3/b/h_comp41.htm).

85. *Id.*

86. See Amnesty International, *Juveniles and the Death Penalty: Executions Worldwide Since 1990*, *supra* note 54.

87. *Id.*

and has consistently espoused its universal abolition. . . In countries which maintain the death penalty, the EU aims at the progressive restriction of its scope and respect for the strict conditions, set forth in several international human rights instruments, under which the capital punishment may be used . . .

The EU is equally concerned about the imposition of the death penalty on persons below 18 years of age.

All the EU Member States reject the idea of incorrigibility of juveniles. These States hold the view that the problem of juvenile delinquency should be addressed bearing in mind that young offenders are in the process of full development, facing several difficulties of adaptation. . . As a result, they are less mature, and thus less culpable, and should not be treated as adults, deserving a more lenient criminal sanctions system. This implies, among other things, rejection of the death penalty for juveniles.

The European approach to juvenile justice is therefore deeply consistent with internationally recognized juvenile justice standards, as enshrined in [numerous] international human rights instruments. . . In fact, the international norms in question expressly prohibit sentencing to death persons below 18 years of age at the time of the commission of the crime.<sup>88</sup>

The execution of juveniles is also a violation of what is commonly referred to as "The Beijing Rules".<sup>89</sup> These are the minimum standards acceptable for the administration of juvenile justice as stipulated by the United Nations.<sup>90</sup> According to Article 17.2, "[c]apital punishment shall not be imposed for any crime committed by juveniles."<sup>91</sup> The agreement specifically acknowledges that Article 17.2 is intended to comply with the ICCPR.<sup>92</sup> Moreover, it states, "it is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles."<sup>93</sup> Again, this requires that signatories recognize and abide by the international prohibition against executing juveniles.

In addition to the above treaty obligations, there is also the

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88. Embassy of Portugal, *EU Memorandum on the Death Penalty*, Mar. 9, 2000 at <http://www.portugalemb.org/eumemorandum.html> (last visited May 1, 2000).

89. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, G.A. Res. 40/33, U.N. GAOR, 40<sup>th</sup> Sess., Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

90. *Id.*

91. *Id.*

92. *See id.*

93. *See id.*



question of customary international law.<sup>94</sup> Critics of the United States' policy of executing juvenile offenders assert that the practice is both contrary to, and prohibited by, customary international law.<sup>95</sup> A showing of four elements evidences customary international law.<sup>96</sup> The criteria necessary to establish such a finding include generality, consistency, duration, and *opinio juris*.<sup>97</sup>

The first two elements require that the practice be widespread and not differ widely from state to state.<sup>98</sup> Therefore, "a practice can be general even if it is not universally followed; there is no precise formula to indicate how wide-spread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity."<sup>99</sup> As detailed above, the United States is one of only 5 nations that still execute juvenile offenders. With the exception of these five nations, there is a universal objection to the practice in all circumstances, even amongst the remaining 90 states that still allow capital punishment for adults.<sup>100</sup> Thus, the prohibition appears both widespread and consistent from country to country. The first two elements are evident.

The third requirement is that of duration. In order to be considered customary, the legal principle must be established within the international community.<sup>101</sup> Such acceptance may have developed gradually over time, or may have occurred more rapidly, depending on the nature of the principle involved.<sup>102</sup> Hence, "although the prohibition of the juvenile death penalty is not an 'ancient usage,' it has nonetheless ripened into a customary norm."<sup>103</sup> The fact that numerous countries have outlawed the practice, and that such a prohibition is reflected in multiple treaties over a period of years, binding a vast majority of states, attests to the qualifications of the prohibition as a legal custom of sufficient duration.

The fourth and final requirement of customary international law

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94. See Hull, *supra* note 75, at 1093. Customary international law is created when "states in and by their international practice...implicitly consent to the creation and application of international legal rules," *Id.* (quoting MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 42 (2<sup>nd</sup> ed. 1993)).

95. Hull, *supra* note 75, at 1081.

96. See *id.*

97. See *id.* at 1094.

98. See *id.* at 1094-5.

99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 102, reporters' note b (1987) [hereinafter RESTATEMENT (THIRD)].

100. See Amnesty International, *The Death Penalty List of Abolitionist and Retentionist Countries (As of April 1, 1999)*, available at <http://www.amnestyusa.org/abolish/abret.html> (last visited May 21, 2001).

101. See Hull, *supra* note 75, at 1095.

102. See *id.*

103. *Id.* at 1096.

has been described as the "psychological element."<sup>104</sup> In short, *opinio juris* requires that states believe that compliance with a legal principle is required by international law.<sup>105</sup> This is a more difficult element to prove. However, "when a large number of states recognize a particular rule, a presumption arises that the rule is generally recognized."<sup>106</sup> Thus, one can argue that many states prohibit the execution of juveniles from a sense of both moral and legal obligation.

One must also acknowledge that, "a principle of customary law is not binding on a state that declares its dissent from the principle during its development."<sup>107</sup> Under this, the United States can attempt to argue that it is not bound by the customary prohibition on executing juveniles. The fact that the U.S. has continued to execute juveniles despite international objections certainly supports this assertion. However, this argument is weakened by the United States' leading role in the creation of many treaties, and its failure to specifically object to treaty obligations at the time of creation.<sup>108</sup> It is noteworthy that the United States' formal objection to Article 6(5) of the ICCPR was not expressed until 1992, more than twenty-five years after the conclusion of the treaty, and that additional treaties in this area have been signed without any objection.<sup>109</sup> Failure to maintain consistent and articulated objections to the prohibition weakens the credibility of the United States' assertion that it is not obligated by customary international law.

#### CURRENT LEGAL ISSUES WITHIN THE UNITED STATES

International law is not without its advocates in the U.S. legal arena. Several unsuccessful attempts have been made to bring the U.S. justice system into compliance with the rest of the world. In *Domingues v. Nevada*, sixteen-year-old Michael Domingues was sentenced to death for murdering his neighbor and her daughter.<sup>110</sup> His attorney appealed to the Nevada Supreme Court, arguing that his death sentence was in direct violation of the ICCPR, and was therefore illegal under international law.<sup>111</sup> In 1998, the Nevada Supreme Court ruled that the U.S. reservation to the ICCPR was valid and did not prohibit the execution of Domingues.<sup>112</sup>

In *Domingues*, "the Nevada Supreme Court also ignored the

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104. *Id.*

105. *See id.*

106. *Id.*

107. RESTATEMENT (THIRD), *supra* note 83.

108. *See* Hull, *supra* note 75, at 1097.

109. *See id.* at 1097-8.

110. *Domingues v. State*, 114 Nev. 783 (1998).

111. Amnesty International, *About the Program*, at <http://www.amnestyusa.com/abolish/page2.html> (last visited April 7, 2000).

112. *Domingues*, 114 Nev. at 785.

recognized principle of international law that states may not invoke domestic laws to avoid complying with their commitments under international treaties.<sup>113</sup> This was the essence of Chief Justice Springer's dissent; "The International Covenant on Civil and Political Rights, to which the United States is a 'party', forbids imposing the death penalty on children under the age of eighteen. . . Under the majority's interpretation of the treaty, the United States, at least with regard to executing children, is a 'party' to the treaty, while at the same time rejecting one of its most vital terms."<sup>114</sup> Springer concluded by stating, "[u]nder Nevada's interpretation of the treaty, the United States will be joining hands with such countries as Iran, Iraq, Bangladesh, Nigeria, and Pakistan in approving death sentences for children. I withhold my approval."<sup>115</sup>

Despite the Chief Justice's comments, the majority upheld the death sentence against Domingues.<sup>116</sup> Following this ruling, Domingues requested a writ of certiorari from the U.S. Supreme Court, asking the court to examine the international legal issues. On June 7, 1999, the Supreme Court requested that the Attorney General's office submit briefs outlining the government's understanding of their obligations under the ICCPR.<sup>117</sup> The Court appeared willing to examine the issue in-depth. This case could have made the difference between life and death for every juvenile currently living on Death Row.

In November 1999, after receiving the requested briefs, the Supreme Court refused to grant certiorari in the *Domingues* case.<sup>118</sup> Although Domingues may be able to appeal his conviction and death sentence on other grounds, the Court's denial was felt by every juvenile currently facing execution.

As the Supreme Court debated whether to grant certiorari in the *Domingues* case, three young men whose lives could have been saved by such an event were preparing for their own executions. Only months after the Supreme Court announced its refusal to examine the issue, all three were dead. They were executed in a two-week period in January of 2000.<sup>119</sup> These men were only seventeen when they committed their crimes; the oldest was barely twenty-seven when the state of Texas killed him.<sup>120</sup>

The first executed was twenty-six-year-old Chris Thomas, who was

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113. *On the Wrong Side of History*, *supra* note 1, at 6.

114. *Domingues*, 114 Nev. at 786 (Springer, C.J., dissenting).

115. *Id.*

116. *Id.*

117. *Domingues v. Nevada*, 526 U.S. 1156 (June 7, 1999).

118. *Domingues v. Nevada*, 528 U.S. 963 (Nov. 1, 1999)

119. *See Execution of Child Offenders*, *supra* note 11. *See also* Glasser, *supra* note 10, at 26.

120. *See* Glasser, *supra* note 10 at 26.

put to death in Virginia on January 10, 2000.<sup>121</sup> Thomas was executed for the murder of his girlfriend's parents, even as new evidence was presented which showed that his girlfriend had acted as more than an accomplice and had in fact committed at least one of the murders.<sup>122</sup> Thomas' lawyer appealed for a stay to the U.S. Supreme Court, citing the possibly exculpatory evidence and violations of international law in his case.<sup>123</sup> The Court denied Thomas' petition for a writ of habeas corpus and refused to stay his execution.<sup>124</sup>

Only three days later, Virginia executed another man for a crime he committed as a child.<sup>125</sup> At the age of seventeen, Steven Roach shot and killed a seventy-year-old woman in rural Virginia.<sup>126</sup> During his six years on Death Row, he "apologized to the victim's family and community, studied the Bible, married, and [wrote] letters to wayward juveniles."<sup>127</sup> Before the twenty-three-year-old's execution, numerous international, political, and religious leaders intervened on his behalf.<sup>128</sup> The Secretary General of Amnesty International, Pierre Sane, pleaded with Virginia Governor James Gilmore for clemency stating, "We in no way seek to excuse the crime or belittle the suffering it has caused. We seek only Virginia's compliance with international law and global standards of justice."<sup>129</sup> Even staunch conservatives argued that Roach was redeemable and should be spared.<sup>130</sup> The Governor of Virginia apparently was unmoved by the defendant's young age, his supporters' pleas or the requirements of international law. On January 13, Steve Roach became the youngest person executed in the United States since the reinstatement of the death penalty 25 years ago.<sup>131</sup> Poignantly, just days before he was killed, Steve Roach remarked to a journalist, "I just don't understand how Virginia can execute two juveniles in one week. How can they say we can't be rehabilitated?"<sup>132</sup>

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121. See Martin Kettle, *No Clemency as Boy Pays Ultimate Price*, GUARDIAN, Jan. 12, 2000 at 15.

122. See Death Penalty Information Center, *Executions of Juvenile Offenders*, at <http://www.deathpenaltyinfo.org/juvexec.html> (last visited Jan. 19, 2001) [hereinafter *Execution of Juvenile Offenders*]. In a glaring example of the inequities of the justice system, because the accomplice was only fourteen at the time of the murders, she was released from juvenile detention upon her twenty-first birthday. See *id.*

123. See Frank Green, *Thomas Executed for Death of Couple; He was 17 Years Old at Time of Slayings*, RICHMOND TIMES DISPATCH, Jan. 11, 2000 at A1.

124. In *Re Douglas Christopher Thomas*, 528 U.S. 1073, 1073 (2000).

125. See Frank Green, *Roach, 23, Put to Death for 1993 Slaying; Execution of Young Offender Criticized*, RICHMOND TIMES DISPATCH, Jan. 14, 2000 at B1.

126. See *id.*

127. Glasser, *supra* note 10 at 26.

128. See Green, *supra* note 124, at A1.

129. *Executions of Juvenile Offenders*, *supra* note 123.

130. Glasser, *supra* note 10, at 26.

131. *Executions of Juvenile Offenders*, *supra* note 123.

132. Glasser, *supra* note 10, at 26.

Steve Roach's death was followed by a third juvenile execution in Texas, just twelve days later.<sup>133</sup> Glen Charles McGinnis was sentenced to death in 1992 for the robbery and murder of a thirty-year-old dry cleaning store clerk, Leta Ann Wilkerson.<sup>134</sup> Despite strong mitigating evidence of a childhood marred by physical and sexual abuse, and no previous prison record, McGinnis was sentenced to death rather than life in prison.<sup>135</sup> Abolitionists within the United States and the international community vigorously protested his scheduled execution, citing his age and upbringing.<sup>136</sup> Representatives of the European Union released an "urgent humanitarian appeal" on his behalf, stressing the international prohibition against the execution of such juvenile offenders.<sup>137</sup> However, the outcry and the demarche were to no avail: Glen Charles McGinnis was put to death on January 25, 2000.<sup>138</sup>

In June of 2000, a fourth juvenile offender was scheduled for execution: Gary Graham (now known as Shaka Sankofa).<sup>139</sup> Graham was sentenced to death in 1981 for robbery and murder.<sup>140</sup> He was convicted solely on the basis of one eyewitness's testimony, a fact which raised a great deal of public debate and controversy over both his actual guilt and the standard of proof which should be required when sentencing a person to death.<sup>141</sup> Questions also arose over his trial lawyer's failure to call additional eyewitnesses who would have testified that he was not the shooter.<sup>142</sup> Lost in much of the media coverage was the equally compelling fact that Graham was only seventeen when he was arrested and convicted of first-degree murder.<sup>143</sup> By the time he was executed on June 22, 2000, he had spent more than half of his life on death row.<sup>144</sup>

A fifth juvenile offender was scheduled for execution in Georgia just

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133. See Lisa Sandberg, *World Pleas Fail to Save Texas Killer; Inmate Says Nothing*, SAN ANTONIO EXPRESS-NEWS, Jan. 26, 2000 at 1A.

134. Texas Department of Criminal Justice, at <http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/mcginnis.jpg> (last visited May 21, 2001).

135. Sandberg, *supra* note 133, at 1A.

136. *See id.*

137. See Statement from the Portuguese Embassy, *European Union Death Penalty Demarche on Behalf of Glen Charles McGinnis*, Jan. 19, 2000 <http://www.portugalemb.org/press/26.html> (last visited Jan. 20, 2000).

138. See Texas Department of Criminal Justice, *Executed Offenders*, at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited June 21, 2001).

139. See Amy Dorsett and Kate Hunger, *Capital Questions; As Execution Date Nears, Proof of Houston Man's Guilt in Slaying Hinges on a Single Eyewitness*, SAN ANTONIO EXPRESS-NEWS, June 11, 2000 at 1A.

140. *See id.*

141. See Toni Locy, *A Furor Over a Lone Star Execution*, U.S. NEWS & WORLD REP. Jul. 3, 2000.

142. *See id.*

143. See Steven A. Drizin and Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, SAN FRAN. CHRON., Apr. 16, 2000, at 1/Z1.

144. *See id.*

two months after Graham.<sup>145</sup> Alex Williams, now thirty-two, was to die on August 22<sup>nd</sup> for the 1986 rape and murder of sixteen-year-old Aleta Bunch.<sup>146</sup> His planned execution generated international outrage and pressure on the Georgia Board of Pardons and Paroles to commute his sentence to life in prison.<sup>147</sup> However, when the Georgia Supreme Court stayed the execution in order to hear further appeals, the Board declined to rule on the issue of commutation of Williams' sentence.<sup>148</sup> Williams' execution has now been stayed indefinitely while the Georgia Supreme Court waits to hear an appeal based on two crucial legal arguments concerning the execution of juvenile offenders.<sup>149</sup> Williams' lawyers are arguing first, and foremost, that the execution of juvenile offenders is so rare as to constitute 'unusual' punishment in violation of the Eighth Amendment.<sup>150</sup> In the alternative, they assert that his execution would be a direct violation of international law.<sup>151</sup>

The first argument may prove successful. In 1999, the Florida Supreme Court held that the execution of an individual under the age of seventeen was a violation of the Florida State Constitution's ban on cruel and unusual punishment.<sup>152</sup> In doing so, the Court specifically noted that no juvenile offender had been executed in Florida for more than twenty-five years.<sup>153</sup> The change in law has removed at least two juvenile offenders from Death Row.<sup>154</sup>

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145. Raymond Bonner, *Georgia Execution is Stayed in Case of Youthful Offender*, N.Y. TIMES, Aug. 23, 2000 at A12.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Brennan v. State*, 754 So.2d 1, 11 (Fla. 1999). "There is no doubt that the murder in this case is a deplorable crime and one for which the defendant should spend the rest of his life in prison. However, we cannot impose the death penalty on this defendant who was sixteen at the time of the crime, consistent with our case law and our Constitution. . . ." *Id.* The Court went on to say, "Accordingly, the death sentence is vacated and reduced to life imprisonment without a possibility of parole." *Id.*

153. *Brennan*, 754 .2d at 7. "In this case, the defendant presented the trial court with unrefuted data that at least since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in Florida. In fact, our research reveals that the last reported case where the death penalty was imposed and carried out on a sixteen-year-old defendant was *Clay v. State*, 143 Fla. 204, 196 So. 462 (1940), over fifty-five years ago." *Id.*

154. Keith Brennan on July 8, 1999 and Roderrick Justin Ferrell on November 9, 2000. *Brennan*, 754 .2d at 11; *Ferrell v. State*, 772 So.2d 1218 (Fla. 2000) (No.SC93127). Both death sentences were vacated and reduced to life in prison without parole. *Brennan*, 754 .2d at 11; *Ferrell v. State*, 772 So.2d 1218 (Fla. 2000) (No.SC93127). In a possible response to these two cases, the 2001 session of the Florida legislature is considering amending the Florida Constitution so that it specifically mentions the death penalty. *See Executing Teens?*, ST. PETERSBURG TIMES, Mar. 13, 2001 at 10A. The Amendment would change the Florida Constitutional language of "cruel or unusual" to the Federal

## CONCLUSIONS

Given the United States' reservations and objections to international treaties that bar the execution of minors, the U.S. may be able to dispute that it is in violation of international law. However, the consensus against this practice is growing. In August 2000, the U.N. Sub-Commission on the Promotion and Protection of Human Rights formally declared that, "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law. . ."<sup>155</sup> In a strongly worded resolution, the United Nations asserted once more that it, "condemns unequivocally the imposition and execution of the death penalty on those aged under 18. . ."<sup>156</sup> In a pointed gesture towards those legal systems which seem insistent upon ignoring the requirements of international law, the U.N. called upon States to "remind their judges that the imposition of the death penalty against such offenders is in violation of international law."<sup>157</sup>

As a principle of customary international law, all countries are expected to abide by this standard, regardless of which treaties they may or may not have signed. Moreover, such a declaration is a sign that the prohibition on executing juvenile offenders may soon progress from an issue of customary international law to a matter of *jus cogens*.<sup>158</sup> When a legal principle attains the status of *jus cogens*, all States are obligated to abide by that principle.<sup>159</sup> Previous objections or reservations are rendered moot.<sup>160</sup> If the United States remains one of the only countries to kill juveniles, their objections simply may no longer be enough to justify their actions.<sup>161</sup>

Furthermore, the continued policy of executing people for crimes

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Constitution's "cruel and unusual" and would force Florida Courts to construe the issue "in conformity" with interpretations of the U.S. Supreme Court. *See id.* Critics of the measure argue that these changes would effectively allow a return to the execution of sixteen year-old offenders. *See id.*

155. E.S.C. Res. 2000/17, 52<sup>nd</sup> Sess., 26<sup>th</sup> mtg., U.N. DOC. E/CN.4/SUB.2/RES/2000/17 (2000).

156. *Id.*

157. *Id.*

158. According to the Vienna Convention, *jus cogens* is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. . ." Hull, *supra* note 75, at 1101, quoting the Vienna Convention, art. 53.

159. Hull, *supra* note 75, at 1101.

160. *Id.*

161. *See* Hull, *supra* note 75, at 1102-1106 (discussing Inter-American Commission on Human Rights Case 9647, concerning the executions of two United States juvenile offenders: James Terry Roach and Jay Pinkerton). Some commentators believe that the prohibition on executing juvenile offenders has already reached the level of *jus cogens*. *See id.*

they committed as juveniles undermines the credibility of the United States within the international human rights dialogue. According to leading death penalty expert Victor Streib, “[i]t puts the U.S. in an embarrassing international position on human rights. [When the U.S. attacks the human rights record in other countries] they say, ‘But you execute your children.’”<sup>162</sup> As long as the U.S. continues to act in violation of the letter and spirit of crucial human rights treaties, they will never be able to present a credible voice on the subject of human rights. And, quite simply, until the United States is willing to respect the human rights of their own children, they may not find the international community willing to listen to their views on other countries’ atrocities and violations. “[F]or any country to adopt a selective approach to its international human rights obligations can serve only to undermine respect for the system as a whole and to diminish the prospect for human rights for all.”<sup>163</sup>

Moreover, the United States is facing increasing scrutiny throughout the world for its continuing support of the death penalty and its willful disregard for the protections of international law. In November 2000, the International Court of Justice heard a case between Germany and the United States concerning the 1999 executions of two German nationals, brothers Karl and Walter LaGrand.<sup>164</sup> The two were sentenced to death after a 1982 bank robbery in which the bank manager was killed.<sup>165</sup> Germany objected to the failure of the United States to inform the men of their right to consular assistance as required under the 1963 Vienna Convention, and strongly objected to their scheduled executions.<sup>166</sup> Arizona continued with the executions of both men despite international pressure from Germany and the European community.<sup>167</sup> Walter LaGrand was executed just one day after the International Court of Justice ruled that his execution be postponed pending further court proceedings.<sup>168</sup> Germany’s current case seeks an official condemnation by the ICJ against the United States for violating the LaGrands’ consular rights, formal recognition of Germany’s right to seek unspecified reparations in the case, and assurances that there will be no further violations.<sup>169</sup>

The case has implications far beyond the LaGrands case. Every year a

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162. Glasser, *supra* note 10, at 26.

163. *On the Wrong Side of History*, *supra* note 1, at 8.

164. See Betsy Pisik, *U.S. Rebukes Germany on Death-Penalty Stance; Hits Call for Reparations at World Court*, WASH. TIMES, Nov. 15, 2000 at A1.

165. *See id.*

166. *See id.*

167. *See id.*

168. See Betsy Pisik, *Execution of 2 Germans in U.S. Leads to World Court Lawsuit*, WASH. TIMES, Nov. 14, 2000 at A13.

169. *See id.*



number of foreign individuals are arrested in the U.S. and denied consular access and some are executed each year. . . Unless international courts, namely the ICJ, can fashion some remedy that will get the attention of the arresting country, states are likely to continue to ignore this international law obligation with impunity.<sup>170</sup>

The U.S. State Department has admitted that it violated international law by failing to inform numerous defendants of their consular rights, and has apologized to Germany in the case of the LaGrands.<sup>171</sup> It is also unclear what effect, if any, an ICJ ruling in Germany's favor would have on the United States as, "although its judgments are binding under international law, the World Court has no independent means to enforce compliance."<sup>172</sup> The U.S. has denied all requests for reparations and has insisted that the failure to provide consular access had no effect on the outcome of the LaGrands' case.<sup>173</sup> A ruling on the case is expected in Summer 2001.<sup>174</sup>

Human rights advocates and international legal scholars are also concerned by further implications of the United States refusal to acknowledge the authority of the International Court of Justice. "[I]f the U.S. refuses to delay an execution notwithstanding a ruling from the highest international court, then other nations may act exempt as well."<sup>175</sup> In this way as well, the United States is contributing to the erosion of human rights on a much larger scale.

The *LaGrand* case is not the only one drawing upon the provisions of international law. In December 2000, the Delaware Supreme Court declined to hear that State's appeal of a trial court decision that suppressed the confession of a Guatemalan national.<sup>176</sup> The confession was solicited in accordance with the required Miranda warnings, but the suspect never was informed of his consular rights under the Vienna Convention on Consular Relations. "The ruling is believed to be the only one in which a US trial court has suppressed a murder confession

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170. *ICJ Hears German Suit Against U.S. for Executions and Violations of Consular Rights*, INT'L ENFORCEMENT L. RPTR, Jan. 2001.

171. *Id.*

172. Pisik, *supra* note 166, at A1.

173. *See id.*

174. Daniel J. Crowley, *World Court Hears German Gripe Against U.S.*, at <http://www.thesynapse.org/politics/punish.html> (visited May 21, 2001). Author's note: On June 27, 2001, the International Court of Justice found overwhelmingly in Germany's favor, ruling that the United States had breached its international obligations and violated the LaGrands' consular rights. *See* Marlise Simons, *World Court Finds U.S. Violated Consular Rights of 2 Germans*, N.Y. TIMES, June 27, 2001, at A10.

175. Richard C. Deiter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, at <http://www.deathpenalty.org/dpic/internationalreport.html> (visited July 27, 2000).

176. *Delaware v. Reyes*, 765 A.2d 953 (Del. 2000). It is noteworthy that in response to the State's application for leave to appeal, defense lawyers submitted materials from the ICJ *LaGrand* proceedings.

on this basis."<sup>177</sup>

The Canadian Supreme Court has also taken a stronger stance against the United States' continued use of the death penalty. In February 2001 the Court refused to extradite two Canadian citizens to the United States, stating that it would be unconstitutional to return the men to the United States until assurances were given that the men would not face the death penalty if convicted.<sup>178</sup> Twenty-five year-olds Sebastian Burns and Atif Rafay had been sought in connection with the triple murder of Rafay's family in Washington State.<sup>179</sup> In refusing to extradite the two, the Court noted that Canada has abolished the death penalty for all crimes, and that the last executed in Canada occurred in 1962.<sup>180</sup> Moreover, under the extradition treaty between the United States and Canada, the Canadian government is entitled to such assurances.<sup>181</sup> The ruling also did not rely upon the fact that the two men were Canadian citizens, suggesting that non-citizens may be protected from extradition in future cases where the death penalty is a possibility.<sup>182</sup>

#### RECOMMENDATIONS

For abolitionists who oppose the death penalty in any situation, the execution of juvenile offenders is one traumatic aspect of a much larger struggle. Recent polls suggest that nearly two-thirds of the American public favors the death penalty.<sup>183</sup> However, this is the lowest level in twenty years.<sup>184</sup> Moreover, statistics also show that Americans who are given the choice of the death penalty or life in prison *without parole* frequently choose life in prison instead.<sup>185</sup> Furthermore, many people do not even realize that the U.S. currently executes juvenile offenders, and are horrified when told the truth. "Simply encountering the bare facts

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177. Mark and Heather Warren, *Delaware Supreme Court Declines to Review Reyes Decision*, in CONSULAR RIGHTS IN AMERICA NEWSLETTER, Jan./Feb. 2001, available at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/jan01/0257.html> (last visited May 21, 2001).

178. See *Canada Bars Extradition to U.S. for Death Penalty*, N.Y. TIMES, Feb. 16, 2001.

179. *Id.*

180. *Id.* Although Canada banned the death penalty for general crimes in 1976, it was still theoretically legal to execute soldiers until 1998. See *id.*

181. *Id.*

182. *Id.*

183. Sara Rimer, *Support for a Moratorium in Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, available at <http://www.nytimes.com/2000/10/31/national/31DEAT/html> (last visited May 21, 2001).

184. *Id.*

185. See Gallup Press Release, 2/24/00, from Death Penalty Information Center, *Summaries of Recent Poll Findings*, at <http://www.deathpenaltyinfo.org/Polls.html> (last visited May 21, 2001).

of this practice causes most to recoil in disgust.”<sup>186</sup>

Despite the current Supreme Court’s unwillingness to confront requirements of international law, there is also the possibility of change on the domestic legal front. Concerns over the execution of juvenile offenders often mirror concerns over the execution of mentally retarded individuals.<sup>187</sup> Legal challenges to the execution of either group are often argued under the Eighth Amendment prohibition on ‘cruel and unusual’ punishment. Thus, juveniles may, in the long run, benefit from one of the cases that the Supreme Court agreed to hear during 2001.<sup>188</sup>

*Penry v. Johnson* concerns the case of a severely retarded man who was sentenced to death in Texas for rape and murder.<sup>189</sup> Many in the legal community hope Penry’s case, which established the legal precedent allowing the execution of the mentally retarded in 1989, will force the Court to examine the issue once again.<sup>190</sup> In *Penry v. Lynaugh*<sup>191</sup>, the Court reasoned much the same as it had in *Thompson* and *Stanford* in order to determine whether executing the mentally retarded was unconstitutional.<sup>192</sup> In order to define the contemporary meaning of ‘evolving standards’, the Court looked to the States.<sup>193</sup> Finding no national consensus against the execution of the mentally retarded, the Court held that the mentally retarded could be sentenced to death as long as the sentencing jury first had been instructed in the mitigating aspects of the individual’s retardation:

In sum, mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person. . . simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to

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186. Streib, *supra* note 78, at 219.

187. Author’s note: the phrase ‘mentally retarded’ is used throughout this section in recognition of the legal terminology used in these cases.

188. See Steve Lash, *Supreme Court to Hear Second Appeal by Penry*, HOUS. CHRON., Nov. 28, 2000, at A1.

189. See Warren Richey, *Can Low IQ Convicts Be Put on Death Row?*, CHRISTIAN SCI. MONITOR, Mar. 26, 2001, at 1. See also Charles Lane, *Court Hears Death Penalty Case; Justices to Rule if Jury got Proper Instruction on Retardation*, WASH. POST, Mar. 28, 2001, at A8.

190. See Warren Richey, *Can Low IQ Convicts Be Put on Death Row?*, CHRISTIAN SCI. MONITOR, Mar. 26, 2001, at 1. Author’s note: On June 4, 2001, the U.S. Supreme Court overturned Penry’s death sentence for a second time. The court did not specifically address the question of executing the mentally retarded, ruling only that the jurors in Mr. Penry’s case received insufficient instructions on how to consider his retardation as a mitigating circumstance. See Linda Greenhouse, *Justices Reverse Death Sentence of Retarded Man*, N.Y. TIMES, June 5, 2001 at A1.

191. *Penry v. Lynaugh*, 492 U.S. 302 (1989)

192. See *Penry*, 492 U.S. at 334.

193. *Penry*, 492 U.S. at 334.

mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case. While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today.<sup>194</sup>

It is possible that the 'national consensus against the practice' that was lacking in 1989 could now be found to exist. In 1989, only one state clearly forbade the execution of mentally retarded defendants.<sup>195</sup> In the years since, the number of jurisdictions prohibiting it has grown to thirteen.<sup>196</sup> Those thirteen states, in addition to the twelve states that have abolished the death penalty in all forms, can be seen as indicative of a 'national consensus' against the practice as referred to in *Penry*.<sup>197</sup>

The parallel of the mentally retarded has already indirectly benefited one juvenile offender. Antonio Richardson was scheduled for execution by the state of Missouri on March 7, 2001 for his role in the 1991 rapes and murders of two sisters.<sup>198</sup> In addition to the fact that he was only sixteen at the time of the crime, Richardson also has been classified as mentally retarded with an I.Q. of seventy.<sup>199</sup> Numerous individuals, including the mother of the victims, had urged for clemency in Richardson's case, citing his age and his mental capacity.<sup>200</sup> Missouri Governor Bob Holden had indicated he would not grant clemency in the case, and Richardson had already finished his last meal and said goodbye to his friends and family when the United States Supreme Court announced a stay of execution.<sup>201</sup>

According to Gino Battisti, Richardson's lawyer, the stay of execution was granted so that the court could consider the single question of whether a national consensus has developed against the execution of the mentally retarded.<sup>202</sup> A similar stay in the scheduled execution of another man, Ernest Paul McCarver, seems to indicate that the Court may be considering just such a conclusion.<sup>203</sup> According

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194. *Penry*, 492 U.S. at 340.

195. *Penry*, 492 U.S. at 334. Although only Georgia specifically banned the practice, Maryland's law prohibiting it took effect just five days after the *Penry* case was decided: July 1, 1989. See *id.*

196. Death Penalty Information Center, *Mental Retardation and the Death Penalty* at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited May 21, 2001).

197. *Penry*, 492 U.S. at 333-334.

198. See Sara Rimer, *Missouri Set to Execute Retarded Man*, N.Y. TIMES, Mar. 6, 2001.

199. *Id.*

200. *Id.*

201. See Bob Herbert, *Cruel and Unusual*, N.Y. TIMES, Mar. 8, 2001, at Sec. A.

202. *Id.* A decision in Richardson's case was still pending at the time of publication.

203. See Stan Swofford, *Critics Attack Easley Over Clemency Issue*, NEWS & RECORD, Mar. 3, 2001 at A1.

to Duke University law professor Jim Coleman, "this has to be very significant. . . the court might be about to say that our evolving standard of decency has reached the point that it is cruel and unusual to put to death the mentally retarded."<sup>204</sup>

Moreover, Court acknowledgment that the 'evolving standards of decency' are in fact 'evolving' and thus open to new interpretation could pave the way for a similar case involving juveniles. However, such a case would only be successful after steady progress on the state level to the point where a majority rather than a minority of states prohibited the execution of juvenile offenders. Although the Florida case described above still leaves seventeen-year-olds vulnerable to a death sentence, the decision is cause for hope that more states will follow Florida's lead and raise the minimum age for capital punishment.

Committed abolitionists believe that the use of the death penalty must be attacked on numerous fronts: as a violation of international law; as morally unthinkable, particularly when it involves executing children or the mentally handicapped; as racist; as ineffective and expensive; and increasingly, as likely to kill innocent men and women. Each of these arguments may reach a different person in a different way, particularly those people 'on the fence', so to speak, who often change their views with additional information or an emotional connection to the controversy. Together, these various arguments form a flexible but persuasive campaign to end the use of the death penalty in the United States completely.

By educating the public and legislators about the United States' obligations under international law, and by building pressure on the state and federal government to comply, the practice of executing juveniles can come to end. Various international organizations have waged economic boycotts and advertising campaigns aimed at discouraging the use of the death penalty in the United States., with varying degrees of success.<sup>205</sup> The death penalty is also currently a prominent issue in the United States, due to the number of overturned convictions based on new evidence and the nationwide push for a moratorium on executions.<sup>206</sup> Hopefully, these various campaigns and international influences will lead to a cessation of executions across the spectrum, and a strengthened appreciation for the most fundamental

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204. *Id.*

205. See Carol J. Williams, *Europeans Baffled by U.S. Support of Death Penalty*, L.A. TIMES, Apr. 6, 2000 at A1.

206. See Rimer, *supra* note 178. In January 2000, Governor George Ryan declared a moratorium on the death penalty in Illinois, citing concerns with the death penalty process there after thirteen innocent men were released from Death Row. Since 1997, the American Bar Association has called for a moratorium to examine death penalty system nationwide, and numerous cities and counties have passed resolutions calling for moratoriums in their states. See *id.*

human right of all: simply, the right to *live*.

*"It was important to Steve Roach that he be remembered. . .not just as the teenager who committed a horrible crime, but also as the adult who accepted responsibility for it and begged the forgiveness of those he caused to suffer; and not just as someone who ended a life for no reason, but also as someone whose own life was ended to no one's benefit. . . Mary Hughes did not deserve to die. But Steve Roach wanted us who live after his death to know that he was not a monster: he was a human being, a young man, with flaws and with promise, who deserved to live."*<sup>207</sup>

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207. Statement by Steven M. Schneebaum, Steve Roach's lawyer after his execution (Jan. 13, 2000).