

October 1990

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Repository Citation

Laura Dalton, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 Wm. & Mary L. Rev. 161 (1990),
<https://scholarship.law.wm.edu/wmlr/vol32/iss1/6>

STANFORD v. KENTUCKY AND WILKINS v. MISSOURI: A VIOLATION OF AN EMERGING RULE OF CUSTOMARY INTERNATIONAL LAW

The eighth amendment to the United States Constitution declares, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹ This language is particularly susceptible to change because the words "cruel" and "unusual" do not lend themselves to the ready creation of a standard by which one can measure punishments.² Recognizing that these words are imprecise and "that their scope is not static,"³ the courts have decided whether individual circumstances warrant the given sentence under the eighth amendment on a case-by-case basis and have not detailed the amendment's "exact scope."⁴

In 1989, the Supreme Court inquired again as to the meaning of the eighth amendment in the consolidated cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*.⁵ Whether the Justices should

1. U.S. CONST. amend. VIII. The people who drafted the eighth amendment in 1791 were accustomed to far more barbaric punishments than the people of today's society. Nonetheless, burning at the stake, crucifixion, and breaking on the wheel were prohibited. *In re Kemmler*, 136 U.S. 436, 446 (1890). Other punishments that appeared in the United Kingdom's early history, such as public dissection and live disembowelment, similarly fell into disfavor. *Weems v. United States*, 217 U.S. 349, 370 (1910).

Mr. Livermore, a participant in the congressional debate, opposed the clause due to vagueness and shed light on the accepted practices of the era when he asked Congress: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in [the] future, to be prevented from inflicting these punishments because they are cruel?" *Id.* at 369 (citation omitted). The sparse debates on the adoption of the clause reveal that a few representatives agreed with Livermore's assertion that the amendment lacked value because it lent no guidance to decisionmakers on what punishments it forbade. *Id.* Notwithstanding the lack of specificity, a considerable majority voted to adopt the eighth amendment as proposed. *Id.*

2. Focusing on the final phrase of the eighth amendment alone, one may question whether punishments must first be cruel or inhuman and second be unusual or apart from the ordinary. The Court has not focused on the distinctions between the two terms in its attempts to define the words, *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), nor has the Court established a bifurcated approach.

3. *Id.* at 100-01.

4. *Id.* at 99; see, e.g., *Weems*, 217 U.S. at 366 (in which the Court upheld an unusually long prison sentence for falsification of government records, reasoning that the eighth amendment implies a concern with degradation rather than sentence length); *O'Neil v. Vermont*, 144 U.S. 323, 331, 337 (1892) (in which the Court upheld a sentence of three days of hard labor per dollar of earnings for the sale of intoxicating liquor without authorization—totalling 19,914 days); *Wilkerson v. Utah*, 99 U.S. 130, 136-37 (1878) (in which public death by gunfire was not cruel and unusual punishment for premeditated murder).

5. 109 S. Ct. 2969 (1989).

consider the practices of other nations and the mandates of human rights instruments⁶ in deciding the constitutionality of a death sentence under the eighth amendment is a source of controversy. The Court's division on the question of what evidence should inform the interpretation of the eighth amendment is of crucial importance because disagreement in the highest tribunal of the land may constitute evidence of an imminent breakthrough in the jurisprudence of the Court.

Pro-abolitionists and commentators pin their hopes on international law to influence the Supreme Court to prohibit juvenile death sentences.⁷ Because four Justices considered international law to be relevant in juvenile death penalty cases,⁸ recognition of international law by additional Justices could be of great consequence. A majority of the Court might then consider the imposition of the death penalty on juvenile offenders to be cruel and unusual in light of the world trend to abolish the death penalty altogether.⁹ Such a decision would more closely align the United States with the practice of the majority of nations in the world. In addition, the United States would be taking steps, through the Court, toward becoming a more cooperative and contributing member of the Organization of American States (OAS) in its endeavors to recognize and promote human rights as a regional unit.¹⁰

This Note first outlines the recent history of the death penalty, examines its current status in the United States, and shows that

6. The Vienna Convention on the Law of Treaties uses the word "instrument" to refer to all written state acts. Such documents may include the text of treaties or subsequent writings that serve to ratify, accept, or approve a treaty on behalf of a particular country. C. PARRY & J. GRANT, *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 171 (1986).

7. See Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245 (1988).

8. Justices Brennan, Marshall, Stevens, and Blackmun considered international law to be relevant in juvenile death penalty cases. See, e.g., *Stanford*, 109 S. Ct. at 2985-86 (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

9. See Fox, *The American Convention on Human Rights and Prospects for United States Ratification*, 3 HUM. RTS. 243, 262-65 (1973). Such a result appears likely because three of the current Justices have cited international law in order to show that the result they would reach would be consistent with the practice of other nations. See *Stanford*, 109 S. Ct. at 2985-86 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 831 (plurality opinion).

10. President Carter informed the Senate in 1978 that the United States' abstention from human rights treaties "increasingly . . . prejudices United States participation in the development of the international law of human rights." Hartman, *supra* note 7, at 657 n.9 (quoting Human Rights Treaties, President's Message to the Senate, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 27, 1978)).

the present interpretation of the eighth amendment does not violate the United States' obligations under its membership in the United Nations (UN) or the OAS. This Note next advances justifications for courts to consider international law, even though current agreements do not obligate such a consideration, and explores the possible ramifications for juvenile offenders. Finally, this Note reevaluates the positions of the *Wilkins* and *Stanford* plurality and dissent to determine their respective degrees of compliance with international law.

THE CURRENT POSITION OF THE SUPREME COURT

In 1988, the Supreme Court granted certiorari to hear the appeals of Kevin Stanford and Heath Wilkins in a consolidated case.¹¹ Both cases involved the imposition of death penalty sentences upon persons generally considered to be juveniles following their convictions for aggravated felonies. A year earlier, the Court had carved out an area protecting persons fifteen years of age and younger from the death penalty.¹² Both appellants exceeded the age of fifteen at the time of their crimes, however, and therefore found themselves outside of the scope of the Court's decision.¹³

A juvenile court convicted Kevin Stanford for the shooting death of a gas station attendant after he repeatedly raped and sodomized her during the commission of a robbery.¹⁴ Stanford was seventeen years and four months of age at the time of the murder.¹⁵ The juvenile court waived jurisdiction under Kentucky law¹⁶ and tried Stanford as an adult, convicting him and sentencing him to death. The Kentucky Supreme Court affirmed the death penalty after finding that no program of treatment in the juvenile system was suitable for the defendant.¹⁷ The court found that mitigating factors

11. *Stanford v. Kentucky*, 109 S. Ct. 217 (1988); *Wilkins v. Missouri*, 487 U.S. 1233 (1988).

12. *Thompson*, 487 U.S. at 837-38 (plurality opinion).

13. *Stanford*, 109 S. Ct. at 2972-73.

14. *Id.*

15. *Id.* at 2972.

16. *Id.* at 2973; see KY. REV. STAT. ANN. § 208.170 (Michie/Bobbs-Merrill 1982). This statute provides that a court may waive jurisdiction either when the defendant is under the age of 16 and charged with a Class A felony or a capital crime, or when the offender is over the age of 16 and charged with a felony.

17. *Stanford v. Commonwealth*, 734 S.W.2d 781, 792 (Ky. 1987), *aff'd sub nom. Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). Petitioner Stanford had been in and out of juvenile court and treatment programs since the age of 10. Efforts at rehabilitation were obviously unsuccessful. The court reasoned that resubjecting Stanford to unproductive therapy only to return him to the streets to continue the pattern of crime would be contrary to the interests of the community and of petitioner himself. *Id.*

such as the defendant's age and the possibility for his rehabilitation were properly within the jury's discretion.¹⁸

In *Wilkins*, the defendant murdered a salesperson in a convenience store. After Wilkins stabbed the victim once, the victim tried to tell the defendant how to access the cash register and then began pleading for her life, but her efforts to communicate resulted in repeated episodes of stabbing.¹⁹ The defendant was sixteen years and six months of age at the time he committed the crime.²⁰ Missouri's juvenile court terminated its juvenile proceedings and certified Heath Wilkins for trial as an adult.²¹ Wilkins received the death penalty. The Missouri Supreme Court found no constitutional violation and affirmed his sentence.²²

Petitioners Stanford and Wilkins appealed to the Supreme Court, arguing that the imposition of the death penalty on persons who committed crimes as juveniles is cruel and unusual punishment and is therefore prohibited by the eighth amendment. The Court affirmed both decisions in a plurality opinion.²³ The Justices agreed that two interpretations of the words "cruel and unusual" exist. The first precludes those punishments that society considered to be excessive at the time of the adoption of the Bill of Rights.²⁴ The second prohibits those penalties contrary to "'evolving standards of decency that mark the progress of a maturing society.'"²⁵

Justice Scalia, writing for a majority of the Court,²⁶ declared from the outset that the eighth amendment prohibits more than

18. *Id.*

19. *Stanford*, 109 S. Ct. at 2973.

20. *Id.*

21. *Id.* Missouri law permits the State to try as adults persons who commit felonies between the ages of 14 and 17. MO. ANN. STAT. § 211.071 (Vernon 1990). Seventeen is the age of majority for the purposes of criminal prosecution. MO. ANN. STAT. § 211.021(1) (Vernon 1990).

22. *State v. Wilkins*, 736 S.W.2d 409, 417 (Mo. 1987), *aff'd sub nom.* *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). The court quickly dismissed the constitutional argument by referring to Supreme Court precedent which established that the death penalty is not cruel and unusual per se. *Id.* at 414 (citing *Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976) (plurality opinion)). Counsel for the defendant did not attempt to argue that the defendant's age made the punishment cruel. *Id.*

23. *Stanford*, 109 S. Ct. at 2980 (plurality opinion).

24. *Id.* at 2974 (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). "There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405.

25. *Stanford*, 109 S. Ct. at 2974 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

26. Justice Scalia was joined by Justices Rehnquist, White, O'Connor, and Kennedy.

those methods of punishment that eighteenth-century society labeled barbaric. The meaning of the words "cruel and unusual" may change, and the Court must interpret those words in a "dynamic manner."²⁷ Although the entire Court accepted this principle, the determination of these evolving standards split the Justices.

Scalia stated that the "conceptions of decency" of "modern American society as a whole" should govern over the Justices' own senses of decency.²⁸ In a footnote immediately following, he added:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant. While "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.²⁹

In his search for objective indications of the public's conceptions of unacceptable punishment, Scalia looked to the enactments of state legislatures.³⁰ He found that such legislation did not establish a national consensus that those offenders below the age of eighteen should be free from the death penalty.³¹

27. *Stanford*, 109 S. Ct. at 2974 (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (plurality opinion)).

28. *Id.* at 2974-75.

29. *Id.* at 2975 n.1 (citations omitted).

30. Of the 37 states permitting capital punishment, 15 states prohibited its use on 16-year-old (and younger) offenders and 12 drew the line at 17 years of age. *Id.* at 2975.

31. Scalia reached his conclusion by comparing the percentages given in the present case with the legislative statistics the Court utilized in another death penalty case, *Tison v. Arizona*, 481 U.S. 137, 154 (1986). In *Tison*, defendants enabled their imprisoned father and another convict to escape from prison. In the course of the getaway and a subsequent robbery, one of the escapees shot and killed a family of four. Defendants testified that they were surprised but made no effort to help the victims. *Id.* at 141. The Supreme Court of Arizona affirmed defendants' death sentences based on an interpretation that situations in which the offender intended or comprehended that deaths might occur satisfied the "intent to kill" requirement. *Id.* at 143-44; see *Enmund v. Florida*, 458 U.S. 782 (1982). To determine the constitutionality of this use of the death penalty, the Court found "the state legislatures' judgment as to proportionality in these circumstances [to be] relevant." *Tison*, 481 U.S. at 152. Of the 32 states permitting the use of the death

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued convincingly that the numbers Scalia relied upon were distorted because they excluded from consideration the fifteen states that deem capital punishment excessive under all circumstances. Brennan found that twenty-seven states prohibited courts from sentencing an offender to death if he was below the age of eighteen at the time he committed the crime.³² More importantly, Brennan recognized that such statistics were only one kind of evidence to consider.³³ Although both sides looked to the juries' application of the laws,³⁴ Brennan's analysis reached further to consider the opinions of respected organizations,³⁵ international evidence as exemplified by legal statistics of other nations,³⁶ and human rights treaties.³⁷

penalty, only 11 would preclude its use under the facts of this case, "powerfully suggest[ing]" that society does not find the use of the death penalty to be grossly excessive. *Id.* at 154.

32. *Stanford*, 109 S. Ct. at 2982-83 (Brennan, J., dissenting).

33. Brennan objected to the majority's approach, which turned over constitutional interpretation to the political process. *Id.* at 2986-87 (Brennan, J., dissenting). He believed:

[The] very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 2987 (Brennan, J., dissenting) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

34. Scalia found jury approval of the death penalty for juveniles on the basis that juries sometimes, even if rarely, imposed the penalty. *Id.* at 2977. Brennan countered that only 1.37% of the inmates on death row are juvenile offenders, showing that jury approval is unusual, and that the Court's jurisprudence has never considered a jury's decision to be dispositive of the constitutionality of an issue. *Id.* at 2984 (Brennan, J., dissenting). An assessment of juries is relevant, however, because one purpose of jury sentencing is "to maintain a link between contemporary community values and the penal system," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion), in an effort to give effect to the "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

35. Such organizations include the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Law Institute, and the National Commission on Reform of the Federal Criminal Laws. Similarly, religious organizations and parent groups such as the National Parents and Teachers Association present important indicia of Americans' views. *Stanford*, 109 S. Ct. at 2984-85 (Brennan, J., dissenting).

36. Brennan noted that more than 50 nations have abolished the death penalty or severely limited its use. *Id.* at 2985 (Brennan, J., dissenting). This figure includes nearly all of the countries of Western Europe. *Id.* Of the eight juvenile executions (under age 18) worldwide since 1978, five occurred in Pakistan, Bangladesh, Rwanda, and Barbados. The remaining three occurred in the United States. *Id.*

37. *Id.* Brennan mentioned article 6(5) of the International Covenant on Civil and Political Human Rights (*see infra* note 114 and accompanying text), article 4(5) of the

In sum, the Supreme Court Justices are split in their analysis of juvenile death penalty cases. To some of the Justices, only state legislative statistics are relevant to determining the age at which the public accepts the imposition of the death penalty.³⁸ The other Justices look to a variety of sources, including international law, to interpret the words "cruel and unusual."³⁹

MODERN APPLICATION OF THE DEATH PENALTY

The United States moved away from mandatory death penalties in the nineteenth century in order to enable factfinders to consider the individual circumstances and characteristics of the defendants.⁴⁰ This move resulted in a great deal of discretion, which led to arbitrary results.⁴¹ In 1972, the Supreme Court found in *Furman v. Georgia*⁴² that such arbitrariness violated the eighth and fourteenth amendments. In *Furman*, the Court did not decide whether the death penalty was per se unconstitutional, but rather opined that guidelines were necessary for its fair application.⁴³ Although the Court's decision in *Furman* invalidated only Georgia's statute, many state courts thereafter struck down their own death penalty statutes after determining that they would fare no better under a similar challenge in the Supreme Court.⁴⁴ The

American Convention on Human Rights (see *infra* note 136 and accompanying text), and article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (see *infra* note 123 and accompanying text). Although Justice O'Connor concurred in the decision of the Court and joined the portion of Scalia's opinion containing the footnote that excludes international norms from consideration, she never addressed the subject.

38. *Stanford*, 109 S. Ct. at 2975-77; *Thompson v. Oklahoma*, 487 U.S. 815, 865-68 (1988) (Scalia, J., dissenting). Justices Scalia, Rehnquist, White, O'Connor, and Kennedy looked only to the legislative statistics of the states. (Although Kennedy joined in the Court's opinion in *Stanford*, he did not take part in the *Thompson* decision). To a more limited extent, these Justices also looked at the sentencing behavior of juries. *Stanford*, 109 S. Ct. at 2977; *Thompson*, 487 U.S. at 869 (Scalia, J., dissenting). The Justices have specifically rejected the consideration of international law. *Stanford*, 109 S. Ct. at 2975 n.1; *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

39. *Stanford*, 109 S. Ct. at 2986 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 830-31 (plurality opinion). Justices Brennan, Marshall, Stevens, and Blackmun looked to international law.

40. *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982). Justice Powell explained: "In this country we attempted to soften the rigor of the system of mandatory death sentences we inherited from England, first by grading murder into different degrees . . . and then by committing use of the death penalty to the absolute discretion of the jury." *Id.* at 111.

41. *Id.*

42. 408 U.S. 238 (1972).

43. *Id.* at 256-57 (Douglas, J., concurring).

44. See, e.g., *Hubbard v. State*, 290 Ala. 118, 274 So. 2d 298 (1973); *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972).

Furman decision, in effect, suspended executions until the states drafted new legislation.⁴⁵ No executions occurred in the United States until 1977.⁴⁶ With the new legislation in place after the *Furman* decision, 3,000 people received the death penalty in the next ten years.⁴⁷ During this period, however, no executions of juvenile offenders took place.⁴⁸

The increased use of the penalty led the Court to grant certiorari in three death penalty cases in 1976 to answer whether execution constituted cruel and unusual punishment under all circumstances. In *Gregg v. Georgia*,⁴⁹ the Court upheld the constitutionality of the penalty.⁵⁰ The Court accepted Georgia's bifurcated approach which first required a determination of guilt or innocence and then, upon a finding of guilt and at least one aggravating circumstance, considered whether any mitigating factors existed which could relieve the person of the death penalty.⁵¹ Likewise, the Court upheld Florida's and Texas' sta-

45. Case 9647, INTER-AM. C.H.R. 147, OEA/ser.L/V/II.71, doc. 9 rev. 1 (1987), reprinted in 21.3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 61, 73 (1988) [hereinafter Case 9647].

46. *Id.* Notably, no execution took place in the five years prior to *Furman*, *id.*, evidencing the natural decline of the use of the death penalty in the United States.

47. *Id.*

48. *Id.* The Inter-American Commission consistently uses the term "juvenile" to refer to persons under the age of 18.

49. 428 U.S. 153 (1976).

50. *Id.* at 186-87 (plurality opinion). Interestingly, the Court supported its finding in three ways. First, the Court brought forward evidence that the Framers accepted the death penalty. *Id.* at 176-77. Secondly, the Court pointed out that punishment by death had continued in the United States for two centuries. *Id.* at 177-78. Finally, the Court pointed to the post-*Furman* flurry of legislation as evidence of the public's acceptance of the death penalty, notwithstanding the convincing argument in *Furman* that modern standards of decency forbade imposition of the death penalty. *Id.* at 179-81. In *Furman*, Justice Brennan set out detailed statistics that demonstrated the American public's increasingly prominent rejection of execution as appropriate punishment. *Furman*, 408 U.S. at 291-93 (Brennan, J., concurring).

Reliance on post-*Furman* legislation to dispute the argument in *Furman* that modern-day citizens find the death penalty abhorrent and violative of human dignity is misleading because American citizens had very little to do with the state legislatures' drafting frenzy. States that enacted new death penalty statutes simply reacted to replace an unconstitutional law with a constitutional one. Presumably, absent *Furman*, the states would have continued a four-decade trend and employed the death penalty less frequently. The use of the death penalty was grinding slowly to a halt until the Court in *Furman* insisted upon legislation to clarify and guide the juries in applying the penalty. Clearly, the states could have chosen to abolish the penalty instead of clarifying it and bringing it to the forefront of the juries' attentions, but the legislation which at first glance appeared to show a flurry of activity in support of the penalty was in fact a response to the Court striking down the vague death penalty statute in *Furman*.

51. *Gregg*, 428 U.S. at 191-92, 196-98 (plurality opinion).

tutes because those statutes included guidelines that allowed mitigation due to individual circumstances.⁵²

In 1978, the Court struck down Ohio's death penalty statute in *Lockett v. Ohio*⁵³ because it enumerated only three mitigating factors for the factfinder to consider.⁵⁴ The Court held that the jury must be able to consider as mitigating factors all aspects of a defendant's character and record, including the age of the defendant.⁵⁵ Similarly, in 1982, the Court held that statutes must permit factfinders to consider the emotional and mental background of the offender in *Eddings v. Oklahoma*.⁵⁶ The Court overturned the death sentence in *Eddings* because the lower court did not give the defendant's upbringing enough weight in its determination.⁵⁷ *Eddings* was sixteen years of age at the time he committed murder. The trial judge found the defendant's age to be a mitigating factor but insufficient to outweigh the aggravating circumstances.⁵⁸ Although the decisions in both *Lockett* and *Eddings* stressed the youth of the defendants, the Court refrained from addressing whether the use of the death penalty for minors constitutes inherently cruel and unusual punishment.

In *Eddings*, the Court did, however, emphasize the importance of considering age.⁵⁹ The Court described adolescence as the time when a person is "most susceptible to influence and to psychological damage"⁶⁰ and pointed out that the law recognizes the immaturity and irresponsibility of youths as compared to adults.⁶¹ The Court readily acknowledged that age is a "relevant mitigating factor of great weight."⁶²

52. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

53. 438 U.S. 586 (1978).

54. *Id.* at 606-09 (plurality opinion). Unless the defendant proved one of the three factors by a preponderance of evidence, the statute mandated the death penalty. The three factors included inducement by the victim, duress or coercion, and mental deficiency. *Id.* at 607 (citing OHIO REV. CODE ANN. § 2929.04(B) (Anderson 1987)).

55. *Id.* at 604.

56. 455 U.S. 104, 116 (1982).

57. *Id.* at 116-17.

58. *Id.* at 108-09.

59. *Id.* at 115. The Court found Eddings's turbulent family history "particularly relevant" due to his youth. *Id.*

60. *Id.*

61. *Id.* at 116. Three reasons for the differential treatment of minors are: (a) children's particular vulnerability; (b) their inability to make informed decisions; and (c) their need for parental guidance. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion) (regulating access of minors to abortion); see also *Ginsberg v. New York*, 390 U.S. 629 (1968) (restricting children's first amendment right to buy sexually oriented magazines).

62. *Eddings*, 455 U.S. at 116.

In 1987, the Court squarely faced the age issue in *Thompson v. Oklahoma*.⁶³ The Court held that the imposition of the death penalty on persons below the age of sixteen at the time they committed a crime violated the eighth and fourteenth amendments.⁶⁴ The Court found that a national consensus existed⁶⁵ and that the execution of a person in this category was generally "abhorrent to the conscience of the community."⁶⁶ The Court's review of legislative enactments influenced its decision. All of the eighteen states that have established a minimum age in their death penalty statutes require the defendant to be at least sixteen years old at the time of the crime. The Court demonstrated that the conclusions it drew from legislative patterns in the United States were consistent with the abolition of the death penalty in other nations, at least as concerns juveniles.⁶⁷ An exploration of the sentencing behavior of juries revealed further evidence of a consensus.⁶⁸

After heavily weighing legislative and jury patterns, the Court made the final determination of the scope of the eighth amendment.⁶⁹ The Court spoke of the youth's reduced culpability⁷⁰ and the fact that application of the penalty to juveniles does not contribute "to the goals that capital punishment is intended to

63. 487 U.S. 815 (1988).

64. *Id.* at 838 (plurality opinion).

65. Justice O'Connor, concurring in the judgment, did not appear as convinced that a national consensus existed as a matter of constitutional law. O'Connor agreed that some age exists below which a state could never constitutionally impose the death penalty, and she found that the state should draw the line to protect those 16 and younger. O'Connor disagreed, however, that the Court should hold as such. She would avoid selecting any age cutoff and would encourage legislatures to generate such numbers. Her more narrow ruling would find the death penalty unconstitutional as applied to petitioner due to the absence of a specified minimum age in Oklahoma's death penalty statute. *Id.* at 857-58 (O'Connor, J., concurring).

66. *Id.* at 832 (plurality opinion).

67. The United Kingdom, New Zealand, and the Soviet Union no longer enforce the death penalty against juvenile offenders. The penalty applies only to such exceptional crimes as treason and piracy in Canada, Italy, Spain, and Switzerland. West Germany, France, Portugal, The Netherlands, and the Scandinavian countries abolished the death penalty. *Id.* at 830-31.

68. *Id.* at 831. Of 82,094 persons arrested for homicide, 1,393 received death sentences. Only five of these were individuals under the age of 16 at the time of the crime. The disparity suggests that these five penalties constituted cruel and unusual punishment. *Id.* at 832-33.

69. *See id.* at 833-38.

70. *Id.* at 834 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)). Additional factors that differentiate youths from adults as offenders include inexperience, lack of education, and less intelligence. *Id.* at 835.

achieve.”⁷¹ The Court labeled deterrence in this context “fanciful” because fifteen-year-olds would not likely engage in a cost-benefit analysis, weighing the possibility of punishment against the desire to commit the crime.⁷² Even if they did, the Court noted that the odds of execution at their age are so small that the youths would probably dismiss the possibility of punishment by death.⁷³

The Juvenile System

State legislatures created juvenile courts because of the belief that the state should rehabilitate children and not subject them to the harshness of the adult criminal law system.⁷⁴ “[O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.”⁷⁵ Limitations on juvenile court jurisdiction vary from state to state, but most juvenile courts lose jurisdiction over persons between the ages of sixteen and eighteen. Not all persons meeting the jurisdictional requirements of juvenile courts, however, will be subject to adjudication in those courts.⁷⁶ Under certain circumstances, a transfer out of juvenile courts works to the youth’s advantage, primarily because the Constitution entitles the offender to all of the protections of the adult system, but also because juries may be more sympathetic. Along with those advantages, however, the youth risks imposition of any of the adult penalties.⁷⁷

In each of the death penalty cases before the Supreme Court, either the age requirements in each jurisdictional state disqual-

71. *Id.* at 838.

72. *Id.* at 837-38.

73. *Id.* at 838.

74. *In re Gault*, 387 U.S. 1, 15-16 (1967).

75. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). See generally Paulson, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167 (summarizing constitutional attacks on the juvenile court system and the system’s general resilience).

76. Most states permit the juvenile court to waive its jurisdiction after the court satisfies varying procedural requirements. The Commonwealth of Virginia, for example, permits the juvenile court to transfer a case to another criminal court if the child is not amenable to rehabilitation in the available juvenile facilities and if the court has “probable cause to believe the child committed the delinquent act.” VA. CODE ANN. § 16.1-269 (1988). Additionally, the child must be at least 15 years of age and not mentally retarded or criminally insane. *Id.* In many states, the juvenile also possesses the right to waive the jurisdiction of the juvenile court. See, e.g., *id.* § 16.1-270.

77. *Kent v. United States*, 383 U.S. 541, 556-57 (1966).

ified the offender from juvenile court, or the offender was subject to trial in the juvenile system but the prosecutor or the defendant himself waived jurisdiction. In *Thompson v. Oklahoma*,⁷⁸ the Court drew a protective line to shield those under sixteen from the death penalty of the adult system.⁷⁹ The Court in *Wilkins v. Missouri* and *Stanford v. Kentucky*⁸⁰ considered whether the line should more appropriately be drawn to protect those under eighteen who found themselves outside of juvenile court.⁸¹ The Court reaffirmed *Thompson* by asserting that the national consensus would preclude execution only for those below the age of sixteen.⁸²

Nations outside of the United States have given great consideration to the same question with which our Supreme Court struggles. As a result of such consideration, many nations individually abolished or restricted use of the death penalty within their domestic legal system and took part in international human rights movements. These movements culminated in the creation of binding treaties, many of which contain provisions regarding the death penalty.

INTERNATIONAL EFFORTS TO PROMOTE HUMAN RIGHTS⁸³

Until the 1940's, international law focused primarily upon the relations between nations, leaving the treatment of nationals within each nation's exclusive jurisdiction.⁸⁴ In 1941, in response to the Hitler era atrocities, President Franklin D. Roosevelt proclaimed the humanistic ideals that formed the basis for the

78. 487 U.S. 815 (1988).

79. *Id.* at 838 (plurality opinion). Although petitioners requested the Court to draw the line to protect those under the age of 18, the Court, on the facts before it, had to consider only the constitutionality of the death penalty as applied to 15-year-olds. *Id.*

80. 109 S. Ct. 2969 (1989).

81. *Id.* at 2980 (plurality opinion).

82. *Id.* When faced with a 15-year-old offender in *Thompson*, four Justices in the plurality included international law in their reasoning. *Thompson*, 487 U.S. at 830-31 (Brennan, Marshall, Stevens, and Blackmun, JJ., plurality opinion). After considering the 16- and 17-year-olds in the more recent case, the four Justices who admitted the relevancy of international law switched their positions and became the dissenters.

83. Although international efforts to promote human rights are not limited to the documents that this Note discusses, the following international agreements have played a role in the Supreme Court's decisionmaking, see *supra* note 37, and in the OAS's finding of a violation of human rights on the part of the United States, see *infra* text accompanying notes 158-60.

84. Buergerthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2 (1988).

strong belief shared by the Allied Nations that the time had come to protect all humankind under international law.⁸⁵ The United Nations Charter embodied the vision of these nations by requiring all members of the UN to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms."⁸⁶ Although the document legally bound the countries participating, the Charter was only a vague beginning. First, nations pledged themselves to promote, but not necessarily to observe, human rights. Second, the document did not include an enumeration of the rights it promoted.

An alien plaintiff attempted to assert the supremacy of the Charter's provisions over California's inconsistent Alien Land Law in order to prevent the escheat of his property to the State of California in the landmark case of *Sei Fujii v. State*.⁸⁷ The Supreme Court of California acknowledged that the Charter was a treaty made under the authority of the United States and therefore was part of the supreme law of the land.⁸⁸ Not all treaties, however, automatically supercede inconsistent law. "A treaty is 'to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision.'"⁸⁹ When a treaty is non-self-executing, it "'addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court.'"⁹⁰ The court found that the Charter was clearly non-self-executing because it stated only "general purposes and objectives of the United Nations Organization."⁹¹ Although the plaintiff prevailed on other grounds, the United Nations Charter had no effect upon the case.⁹²

The Charter was significant, however, because it constituted the first time that international law claimed an interest in the protection of individuals, ignoring the traditional boundary between matters of universal concern and those within domestic

85. *Id.* at 2-3.

86. U.N. CHARTER art. 55.

87. 38 Cal. 2d 718, 720, 242 P.2d 617, 619 (1952) (citing CAL. GEN. LAWS ANN. act 261, §§ 1, 2, 7 (Deering 1945)).

88. *Id.* at 721, 242 P.2d at 619-20; U.S. CONST. art. VI, cl. 2.

89. *Sei Fujii*, 38 Cal. 2d at 721, 242 P.2d at 620 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)). Treaties that are automatically operative upon ratification are termed "self-executing." *Id.*

90. *Id.* (quoting *Foster*, 27 U.S. (2 Pet.) at 314).

91. *Id.* at 722, 242 P.2d at 620. See *id.* at 723-24, 242 P.2d at 621-22 for a complete analysis of the differences between self-executing and non-self-executing treaties.

92. *Id.* at 724-25, 737-38, 242 P.2d at 622, 630.

sovereignty.⁹³ Human rights law, conceptualized in the Charter and spelled out in detail in subsequent agreements, has created an environment in which derogations by any nation may result in criticism and efforts to prevent repetition of the internationally illegal conduct.⁹⁴ The United States actively participated in the creation of these documents, which have given individuals new rights and rendered illegal a wide variety of acts.

United Nations Membership

The United States is one of forty-nine original members of the UN, which was organized in 1945 to promote peace and prosperity.⁹⁵ The General Assembly, which consists of up to five delegates from each member nation,⁹⁶ may consider and subsequently recommend action on any question of world peace or security except those issues reserved for the Security Council⁹⁷ or matters within the internal affairs of the member states.⁹⁸ A committee of representatives, assigned to research matters and formulate position statements, recommends resolutions for adoption by the General Assembly.⁹⁹ The General Assembly decides important questions by a two-thirds majority of the members present and voting; a simple majority vote decides all other questions.¹⁰⁰ A resolution adopted by the Assembly states the position of the UN on a matter but does not legally bind any state unless that state becomes a party to the particular convention or treaty.¹⁰¹

93. Buergenthal, *supra* note 84, at 4.

94. *Id.* at 4-5.

95. D. COYLE, *THE UNITED NATIONS AND HOW IT WORKS* 249-50 app. C (1966).

96. *Id.* at 181. Regardless of the number of representatives, each member nation has one vote. *Id.* at 205.

97. *Id.* at 181. The Security Council has greater power than the General Assembly but is involved only in "situations which are likely to endanger international peace and security." U.N. CHARTER art. 11, para. 3. Being one of the five world powers in 1945, the United States also serves as a member of the Security Council. *Id.* art. 23, para. 1. The founders originally intended for the Security Council to command a military force to keep world peace, but disagreement as to the proper use of force for peacekeeping has prevented the realization of this goal. D. COYLE, *supra* note 95, at 182. Nations may still consult the Security Council whenever a breach of the peace is imminent, but inaction has diminished the power of the Council, resulting in an increase in the power of the General Assembly to make recommendations. *Id.* at 182-83.

98. *Id.* at 181. What constitutes "internal affairs" is a controversial subject in the Assembly. *Id.* The overall trend is for the UN to become increasingly involved as the definition of internal affairs becomes more restricted over time. *Id.* at 181-82.

99. *Id.* at 181.

100. *Id.* at 182.

101. *Id.* at 201. The United Nations Charter empowers the UN to make recommendations only. See U.N. CHARTER art. 10.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948

The Universal Declaration of Human Rights¹⁰² was the product of the Commission on Human Rights, chaired by Eleanor Roosevelt, which sought to identify common wrongs and to formulate general principles to protect individuals from continued suffering.¹⁰³

The Commission presented these principles in the form of a covenant, ratification of which meant that the particular member state pledged to promote the observance of the stated rights and fundamental freedoms.¹⁰⁴ Article 5 of the Universal Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁰⁵ The General Assembly unanimously adopted the Declaration.¹⁰⁶

The preamble labels the Universal Declaration a "common standard of achievement for all peoples and all nations,"¹⁰⁷ and a UN publication referred to it as a "formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."¹⁰⁸ The preamble is not binding legally,¹⁰⁹ however, except insofar as it may constitute a statement of customary international law.¹¹⁰ In *Filartiga v. Pena-Irala*,¹¹¹ for example, the United States Court of Appeals for the Second Circuit relied upon the Declaration, among other sources, as establishing that the international community abhors acts of

102. *International Bill of Human Rights: A Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810, reprinted in 2 D. DJONOVICH, UNITED NATIONS RESOLUTIONS: SERIES I: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 135 (1973) [hereinafter *Universal Declaration*].

103. D. COYLE, *supra* note 95, at 79.

104. *Id.*; see also U.N. CHARTER preamble.

105. *Universal Declaration*, *supra* note 102, at 137.

106. D. COYLE, *supra* note 95, at 80.

107. *Universal Declaration*, *supra* note 102, at 135-36.

108. 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).

109. Mrs. Franklin D. Roosevelt explained to the General Assembly prior to the adoption of the Declaration that one should keep in mind that the Declaration is not a treaty. She admonished: "It is not and does not purport to be a statement of law or of legal obligation." 5 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 243 (1965).

110. Consistent state practice creates customary international law, which binds the practicing nations, as well as others, over time. See *infra* notes 195-99 and accompanying text. For support of the proposition that the Declaration has become binding as a part of customary international law, see Nayar, *Introduction: Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816-17 (1978); Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 11 INT'L & COMP. L.Q. 1, 15 (Supp. 1965).

111. 630 F.2d 876 (2d Cir. 1980).

torture and, therefore, that customary international law prohibits such acts.¹¹² Even if one argued that the Universal Declaration's prohibition against cruel and inhuman punishment legally bound nations as a matter of international law due to universal adherence to the Universal Declaration's mandates, courts are no closer to resolving the meaning of those words, which parallel those in the eighth amendment.¹¹³

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Since 1948, nations and international organizations have drafted more specific documents to enforce the ideals set forth in the Universal Declaration. For example, the General Assembly also adopted unanimously a resolution entitled the International Covenant on Civil and Political Rights.¹¹⁴ The United States participated in the drafting of this Covenant by means of representatives who served on the Economic and Social Council.¹¹⁵ The Covenant is more specific than the Declaration and asserts in article 6, paragraph 5 that "[s]entences of death shall not be imposed for crimes committed by persons below eighteen years of age."¹¹⁶ The Covenant, which member states opened for signature in 1966,¹¹⁷ became effective in 1976.¹¹⁸ The signature of a nation's representative indicates the signatory's initial commitment to consider taking the necessary steps to ultimately ratify the document but does not normally bind the signatory.¹¹⁹ The *Vienna Convention on the Law of Treaties*¹²⁰ imposes limited obligations on signatories that do not ratify a document. Article 18 prohibits the signatory from engaging in acts that would defeat the purpose of the treaty. The obligation continues until the nation ratifies the treaty or the signatory makes clear its intention not to

112. *Id.* at 882.

113. See *supra* text accompanying note 1 for the relevant text of the eighth amendment.

114. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter International Covenant].

115. Article 62 of the United Nations Charter empowers the Economic and Social Council to conduct studies and make recommendations to the General Assembly with respect to international economic, educational, cultural, health, and social matters. U.N. CHARTER art. 62, para. 1.

116. International Covenant, *supra* note 114, art. 6, para. 5.

117. *Id.* art. 48, para. 1.

118. *Id.* at 172 n.1.

119. Liang, *Notes on Legal Questions Concerning the United Nations*, 44 AMER. J. INT'L L. 333, 342-46 (1950).

120. 8 INT'L LEGAL MATERIALS 679 (1969), U.N. Doc. A/CONF. 39/27 [hereinafter *Vienna Convention*].

become a party.¹²¹ Although the United States signed the Covenant, it has not yet ratified the document.¹²² Because article 48, paragraph 2 requires ratification before the Covenant has binding effect, the United States does not violate article 6, paragraph 5 by continuing to impose the death penalty.

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War¹²³ allows the use of the death penalty when the accused committed a crime involving espionage or serious acts of sabotage against the military of the occupying state.¹²⁴ The Convention also permits capital punishment when the accused intentionally caused the death of at least one person, so long as the offense would have subjected the offender to the same penalty under the law of the occupied territory as it existed prior to occupation.¹²⁵ The final sentence of article 68 leaves no doubt, however, that "[i]n 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 offence."¹²⁶ Although the Geneva Convention's title suggests that its contents have effect only during war, article 2 also refers to the implementation of certain provisions in peacetime.¹²⁷ No qualifying clause restricts article 68 to wartime; it refers only to "protected persons." Article 4, however, defines "protected persons" as persons held by a party to the conflict or an occupying force of which they are not nationals.¹²⁸ Obviously, then, the death penalty provisions of the Geneva Convention are binding upon the United States only under conditions of war.

Membership in the Organization of American States

The first conception of a regionally united America was implicit in the Monroe Doctrine of 1823, in which President James Monroe

121. *Id.* art. 18, at 686.

122. Article 11 of the *Vienna Convention on the Law of Treaties* provides that states may consent to be bound to a treaty by signature, ratification, or any other agreed-upon means. *Id.* art. 11, at 684.

123. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter *Geneva Convention*].

124. *Id.* art. 68, at 3560.

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.* art. 2, at 3518.

128. *Id.* art. 4, at 3520.

declared that the United States has a special interest in the unity of the hemisphere.¹²⁹ In 1905, President Theodore Roosevelt added a corollary to the Monroe Doctrine which went further and actually asserted a United States' right to intervene in the affairs of other American nations in order to keep peace.¹³⁰ This assertion contravened American policy since 1889, when the United States called the First International Conference of American States in order to promote beneficial reciprocal relations between the nations of the Western Hemisphere.¹³¹ Throughout the occasional meetings of this Conference, the Latin American states opposed the United States' asserted right of intervention.¹³² The United States, over time, accepted the principle of nonintervention¹³³ and a period of cooperation ensued.¹³⁴ Desiring to reinforce the productive new relationship, the nations formed the Organization of American States and adopted its charter in 1948.¹³⁵

The American Convention on Human Rights

In 1969, the OAS created the American Convention on Human Rights,¹³⁶ also known as the San José Pact.¹³⁷ The American Convention created rights themselves,¹³⁸ as well as the necessary structures and organs responsible for their promotion.¹³⁹ The Convention also established the first international tribunal in the American States: the Inter-American Court of Human Rights.¹⁴⁰

129. D. ARMSTRONG, *THE RISE OF THE INTERNATIONAL ORGANISATION: A SHORT HISTORY* 98 (1982).

130. *Id.*

131. *Id.* at 99.

132. See R. LAWSON, *INTERNATIONAL REGIONAL ORGANIZATIONS* 320-22 (1974).

133. D. ARMSTRONG, *supra* note 129, at 99. As Armstrong points out, articles 15 through 20 of the original Charter (articles 18 through 22 of the Charter as amended in 1967 and 1985) demonstrate the member states' acceptance of nonintervention. *Id.* at 100; see also O.A.S. CHARTER arts. 18-22.

134. D. ARMSTRONG, *supra* note 129, at 99.

135. 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM part 1, booklet 2, at 3 (T. Buergeenthal & R. Norris eds. 1989) [hereinafter HUMAN RIGHTS].

136. American Convention on Human Rights, Nov. 22, 1969, OAS Off. Rec. OEA/ser. K/XVI/I.1, doc. 65 rev. 1 (1970), reprinted in 9 INT'L LEGAL MATERIALS 673 (1970) [hereinafter American Convention].

137. *Id.* at 696.

138. For the enumerated civil and political rights, see *id.* arts. 3-25, at 676-83. Article 26 describes economic, social, and cultural rights. *Id.* art. 26, at 683.

139. *Id.* art. 33, at 685.

140. *Id.* arts. 52-73, at 690-94.

This court serves in an advisory capacity¹⁴¹ and enjoys contentious jurisdiction for alleged violations of the rights that the Convention created.¹⁴² Member states of the OAS or individuals through the election of the Inter-American Commission on Human Rights file complaints with the court.¹⁴³

The Inter-American Commission on Human Rights, an organ of the OAS, was designed to promote and defend human rights and to serve as a consultative body in matters concerning human rights.¹⁴⁴ The Commission gained additional responsibilities under the Convention.¹⁴⁵ The Commission educates nations and "promote[s] the observance and protection of human rights."¹⁴⁶ To these ends, the Commission advises nations when a member state so requests,¹⁴⁷ in response to the petition of an individual or in response to the communications of another member state,¹⁴⁸ regardless of whether an individual brings a complaint. The Commission has the power to encourage the member states to comply with resolutions of the OAS and provisions of the Convention when applicable.¹⁴⁹

The Convention permits the death penalty in countries that have not yet abolished it for only the most serious of crimes.¹⁵⁰ No state, having abolished the penalty, may reinstate it,¹⁵¹ nor may any state extend application of the death penalty to crimes for which it does not currently apply.¹⁵² Finally, the Convention does not allow the death penalty for pregnant women or persons over seventy or under eighteen years of age at the time of the crime.¹⁵³

The United States participated in the drafting of the Convention and is a signatory, but never accepted the document in its

141. The court may assist states by interpreting treaties concerning human rights or by giving its opinion as to the compatibility of a state's laws with the Convention. *Id.* art. 64, at 692.

142. *Id.* art. 62, para. 3, at 692.

143. *Id.* arts. 48-50, 61, at 688-89, 691.

144. Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, art. 12, 21 U.S.T. 607, T.I.A.S. No. 6847, reprinted in 6 INT'L LEGAL MATERIALS 310, 342 (1967) [hereinafter Protocol].

145. See generally Volio, *The Inter-American Commission on Human Rights*, 30 AM. U.L. REV. 65 (1981).

146. Protocol, *supra* note 144, at 342.

147. American Convention, *supra* note 136, art. 41, para. e, at 686.

148. *Id.* art. 41, para. f, at 686.

149. Volio, *supra* note 145, at 69-70.

150. American Convention, *supra* note 136, art. 4, para. 2, at 676.

151. *Id.* art. 4, para. 3, at 676.

152. *Id.* art. 4, para. 5, at 676.

153. *Id.*

entirety.¹⁵⁴ In 1978, President Carter unsuccessfully encouraged Congress to ratify the American Convention.¹⁵⁵ The Reagan administration did not resubmit it.¹⁵⁶ Without ratification, other countries cannot hold the United States to the provisions of the Convention,¹⁵⁷ even though as a member of the OAS the United States remains subject to the recommendations of the Commission, which may include input from the court in the form of an advisory opinion.¹⁵⁸ The Commission may make recommendations to the United States even though the United States is not a party to the Convention due to the Commission's dual role as an organ of the American Convention and the OAS.¹⁵⁹ In 1987, the Commission issued a report to the United States that found the United States in violation not of the Convention, but of another resolution of the OAS.¹⁶⁰

154. See generally United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights (Apr. 22, 1970), reprinted in 9 INT'L LEGAL MATERIALS 710 (1970). The delegation reported that the United States was unsuccessful in removing the proscription of capital punishment for certain age groups from the draft of the Convention. *Id.* at 716. The draft did not conflict with the Constitution but was at odds with some federal legislation, forcing the delegation to abstain from the vote on article 4. *Id.* at 717.

155. Fox, *Inter-American Commission on Human Rights Finds United States in Violation*, 82 AMER. J. INT'L L. 601, 603 (1988). In 1978, President Carter submitted the American Convention on Human Rights, the International Convention on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination to the Senate for approval. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOC. C, D, E, & F, 95th Cong., 2d Sess. (1978) [hereinafter MESSAGE]. The President recommended that a non-self-executing provision limit the treaties, with subsequent legislation to implement the treaties to govern federal law. *Id.* at 18; see also *Foster v. Neilson*, 27 U.S. 253, 313 (1829) (distinguishing between self-executing and non-self-executing treaties). Specifically focusing on the American Convention, Carter proposed ratification with a reservation as to article 4 and other articles. MESSAGE, *supra*, at 18. He suggested that the United States enter its reservation as follows: "United States adherence of Article 4 is subject to the Constitution and other laws of the United States." *Id.*

156. Fox, *supra* note 155, at 603.

157. American Convention, *supra* note 136, art. 74, para. 2, at 694.

158. The court may render an advisory opinion even if a member state of the OAS does not accept the jurisdiction of the court over a particular matter. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 (Sept. 8, 1983), reprinted in 23 INT'L LEGAL MATERIALS 320, 330 (1984). Acceptance of jurisdiction is necessary only in contentious cases. *Id.*

159. Article 53 of the Regulations of the Inter-American Commission on Human Rights authorizes the Commission to organize its own activities and appoint the "persons necessary to carry out any activity related to its mission." Regulations of the Inter-American Commission on Human Rights, 9 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 51-52 (1988). The Commission relies on article 53 as authority for the advisory opinions it renders. See Case 9647, *supra* note 45, at 64.

160. Case 9647, *supra* note 45.

American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man¹⁶¹ is similar in nature to the UN's Universal Declaration in that both documents merely declare general principles of human rights. The Inter-American Juridical Committee, created for the Inter-American Conference on the Problems of War and Peace (Mexico City, 1945), prepared the first draft of the American Declaration, which the Ninth International Conference of American States (Bogota, 1948) adopted with revisions.¹⁶² The member states of the OAS clearly did not intend for this document to bind them legally, but rather adopted it as a resolution containing common standards of treatment which the states desired to protect.¹⁶³

Although the OAS created numerous other resolutions generally arising from the text of the American Declaration, not until 1980 did the OAS significantly promote the general human rights principles contained in the Declaration.¹⁶⁴ The OAS implemented the proclaimed principles by incorporating the American Declaration into the Statute of the Inter-American Commission on Human Rights.¹⁶⁵ Article 2 of the statute in effect authorizes the Commission to refer to the provisions of the American Declaration to determine whether any member nation has violated an individual's human rights.¹⁶⁶ Revisions of the OAS Charter gave additional significance to the Declaration.¹⁶⁷ In 1987, the Commission found that the United States' practice of executing juveniles violated the American Declaration.¹⁶⁸

In an unsuccessful attempt to intervene in the executions of juveniles James Terry Roach and Jay Pinkerton, the Commission contacted the governors of the concerned states and the United States Secretary of State.¹⁶⁹ Although the Declaration does not

161. American Declaration on the Rights and Duties of Man, OAS Off. Rec. OEA/ser. L./V/II.23, doc. 21 rev. 6 (1975), reprinted in T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 285-89 (1st ed. 1982) [hereinafter American Declaration].

162. 1 HUMAN RIGHTS, *supra* note 135, part 1, booklet 5, at i.

163. *Id.*

164. 2 HUMAN RIGHTS, *supra* note 135, part 1, booklet 9, at 1 (1980).

165. *Id.*

166. 1 HUMAN RIGHTS, *supra* note 135, part 1, booklet 5, at i.

167. See generally Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AMER. J. INT'L L. 828 (1975).

168. Case 9647, *supra* note 45, at 87.

169. The Commission attempted to intervene in the cases of Pinkerton v. McCotter, No. 81-CR-0387D (105th D. Ct. Nueces Co. May 30, 1981), *reh'g denied*, 660 S.W.2d 58

include any specific provisions regarding the death penalty, the Commission found that the United States violated article 1 of the American Declaration, which proclaims that "[e]very human being has the right to life."¹⁷⁰ Petitioners Pinkerton and Roach argued that the Commission could interpret this phrase by referring to customary international law, which they contended prohibited "the imposition of the death penalty on persons who committed capital crimes before completing eighteen years of age."¹⁷¹ The Commission rejected this argument due to the United States' continual refusal to conform to the prohibition.¹⁷² The Commission, however, did not say that this prohibition or norm has been established as a matter of customary international law, but rather 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."¹⁷³ The Commission went on to state that the norm may bind a dissenting nation only if the norm acquires the status of *jus cogens*.¹⁷⁴ In a very limited section of the report, the Commission decided that the ban against executing juveniles is a practice that has attained the status of *jus cogens* and that the United States is therefore legally obligated to cease executions, regardless of its practice of dissenting.¹⁷⁵ The Commission insisted that the United States actually accepts the prohibition on the execution of "children" by virtue of its juvenile court system, which protects youths from harsh adult penalties.¹⁷⁶

At least one writer laments the Commission's failure to explain further its conclusion that the norm had reached the status of

(Tex. Ct. App. 1983), *cert. denied*, 474 U.S. 865 (1985), *stay of execution of death sentence denied*, 476 U.S. 1109 (1986), and *State v. Shaw (and Roach)*, 273 S.C. 194, 255 S.E.2d 799, *cert. denied*, 444 U.S. 957 (1979), *cert. denied sub. nom. Roach v. South Carolina*, 444 U.S. 1026 (1980).

170. 1 HUMAN RIGHTS, *supra* note 135, part 1, booklet 5, at 2.

171. Case 9647, *supra* note 45, at 77.

172. *Id.* at 78. See *infra* notes 195-99, 260-63 and accompanying text for an explanation of customary international law and the effect of dissenting from a practice.

173. Case 9647, *supra* note 45, at 78.

174. *Id.* Article 53 of the *Vienna Convention*, *supra* note 120, explains the concept of *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Case 9647, *supra* note 45, at 78 n.3. The Commission considered genocide to be such a norm. *Id.* at 79.

175. Case 9647, *supra* note 45, at 80. The United States argued that although the proposition that the state should not punish children by death is generally true, no consensus exists as to the age of majority. *Id.* at 71. To the Commission, the issue was not the age of majority, but whether the United States' failure to prohibit executions under the age of 18 as a matter of federal law violated the American Declaration. *Id.* at 82.

176. *Id.* See *supra* notes 74-77 and accompanying text for a discussion of the juvenile justice system.

jus cogens.¹⁷⁷ Conceptual inconsistency was rampant in the Commission's reasoning. Customary international law and universally binding general principles of international law constitute the second and third levels of international commitment. The first level consists of sporadic practices of nations; as a general rule, these practices do not bind any nation. At the second level, more nations participate in a particular practice that becomes common and widespread, and the international community labels this norm a rule of customary international law. The custom binds the practicing nations and all other nations that are aware of the norm and have not dissented openly. At the final level, nations may not deviate from those practices that have achieved the status of *jus cogens*, or peremptory obligations. To achieve such a status, the whole international community must recognize the norm.¹⁷⁸ If a custom is not even prevalent enough to be binding as a matter of customary international law,¹⁷⁹ which requires common and widespread practice, then the Commission's conclusion defies logic by implicitly deciding that the prohibition is a matter of universal acceptance similar to the prohibition against genocide.¹⁸⁰ The greater commitment necessarily includes the lesser.

Whatever the Commission's opinion, the Commission is not an international court with the power to decide cases with binding results.¹⁸¹ Although the United States may benefit from considering the Commission's view because the Commission is an organ of the OAS and is composed of international experts,¹⁸² the United States is not legally compelled to do so.

The obvious conclusion from a review of all relevant human rights treaties is that the United States is currently free from binding international agreements regarding the eighth amendment. Treaties are likely to remain a "particularly unpromising" means of injecting international human rights law into United States courts.¹⁸³ The courts hesitate to deem treaties as self-

177. Fox, *supra* note 155, at 601-02.

178. *Vienna Convention*, *supra* note 120, art. 53, at 698-99.

179. The Commission states bluntly that it is "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." Case 9647, *supra* note 45, at 82.

180. *Id.* at 80.

181. Fox, *supra* note 155, at 602.

182. *Id.* at 602-03.

183. Bilder, *Integrating International Human Rights Law Into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1, 8 (1981).

executing, so that even in the unlikely event that the United States was to ratify a current treaty, the United States would consider itself bound only if Congress enacted legislation to provide for the content of the agreement.¹⁸⁴ "[S]ubtle factors of national pride,"¹⁸⁵ particularly with respect to the constitutional system of protection, also prevent the United States from admitting that any need exists to look to international human rights law.¹⁸⁶

JUSTIFICATIONS FOR RELIANCE ON INTERNATIONAL LAW FOR PURPOSES OF INTERPRETATION

When one understands that outside sources must be used to interpret the eighth amendment, the inquiry turns to the identification of proper indicia of societal consensus. As noted previously, the courts have looked to state death penalty statutes, juries' willingness to impose the penalty, other legislative indications that help to define the point at which youths become functioning, responsible adults, and, occasionally, the practices of foreign nations, including involvement in human rights treaties.¹⁸⁷ A plurality in *Thompson v. Oklahoma*¹⁸⁸ relied upon the compilation of all of these statistics; the *Wilkins* and *Stanford* plurality rejected the use of all but legislative patterns revealed by state death penalty statutes and jury behavior.¹⁸⁹ The four Supreme Court Justices explicitly rejecting the use of international law as a source¹⁹⁰ may be overlooking some very important justifications and possibly even a mandate for the consideration of international practice.

Theoretical Justifications from a Domestic Point of View

The literature contains two theories that may justify the inclusion of international law in domestic analysis of the eighth amendment.¹⁹¹ The first theory incorporates international law into federal common law,¹⁹² which is superior to inconsistent state law

184. *Id.*; see, e.g., *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

185. *Bilder*, *supra* note 183, at 9.

186. *Id.*

187. *Thompson v. Oklahoma*, 487 U.S. 815, 823-31 (1988) (plurality opinion).

188. 487 U.S. 815.

189. See *supra* notes 28-30, 65-68 and accompanying text.

190. See *supra* note 38.

191. Hartman, *supra* note 7, at 659-98; Comment, *supra* note 7, at 257-63.

192. Hartman, *supra* note 7, at 659-86; Comment, *supra* note 7, at 257-60.

under the supremacy clause.¹⁹³ The second utilizes international law to inform the courts' interpretation of the eighth amendment.¹⁹⁴ The analysis of both theories requires a general understanding of the concept of customary international law.

Customary international law is created through the general and consistent practices of states, which occur due to a sense of legal obligation.¹⁹⁵ Customs established in this way become legally binding¹⁹⁶ upon satisfaction of the following requirements: (1) the identification of a consistent state practice that asserts a value judgment and (2) evidence that the practicing state believes that a legal obligation exists.¹⁹⁷ Nations need not practice the custom unanimously.¹⁹⁸ Rather, the practice must "reflect wide acceptance among the states particularly involved in the relevant activity."¹⁹⁹

Federal Common Law

The Supreme Court held in *The Paquete Habana*²⁰⁰ that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."²⁰¹ In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*,²⁰² the Court recently reaffirmed this principle. Commentators rely upon these cases to assert the theory that norms of international law overrule inconsistent state law because international law is part of federal common law.²⁰³

193. U.S. CONST. art. VI. See Bilder, *supra* note 183, for a detailed discussion of settled federal law.

194. Hartman, *supra* note 7, at 687-98; Comment, *supra* note 7, at 260-63.

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

196. *Id.* § 102(1)(a).

197. *Id.* § 102(2). For example, the International Court of Justice held that the principle of equidistance that Denmark used to delimit the Continental Shelf did not rise to the status of a principle of customary law because nations used the principle sporadically and because concerns other than a sense of legal obligation motivated the principle's use. *North Sea Continental Shelf Cases (W. Ger. v. Den. and Neth.)*, 1969 I.C.J. 3, 44-46 (Feb. 20, 1969).

198. Hartman, *supra* note 7, at 683.

199. RESTATEMENT, *supra* note 195, § 102 comment b.

200. 175 U.S. 677 (1900).

201. *Id.* at 700. The Court refers to customary international law.

202. 462 U.S. 611, 622-23 (1983).

203. See Hartman, *supra* note 7; Comment, *supra* note 7; see also *The Antelope*, 23 U.S.

In *Erie Railroad v. Tompkins*,²⁰⁴ Justice Brandeis asserted that "[t]here is no federal general common law."²⁰⁵ Although the issue in *Erie* was purely domestic, the dictum's effect upon international law quickly received attention from Judge Philip C. Jessup, among others.²⁰⁶ Jessup posited that if one accepted literally the dictum of Brandeis, then the traditional view of international law as part of the law of the land, presented in *The Paquete Habana*, actually would be referring to the law of the states.²⁰⁷ Following the same line of reasoning, the Supreme Court would not be able to review a matter involving international law that was adjudicated by the state courts, as the issues would involve only findings of state law.²⁰⁸ In repudiating the *Erie* dictum in the context of international law, Jessup wrote:

The application of international law by the federal courts does not need to be justified by the theory that we took over international law as part of the common law. International law is applied by the courts of many countries who look back upon no inheritance from England. . . . The duty to apply it is one imposed upon the United States as an international person. . . . It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.²⁰⁹

Jessup's views represent the modern conception of international law as part of domestic federal law.²¹⁰

(10 Wheat.) 66 (1825) (determining the illegality of slave trade under international law); *Ware v. Hylton*, 3 U.S. (3 Dal.) 199 (1796) (applying international law to confiscation of property of British subjects located in the United States); Comment, *supra* note 7, at 256 n.85.

204. 304 U.S. 64 (1938).

205. *Id.* at 78.

206. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law* (Editorial Comment), 33 AM. J. INT'L L. 740 (1939).

207. *Id.* at 742.

208. *Id.*

209. *Id.* at 743.

210. Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984). The Court adopted Judge Jessup's views in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964), which repudiated the applicability of *Erie* in the context of international law. Henkin explained that employing the term "federal common law" to refer to international law is misleading. Although international law is similar to federal common law in that both are supreme over state law and Supreme Court interpretations of both are binding upon the states, federal common law differs in that such law is judge-made and created pursuant to constitutional or congressional authority. Henkin, *supra*, at 1561-62. For the purposes of consistency with the publicists referred to in this Note, the definition of the term "federal common law" will continue to include international law.

The supremacy clause ensures that the Constitution, laws of the United States, and treaties shall be supreme over state law.²¹¹ Because federal common law enjoys status equal to federal statutes and treaties for jurisdictional purposes,²¹² the courts should interpret the supremacy clause similarly to include federal common law.²¹³ Customary law, as a particular subspecies of international law, is not enumerated specifically in the Constitution but is the equivalent of a treaty in international law and is therefore also superior to state law.²¹⁴ Customary law is self-executing, or automatically binding, in the domestic system.²¹⁵

If one accepts that international law is part of the federal common law, which by analogy to the jurisdictional clauses of the Constitution is equal to federal law and treaties for the purpose of the supremacy clause, then international law could invalidate inconsistent state law. In the context of the juvenile death penalty, one must be willing to assume further that customary law is equal in status to positive international law and that a rule of customary law precludes the execution of juveniles in the United States. If one accepts each of the above propositions, then one could theoretically invalidate state laws that permit the execution of persons who committed crimes while under the age of eighteen without resort to the eighth amendment.²¹⁶

The federal common law theory presents several difficulties. First, the application of international norms to the conflict in *The Paquete Habana* occurred only because of the absence of domestic

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

212. *Id.* art. III, § 2, cl. 1.

213. Hartman, *supra* note 7, at 662.

214. Henkin, *supra* note 210, at 1564-65. The Restatement of Foreign Relations supports the view that customary international law also constitutes federal common law. RESTATEMENT, *supra* note 195, § 111 comment d.

215. Henkin, *supra* note 210, at 1566.

216. Note that in order for preemption of state law to occur, Congress must intend to pervade the area of law, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151-52 (1980) (pervasive federal legislation preempted state tax laws applicable to Indian reservations), or a need for uniformity must exist, *e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977) (uniformity of food weight labeling necessary to facilitate value comparisons). Obviously, congressional intent is irrelevant in the absence of a domestic legislative process. A need for uniformity does exist, however, justifying preemption of state law by customary international law as part of the law of the United States. Hartman, *supra* note 7, at 662. Henkin implicitly asserts that international questions inherently give rise to a need for uniformity of interpretation when he states that "[i]t made no sense that questions of international law should be treated as questions of state rather than federal law . . . determined independently, finally and differently by the courts of fifty states." Henkin, *supra* note 210, at 1559.

law addressing the issues.²¹⁷ Similarly, the principles governing *First National City Bank* were common to both international law and federal common law.²¹⁸ In neither case did a principle of international law conflict with state law. In fact, no court has decided a case in which customary international law invalidated inconsistent domestic law.²¹⁹ Juvenile death penalty abolitionists encounter another problem under this theory; that is, the lack of conclusive evidence that "the eighteenth birthday [is] the magical moment of full moral responsibility" as a matter of customary international law.²²⁰ Unless courts can draw the line in a concrete manner, the application of international law would invalidate only sentences in which the factfinders did not consider youth,²²¹ as in *Eddings v. Oklahoma*.²²² Additionally, the isolationism of the United States and attitudes of positivist judges who believe that no legitimate international law exists²²³ form tremendous barriers which prevent any significant use of this theory of justification.²²⁴

International Norms as Informing Interpretation

The second theory, which Hartman referred to as "weak"²²⁵ due to the less significant role that international law plays in the decisionmaking process, is much more realistic. Under this theory, courts consider international norms within the framework of constitutional interpretation. The Supreme Court has occasionally employed this comparative approach. Even as early as 1948, four Justices noted in their concurring opinions that the majority's opinion was consistent with the human rights provisions of the United Nations Charter.²²⁶ Since then, the Justices have mentioned in footnotes that other nations do not permit the

217. "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

218. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

219. Hartman, *supra* note 7, at 687.

220. *Id.* at 680.

221. *Id.*

222. 455 U.S. 104 (1982).

223. *See* Hartman, *supra* note 7, at 670-79.

224. *Id.* at 686-87.

225. *Id.* at 659, 687-98.

226. *Oyama v. California*, 332 U.S. 633, 649-50, 673 (1948) (Black, Douglas, Murphy, and Rutledge, JJ., concurring) (striking down certain provisions of the California Alien Land Law on equal protection grounds).

imposition of the death penalty for the rape of an adult woman²²⁷ or for participation as an accomplice in a felony murder.²²⁸ In *Thompson v. Oklahoma*,²²⁹ the Court showed a slightly greater reliance on international norms. The information regarding the international status of the death penalty for juveniles appeared in the text as one of the many relevant pieces of evidence that the plurality considered.²³⁰

In addition to the traces of international law in Supreme Court opinions, a number of lower federal court opinions make stronger use of similar arguments. In *Letelier v. Republic of Chile*,²³¹ the relatives of an assassinated Chilean ambassador brought a wrongful death action against the Republic. The United States District Court for the District of Columbia found that Chile's acts violated international law, and the court imposed liability under the Federal Sovereign Immunities Act.²³² In another wrongful death action, *Filartiga v. Pena-Irala*,²³³ the United States Court of Appeals for the Second Circuit held a Paraguayan official accused of torturing a Paraguayan citizen liable under the United States Alien Tort Statute.²³⁴ The court found that torture violated international customary law.²³⁵ Finally, in *Haitian Refugee Center v. Civiletti*,²³⁶ the United States District Court for the Southern District of Florida employed international legal standards concerning the treatment of aliens and found a violation of the constitutional rights of Haitian refugees.²³⁷

Federal courts have also employed international standards in cases of purely domestic concern. For example, in *Fernandez v. Wilkinson*,²³⁸ the United States District Court for the District of Kansas examined international treatment of prisoners and decided that a federal prison had unconstitutionally detained a Cuban refugee.²³⁹ Likewise, in *Lareau v. Manson*,²⁴⁰ the United

227. *Coker v. Georgia*, 433 U.S. 584, 592-93 n.4, 596 n.10 (1977) (plurality opinion).

228. *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982).

229. 487 U.S. 815 (1988).

230. *Id.* at 830-31 (plurality opinion).

231. 488 F. Supp. 665 (D.D.C. 1980).

232. 28 U.S.C. §§ 1330, 1602-1611 (1982).

233. 630 F.2d 876 (2d Cir. 1980).

234. 28 U.S.C. § 1350.

235. *Filartiga*, 630 F.2d at 880.

236. 503 F. Supp. 442 (S.D. Fla. 1980).

237. *Id.* at 532.

238. 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

239. *Id.* at 795-800.

240. 507 F. Supp. 1177 (D. Conn. 1980).

States District Court for the District of Connecticut consulted international standards of prohibited overcrowding and found a constitutional violation.²⁴¹

In *Sterling v. Cupp*,²⁴² the Supreme Court of Oregon conducted a similar review of international law when considering whether searches of male inmates by female prison guards infringed upon the prisoners' rights. The court perused such documents as the Universal Declaration of Human Rights,²⁴³ the International Covenant of Civil and Political Rights,²⁴⁴ and the European²⁴⁵ and American Conventions.²⁴⁶ The court emphasized that "[t]he various formulations in these different sources in themselves are not constitutional law."²⁴⁷ Rather, the court cited the documents "as contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13 [of the Constitution]."²⁴⁸

In each of these cases, the courts acted "out of a sense of obligation which implies that these norms have attained a status above that of being mere guidelines—they are being accorded legally binding effect."²⁴⁹ In other words, the courts identified rules of customary international law prohibiting assassination, torture of political dissidents, brutal treatment of refugees, unreasonable overcrowding, offensive searches, and unlawful detention in prisons. One commentator termed the principles contained in these decisions "a legal arsenal of persuasive arguments which have resulted in announcements of protection for the rights of individuals."²⁵⁰ The arsenal exists, however, only to the extent that a principle is accepted widely.

Some argue that customary international law has established a prohibition of death sentences for persons under the age of

241. *Id.* at 1189-95.

242. 290 Or. 611, 622 n.21, 625 P.2d 123, 131 n.21 (1981).

243. *Universal Declaration*, *supra* note 102.

244. *International Covenant*, *supra* note 114.

245. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

246. *American Convention*, *supra* note 136; *Sterling*, 290 Or. at 622 n.21, 625 P.2d at 131 n.21.

247. *Sterling*, 290 Or. at 622, 625 P.2d at 131.

248. *Id.*

249. Note, *The Application of International Human Rights Arguments in United States Courts: Customary International Law Incorporated into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207, 218 (1982).

250. *Id.* at 220.

eighteen.²⁵¹ The prohibition, however, has not clearly reached the necessary level of universality and consistency that international law requires. A determination of the age at which protection from adult punishments ceases is crucial to juvenile offenders. The human rights treaties specify eighteen as that age. The particular practices of the states that are parties to the conventions do not establish a rule of customary international law because those states act not under a sense of obligation, but rather under a contractual duty which commenced with ratification.²⁵² From the actions of these states, which correspond with the treaty's contractual provisions, "no inference could legitimately be drawn as to the existence of a rule of customary international law."²⁵³

Treaties and customary international law exist in three possible scenarios. First, a treaty can be a document filled with ideals and goals for nations which does not embody customary law but attempts to create it in a futuristic sense.²⁵⁴ Alternately, a treaty may codify customary law.²⁵⁵ Finally, the provisions of a treaty may become customary international law, binding upon nonmember nations, through universal acceptance of the principles the treaty proclaims.²⁵⁶ Clearly, the specific preclusion of the death

251. See, e.g., Comment, *supra* note 7, at 256. For the purposes of her analysis, Hartman assumes that enough evidence exists to establish a rule of customary international law precluding juvenile death penalties. See generally Hartman, *supra* note 7, at 670-82.

252. North Sea Continental Shelf Cases (W. Ger. v. Den. and Neth.), 1968 I.C.J. 3, 43 (Feb. 20, 1969).

253. *Id.*

254. Article 13(2) of the Universal Declaration of Human Rights, for example, states: "Everyone has the right to leave any country, including his own, and to return to his country." *Universal Declaration*, *supra* note 102. Although many nations have opened their borders, more than 40 years after its passage, this declaration remains an ideal and not reality. When no binding rule of customary international law existed prior to the treaty and the member states did not universally ratify the document with the intent to implement the provisions, the subsequent activities of member states do not establish the rule because their obligation is contractual and is not the result of *opinio juris*.

On the other hand, some treaties embody established principles of law. Article 5 of the Universal Declaration, for example, requires that "[n]o one shall be subjected to torture." The world's abhorrence of a state's torture of a citizen was therefore already clear in 1948. Certainly, the prohibition against torture existed as a matter of customary international law by 1969, when the drafters of the American Convention of Human Rights included an identical clause prohibiting torture in Article 5(2). American Convention, *supra* note 136. In this case, the practice of the states prior to signing the treaty created the obligation under the principles of customary international law. Inclusion of a treaty provision that is already binding law is redundant but desirable because a signed contract simplifies and clarifies duties for future reference.

255. *Vienna Convention*, *supra* note 120, art. 38, at 694.

256. Western Sahara, 1975 I.C.J. 12, 31 (Advisory Opinion of Oct. 16) (the principle of

penalty for offenders under the age of eighteen in the human rights treaties was not an adoption of already existing customary law,²⁵⁷ and nations have not universally accepted the particular treaty provisions pertaining to the death penalty.²⁵⁸ The rule, then, appears to be a goal for eventual compliance by all nations. Therefore, the only legitimate way to explore the creation of a rule of customary international law that would prohibit the juvenile death penalty is to determine the practices of nations prior to the creation of the American, European, or African conventions on human rights²⁵⁹ in order to establish a consistent state practice coupled with *opinio juris* and, in addition, to look to the practices of the nations presently uninvolved in the treaties or with reservations to the death penalty clauses to prove sufficient universal compliance to establish the norm as a rule of customary international law. Research reveals no such attempt.

Effect of Dissenting from Custom

Both the federal common law and constitutional interpretation theories can function only upon the establishment of a norm of customary international law. Even if one agrees that a norm does exist that precludes the application of the death penalty to juveniles under the age of eighteen, a protesting nation may carve out an exception for itself from the rule.²⁶⁰ Generally, international tribunals interpret silence regarding a developing

self-determination that the United Nations Charter announced in article 54 has become binding on all states due to the development of international law subsequent to the creation of the Charter).

257. Even today, 61 countries that impose the death penalty in practice do not distinguish juveniles from adult offenders. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2985 (1989) (Brennan, J., dissenting). Some of these nations are parties to treaties that preclude such punishment. The other 65 nations retaining the penalty do separate youths from adults and at least 75 more have either abolished virtually all use of execution as punishment or do not, in practice, impose the penalty. *Id.* From a modern viewpoint, the numbers do not necessarily prove the nearly universal acceptance of the norm that is required to create customary international law, and the numbers certainly were not even this convincing years ago at the time of the creation of the human rights treaties.

258. See *supra* note 172 and accompanying text.

259. For a brief summary of the human rights efforts of the Organization of African Unity, see Bello, *Organization of African Unity*, 6 *ENCYCLOPEDIA OF PUB. INT'L L.* 270 (R. Bernhardt ed. 1983).

260. "A principle of customary law is not binding on a state that declares its dissent from the principle during its development." *RESTATEMENT, supra* note 195, § 102 comment b.

state practice as sufficient acquiescence to bind a state.²⁶¹ Dissent from a practice cannot relieve a state of the obligation of the customary norm unless the state's opposition has been evident during the norm's creation.²⁶² One commentator, Hartman, claims that uncertainty exists as to whether the protest must be an affirmative renunciation or simply continued inconsistent state practice.²⁶³ She suggests that an unwillingness to ratify a treaty because a nation does not want to accept the implementation provisions does not demonstrate a substantively opposed position to each of the provisions therein.²⁶⁴ Hartman concludes that failure to conform is not protest enough.²⁶⁵ Continued assertion of the death penalty by courts and legislatures and the practice of carrying out executions are not silence constituting acquiescence that can subject a nation to a rule of customary law. The United States has never formally repudiated the norm but has acted inconsistently with it throughout its evolution, thereby avoiding the binding effect of customary law. The Inter-American Commission on Human Rights concedes that the United States' protest avoids this alleged rule of customary law.²⁶⁶

Doubt exists, therefore, as to whether either theory is viable. Yet, Hartman proposes "to magnify the role of this comparative component by establishing the international norm as a precise benchmark for the interpretation of the cruel and unusual pun-

261. Acquiescence cannot bind a state to a norm, however, unless that state had actual or constructive knowledge of the practice. *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 139 (Dec. 18).

262. RESTATEMENT, *supra* note 195, § 102 comment d. Dissent from *jus cogens* also does not excuse a state from compliance. *Jus cogens* are peremptory norms of international law, overriding laws and agreements that conflict with them. The prohibition against the use of force contained in the United Nations Charter is an example. *Id.* § 102 comment k.

263. Hartman, *supra* note 7, at 684.

264. *Id.* at 684-85. Similarly, Hartman argues that President Carter's efforts to convince the Senate to ratify human rights treaties by suggesting that the United States record a reservation to the clauses dealing with the death penalty do not constitute evidence that the United States opposed the use of the death penalty. The purpose of the reservation, from Carter's point of view, was to increase the likelihood of the ratification by removing political opposition. *Id.* at 685.

265. *Id.* at 686.

266. "Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist." Case 9647, *supra* note 45, at para. 54. The Commission jumped to a higher level of analysis and decided that the norm in question had achieved the status of *jus cogens* and any protest was irrelevant. This position is difficult to justify given the lack of consensus as to whether enough consistent state practice exists to warrant a finding that the norm has become customary international law. At least one commentator laments the Commission's limited explanation for the unprecedented assertion. Fox, *supra* note 155, at 601.

ishment clause"²⁶⁷ to which the Supreme Court could look for a definitive answer. Another writer concludes that no matter which theory one utilizes, the result is the same: international practice disfavors juvenile execution, and the United States must prohibit juvenile execution under the eighth amendment in order to bring the United States in line with civilized nations of the Western Hemisphere.²⁶⁸

The commentators reached unconvincing conclusions because they leave unanswered the fundamental question: Why should courts look to international law at all in their interpretation of a domestic constitutional matter? The international organizations to which the United States belongs, and the respective treaties and resolutions of each, cannot mandate the consideration of the substance contained therein because the United States has not ratified those that restrict the use of the death penalty. The federal common law theory cannot withstand close analysis, and the United States has dissented from any rule of customary international law that may have developed to preclude the death penalty as applied to juveniles. The Supreme Court Justices who have made references to the practices of foreign nations made no attempt to justify doing so.

One commentator summarily dismisses the importance of explaining why courts should consider international law.²⁶⁹ She asks rhetorically what the appropriate framework for evidence is and immediately supplies the answer: the world community. Her justification is that the world community "is as logical as any other."²⁷⁰ One need not wonder why a majority of the Justices of the Supreme Court remain unconvinced that they should focus their attention on anything but American legislative statistics, and yet the appearance of international law in briefs,²⁷¹ opinions, and legislation continues.²⁷² Perhaps these lawyers and judges

267. Hartman, *supra* note 7, at 689.

268. Comment, *supra* note 7, at 265.

269. Hartman, *supra* note 7, at 688.

270. *Id.*

271. "[C]andor requires internationalists to recognize that international human rights law has not yet become a significant (or indeed, more than a marginal) factor in constitutional decisionmaking in the minds of most constitutional lawyers, although the number of practitioners employing international law arguments in the courts is steadily increasing." Lillich & Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AMER. J. INT'L L. 151, 162 (1985).

272. Judges may look to international law as a source that can help them judge the soundness of domestic policies and support liberal interpretations of the law that are without great precedent in the United States. Congress is also mindful of international

simply perceive that international law should matter, but quite possibly the use of international law in judicial interpretation legitimately arises from an obligation that international law imposes which those who perceive its presence have yet to articulate or understand.

International Law Obligations from an International Point of View

The key to a determination of international law obligations may be to take a fresh look at the subject from the vantage point of an international scholar, as opposed to the above domestic, constitutional approach. This approach requires a thorough exploration of the sources of international law. The creation of international law occurs in three ways: through (1) bilateral and multilateral agreements, (2) customary law, and (3) general principles of law that major legal systems have accepted.²⁷³ This Note previously discussed the nonbinding effect of current treaties on the United States. The latter two sources, however, merit further attention.

General International Law

Most international theorists and judges believe that certain principles common to the major legal systems of the world may supplement other rules of international law.²⁷⁴ These principles

law and disassociating the United States from nations perceived to be in violation of international law, suggesting a "strong present congressional policy favoring the international human rights concept." Bilder, *supra* note 183, at 11. Section 502B of the Foreign Assistance Act, for example, states that generally "no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violation of internationally recognized human rights." 22 U.S.C. § 2304 (1988).

273. RESTATEMENT, *supra* note 195, § 102(1). The Statute of the International Court of Justice, to which the United States is a party, contains the same sources of international law. The Statute, governing the matters brought to the International Court of Justice (also known as the ICJ, or World Court), entered into force in 1945. S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 34 (2d rev. ed. 1985). The Statute of the International Court of Justice authorizes the World Court to apply (a) international conventions recognized by the contesting states, (b) international customs, (c) general principles of law, and, at times, (d) judicial decisions and opinions of scholars. Statute of the I.C.J., art. 38(1) (located in 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS 355, 360 (San Francisco, 1945)).

274. Waldock, *General Course on Public International Law*, 106 *Hague Recueil* 54 (1962-II); RESTATEMENT, *supra* note 195, § 102(4); Statute of the I.C.J., art. 38(1)(c) (located in 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS 355, 360 (San Francisco, 1945)).

are "accepted by all nations *in foro domestico*, such as principles of procedure, the principle of good faith, and the principle of *res judicata*."²⁷⁵ One such principle is that courts should interpret domestic law in conformity with international law to the greatest extent possible. The Supreme Court has observed "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"²⁷⁶ and that a presumption exists that legislators intended conformity unless the drafters unmistakably intended to disregard a principle of international comity.²⁷⁷ Courts have applied this general principle only to federal laws. If a federal law, as opposed to a constitutional provision, regarding the death penalty existed today, the United States' own precedents would obligate the courts to interpret such a law to conform with the bulk of the body of international law, possibly precluding the use of the juvenile death penalty. No such precedent exists for constitutional interpretation, however, and the general principle that the courts must interpret domestic law in conformity with international law therefore does not justify the inclusion of international law in the interpretation of the eighth amendment.

A modern constitutional trend has introduced an exception to traditional ideas of the supremacy of national constitutions that conflict with international law in the area of human rights. For instance, the Federal Republic of Germany's constitution provides: "The general rules of public international law are an integral part of the federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."²⁷⁸ Spain similarly adopted a constitutional article expressly requiring courts to interpret constitutional rights "in conformity with the Universal Declaration

275. D. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 42 (3d ed. 1983) (quoting *Procès verbeaux of the Proceedings of the Committee*, 1920 P.C.I.J. Advisory Comm. of Jurists (L.N. Pub.), at 335 (June 16-July 24) (Lord Phillimore (Great Britain))).

276. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

277. *Schroeder v. Bissell* (The Over the Top), 5 F.2d 838, 842 (D. Conn. 1925). International comity is a rule based upon a consistent practice of nations that is unaccompanied by a sense of obligation which courts sometimes interchange with "international law." D. HARRIS, *supra* note 275, at 35. Arguably, one likewise should presume that the Framers, themselves lawmakers, acted in accordance with the law of nations. This approach is unproductive, however, because obviously one could expect conformity with international law only as it existed at the time of lawmaking, and the recognition of international human rights is a recent phenomenon.

278. "The Basic Law for the Federal Republic of Germany," 6 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 50 (A. Blaustein & G. Flanz eds. 1990).

of Human Rights and the international treaties and agreements on those matters ratified by Spain."²⁷⁹

Despite this trend to accept international human rights as supreme over constitutional law, such is not the case in the United States. Courts in the United States must interpret international law within the confines of the Constitution,²⁸⁰ and the treaty power cannot authorize that which the Constitution forbids.²⁸¹ The courts' present adherence to the traditional rules prevents the adoption of any international law that conflicts with the Constitution.

Customary Law Revisited

At one time, the conclusion that prohibition of the juvenile death penalty either does not exist as a matter of customary law or that the United States' protest of the norm excuses the United States from the norm's application ended the inquiry into the effect of customary international law. This Note proposes that one aspect of customary international law merits further exploration: the new rule of customary law that requires a court to consider international law as part of its decisionmaking process.

The usual approach to customary law may best be understood as rules of specific substantive law. In other words, defense lawyers and various *amici* groups traditionally commenced a search to determine whether the practice of most nations prohibited executions of juveniles under the age of eighteen in order to prove the existence of a particular rule of customary law. These juvenile death penalty opponents sought to use customary law to force deviating nations to adopt the dominant practice, arguing that their nonconformance breached international law. As discussed previously, opponents could not prove definitively the existence of a rule of customary law that would prevent the execution of juveniles under the age of eighteen.

Other substantive rules of customary law do exist, however. In order to demonstrate that the prohibition of the juvenile death penalty is of a specificity not yet evident in customary international law and to show the distinction between the traditional rules and the rule that this Note proposes, a brief review of the

279. "The Spanish Constitution," 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3 (A. Blaustein & G. Flanz eds. 1990).

280. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion).

281. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

existing substantive rules of customary law in the area of human rights is necessary. A state violates customary rules of international human rights law, for example, if:

As a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.²⁸²

The rights that subsections (a)-(f) enunciate are at the core of human dignity and are therefore peremptory norms such that even an international agreement in violation of those rights would be void.²⁸³ An analysis of subsection (g) reveals the accepted rule that no single or sporadic violation of any other recognized human right is, in and of itself, a violation of international law unless that right is intrinsic to human dignity. Although all of the rights contained in the Universal Declaration, for example, are "internationally recognized," not all are fundamental.²⁸⁴

Unlike the substantive rules discussed above, a new rule of international law is now emerging that, unlike every justification so far discussed, may not merely suggest looking to international law but may actually mandate its consideration. This new rule requires that a court consider the body of international law relevant to human rights whenever an individual's fundamental rights are in jeopardy. Not only must a court be aware of infringing upon the rights to which an individual's national citizenship entitles him, but the court also must ascertain whether any rights attach under international law.²⁸⁵ This rule is proce-

282. RESTATEMENT, *supra* note 195, § 702.

283. *Id.* comment n.

284. *Id.* comment m.

285. Such an inquiry would include a review of relevant substantive rules of customary law, *see supra* notes 282-84 and accompanying text, and the major human rights documents, *see supra* notes 102, 114, 123, 136, 161 and accompanying text. The fact that a nation is not a party to a particular document does not preclude the obligation to consider its contents. Undoubtedly, for example, every individual has the right to live without the threat of genocide. *See Convention on the Prevention and Punishment of the Crime of*

dural in that a consideration of international law is one of the steps that a court must take to comply with this international requirement, which is analogous to procedural due process. The requirement does not necessarily require the court to adhere to the substantive rules found therein, but the court must at least consider these substantive rules.

One can best explore the emerging procedural rule of customary law in the context of the state responsibility doctrine, which encompasses the rights of aliens.²⁸⁶ In that area, a longstanding debate exists as to whether the state responsibility doctrine requires nations to afford aliens the minimal rights of nationals of the state in which the aliens are living, or whether the doctrine requires the nation to provide an internationally agreed upon minimum, regardless of the nation's treatment of its own people.²⁸⁷

In the 1950's, the General Assembly requested the United Nations Law Commission to undertake the codification of state responsibility.²⁸⁸ Special Rapporteur Dr. García-Amador was innovative in his reports, relying on the newly emerging international law of human rights to attempt to bridge the gap between nations adhering to the international minimum standard approach and those applying the national treatment concept.²⁸⁹ Rather than attempting to codify the substantive requirements for the treat-

Genocide, G.A. Res. 260, U.N. Doc. A/810 (1948), reprinted in 45 AM. J. INT'L L. supp. at 7 (1951); Judgment, *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 175 (1947) (quoting the Tribunal Charter, art. 6(c)); *Draft Articles on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N part 2, at 91, U.N. Doc. A/34/10 (1979); *Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2 Y.B. INT'L L. COMM'N part 2, at 14, 69 art. 19(3)(c), U.N. Doc. A/35/10 (1980); *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). A nation has no defense in a claim that its citizens did not have the right to be free of genocide because that nation had not ratified the Convention on Genocide. Even if this hypothetical nation was not a member of the UN or any other international organization, if the nation engaged in the practice of genocide, the nation clearly would be violating international human rights law. Although genocide is an extreme and obvious example, other instances in which state practice violates an individual's international rights require the same result. If membership in the class of human beings bestows rights on individuals, which is clear, then a state logically cannot prevent the vesting of such rights by failing to ratify a written document. A nation must therefore consider all major relevant multilateral treaties that express fundamental human rights.

286. Aliens are persons not presently residing or located in the country of their nationality. R. BLEDSOE & B. BOCZEK, *THE INTERNATIONAL LAW DICTIONARY* 121 (1987).

287. Lillich, *Duties of States Regarding the Civil Rights of Aliens*, III *ACADÉMIE DE DROIT INTERNATIONAL* 329, 343-56 (1978).

288. *Id.* at 373.

289. *Id.* at 374-76.

ment of aliens, García-Amador proposed that nations accord aliens the rights that nationals enjoy, which in any case should not be less than the fundamental human rights contained within the major international instruments.²⁹⁰ This proposal would force a nation to consult the major human rights treaties whether dealing with nationals or aliens, even when the nation was not a party to the treaties and therefore would not otherwise be legally bound.

The commentary to the proposed article listed the following documents as contemporary international instruments that nations should consider: United Nations Charter, OAS Charter, American Declaration on the Rights and Duties of Man, the Universal Declaration, European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Covenant on Civil and Political Rights.²⁹¹ Of course, not every right that these instruments protect is fundamental.²⁹² In the criminal punishment area, García-Amador listed as fundamental such rights as the right to be presumed innocent, the right to a speedy trial, the right to speak in one's own defense, and the right to counsel.²⁹³ Although the enumeration clearly is nonexhaustive, noticeably absent in the documents are any specifics, such as the permissible number of days that may pass between an arrest and trial. This approach shifted the focus from compiling a list of alien rights to directing states' attentions to standards of international human rights law which states must consider in order to avoid committing a breach. The reports of García-Amador codified only general principles of state responsibility and did not "spell out the content of obligations whose breach entails state responsibility."²⁹⁴

The concept that García-Amador understood and applied within the context of the treatment of aliens is that a new procedural rule of customary law has emerged which requires a state, although acting in matters that are domestic in nature, to consider the fundamental rights that the major human rights instruments define in order to comply with international law. This theory requires a state to consider international law, as contained within the treaties, in all matters that affect the human rights that international law gives to individuals and is therefore quite wide in its scope.

290. *Id.* at 375.

291. *Id.*

292. *Id.*

293. *Id.* at 376.

294. *Id.* at 378.

The procedural rule of customary law that requires a nation to consult international human rights law is evident in the decisions of the International Court of Justice (ICJ). In the *Barcelona Traction Case*,²⁹⁵ the World Court considered the obligations that a state assumed upon admitting foreign investors into its territory. In this case, the Spanish government caused injury to a Canadian corporation within its territory.²⁹⁶ After Canada failed to espouse the claim, Belgium nationals who held a majority of the issued shares brought suit against Spain due to the injury to Belgian shareholders.²⁹⁷ Spain objected that Belgium lacked standing to bring suit, as the injury was to a corporation and not individuals.²⁹⁸ The ICJ found that Spain had obligations concerning the treatment to be afforded foreigners, whether they were natural persons or juristic persons such as corporations.²⁹⁹ Speaking within the context of these obligations, however, the court found:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.³⁰⁰

In other words, the ICJ distinguished between the general treatment of foreigners, including corporate entities, and the more specific relationship between the Spanish government and the Canadian corporation. All nations, even strangers to the corporation, would have an interest and therefore standing to bring suit against Spain if the injuries contravened human rights law. The ICJ mentioned as relevant such international human rights laws as the prohibitions against genocide, acts of aggression, slavery, and racial discrimination.³⁰¹ Knowledge of this type of violative practice justifies a nation in bringing a suit, thereby essentially fulfilling its obligation towards the international com-

295. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

296. *Id.* at 7-10.

297. *Id.* at 7, 11.

298. *Id.* at 14.

299. *Id.* at 32.

300. *Id.*

301. *Id.*

munity to guard against human rights violations. On the other hand, when the injury is the result of nondiscriminatory bankruptcy laws operating in a manner adverse to the corporation, as here, only injured parties may bring suit.³⁰²

The distinction drawn between obligations to the international community and the more specific relationship between two countries is relevant to the death penalty cases. Because individuals derive rights from international law as well as from their national state, a court must analyze more than domestic law to determine whether a violation of individual rights exists. An analysis of international law is important because, as the ICJ found, a state is obligated to the international community to uphold and enforce international law, a large part of which focuses on the protection of individuals. As a matter of procedure, then, in deciding a domestic case involving human rights, the courts of the United States must consult the body of international law before rendering judgment, as must the courts of every other nation.

The World Court has also relied on this recently developed requirement of ascertaining international obligations for domestic affairs to impose the principle of self-determination found in the United Nations Charter³⁰³ for the benefit of all territories. The World Court found that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."³⁰⁴ The World Court construed other instruments, such as the Declaration on the Granting of Independence to Colonial Countries and Peoples,³⁰⁵ as constituting crucial stages in the development of the law, in which principles of self-determination are now pervasive. The court found that it must consider the development of the

302. The injured party in this case was the corporation, which was a creature of Canadian law, and therefore only Canada had standing to bring suit even though Belgium nationals held 88% of the shares. The court noted that the result would have been different if the act complained of had infringed on the direct rights of the shareholders. When the injury is to the company, however, and the shareholders feel the repercussions, they may look only to the company for redress of the injuries, "for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed." *Id.* at 35.

303. U.N. CHARTER art. 1, para. 2.

304. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (Advisory Opinion of June 21).

305. G.A. Res. 1514, 8 U.N. GAOR Supp. (No. 16) at 188, U.N. Doc. A/L.323 and Add.1-6 (1960).

law in order to faithfully discharge its functions. In other words, the World Court considered other international instruments of human rights so as to ascertain generally accepted principles regarding self-determination and applied these principles to the case, completely outside of and in addition to holding a state responsible for the content of instruments that it has ratified.

More recently, similar reasoning appeared in the World Court's opinion in *Nicaragua v. United States*,³⁰⁶ which involved a dispute over responsibility for military and paramilitary activity in Nicaragua. First, the court found the laying of mines by the United States to be a breach of the principles of humanitarian law that underlie the Hague Convention No. VIII of 1907.³⁰⁷ Second, even though Nicaragua failed to refer the World Court to four applicable Geneva Conventions in presenting its case, the court declared that the "United States is under an obligation to 'respect' the Conventions and even to 'ensure respect' for them. . . . This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression."³⁰⁸ Again, the World Court made clear a nation's duty to consult the body of human rights law whenever it acts or decides not to act.

The most recent edition of the Restatement on the Foreign Relations Law of the United States³⁰⁹ recognizes nations' obligations to consider international human rights law as a matter of customary law. Comment o of section 702 proclaims that violations of the human rights norms delineated in that section³¹⁰ are a breach of an obligation to all states and allows a state to pursue the ordinary remedies available upon a violation of its rights under customary law. More explicitly, comment m provides that a state party to the International Covenant on Civil and Political Rights³¹¹ would be responsible for a single breach of the fundamental rights listed therein, but that "*any state* is liable under customary law for a consistent pattern of violations of any such right as state policy."³¹² The underlying rule thus surfaces again; that is, a nation must look to international law and consider fully

306. 1985-86 I.C.J.Y.B. 137 (1986) (summarizing Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27)).

307. *Id.* at 150-51.

308. *Id.* at 151.

309. RESTATEMENT, *supra* note 195, § 702.

310. See *supra* note 282 and accompanying text.

311. See *supra* note 114.

312. RESTATEMENT, *supra* note 195, § 702 comment m (emphasis added).

its content to be sure the nation does not violate that law. Although the rule is not stated in so many words, the rule is implicit in the notion that responsibility can arise in the arena of human rights law without a nation's express consent.³¹³

Applying this obligation to the death penalty context, just as a jury must consider the offender's youth as a mitigating factor, so must the Supreme Court consider international norms.³¹⁴ The jury may find, however, that although youth is mitigating, youth is not enough to relieve the offender of the death penalty because of the existence of overwhelming aggravating circumstances. Similarly, international law requires the Court to consider the body of human rights law in making its determination. Rejecting the use of these norms outright, as the plurality did in *Stanford* and *Wilkins*, violates the emerging rule of customary international law that requires the consideration of human rights law. A finding that international norms do not mitigate the result would not be a breach of international law because, at a minimum, the Court considered the norms.

CONCLUSION: APPLICATION OF PROCEDURAL CUSTOMARY INTERNATIONAL LAW

Applying the recurring theme of the cases of the ICJ to the *Stanford* and *Wilkins* cases reveals the error of the view that international law is irrelevant to the determination of what constitutes cruel and unusual punishment under the eighth amendment. All nations must consider the evolving law of human rights, and every nation must act in compliance with the fundamental rights of this law, as codified in the human rights instruments.

313. The rules on dissenting from an emerging custom are fully applicable to this rule as well. The United States, however, cannot claim to have dissented from a rule that requires a nation to consider an individual's internationally given human rights, because United States' courts have participated in the formation of the rule as recently as 1988 in *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion). In *Thompson*, a plurality of the Court looked to international law in striking down Oklahoma's death penalty law, which operated without regard to age.

314. Although the four Justices claiming that international law is irrelevant arguably have "considered" such law in that the dissenting Justices exposed them to it, mere exposure is not enough. At the least, in order to comply with international law, the Justices must be willing to actually consider international practice even if they later find that international law is not dispositive in the particular case. *Id.* at 868 n.4 (Scalia, J., dissenting).

Because of the unlikelihood that the Senate will ratify any of the present human rights treaties,³¹⁵ to some, "[d]omestic enforcement of customary norms has become the promising new frontier for human rights proponents in the United States."³¹⁶ In the context of the death penalty, however, the establishment of a rule of customary law prohibiting the execution of juveniles is tenuous at best, and nothing obligates the United States to honor any rule that might exist due to its clear and consistent dissent from the formation of the norm. Although the outlook for juveniles on death row is not so promising if premised on traditional customary law,³¹⁷ the Supreme Court could take a step in the right direction by acknowledging its obligation to consider the content of the law of fundamental human rights.³¹⁸

Because only fundamental rights are binding, no hope exists that even looking to the law of human rights will presently change the outcome of the juvenile death penalty cases, which depend upon the drawing of a line at a particular age. Nevertheless, looking to international law will set a precedent in the context of the eighth amendment. After all, if "international human rights law influences domestic law only indirectly, rather than directly, this would seem no reason for disappointment."³¹⁹ Over time, the cases may present the Court with such a clear and compelling world view of what constitutes cruel punishment that the Court will have no choice but to overrule *Stanford* and *Wilkins* and the cases that may follow in their wake.

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315. Hartman, *supra* note 7, at 657.

316. *Id.*

317. The courts often avoid even principles as well-established as customary international law. The courts' hesitancy may be attributable to their reluctance to admit insufficiency in United States' laws or the need to turn to other nations. The courts also may be unsure of the field of international human rights law, due to its comparatively recent creation and still evolving nature. *See generally* Bilder, *supra* note 183, at 8-9.

318. Motivation to consult international law does exist in that, even though courts are concerned with the embarrassment of admitting that the United States is not a perfect model of human rights, international exposure revealing less than humane, judicially condoned activity might be equally, if not more, embarrassing. *See id.*

319. *Id.* at 9-10.