COMMENTS

Implications of the United States' Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations

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I. INTRODUCTION

Before the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, human rights groups and death penalty opponents saw the sweeping human rights treaty as a chance for change.[1] Those hopes were quickly dashed, however, when

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1. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976, and ratified by the United States June 8,

the U.S. ratification was accompanied by fourteen reservations, understandings, and declarations (collectively referred to as RUDs) that effectively negated the ICCPR's enforceability in the United States.[2] The most controversial of those RUDs declared that the ICCPR was non-self-executing, meaning that it did not afford a private cause of action in U.S. courts.[3] In another hotly contested RUD, the reservation to article 6(5), the United States reserved the right to execute juvenile offenders under the age of eighteen.[4] Both of those RUDs stand as major "stumbling blocks" for persons facing the death penalty and virtually prevent any reliance on the ICCPR that could otherwise support their cases.[5]

Since ratifying the ICCPR, criticism of the U.S. RUDs has remained steady while international opposition to the death penalty has gained strength.[6] Part II outlines the history of the ICCPR's ratification Part III explores the possible reasons for the U.S. non-self-executing declaration and death penalty reservation as well as the international political ramifications of those RUDs. Part IV examines several recent death penalty cases as illustrations of the issues that arise when capital offenders—both adult and juvenile—seek to rely on the ICCPR in light of those RUDs. Parts V and VI discuss theories of non-self-execution and alternatives to ICCPR arguments as they relate to ICCPR death penalty claims. Finally, Part VII addresses the international community's criticisms of the United States' use of the death penalty and analyzes several of the current negative ramifications for the United States' international relations.

1992) [hereinafter ICCPR]; William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still Party?*, 21 BROOK. J. INT'L L. 277, 277 (1995).

2. *See* Schabas, *supra* note 1, at 280; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516 (1991).

3. *See* Margaret Thomas, *"Rogue States" Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights*, 90 CAL. L. REV. 167, 177 (2002).

4. *See* Schabas, *supra* note 1, at 280-81; *see also* Edmund P. Power, *Too Young to Die: The Juvenile Death Penalty After* Atkins v. Virginia, 15 CAP. DEF. J. 93, 93-94 (2002) (noting that several United States Supreme Court Justices believe that executing juveniles violates the Eight Amendment).

5. Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L. J. 459, 468 (2000).

6. *See, e.g.*, Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, Oct. 1999, *at* http://www.deathpenaltyinfo.org/internationalreport.html (last visited Feb. 23, 2003).

II. BACKGROUND AND HISTORY OF ICCPR RATIFICATION

During the last thirty years, the major human rights treaties ratified by the United States have been accompanied by declarations that the treaties are non-self-executing.[7] The most sweeping treaty the United States ratified during that period was the ICCPR.[8] In 1966, the General Assembly of the United Nations drafted the ICCPR, which has been adopted by at least 149 nations, making it a significant protectorate of international human rights.[9] As the United States Senate Committee on Foreign Relations stated, the purpose of the ICCPR is to guarantee "a broad spectrum of civil and political rights, rooted in basic democratic values and freedoms, to all individuals within the territory or under the jurisdiction of the States Party without distinction of any kind, such as race, gender, ethnicity, et cetera."[10]

While the ICCPR was created without delay, the path to ratification in the United States was long and arduous.[11] President Jimmy Carter signed the treaty in 1977; however, the Senate did not consent to ratification until 1991.[12] As a result, the treaty did not enter into force for the United States until September 8, 1992, fifteen years after its passage.[13]

When the Senate finally adopted the ICCPR, at the urging of then-President George H.W. Bush,[14] the treaty was accompanied by five reservations,[15] five understandings,[16] and four declarations.[17] These RUDs

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7. Those four major treaties include the ICCPR, *supra* note 1; the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969, and ratified by the United States Nov. 20, 1994); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. TREATY DOC. NO. 100-20 (1988) (entered into force June 26, 1987, and ratified by the United States Nov. 20, 1994); and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, S. TREATY DOC. NO. 80-1 (1989) (entered into force Jan. 12, 1951, and ratified by the United States Feb. 23, 1989).

8. *See* Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1212 (1993) (noting that the ICCPR plays a fundamental role in the trend towards the universalization of human rights).

9. *See id.*

10. S. EXEC. REPT. NO. 102-23, at 1 (1992) [hereinafter SENATE COMMITTEE REPORT].

11. *See* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1288-90 (1993).

12. *Id.* at 1289-90.

13. *Id.* at 1291.

14. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 2.

15. *See id.* at 6-8. The United States attached reservations to: article 6, which prohibits the execution of juveniles; article 7, which potentially provides greater protections than allowed under the Fifth, Eighth, and Fourteenth Amendments; article 10, which requires the separation of juveniles and adults in prison and detention; article 15, which permits a

have limited both the scope and applicability of the ICCPR in the United States.[18] The most important and pertinent RUD was the declaration that the ICCPR would have a non-self-executing status.[19]

Another important ICCPR RUD was the reservation to the nonexecution of juveniles in article 6(5).[20] Article 6 of the ICCPR states that the "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."[21] The U.S. reservation to article 6(5) provided: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[22] One of the most telling figures in relation to the death penalty reservation is that, since 1998, the United States has been the only State Party to execute juveniles.[23] The United States reaffirmed its intent to continue using the death penalty to the international

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defendant to benefit from changes to sentencing laws made subsequent to the commission of the offense; and article 20, which restricts speech more than the First Amendment allows. *Id.*

16. *See id.* at 8-9. The United States attached understandings to articles 2, 4, and 26, a clarification of legal distinctions allowed under U.S. law, including those made on the basis of age; articles 9 and 14, a statement that the United States would provide a right to seek compensation for an illegal arrest, but not the right to receive compensation granted by the ICCPR; article 10, a clarification that the accused and the convicted do not have to be separated; article 14, a statement that indigents are guaranteed the right to counsel but not to counsel of their choosing; and, finally, article 50, a statement that the principles of federalism prevented the United States from fully enforcing the treaty at the state and local levels. *Id.* The "federalism" understanding, as it is commonly called, has been a subject of much scholarly debate. *See e.g.*, Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001).

17. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 9-10. The United States attached declarations to articles 1-27; articles 19 and 20, a statement that the ICCPR was not self-executing, a statement urging the States Party to promote free speech rather than restrict free speech; articles 41, a statement recognizing the competence of the Human Rights Committee; and article 47, a statement that other international principles could restrict rights granted by the ICCPR. *Id.*

18. *See* Posner & Spiro, *supra* note 8, at 1209.

19. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 9. Numerous definitions have been given to the term "non-self-executing." *See* discussion *infra* Part III.A.

20. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 7-8; 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (statement of Presiding Officer).

21. ICCPR, *supra* note 1, art. 6(5). The ICCPR itself does not have a provision against the imposition of the death penalty on adults. *See id.* art. 6(2).

22. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 11. Specifically, the United States reserved the right to impose capital punishment on "any person (other than a pregnant woman)." *Id.*

23. *See* Dieter, *supra* note 6.

community by voting against the adoption of the Second Optional Protocol to the ICCPR.[24]

The international backlash to the U.S. RUDs has remained consistent since the ICCPR's ratification in 1992.[25] When the United States ratified the ICCPR, several nations objected to the RUDs as being contrary to the essential object and purpose of the treaty.[26] Furthermore, the Human Rights Committee (HRC), the oversight committee for the ICCPR, immediately voiced its disapproval of the scope and number of RUDs.[27] The HRC's chief concern was the non-self-executing status of the ICCPR, which the HRC viewed as contrary to the purpose of the treaty.[28]

In the United States' first required report to the HRC, committee members expressed their doubts about the U.S. commitment to the human rights enumerated within the ICCPR.[29] Concerns centered around the United States' "high degree of commitment to changing domestic legislation" in spite of the ICCPR's provisions.[30] Another committee member stated that "it was unclear how Covenant rights would actually be protected in cases where domestic law was not up to the standards set by that instrument."[31] In the HRC's official responding comments to the United States' report, the committee criticized the lack of domestic

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24. *See* U.S. Reservations, Understandings, and Declarations to the International Covenant on Civil and Political Rights, 138 CONG. REC. 8068, 8071 (1992) (discussing rejection of the Second Optional Protocol). While the ICCPR limits the death penalty under section 6(2) to the "most extreme crimes," the Second Optional Protocol provides for its abolition. *Compare* ICCPR, *supra* note 1, art. 6(2) *with* Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR 3rd Comm., 44th Sess., Supp. No. 49, Annex, U.N. Doc. A/44/49 (1989) (entered into force July 11, 1991). Thus, adults seeking to rely on the ICCPR face a significant barrier because the United States has not ratified the Second Optional Protocol. Minors, on the other hand, have a much stronger case for using the ICCPR defensively, although the United States reserved the right to execute minors in its 6(5) reservation. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 11-12.

25. *See* Thomas, *supra* note 3, at 176-78 (comparing the United States' RUDs to other countries' RUDs, and discussing the growing criticisms of U.S. RUDs).

26. *See* Edward F. Sherman, Jr., *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 72 n.15, 75 (1994) (recognizing that Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal, and Spain objected to the United States' reservations).

27. *See* Thomas, *supra* note 3, at 177.

28. *See id.*

29. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1401st mtg. at 9, ¶ 38, U.N. Doc. CCPR/C/SR.1401 (1995).

30. *Id.*

31. *See id.* at 8, ¶ 34.

implementation at the state and local levels.[32] Numerous critics and human rights groups have repeated those concerns with futility since ratification.

III. NON-SELF-EXECUTING DECLARATIONS

A. Theories

Since the ratification of the ICCPR and its non-self-executing declaration, theorists and courts have grappled with numerous definitions of "non-self-executing."[33] The Senate's language in passing the ICCPR non-self-executing declaration provides insight into its meaning, or, perhaps more importantly, the Senate's *intent* in making the declaration.[34] When the Senate attached the declaration, it stated that the declaration aimed "to clarify that the Covenant will not create a private cause of action in U.S. courts."[35] This vague language left the door open for interpretation, begging the question whether the Senate wanted to render the ICCPR completely ineffective in U.S. courts.[36] Further documentary evidence from the Senate Foreign Relations Committee suggests that the Senate's intent was simply to ensure that plaintiffs could not use the ICCPR for a private cause of action.[37] The Senate's stated intent to stop private rights of action leaves open the possibility that the ICCPR could be used *defensively*.[38]

The Senate's declaration represents what some scholars would classify as a "cause of action" theory of "non-self-executing."[39] Under this theory, substantive provisions of treaties may still be indirectly

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32. *See id.* at 8-11, ¶¶ 34-48.

33. *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 12-18 (2002) (summarizing four competing theories of the meaning of non-self-executing declarations); *see also* Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2176-83 (1999) (discussing various non-self-executing theories and arguing that such a declaration takes away much of the force behind the treaty). Sloss focuses on the intent of the treaty makers as being the primary determination of whether or not a treaty can be non-self-executing. *See* Sloss, *supra*, at 13-18. Vázquez argues that the four types of self-executing treaties are: unconstitutional treaties, nonjusticiable treaties, treaties addressed to the legislature, and treaties that do not create a private right of action. Vázquez, *supra*, at 2176-83.

34. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 19.

35. *Id.*

36. *See* Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger?*, 26 N.C. J. INT'L L. & COM. REG. 1, 8-14 (2000).

37. *Id.* at 11-12.

38. *Id.* at 12.

39. *See, e.g.*, *id.* at 12-14.

invoked by plaintiffs or defendants; in short, it would not totally forbid reliance on the treaty to argue another domestic law claim.[40]

The three alternative theories are: the "no standing" theory, the theory that the treaty is not enforceable in the United States, or the "lack of a privately enforceable right" theory.[41] These theories limit the ICCPR's availability more stringently than does the "cause of action" theory.[42] In particular, those three theories suggest that a party cannot use the ICCPR defensively or use another federal statute to provide the necessary enabling provisions.[43]

Proponents of the "no standing" theory reason that a non-self-executing treaty necessarily means plaintiffs have no capacity to bring a claim based on that treaty.[44] In other words, an individual lacks standing to invoke the treaty as the basis for a cause of action, whether procedurally or substantively.[45]

The "not enforceable in the United States" theory basically denies a plaintiff or a defendant the right to rely on the ICCPR in any capacity.[46] Even though the provision has the status of domestic law, courts are not authorized to remedy ICCPR violations because the judiciary is not competent to enforce the provisions of a non-self-executing treaty.[47] This theory is derived from Chief Justice John Marshall's statement that some treaties are addressed "to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court."[48] In other words, unless self-executing, a treaty becomes primary domestic law upon ratification, but the judiciary lacks the authority to enforce it.[49]

The "lack of a privately enforceable right" theory means that no enforceable ICCPR-based rights exist.[50] Some commentators refer to this concept as the Whitney doctrine.[51] While a self-executing treaty is automatically incorporated into domestic law upon ratification, under the

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40. *See id.*
41. *Id.* at 13.
42. *Id.* at 13-14.
43. *Id.* at 14.
44. *See* United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) (holding "a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty.").
45. *See* Carpenter, *supra* note 36, at 13 n.42.
46. *See* Sloss, *supra* note 33, at 13.
47. *Id.*
48. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). This theory has also been described as the "Foster" doctrine. *See* Sloss, *supra* note 33, at 13.
49. *See* Sloss, *supra* note 33, at 19.
50. *See* Carpenter, *supra* note 36, at 13 n.43.
51. *See* Sloss, *supra* note 33, at 29.

Whitney doctrine, the opposite is true for a non-self-executing treaty.[52] A non-self-executing treaty has no domestic status in the absence of incorporating legislation.[53] Although this sounds similar to the "no cause of action" theory, it can be differentiated because this theory forbids either procedural *or* substantive reliance on the treaty.[54]

Several scholars argue that treaties are presumed self-executed, and therefore judicially enforceable, regardless of subsequent implementing legislation.[55] This argument, known as the automatic execution theory, relies on the Supremacy Clause of the Constitution, which states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."[56] Based on this language in the Supremacy Clause, these scholars reason that no other theory is needed to grant all treaties the status of domestic law.[57]

B. U.S. Reasons and Defenses for the ICCPR Declaration

The United States has espoused several defenses for adding a non-self-executing declaration to the ICCPR. First and foremost, the Senate was probably motivated by a "justifiable pride in indigenous sources of U.S. law" and saw the ICCPR as a threat to the Constitution and domestic legislation.[58] One main reason cited is that without a non-self-executing declaration, rights granted through the United States

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52. *See id.* at 31.

53. *See id.* at 29.

54. *See* Carpenter, *supra* note 36, at 13-14.

55. *See, e.g.*, Vázquez, *supra* note 33, at 2154 (arguing that the Supremacy Clause gives all U.S. treaties, if valid and in force, the status of domestic law).

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

57. *See* Vázquez, *supra* note 33, at 2154.

58. Damrosch, *supra* note 2, at 517-18 (discussing the Senate's treaty adoption patterns and how the Senate weakens treaties through RUDs); *see also* Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 780 (2001); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995). Van der Vyver lists Henkin's summary of guiding principles upon which the Senate insists for ratification of human rights treaties: (1) the United States will not undertake any obligation inconsistent with the Constitution; (2) the United States adherence to a human rights treaty should not affect or change existing U.S. law; (3) the United States will not submit to the jurisdiction of the International Court of Justice for interpretation of the treaty; (4) every treaty will be subject to a federalism clause, which leaves implementation to the states; and (5) every international human rights treaty should be non-self-executing. Van der Vyver, *supra*, at 780.

Constitution would be affected.[59] The Senate Committee on Foreign Relations saw most of the rights protected in the ICCPR as already being addressed by the Constitution, and there was a fear that constitutional rights would be altered unless the United States used a non-self-executing declaration.[60] In its initial report to the HRC, the United States noted that the Constitution already granted the most important rights and freedoms necessary in a democratic society.[61] Thus, constitutional rights, which were considered to encompass most ICCPR rights, were probably a primary motivating factor in passing the non-self-executing declaration.[62]

Accompanying the U.S. pride in domestic legislation is the desire to gain a reputation as a supporter of human rights, all the while avoiding enforcement of those rights domestically.[63] By ratifying the ICCPR and using a non-self-executing declaration, it seems that the United States is trying to have its cake and eat it too. In other words, the United States acts as if it is a supporter of human rights, when, in reality, there is no ability to enforce ICCPR-based rights in the United States.[64] Evidence of this intent can be seen in the Senate Committee on Foreign Relations report on the ICCPR: "The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field."[65] By using a non-self-executing declaration, the United States can control the authority given to international enforcement organizations, such as the ICCPR's oversight committee, the HRC. But by at least ratifying the treaties, the United States purports to send the general message of support for human rights.[66] In form, the support for the

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59. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1177 (1993).

60. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 10.

61. *See Initial Reports of States Parties Due in 1993: United States of America*, U.N. GAOR Hum. Rts. Comm., ¶ 7, U.N. Doc. CCPR/C/81 Add.4 (July 29, 1994).

62. *See* Thomas, *supra* note 3, at 178-79 (discussing considerations of the Senate in deciding to use the non-self-executing declaration in ratifying the ICCPR); *see also* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 443-44 (1998) (arguing that the Senate is slow to consent to human rights treaties due to federalism concerns).

63. *See* Thomas, *supra* note 3, at 178. Thomas, however, is careful to note that "reducing U.S. acceptance of the Covenant to mere power politics in foreign affairs oversimplifies the contradictions posed by the RUD package." *Id.*

64. *See id.*

65. SENATE COMMITTEE REPORT, *supra* note 10, at 3.

66. *See* Thomas, *supra* note 3, at 178.

ICCPR and its mission exists; in substance, the U.S. ratification is hollow because no domestic claims can be brought based on the ICCPR.[67]

IV. HISTORY OF U.S. DEATH PENALTY JURISPRUDENCE

A. Adults

Without the reservation to article 6(5), the ICCPR would have affected lengthy and well-recognized United States Supreme Court jurisprudence upholding the death penalty as a legitimate form of punishment.[68] For a very brief period in U.S. history, the Court held that the death penalty was invalid and unconstitutional.[69] Over thirty years ago, the Supreme Court abolished the death penalty, as it was then administered, in *Furman v. Georgia*.[70] After examining Georgia's statutory scheme for imposing the death sentence, the Court held that the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[71] Four years later, in *Gregg v. Georgia*, the Court sustained several post-*Furman* death penalty statutes, reasoning that the new statutes addressed many of the concerns voiced in *Furman*.[72] *Gregg* clarified that the death penalty was not per se invalid under the Eighth Amendment and that the Court would monitor state schemes on an individual basis.[73]

Since *Gregg*, the Court has, for the most part, upheld state death penalty schemes as constitutional, both facially and in practice.[74] Yet

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67. *See id.*

68. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); McCleskey v. Kemp, 481 U.S. 279 (1987); Stanford v. Kentucky, 492 U.S. 361 (1989); Franklin v. Lynuagh, 487 U.S. 164 (1988); California v. Brown, 479 U.S. 538 (1987).

69. The only time the death penalty was held to constitute "cruel and unusual punishment" was during the four years between *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

70. *Furman*, 408 U.S. at 239-40.

71. *Id.* The *per curiam* opinion of the Court was very brief in answering the limited question of whether or not the imposition of the death penalty constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *See id.* However, Justice Douglas wrote a lengthy concurring opinion in which he recognized the ethnic and racial disparities in sentencing offenders to death. *Id.* at 240-57 (Douglas, J., concurring).

72. *Gregg*, 428 U.S. at 154-55. The new Georgia statutory scheme required specific jury findings as to the circumstances of the crime, and the State Supreme Court would then review the comparability of each death sentence with sentences imposed "on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 155. It is notable that *Gregg* did not recognize any international covenants, treaties, or case law in the majority opinion by Stewart. *See id.* at 153-207.

73. *See id.* at 195.

74. *See, e.g.*, Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

there have been many challenges to the death penalty since the late 1970s, most notably in *McCleskey v. Kemp*.[75] McCleskey, the defendant, argued that an extensive study on the death penalty showed conclusive evidence that the death penalty was disproportionately issued to black males as opposed to white males, and additionally, that killers of black victims were the least likely to receive the death penalty.[76] The Court denied his claim and held that the defendant failed to show that a discriminatory purpose was the basis for the death penalty sentence in *his* case alone; evidence of system-wide discrimination was insufficient for claiming that he was discriminated against in his particular case.[77] As in the Court's earlier death penalty cases, there is no mention of international treaties, covenants, case law, or general trends in administering the death penalty outside the United States.[78]

McCleskey has not been the only challenge to the death penalty on the grounds of discrimination. While *McCleskey* focused on discriminatory purpose, *United States v. Armstrong* focused on the discriminatory *effects* of the death penalty.[79] The Court held that for a defendant to be entitled to discovery on a claim that he was singled out on the basis of race, he must "satisfy the threshold showing . . . that the Government declined to prosecute similarly situated suspects of other races."[80]

Even though the majority of recent Supreme Court jurisprudence upholds the death penalty, the Supreme Court has held that the death penalty is unconstitutional in relation to retarded offenders.[81] In *Atkins v. Virginia*, the Court held that imposing the death sentence on retarded offenders constitutes "cruel and unusual punishment," and is therefore a violation of the Eighth Amendment.[82] *Atkins* is the most recent holding

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75. 481 U.S. 279 (1987). In *McCleskey*, the Court upheld the Georgia death penalty despite extensive social science research indicating that blacks are discriminated against in the imposition of the death penalty. *Id.* at 286-87, 292.

76. *Id.* at 286-87. The Baldus study was based on over 2,000 murder cases that occurred in Georgia in the 1970s and involves data relating to various combinations of defendants' and victims' races. *Id.* It suggested, based on statistical evidence, that black persons who killed white persons have the greatest likelihood of receiving the death penalty. *Id.* at 287.

77. *Id.* at 292-93.

78. *See generally id.* at 279-320.

79. United States v. Armstrong, 517 U.S. 456 (1996). The Court stated that to show discriminatory effect, the defendant must show that similarly situated individuals were treated differently. *Id.* at 465.

80. *Id.* at 458.

81. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

82. *Id.* In an opinion by Justice Stevens, the Supreme Court held that the execution of mentally retarded criminals was prohibited by the Eighth Amendment. *Id.* The Court

in which the Supreme Court has limited the use of the death penalty.[83] In limiting the applicability of the death penalty for retarded offenders, the Court did not cite any international basis, but instead focused primarily on domestic jurisprudence that supports the death penalty.[84]

B. Juveniles

In terms of juvenile death penalty jurisprudence, the most important challenges have arisen in *Thompson v. Oklahoma*[85] and *Stanford v. Kentucky*.[86] In a 5-3 decision in *Thompson*, the Supreme Court overruled the death sentence imposed on fifteen-year-old Thompson.[87] In its decision, the Court held that the imposition of the death penalty upon a fifteen-year-old constituted cruel and unusual punishment, thereby violating the Eighth Amendment.[88] The Court reasoned that, due to their age and immaturity, juveniles are incapable of acting with the degree of culpability required for imposing the death penalty.[89] The Court did articulate criteria under which a juvenile may be sentenced to death—a standard that is progressive, informed, and "enlightened by a humane justice."[90]

The strides made in advancing human rights in *Thompson* were reversed one year later in *Stanford*.[91] Stanford was a seventeen-year-old offender who was sentenced to death for murder.[92] The Court in *Stanford* held that no consensus—either historical or modern—disallowed the use of the death penalty on juveniles.[93] Unlike in *Thompson*, the Court's

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reasoned that the reduced capacity of retarded offenders provided justification for a categorical rule making such offenders ineligible for the death penalty. *Id.* Justices Rehnquist, Scalia, and Thomas dissented from the opinion. *See id.* at 321-54 (Rehnquist, C.J., Scalia & Thomas, JJ. dissenting).

83. *See id.* at 304.

84. *See id.* at 318-19 ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.").

85. 487 U.S. 815 (1988).

86. 492 U.S. 361 (1989).

87. *Thompson*, 487 U.S. at 838. Justice Kennedy took no part in the consideration or decision of the case. *Id.*

88. *Id.* (noting that it is an unconstitutional punishment because it is a "purposeless and needless imposition of pain and suffering") (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

89. *See id.* at 836-37.

90. *See id.* at 821 n.4 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

91. *Stanford*, 492 U.S. at 380.

92. *Id.* at 365-66.

93. *Id.* at 380. Notwithstanding Justice Scalia's formidable powers of obfuscation, over half of the jurisdictions in the United States prohibit imposition of the death penalty on those 16 years old or younger. *Id.* at 370. Furthermore, the American Bar Association has found the death penalty "a haphazard maze of unfair practices with no internal consistency."

rationale rested on the plethora of state statutes providing for juvenile executions.[94] Reasoning that those statutes were the result of the democratic process, the Court stated that they represented the majority viewpoint towards imposing the death penalty on juveniles.[95] What is most striking about the *Stanford* opinion, however, is the Court's refusal to examine international jurisprudence or opinions on juvenile executions.[96]

V. IMPLICATIONS OF ICCPR RUDS FOR U.S. CAPITAL OFFENDERS

A. Adults

The non-self-executing declaration and article 6(5) reservation to the ICCPR have significant effects for capital offenders seeking to rely on the ICCPR.[97] The criticism of both the U.S. declaration and its application by the judiciary, when examined in the context of death penalty cases, literally becomes a matter of life or death. Furthermore, they intersect with the issue of international condemnation of the United States' use of the death penalty. An examination of specific death penalty cases provides greater insight into the issues surrounding a defendant's attempt to rely on the ICCPR and the international political implications for failing to recognize such a claim.

People v. Caballero is one case that illustrates the tension between granting a façade of rights in the ICCPR and the international community's dissatisfaction with the rights granted.[98] Juan Caballero, a Mexican citizen, was sentenced to death for his involvement in the stabbing deaths of three individuals.[99] In his fifth post-conviction proceeding in January 2002, Caballero argued that his death sentence violated provisions in the ICCPR, as well as the Convention for the

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Ved Nanda, *U.S. Must Reexamine Executions*, DENV. POST, Feb. 13, 1997, at 7B. Moreover, executing criminals for crimes committed as juveniles places the United States in the same club with such luminous defenders of human rights as Iran, Iraq, Pakistan, Yemen, Bangladesh, and Nigeria. *Id.*

94. *See Stanford*, 492 U.S. at 370-71.

95. *See id.*

96. *See generally id.*

97. *See* Carpenter, *supra* note 36, at 11 (arguing that defendants will face a significant challenge because of precedent, but also recognizing that scholars still disagree on the definition of non-self-executing. Carpenter also argues that courts have interpreted the declaration to be more restrictive than originally intended by the Senate.)

98. People v. Caballero, No. 88784, 2002 WL 31341296 (Ill. Oct. 18, 2002) (not released for publication in the permanent law reports as of Apr. 11, 2003).

99. *Id.* at *1-*3.

Elimination of All Forms of Racial Discrimination.[100] Those claims were found in an *amicus curiae* brief that Mexico filed on Caballero's behalf.[101] The court addressed the treaty-based claims, but ultimately ducked the question by holding that Caballero's death sentence should stand because the ICCPR was ratified after Caballero's sentencing.[102]

Despite that holding, Caballero's case demonstrates that U.S. courts usually do not use the "cause of action" theory of non-self-execution; had it been used in Caballero's case, the court would have at least accepted substantive ICCPR arguments.[103] Furthermore, the court in *Caballero* emphasized the United States' death penalty reservation to the ICCPR as proof that Mexico lacked a legitimate ICCPR claim on behalf of Caballero.[104] Surprisingly, the court did not distinguish article 6(5) as being applicable only to juveniles.[105] The court stressed that the United States specifically reserved the right to impose the death penalty in accordance with the Constitution, and because Caballero's sentence did not violate any constitutional constraints, it could not violate the obligations undertaken by the United States in the ICCPR.[106]

While the court's analysis of the applicability of the ICCPR claim does not represent a departure from the normal analysis, the court's decision to address those arguments raised by Mexico makes the opinion noteworthy. Even though Mexico's ICCPR argument against Caballero's death sentence ultimately failed, the court's recognition of such arguments is significant for a U.S. state court death penalty case.[107] The court's decision to address Mexico's brief on behalf of Caballero represents a significant step for state courts by recognizing international

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100. *Id.* at *18. Caballero presented several other domestic arguments that are not focused on in this note. They included a claim that his death sentence was unconstitutionally disparate as compared to the consecutive life sentences of two of his co-offenders and a claim that the state's inconsistent arguments about whether he was more culpable than a co-offender violated his due process rights. *See id.* at *7, *12. Both claims were denied in the hearing. *See id.* at *12, *17.

101. *See id.* at *17-*18.

102. *Id.* at *20.

103. *See* Carpenter, *supra* note 36, at 12-13.

104. *See Caballero*, 2002 WL 31341296, at *21. The court cited the reservation to article 6(5) of the ICCRP: "'the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . duly convicted under existing or future laws permitting the imposition of capital punishment.'" *Id.* (citation omitted).

105. *See id.* As stated earlier, the general prohibition of the death penalty would have been found in the unratified Second Optional Protocol. *See* discussion *supra* Part II & note 24.

106. *Caballero*, 2002 WL 31341296, at *21.

107. *See id.* at *20-*21.

authority and the possible political implications of having an *amicus curiae* brief filed by another state.

Because state courts deal with foreign governments quite infrequently, they have often simply ignored briefs of foreign states and the international implications of their decisions.[108] In addressing Mexico's brief, the court arguably acknowledged the ever-increasing international pressure to declare the death penalty unconstitutional and inconsistent with a variety of multilateral treaties.[109] Such recognition represents a possible weakening of the insularity of U.S. courts from the international community's stance on the death penalty.[110]

B. Juveniles

In comparison to adult capital offenders making ICCPR claims, juvenile offenders stand a stronger chance of successfully invoking the ICCPR. Obviously, the main hurdle to using the ICCPR is the United States' specific reservation to article 6(5) to continue to use the death penalty.[111] Juveniles must therefore argue that the RUDs attached to the ICCPR—specifically the non-self-executing declaration and the article 6(5) reservation—are invalid.[112] Determining the legitimacy of the U.S. juvenile execution reservation is not as simple as it appears at first glance. Under the Vienna Convention on the Law of Treaties, reservations are permitted unless they are incompatible with the purpose and object of the treaty.[113] Therefore, a juvenile defendant must argue that refusing to enforce article 6(5) defeats the purpose of the ICCPR because the right to life is nonderogable under the Covenant.[114] Article 4(2) of the ICCPR prohibits derogation from article 6 even in times of

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108. *See* Erica Templeton, *Killing Kids: The Impact of* Domingues v. Nevada *on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV. 1175, 1196 (2000); *see also* Elizabeth A. Reimels, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the Game, but Only if It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 345 (2001).

109. *See Caballero*, 2002 WL 31341296, at *21. The recognition of that pressure is significant because, due to its size, the United States is more immune to outside influence than most nations. *See generally* Quigley, *supra* note 11.

110. *See International Law and Juvenile Death Penalty*, Feb. 2001, http://www.scaec.org/international.htm. (last visited Feb. 12, 2003).

111. *See* SENATE COMMITTEE REPORT, *supra* note 10, at 7.

112. *See* D. Kirk Morgan II, *The International Covenant on Civil and Political Rights: A New Challenge to the Legality of the Juvenile Death Penalty in the United States?*, 50 CATH. U. L. REV. 143, 158 (2000) (discussing how the validity of reservations is determined under the Vienna Convention).

113. *Id.*

114. *See International Law and Juvenile Death Penalty*, *supra* note 110.

emergency or public crisis.[115] As a result, the U.S. reservation to article 6 is invalid under international law.[116]

Even if the reservation to article 6 is invalid, the problematic question of non-self-execution still remains.[117] The non-self-executing status of the ICCPR creates a virtual roadblock for an article 6 claim by a juvenile offender.[118] However, if the "cause of action" theory is argued, the defendant could still rely on the substantive provisions of the ICCPR.[119] There is considerable merit in being able to use the ICCPR substantively, especially in light of the voluminous international law precedent supporting affirmative arguments.[120] In the final analysis, whether or not a defendant could use the ICCPR substantively will depend on the theory of non-self-execution that is applied.[121] The other theories of non-self-execution—the "no standing," the "no privately enforceable right," and the "not enforceable in the United States" theories—would leave the defendant without the ability to use the ICCPR defensively.[122] Therefore, unless the "cause of action" theory is applied, it appears the United States has effectively prevented minors from using the ICCPR for death penalty claims or general substantive arguments.[123]

The international community's opposition towards U.S. juvenile executions is even more fervent than the opposition to adult executions.[124] At the January 2002 session of the United Nations Commission on Human Rights, the sub-commission recommended a draft decision stating that international law "clearly establishes that the imposition of the death penalty on persons aged under 18 at the time of the offense is in contravention of customary international law."[125] Although the draft

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115. *Id.*
116. *Id.*
117. *See id.*
118. *See id.*
119. Carpenter, *supra* note 36, at 12-13.
120. *See International Law and Juvenile Death Penalty*, *supra* note 110.
121. *See* Carpenter, *supra* note 36, at 12-13.
122. *Id.*
123. Of course, the actual validity of the Senate's non-self-executing declaration could be challenged by a defendant seeking to rely on the ICCPR. *See International Law and Juvenile Death Penalty*, *supra* note 110. Alternatively, the defendant could rely on the Supremacy Clause to argue that all treaties automatically are the supreme law of the land. *See id.*
124. *See id.*
125. Michael J. Dennis, *The Fifty-Seventh Session of the UN Commission on Human Rights*, 96 AM. J. INT'L L. 181, 184 (2002).

ultimately failed, it still shows how out of step the United States is with the rest of the world on the issue of juvenile executions.[126]

The case of *Domingues v. Nevada* provides an excellent illustration of the above arguments made in a juvenile execution case.[127] Michael Domingues was a juvenile offender sentenced to death for killing a woman and her four-year-old son.[128] Domingues filed a motion for correction of an illegal sentence, arguing that article 6 of the ICCPR superceded the Nevada statute allowing the execution of juveniles.[129] The Nevada Supreme Court summarily dismissed his claim, reasoning that the Senate's reservation to article 6(5) negated his claim that he was illegally sentenced to death.[130] The court focused on other U.S. jurisdictions that continued to use the death penalty without mentioning the anti-death penalty consensus of the international community.[131]

More significant than the majority opinion in *Domingues* is the dissenting opinion of Justice Rose. Like the majority in *Caballero*, Rose's dissent recognized the debate around the United States' RUDs and the isolation of the United States in using capital sentencing for juveniles.[132] Rose stated that the court failed to address whether the U.S. reservation was valid, as well as the effect of ratification of the ICCPR on the state's ability to execute juveniles.[133] Arguing that a full hearing was deserved, Rose stated that the "penultimate issue that the district court should have considered is whether the Senate's reservation was valid."[134] Further, Rose stressed that Domingues' ICCPR claim was not an "easy" question, and that "testimony about the international conduct of the United States concerning the subjects contained in the treaty . . . may be necessary."[135]

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126. *See id.*

127. 961 P.2d 1279, 1280 (Nev. 1998), *cert. denied*, 526 U.S. 1156 (1999).

128. *Id.* at 1279.

129. *See id.* at 1279-80.

130. *Id.* at 1280.

131. *Id.* (citing Stanford v. Kentucky, 492 U.S. 361 (1989); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1312-13 (1995) (finding that thirty-six states have capital punishment statutes; of these, eleven require an offender to be at least eighteen years of age to be eligible for the death penalty, whereas four require an offender to be at least seventeen years of age, seven require an offender to be at least sixteen years of age, one requires an offender to be fifteen years of age, two only require an offender to be fourteen years of age, and one allows a ten-year-old to be executed!)).

132. *See id.* at 1281 (Rose, J., dissenting).

133. *Id.* (Rose, J., dissenting).

134. *Id.* (Rose, J., dissenting).

135. *Id.* (Rose, J., dissenting).

In a 2001, post-*Domingues* juvenile death penalty decision, the Nevada Supreme Court reaffirmed its holding.[136] In *Servin v. Nevada*, the court emphasized that the United States Supreme Court has not granted certiorari in a case challenging the Senate's ICCPR reservation and its effect on state death penalty statutes.[137] The court held that executing juvenile offenders like Servin did not violate the ICCPR and that an ICCPR-based claim was without merit.[138] Despite these comments on the ICCPR, Servin's death sentence was vacated and the cause remanded because the court found the sentence to be excessive under the circumstances.[139]

As in *Domingues*, Justice Rose again discussed the international issues surrounding juvenile executions.[140] Rose argued customary international law provided an additional ground for vacating the death sentence: "there appears to be overwhelming support among the majority of nations to ban the imposition of the death penalty for juvenile offenders."[141] Rose named customary international law as another reason the sentence should be vacated and recognized the international support for a ban on juvenile executions.[142] However, Rose maintained the U.S. reservation was valid because the objecting states party to the ICCPR did not make their objections within the allocated twelve months after ratification.[143] Neither the majority nor Rose's concurrence addressed the non-self-executing declaration that accompanies the ICCPR.[144]

VI. ALTERNATIVE ARGUMENTS FOR CAPITAL OFFENDERS

After examining the lack of success of ICCPR-based arguments in U.S. courts, the question remains on what other sources of international law could capital offenders rely.[145] One often-used argument is that the U.S. declaration of non-self-execution and its reservation to the death

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136. Servin v. Nevada, 32 P.3d 1277, 1286 (Nev. 2001).

137. *Id.*

138. *See id.* The court noted that thirty-eight states still impose the death penalty and found eighteen states set the minimum age at sixteen years. *Id.* at 1286 n.26.

139. *Id.* at 1290.

140. *See id.* (Rose, J., concurring).

141. *Id.* at 1291 (citation omitted) (Rose, J., concurring).

142. *Id.* (Rose, J., concurring)

143. *Id.* at 1290-91 (Rose, J., concurring).

144. *See id.* at 1277-94.

145. As a domestic law alternative, defendants could rely on the Eighth Amendment's prohibition of cruel and unusual punishment. For a further discussion of the Eighth Amendment debate, see Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

penalty provision violate customary international law.[146] Customary international law arises out of "a general and consistent practice of states followed by them from a sense of legal obligation."[147] Such an argument would include the fact that only five countries impose the death penalty on juveniles.[148]

This customary international law argument is much stronger for juvenile capital offenders because international opposition to juvenile executions is much stronger than for adults.[149] Proponents of the argument point to a variety of treaties prohibiting the death penalty on juveniles: the ICCPR, the Convention on the Rights of the Child, and the American Convention on Human Rights.[150] Furthermore, approximately one hundred and fifteen countries still using the death penalty have prohibited juvenile executions, either by domestic legislation or through international human rights treaties.[151] In fact, only five countries continue to execute juvenile offenders.[152] In summary, the practice of other countries, the support of multilateral treaties with provisions against the execution of juveniles, and the general consensus of the international community support the proposition that juvenile executions violate customary international law.[153] However, this argument has a low probability of success, as U.S. courts have typically been leery of relying on any international jurisprudence, especially with regard to the death penalty.[154]

Another non-ICCPR-based argument is that the death penalty violates *jus cogens* norms, or the peremptory norms of international law

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146. *See International Law and the Juvenile Death Penalty*, *supra* note 110.

147. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

148. *International Law and the Juvenile Death Penalty*, *supra* note 110.

149. *See id.*

150. *See id.*

151. *Id.*

152. *See id.* These countries include the United States, Iran, the Democratic Republic of Congo, Nigeria, and Saudi Arabia. *Id.* Yemen and Pakistan recently enacted laws that prohibit the practice of executing juveniles. *Id.*

153. *See id.* (stating that the 144 states party to the ICCPR "far exceeds the threshold numerical figure for establishing a customary international law norm," and that the unanimous adoption of the ICCPR by the UN General Assembly indicates that the prohibition on juvenile executions has reached customary international law status). *Id.*; *see also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (finding customary international law prohibited torture as ninety-five countries were party to the prohibition of torture convention).

154. *See* Celé Hancock, *The Incompatability of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699, 720-21 (1995) (discussing notable cases that have declined to follow customary international law).

that the international community accepts as a whole.[155] *Jus cogens* norms are those from which no derogation can be justified and which can only be changed by a subsequent norm of the same character.[156] As with the customary international law argument, the case is much stronger for a juvenile defendant rather than an adult defendant.[157] Scholars and juvenile capital offenders alike have argued that the death penalty violates *jus cogens*, but the defendants have had little success in U.S. courts.[158] Much of the same authority for the customary international law argument is cited for the *jus cogens* argument, such as widespread international bans on juvenile death penalty sentences and treaties including provisions against the death penalty.[159] Further support of a *jus cogens* norm prohibiting juvenile executions is found in the Annual Report of the Inter-American Human Rights Commission, which stated that juvenile executions violated a regional norm.[160] The commission stated that "in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all States of the Inter-American system, including the United States."[161]

VII. RECENT INTERNATIONAL CRITICISMS AND FOREIGN RELATIONS RAMIFICATIONS

The effects of the United States' non-self-executing declaration and the juvenile execution reservation are becoming apparent as more and more countries abolish the death penalty. The international movement towards abolition is so pervasive that the United Nations Committee on the Elimination of Racial Discrimination has urged a moratorium on the death penalty in the United States as recently as August 2001.[162] While there is no exact way to gauge the effects of the United States' ICCPR RUDs, recent events show that those RUDs are interfering with international relations.[163] As such, the criticisms of the United States'

155. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 8 I.L.M. 679, 698-99 (entered into force Jan. 27, 1980, and not ratified by the United States) (providing the concise definition of *jus cogens*).

156. *Id.*

157. *See International Law and the Juvenile Death Penalty*, *supra* note 110.

158. *See id.*

159. *See id.*

160. Inter-Am. C.H.R., 147, OES/ser.L/II/71m dic, 9m rev. 1 (1987), ¶ 56.

161. *Id.*

162. *See* Dieter, *supra* note 6, at *International Developments*.

163. *See id.*

arguably hollow adoption of the ICCPR and, more specifically, criticisms of the death penalty are becoming more widespread and vocal.[164]

Several international disputes over the United States' use of the death penalty have been in the headlines within the last year.[165] The President of Mexico, Vicente Fox, cancelled a scheduled trip to Texas because of the execution of Mexican national.[166] Even in the wake of September 11, 2001, the U.S. fight against terrorism has also been adversely affected by the continued use of the death penalty.[167] Germany's minister of the interior urged the United States to drop the death penalty sentence against Zacarias Moussaoui, an alleged would-be highjacker in the September 11, 2001, attacks.[168] Germany actually threatened to withhold evidence unless the United States changed the sentence sought.[169] The United States Attorney General has had a difficult time trying to prosecute alleged terrorists throughout Europe.[170] Attorney General Ashcroft recently met with the European Union Justice Ministers to boost cooperation with extradition, as several EU Member States did not want to comply with extradition orders due to the United States' use of the death penalty.[171]

VIII. CONCLUSION

Due to the non-self-executing declaration and the death penalty reservation to the ICCPR, capital offenders are usually deprived of any reliance on the ICCPR. The United States' decision to attach such broad RUDs has effectively denied death penalty defendants any protections under the ICCPR, unless the "cause of action" non-self-executing theory is used. Even then, juvenile capital offenders face the challenge of arguing that the article 6 reservation is invalid under customary international law or *jus cogens* norms. The United States stands isolated among other civilized countries in its use of the death penalty, and, more and more, that difference affects international relations in a variety of areas. Several domestic cases show that U.S. courts are beginning to consider those international ramifications. But for effective changes to take place, U.S. courts must continue to look outward to international

164. *See id.* (noting that the international community focuses attention on the United States due to its lack of commitment to its stated ideals).
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.*
169. *Id.*
170. *See id.*
171. *Id.*

treaties, comments, and state practices that condemn the use of the death penalty. Applying that broader focus will be a difficult, as seventy percent of the U.S. population still supports the death penalty.[172] In this regard the United States should remember that, even though domestic support remains high, it is increasingly isolating itself from the rest of the civilized world. Moreover, until the United States joins the rest of the world, its decision to execute persons will continue to adversely affect its foreign relations. In the final analysis, the United States must choose between continued use of the death penalty, despite being a party to the ICCPR, or abolishing the practice. The latter is the only way it can hope to salvage its reputation for respecting the evolving standard of human rights.

172. *See id.* at *Summaries of Recent Poll Findings* (citing Gallup poll dated October 29, 2002). The seventy percent figure reflects a two percent decline in support from the last Gallup death penalty poll five months earlier. *Id.*