

## **The Role of International Human Rights Law in the American Decision to Abolish the Juvenile Death Penalty**

### **Introduction**

Nine months shy of his eighteenth birthday, Christopher Simmons and one accomplice, Charles Benjamin, carried out a brutal murder. They planned to break into someone's home, tie up their victim, and throw the person off a bridge. Simmons thought they could "get away with it" because of their age.<sup>1</sup> In the middle of the night, they executed their plan. They broke into the home of their victim, Shirley Crook, a 46 year-old wife and mother, and held her down while they bound her hands and feet using duct tape.<sup>2</sup> They covered her head with a towel, blinding her, and threw her in the back of her own minivan. They then drove to a state park and walked Crook to a railroad trestle. There, they reinforced the bindings on her hands and feet with electrical wire, wrapped her head in duct tape, and threw her, conscious and screaming, off the bridge into the waters below.<sup>3</sup>

Crook was found dead soon after. The police soon learned of Simmons' involvement, as he bragged about his acts to his friends. During a police interrogation, Simmons confessed to the whole event, and volunteered to re-enact the crime at the scene. The State of Missouri sought the death penalty, and the jury recommended it after finding the necessary aggravating factors.<sup>4</sup>

The case of Christopher Simmons eventually found its way to the Supreme Court, which considered whether the execution of someone who committed a crime before his eighteenth birthday violated the Eighth Amendment prohibition on "cruel and unusual punishment".<sup>5</sup> The Court had previously decided that the so-called "juvenile death penalty" did not violate the Eighth Amendment.<sup>6</sup> The Court overruled its earlier precedent, holding that the Eighth Amendment prohibits the execution of those who committed crimes before their eighteenth birthday.<sup>7</sup>

The *Simmons* case raised a central issue in international human rights law; an issue that had separated the US from most of the rest of the world. Many international human rights instruments, as well as most, if not all, nations, have now expressly prohibited the juvenile death penalty. This paper will consider international law relevant to the execution of minors and evaluate the role international human rights law played in the recent Supreme Court decision in *Roper v. Simmons*. The paper will argue that international law (as represented in treaties and related sources) played a significant, though not primary, role in the Court's decision. Rather, something more akin to international "peer pressure", as opposed to any formal obligation under international law, was the decisive factor. In other words, the overwhelming opposition among other nations to the juvenile death penalty led the Supreme Court to conclude that the US had to change its ways. This distinction may be important in considering how the Court may rule on other human rights issues.

Part I of the paper considers the development of case law on the juvenile death penalty and the rationale of *Simmons*. Part II reviews the status of the juvenile death penalty under human rights treaties and customary international law. Part III then looks more closely at the role of international law in *Simmons*, and evaluates the significance placed upon it by the Court, as compared to other

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 556 (2005).

<sup>2</sup> *Id.* at 556.

<sup>3</sup> *Id.* at 556-57.

<sup>4</sup> *Id.* at 558.

<sup>5</sup> The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". U.S. CONST. amend. VIII.

<sup>6</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>7</sup> *Simmons*, 543 U.S. at 578.

considerations involved in the decision. Part IV then speculates about the impact of international law in future Court decisions, such as that relating to the adult death penalty. Part V is a conclusion.

### **Part I – The Development of American Jurisprudence on the Execution of Minors and the Rationale of the *Simmons* Decision**

The Supreme Court evaluates the Eighth Amendment prohibition on “cruel and unusual” punishments by considering the “evolving standards of decency that mark the progress of a maturing society”, so as to determine which punishments are so disproportionate as to be cruel and unusual.<sup>8</sup> Over time, the “evolving standards of decency” analysis has led the Court to bar the execution of those below the age of sixteen at the time of their offense.<sup>9</sup> There, the Court considered the views of professional organizations, other nations, and the practice of juries.<sup>10</sup> The Court also considered the “evolving standards of decency” in overruling an earlier decision regarding the execution of the mentally retarded, concluding that the standards of decency had evolved since the Court’s earlier decision, and now demonstrate that the execution of the mentally retarded constitutes cruel and unusual punishment.<sup>11</sup>

In *Stanford v. Kentucky*<sup>12</sup> the Court considered whether execution of juvenile offenders over the age of fifteen but below eighteen violated the Eighth Amendment. In 1989, when the case was decided, 22 of the 37 death penalty states permitted the death penalty for 16-year-old offenders, and 25 of the 37 permitted it for 17-year-old offenders. Given these numbers, the Court concluded that there was no national consensus “sufficient to label a particular punishment cruel and unusual.”<sup>13</sup>

Roughly fifteen years after *Stanford* was decided, the Court reconsidered the issue of the execution of juveniles in *Roper v. Simmons*. In concluding that the standards of decency had evolved so as to prohibit the execution of juvenile offenders, the Court put forth three reasons.

First, the Court found a national consensus against the juvenile death penalty. It found that in the past decade, only 3 states have executed juveniles, even though 20 still had no express prohibition.<sup>14</sup> Because a majority of the states reject the juvenile death penalty, the Court found this to be strong evidence in favor of an evolving standard of decency against the practice.<sup>15</sup>

Second, the Court considered scientific evidence on the distinct nature of juvenile offenders. The Court found that because juvenile offenders lack maturity and are influenced by peer pressure,<sup>16</sup> they cannot “with reliability be classified amongst the worst offenders”.<sup>17</sup> The Court also noted that states already have laws prohibiting those below 18 from voting, serving on juries, or marrying, thus recognizing the comparative immaturity of juveniles.<sup>18</sup> Finally, the Court noted that the main objectives served by the death penalty would not be served by the execution of juveniles.<sup>19</sup>

Third, the Court considered international law. It first noted the “stark reality that the United States is the only country in the world that continues to give official sanction to the

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<sup>8</sup> *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

<sup>9</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 818-38 (1988).

<sup>10</sup> *Id.* at 830.

<sup>11</sup> *Atkins v. Virginia*, 536 U.S. 304, 314 (2002).

<sup>12</sup> 492 U.S. 361 (1989).

<sup>13</sup> *Id.* at 370-71.

<sup>14</sup> *Simmons*, 543 U.S. at 565.

<sup>15</sup> *Id.* at 567.

<sup>16</sup> *Id.* at 570 (citing E. Erikson, *Identity: Youth and Crisis* (1968)).

<sup>17</sup> *Id.* at 569.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 571.

juvenile death penalty.”<sup>20</sup> The Court also noted several international human rights law treaties that prohibit the juvenile death penalty, including the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights (but not Optional Protocol 2), the American Convention on Human Rights, and others.<sup>21</sup> The Court further noted the abolishment of the juvenile death penalty in the United Kingdom in 1948, prior to the adoption of the treaties. The Court concluded, regarding its review of international law on the subject:

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. *The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.*<sup>22</sup>

Four of the nine Justices dissented from the opinion. There were two main points of contention. First, the dissenting Justices questioned the development of a genuine national consensus.<sup>23</sup> They felt that the majority had relied on too weak of a showing to support its conclusion. The paper will return to this issue in more detail later in Part IV. Second, the Justices questioned the majority’s use of international law in its decision. Scalia, in his dissent, noted “the basic premise . . . that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.”<sup>24</sup> Unless the Supreme Court was willing to reconsider a number of its holdings which are not in line with the rest of the world, Scalia argued, “it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”<sup>25</sup>

## **Part II – The Juvenile Death Penalty under International Law**

### *A. International Treaties*

#### 1) The International Covenant on Civil and Political Rights (ICCPR)<sup>26</sup>

The ICCPR was meant to give effect to the standards of the Universal Declaration of Human Rights, and obliged each State party to “respect and ensure [the ICCPR] rights, to adopt legislative or other necessary measures to give effect to these rights, and to provide an effective

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<sup>20</sup> *Id.* at 575.

<sup>21</sup> *Id.* at 576.

<sup>22</sup> *Id.* at 578 (emphasis added).

<sup>23</sup> *Id.* at 588 (O’Connor, J., dissenting) (“I would demand a clearer showing that our society truly has set its face against [execution of juveniles] before reading the Eighth Amendment categorically to forbid it.”)

<sup>24</sup> *Id.* at 624 (Scalia, J., dissenting).

<sup>25</sup> *Id.* at 627 (Scalia). This was not the first case in which Justice Scalia expressed his opposition to the use of international law in resolving Eighth Amendment issues. *See, e.g.,* *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.14 (1987) (Scalia, J., dissenting) (“[T]he views of other nations, however enlightened the Justices of this court may think them to be . . . cannot be imposed upon Americans through the Constitution.”); *Stanford v. Kentucky*, 493 U.S. 361, 369 n.1 (1989) (“[I]t is the American conceptions of decency that are dispositive”.)

<sup>26</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

remedy to those whose rights are violated.”<sup>27</sup> In particular, Article 6(5) prohibits the death penalty “for crimes committed by persons below eighteen years of age.”<sup>28</sup>

The US ratified the ICCPR in 1992, more than a quarter century after it was first drafted.<sup>29</sup> The US played a central role in the drafting of the ICCPR, and did not object to the inclusion of the juvenile death penalty provision at the time. However, when US ratified the treaty, it included a reservation that allowed the continued imposition of the juvenile death penalty.<sup>30</sup> There has been considerable debate about the effect of this reservation, with some arguing that the reservation is illegal, as it conflicts with the “object and purpose” of the treaty, or because the prohibition constitutes a preemptory norm from which states cannot derogate.<sup>31</sup> Eleven countries have filed objections to the reservation and the Human Rights Committee, which has asserted its authority to determine the validity of reservations, has declared it invalid.<sup>32</sup> If ultimately declared invalid, the reservation would have no effect, and the US would be bound by Article 6(5). Alternatively, if the reservation cannot be severed from the treaty, the US would no longer be considered a party to the treaty.<sup>33</sup>

The US Senate, when ratifying the ICCPR, declared that it was non-self-executing, thus preventing individuals from relying on its provisions in US courts.<sup>34</sup> Declaring a treaty that grants individual rights to be non-self-executing undercuts the functionality of that treaty in the domestic system. Recognizing this, many international law scholars have questioned the declaration. They suggest that implementation of the treaty by other countries demonstrates that it was meant to be self-executing, and the US decision undermines the treaty.<sup>35</sup>

While these arguments are important and remain unresolved, the resolution of these issues is not particularly relevant to the argument presented in this paper. Further, as constitutional provisions trump treaty obligations under US law,<sup>36</sup> even a binding treaty obligation would not change the constitutional question.

## 2) UN Resolutions

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<sup>27</sup> S. Exec. Rep. No. 102-23, at 1-2 (1992), reprinted in 31 I.L.M. 645, 648-49 (1992).

<sup>28</sup> ICCPR, *supra* note 26, art. 6(5).

<sup>29</sup> Comment, “Enlightened by a Humane Justice”: *An International Law Argument Against the Juvenile Death Penalty*, 47 KAN. L. REV. 1079, 1088 (1999).

<sup>30</sup> The reservation stated:

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

138 CONG. REC. S4783 (1992).

<sup>31</sup> See, e.g., Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 500 (2002).

<sup>32</sup> Elizabeth A. Reimels, Comment, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty*, 15 EMORY INT’L L. REV. 318. Note, however, that under the Vienna Convention on the Law of Treaties, the determination of whether a reservation violates the object and purpose of a treaty is left to the treaty parties. See *United Nations Conference on the Law of Treaties, Official Records*, 1st Sess., 24th mtg. at 125-36, U.N. Doc. A/Conf.39/11 (1969); *United Nations Conference on the Law of Treaties, Official Records*, 2nd Sess., 10th Mtg. at 29-30, U.N. Doc. A/Conf.39/11/Add.1, at 29-30 (1970). Given this, since only 11 of the parties have voiced objection, the reservation should be considered valid. See Bradley, *supra* note 31, at 505.

<sup>33</sup> Reimels, *supra* note 32, at 320.

<sup>34</sup> Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, 31 I.L.M. 645 (1992).

<sup>35</sup> Reimels, *supra* note 32, at 322.

<sup>36</sup> Restatement of Foreign Relations Law §115(3).

In 1984, the UN Economic and Social Council adopted a resolution designed to protect the rights of those on death row. Safeguard 3 provides: “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death . . . .” The Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders endorsed the protections in 1985.<sup>37</sup>

Other bodies within the UN have also called for the abolition of the juvenile death penalty. In 1999, the Subcommission on the Promotion and Protection of Human Rights condemned the juvenile death penalty and called on all retentionist countries to abolish the practice. The next year, the Subcommission urged the Commission on Human Rights to adopt the position that the juvenile death penalty violated customary international law. The Commission has since adopted this position, passing several resolutions since 2000 calling for the abolition of the juvenile death penalty.<sup>38</sup>

### 3) American Convention on Human Rights (ACHR)<sup>39</sup>

The ACHR is meant to guarantee civil and political rights to individuals within the jurisdiction of the state parties – those in North and South America. Article 4(5), relevant to the juvenile death penalty, states: “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . .”<sup>40</sup>

While the US helped to draft the ACHR, it has not yet ratified it.<sup>41</sup> In relation to Article 4(5), the US argued that placing a specific age limit for the death penalty in the treaty fails to take into account the “‘already existent trend’ toward the abolition of the death penalty altogether.”<sup>42</sup> Given this, it abstained from this provision of the treaty.<sup>43</sup>

### 4) Convention on the Rights of the Child (CRC)<sup>44</sup>

Like the ICCPR and the ACHR, the CRC also contains a provision which prohibits the juvenile death penalty. Specifically, Article 37(a) provides “capital punishment . . . shall [not] be imposed for offences committed by persons below eighteen years of age.”<sup>45</sup>

Every member of the United Nations has ratified the CRC with the exception of the US and Somalia. The US opposes ratification in order to “retain the flexibility and authority to impose sentences in accordance with the tenets of its citizens and elected officials.”<sup>46</sup> The United Nations Human Rights Committee has concluded that a reservation concerning the execution of children would be incompatible with the rules of customary international law, and therefore invalid.<sup>47</sup>

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<sup>37</sup> Amnesty Int'l, U.S.A., *The Death Penalty and Juvenile Offenders* 78 (Oct. 1991).

<sup>38</sup> Economic and Social Council, Report of the Secretary-General, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, Commission on Crime Prevention and Criminal Justice, E/CN.15/2001/10 (Mar. 29, 2001). Some of the resolutions include Resolution 2002/77, the Question of the Death Penalty, reconfirmed in both Resolution 2003/67 and Resolution 2004/67.

<sup>39</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143.

<sup>40</sup> *Id.* art 4(5).

<sup>41</sup> Comment, *supra* note 29, at 1091.

<sup>42</sup> See 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, 1329 (1993).

<sup>43</sup> *Id.*

<sup>44</sup> Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR 3d Comm., 44th Sess., 61st plen. Mtg., Supp. No. 49, at 165, U.N. Doc. A/44/736 (1989).

<sup>45</sup> *Id.* art 37(a).

<sup>46</sup> Cele Hancock, *The Incompatibility 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, 700 (1995).

<sup>47</sup> Comment, *supra* note 29, at 1092.

5) Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)<sup>48</sup>

This treaty provides protections for individuals during times of war. It, along with subsequent protocols, has several provisions that prohibit the juvenile death penalty. Specifically, Article 68 states that “the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.”<sup>49</sup> Further, Article 77(5) of Protocol I to the Fourth Geneva Convention declares “[t]he death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.”<sup>50</sup> Finally, Article 6(4) of Protocol II states “[t]he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence.”<sup>51</sup>

The United States has ratified the Fourth Geneva Convention itself, but has not adopted either Protocol.<sup>52</sup> When it ratified the Convention, the US included a reservation to Article 68 to allow the continued use of the death penalty, consistent with national law.<sup>53</sup> Like in other contexts, there has been significant debate over the validity of this reservation.<sup>54</sup>

*B. Customary International Law*

Many international legal scholars have come to the conclusion that the prohibition on the juvenile death penalty now constitutes a rule of customary international law, thus binding all states that are not persistent objectors. Generally, in order for a specific practice to become a customary rule of international law, four elements must be met. First, the practice must be widespread. Second, the practice must be consistent from state to state. Third, the practice must have developed over a significant period of time. Finally, there must be *opinio juris*, which is often defined “as a conviction felt by states that a certain form of conduct is required by international law.”<sup>55</sup>

Scholars have applied the facts to these four principles, noting the widespread and consistent rejection of the juvenile death penalty, the development of the practice over the past fifty years, and the behavior of states showing their general recognition of the prohibition.<sup>56</sup> Given this analysis, they have consistently come to the conclusion that the prohibition on the juvenile death penalty is indeed a customary norm. There is less agreement among scholars as to whether the US is a consistent objector, as the US did not object to the ICCPR at the time of drafting, and failed to file a reservation to the ACHR.<sup>57</sup> Others note, however, that the continued execution of minors in the US constitutes consistent objection.<sup>58</sup>

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<sup>48</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3518, 75 U.N.T.S. 289 [hereinafter Fourth Geneva Convention].

<sup>49</sup> *Id.* art. 68.

<sup>50</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77(5), *adopted* June 8, 1977, 1125 U.N.T.S. 3.

<sup>51</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6(4), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>52</sup> See <http://www.aiipowmia.com/legis/protocoles.pdf>.

<sup>53</sup> William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 305-06 (1995).

<sup>54</sup> Comment, *supra* note 29, at 1093.

<sup>55</sup> MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 29 (6th ed. 1987).

<sup>56</sup> See Comment, *supra* note 29, at 1094-98.

<sup>57</sup> *Id.* at 1097-98.

<sup>58</sup> See, e.g., Bradley, *supra* note 31, at 535.

For the purposes of this paper, it is not necessary to resolve this dispute. Rather, it is only necessary to note that many scholars have found that the prohibition on the juvenile death penalty is a customary norm, and thus binding on nations regardless of their ratification of treaties or the existence of reservations, unless they can be considered consistent objectors.

### C. *Jus Cogens*

Some scholars have suggested that the prohibition on the juvenile death penalty is more than a customary norm, but rather it is a *jus cogens* norm. Determining whether a practice constitutes a *jus cogens* norm is important because such norms are non-derogable.<sup>59</sup> Article 53 of the Vienna Convention on the Law of Treaties defines *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 and which can be modified only by a subsequent norm of general international law having the same character.”<sup>60</sup> Under international law, to be considered a *jus cogens* norm, a practice must satisfy three conditions. First, a large number of states must consider it necessary for international public order. Second, multilateral agreements must prohibit derogation from the norm. Finally, international tribunals must have applied the norm.<sup>61</sup>

The first two criteria have been addressed above. Regarding the third criterion, the Inter-American Commission on Human Rights (IACHR) has applied the prohibition on the execution of juveniles as a *jus cogens* norm in the case of two seventeen year olds who committed murder and were later executed. The Commission held that the prohibition on the execution of minors had reached the status of *jus cogens*, although the rule had not yet ripened into a customary norm.<sup>62</sup> This was the first case to state that the prohibition on the juvenile death penalty constitutes a *jus cogens* norm.<sup>63</sup> Nevertheless, Commission’s decision has been criticized, particularly its adoption of the “regional *jus cogens*” principle, which ignored the international nature of the *jus cogens* obligation.<sup>64</sup>

There has been considerable controversy in the international legal community about whether the prohibition on the juvenile death penalty rises to the level of a *jus cogens* norm. While many of the proponents put forward facts such as those discussed above, others question the position on a fundamental level. For example, one author notes:

[I]t may be difficult to justify the placement of capital punishment for sixteen- and seventeen-year-old murderers in the same category as genocide, slavery, and torture. Indeed, there is a danger that the “shock the conscience” nature of the *jus cogens* concept will be undermined by expanding the category in this way.<sup>65</sup>

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<sup>59</sup> Reimels, *supra* note 32, at 332.

<sup>60</sup> Vienna Convention on the Laws of Treaties, art. 53, May 23, 1980, 1155 U.N.T.S. 331.

<sup>61</sup> Comment, *supra* note 29, at 1102.

<sup>62</sup> Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987), reprinted in Inter-American Commission on Human Rights, Inter-American Yearbook on Human Rights 260 (1987).

<sup>63</sup> Since then, the Inter-American Commission on Human Rights has re-affirmed its ruling in three cases, all decided in 2003. See Gary Graham v. United States, Report No. 97/03, Case No. 11.193, Dec. 29, 2003; Napoleon Beazley v. United States, Report No. 101/03, Merits Case 12.412, Dec.29, 2003; Douglas Christopher Thomas v. United States, Report No. 100/03, Case No. 12.240, Dec. 29, 2003.

<sup>64</sup> Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987), reprinted in Inter-American Commission on Human Rights, Inter-American Yearbook on Human Rights 260 (1987), at 322.

<sup>65</sup> Bradley, *supra* note 31, at 537-38.

Once again, the purpose of this paper is not to analyze the competing claims on this subject, but rather to present the various sources in international law that come into play on this issue. While some legitimate arguments have been raised in favor of considering the prohibition on the juvenile death penalty a *jus cogens* norm, ultimately there is no general agreement on this subject.

#### *D. International case-law*

While there is little case law on the legality of the juvenile death penalty under international law, the Soering case, provides some background. Soering, a German national, was charged with murdering two people in the US when he was eighteen.<sup>66</sup> He had fled to England following the murders, and the US requested extradition so that Soering could face capital murder charges. The case was ultimately heard before the European Court of Human Rights. The Court had to determine whether extradition to the US would violate the European Convention on Human Rights. The court's decision, instead of focusing on the nature of the execution itself, hinged on the "death row phenomenon," which is a combination of psychological factors prisoners experience while awaiting execution. The court found that this alone would be inhumane.<sup>67</sup> Given this, the court held that the death row phenomenon constituted the type of inhuman and degrading treatment prohibited by Article 3 of the European Convention.<sup>68</sup> Because the extradition would potentially violate the European Convention, it was blocked.<sup>69</sup> Even though Soering was not a juvenile when he committed the crime, the court noted that Soering's age factored into its determination.<sup>70</sup>

### **Part III – The Role of International Law in the *Simmons* Decision**

The use of international law in the Supreme Court's interpretation of the Eighth Amendment has followed a rather circuitous path. International law was first consulted by the Court in 1958, in *Trop v. Dulles*, a case considering whether expatriation as penalty for desertion from the military violated the Eighth Amendment. It considered the laws of "civilized nations of the world" in determining the evolving standards of decency and deciding that this penalty was unconstitutional.<sup>71</sup> The Court continued this practice in later cases.<sup>72</sup> However, in *Stanford v. Kentucky*,<sup>73</sup> the first case to consider the juvenile death penalty, the majority of the Court rejected any consideration of international law.<sup>74</sup> Nevertheless, international law reappeared as a significant consideration in 2002, in *Atkins v. Virginia*, where the Court, considering the constitutionality of executing the mentally retarded, recognized the international community's "overwhelming disapproval" of the practice.<sup>75</sup> A significant reason for this return to international law and public opinion is the change in composition of the Court. In 1989, when *Stanford* was decided, three of the

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<sup>66</sup> *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, ¶ 12 (ser. A) (1989), reprinted in 28 I.L.M. 1063 (1989).

<sup>67</sup> *Id.* ¶¶ 76-77.

<sup>68</sup> ¶¶ 99-100.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* ¶ 111.

<sup>71</sup> *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

<sup>72</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>73</sup> 492 U.S. 361 (1989).

<sup>74</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is the American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.").

<sup>75</sup> *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

justices (Souter, Ginsburg, and Breyer) who formed the majority in *Atkins* and *Simmons* were not yet on the Court. Justice Stevens, in the majority in both *Atkins* and *Simmons* was on the Court in 1989, but was in the dissent in the *Stanford* decision, which explicitly referenced international law in its analysis.<sup>76</sup> The only surprising change is Justice Kennedy, who was in the majority in the *Stanford* decision,<sup>77</sup> but then joined the majority in the *Atkins*,<sup>78</sup> and wrote the opinion in *Simmons*.<sup>79</sup> Overall, the change in the Court's opinions towards international law came about primarily through changes in the composition of the Court, rather than a widespread change in judicial philosophy among existing members of the Court, with the possible exception of Justice Kennedy.

Looking more closely at the *Simmons* decision itself, international law initially appears to play a secondary role in the court's holding. A closer examination, however, demonstrates a far more significant role for international law than the Court reveals.

There are two indicators that the Court appears to discount the importance of international law. First, the Court openly states that international law does not control on this issue. It notes early on that even though the US is the only country to officially sanction the juvenile death penalty, this is not "controlling, for the task of interpreting the Eighth Amendment remains [the Court's] responsibility."<sup>80</sup> Nevertheless, the views of the international community are "instructive" in the interpretation of the Eighth Amendment.<sup>81</sup> Later, the Court again puts the relevance of international law into perspective, stating that "the opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions."<sup>82</sup>

Second, the Court refers to international law only as tertiary support for the other two justifications it puts forward for its new interpretation of the Eighth Amendment – national consensus against the death penalty<sup>83</sup> and scientific research.<sup>84</sup> Only after considering these two sources did the Court turn to international law. This placement in the opinion suggests that international law is considered less persuasive and less important than the other two considerations.

Nevertheless, a closer examination of the two primary justifications the Court puts forward suggests that international law played a much more important role than the Court officially reveals. As will be discussed below, this is not "international law" in the traditional sense of treaties or customary law, but rather international public opinion (in the form of laws of other nations), which is so overwhelmingly opposed to the juvenile death penalty that the Court was left with little choice but to abolish it in the US as well.

Consider first the supposed "national consensus" in favor of prohibiting the juvenile death penalty. The dissent questioned the development of such a consensus.<sup>85</sup> Justice Scalia's analysis is especially illustrative. He notes first that prior cases have required "overwhelming opposition to a challenged practice, generally over a long period of time."<sup>86</sup> For example, no jurisdiction allowed execution of the criminally insane when the Court declared it unconstitutional, and 78% of the states prohibited execution of a participant in a robbery when an accomplice committed murder. Even

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<sup>76</sup> *Stanford*, 492 U.S. at 365; 389-90 (Brennan, J., dissenting).

<sup>77</sup> *Id.* at 365.

<sup>78</sup> *Atkins*, 536 U.S. at 306.

<sup>79</sup> *Roper v. Simmons*, 543 U.S. 551, 555 (2005).

<sup>80</sup> *Id.* at 575.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 578.

<sup>83</sup> *Id.* at 565-68.

<sup>84</sup> *Id.* at 568-72.

<sup>85</sup> *Id.* at 607 (O'Connor, J., dissenting), 609 (Scalia, J., dissenting).

<sup>86</sup> *Id.* at 609 (Scalia, J., dissenting).

then, the Court was hesitant to find a national consensus.<sup>87</sup> In contrast, a 42% agreement among states on the juvenile death penalty in *Stanford* was found to be insufficient to show a national consensus. Thus, Scalia argues, the consensus found in *Simmons*, which is only slightly higher than that rejected in *Stanford*, is insufficient under the Court's own jurisprudence to establish a national consensus.<sup>88</sup> Clearly, a situation where nearly half (20) of the states overall, and more than half of those that allow the death penalty (20 of 37) do not prohibit the execution of juvenile offenders, is not indicative of a "national consensus". Scalia also cites statistics which show that the number of 16 and 17 year old offenders sentenced to death has held steady, or even increased slightly since *Stanford*. Scalia concludes that "these statistics in no way support the action the Court takes today".<sup>89</sup> Given this comparison, the national consensus the majority uses to support its holding is much weaker than it suggests. The Court may have been more willing to rely on a weaker consensus than it did in the past because of the overwhelming international opposition to the juvenile death penalty.

This conclusion is further supported by an examination of the second justification the Court puts forth – the distinct nature of the juvenile offender. Several of the studies and prior cases that the Court cites to support its conclusions about the differences between adults and juveniles date from the 1960s to the early 1980s, well before the Court last considered the juvenile death penalty in 1989.<sup>90</sup> Studies which demonstrate that juveniles lack maturity and are more susceptible to negative influences than adults certainly existed at the time the Court decided *Stanford*. Further, as Justice Scalia points out in dissent, the results of these studies are not conclusive, as other research contradicts their conclusions – the Court merely chose those studies that supported its preferred conclusion.<sup>91</sup> Regardless of whether one ultimately chooses to accept the research or not, it is clear that such research did not present new information to the Court. Similar research was so inconsequential to the Court when it decided *Stanford* that it devoted no significant attention to the studies whatsoever. It is unclear why the Court chose to rely so heavily on scientific research in *Simmons* when research of a similar character was ignored in *Stanford*.

Thus, neither the national consensus nor the scientific research on the nature of juveniles could alone support the decision to overrule *Stanford*. From this, one can conclude that international developments were decisive in the Court's decision to overturn its own precedent.<sup>92</sup>

While the Court did look to international human rights treaties in support of its conclusion, noting several, including the ICCPR, it referred to such treaties only once, in one paragraph, and devoted no attention to US obligations under such treaties.<sup>93</sup> In contrast, the majority of the Court's discussion of international law was dominated by reference to the laws of other nations. The Court noted the "stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"<sup>94</sup>, that "only seven countries other than the United States have executed juvenile offenders since 1990"<sup>95</sup>, and that the "United States now stands alone

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<sup>87</sup> *Id.* at 610.

<sup>88</sup> *Id.* at 609.

<sup>89</sup> *Id.* at 615.

<sup>90</sup> *Id.* at 568 (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); 570 (citing ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

<sup>91</sup> *Id.* at 616-17.

<sup>92</sup> For more on this, see David Sloss, *Book Review: Do International Norms Influence State Behavior? The Limits of International Law*, 38 GEO. WASH. INT'L L. REV. 159, 181 (2006).

<sup>93</sup> The Court noted several treaties all in one string citation. *Simmons*, 543 U.S. at 576 (citing the CRC, the ICCPR, the ACHR, and the African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999)).

<sup>94</sup> *Id.* at 575.

<sup>95</sup> *Id.* at 577.

in a world that has turned its face against the juvenile death penalty”.<sup>96</sup> The Court goes further into its examination of the laws of foreign nations, taking a full paragraph to review the abolishment of the juvenile death penalty in the United Kingdom.<sup>97</sup> The Court concludes that:

[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions . . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the *express affirmation of certain fundamental rights by other nations and peoples* simply underscores the centrality of those same rights within our own heritage of freedom.<sup>98</sup>

The importance of international opinion is even more apparent when one looks behind the scenes at the other influences presented to the Court, including pleas made by a coalition of international organizations and states in the years leading up to the *Simmons* decision. In private diplomatic exchanges, many states urged the US to prohibit the juvenile death penalty.<sup>99</sup> Further, amicus briefs filed by several retired US diplomats argued that the continuation of the juvenile death penalty would put a strain on ties between the US and other nations, particularly its established allies. Pressure also came from the UN, in the form of resolutions from the UN Human Rights Commission, which condemned the execution of juvenile offenders every year since 1997.<sup>100</sup>

It is difficult to know for sure why international public opinion held more weight for the Court than treaty or customary obligations. One possibility, however, is that international public opinion may be more relevant to the American public than any obligation under international law, especially when that opinion is so overwhelming. The Court may have felt it especially important to provide such reasoning, given the brutality of the crime at stake in *Simmons*, and the still substantial support among the states for the juvenile death penalty. The decision to abolish the juvenile death penalty is as much a policy determination as a legal one, as the words of the Eighth Amendment provide little guidance. If the Court were to base its conclusion on international treaties or customary international law, the reasoning might be too obscure for most people to accept. Further, as discussed above, US obligations under those treaties or customary law have been the subject of controversy. A decision to abolish the juvenile death penalty becomes easier to understand when it becomes clear that the US is alone on this issue – the abolishment of the juvenile death penalty is not simply some aspirational goal contained in a treaty, but rather a reality, accepted by every nation except the US. Understood in this light, the Court’s rationale makes more sense.

Overall, then, one can conclude that international law and practice played a larger role in the Court’s holding than it suggests. While international treaties factored into the decision, the Court appeared to be most moved by overwhelming international opinion. Only at one point in the opinion are international treaties mentioned, and nowhere does the Court expound on any formal obligation the US may have under any such treaty or customary norm.

The question remains whether the Supreme Court will be influenced by international practice in other areas of international human rights law where a clear consensus at the international level is growing, such as the death penalty for adult offenders. This is considered in Part IV.

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 577-78.

<sup>98</sup> *Id.* at 578 (emphasis added).

<sup>99</sup> Sloss, *supra* note 92, at 177-78.

<sup>100</sup> *Id.*; see *supra* notes 37-38 and accompanying text.

#### **Part IV – The Influence of International Law in Future Decisions Facing the United States**

The next important step facing the Supreme Court is whether to declare the adult death penalty unconstitutional. As the situation relating to the adult death penalty is sufficiently different from that relating to the juvenile death penalty, the Court may not be influenced by international law in the same way at this point in time.

First, as noted above, the Supreme Court considers national consensus when examining the “evolving standards of decency” under the Eighth Amendment. As the Court was already pushing the concept of “consensus” when it found that a ban by 60% of the states was sufficient to establish a “national consensus” on the subject of the juvenile death penalty, a ban by only 24% of the states in relation to the adult death penalty would be wholly insufficient to establish a consensus.<sup>101</sup> Given this, the Court would be unlikely to even consider international law in its analysis of the issue. Additionally, the recent changes on the Court could affect its future willingness to look to international law. The Court already has two outspoken critics of the use of international law in resolving Eighth Amendment questions,<sup>102</sup> and, with the recent changes on the Court, it is possible that this view could soon attract a majority, as it did in *Stanford v. Kentucky*.<sup>103</sup>

If the Court were to consider international law, both in terms of international treaty law and the law of other nations, it would find that the picture is far less clear for the adult death penalty than it is for the juvenile death penalty. Several of the most important international human rights law treaties do not contain an absolute ban on the death penalty. The ICCPR states, in Article 6(2), that for countries that retain the death penalty, the “sentence of death may be imposed only for the most serious crimes”.<sup>104</sup> While the Second Optional Protocol to the ICCPR does call for the abolition of the death penalty, fewer countries have signed or ratified it.<sup>105</sup> Other treaties, such as the ACHR, also do not call for the abolition of the death penalty, but only call for it to be applied to the “most serious crimes”.<sup>106</sup> Once again, while a Protocol to the ACHR does call for a ban on capital punishment,<sup>107</sup> few nations have signed or ratified it.<sup>108</sup> The Fourth Geneva Convention also does not require a ban on the death penalty.<sup>109</sup> Further, comments from the UN High Commissioner on Human Rights have not stressed abolishing the death penalty altogether to the same extent that it has stressed the importance of limiting the death penalty to the “most serious crimes”, and ensuring adequate process before the death penalty is imposed.<sup>110</sup> While some may argue that this is just a preliminary step towards total abolition, it demonstrates that the US, which imposes the death penalty only for egregious crimes<sup>111</sup> and subject to many procedural protections, is not outside the main stream to the extent it was in relation to the juvenile death penalty.

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<sup>101</sup> For statistics, see *Simmons*, 543 U.S. at 581.

<sup>102</sup> These are Justices Scalia and Thomas, who dissented in *Simmons*.

<sup>103</sup> 493 U.S. 361 (1981).

<sup>104</sup> ICCPR, *supra* note 26, art. 6(2).

<sup>105</sup> Protocol II, *supra* note 51, art 1. There are only 45 parties to the Second Protocol, and 25 of these are the members of the European Union. See [http://www.europarl.eu.int/comparl/libe/elsj/charter/un\\_legislation\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/charter/un_legislation_en.htm).

<sup>106</sup> American Convention, *supra* note 39, art. 4(2).

<sup>107</sup> Protocol to the American Convention on Human Rights to Abolish the Death Penalty, opened for signature June 8, 1990, art. 1, O.A.S. T.S. No. 73.

<sup>108</sup> See <http://www.oas.org/juridico/english/Sigs/a-53.html>. Only 9 of 33 countries have signed and ratified it.

<sup>109</sup> Fourth Geneva Convention, *supra* note 48, art. 68.

<sup>110</sup> General Comment No. 06: The Right to Life (art. 6) 30/04/82, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument).

<sup>111</sup> See Initial Reports of States Parties Due in 1993: United States of America. 24/08/94. CCPR/C/81/Add.4 (State Party Report) ¶ 133.

Further, the number of retentionist countries remains quite high. As of 2005, 74 countries retain the detain penalty.<sup>112</sup> This is certainly nowhere near the consensus seen in relation to the juvenile death penalty. While it is true that the US remains one of the few democracies to retain the adult death penalty,<sup>113</sup> the numbers are likely insufficient to compel the Court to change US practice, especially in the face of significant national support for the death penalty.<sup>114</sup>

Thus, while one might expect from the reasoning of *Simmons* that the Supreme Court would decide to abolish the death penalty for all offenders if the international community presented a united front against it, the lack of such unanimity, together with no clear national consensus against the adult death penalty, suggests that no such decision is on the way.

## **Part V – Conclusion**

Prior to the Supreme Court's decision in *Roper v. Simmons*, the US was the only country to officially sanction the juvenile death penalty. This practice put the US at odds with several international human rights instruments and, some would argue, customary international law. When the question came before the Supreme Court in *Simmons*, however, it was not any specific obligation under those instruments or customary law that led the Court to declare the practice unconstitutional, but rather international practice – “peer pressure” from every other nation in the world, not just the most liberal ones, that tipped the scales in favor of abolishment. While the Supreme Court majority tried to play down the importance of international practice in its interpretation of the Eighth Amendment, a deeper analysis of the opinion shows that the overwhelming international consensus played a significant, if not determinative, role in the outcome of the case.

It seems unlikely that the *Simmons* decision signals a trend in the Court's consideration of other American practices that may be at odds with current international human rights law, such as the adult death penalty. Given that there is a less clear international consensus as to the adult death penalty, and substantial national support for it, it seems unlikely that the Court would declare it unconstitutional anytime soon. Nevertheless, if the situation were to change, the same considerations that led to the Court's decision in *Simmons* might play a role in a reconsideration of the death penalty in general.

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<sup>112</sup> See, e.g., <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

<sup>113</sup> *Id.*

<sup>114</sup> Some have argued that practical considerations, such as the refusal of foreign nations to extradite offenders to the US when the death penalty remains an option, may force the US to ultimately eliminate or dramatically scale back its use of the death penalty. See e.g., Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, FOREIGN SERVICE J. (2003), available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=806>.