

UPDATE ON THE JUVENILE DEATH PENALTY

By: Connie de la Vega and Chelsea Haley Nelson*

Introduction

The imposition of the juvenile death penalty, and the number of countries practicing it, have been steadily decreasing over the last 10 years. Moreover, the practice of executing those who were under the age of 18 at the time of their crime is directly prohibited by the International Covenant on Civil and Political Rights (ICCPR), by the U.N. Convention on the Rights of the Child, and the American Convention on Human Rights. So broad is the acceptance of this ban that it is widely recognized as a norm of customary international law or a *jus cogens* norm.

The United States remains the only country to continue to execute juvenile offenders as part of its criminal justice system. As of January 2004, more than 70 juvenile offenders sat on death rows throughout the United States; this constitutes approximately 2% of the total death row population. Yet, support for the juvenile death penalty in the United States remains low. A 2002 Gallup poll survey found that 69 percent of Americans oppose capital punishment for juvenile offenders. In

addition, four Supreme Court Justices recently described the execution of young offenders as a “relic of the past” and a “shameful practice” that should be ended.

The recent international and national developments regarding the juvenile death penalty are summarized in this report.

A. Developments in International Law

1. Jus Cogens

International human rights advocates argue that the prohibition against the practice of executing persons who were younger than 18 years old at the time of the commission of the crime, has risen to the level of *jus cogens* because: it is general international law based on the numerous treaties and international resolutions that prohibit it; the prohibition is accepted almost unanimously by states as a whole; the prohibition is immune from derogation because the ICCPR states that there shall be “no derogation from Article 6” which prohibits juvenile death penalty; and the prohibition is not contradicted by any emerging norm of the same status. Because the juvenile death penalty satisfies all three of the elements laid out by the Vienna Convention on the Law of Treaties, it has become *jus cogens*.

Numerous treaties, declarations and pronouncements by international bodies, evidence that the execution of persons who are under the age of 18 at the time their crime, is now generally accepted in international law. Among these treaties are the International Covenant on Civil and Political Rights, article 6(5); the Convention on the Rights of the Child, article 37(a); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 68; and the American Convention on Human Rights, Chapter 2, Article 4, Section 5. Similarly, a resolution of the United Nations Economic and Social Council opposed the imposition of the death penalty for juvenile offenders. *See Safeguards Guaranteeing*

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Protection of the Rights of those Facing the Death Penalty, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. No. 1, at 33, E/1984/84 (1984). And in 1985, the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, which opposes capital punishment for juveniles. See G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. No. 53, at 207, A/40/53(1985).

In addition, since 1997, the United Nations Human Rights Commission has passed annual resolutions calling on all states “not to impose [the death penalty] for crimes committed by persons below the 18 years of age.” See The Question of Death Penalty, Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); The Question of the Death Penalty, Resolution 2000/65, adopted April 27, 2000, E/CN.4/RES/2000/65 (2000); The Question of the Death Penalty, Comm. On Hum. Rts., 57th Sess. Resolution 2001/68, adopted April 25, 2001, E/CN.4/RES/2001/68 (2001); The Question of the Death Penalty, Comm. On Hum. Rts. 58th Sess. Resolution 2002/77, adopted April 25, 2002, E/CN.4/RES/2002/77 (2002); The Question of the Death Penalty, Comm. On Hum. Rts. 59th Sess., Resolution 2003/67, adopted April 24, 2003, E/CN.4/RES/2003/67 (2003). Those Commission resolutions passed with a number of dissenting voices, reflecting the fact that they also called for a moratorium on the death penalty generally. However, other Commission resolutions that mention only the prohibition against the juvenile death penalty, in particular the Rights of the Child, have passed by consensus for the passed three years. While the United States opposed the resolution in 2004, the resolution passed by a vote of 52-1 See Rights of the Child, Comm. On Hum. Rts. 60th Sess. Resolution 2004/48, adopted April 14, 2004, E/CN.4/RES/2004/48 (2004).

Other international bodies have reached the same conclusion. Since the Inter-American Commission on Human Rights’ initial decision

in October 2002 finding that the juvenile death penalty has risen to the level of *jus cogens*. (See: Report No. 62/02, Case No. 12.285, *Domingues v. United States*, ¶ 84-85 (2002), the Commission has come to the same conclusion in three additional cases: *Napoleon Beazley v. United States*, Inter-American Commission on Human Rights, Report No. 101/03, Merits Case 12.412, December 9, 2003; *Gary Graham v. United States*, Report No.97/03, Case No. 11.193, December 29, 2003; *Douglas Christopher Thomas v. United States*, Report No. 100/03, Case No. 12.240, December 29, 2003.

2. The 60th Session of United Nations Commission on Human Rights

At the United Nations Commission on Human Rights in spring 2004, the United States attempted to change language that condemned execution of juvenile offenders. The issue of juvenile death penalty was addressed under agenda item 13, rights of the child.

During drafting meetings of a resolution to the Convention of the Rights of the Child, members of the United States Delegation continually tried to change the language and force other delegations to agree. Ultimately, no change was made and the resolution went to a vote, where the United States was the sole vote against the entire resolution.

The previous year, at the 59th session, the United States was the only country to vote against a similar paragraph condemning the juvenile death penalty, but the rest of the resolution passed successfully. In U.S.’s statement regarding the vote this year, they requested that the process be changed to increase transparency in the process of drafting the resolution (See: *Commission on Human Rights Adopts Resolutions on Rights of Women and Children, Specific Groups, Indigenous Issues*, April 20, 2004, available at: <http://www.unhchr.ch/hurricane.nsf/NewsRoom>

?OpenFrameSert). This comment seemed out of place due to the fact that the drafting of the Rights of the Child held the most open sessions for draft resolution meetings. If anything, the drafting of this resolution was more transparent than most such as the resolution on the responsibilities of transnational corporations and related business enterprises with regard to human rights. (E/CN.4/2004/RES/L.73/Rev.1)

During the debate on the floor, Norway made a strong statement for all governments to eliminate juvenile death penalty. Iran stated that they were in the process of passing legislation to prohibit the execution of youth offenders under the age of 18.

B. Recent Developments in the United States Regarding Juvenile Offenders

1. Roper v. Simmons

The United States Supreme Court has granted certiorari to *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003) *cert. granted*: 124 S.Ct. 1171 (2004), wherein Missouri Supreme Court had found that the practice of juvenile death penalty constituted cruel and unusual punishment in violation of the 8th Amendment of the U.S. Constitution. The opinion focused on the developments during the past fourteen years since *Stanford v. Kentucky* 492 U.S. 361 (1989) where U.S. Supreme Court ruled the death penalty for offenders over the age of 16 was constitutional and *Thompson v. Oklahoma*, 487 U.S. 815 (1988) where the Court ruled that death penalty for offenders under the age of 16 constituted cruel and unusual punishment and therefore violated the 8th amendment. The Court noted the international community's universal opposition to the practice and cited the U.N. Convention on the Rights of the Child as both reflective of growing standards of decency.

In the *Amicus Curiae* brief filed by Connie de la Vega; Audrey J. Anderson and William H. Johnson, Hogan & Harston L.L.P.; Thomas H. Speedy Rice, University of Central

England; Philip Sapsford, Queen's Counsel, Goldsmith Chambers; and Hugh Southey on behalf of Human Rights Advocates, Human Rights Committee of the Bar of England and Wales, Human Rights Watch and World Organization for Human Rights—USA, *amici* urge the Supreme Court of the United States to consider international law and opinion when applying the Eighth Amendment clause prohibiting cruel and unusual punishment to ultimately conclude that the standards of the Eighth Amendment have evolved to comply with what is now a preemptory norm of international law. (brief available at: www.humanrightsadvocates.org).

Specifically, *amici* argue that the laws of the United States, since its birth, have been informed and shaped by laws and opinions of the international community, especially those of the United Kingdom. The United States shares its common law heritage with the United Kingdom with many U.S. legal doctrines deriving from the laws and practices of our English ancestors. In fact, the "cruel and unusual punishment" clause of the Eighth amendment traces to English Declaration of Rights in 1688 and the principle itself came from the Magna Carta. Consequently, the experience of England and Wales in determining the permissibility of the juvenile death penalty should guide the Supreme Court. Historically, juvenile offenders were treated with more leniency than adults in UK in the application of the death penalty. The UK reluctance to execute juveniles was codified successively in The Children Act of 1908, 8 Edw. 7, c.67 (eng.) (prohibiting executions of persons under age of 16), and the Children and Young Persons Act of 1933 (prohibiting executions of persons under 18 at time of the sentence). These statutory developments took place at a time when British law still accepted that adults could and should be executed.

Amici also argue that international law and opinion also condemn the execution of juvenile offenders. The prohibition against the

juvenile death penalty has reached the level of *jus cogens* norm, binding on the United States. Even if court not recognize the *jus cogens*, the universality and uniformity of international law on prohibition should weigh heavily in the Court's determination that juvenile death penalty is inconsistent with Eighth Amendment prohibition on cruel and unusual punishment. The importance of recognizing international law and treaty standards as they related to the execution of persons who were under 18 at the time the committed their crime ("juvenile death penalty") is imperative to the future of domestic compliance with international norms, and those international laws and norms are important indicator of how community standards regarding the juvenile death penalty have evolved. Incorporation into the Eighth Amendment of the almost universal prohibition against the juvenile death penalty would bring the United States into compliance with one of the most widely accepted human rights norms.

A number of other *Amicus Curiae* briefs have been filed in support of Respondent, Simmons and make similar international law arguments

The American Bar Association argues that there is growing international consensus that the death penalty is inappropriate for juveniles offenders because violates "evolving standards of decency." The U.S. is virtually alone among the worlds nations in permitting the execution of juvenile offenders, a factor this Court considered in *Thompson* and again in *Atkins*. 2004 WL 1617399. Since 2000, the execution of juvenile offenders in a handful of countries were under special circumstances, leaving the United States as the only country in the world that openly continues to execute juvenile offenders within the framework of its regular criminal justice system. *Id.* The ABA is represented by Dennis W. Archer, Amy R. Sabrin, Mathew W.S. Estes, Kelly D. Makins, Leslie J. Abrams.

48 nations, including, The European Union (Austria, Belgium, Cyprus, Czech

Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom); The Council of Europe (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom); Canada; Iceland; Liechtenstein; Mexico; New Zealand; Norway; and Switzerland have also filed an *Amicus Curiae* brief. *Amici* assert that the execution of persons below 18 years of age at the time of their offenses violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations. Thus, *amici* believe the U.S. position on the execution of juvenile offenders is out of step with the international community. *Amici* are represented by Richard Wilson, Professor of Law, American University.

Additionally, in an *Amicus Curiae* brief filed by former U.S. Diplomats Abramowitz, Bosworth, Eizenstat, Kornblum, Oakley, Pickering, Rohatyn, Roy, and Wisner, *amici* argue that, based on their longstanding experience representing the United States abroad, these diplomats believe that permitting a few select states in the United States to continue the aberrant practice of executing juvenile offenders increasingly isolates this nation from our close allies and impairs U.S. foreign policy interests at a critical time. The U.S. practice of executing juvenile offenders is "manifestly inconsistent with global standards of decency that have been embraced by nearly every nation in the world." 2004 WL 1636448. In addition,

that the execution of persons with mental retardation offends civilized standards of decency, in part, because, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.*, citing *Atkins* 536 U.S. at 316 n.21. The continuation of this practice by a few states in the United States strains diplomatic relations with close American allies and needlessly places U.S. diplomats abroad on the defensive at a critical juncture in our foreign policy agenda. Amici are represented by Donald Francis Donovan, Debevoise & Plimpton, LLP; Stephen Bright, Southern Center for Human Rights; Harold Hongju Koh, James Silk, Mary Hahn, Allard K Lowenstein International Human Rights Clinic, Yale Law School.

Furthermore, *Amicus Curiae* for President James Earl Carter, Jr., President Frederik Willem De Klerk, President Mikhail Sergeyevich Gorbachev, President Oscar Arias Sanchez, President Lech Walesa, Shirin Ebadi, Adolfo Perez Esquivel, the Dalai Lama, Mairead Corrigan Maguire, Dr. Joseph Rotblat, Archbishop Desmond Tutu, Betty Williams, Jody Williams, American Friends Service Committee, Amnesty International, International Physicians for the Prevention of Nuclear War, and the Pugwash Conferences on Science and World Affairs (Nobel Peace Prize Laureates) argue that, in order to answer the question of whether or not death penalty for a crime committed by a person under the age of 18 constitutes cruel and unusual punishment, the Court must consider the opinion of the international community which has rejected the death penalty for child offenders worldwide. The global opinion is relevant to evolving standards of decency that mark the progress of a maturing society. *Amici* note that the Supreme Court historically has considered internationally accepted standards of human rights and decency, and especially should consider international standards in this case.” 2004 WL 1636446. Amici is represented by

Thomas F. Geraghty, Director Blum Legal Clinic, Northwestern University School of Law.

Amici state the prohibition on the juvenile death penalty is widely recognized as a rule of customary international law. The practice of nations almost universally rejects the juvenile death penalty. As a consequence, in a series of decisions against the United States, the Inter-American Commission on Human Rights has found that the customary international law bar on the juvenile death penalty has evolved to *jus cogens* status. All nations are bound by *jus cogens* prohibitions because they “derive their status from fundamental values held by the international community” and violations of such prohibitions are “considered to shock the conscience of humankind.” The unusual strength and clear definition of the international prohibition on the death penalty for offenses committed by children under 18 years old makes it particularly relevant to this Court’s decision whether to extend Eighth Amendment protection in this case. Additionally, *amici* note that the Supreme Court has always maintained a need to construe domestic law so as to avoid violating international law obligations. More specifically, the U.S. Supreme Court has interpreted the fundamental law expressed in the constitutional prohibition on cruel and unusual punishment as protection against acts that, among the nations of the world, are “everywhere forbidden.” *Id.*, citing *Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988); *Gisbert v. United States Attorney General*, 988 F.2d. 1437, 1448 (5th Cir. 1993).

2. Oral Arguments

The United States Supreme Court Wednesday, October 13, 2004, heard oral arguments in the Roper v. Simmons case. “Justices repeatedly referred to amicus arguments filed on behalf of Simmons by foreign leaders, Nobel Peace Prize winners and former U.S. Diplomats.” (“High Court Weighs

Juvenile Death Penalty”, Associated Press, October 13, 2004)

Encouraging were comments and questions raised by some Justices about the relevance of international law and opinion on the juvenile death penalty. Justice Ruth Bader Ginsburg warned that the United States, as a world leader, must “show a decent respect for the opinions of mankind.” (*Id.*) Justice Stephen Breyer asked “Is there some special reason why what happens abroad would not be relevant here?” (*Id.*) In referring to the world opinion against the juvenile death penalty, Justice John Paul Stevens “asked if the court should ignore that America’s global respect was on the line in the case.” (Gina Holland, Associated Press, “Supreme Court Debates Constitutionality of Juvenile Executions”, October 13, 2004.)

In previous years, Justices Ginsburg, Breyer, Stevens and Souter, have taken a stand against the juvenile death penalty saying it is “a relic of the past and is inconsistent with evolving standards of decency in a civilized society.”

Justice Anthony M. Kennedy noted that the rest of the world opposes the execution of juveniles. (*Id.*) He asked with respect to this global consensus against the use of juvenile death penalty, “Does that have a bearing on what’s unusual?” Justice Sandra Day O’Connor spoke only once during the arguments to point out that the statistics on the use of juvenile death penalty showed the same consensus as two years ago against executing the mentally retarded.

James Layton, counsel for Missouri, urged that the Court should not be swayed by “what happens in the rest of the world.” Seth Waxman, attorney for Simmons, in reference to the international condemnation of execution of minors and the United States practice, said that “We are literally alone in the world.” (*Id.*)

Conclusion

The international community continues to reinforce the existence of a universal prohibition against the execution of juvenile offenders. As a result of an upsurge in international pressure and current domestic developments in *Roper v. Simmons*, the United States Supreme Court provided the opportunity to reconsider the matter. Based on comments of Justices during oral arguments, the U.S. Supreme Court seems poised to recognize the impact of international law on the domestic practice of executing juvenile offenders.