

INTERNATIONAL LAW AND THE IMPLEMENTATION OF THE AMERICAN BAR ASSOCIATION RESOLUTION REGARDING THE DEATH PENALTY

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I. INTRODUCTION

My assignment is to consider the emerging international norms and how they might affect implementation of the American Bar Association (ABA) resolution calling for a moratorium on the imposition and enforcement of the death penalty.¹ The American Bar Association

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1. The language of the ABA's resolution follows:

RESOLVED, that the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed; . . .

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims

resolution calls attention to the unfair and unjust practices and procedures with which the death penalty is carried out in the United States. I have looked at the various aspects of the resolution's goals — providing competent legal counsel at all stages of the conviction, sentencing, and appeals processes; preserving due process, especially in adjudication of constitutional claims in state post-conviction proceedings and in federal habeas corpus proceedings; elimination of discrimination in death sentences on the basis of race of either the victim or the defendant; and prevention of execution of persons who were juveniles under the age of eighteen or mentally retarded at the time they committed their offenses.

In my allotted time, however, I will begin with a glance at selected recent major developments in international fora regarding capital punishment. This will be followed by a comparison between the Eighth Amendment of the United States Constitution and the International Covenant on Civil and Political Rights, and other international human rights instruments as they bear on the death penalty. Then I will discuss primarily three aspects: racial discrimination, the execution of juveniles, and the execution of mentally retarded persons.

Coincidentally, the day of the ABA vote, February 3, 1997, was also marked by the decision announced in *Gomez v. Acevedo*,² in which a panel of the Seventh Circuit ruled that the Federal Anti-Terrorism and Effective Death Penalty Act of 1996³ narrows the scope of federal habeas

in state post-conviction and federal habeas corpus proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

See James Podgers, *Time Out for Executions — ABA Action at the Midyear Meeting is Expected to Stir Renewed Debate on the Death Penalty*, 83 A.B.A.J. 26 (Apr. 1997); Gina Chon, *ABA Reinigorates Death Penalty Debate*, 24 HUM. RTS. 8 (Spring 1997). For a comprehensive study on the implementation of the ABA's recommendation regarding the moratorium, see Randall Coyne & Lyn Entzeroth, *Report Regarding implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3 (1996) [hereinafter Coyne & Entzeroth].

2. *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir. 1997), cert. denied, Oct. 6, 1997, 1997 U.S. LEXIS 4568.

3. 110 Stat. 1214 (1996).

corpus review of state court decisions in capital cases. The panel held that the new section 2254(d) of Title 28 (28 U.S.C. 2254(d))⁴ mandates that federal courts give deferential review to state court decisions on claims pertaining to sufficiency of the evidence.⁵ The court held that the new section 2254(d)(1) requires only deferential review for reasonableness on mixed questions in habeas proceedings.⁶ The court said that it was

compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the *Jackson*⁷ standard. Federal review of these claims, therefore, now turns on whether the state court provided fair process and engaged in reasoned, good-faith decision making when applying *Jackson's* no rational trier of fact test.⁸ As we stated in *Lindh*, section 2254(d)(1), requires federal courts to take into account the care with which the state court considered the subject. . . . [A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.⁹

II. DEVELOPMENTS IN INTERNATIONAL FORA REGARDING CAPITAL PUNISHMENT

The movement to ban capital punishment worldwide has been ongoing at the United Nations and in other international fora since the 1960s.¹⁰ In 1968 the United Nations General Assembly adopted a resolution declaring the objective of gradually but progressively restricting

4. This section prohibits federal courts from granting a writ of habeas corpus on a claim adjudicated on the merits in state court, unless such adjudication 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

5. *Gomez*, 106 F.3d at 193-94.

6. *Id.* at 199, citing *Lindh v. Murphy*, 96 F.3d 856, 870-71 (7th Cir.1996) (en banc), cert. granted in part, 117 S.Ct. 726 (1997).

7. *Jackson v. Virginia*, 443 U.S. 307 (1979) (which expanded the availability of the writ of habeas corpus).

8. There the court had said that a federal court may grant habeas relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

9. *Gomez*, 106 F.3d at 199, quoting *Lindh*, 96 F.3d at 871.

10. See generally WILLIAM A. SCHABAS, *THE ABOLITION OF DEATH PENALTY IN INTERNATIONAL LAW* (1993); Ariane M. Schreiber, *Note, States That Kill: Discretion and the Death Penalty — A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263 (1996).

the range of offenses punishable by death.¹¹ Two decades later, in 1989, the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights,¹² obligating each state party to "take all necessary measures to abolish the death penalty within its jurisdiction," and acknowledging a worldwide effort to abolish capital punishment for all purposes.¹³

In 1994 a United Nations draft resolution called for a worldwide moratorium on capital punishment and for a global ban on the death penalty by the year 2000.¹⁴ Although the resolution was rejected by the General Assembly's Social, Humanitarian, and Cultural Committee by a vote of 44 to 33, there were 74 abstentions,¹⁵ which left the door open for such initiatives in the future. More recently, the United Nations Commission on Human Rights has called for the abolition of the death penalty.¹⁶

In international fora, the American Convention on Human Rights in 1978 forbade capital punishment for "political offenses or related common crimes" and prohibited the execution of "persons who, at the time the crime was committed, were under eighteen years of age or over seventy years of age," or pregnant women.¹⁷ The Convention limited the death penalty to only the most serious crimes, and mandated that it "shall not be reestablished in the states that have abolished it," and that its application "shall not be extended to crimes to which it does not presently apply."¹⁸ Subsequently, the 1984 Protocol to the American Convention on Human Rights to Abolish the Death Penalty resolved "in accordance with the spirit of Article 4 [of the Convention] and the universal trend to eliminate the death penalty, [to] call on all countries in the Americas to abolish it."¹⁹

11. UN GAOR 3rd Comm., 23d Sess., agenda item 59, U.N. Doc. A/Res./2393 (XXIII) (1968).

12. *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, 44th Sess., supp. no. 98, operative para. 2, U.N. Doc. A/RES/44/128 (1990).

13. *Id.* at Annex, art. 1(2).

14. See E. Leopold, *U.N. Panel Defeats Resolution on Capital Punishment*, REUTERS WORLD SERVICE, Dec. 10, 1997 (available in LEXIS, Nexis Library).

15. *Id.*

16. The vote last year was 27 in favor to 11 against with 14 abstentions.

17. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. no. 36, at 1, art. 4 (*entered into force* July 18, 1978).

18. *Id.*

19. Inter-Am. Commission on Human Rights, Annual Report 1984-1985, O.A.S. Doc. OEA/Ser. L./V./II. 77 doc. 10 rev. 1, at 10 (1985).

In Europe, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁰ which was entered into force in 1953, recognized capital punishment as an exception to the right to life. In 1985, however, European states adopted Protocol No. 6 to the European Convention Concerning the Abolition of the Death Penalty.²¹ It declared the abolition of the death penalty in time of peace. Article 1 of the Protocol explicitly states, "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Its Preamble states that the Protocol had its genesis in the recognition that several member states of the Council of Europe had experienced an evolution which "expresses a general tendency in favor of abolition of the death penalty."²² Under the Protocol, parties are still allowed to impose death sentences for acts committed in time of war or during a time of imminent threat of war.²³ No reservations are permitted to any of its provisions.²⁴ In October 1997, the Council of Europe, meeting in Strasbourg, endorsed a moratorium on capital punishment. Among the prior holdouts, Ukraine and Russia have now signed the Sixth Protocol and are committed to abolition.

Among the fifty-three members of the organization for Security and Cooperation in Europe, the United States now stands alone in opposing the moratorium on the death penalty or its abolition. In extradition cases, the United States is consistently being refused extradition by many countries²⁵ until it gives undertakings not to impose the death penalty on the extraditee.

The United States, having ratified the International Covenant on Civil and Political Rights (ICCPR),²⁶ the Convention Against Torture and

20. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention].

21. Protocol No. 6 of the Convention for the protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* April 28, 1983, E.T.S. No. 114, *reprinted in* 22 I.L.M. 538 (1983) (*entered into force* March 1, 1985).

22. *See* COUNCIL OF EUROPE, THE DEATH PENALTY IN EUROPEAN COUNTRIES (1962). In 1973, the Council adopted a resolution stating that capital punishment was "inhuman and degrading within the meaning of Article 3 of the European Convention." Eur. Consult. Assn., 25th Sess., Doc. No. 3297, at 2 (1973).

23. *Id.* art. 2.

24. *Id.* art. 4.

25. *See generally* AMNESTY INTERNATIONAL, WHEN THE STATE KILLS THE DEATH PENALTY, A HUMAN RIGHTS ISSUE 85 (1989); John Palk, *Note -Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239 (1993).

26. International Covenant on Civil and Political Rights, GA Res. 2200 A(XXI), U.N. GAOR, 21st Sess., 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].

Other Cruel, Inhuman or Degrading Treatment or Punishment²⁷, and the International Convention on the Elimination of Racial Discrimination (ICERD),²⁸ is obligated under international law to comply with their various applicable provisions pertaining to capital punishment. These obligations exist notwithstanding the various reservations, understandings, and declarations that relate to the practice and procedures of death penalty sentencing within the United States, for example, the United States reservation regarding imposition of the death penalty on juveniles.²⁹ In addition, even though the United States has simply signed but not ratified the Convention on the Rights of the Child,³⁰ since the signing was without reservations, it could be argued under the Vienna Convention on the Law of Treaties³¹ that the United States must not violate the Convention provision which bans execution of those who committed the offense while younger than eighteen.

It may be recalled that the ICCPR includes the obligation on state parties to "respect and ensure to all individuals within its territory and subject to its jurisdiction" the basic right of nondiscrimination,³² the right to a fair trial,³³ and specific rights in respect of death penalty sentencing.³⁴ Although the Covenant does not prohibit the death penalty, it restricts the application of capital punishment with special safeguards and with a view to its ultimate abolition.³⁵ The Race Convention obligates parties to "pursue by all appropriate means and without delay a policy of eliminating

27. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984) (*entered into force* June 26, 1987).

28. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966) (*entered into force* Jan. 4, 1969) [hereinafter ICERD].

29. Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 19(c), 115 U.N.T.S. 331 (*entered into force* Jan. 27, 1980): the reservation must not be "incompatible with the object and purpose of the treaty." [hereinafter Vienna Convention.].

30. Convention on the Rights of the Child, U.N. GAOR, 3rd Comm., 44th Sess., Agenda Item 108, UN Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1457 (1989).

31. Vienna Convention, *supra* note 29, art. 18 (a) (a state that has signed a treaty "is obliged to refrain from acts which would defeat the object and purpose of [that] treaty").

32. ICCPR, *supra* note 26, arts. 2, 26.

33. *Id.* arts. 2, 14.

34. *Id.* arts. 2, 6.

35. *Id.* art. 6.

racial discrimination in all its forms.”³⁶ It includes the right to equal treatment before the courts.³⁷

Two general comments are in order. First, in 1996 the International Commission of Jurists sent a fact finding mission to the United States to study the administration of the death penalty in this country — to investigate both federal and state practices and procedures in respect of capital punishment sentencing.³⁸ It found that almost no attention was given to accepted international norms in the administration of the death penalty in the United States, specifically to United States obligations under the ICCPR and the ICERD.³⁹ The ICJ urged “the United States and other countries with death penalty sentencing . . . to take the necessary steps to ensure that there is greater compliance with their international obligations.”⁴⁰

Second, in light of the United States ratification of these instruments, it is necessary to revisit Justice Scalia’s opinion in *Stanford v. Kentucky*,⁴¹ when he wrote for the plurality that sentencing practices of foreign countries, if they did not reflect American conceptions of decency, were not relevant. In his words,

we emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant. While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty, that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.⁴²

36. ICERD, *supra* note 28, art. 2.

37. *Id.* art. 5(a).

38. For a report, see International Commission of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165 (1997) [hereinafter ICJ Report].

39. *Id.* at 169.

40. *Id.* at 170.

41. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

42. *Id.* at 369 n.1, *quoting* *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting).

It is useful to recall that a year earlier in *Thompson v. Oklahoma*,⁴³ in which the question was whether the implementation of a death sentence on a person who was fifteen years of age when he committed a capital crime would violate the Cruel and Unusual Clause of the Eighth Amendment, the Court held that the execution of any person under the age of sixteen at the time of the offense would violate the Eighth Amendment guarantees. Justice Stevens' plurality opinion held that "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense,"⁴⁴ and interpreted evolving standards of decency in the light of standards under international law as well as the practices of other nations,⁴⁵ specifically citing the practices of western European democracies. It was in *Trop v. Dulles*⁴⁶ that, while analyzing and interpreting the Eighth Amendment, the Supreme Court observed that the "evolving standards of decency that mark the progress of a maturing society" must be considered.⁴⁷

III. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PERTINENT INTERNATIONAL INSTRUMENTS

Under the Eighth Amendment to the United States Constitution, "cruel and unusual punishments" shall not be inflicted. The comparable language under the International Covenant on Civil and Political Rights (ICCPR) is that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁴⁸ This language is identical to that used in the Universal Declaration of Human Rights.⁴⁹ Among other international instruments of human rights, the European Convention on Human Rights stipulates that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment."⁵⁰

Several decisions of the European Commission of Human Rights and the European Court of Human Rights have interpreted the language of Article 3 of the European Convention to develop definitional distinctions

43. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

44. *Id.* at 830.

45. *Thompson*, 487 U.S. at 830-31.

46. *Trop v. Dulles*, 356 U.S. 86 (1958).

47. *Id.* at 101.

48. ICCPR, *supra* note 26, art. 7.

49. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3rd Sess., at 71, art. 5, U.N. Doc. A/810 (1948).

50. European Convention, *supra* note 20, art. 3.

between torture and "inhuman or degrading treatment or punishment."⁵¹ Also, the United Nations Human Rights Committee has interpreted Article 7 of the ICCPR's prohibitions on torture and cruel and inhuman treatment.⁵² It has also interpreted the ICCPR "to prohibit extradition to a jurisdiction where the extraditees faces a real risk, that his rights under ICCPR will be violated. This position is consonant with the European Court's interpretation of the European Convention in *Soering v. United Kingdom*."⁵³ In *Soering*, the Court ruled that the "death row phenomenon" in the United States,⁵⁴ which potentially faced the defendant were he sentenced to capital punishment, would violate the accused's rights under the European Convention.

These interpretations should inform the United States Supreme Court in its analysis of the Eighth Amendment, since they are much broader in their reach of what constitutes inhuman or degrading treatment than the United States Supreme Court's interpretation of the comparable Eighth Amendment language of cruel and unusual punishment.

IV. RACIAL DISCRIMINATION

In August 1988, the American Bar Association adopted the following policy in opposition to discrimination in capital sentencing:

BE IT RESOLVED, that the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

BE IT FURTHER RESOLVED, that the American Bar Association supports the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist.⁵⁵

Several studies have shown how racial discrimination based on the race of the victim or the defendant affects the imposition of capital punishment.⁵⁶ These include studies by the National Association for the

51. See generally David Heffernan, *Comment — America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U.L. REV. 481, 518-30 (1996).

52. See *id.* at 530-37.

53. *Id.* at 539, citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R.(ser. A) (1989).

54. On the death row phenomenon, see ICJ Report, *supra* note 38, at 206-09.

55. ABA POLICY AND PROCEDURES HANDBOOK (1988). For a thorough discussion, see Coyne & Entzerth, *supra* note 1, at 34-40.

56. See *id.* at 34-37.

Advancement of Colored People Legal Defense and Educational Fund; a comprehensive statistical analysis of racial discrimination in capital cases by Professor David Baldus, who took into account 230 non-racial factors and still found that even if they "might legitimately influence a sentencer, the jury more likely than not would have spared [the defendant's] life had his victim been black;"⁵⁷ and a 1990 General Accounting office report reviewing twenty-eight different empirical studies that examined racial discrimination in capital cases with its conclusion that these studies clearly showed a pattern "indicating racial disparities in the charging, sentencing and imposition of the death penalty."⁵⁸

In *McCleskey v. Kemp*,⁵⁹ the Court held that statistical evidence of racial disproportion in death sentences does not demonstrate arbitrary, capricious, or discriminatory application of the death penalty.⁶⁰ The Court held that the Baldus study, which demonstrated that blacks who kill whites are sentenced to death "at nearly twenty-two times the rate of blacks who kill blacks, and more than seven times the rate of whites who kill blacks."⁶¹ In a five to four opinion, the Court held that the statistical study did not demonstrate a risk of racial bias in violation of the Eighth Amendment.⁶² It also rejected McCleskey's Fourteenth Amendment claim for his failure to show intentional discrimination.⁶³

The International Commission of Jurists' Mission to the United States found that "the Race Convention's prescription of effects-based discrimination (Article 2(c) of the ICERD) extends to areas of disparate impact-discrimination not currently proscribed under United States law in the United States."⁶⁴

In response to the Supreme Court's finding in *McCleskey* that problems of racism in death penalty cases "are best presented to the legislative bodies,"⁶⁵ there have been several bills introduced in the United States Congress since 1988 to remedy the situation presented by these studies. These bills are aimed at giving the condemned a federal right to

57. *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987) (Brennan, J., dissenting, *citing* Baldus study).

58. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES 5 (1990).

59. *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987).

60. *See id.* at 292-93.

61. *Id.* at 327 (Brennan, J., dissenting; *citing* Baldus study).

62. *Id.* at 313.

63. *Id.* at 297-99.

64. ICJ Report, *supra* note 38, at 203.

65. *McCleskey*, 481 U.S. at 319.

challenge any death sentence that “furthers a racially discriminatory pattern” based on the race of either the defendant or the victim. The defendant may support his or her challenge by statistical proof and without the necessity of showing discriminatory intent, motive or purpose.

In 1994, the House of Representatives passed the Racial Justice Act, under which proof of significant racial discrimination in the administration of capital sentencing would have required the prosecutor to show a non-race based explanation for the death sentence.⁶⁶ However, the bill has not yet been enacted into law.⁶⁷ The ICJ Mission has said that a failure to enact the Racial Justice Act “would constitute a breach of the United States government’s express ratification of the ICCPR and the ICERD — particularly of Articles 6(1), 6(2) and Article 26 read with Article 2(2) of the . . . ICCPR, and of Articles 2(l) and 5(a) of . . . the ICERD.”⁶⁸ It added:

The mission is conscious of the final reservation taken, [by the United States] to the [ICCPR] and to the [ICERD], namely that their provisions are not self-executing [citation omitted]. But this reservation touches upon the non-enforceability of international instruments under domestic law, and does not effect a conclusion based upon non-implementation of the provisions of the [ICCPR] and of the [ICERD].

The Mission is of the considered opinion that in the absence of a nation-wide law framed on the pattern of the Racial Justice Act, the administration of capital punishment in the United States will continue to be arbitrary, and definitely not in consonance with Articles 6 and 40 of the [ICCPR].⁶⁹

The Mission’s report concludes that:

(b) Change in United States law is mandated by the provisions of Article 2(c) of the [ICERD], which was ratified by the United States in 1984 without any reservation being taken on this provision.

66. H.R. 4017, 103rd Cong., 2nd Sess. (1994).

67. See generally E. Chemerisky, *Eliminating Racial Discrimination in Administration of the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995).

68. ICJ Report, *supra* note 38, at 204.

69. *Id.* at 204.

(c) Even in the absence of such change, the Mission submits that by virtue of the Supremacy Clause in the United States Constitution (Article VI Clause 2) broader treaty obligations under the [ICERD] would furnish the Controlling Rule of the Law in the United States.⁷⁰

V. EXECUTION OF MENTALLY RETARDED PERSONS

In February 1989, the ABA adopted a policy prohibiting the execution of mentally retarded persons:

Be It Resolved, that the American Bar Association urges that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death and execution; and

Be It Further Resolved, that the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.⁷¹

The American Association of Mental Retardation adopted in 1992 a revised definition of *mentally retarded person*:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen.⁷²

In 1989, in deciding *Penry v. Lynaugh*,⁷³ the United States Supreme Court held that the execution of a mentally retarded prisoner would not violate the Eighth Amendment. While a psychiatrist had testified that the defendant was suffering from a brain disorder at the time of the offense so that he could not appreciate the wrongfulness of his

70. *Id.* at 212.

71. ABA, *Summary of Action of the House of Delegates, 1989 Midyear Meeting*, Feb. 1989.

72. Coyne & Entzeroth, *supra* note 1, at n. 40.

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

conduct and was unable to conform his conduct to the law," the Court said that "in the absence of better evidence of a national consensus against execution of the retarded, mental age should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence."⁷⁵ Accordingly, the Court declined to hold that "the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability [with the reasoning capacity of a seven-year-old] convicted of a capital offense simply by virtue of his or her mental retardation alone."⁷⁶ It should be noted that the decision was five to four and Justices Blackmun, Brennan, Marshall and Stevens considered executing mentally retarded persons as unconstitutional.

Examples show that some severely psychologically impaired individuals have been executed in the United States.⁷⁷ In one capital case, Judge Fitzpatrick aptly observed:

No justification can be had for the execution of a child of ten or eleven years of age in any society that considers itself civilized. If a child of ten or eleven should not be executed under any circumstances, then surely a person who may have a chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death.⁷⁸

VI. DEATH PENALTY FOR JUVENILE OFFENDERS⁷⁹

In *Stanford*, writing for the majority, Justice Scalia held that the execution of two defendants, ages sixteen and seventeen, was permissible under the Constitution. Rejecting the defenses argument that "juveniles, possessing less developed cognitive skills than adults, are less likely to fear death [and,] being less mature and responsible, are also less morally blameworthy,"⁸⁰ Justice Scalia stated that the juvenile death penalty would fail under equal protection arguments, rather than the Eighth Amendment,

74. *Id.* at 308-09.

75. *Id.* at 340.

76. *Id.*

77. See Coyne & Entzeroth, *supra* note 1, at 41-46.

78. *Smith v. Kemp*, 664 F.Supp. 500, 507 (M.D. Ga. 1987).

79. See Ved 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 (1993).

80. *Stanford*, 492 U.S. at 377.

if such arguments could be conclusively proven.⁸¹ He stated that the will of the majority should govern a court's consideration of punishments imposed by a government. Thus, under the *Stanford* plurality's ruling, the fate of juvenile offenders is to be decided solely by the voters of the 50 states.

Pertinent international agreements containing prohibitions on the death penalty against juvenile offenders include the ICCPR, which states that a "[s]entence of death shall not be imposed for crimes committed below eighteen years of age" ⁸² Similarly, the American Convention on Human Rights states that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age" ⁸³ Among other pertinent international instruments, the Fourth Geneva Convention, the Convention Relative to the Protection of Civilian Persons in Time of War,⁸⁴ states, "In any case, the death penalty may not be pronounced against a protected person [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offense."⁸⁵

The 1977 Protocols to the Geneva Conventions specifically prohibit imposition of capital punishment on those who committed those crimes while they were under the age of eighteen. The Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) states in Article 77, paragraph 5, "The death penalty related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offense was committed."⁸⁶ Also, the Additional Protocol Relating to the Protection of Victims of NonInternational Armed Conflicts (Protocol II) states, "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offense" ⁸⁷

In 1989, the Convention on the Rights of the Child mandated that states parties ensure that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences

81. *Id.* at 378.

82. ICCPR, *supra* note 26, art. 6(5).

83. American Convention on Human Rights, *supra* note 17, art. 4(5).

84. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 286.

85. *Id.* art. 68.

86. Geneva Protocol I, Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 77, *reprinted in* 16 I.L.M. 1391, 1425 (1977).

87. Additional Protocol, Protocol II, art. 6(4), *reprinted in* Geneva Protocol I, *supra* note 86, at 1446.

committed by persons below eighteen years of age.⁸⁸ As already mentioned, in 1983, Protocol 6 to the European Convention on Human Rights abolished the death penalty in time of peace⁸⁹ and, in December 1989, the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty.⁹⁰

Although the United States is not a party to the American Convention on Human Rights, another organ of the Organization of American States (OAS), the Inter-American Commission on Human Rights, found the United States in 1987 to be in violation of a rule of *jus cogens* because of its practice of executing juvenile offenders.⁹¹ The case involved J. Terry Roach and James Pinkerton, both seventeen at the time of their crimes, who were sentenced to capital punishment. A complaint filed by Amnesty International on behalf of Roach argued that the execution of a juvenile would violate United States obligations under customary international law and human rights provisions of the OAS.⁹² The Commission, and subsequently the OAS Secretary General, appealed for a stay of Roach's executions.⁹³ However, these appeals fell on deaf ears.

Although the United States has not ratified some of the international human rights instruments mentioned above, and has made reservations to the International Covenant on Civil and Political Rights, it can be persuasively argued under the Vienna Convention on the Law of Treaties that the United States reservation is incompatible with the objects and purposes of the ICCPR and that its signing the instruments obligates it not to violate their provisions.⁹⁴

VII. CONCLUSION

The United States stands virtually alone among its peer countries in its practice regarding capital punishment. The obligations it has assumed under the international human rights instruments are unambiguous. The

88. Convention on the Rights of the Child, *supra* note 30, art. 37(a).

89. *Supra* note 21.

90. *Supra* note 12.

91. Case 9647, Inter-American C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987), reprinted in HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 61, 73 (R.E. Norris & T. Buergenthal eds., 1988).

92. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 72 (1987).

93. *Id.* at 72-73.

94. See *supra* notes 26-31 and accompanying text.

call by the American Bar Association for a moratorium on the death penalty, its concern over racial inequality in capital sentencing, and its assertion of the impropriety of execution of mentally retarded and juvenile offenders should renew the debate within the American legal community on these critical issues, to the end that a more rational death penalty jurisprudence emerges, informed as well by international law.