

No. 03-5956

In The
Supreme Court of the United States

NANON MCKEWN WILLIAMS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas**

**MOTION TO FILE BRIEF *AMICUS CURIAE* AND
BRIEF OF *AMICI CURIAE* HUMAN RIGHTS
ADVOCATES, HUMAN RIGHTS WATCH,
MINNESOTA ADVOCATES FOR HUMAN RIGHTS,
HUMAN RIGHTS COMMITTEE, BAR OF ENGLAND
& WALES IN SUPPORT OF PETITIONER**

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MOTION TO FILE BRIEF *AMICUS CURIAE*

Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, and the Human Rights Committee of the Bar of England and Wales¹ hereby move this Court for permission to file the attached *amicus curiae* brief. The interests of *amici* are described in detail in the appendix to the Brief. *Amici* would like to further develop the issues regarding the *jus cogens* norms, and the application of treaty standards in this case. (The argument is summarized at the beginning of the brief.)

Supreme Court Rule 37(2)(a) states “[a]n *amicus curiae* brief submitted before the Court’s consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph (2)(b) of this rule.” SUP. CT. R. 37(2)(a). “A private party may file an *amicus curiae* brief only by consent of the parties or by Court order upon a motion for leave to file such brief.” ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 10.10 (7th ed. 1993). *See also United States v. California*, 377 U.S. 926 (1964); *United States v. Nevada*, 410 U.S. 901 (1973).

Amici have obtained consent from counsel and should be able to address this matter on an issue which raises the United States’ compliance with one of the most widely accepted norm of international human rights law.

¹ Letters from both counsel consenting to the filing of this brief are being sent with this motion and brief to the Clerk of this Court.

For the foregoing reasons, the Court is urged to grant this motion to file the accompanying *Amicus Curiae* brief in support of the Petition for Writ of Certiorari.

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BRIEF AMICI CURIAE
INTEREST OF AMICI CURIAE

Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, and the Human Rights Committee of the Bar of England and Wales hereby request that this Court consider the present brief pursuant to Rule 37.2(a) in support of Petitioner's Original Petition for Writ of Habeas Corpus. Consent of Petitioner's Counsel of Record and the State Attorney General's Office has been obtained.¹ The interests of *Amici* are described in detail in the Appendix.

Amici would like to take the opportunity to further develop the issues regarding the *jus cogens* norms, and the application of treaty standards in this case. *Amici* are specifically concerned that this Court's *Amici* are concerned that this Court's past rulings on the Eighth Amendment issue have provided a roadblock to the ability of federal and state governments to comply with treaty standards and international law. See *Beazley v. Johnson*, 242 F.3d 248, 266, 268 (5th Cir. 2001), *cert. denied*, 534 U.S. 945 (2001) and state and federal cases cited therein on the ability of federal and state governments to comply with those treaty standards and international law. The importance of defining United States treaty obligations and recognizing international law as it relates to the juvenile death penalty is imperative to the future of domestic compliance with human rights norms. Failure to comply with those norms is isolating the United States as the lone violator in the world. However, incorporation into the Eighth and Fourteenth Amendments of the almost universal prohibition against the death penalty for crimes

¹ Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of the brief.

committed by persons under age 18 would not only bring the United States into compliance with one of the most widely accepted human rights norms, but would also provide the redress that is lacking for violation of a treaty to which the United States is a party.

SUMMARY OF THE ARGUMENT

The prohibition against the execution of persons who were under eighteen years of age at the commission of the crime is not only customary international law, it has attained the status of *jus cogens*, a peremptory norm of international law. No other nation has executed juvenile offenders at the rate practiced in the United States. While six other nations executed juvenile offenders during the past twelve years, those countries have either changed their laws raising the age to eighteen or have in other ways accepted the norm. This Court must consider this issue before one more execution of juvenile offenders takes place in the United States. Otherwise, the United States will continue to bring itself under increasing international scrutiny, tainting its image as a leader in the protection of human rights.

Because the prohibition against the juvenile death penalty is a *jus cogens* norm, the reservation by the United States to Article 6(5) of the International Covenant on Civil and Political Rights is invalid. Because that provision is self-executing and being used defensively in a criminal case, it should apply to Petitioner's case. In any event, this Court should consider the United States' present obligations to comply with the *jus cogens* norm and Article 6(5) as compelling factors in finding an Eighth Amendment prohibition.

This brief, therefore, is submitted in support of the Petition for Writ of Certiorari. The issues addressed are important throughout the United States, not just in Texas. Because of the serious implications of the opinion of the Court below, as well as those of State Supreme Courts, on the ability of federal and state governments to comply with treaty standards and international law, *amici* respectfully

request that this Court grant the Petition for Writ of Certiorari.

ARGUMENT

I. The Prohibition Against Executing Juvenile Offenders is a *Jus Cogens* Norm

Under Article 53 of the Vienna Convention, a *jus cogens* peremptory norm is “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.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, *reprinted in* 8 I.L.M. 679 (hereinafter Vienna Convention). The Restatement (Third) of the Foreign Relations Law, agrees with this standard, and provides that a *jus cogens* norm is a “norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character,” that the norm is established where there is acceptance and recognition by a “large majority” of states, even if over dissent by a very small number of states. Restatement (Third) of the Foreign Relations Law § 102, and reporter’s note 6 (1986), *citing* Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72. Hence, a norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under eighteen at the time they committed their offense clearly meets those requirements.

A. The Prohibition is General International Law

First, the prohibition against the execution of persons who were under 18 at the time they committed their crime

(“juvenile offenders”) is general international law. Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations are evidence of that law. Among the treaties are the International Covenant on Civil and Political Rights, Article 6(5) (the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, hereinafter “International Covenant”), the Convention on the Rights of the Child, Article 37 (Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989), hereinafter C.R.C.), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 68 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 286 (hereinafter Fourth Geneva Convention)), and the American Convention on Human Rights, Chapter 2, Article 4, Section 5 (American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2 (1969) (hereinafter American Convention)), are among the treaties that prohibit the death penalty for juvenile offenders.

A resolution by the United Nations Economic and Social Council also opposed the imposition of the death penalty for juvenile offenders. *See* Safeguards Guaranteeing 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, U.N. Doc. E/1984/84 (1984). In 1985 the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) which also oppose capital punishment for juveniles. G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985). The United Nations Commission on Human Rights has since 1997 passed resolutions calling on states to abolish the death penalty generally, but has specifically asked countries “not to impose it for crimes committed by persons below 18 years of age.” *See 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); *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., 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., 56th Sess. Resolution 2000/65, adopted April 27, 2000, E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Comm. on Hum. Rts., 55th Sess. Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Comm. on Hum. Rts., 54th Sess. Resolution 1998/8, adopted April 3, 1998, E/CN.4/RES/1998/8 (1998); *The Question of the Death Penalty*, Comm. on Hum. Rts., 53rd Sess. Resolution 1997/12, adopted April 3, 1997, E/CN.4/RES/1997/12 (1997). While the Commission resolutions passed with a number of dissenting votes, that can be attributed to the fact that they also called for a moratorium on the death penalty generally, and that a number of countries still have the death penalty which is not prohibited by the International Covenant and the prohibition is not as widely accepted. That is supported by the fact that the Commission resolutions that mention only the prohibition against the juvenile death penalty passed by consensus without a vote. See *Rights of the Child*, Comm. on Hum. Rts. 59th Sess. Resolution 2003/86, adopted April 25, 2003, E/CN.4/RES/2003/86 ¶ 35 (2003) (an effort by the United States to delete that paragraph lost by a vote of 51-1, United Nations Press Release, Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work, Press Release, 25 April 2003, Afternoon at 9-10); *Rights of the Child*, Comm. on Hum. Rts. 58th Sess. Resolution 2002/92, adopted April 26, 2002, E/CN.4/RES/2002/92 ¶ 31(a) (2002); *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, Comm. on Hum. Rts. 58th Sess. Resolution 2002/47, adopted April 23, 2002, E/CN.4/RES/2002/47 ¶ 19 (2002); *Rights of the Child*, Comm. on Hum. Rts., 57th Sess., Resolution 2001/75, adopted April 25, 2001, E/CN.4/RES/2001/75 ¶ 28(a)

(2001). These resolutions request governments to end the practice of executing offenders who were under 18 at the time they committed their crime.

The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In the 1999 resolution, the United States is specifically mentioned as one of the six countries that had executed juvenile offenders since 1990 and that it accounted for 10 of the 19 executions during that time period. *The death penalty, particularly in relation to juvenile offenders*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., RES/1999/4, adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999). One year later, the Sub-Commission affirmed “that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law.” *The death penalty in relation to juvenile offenders*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 53rd Sess., Res. 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000). Again, the latter resolution was adopted without a vote.

Also, the Inter-American Commission on Human Rights, the body responsible for the protection of fundamental freedoms in the Organization of American States (OAS) which the United States is a member of, found that there a *jus cogens* norm proscribing the execution of persons who were under 18 at the time of the commission of their crime. *Michael Domingues v. United States*, Inter-American Commission on Human Rights, Report No. 62/02, Merits Case 12.285, October 22, 2002 (<http://www.cidh.org/annualrep/2003eng/USA.12285.htm>).

B. The Prohibition is Accepted by All States Except One

The second requirement for a *jus cogens* norm is satisfied in that the norm is accepted “by ‘a very large majority of’ States, even if over dissent by ‘a very small

number' of states." Restatement (Third) of Foreign Relations Law, Sect. 102, reporter's note 6 (interpreting the Vienna Convention and citing to Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72). The United States is the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The only other countries known to have executed juvenile offenders in the last ten years have since abolished the practice, acknowledge that such executions were contrary to their laws, or deny that they have taken place.

Almost every nation in the world has ratified the Convention on the Rights of the Child. Status of the Convention on the Rights of the Child, Report of the Secretary General, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 20, ¶ 2, U.N. Doc. E/CN.4/1998/99 (1997). The only States not to ratify are the United States and Somalia, which has no government. *See Rights of the Child: Status of the Convention on the Rights of the Child*, U.N. ESCOR, 57th Sess., Agenda Item 13, U.N. Doc. E/CN.4/2001/74, ¶ 5 & Annex 1 (2000). Indeed, the C.R.C. has been the catalyst that has prompted many countries in the past ten years to change their laws raising the eligibility for the death penalty to 18. The United Nations reported that Barbados, Yemen and Zimbabwe changed their laws in 1994. Crime prevention and criminal justice: Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 ¶ 90. China changed its age to 18 in 1997. *Id.* Indeed, by the time of that report, only 14 countries that had ratified the C.R.C. had not changed their laws to adhere to the prohibition.² *Id.* However, none

² The countries were Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco,
(Continued on following page)

of those countries had reserved to the C.R.C. requirements and only six executed juvenile offenders since 1991: Democratic Republic of the Congo (1 in 2000), Iran (6: 3 in 1992, 1 in 1999, 1 in 2000, 1 in 2001), Nigeria (1 in 1997), Pakistan (2: 1 in 1992, 1 in 1997), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). Amnesty International, *Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001 (June 2001). In addition, an execution was documented in Pakistan on November 3, 2001. Amnesty International, *Death Penalty News, December 2001*, AI Index: ACT 53/001/2002 (January 2, 2002).

Of the six countries besides the United States where juveniles have been executed since 1990, the laws have been changed or the governments have denied that the executions of juvenile offenders have taken place. The laws have changed in Yemen, as noted above, and Pakistan, where the Juvenile Justice System Ordinance was promulgated in July 2000, banning the death penalty for anyone under 18 at the time of the crime. Amnesty International, *Report 2001*, page 186, AI Index: POL 10/001/2001. Since the passage of the Juvenile Justice System Ordinance, President Musharrah of Pakistan commuted the death sentences of approximately 100 young offenders to imprisonment in response to Amnesty International's Secretary General Irene Khan's request. Amnesty Internt'l Irish Section, *Pakistan: Young Offenders Taken Off Death Row*, AI Index: ASA 33/029/2001 (Dec. 13, 2001). Nigeria, as noted in the United Nations report above, has national legislation setting the age at 18. With respect to the execution in 1997, the Nigerian government insisted to the Sub-Commission on the Promotion and Protection of Human Rights last year that the offender was well over 18 at the time of the offense and reiterated that any juveniles convicted of capital offenses have their sentences commuted. See Summary Record of the 6th Meeting of the

Myanmar, Nigeria (excepting Federal Law), Pakistan, the Republic of Korea, Saudi Arabia, and the United Arab Emirates. *Id.* at footnote 36.

Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., August 4, 2000, E/CN.4/Sub.2/2000/SR.6 ¶ 39 (2000). Saudi Arabia has adamantly insisted at the Commission on Human Rights that the allegations regarding the execution of a juvenile in 1992 are untrue. *See* Summary Record of the 53rd meeting of the Commission on Human Rights, 56th Sess., April 17, 2000, E/CN.4/2000/SR.53, ¶¶ 88 and 92 (2000). While there has been documentation that the executions in Nigeria and Saudi Arabia did take place, (Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/010/2000) they do appear to be isolated incidents, and the denial by the governments is an indication that they in fact have accepted the norm. It was also recently reported that while a 16 year old offender had been sentenced to death in Saudi Arabia this year, he had been pardoned. Abdul Wahab Bahsir, *65 Convicts on Death Row in Makkah Region*, ARAB NEWS, July 5, 2003, available at <http://www.arabnews.com/?page=1§ion=0&article=28403&d=5&m=7&y=2003>.

While executions of juvenile offenders seem to have taken place with more frequency in Iran, the government recently denied at the Commission on Human Rights that they take place. *See*, U.N. Press Release, Commission on Human Rights Starts Debate on Specific Groups and Individuals, 11 April 2001 (Right of Reply by Representative of Iran). No executions of juvenile offenders have taken place in Iran since.

The Democratic Republic of the Congo, which is in the midst of civil war, is also reported to have executed a juvenile offender in 2000 despite a moratorium on the death penalty in that country. *See* Amnesty International, Dem. Republic of Congo: Killing Human Decency, AI Index: AFR 62/11/00, 31 May 2000 at 12. That execution was carried out by the Military Order Court rather than through the judicial process. *Id.* In 2001, when four juvenile offenders were sentenced to death by the Military Order Court, the executions were stayed and the sentences commuted following appeals from the international community. *Death Sentences of Five Children Commuted to Life Imprisonment*, Case

COD 270401.1.CC, 31 May 2001, OMCT-World Organization Against Torture. Thus, it appears that even during wartime in that country that the military intends to comply with the international norm.

Hence, only the United States has not accepted the norm against the execution of juvenile offenders. Even if the reports that executions of juveniles took place not only in the United States but in Iran and the Democratic Republic of the Congo as well, the adherence to the norm is similar to those noted in the Restatement (Third) as having had attained peremptory status: rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights. Restatement (Third), *supra*, reporter's note 6. And while United States courts have found the prohibition against torture to have attained the status of a *jus cogens* norm (see, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)), Amnesty International found that 125 countries violated that norm alone last year. Amnesty International Report 2001, Annual Summaries 2001, AI Index:POL 10/006/2001. In stark contrast, only one country has violated the norm prohibiting the execution of juvenile offenders the past year.

C. The Norm is Non-Derogable

The prohibition is non-derogable. The International Covenant expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders. International Covenant, *supra*, Article 4. The express prohibition in the treaty coupled with the wide acceptance, evidenced by treaties, resolutions, national laws and practice, support the conclusion that the norm is non-derogable.

D. There is No Emerging Norm Modifying this Norm

As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The

prohibition of the juvenile death penalty has been universally accepted by all but one country. There is thus no question that the prohibition against the execution of persons who were under 18 at the time they committed their crime has attained the status of a *jus cogens* norm.

II. The *Jus Cogens* Norm Is Applicable to Petitioner's Eighth Amendment Claims

Petitioner is urging that this Court grant certiorari in this case in order to review the question whether the Eighth Amendment of the United States Constitution prohibits the imposition of the death penalty for crimes committed by persons under the age of 18. Not only should this Court consider the *jus cogens* norm in determining whether the United States Constitution protects against the imposition in this case, but the Supremacy Clause mandates it. More importantly, the peremptory norm is relevant to whether the reservation to Article 6(5) of the International Covenant is void. And if it is void then the treaty provision applies and can be directly enforced by the courts because it is self-executing. The decision to incorporate the *jus cogens* norm into the Eighth Amendment analysis would be consistent with the United States' treaty obligations (*see Grutter v. Bollinger*, 529 U.S. ___, 123 S.Ct. 2325, 2347 (2003), Justice Ginsburg's concurring opinion notes that the Court's decision is consistent with the United States' treaty obligations), and would provide individuals with a process for seeking compliance with those obligations. Although certiorari review is not being sought directly on the International Covenant issue, this Court should consider the United States' duty under Article 6(5) as a component of its Eighth Amendment analysis.

A. *Jus Cogens* Norms are Binding in the United States

As this Court has noted, customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also*

Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2284 (1991); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS J. 53, 69-70 (1990); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999). In this regard, the Restatement (Third) provides that “[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States” and “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* at § 102. A noted commentator has also recognized that “as in the case of treaties, American courts will give effect to the obligations of the United States under customary law; at the behest of affected private parties, courts will prevent violations of international law by the States. . . .” LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223 (1972). Indeed, seven years ago, Justice Blackmun noted:

The early architects of our nation were experienced diplomats who appreciated that the law of nations was binding on the United States. John Jay, the first Chief Justice of the United States, observed . . . that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.” Although the Constitution, by Art. I, § 8, cl. 10, gives Congress the power to “define and punish. . . . Offenses against the Law of Nations,” and by Art. VI, cl. 2, identifies treaties as the supreme Law of the Land,” the task of further defining the role of international law in the nation’s legal fabric has fallen to the courts. . . .

As we approach the 100th anniversary of the *Paquete Habana*, then, it perhaps is appropriate

to remind ourselves that now, more than ever, “international law is part of our law” and is entitled to respect of our domestic courts. . . . I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind.

FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 555 (2d ed. 1996) (citing Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, AM. SOC’Y OF INT’L LAW NEWSL. (Am. Soc’y of Int’l Law, D.C.), Mar.-May 1994, at 1, 6-9)).

The principle that customary international law is part of United States law applies with greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (“Marcos II”)*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (“Marcos I”)*, 978 F.2d 493 (9th Cir. 1992); *White v. Paulson*, 997 F. Supp. 1380 (E.D. 1998). As the Ninth Circuit Court of Appeal in *Siderman de Blake v. Argentina*, noted, courts are obligated to enforce *jus cogens* norms. *Siderman de Blake*, 965 F.2d at 715-16. The Court observed that “[b]ecause *jus cogens* norms do not depend solely on the consent of states for their binding force, they ‘enjoy the highest status within the international law.’ [Citation.] For example, a treaty that contravenes *jus cogens* is considered . . . to be void. . . .” *Id.* at 715 (*citing* to the Vienna Convention). Certainly if a treaty is void if it violates a *jus cogens* norm, a reservation is void if it does likewise. Not only should this Court consider the *jus cogens* norm in determining the parameters of the evolving standards under the Eighth Amendment as is urged by the petitioner,³ but it should

³ While the Court in the *Paquete Habana* noted that customary international law is looked to “where there is no treaty, and no controlling executive or legislative act or judicial decision,” (175 U.S. 677, 700

(Continued on following page)

also be used to assess the validity of the United States reservation in light of that norm.

There is no question when the reservation is considered in light of the *jus cogens* norm that it is void. If it is void, the Court must then consider whether the treaty can be applied directly in the United States. *Amici* will turn now to that question.

B. Article 6(5) Can Be Enforced by Courts in the U.S.

If the reservation is void, the question is whether Article 6(5) can be enforced directly by the courts. This requires an analysis of whether the United States is a party to the treaty without the reservation and whether the provision is self-executing. Further, while the Senate declared that the International Covenant was not self-executing, that declaration does not apply in this case where the treaty is being used defensively.

1. The United States is Still Party to the International Covenant

If the reservation is not valid, the Court must determine whether the United States is bound by Article 6(5). Under the view of the Human Rights Committee, the United States is bound by the provision if the reservation is void. *See* General Comment 24, U.N. GAOR, Hum. Rts. Comm. 52nd Sess., 1382 mtg., at 11, 12, U.N. Doc. CCPR/C/21/rev.1/Add.6 (1994). Furthermore, there is a growing international consensus that an invalid reservation is severed from the document of ratification. *See* Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347

(1900)) that does not preclude courts from considering customary international law or *jus cogens* norms to determine whether evolving standards of decency under the Eighth Amendment do include, in the words of the First Chief Justice, “the law of nations.”

(1989). Moreover, broad general reservations are not favored, particularly in human rights multilateral treaties. *Id.*

In the *Belilos* case, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. Hum. Rts. Rep. 466 (1988), the European Court of Human Rights held that if a non-essential reservation is invalid it is severed and the country submitting the reservation is still a party to the treaty and bound by the provision without the reservation. Whether a reservation is non-essential depends on whether the country's overriding intention was to accept the obligations under the treaty. See Bourguignon, *supra*, at 382. There is nothing to indicate that the United States did not have the overriding intention to accept the International Covenant, and since the reservation to Article 6(5) is invalid, it is bound by its requirements and must be applied in the United States as the Supreme Law of the Land. The non-binding character of the reservation to Article 6 finds expression in the Senate Foreign Relations Committee's comments upon adoption of the International Covenant recognizing that the necessity to remove the reservation might arise. The Committee "recognize[d] the importance of adhering to internationally recognized standard of human rights," and observed that, because Article 6 represented an "internationally recognized standard of human rights," change in domestic law might be "appropriate and necessary." 31 I.L.M. 645, 650 (1992). In turn, in relation to the question of whether a reservation to Article 50, which provides that the Covenant applies to all parts of federal states, was needed, the Bush Administration, promised our treaty partners that "judicial means" would be used to guarantee full domestic compliance with the Covenant. *Id.* at 657.

2. Article 6(5) is a Binding Expression of the *Jus Cogens* Norm, Enforceable Through the Eighth Amendment

Because the United States has ratified the International Covenant and is bound by Article 6(5), Article 6(5)

should help courts construe the scope of the Eighth Amendment's final clause. At the same time, the Eighth Amendment incorporation of such independent *jus cogens* and Covenant duties may provide a private right of action for persons like Petitioner who claim violation of their international law rights. See *Davis v. Passman*, 442 U.S. 228, 242-42 (1979); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971).

International human rights standards have often been useful tools for interpreting laws in the United States. See, e.g., *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980); see generally, Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1993); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193 (1999). Indeed, the United States government told the Human Rights Committee that "the courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). Ratification of treaties is not to be treated lightly, and such action by the President and two-thirds of the Senate evidences the acceptance of the treaty. The document should, therefore, provide meaningful guidance to the Court.

3. Article 6(5) is Self-Executing and the Non-Self-Executing Declaration Does Not Apply

The Courts have developed the doctrine of "self-executing" treaties to limit the Constitutional rule that treaties are the law of the land. See *Foster v. Neilsen*, 27 U.S. (Pet. 2) 253, 314 (1829).⁴ Under that doctrine, only

⁴ The holding in *Foster* was not in complete conformity with prior decisions upholding the application of treaties. See Stefan A. Riesenfeld & (Continued on following page)

clauses of treaties that specify duties that directly confer rights may be enforced directly by the courts. Courts have applied various theories when discussing that doctrine. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). Under one test, a self-executing clause is "equivalent to an act of the legislature whenever it operates by itself without the aid of any legislative provision." *Foster*, 27 U.S. (2 Pet.) at 314. Another test looks for the "intent of the parties" reflected in the treaty's words and, when the words are unclear, in circumstances surrounding the treaty's execution. See *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *Cook v. United States*, 288 U.S. 102, 119 (1933); *Jones v. Meehan*, 175 U.S. 1, 10-23 (1899); *Chew Heong v. United States*, 112 U.S. 536, 539-43 (1884); *Perchman*, *supra*, 32 U.S. (7 Pet.) at 65-68; *Foster*, *supra*, 27 U.S. (2 Pet.) at 310-16.

The intent of the parties may be difficult to ascertain when multilateral treaties such as the International Covenant are involved, and it is questionable that the intent of only one of the parties would determine the effect of a particular clause. Multilateral treaties rarely make clear the process by which parties are to incorporate its provisions into national law. See FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 586 (1996). Many countries, such as the United States, incorporate treaties without separate action by the legislature. See *Riesenfeld & Abbott*, *supra* at 575. Indeed, the original purpose of the Supremacy Clause

Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 577 (1991). Furthermore, *Foster* must be read in conjunction with *United States v. Perchman*, 32 U.S. (Pet. 7) 51 (1833), where the Court admitted error in its first analysis of the treaty in question. Nonetheless, the basic rule remains, that only clauses of treaties that specify duties that directly confer rights may be enforced directly with the courts.

was to alter the British rule that all treaties are “non-self-executing” in order to require the state courts as well as the federal courts to enforce treaties directly. *See Vázquez, supra* at 698-700.

Some courts have listed factors they considered in ascertaining intent. *See Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985); *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974). The *Frolova* factors are: the language and purposes of the agreement as a whole; the circumstances surrounding its execution; the nature of the obligations imposed by the agreement; the availability and feasibility of alternative enforcement mechanisms; the implications of permitting a private cause of action; and the capability of the judiciary to resolve the dispute. *See Frolova, supra*, 761 F.2d at 373.

Under the *Frolova* factors, Article 6(5) of the International Covenant is self-executing. First, the language and purpose of the treaty are clear – to protect the human rights of individuals. Second, Article 3 of the International Covenant imposes an obligation to State Parties to provide for effective remedies. It provides:

“Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

International Covenant, *supra*, at Article 3.

Third, because the United States has not ratified the Optional Protocol to the Covenant on Civil and Political

Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR, Supp. (No. 16) at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302, *entered into force* March 23, 1976, which provides for an individual right to petition the Human Rights Committee, there are no other enforcement mechanisms available. Fourth, since the treaty provides rights to individuals, there is no reason to believe that individuals should not have a private cause of action to enforce the provisions. Finally, the judiciary is the most capable institution for addressing whether the treaty has been violated since it has traditionally been the means whereby individuals in the United States enforce their constitutional rights.

Furthermore, the prohibitory language of Article 6(5) is clear: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . ." International Covenant, *supra* Article 6(5). Hence, in considering all the relevant factors, the provision of that article are self-executing.

Despite the clarity of many of the provisions in the International Covenant, the Senate ratified it with a declaration that it was not self-executing. 138 CONG. REC. S4784, § III(1) (April 2, 1992). It is questionable whether the Senate instead of the courts can make such a determination. *See* Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 WHITTIER L. REV. 215, 220 n. 33 (1999). Further, such a declaration should not be given effect because it runs counter to the object and purpose of the treaty, which is to protect the individual rights that are enumerated therein. *See* Riesenfeld & Abbott, *supra* at 608. This Court, however, need not address those points since the legislative history indicates that the Senate merely intended to prohibit private and independent causes of action. *See* 138 CONG. REC. S4784. In this case, Petitioner would not be using the treaty to assert a private cause of action. He would use it defensively and thus would not invoke a separate cause of action. *See* John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 581-82 (1998).

The defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without having courts make a determination regarding whether the provisions are self-executing. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (allowing defensive use of a treaty to escheat proceeding under Oregon law); *Ford v. United States*, 273 U.S. 593 (1927) (allowing use of a treaty as a defense to personal jurisdiction); *Patson v. Pennsylvania*, 232 U.S. 138 (1914) (recognizing the defensive use of a treaty in a criminal case, but ultimately holding that there was no conflict between the treaty and state law). Hence, this Court need not address the non-self-executing declaration and can apply Article 6(5) to this case.

CONCLUSION

There is no clearer precept in international law than the prohibition of the death penalty for juvenile offenders. The United States cannot continue to demand compliance with human rights principles and norms abroad while it refuses to apply them in its own country. As a branch of the United States government, this Court has the obligation to consider whether indeed those principles must be applied not only by United States courts but by the courts of the fifty states as well. This Court should grant the Petitioner's Writ of Certiorari to address the very important issues related to faithful compliance to United States treaty obligations as well as international law.

Respectfully submitted,

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APPENDIX

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Consultative Status in the United Nations and has participated at the meetings of the Commission on Human Rights. Human Rights Advocates has duly submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.¹

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It also has a Special Consultative Status in the United Nations. It regularly reports on human rights conditions in more than seventy countries around the world, and it actively promotes legislation and policies worldwide that advance protections in the area of domestic and international human rights and humanitarian law.

Minnesota Advocates for Human Rights, founded in 1983, is the largest Midwest-based non-governmental

¹ Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Gutter v. Bollinger*, 529 U.S. ___, 123 S.Ct. 2325 (2003); *Dominguez v. Nevada*, cert. denied, 528 U.S. 963 (1999); *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

organization engaged in international human rights work. The organization has some 4,000 members. Minnesota Advocates for Human Rights also has a Special Consultative Status in the United Nations. Minnesota Advocates for Human Rights has received international recognition for a broad range of innovative programs to promote human rights and prevent the violation of those rights.

The Bar of England and Wales, through the Human Rights Committee, appears on behalf of persons whose human rights are endangered. The Human Rights Committee is nonpolitical and nonpartisan. Its guiding principle is the belief that no person should be punished for any crime except after a trial and appeals process that accords with the highest standards for fairness and the rule of law. Although member states of the European Community no longer implement capital punishment, the Human Rights Committee's purpose is not to challenge the right of the State of Texas to implement capital punishment in a manner consistent with legal notions of justice and fairness. Instead, the Bar Council seeks only to set out international standards in the hope that international, English, British Commonwealth and European Court of Human Rights sources may be of assistance to this Court. Those international standards are especially relevant because the United States has ratified the International Covenant on Civil and Political Rights, thus evincing a sincere concern for the norms of international law.² Further, the comity among

² In submitting his proposal for the ratification of the International Covenant to the Senate for its advice and consent, President George Bush argued that ratification reflected the role that he envisaged for the United States as a leader amongst nations. In a letter submitted to Senator Clairborne Pell, Chair of the Senate Foreign Relations Committee,

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the common-law nations makes the experience of each persuasive to the other. In particular, the courts of the United States and of England have often looked to each other for guidance. For example, the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982), specifically recognized the influence of international opinion and relied upon it to guide its determination. The Court noted that the felony murder doctrine had been abolished in England.

President Bush stated that “United States ratification of the Covenant of Civil and Political Rights at this moment of history would underscore our natural commitment to fostering democratic values through international law. 31 I.L.M. 645,660.
