

No. 03-633

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER
Superintendent, Potosi Correctional Center,
Petitioner

v.

CHRISTOPHER SIMMONS
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* PRESIDENT JAMES EARL CARTER, JR., PRESIDENT
MIKHAIL SERGEYEVICH GORBACHEV, PRESIDENT OSCAR ARIAS SANCHEZ,
PRESIDENT LECH WALESZA, ADOLFO PEREZ ESQUIVEL, THE DALAI LAMA,
MAIREAD CORRI

STATEMENT OF *AMICI CURIAE* INTEREST

We, recipients of the Nobel Peace Prize, file this brief as *amici curiae* in support of Respondent, pursuant to Rule 37.2 of the Court.¹

The Nobel Academy was established in 1901 and in accordance with the Statutes of the Nobel Foundation, prizes are awarded each year to those who, in the preceding year, have “conferred the greatest benefit to mankind” in the fields of physics, chemistry, medicine, literature, peace and economics. The Peace Prize is awarded to “the person who has the done the most or the best work for fraternity between nations, for the abolition of standing armies and for the holding and promotion of peace congresses.”² Each of the *amici curiae* has been awarded the Nobel Peace Prize for efforts in advancing the principles of democracy and the protection of human rights worldwide. We have a continued interest in ensuring that internationally accepted standards of human rights and morality are respected by every nation.

The Nobel Peace Prize and its winners are a testament to the relevance of global opinion and practice in the area of human rights, and the importance of respecting internationally accepted standards of morality. *Amici curiae* have brought scores of human rights issues to the world’s attention, resulting in the cessation of practices that violate human rights. Examples include the dismantling of apartheid in South Africa, the easing of tensions in Northern Ireland and the passing of the Ottawa Treaty banning the use of landmines. *Amici curiae* urge this Court to consider carefully the importance and relevance of respecting internationally accepted principles of human rights and morality. We have publicly stated our belief that the “death penalty is ... especially unconscionable when imposed on children.”³ When receiving his Nobel Peace Prize in 2002, President Jimmy Carter also reflected on the strength of this norm when he endorsed the

¹ Letters of consent from both parties are on file with the Clerk of this Court. *Amici* have not received any contribution or support for this brief from either party, and no counsel for either party authored this brief in whole or in part. *Amici* have not received any monetary contribution to the submission of this brief.

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international movement toward “prohibition of the death penalty, at least for children.”⁴

SUMMARY OF ARGUMENT

At issue before this Court is whether the death penalty for a crime committed by a person under the age of eighteen constitutes “cruel and unusual punishment” in violation of the Eighth Amendment to the Constitution of the United States of America.

In order to answer this question this Court should consider the opinion of the international community, which has rejected the death penalty for child offenders worldwide. That opinion is exceptionally relevant when determining whether such a practice contradicts “evolving standards of decency that mark the progress of a maturing society.”⁵ This Court historically has considered internationally accepted standards of human rights and decency,⁶ and especially should consider international standards in this case.

The prohibition on the juvenile death penalty is widely recognized as a rule of customary international law, which has been defined as the “general and consistent practice of states followed by them from a sense of legal obligation.”⁷ “[S]tate practice is generally interpreted to mean official government conduct which would

State practice 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.⁹ A *jus cogens* prohibition is a “rule[] of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary law of contrary effect.”¹⁰ A state that persistently objects to a customary international law rule usually may be held exempt from the rule, but all states 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.”¹¹

The unusual strength and clear definition of the international prohibition on the death penalty for offences committed by children under eighteen years old makes it particularly relevant to this Court’s decision whether to extend Eighth Amendment protection in this case.¹² This Court always has maintained that United States courts must construe domestic law so as to avoid violating principles of international law.¹³ In particular, this Court has interpreted the fundamental law expressed in the constitutional guarantee of due process and prohibition on cruel and unusual punishment as protection against acts that, among the nations of the world, are “everywhere forbidden.”

ARGUMENT

A. INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW PROHIBITS THE DEATH PENALTY FOR CHILD OFFENDERS

The protection of human dignity is at the core of both international human rights law and the Eighth Amendment. This Court has said: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”¹⁵ Similarly, the preambles of many human rights treaties state that the concept of human dignity is the bedrock principle upon which human rights are based.¹⁶ The fundamental right to human dignity grounds the rejection of the death penalty for child offenders in international law.¹⁷

Evidence for the rule barring the death penalty for child offenders includes, *inter alia*, treaty provisions, resolutions adopted by international bodies, jurisprudence of international courts and treaty bodies, and national level state practice. Such evidence is used by the International Court of Justice to determine

- i) *International treaties and resolutions illustrate that the death penalty for child offenders is contrary to internationally accepted standards of human rights.*

A number of widely ratified multilateral human rights treaties prohibit the death penalty for child offenders. These include the *International Covenant on Civil and Political Rights* ("ICCPR"), the *American Convention on Human Rights* ("ACHR"),¹⁹ the *United Nations Convention on the Rights of the Child* ("CRC"), and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* ("Fourth Geneva Convention").²⁰

The ICCPR, which has been ratified by 152 nations,²¹ prohibits the death penalty for offenders under the age of eighteen. According to Article 4 of the ICCPR, parties may not "derogate" from this prohibition in Article 6(5) even "in time of public emergency which threatens the life of a nation." In 1978, President Carter submitted the ICCPR to the Senate for its advice and consent. Final ratification came in 1992, with a reservation to Article 6(5), which reads:

The United States reserves the right, subject to its constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age.²²

Eleven other parties to the ICCPR (Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden) immediately entered formal objections to this reservation.²³ Subsequently, the United Nations Human Rights Committee, which the United States recognizes as

¹⁹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 [hereinafter ACHR].

²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (ratified by the United States).

²¹ Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties, as of 03 June 2004*, at 12.

²² Senate Comm. On Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Report. No. 23, 102d Cong., 2d Sess. (1992) reprinted in 31 I.L.M. 645, 653-54 (1992).

²³ *Reservations, Declarations, Notifications and Objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto*, U.N. Doc. CCPR/C/2/Rev.4 (1994).

competent to monitor ICCPR compliance,²⁴ declared the reservation to Article 6(5) “incompatible with the object and purpose of the Covenant” and asserted that it “deplored” state statutes in the United States allowing the death penalty for “crimes committed by persons under 18.”²⁵

The ACHR, which has been ratified by 25 nations of the Western Hemisphere, also prohibits capital punishment for offenders under the age of eighteen. According to Article 27 of the ACHR, parties may not “derogate” from this prohibition in Article 4(5) even “[i]n time of war, public danger or other emergency that threatens the independence or security of a State Party.”

The CRC, which has been ratified by 192 nations, prohibits the death penalty for offenders under 18 in Article 37(a).

The Fourth Geneva Convention, which has been ratified by 192 nations,³¹ also prohibits in Article 68 the death penalty for offences committed by persons under age 18 in occupied territories. At the time the United States ratified the Fourth Geneva Convention, it entered no reservation to Article 68.³²

Aside from conventional international law, which itself can be evidence of a customary international rule, international human rights bodies have adopted numerous resolutions and declarations calling for the abolition of the death penalty for child offenders.³³ Most recently, on April 20, 2004, the United Nations Commission on Human Rights adopted Resolution 2004/48 on the Rights of the Child, which *inter alia* “[c]alls upon” those “States in which the death penalty has

ii) *The practice of other countries illustrates that the death penalty for child offenders is contrary to internationally accepted standards of human rights.*

a) The practice of the British Commonwealth and Europe.

This Court repeatedly has examined the practices of countries sharing its Anglo-American heritage, as well as those of the European democracies, in the process of interpreting the United States Constitution.³⁶ The jurisprudence of the United States' legal predecessor, the United Kingdom, and the countries of the British Commonwealth is of particular relevance. Starting in 1887, executions of persons under eighteen were "virtually abolished" in the United Kingdom "by use of the royal prerogative of mercy."³⁷ In 1908, Parliament formally abolished the death penalty for persons under age sixteen (Children Act 1908, section 103), setting a norm comparable to that in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) and *Stanford v. Kentucky*, 492 U.S. 361 (1989).³⁸ In 1933, Parliament again confirmed the actual cessation of executions of child offenders by raising the minimum age to eighteen in Section 53(1) of the Children and Young Persons Act 1933.³⁹ The United Kingdom abolished the death penalty for murder in 1965 and for the remaining crimes carrying the death penalty (treason, piracy, and some military offences) in 1998.⁴⁰

In South Africa, during apartheid, national law prohibited the death sentence for offenders under age eighteen.⁴¹ When South Africa completed the transition to

³⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to "other nations that share our Anglo-American heritage" and 06.09988 391.31998S0).

full democracy, a new South African Constitution was adopted. The basic premise of its Bill of Rights is similar to that of the United States Constitution – it “enshrines . . . and affirms the democratic values of human dignity, equality, and freedom.”⁴² In 1995, the Constitutional Court abolished the death penalty for all offenses, holding that it was incompatible with the new constitution’s rights to life and dignity.⁴³ The South African Constitution now explicitly incorporates the international legal definition of “child,” affording numerous, specific, personal rights to children “under the age of 18 years.”⁴⁴

The United States’ retention of the death penalty --- and in particular for children --- is of great concern to European nations, as reflected in recent demarches from the European Union and Council of Europe on the issue of children and the death penalty.⁴⁵ Even fifteen years ago, the European Court of Human Rights ruled that the extradition of an eighteen-year-old offender to the United States to face charges involving the death penalty would violate Article 3 of the European Convention on Human Rights,⁴⁶ which prohibits “torture or... inhuman or degrading treatment or punishment” in part because of the youth of the defendant “at the time of the offence.”⁴⁷

b) The practice of the rest of the world.

A recent report by Nobel Peace Prize laureate Amnesty International, *The Exclusion of Child Offenders from the Death Penalty under General International Law*, documents the use of the juvenile death penalty worldwide.⁴⁸ Since 1990, only eight of the 191 United Nations member states are known to have inflicted the “ultimate punishment” on child offenders – Yemen, Nigeria, Pakistan, Saudi Arabia,

⁴² S. Afr. Const. ch. II, § 7.

⁴³ *State v. Makwanyane*, 1995 (3) SALR 391 (C.C.).

⁴⁴ S. Afr. Const. ch. II, § 28(3).

⁴⁵ European Union, EU Demarche on the Death Penalty, May 10, 2001 (presented by Swedish Presidency) (announcing EU clemency demarches in cases involving offenders under 18 and protesting that Article 6 of the ICCPR enshrines the minimum rules for the protection of the right to life); Council of Europe, Parliamentary Assembly, Doc. 9908, Report, 11 September 2003, *Abolition of the Death Penalty in Council of Europe Observer States* (presented by Committee on Legal Affairs and Human Rights, Mrs. Renate Wohlwend, Rapporteur) (“[T]he execution of child offenders is not only a particularly heinous practice, but also clearly in violation of international law.”).

⁴⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*: Nov. 4, 1950, 213 U.N.T.S. 221, entered into force, Sept. 3, 1953.

⁴⁷ *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, at ¶¶ 108, 109 (1989).

⁴⁸ Amnesty International, *The exclusion of child offenders from the death penalty under general international law*, July 2003, AI Index: ACT 50/004/2003 (available by AI Index search at www.amnesty.org/library/index).

In January 2000, a fourteen-year-old child soldier was executed in the Democratic Republic of the Congo after proceedings before a military tribunal that did not meet internationally accepted standards for a fair trial. However, in 2001, after an appeal from the international community, four child offenders who had been sentenced to death by a Congolese military court had their death sentences commuted.⁵⁷

In 1997, China --- the world's leading executioner and seventh country among those known to have executed child offenders since 1990 --- amended its Criminal Law to prohibit the death penalty for offenders under eighteen.⁵⁸

Clearly, "the world community considers the execution of offenders aged below eighteen years at the time of their offence to be inconsistent with prevailing

under treaties and the law of nations . . . is not debatable. This doctrine has been upheld from the inception of our national life . . . and has never been seriously questioned in our judicial history.”⁶⁷ The judge concluded, albeit in dissent, that the defendant’s mob-driven trial had violated fundamental “rules of procedure applicable to the law of nations” and that, therefore, “his conviction and sentence were obtained without due process of law.”⁶⁸

The Texas judge accurately described this Court’s recognition of the role of foreign and international law in federal constitutional jurisprudence. This Court long had recognized the wisdom of considering international sources when interpreting the parameters of due process. For example, in 1884, this Court asserted in *Hurtado v. California*:

The constitution of the United States was ordained, it is true by the descendents of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.⁶⁹

International law and foreign law, indeed, have “played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment” and have contributed to this Court’s understanding of substantive due process.⁷⁰ In *Palko v. Connecticut*, this Court interpreted “fundamental” rights under the Fourteenth Amendment in light of international practice as it had in

⁶⁷ *Ex parte Martinez*, 145 S.W. 959, 995, 1014-15 (Tex. Crim. App. 1912) (Davidson, P.J., dissenting) (citing *Miller v. The Resolution*, 2 U.S. 1 (Mem.), 2 Dall

places by "certain great principles of government . . . which were deemed 'essential to the rule of law and the maintenance of individual freedom,'" and the practical rules of government essential to the preservation of those principles.⁷⁵ This Court concluded that the prohibition on cruel and unusual punishment was such a principle and that it must be observed in the Philippine Islands "however [it] might conflict with the customs or laws of procedure with which they were familiar." The "enlightened thought of the Philippine Islands [would] come to appreciate" its importance.⁷⁶

In *Trop v. Dulles*

that a non-derogable “fundamental law” has arisen clearly identifying an evil of the sort which the Eighth and Fourteenth Amendments also are designed to bar.⁸¹

This Court should be guided by its Eighth and Fourteenth⁸² Amendment precedents to determine that United States standards of decency must meet the minimum normative threshold of world opinion and practice.⁸³ The customary international law norm places offenders under the age of eighteen “beyond the State’s power to punish with death.”⁸⁴ Competing interests of federalism and separation of powers should fall away before the norm, because “[t]here is little

fundamental norms on regional and world-wide levels. The world is indebted to the United States for its enthusiasm and vigor in setting the wheels of international human rights law in motion. *Amici* are humbled to have received the same prize as the esteemed U.S. statesmen, Woodrow Wilson and Cordell Hull. President Woodrow Wilson was awarded the Nobel Peace Prize in 1919 for his role in creating the League of Nations, and Secretary of State Cordell Hull was awarded the Nobel Peace Prize in 1945 for his role in the creation of the United Nations.⁸⁶

Eleanor Roosevelt was a major participant in the drafting of the Universal Declaration of Human Rights.⁸⁷ Proclaimed in 1948, this groundbreaking document

the world had not spoken out against apartheid, it might still be in place in South Africa. If Northern Ireland had not accepted the help of the United States, the peace agreement might never have come about. If nations across the world had not united to adopt the Ottawa Treaty, the use of landmines would be much more widespread than it is today. Nowhere is international law and opinion more important than in the field of human rights and humanitarianism.

When accepting his Nobel Peace Prize in 2001, United Nations Secretary-General Kofi Annan spoke of the “Butterfly Effect” – the theory that, in the world of nature, a butterfly flapping its wings in the Amazon rainforest can generate a violent storm on the other side of the world. As Mr. Annan said, “Today, we realize, perhaps more than ever, that the world of human activity also has its own ‘Butterfly Effect’ – for better or for worse.”⁸⁹

By continuing to execute child offenders in violation of international norms, the United States is not just leaving itself open to charges of hypocrisy, but is also endangering the rights of many around the world. Countries whose human rights records are criticized by the United States have no incentive to improve their records when United States fails to meet the most fundamental, base-line standards.⁹⁰

Amici curiae respectfully ask this Court to consider the relevance of internationally accepted standards of human rights and morality when addressing the constitutionality of the juvenile death penalty, especially in light of the Inter-American Commission’s conclusion that the prohibition on that punishment has achieved *jus cogens* status. Norms of international law, such as the prohibitions on genocide, slavery and torture, are not merely “foreign moods, fads, or fashions” that we are seeking to “impose on Americans.”⁹¹ They protect human dignity across all of our national frontiers.

⁸⁹ Kofi Annan, Nobel Peace Lecture at the Nobel Academy, Oslo, Norway (Dec. 10, 2001) (transcript available at <http://www.nobel.se/peace/laureates/2001/annan-lecture.html>).

⁹⁰ The United States State Department has labeled as generally “poor” the human rights records of six of the seven other nations which have executed child offenders since 1990. United States Department of State, Country Reports 2003, released February 2004, available at www.state.gov/g/drl/rls/hrrpt/2003/index.htm, last visited June 10, 2004 (describing the Congo, Nigeria, Saudi Arabia, and Pakistan as “remaining poor,” Yemen as “improving,” and Iran as “worsening”).

⁹¹ *Lawrence v. Texas*, 123 S. Ct. 2472, 2488, 2495 (2003) (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 470 n.* (2002) (Mem.)).

For these reasons, along with those outlined in Respondent's brief, Respondent's death sentence should be vacated because it violates internationally accepted standards of human rights and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States of America.

Respectfully submitted,

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Amici Curiae

President James Earl Carter, Jr.

President Mikhail Sergeyeovich Gorbachev

President Oscar Arias Sanchez

President Lech Walesa

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

**Institute of International Law (L'Institut de
droit international)**

International Peace Bureau

**International Physicians for the Prevention of
Nuclear War**

APPENDIX

Amici curiae include representatives from North America, Central America, South America, Europe, and Africa.

Institute of International Law (L'Institut de droit international), Belgium, 1904

For its efforts advancing the progress of international law.

International Peace Bureau, Switzerland, 1910

For its efforts encouraging peace congresses.

American Friends Service Committee, United States of America, 1947

For its humanitarian work and its work to promote fraternity between nations.

Betty Williams, Northern Ireland, 1976

For her role in founding the Peace Movement of Northern Ireland.

Mairead Corrigan-Maguire, Northern Ireland, 1976

For her role in founding the Peace Movement of Northern Ireland.

Amnesty International, England, 1977

For its efforts ensuring the worldwide implementation of the principles enshrined in the Universal Declaration of Human Rights, 1948.

Adolfo Perez Esquivel, Argentina, 1980

For his work to promote human rights based on non-violent means throughout South America.

President Lech Walesa, Poland, 1983

For the leading role he played in the Solidarity movement, which brought many freedoms to the Polish people.

Archbishop Desmond Tutu, South Africa, 1984

For his role in leading South Africa to a peaceful means of solving the problem of apartheid.

International Physicians for the Prevention of Nuclear War, United States of America, 1985

For its work to prevent the outbreak of nuclear war.

President Oscar Arias Sanchez, Costa Rica, 1987

For his work for to bring peace to Central America

President Mikhail Gorbachev, Former U.S.S.R., 1990

For his role in bringing peace to East-West relations.

Dr. Joseph Rotblat, United Kingdom, 1995

For his efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms.

Pugwash Conferences on Science and World Affairs, Canada 1995

For its efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms.

Jody Williams, United States of America, 1997

For her work mobilizing global opinion against the use of anti-personnel mines, culminating in the passing of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997 Mine Ban Treaty)

International Campaign to Ban Landmines, United States of America, 1997

For its work mobilizing global opinion against the use of anti-personnel mines, culminating in the passing of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997 Mine Ban Treaty)

President James Earl Carter, Jr., United States of America, 2002

For his efforts toward finding peaceful solutions to international conflicts, advancing democracy and human rights worldwide and in the promotion of economic and social development.